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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2017-CP-10-00838
Appellate Case No. 2020-001210

Jacque Lucas, Shirley Ann Lucas, and Daniel Simerly, Appellants,

v.

KapStone Paper and Packaging Corporation, KapStone Kraft Paper Corporation, Safway Group Holdings, LLC, Easy Way Insulation Co., Sypris Technologies, Inc. f/k/a Tube-Turns Technologies Inc., Thompson Construction Group, Inc., and Thompson Industrial Services, LLC, Defendants,

Of which

KapStone Paper and Packaging Corporation and KapStone Kraft Paper Corporation are Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court misapplied the "alter ego" factors set forth in *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013), by treating Defendants KapStone Paper and Packaging Corporation ("Paper") and KapStone Kraft Paper Corporation ("Kraft") as one.

2. Whether Kraft and KapStone Charleston Kraft, LLC ("Charleston") are separate and distinct corporate entities rather than alter egos under the *Poch* factors.

3. Whether Paper and Charleston are separate and distinct corporate entities rather than alter egos under the *Poch* factors.

STATEMENT OF THE CASE

I. Underlying Facts

This case arises from a tragic workplace accident at a paper mill in Charleston, South Carolina that left Jacque Lucas and Daniel Simerly horrifically burned. On May 24, 2016, Lucas and Simerly were working for KapStone Charleston Kraft, LLC ("Charleston") at a paper mill that it owned in North Charleston, South Carolina. (R. pp. 1255, 1584–97). As they were cleaning and clearing a large overhead vessel used to hold hot chemicals, the system was brought down for maintenance. (R. pp. 1255, 2573, 2577).

Ordered to open the door at the bottom of the vessel, Lucas and Simerly maneuvered below it. (R. p. 1255). Tragically, "there was [chemical] build up" in the vessel, so, when it opened, "hot black liquor rushed out and sprayed [Plaintiffs], resulting in severe burns" across large areas of their bodies. (R. pp. 2573, 2577). Both Plaintiffs were transported by life flight helicopter to the Joseph M. Still Burn Center at Doctors Hospital in Augusta, Georgia. (R. pp. 2573, 2577).

Lucas suffered third-degree chemical burns to 66% of his total body surface area from the discharge, Simerly 10%. (R. pp. 2573, 2577). Both required extensive treatment, including numerous surgical procedures, long hospital stays, debridement and grafting, occupational and physical therapy, and psychological care. (R. pp. 2573–75, 2577–79).

Plaintiffs filed worker's compensation claims as a result of the incident and received benefits pursuant to the South Carolina Worker's Compensation Act ("WCA"). (R. pp. 2573–79).

II. Procedural History

After the accident, Lucas, his wife Shirley Ann Lucas, and Simerly commenced this negligence action against KapStone Paper and Packaging Corporation ("Paper") and KapStone

Kraft Paper Corporation ("Kraft") (collectively, "Defendants"),[1] among other defendants not party to this appeal. (R. pp. 1253–64, 1265–76). Paper is the sole shareholder of Kraft, and Kraft is the sole "member" of Charleston. (R. pp. 1571, 1644).[2] In other words, Kraft is Charleston's corporate parent, and Paper is its corporate grandparent.

On June 8, 2017, Defendants moved to dismiss all claims against them, arguing that, as Charleston's parent companies, the WCA immunized them from suit because Plaintiffs received benefits from their employer. (R. pp. 1250–52). Defendants subsequently filed two amended motions to dismiss to clarify that they were challenging the trial court's subject matter jurisdiction. (R. pp. 1201–04, 1245–49). The trial court stayed merits discovery pending resolution of the jurisdictional issue, and the parties engaged in jurisdictional discovery over the next eighteen months. (R. pp. 10, 34–37). Once jurisdictional discovery concluded, Plaintiffs filed their Response to Defendants' Motion to Dismiss, which included a motion to strike their corporate representative's affidavit. (R. pp. 998–1044). The parties then filed multiple supplemental briefs, which provided more evidence and argument on the WCA issue.[3]

The trial court held a hearing on the motion on September 27, 2019. (R. pp. 1277–1376). On February 26, 2020, the trial court granted Defendants' motion, reasoning that they were alter egos of Plaintiffs' employer and therefore entitled to WCA immunity. (R. pp. 8–33). It also denied Plaintiffs' motions to strike the corporate representative's affidavit. (R. pp. 28–33). Plaintiffs filed a Motion to Reconsider, which the trial court denied in a short form order on August 7, 2020. (R. pp. 5–7, 96–153).

[1] The original complaint mislabeled Kraft as "KapStone Container Corporation," a misnomer Plaintiffs later corrected. (*Compare* R. p. 1266 *with* R. p. 1254).
[2] Charleston was formerly known as Oak Acquisition LLC. (R. pp. 1584).
[3] (*See, e.g.*, R. pp. 723–872, 961–83, 296–312).

Defendants then filed a Motion for Rule 54(b) Certification of the Final Judgment. (R. pp. 84–87). The trial court granted that motion on August 26, 2020. (R. pp. 1–4). Plaintiffs filed and served a notice of appeal of the trial court's order on their Motion to Reconsider on September 4, 2020. (R. pp. 76–77). They filed and served an amended notice of appeal on September 8, 2020, expanding the appeal to additionally include both the underlying order granting Defendant's Motion to Dismiss and the order granting Defendants' Motion for Rule 54(b) Certification of Final Judgment. (R. pp. 38–39).

STANDARD OF REVIEW

The trial court granted Defendants' motion to dismiss pursuant to the exclusivity provision of the WCA. (R. pp. 31–32). This provision "precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 366, 747 S.E.2d 757, 761 (2013). As such, the "determination of the employer-employee relationship for workers' compensation purposes is jurisdictional." *Id.* at 367. Appellate courts have "the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Id.*; *see also, e.g.*, *White v. J. T. Strahan Co.*, 244 S.C. 120, 125, 135 S.E.2d 720, 723 (1964); *Murray v. Aaron Mizell Trucking Co.*, 286 S.C. 351, 354, 334 S.E.2d 128, 129 (Ct. App. 1985). The reviewing court "is not bound by a finding of fact" of the trial court, *White*, 244 S.C. at 125, but instead must decide the jurisdictional facts based on its independent assessment of "the weight of the evidence." *Poch*, 405 S.C. at 373. Questions of law, meanwhile, are reviewed *de novo*. *Berry v. S.C. Dep't of Health & Envtl. Control*, 402 S.C. 358, 363, 742 S.E.2d 2, 4 (2013); *Swicegood v. Thompson*, 431 S.C. 130, 137, 847 S.E.2d 104, 108 (Ct. App. 2020).

SUMMARY OF THE ARGUMENT

Given its tremendous respect for the corporate form, South Carolina law strongly discourages veil piercing in general and in the worker's compensation context in particular. The default rule thus permits injured employees to sue their employer's parent companies even after receiving worker's compensation benefits.

Poch v. Bayshore Concrete Products/S.C., Inc., 405 S.C. 359, 747 S.E.2d 757 (2013), recognizes a narrow exception to this rule for when the parent is "the alter ego of the employer-subsidiary." *Id.* at 371. This exception only applies where the eight factors *Poch* identified indicate that the two entities "operate essentially as one" and "are so integrated and commingled that neither can be realistically viewed as a separate economic entity." 405 S.C. at 371, 375. Importantly, in addressing this question, courts must compare *each particular defendant* to the plaintiff's employer, to ensure that *that defendant* is truly an alter ego. They must not treat multiple defendants as one.

The trial court committed this exact error here, conflating Kraft and Paper and attributing to both defendants evidence applicable only to one. Consequently, it erroneously found that multiple *Poch* factors supported an alter ego finding as to one defendant based on evidence only relevant to the other. This legal error alone merits reversal and remand for a proper application of the *Poch* analysis.

Remand is unnecessary, however, because, on a proper application of the *Poch* factors, the "weight of the evidence" demonstrates that neither Kraft nor Paper are alter egos of Charleston. *Poch*, 405 S.C. at 373. The evidence shows that Kraft and Charleston transacted business from different locations, hired and paid their own employees, held themselves out to their employees as two separate entities, maintained separate books, accounts, and records, had distinct tax

identification numbers, and filed separate tax returns. Paper differs from Charleston in the same ways *and* engaged in a completely distinct business activity from its corporate grandchild to boot.

The operational realities therefore demonstrate that Charleston is a "separate and distinct corporate entity" from both Kraft and Paper, and no alter ego finding is warranted. The trial court's holding to the contrary should be reversed and judgment rendered denying Defendants' motion to dismiss.

ARGUMENT

I. Parent companies may be held liable despite a subsidiary's payment of worker's compensation benefits.

In *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013), the South Carolina Supreme Court recognized that, as a "general rule," injured employees may sue their employer's parent company even if the employer pays worker's compensation benefits for their injury:

> 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 entitlement to workers' compensation. Where an employee of a subsidiary is injured . . . 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.

Id. at 370. This rule is consistent with South Carolina law in other contexts, which disapproves of veil piercing overall and respects the corporate form in the worker's compensation context specifically.

A. The law discourages veil piercing.

One of the most basic principles of corporate law is that "a corporation is an entity, separate and distinct from its officers and [owners], and that its debts are not the individual indebtedness of its [owners]." *Hunting v. Elders*, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004) (quoting *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976)).

South Carolina has formally adopted this rule, providing via statute that owners are not liable for the debts or obligations of their entities. *See* S.C. Code §§ 33-6-220, 33-44-303. Because of these protections, corporations and other entities "are often formed for the purpose of shielding [owners] from individual liability." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018). "[T]here is nothing remotely nefarious in doing" this. *Id.* Likewise, the "[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly

within the law and is commonplace." *Id.* at 654 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)).

Nevertheless, "the South Carolina Supreme Court has ruled that the corporate entity may be disregarded in certain situations." *Hunting*, 359 S.C. at 223 (citing *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 271 S.E.2d 596 (1980)). This "doctrine of piercing the corporate veil is not to be applied without substantial reflection," however, and a corporation typically "will be looked upon as a [separate] legal entity until sufficient reason to the contrary appears." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008); *see also DeWitt*, 540 F.2d at 683 ("Th[e] power to pierce the corporate veil . . . is to be exercised reluctantly and cautiously.") (footnotes omitted).

For this reason, "[c]ourts are generally reluctant to disregard the corporate entity . . . [and] generally [do so] only where equity requires piercing the corporate veil to assist a third party." *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007). Courts should not, for example, hold entities "liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances." *Pertuis*, 423 S.C. at 654. Instead, "[t]here must also be evidence of abuse or injustice and inequity," such as "fraud" or "criminal conduct." *Id.* at 654–55 (ellipsis omitted) (quoting *SSP Partners*, 275 S.W.3d at 455). Disregarding the corporate form absent such evidence "would seriously compromise . . . a bedrock principle of corporate law—that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations." *Id.* at 655 (quoting same).

Because the corporate form is meant to protect the company's owner, moreover, "piercing of the corporate veil generally will not be permitted for the *benefit* of the parent [company] or its [owners]." *Catawba Indian Tribe v. State of S.C.*, 978 F.2d 1334, 1344 (4th Cir. 1992) (emphasis

added). This follows from another settled principle: companies "may not assume the benefits of the corporate form and then disavow that form when it is to their and their [owners'] advantage." *Berger v. H.P. Hood, Inc.*, 416 Mass. 652, 658, 624 N.E.2d 947, 950 (1993); *see also Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, 2016 WL 6525478, at *11 (D.S.C. Nov. 3, 2016) ("[U]nder South Carolina law as well as the law of many other jurisdictions, a shareholder may not engage in 'reverse veil-piercing' and ignore the corporate entity when it is convenient.") (citing, *inter alia*, *Carawba*, 978 F.2d at 1344).[4] Thus, once an owner "take[s] advantage of the benefits of dividing the business into separate corporate parts," "principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee." *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979).

B. South Carolina courts respect the corporate form in the worker's compensation context.

Consistent with these overarching principles, South Carolina courts have long respected the distinctions between different legal entities in the worker's compensation context. *See, e.g.*, *Brown v. Moorhead Oil Co.*, 239 S.C. 604, 609, 124 S.E.2d 47, 50 (1962); *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 444, 49 S.E.2d 718, 720 (1948); *Monroe v. Monsanto Co.*, 531 F. Supp. 426, 434–35 (D.S.C. 1982). *Monroe* is the key authority in this area. There, the court rejected the defendant's argument that the WCA immunized it from suit based on a *sister entity's* payment of benefits to the plaintiff. *See* 531 F. Supp. at 431–35.

The court first recognized the general principle that "associated corporations may be estopped [from] deny[ing] their separate existence" once they have "retained whatever benefits may be available to themselves as separate and distinct corporations." *Id.* at 432. It then identified

[4] *See also e.g.*, *Howsden v. Roper's Real Estate Co.*, 805 N.W.2d 640, 645 (Neb. 2011); *Shelby County v. Barden*, 527 S.W.2d 124, 130 (Tenn. 1975).

"eight important factors" to consider in deciding whether two entities "should be considered as separate and distinct corporations for workmen's compensation purposes," *id.* at 433, framing the analysis around eight questions the *Poch* Court would later embrace:

1. Do the two businesses maintain separate corporate identities?
2. Do the two businesses maintain separate Boards of Directors?
3. Do the two businesses transact business from different locations under different managers?
4. Do the two businesses hire and pay their own employees?
5. Do the two corporations hold themselves out to their employees as two separate entities?
6. Do the two corporations engage in different business activities?
7. Do the two corporations maintain separate books, bank accounts and payroll records?
8. Do the two corporations file separate tax returns?

Id. at 434; *see also Poch*, 405 S.C. at 372 (the "*Poch* factors"). These factors favored a finding of separation in *Monroe,* so the court permitted the plaintiff's action against his employer's sister company despite his receipt of worker's compensation benefits from his employer. *Monroe*, 531 F. Supp. at 434–35.

The cases from which *Monroe* derived its eight-factor analysis further demonstrate South Carolina courts' respect for the corporate form in the WCA context. In the earliest of these cases, *Gordon*, the defendant argued it was not required to pay worker's compensation benefits because, at that time, the WCA exempted employers that manufactured shipping containers, and the defendant's parent company qualified for the exemption. 213 S.C. at 442. The Supreme Court disagreed. Foreshadowing *Monroe*'s fourth and seventh factors, the Court held that the defendant was "a separate and distinct corporate unit" from its parent because it "hir[ed] its own help, [paid] its own employees, [kept] its own books, [issued] invoices, and [did] other things necessary to

carry on the business." *Id.* at 444. Furthermore, the two entities "engaged in different business activities" under the sixth factor, *Monroe*, 531 F. Supp. at 433–34, as the subsidiary produced "rotary cut veneer and not [the] finished shipping containers" its parent manufactured. *Gordon*, 213 S.C. at 444.

The Court applied a similar rationale in *Brown*. *See* 239 S.C. at 609. Because his employer was *not* subject to the WCA, the plaintiff there sued its sister company instead. *Id.* at 606. The Court again rejected the attempt to blur the corporate lines. *Id.* at 609. It recognized that evidence correlating to the first and second factors supported an alter ego finding, as the two entities were "regarded as one big operation," and one person "owned and generally supervised the[ir] management." 239 S.C. at 608–09. In addition, some evidence on the seventh factor went in the same direction because "[a]ll of the books for the[] corporations were kept by the same persons in the offices of [the defendant]." *Id.*

The Court nevertheless held that the entities were "separate and distinct." *Id.* at 609. On balance, the evidence on the seventh factor weighed slightly *against* a finding of alter ego because, apart from "the central bookkeeping arrangement," "separate books, bank accounts, and payroll records were kept for each" entity. *Id.* at 608. In addition, the third factor indicated separateness because "the business of [the plaintiff's employer] was transacted from a different location, under a separate manager" than the defendant's. *Id.* at 608–09. The same was true of the fourth and fifth factors, as the plaintiff "was carried as an employee on [his employer's] payroll records, and his wages were paid by checks of that corporation." *Id.* at 608. Finally, once again, the two entities

"were engaged in different business activities" under the sixth factor, "one recapping tires and one distributing petroleum products," *Monroe*, 531 F. Supp. at 433 (citing *Brown*, 239 S.C. 604).[5]

As both *Gordon* and *Brown* confirmed, "[t]he mere ownership of the capital stock of one corporation by another does not create an identity of corporate interest between the two companies, or . . . alter ego between the two." *Gordon*, 213 S.C. at 444; *accord Brown*, 239 S.C. at 608. Instead, as in all veil-piercing cases, courts are to "disregard the corporate entity" in the worker's compensation context only when the equities call for it. *Brown*, 239 S.C. at 610.

II. *Poch* is the exception, not the rule, and only applies when the operational realities justify it.

A. *Poch* provides a limited exception to the general rule against veil piercing.

Poch illustrates one of the rare situations in which veil piercing is warranted to immunize a parent company from suit under the WCA. There, the Supreme Court formally embraced the factors *Monroe* had identified and held that they justified an alter ego finding on the specific facts before it. 405 S.C. at 373–75. As noted, the Court began by accepting the premise that parent companies may be held liable despite a subsidiary's payment of WCA benefits. *Id.* at 370. But it also recognized an exception to this "general rule" in cases where "the parent is or may be found to be the alter ego of the employer-subsidiary corporation." *Id.* at 370–71. In deciding this question, the Court held that the "correct approach is the one found in *Monroe*" and embraced *Monroe*'s eight-factor test. *Id.* at 371–72.

[5] The only remaining case the *Monroe* court cited to formulate its eight-factor test was *Strickland v. Textron, Inc.*, 433 F. Supp. 326 (D.S.C. 1977), a case that did not even implicate veil-piercing issues. The plaintiff there sued "Textron, Inc." on the theory that she only received WCA benefits from its "Talon Division," the department in which she worked. *See id.* at 327–28. But, legally, the "Talon Division [was] not a separate corporate entity" from Textron. *Id.* at 328. Thus, the plaintiff was simply suing her employer directly, and Textron was therefore entitled to WCA immunity. *See id.*

The Court then turned to the factors themselves and concluded that they supported an alter ego finding. *Id.* at 373–75. Its analysis of each factor is discussed in more detail below, but the threshold point is that *all but one* of them indicated that the parent and subsidiary were alter egos.

This is not surprising. *Poch* involved a highly unusual situation in which the subsidiary was nothing more than a temporary offshoot of the parent. Specifically, the same day it secured a bid on a construction project in South Carolina, the parent company created the subsidiary solely "for the purpose of . . . fulfill[ing] the bid locally for the project." *Id.* at 364. The parent performed the same business activity as the subsidiary, executed the lease for the subsidiary's factory site, and bought the equipment the subsidiary used for the job. *Id.* In short, the subsidiary served as a limited-engagement extension of the parent to complete a job in South Carolina. *See id.* In these circumstances, the *Poch* factors overwhelmingly favored a finding of alter ego, and it was appropriate to disregard the corporate form. *See id.* at 373–75.

Gordon, *Brown*, *Monroe*, and South Carolina precedent on veil-piercing more generally caution against a broad reading of *Poch*. As noted, given the interests underlying the corporate form, "settled authority" prohibits courts from disregarding it "without substantial reflection." *Drury*, 380 S.C. at 101. This is true whether the doctrine is applied offensively to hold owners liable, *see Hunting*, 359 S.C. at 223, or defensively after they have "taken advantage of the benefits of dividing the business into separate corporate parts," *Boggs*, 590 F.2d at 662. Piercing the veil in the former circumstance denies owners the protection the corporate form is meant to provide while doing so in the latter circumstance affords them its benefits without the burdens. Both require a compelling justification. *Pertuis*, 423 S.C. at 654–55.

Such a justification existed in *Poch*. That case involved far more than a mere ownership relationship between the parent and subsidiary. *See Gordon*, 213 S.C. at 444. It involved far more

than shared executive leadership or a perception that the entities operated "as one big operation by [the owner]." *Brown*, 239 S.C. at 608–09; *see also Monroe*, 531 F. Supp. at 434. And it involved far more than "centralized control, mutual purposes, and shared finances." *Pertuis*, 423 S.C. at 654. Rather, there was *so much* overlap between the parent and subsidiary across *all but one factor* that it was fair to view them "as only one economic entity." 405 S.C. at 374.

Except for the rare case where the *Poch* factors overwhelmingly support such a finding, the proper approach is to respect the corporate form and treat the two entities as "separate and distinct." *Monroe*, 531 F. Supp. at 434; *see also Gordon*, 213 S.C. at 444; *Brown*, 239 S.C. at 608–09. Otherwise, the exception *Poch* created would swallow the rule, allowing owners "to ignore the corporate entity when it is convenient" for them, *Catawba*, 978 F.2d at 1344, and at the same time undermining the "bedrock principle of corporate law" that limits the liability of owners for corporate obligations. *Pertuis*, 423 S.C. at 655. In short, these rules cut both ways.

B. The *Poch* factors concerning operational realities carry the most weight.

Poch makes clear that "the *Monroe* test is not mathematically precise and no single factor is determinative." 405 S.C. at 375 n.9. In fact, neither *Poch* nor *Monroe* provided precise guidance on how courts should balance the various factors, as they generally pointed in the same direction in both cases. *See id.* at 373–75; *Monroe*, 531 F. Supp. at 434.

Still, a close analysis of these cases and their predecessors demonstrates that, in practice, courts follow a two-step approach to the *Poch* factors. First, they apply the first two factors to ask whether the two entities shared "corporate identities" or high-level leadership (e.g., boards of directors). *See Poch*, 405 S.C. at 373; *Monroe*, 531 F. Supp. at 434. If these first two factors are absent, there is no possible basis for an alter ego finding and the court may end its analysis straightaway.

If the first two factors are present, however, then courts put legal formalities aside and proceed to the second step, examining the operational realities reflected in the latter six factors. *See Poch*, 405 S.C. at 373; *Monroe*, 531 F. Supp. at 434. Thus, the shared identity and leadership factors serve as gatekeepers, setting forth the threshold requirements that a defendant must satisfy to pierce the corporate veil. They do not, however, support an alter ego finding on their own.

Poch and its predecessors bear this out. Start with *Brown*. There, the two entities shared a corporate identity because they were "regarded as one big operation." 239 S.C. at 608–09. They also shared the same high-level leadership because they had a single owner who "generally supervised the management" of both entities and exercised final hiring authority over all their employees. *Id.* This sufficed to justify a close examination of the entities' respective operations, but that examination revealed that the entities were "separate and distinct" from one another. *Id.* They operated from different locations, hired and paid their own employees, engaged in different business activities, and kept separate books. *Id.* As such, despite the entities' shared corporate identity and leadership, the Supreme Court declined to pierce the corporate veil between them. The operational realities did not justify such an action. *See id.*

Poch illustrates the converse situation. The Court there concluded at the outset that the parent and subsidiary shared a corporate identity and high-level leadership before proceeding to the operational factors. 405 S.C. at 373–75. Unlike in *Brown*, *Gordon*, and *Monroe*, however, those factors *did* demonstrate that the two entities operated as one and therefore supported an alter ego finding. *Id.*

Gordon, meanwhile, underscores the dispositive nature of the operational factors. *See* 213 S.C. at 443–44. There, the Court did not even need to address corporate identity or shared leadership because, even assuming they were satisfied, the operational realities made clear that the

parent and subsidiary were distinct entities. *See id.* Specifically, the defendant's control over the hiring and payment of its own employees, maintenance of its own books, and transaction of a different business activity than its parent alone sufficed to demonstrate separation between the two. *Id.*

This two-step approach, lending greater weight to the operational factors, makes sense as a doctrinal matter. As outlined above, South Carolina law strongly disfavors veil piercing in general, and there is a strong presumption against disregarding the corporate form. *See supra* § I.A; *Drury*, 380 S.C. at 101. But if two entities share a corporate identity and have substantial overlapping leadership, this presumption is displaced enough to justify a more searching inquiry into the operational realities between the two entities.

At this point, the court may only pierce the corporate veil under an alter ego theory if it finds that the "two corporations *operate* essentially as one." *Poch*, 405 S.C. at 371 (emphasis added). As such, merely satisfying the first two factors is not sufficient to disregard the corporate form because they focus on *form*, not *substance*. A corporate parent and its subsidiary "will be considered a single employer for workers' compensation purposes if the two corporations are so integrated and commingled that neither can be realistically viewed as a separate economic entity." *Id.* at 375.

Put another way, the operational factors (Factors 3 through 8) provide the strongest and most objectively verifiable indicators of whether two entities are truly "integrated and commingled" from a practical standpoint. *Id.* Conversely, whether entities share an identity is significantly more amorphous and subjective while their nominal, high-level leadership says little about whether "the two corporations operate essentially as one" on a regular basis. *Id.* at 371. Accordingly, the first two factors are best viewed as *predicates* to an alter ego finding—factors

that warrant further analysis if they are present but, if so, deserve significantly less weight as to the ultimate finding.

III. Neither Kraft nor Paper is an alter ego of Charleston.

The trial court held that Kraft and Paper were alter egos of Charleston based on the *Poch* factors. A crucial legal error poisoned the court's entire analysis from the start, however, and, in any case, the "weight of the evidence" on the *Poch* factors firmly demonstrates separation between Charleston and each of the Defendants. *Poch*, 405 S.C. at 373. Accordingly, reversal is warranted.

A. The trial court improperly conflated Kraft and Paper.

When applying the *Monroe* test, courts compare the defendant *in question* to the plaintiff's employer to determine whether that *particular defendant* is an alter ego of the employer. *See Poch*, 405 S.C. at 373–75; *Monroe*, 531 F. Supp. at 434; *Brown*, 239 S.C. at 608–09. They do not mix-and-match multiple defendants.

Monroe and *Brown* are most instructive on this point. In both cases, a single owner controlled multiple entities and operated those entities together as part of a larger enterprise. *See Monroe*, 531 F. Supp. at 431; *Brown*, 239 S.C. at 607–08. But in each case, the court limited its analysis to the plaintiff's employer and its sister corporation. *See Monroe*, 531 F. Supp. at 427, 434; *Brown*, 239 S.C. at 608. Neither court explored the relationship between these entities and their mutual parent, other companies in the corporate family, or the owner's larger business. *See Monroe*, 531 F. Supp. at 434; *Brown*, 239 S.C. at 608–09.

This analysis is sound. Given the law's disapproval of veil piercing and the need to proceed "reluctantly and cautiously" on issues relating to it, *DeWitt*, 540 F.2d at 683, courts are right to limit their analysis to whether two specific entities are alter egos. In *Monroe*, for example, the factors supported a finding of separateness between the plaintiff's employer and its sister company. 531 F. Supp. at 434. If those same factors had indicated that both entities were alter egos of their

mutual parent, that still would not make the employer and its sister alter egos. Otherwise, the sister company could have easily piggybacked off its parent's relationship with the employer to pierce the corporate veil and procure immunity to which it has no right. The whole point of veil-piercing law is that courts must respect the corporate form except in exceptional circumstances, so it would make no sense to blur the lines among multiple defendants when undertaking the analysis.

Applied more broadly, such a rule would enable *all* members of a corporate family to exploit their relationship with a shared parent to secure immunity, no matter how "separate and distinct" they might be from the plaintiff's employer. Even worse, it would allow multiple entities to pool their evidence, tag-team the *Poch* factors, and secure an alter ego finding even if none could do so on its own. Plaintiffs would not be allowed to pierce the veil in this way; Defendants should not be able to do so as a defensive matter.

The trial court committed this exact error here. It failed to independently scrutinize the differing relationships between Kraft and Charleston, on the one hand, and Paper and Charleston, on the other. Instead, the court examined the relationships of all three entities collectively, repeatedly treating Kraft and Paper as a single entity. As a result, the court attributed to *both* Defendants evidence applicable to only *one*. This legal misstep led the trial court to conclude that several factors supported an alter ego finding even though there was minimal evidence to that effect as to a particular defendant. *See infra* § III.B–C.

By itself, the court's legal error warrants reversal and remand for a proper application of the *Monroe* test. But as discussed below, once the proof relating solely to the other entity is excluded from the analysis, the "weight of the evidence" leaves only one conclusion: neither Kraft nor Paper were alter egos of Charleston.

B. Kraft is not the alter ego of Charleston.

The trial court's legal error is most impactful as to Kraft, as the vast majority of the evidence it cited related solely to the relationship between *Paper* and Charleston. Once this evidence is properly disregarded, the evidence firmly demonstrates that Kraft and Charleston "are two separate and distinct corporate entities." *Monroe*, 531 F. Supp. at 434.

1. The operational factors demonstrate separation.

This Court need not address the threshold questions of whether Kraft and Charleston "maintain separate corporate identities" or high-level leadership because, as in *Gordon*, the operational factors decisively establish that these two entities are not alter egos as a matter of economic reality.

a. Kraft and Charleston transact business from different locations.

In deciding whether two entities "transact business from different locations" under the third *Poch* factor, courts limit their focus to the exact location where each entity physically performs its operations. *Monroe*, 531 F. Supp. at 434 (employer "operate[d] plants in Abbeville, South Carolina and Foley, Alabama" while sister "operate[d] four plants in Connecticut and one at Cedartown, Georgia"); *Brown*, 239 S.C. at 608–09 ("[T]he business of [the employer] was transacted from a different location."). *Poch* departed from this practice only because the parent micromanaged the local operations of its subsidiary. *See Poch*, 405 S.C. at 373.

Here, Kraft and Charleston plainly operated from different physical locations. Charleston has "one plant in Charleston, [South Carolina]," all its employees "work at the plant in Charleston," and all its products are generated from that facility. (R. pp. 206–07). Kraft, by contrast, operates primarily out of "the Roanoke Rapids paper mill in North Carolina." (R. p. 849).

This should have ended the analysis. The trial court, however, went beyond the precise evidence the third *Poch* factor instructs it to consider, finding that Defendants transacted business

from the same location as Charleston in large part because *Paper*'s general policies applied to the Charleston plant, and *Paper* provided various "shared services," funding, and benefits to the Charleston mill from its headquarters in Northbrook, Illinois. (R. pp. 17–19). None of this evidence shows that *Kraft* and Charleston operated from the same location, so it is irrelevant.

The only other evidence the district court cites on this factor consists of the presence of a small number of Kraft *and* Paper employees at the Charleston mill (approximately 8% between the two of them) and some machinery leases that Kraft executed for Charleston. (R. p. 18). This hardly equates to the evidence that pushed this factor toward an alter ego finding in *Poch*—evidence that went beyond employee overlap and the purchase of equipment to include a lease by the parent company on the *actual premises* where the subsidiary operated, the parent's receipt of all the subsidiary's "billing invoices and normal correspondence," and its retention of the subsidiary's "corporate and personnel files." 405 S.C. at 373; *cf. Monroe*, 531 F. Supp. at 434 (officer overlap did not outweigh evidence that entities operated from different locations).

b. Kraft and Charleston hire and pay their own employees.

The fourth *Poch* factor—whether "the two businesses hire and pay their own employees," *Monroe*, 531 F. Supp. at 434—turns on (1) which entity has formal hiring (and firing) authority and (2) which one signs the employees' paychecks. *See id.*; *Brown*, 239 S.C. at 608; *Gordon* 213 S.C. at 444. Even *Poch* demonstrates this to be true, as the parent company there handled both "the hiring and firing of [the subsidiary's] salaried employees," and those employees "received a paycheck" directly from the parent. *Poch*, 405 S.C. at 374. Absent evidence of hiring power over and direct payments to another entities' employees, this factor weighs heavily against an alter ego finding.

Here, the evidence shows that each entity was responsible for hiring, firing, and paying its employees. Defendants' internal documents unmistakably indicate that "[e]ach site manages hiring and firing" of its employees (R. p. 2278), a fact their corporate representative corroborated (R. pp. 240–41, 244). Plaintiffs' earnings statements and W-2s, meanwhile, unequivocally list "Charleston" as the entity that paid their wages. (R. pp. 1689–90, 2647–50, 2651–56). The corporate representative confirmed that this practice exists across the entire corporate family:

> Q. [H]ow many different entities are there that go on checks for payroll? . . .
>
> A. So Kapstone Paper, KapStone Kraft, Kapstone Charleston, Longview, Kapstone Container and beyond that I would have to confirm. . . .
>
> Q. [T]he employees for those particular entities receive a check with their respective entity on there, their employer?
>
> A. Yes.
>
> Q. Okay. And that would be true whether it comes as direct deposit or whether it comes as a hard check because their W2s list their distinct employer as well, correct?
>
> A. Correct.

(R. pp. 244; *see also* R. pp. 201–02).

Against this proof, "there is no indication in the record that [Kraft] had any connection with the hiring of employees of [Charleston]." *Monroe*, 531 F. Supp. at 434. The evidence therefore compelled the trial court to concede that "[e]ach Kapstone entity generally hired its own local employees, both hourly and salaried." (R. p. 12).

Nevertheless, the court held this factor favored an alter ego finding because Paper "processed and funded" "all employee compensation," including benefits, and that each entity transferred funds into Paper's account at the end of each day. (*Id.*). This reasoning is wrong across the board, *see infra* § III.C.1.b, but it is particularly wrong as to Kraft. *Paper*'s alleged funding of Charleston's payroll does not imply that *Kraft* played any role in the payment of

Charleston's employees, much less their hiring or firing. As such, this factor strongly favors a finding of separation between these two entities.

c. Kraft and Charleston hold themselves out to their employees as two separate entities.

Relatedly, the fifth *Monroe* factor requires examination of how the entities present themselves to their employees. *See Poch*, 405 S.C. at 473; *Monroe*, 531 F. Supp. at 434. The failure to "disclose[] any relationship between the corporations to their employees," for example, can show that they held "themselves out . . . as two separate entities," as can distinct names for the distinct facilities from which those entities operate. 531 F. Supp. at 434. The provision of "[e]mployment documents that [are] standard for [the parent]," by contrast, is proof that the entities presented themselves as one. *Poch*, 405 S.C. at 473.

Here, "[t]here is no indication in the record that [Kraft] or [Charleston] ever disclosed any relationship between the two corporations to their employees." *Monroe*, 531 F. Supp. at 434. On the contrary, as noted above, the documents Charleston employees receive most regularly unequivocally indicate that Charleston is their employer, not Kraft. (R. pp. 1689–90, 2647–50, 2651–56). In the same way, Kraft employees' payment records list Kraft as their employer. (R. pp. 201–02, 244). Employees' work, moreover, is limited to a single mill—the Charleston mill for Charleston and the Roanoke Rapids mill for Kraft, each with their own name and their own employees. (R. pp. 201–02, 215). Finally, the benefits documents Paper provides to its subsidiaries' employees consistently describe Kraft and Charleston as "other participating employers" rather than a single entity. (R. p. 2618; *see also* R. p. 1672). Collectively, these documents demonstrate that Kraft and Charleston "hold themselves out to their employees as two separate entities." *Monroe*, 531 F. Supp. at 434.

In holding otherwise, the trial court continued its pattern of relying on Paper-specific evidence to justify its conclusion as to Kraft, citing a variety of documents that supposedly indicate *Paper* is the employer. (R. pp. 20–21). But regardless of whether Paper and Charleston held themselves out to their employees as a single entity, there is minimal, if any, evidence that Kraft and Charleston did so.[6]

d. Kraft and Charleston maintain separate books, bank accounts, and payroll records.

Under the seventh *Monroe* factor, courts examine whether the entities keep "separate books, bank accounts, and payroll records." *Monroe*, 531 F. Supp. at 434. Importantly, it does not matter if "[a]ll of the books for the[] corporations [are] kept by the same persons" in a "central bookkeeping arrangement" so long as they are maintained separately for each entity. *Brown*, 239 S.C. at 608.

That is the case here. Although Paper kept "[a]ll of the books" for its subsidiaries, *id.*, it maintained them based on "specific identifier [numbers] that separate[]" them from one another. (R. pp. 246–47). Thus, Kraft and Charleston (and Paper, for that matter) each have separate payroll records, separate accounts payable and receivable, separate bank accounts, separate employee lists, separate budgets, separate profit and loss statements, and separate balance sheets. (*See id.*; R. pp. 1666, 1704–25, 2016–70, 2621, 2647, 2651–54, 3517–58, 3570–72).

The trial court nevertheless held that this factor favored an alter ego finding primarily because of Paper's electronic consolidation of its subsidiaries' records and procedures by which

[6] The court also cited the "general shared use of the 'KapStone' name, logo, trademark, internal letterhead, website, and business forms." (R. p. 20). This evidence is better suited to a determination of whether Kraft and Charleston "maintained separate corporate identities" under the first *Poch* factor. 405 S.C. at 372. In any event, because those materials are not specific to *Kraft*, they cannot reasonably be construed as representations to Charleston employees that *Kraft* is their employer.

subsidiaries would routinely transfer all their funds and accounts receivable to Paper, and Paper, in turn, would use that income to finance subsidiaries' operations. (R. pp. 23–24). Again, irrespective of its effect on the *Paper*-Charleston relationship, this evidence does nothing to show that *Kraft* and Charleston maintained the same "books, bank accounts, and payroll records." *Monroe*, 531 F. Supp. at 434. Thus, the evidence the trial court cited does not suggest overlap between Kraft and Charleston on the seventh factor.

e. Kraft and Charleston maintained separate tax identification numbers and filed separate tax returns.

The eighth *Monroe* factor is straightforward. Separate tax identification numbers and tax returns "militate against" an alter ego filing, so courts need only examine the entities' tax filings to assess this "weighty" factor. *Poch*, 405 S.C. at 374. Here, it is undisputed that the two companies had "different federal tax I.D. numbers." (R. p. 216; *see also* R. p. 1672). And contrary to the trial court's assertion, Charleston *did not* "file[] a single consolidated federal tax return" alongside Paper or Kraft. (R. p. 24). The only tax return in the record shows that *Kraft and Paper* filed a single return, but Charleston was not included within it. (*See* R. p. 3150 (return filed on behalf of Paper and Kraft but not Charleston); *see generally* R. pp. 3150–3376) (no mention of Charleston). The filing of a single return between Kraft and Paper says nothing about Kraft's relationship with Charleston.

2. The remaining factors do not tip the balance in favor of an alter ego finding.

The only factors even arguably favoring an alter ego finding are the first, second, and sixth factors. As outlined above, however, the first and second factors are entitled to minimal weight in the substantive analysis, and, in any case, the evidence on both here is unpersuasive.

In substance, therefore, the question is whether the sixth factor outweighs the substantial evidence on the other five operational factors demonstrating that Kraft and Charleston are separate

and distinct corporate entities. Given the presumption against disregarding the corporate form and the high burden of proof imposed by South Carolina law for this purpose, the trial court erred by finding that Kraft and Charleston are alter egos of each other.

a. It is unclear whether Kraft and Charleston share a corporate identity.

There is substantial conflicting evidence on whether Kraft and Charleston share a corporate identity *at all*. This first *Poch* factor requires examination of the entities' subjective perception of themselves based on internal documents, government filings, and materials made available to the public. *See Poch*, 405 S.C. at 473; *Monroe*, 531 F. Supp. at 434. In *Monroe*, the entities' filing of "separate applications and reports with governmental agencies," the defendant's inability "to do business in South Carolina," and its representation "to the Secretary of State of South Carolina that it was no longer transacting business in this state" signaled "separate corporate identifies." 531 F. Supp. at 434. In *Poch*, on the other hand, the use of a common name, "a standard [corporate] designation" on "letterhead, employment applications, benefits packages, and safety manuals," and a shared "worker's compensation policy" signaled the opposite. 405 S.C. at 473.

Here, the trial court held that Kraft and Charleston "maintained a shared corporate identity" based on (1) their use of the same "Kapstone" name, logo, trademark, color scheme, website, letterhead, employment forms, and corporate policies and procedures, (2) references to Defendants in Plaintiffs' hiring letters, and (3) Paper's funding of Charleston's WCA policies. (R. pp. 15–16). Although the first two categories of proof can support a finding of shared corporate identity, the third is irrelevant to the Kraft-Charleston relationship, and, in any case, the trial court overlooked critical additional evidence that went the other direction.

Specifically, Kraft and Charleston are distinct legal entities with different legal names in public filings. (R. pp. 179, 244, 2562–64, 2565–66, 2567–72, 2822–36). Paper treats them as

distinct internally. (*See, e.g.*, R. pp. 1454, 1465, 1543, 1571, 1666, 2016–2070, 2561, 2621, 2623, 2627, 3517–18, 3570–72). Moreover, Kraft and Charleston owned their own facilities, and Charleston executed its own contracts with labor unions, suppliers, and equipment lessors. (R. pp. 202, 1584–97, 2657–2712, 3475–96, 3536–3551, 3552–69). These two entities even had their own contract between themselves, appointing Kraft as Charleston's managing member and setting forth their respective rights and obligations toward each other. (R. pp 1642–56). If two entities view themselves as one, it would be odd for them to execute a contract that could serve as the basis for a lawsuit between them.

Overall, therefore, while the evidence on this factor may be sufficient to justify moving on to the second step in the analysis, it is so contradictory as to whether Kraft and Charleston shared a corporate identity that the first *Poch* factor should be viewed as, at worst, neutral.

b. The evidence of common leadership is unreliable and inconclusive.

The second factor asks whether "the two businesses maintain separate Boards of Directors." *Monroe*, 531 F. Supp. at 434. This inquiry normally requires a mere comparison between the two entities' boards. *See id.*; *Poch*, 405 S.C. at 373. Here, because Charleston is an LLC with no Board of Directors, the proper question is whether the two entities share high-level leadership.

While Defendants introduced a document purporting to show that Charleston does in fact share officers with Kraft, that document only reflects the entities' executive leadership as of February 2017. (R. pp. 168–70, 182–83, 231). It lists "no officers and directors from 2016" when the accident occurred. (R. p. 183). Furthermore, the witness who authenticated it "did not" create this document, nor did she "review any documents as to who the officers and directors were in 2016" when the accident occurred. (R. pp. 181–82). The document was prepared by some

unknown individual in "KapStone's legal department," and the witness did nothing to verify the information. (R. p. 182).

Thus, even if the court did not abuse its discretion in admitting the document,[7] it says nothing about the critical time period, and the dubious circumstances surrounding its creation mean that it is entitled to only minimal weight.

In any event, even if Kraft and Charleston did share some high-level officers, those officers were charged with "set[ting] strategic direction" and receiving reports—not with the local, day-to-day management of the facility. (R. p. 233). This suggests Charleston functionally operated as a standalone company, irrespective of its formal executive leadership. (R. pp. 269–70).

c. The evidence of common business activity is present but does not tip the balance on the operational factors.

Finally, as for the sixth *Monroe* factor, it is true that Kraft and Charleston both "engaged in the same business activity" of manufacturing paper products. 531 F. Supp. at 434. But as the majority of the other operational factors support a finding of separation, "this one factor . . . is not dispositive." *Poch*, 405 S.C. at 375.

The judgment should plainly be reversed as to Kraft.

C. Paper is not the alter ego of Charleston.

In much the same way, the weight of the evidence across the *Poch* factors demonstrates that Paper and Charleston are "separate and distinct corporate entities." *Monroe*, 531 F. Supp. at 434. Accordingly, reversal is warranted as to Paper as well.

[7] The exhibit was attached to the corporate representative's affidavit that Plaintiffs moved to strike for lack of personal knowledge. (R. pp. 1002–09).

1. The operational factors demonstrate separation.

Like with Kraft, this Court need not delve deeply into the threshold *Poch* factors to determine whether Paper and Charleston are alter egos because the operational factors firmly show otherwise. Indeed, *all* the operational factors are strongly in Plaintiffs' favor as to this defendant.

a. Paper and Charleston transacted business from different locations under different managers.

As noted, in assessing the third *Poch* factor, courts usually look to the physical facilities in which each entity literally performs its operations. *See supra* § III.B.1.a. In addition, this factor's second element concentrates on whether there is overlap in the people who manage the operations from a day-to-day standpoint. *See Poch*, 405 S.C. at 373 (parent "sent employees to oversee completion of the project"); *Monroe*, 531 F. Supp. at 434 (minimal overlap in *officers* as opposed to directors); *Brown*, 239 S.C. at 608–09 (no alter ego where employer operated "under separate manager" even though owner had general hiring and supervisory authority).

This factor firmly demonstrates separation between Paper and Charleston because Charleston operated from its plant in Charleston, South Carolina, while Paper operated out of the "corporate" office in Northbrook, Illinois. (R. pp. 232, 1451 (Paper's Form 10-K listing Northbrook address), 2016–70 (records listing employees of various entities based on location)). The two entities also operated under different day-to-day managers, as the only Paper employees who worked at the Charleston mill were IT personnel, not operations managers. (R. p. 2595).

The trial court nevertheless held that this factor favored an alter ego finding, citing the same four categories of evidence it invoked to support its finding on this element as to Kraft. (R. pp. 17–18). As explained above, however, an 8% overlap in employees and the execution of a few leases does not rise to the same level as the evidence that pushed this factor in the parent's favor in *Poch*. *See supra* § III.B.1.a.

In addition, Paper's application of corporate policies, as well as its provision of various services to *all* its entities from Northbrook, does not show that Paper transacted business from Charleston or that Charleston transacted business from Northbrook. And unlike in *Poch*, *see* 405 S.C. at 373, these policies and services were not specific to the subsidiary-employer (Charleston), the parent (Paper) did not lease the *facility* from which the subsidiary operated (Charleston owned the mill), and the parent did not provide all the equipment to be used at the jobsite (Charleston leased much of it directly). (R. pp. 156, 198, 229–30, 1584–97, 3536–51). The evidence thus falls far short of supporting the trial court's conclusion that Paper and Charleston "conducted business from shared locations," especially given the direct, irrefutable evidence that, in practice, one operated from Northbrook and the other from Charleston. (R. p. 19).

b. Paper and Charleston hire and pay their own employees.

Again, the fourth *Poch* factor turns largely on formal hiring and firing authority and the name of the employer listed on the employee's payment records. *See supra* § III.B.1.b. And the evidence here shows that Charleston alone had formal hiring and firing authority over its own employees and Charleston alone was listed on its employees' payment records. *See id.* This is just as true for Paper as it is for Kraft and Charleston. (R. pp. 201, 244). Thus, on its face, this factor demonstrates separation. *See Monroe*, 531 F. Supp. at 434; *Brown*, 239 S.C. at 608; *Gordon*, 213 S.C. at 444.

The trial court held that this factor favored an alter ego finding based entirely on the funding arrangement between Paper and its subsidiaries. (R. p. 19). But payment is only one side of the coin. Hiring and firing is the other, and the trial court conceded that Charleston alone exercises this authority over its employees. (*See id.*) This key fact distinguishes *Poch*, where, in addition

to funding payment and benefits, the parent had full control over the hiring and firing of salaried employees. *Poch*, 405 S.C. at 373–74.

In any event, to the extent Paper "funded" the compensation of Charleston employees, it did so largely with Charleston's own coin. All KapStone entities, including Charleston, would deposit any cash they received from their operations into Paper's account at the end of each day. (R. pp. 228, 247, 1666). Furthermore, whenever Charleston would generate business, it would sell its accounts receivable to yet another KapStone entity, KapStone Receivables LLC, which would then sell the proceeds from those receivables to Paper. (R. p. 158; *see also* R. p. 1769–2014). Paper would use these funds to finance Charleston's operations and employee compensation. (R. p. 158).

Thus, Paper was not paying Charleston's employees with money Paper itself generated. Rather, Charleston was effectively paying its employees with its own funds, albeit after those funds had circulated to and from Paper for processing. The fact remains that Paper did not "hire [or] pay" Charleston's employees in any meaningful sense. *Monroe*, 531 F. Supp. at 434. This factor therefore strongly supports a finding of separation.

c. Paper and Charleston held themselves out to employees as two separate entities.

The fifth *Poch* factor also demonstrates separation between Paper and Charleston for many of the same reasons it shows separation between Kraft and Charleston. Although there was some evidence that Paper presented itself as the employer of Charleston employees *at the beginning* of their employment—through employment applications, hiring letters, and corporate policies that employees were required to sign—there was much more evidence that, on a routine basis, only Charleston presented itself as their employer.

For example, Charleston listed itself as the employer on its employees' paychecks, financial statements, W-2s, and benefits documents, and their work was limited to the Charleston

mill. (R. pp. 201–02, 244, 1672, 1689–90, 2618, 2647–50, 2651–56). Not surprisingly, therefore, employees viewed the various KapStone entities as distinct from one another. Defendants' corporate representative, for instance, considered herself to be "work[ing] for corporate" rather than Paper's subsidiary entities and referred to the subsidiaries' employees "by their [specific] employer." (R. pp. 207, 232). Indeed, "a hundred percent of the time," she knew references to "Charleston" at the Northbrook office involved Charleston employees. (R. p. 207). She also knew that each entity had its own employees:

> Q. Your employer is KapStone Paper and Packaging Corporation, correct?
>
> A. Yes.
>
> Q. Okay. KapStone Charleston Kraft LLC has its own employees as well, correct?
>
> A. Correct.
>
> Q. And KapStone Kraft Paper Corporation has its own employees as well, correct?
>
> A. Correct.
>
> Q. All are separate employers of individuals, true?
>
> A. Yes.

(R. p. 201).

In short, despite the occasional reference to Paper early on in the hiring process, the operational realities demonstrate that, on an everyday basis, only one entity presented itself to Charleston employees as their employer. That entity was not Paper.

d. Paper and Charleston engaged in different business activities.

In analyzing whether "the two corporations engage in different business activities" under the sixth factor, courts focus on the *precise* activity each entity performs, not the activity of the overall enterprise in which the entity functions. *Monroe*, 531 F. Supp. at 434. In *Monroe*, for

instance, though the employer and the defendant both contributed to their shared parent's overall operations, the court held that this factor demonstrated separation because the employer's "business activity [was] restricted to processing of continuous fiber into carpet staple" while the defendant was "engaged in the processing of fibers and manufacture and marketing of fabrics." *Id.*; *see also Brown*, 239 S.C. at 608 (similar). *Poch* went the other way because "both corporations . . . provid[ed] concrete forms for construction sites," using "the same process and equipment in performing this work." 405 S.C. at 374.

While Paper and Charleston are parent and subsidiary, rather than sister companies, the logic of these cases still dictates that they "engage[d] in different business activities." *Monroe*, 531 F. Supp. at 434. Indeed, it is undisputed that Paper did not manufacture paper products, as Charleston did:

> Q. Would you agree with me that KapStone Paper and Packaging does not manufacture or sell paper products?
>
> A. I agree.
>
> Q. Do you agree with me that KapStone Charleston Kraft LLC does manufacture and sell paper products?
>
> A. I agree.

(R. p. 183; *see also* R. pp. 195–96). In fact, *none* of Paper's 200 employees "actually work[s] the job that [Plaintiffs] work[ed], meaning a mechanic at a mill for the paper manufacturing and selling." (R. p. 213). Rather, Paper's business activity is limited to "office" work, such as handling "accounts payable, receivable, credit, collections, payroll, and insurance," as opposed to manual labor. (R. pp. 229–30; *see also* R. pp. 195–96, 214–15).

The trial court acknowledged that Paper "did not literally manufacture paper" and instead simply "managed the financial aspects of its subsidiaries that were engaged in the paper-manufacturing industry." (R. p. 21). Again, the analysis on this factor should have ended

there. *See Monroe*, 531 F. Supp. at 434; *Brown*, 239 S.C. at 608. But the court looked past the actual "business activities" in which each entity was engaged and held that this factor supported an alter ego finding because "the KapStone entities *collectively* engaged in the business of manufacturing, selling, and distributing paper products." (R. p. 21 (emphasis added)).

Monroe and *Brown* foreclose such reasoning. If a collective enterprise across numerous entities sufficed to show they "engaged in the same business activity," then the sixth *Poch* factor would *always* favor an alter ego finding in cases involving large corporate families. This outcome would fly in the face of South Carolina's disapproval of veil piercing theories in general. *See supra* § I.A.[8]

e. Paper and Charleston maintained separate books, bank accounts, and payroll records.

The seventh *Poch* factor favors a finding of separation between Paper and Charleston for largely the same reasons it supports the same finding between Kraft and Charleston. *See supra* § III.B.1.d. As noted, although Paper kept "[a]ll of the books" for all its subsidiaries, *Brown*, 239 S.C. at 608, they maintained those records separately by specific identification numbers for each entity. *See* § III.B.1.d.

Contrary to the trial court's reasoning, moreover, Paper's consolidation of these records does not support a finding of alter ego. (*See* R. pp. 23–24). As noted, a "central bookkeeping arrangement" is insufficient to support such a finding. *Brown*, 239 S.C. at 608. This makes sense, given that, in practice, consolidation of records has "little bearing on showing integration between companies." (R. p. 271). Instead, "it is simply evidence that the company follows U.S. generally accepted accounting principles." (*Id.*). Paper's own audit statement admits as much, providing

[8] The court also asserted that *Poch* supported its reasoning. (R. p. 22). Not so. As noted, the entities in *Poch* both performed the exact same service. That is not the case here.

that its "consolidated financial statements [are] prepared . . . in conformity with" these principles. (R. p. 1510; *see also* R. pp. 1504–05).

As for the financing arrangement the court cited, while Charleston's contribution to Paper's "gross revenue" suggests some level of overlap between those two entities, the "[m]ore important[]" question is whether *Paper* is "entirely responsible for the financial operation of" Charleston. *Poch*, 405 S.C. at 374. Here, that is not the case. As outlined above, Paper finances Charleston's operations using funds that Charleston itself provides. Thus, unlike in *Poch*, the evidence the trial court cited does not outweigh the "separate books, accounting records, and bank accounts" the three entities maintained.

f. Paper and Charleston have different tax numbers and file separate returns.

The eighth factor demonstrates separation between Paper and Charleston for the same reason it demonstrates separation between Kraft and Charleston: the two entities have different tax numbers and file their own tax returns. *See supra* § III.B.1.e. The trial court cites no evidence to support its conclusion to the contrary. (R. p. 24).

2. The first and second *Poch* factors are not controlling.

The only *Poch* factors that arguably favor an alter ego finding as to Paper are the first and second, *i.e.*, the ones that merit the least weight. *See supra* § II.B. As discussed above, those factors are best understood as threshold inquiries to the substantive analysis of the operational factors; they are not decisive in their own right.

With respect to the first *Poch* factor, the trial court again ignored evidence that contradicts its findings, evidence that renders the first factor neutral overall. Specifically, in addition to the independent evidence of separate corporate identities identified above, *see supra* § III.B.2.a, the court failed to grapple with key evidence that Paper *cannot even do business in South Carolina*.

(R. pp. 292–95). In June 2015, Paper forfeited its license to do business in South Carolina because it failed to comply with South Carolina regulations that required it to deliver its annual report to the Department of Revenue and pay applicable taxes. (*Id*.). This evidence is materially indistinguishable from the evidence that demonstrated "separate corporate identities" in *Monroe*, where the defendant *also* "was not authorized to do business in South Carolina and had represented . . . that it was no longer transacting business in this state." 521 F. Supp. at 434. If this evidence established separate corporate identities in *Monroe*, it is certainly strong enough to counteract the evidence the district court cited here and render the first factor neutral.

With respect to the second factor, as explained above, the evidence of shared leadership lacks credibility, does not address the relevant timeframe, and reveals little about whether the entities were "integrated and commingled" from a day-to-day standpoint. *Poch*, 405 S.C. at 375; *see also supra* § III.B.2.b.

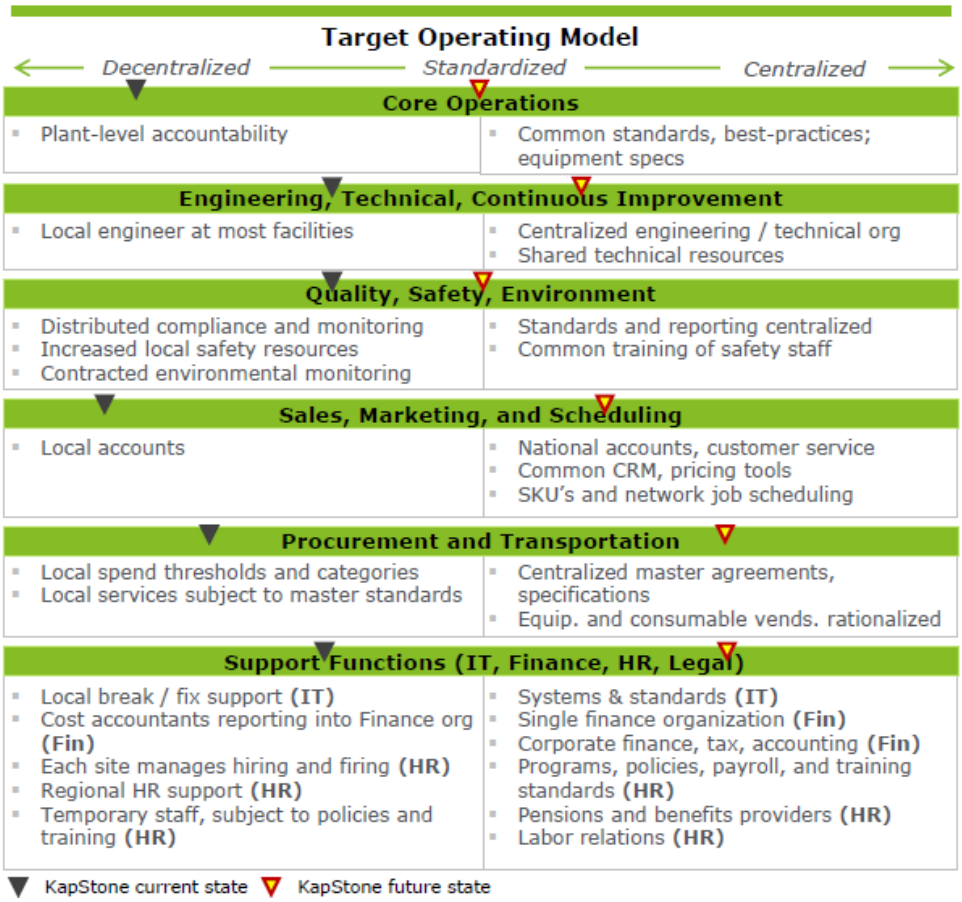
In sum, the operational factors indicate that Paper and Charleston "are two separate and distinct corporate entities" while the shared identity and leadership factors, at worst, point only slightly in the opposite direction. *Monroe*, 531 F. Supp. at 434. As such, the "weight of the evidence" does not demonstrate that Paper and Charleston are alter egos, and the trial court erred in reaching this conclusion.

D. The fact that Charleston was not integrated with Defendants at the time of the accident distinguishes this case from any other case and materially changes the alter ego analysis.

Finally, *Poch* and *Monroe* both hold that courts may consider "other factors which are or may be relevant to a determination" of whether entities are alter egos. *Monroe*, 531 F. Supp. at 434; *accord Poch*, 405 S.C. at 373. One such "other factor" is the evolution in the operational integration between Paper, Kraft, and Charleston. This consideration underscores that Charleston was operated as a separate entity at the time of the accident, but the situation changed later—

proving the separate nature of these entities *at the relevant time*. No other reported case includes this fact.

Before the accident, Paper did not operate its subsidiaries as a single, integrated company. (*See* R. pp. 264–66, 2266–2302, 2471–2505). Quite the reverse, operations were largely decentralized, with each entity enjoying a high level of independence from one another and Paper itself. (*See* R. pp. 264–66, 2278). Specifically, Paper "grew through acquisitions but ha[d] not integrated to capture the benefits of the combined Mill & Container business" as of January 2017. (R. p. 2273). At this time, its subsidiaries were "less vertically integrated than many of [its] competitors," "[l]ow levels of standardization" existed across them, and their "divisional structure" "create[d] organizational barriers to collaboration." (R. p. 2494, 2498, 2500). For these reasons, the "current state" of Paper's entities in January 2017 was markedly decentralized:



(R. p. 2278).

As this chart demonstrates, at the time of the accident, Paper did not impose "[c]ommon standards," "best-practices," or even uniform "equipment spec[ifications]" to govern "core operations" across its subsidiaries. (*Id.*). Instead, each plant developed its own standards of "accountability." (*Id.*). Likewise, sales, marketing, and scheduling were handled through "[l]ocal accounts" rather than "[n]ational accounts" or other centralized tools. (*Id.*). And "[p]rior to January 2017 . . . there was no Shared Services Department" at Paper to formally provide centralized services to the various entities. (R. p. 178).

Recognizing the "urgent need . . . to operate as a unified company" (R. p. 2273), Paper initiated the "One KapStone" project in late 2016 to become "an integrated company." (R. p. 209). To that end, several months after the accident, Paper hired a consultant to "develop[] an execution plan" to integrate operations across its subsidiaries. (R. p. 2470).

The OneKapStone project resulted in several major changes beginning in January 2017. These included the establishment of "common standards, processes, [and] specs" for core operations, the centralization of quality, safety, and environmental "standards, policies, and training," and the consolidation of "support functions into [a] central organization with consistent processes & policies." (R. p. 2278).

Importantly, Paper implemented these changes to *correct* the *lack* of operational integration among its subsidiaries that existed before January 2017. These post-accident integration efforts highlight the separateness of its subsidiaries' operations at the time of the accident, thus implying that Paper, Kraft, and Charleston did not operate as "one economic unit" during the key period. *Poch*, 405 S.C. at 375. This fact differentiates the present case from any

other reported case and proves that, as a matter of operational reality, Charleston was not an alter ego of the other entities at the time of the accident. The trial court erred in ruling otherwise.

CONCLUSION AND PRAYER

The trial court's order should be reversed, and judgment should be rendered denying Defendants' motion to dismiss. In the alternative, the trial court's order should be reversed, and the case remanded for a proper application of the *Monroe* test with full consideration of the evidence separately as to each Defendant.

Respectfully submitted,

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I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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