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 REPLY BRIEF OF APPELLANTS

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Defendants want the benefits the corporate form provides, but not the burdens—its rewards without its risks. To that end, Defendants go to great lengths to distinguish the *Poch* analysis from veil piercing in the liability context, arguing that the case law on the Workers' Compensation Act ("WCA") requires an expansive reading of *Poch*. This reply brief begins with a "big picture" view of this entire field of law, both to assist the Court in interpreting the details of this particular record and to underscore the implications of this decision for future cases. Appellate courts must always be mindful that each decision has consequences for the future, and this case is no exception.

Fundamentally, *Poch* and traditional veil piercing accomplish the same end: they allow a court to disregard the formal legal separation between two distinct entities. It is unsurprising, therefore, that the test for veil piercing under *Poch* closely resembles the tests for two common veil piercing theories in the liability context, with all three doctrines requiring consideration of many of the same, substantive factors regarding operations. As such, Defendants are mistaken to assume that this Court's interpretation of *Poch* will not have broader ramifications that undermine the corporate form more generally.

Contrary to Defendants' lead argument, moreover, stretching the boundaries of *Poch* will *not* advance the interest underlying the WCA: to protect workers. This is why courts construe the statute's *express* provisions broadly—to extend its protections to *more* workers. *Poch* does not serve this purpose. It does not permit employees to collect worker's compensation benefits from their employer's parent companies in the event their employer is unable to provide coverage. Instead, *Poch* only runs in one direction, allowing parent companies to take advantage of their subsidiaries' WCA immunity without affording employees any corresponding benefits. Therefore, broad interpretations of *Poch* will actually *undermine* the policy interests underlying the WCA. Consequently, a narrow interpretation is warranted.

Under a proper interpretation of *Poch*, the evidence here demonstrates that Defendants were not "operated as one economic entity" with Charleston at the time of the accident. *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 374, 747 S.E.2d 757, 765 (2013). Although there is some evidence of shared corporate identity and overlapping leadership, the operational realities confirm that, in practice, the three companies functioned as their own distinct businesses, operating from different locations, hiring and paying their own employees, holding themselves out as distinct entities to those employees, engaging in different activities, maintaining separate books, bank accounts, and payroll records, and filing separate tax returns. *See id.* at 373, 747 S.E.2d at 764. Accordingly, neither Defendant is entitled to Charleston's WCA immunity. The trial court's judgment should be reversed.

I. Deference to the corporate form requires a narrow interpretation of *Poch*.

Because Defendants suggest that the *Poch* test has no consequences for the corporate form as a general matter, Plaintiffs begin by refuting that fundamental misconception.

A. A broad reading of *Poch* undermines the protections the corporate form provides to owners.

As Defendants acknowledge, a plaintiff may pierce the corporate veil to hold an owner liable in multiple ways, two of which are particularly relevant here. (*See* Resp. Br. at 15–16). First, for a plaintiff to pierce the corporate veil based on an "alter ego" theory, he must show "(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby." *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012) (citing *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006)). "Control may be shown" to satisfy the first element "where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity." *Id.* (citing same).

Significantly, "[c]ommon officers and/or directors and public identification of one corporation as the other's subsidiary do not, without more, support the conclusion [that] the subsidiary is its parent's alter ego." *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153–54, 268 S.E.2d 42, 44 (1980). Instead, much like the *Poch* inquiry, the "alter ego" analysis for liability purposes turns on "several factors" regarding the companies' operations, extending beyond "stock ownership by [the] parent" and "common[ality] [of] officers and directors" to include "financing of [the] subsidiary by [the] parent; payment of salaries and other expenses of [the] subsidiary by [the] parent; failure of [the] subsidiary to maintain formalities of separate corporate existence; identity of logo; and [a] plaintiff's knowledge of [the] subsidiary's separate corporate existence." *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 268, 678 S.E.2d 819, 824 (Ct. App. 2009).

Second, under the "single business enterprise" or "amalgamation" theory of liability, a plaintiff may pierce the corporate veil "where multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 652–53, 817 S.E.2d 273, 279 (2018). "Disregarding the corporate structure" pursuant to this doctrine "involves two considerations. One is the relationship between two entities. The other . . . is whether the entities' use of limited liability was illegitimate." *Id.* at 655, 817 S.E.2d at 280 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)) (ellipsis omitted). Between the two, "[t]he threshold . . . issue is an assessment of whether the[] entities actually operate as a single business enterprise." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, LLC, 425 S.C. 276, 298, 821 S.E.2d 509, 520 (Ct. App. 2018) (quoting *Pertuis*, 423 S.C. at 650, 817 S.E.2d at 278). If not, the inquiry is at an end. *See id.*

In assessing this threshold issue, courts again consider operational realities, like "the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability." *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 527, 827 S.E.2d 348, 365 (Ct. App. 2019); *see also Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 359–60, 725 S.E.2d 112, 118 (Ct. App. 2012); *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (similar). Whether "the corporate entities' identities or interests were blurred or could be confused with one another" is also relevant. *Pertuis*, 423 S.C. at 651, 817 S.E.2d at 279.

Noticeable parallels exist between the piercing doctrines in the liability context and *Poch* piercing in the WCA context. In both situations, for example, piercing the veil requires *more* than a shared identity or high-level leadership. *Compare, e.g.*, *Yarborough*, 275 S.C. at 153–54, 268 S.E.2d at 44 ("Common officers and/or directors and public identification of one corporation as the other's subsidiary do not, without more, support the conclusion [that] the subsidiary is its parent's alter ego.") *with Monroe v. Monsanto Co.*, 531 F. Supp. 426, 432 (D.S.C. 1982) ("The mere ownership of the capital stock of one corporation by another does not create an identity of corporate interest between the two companies, or create the relationship of . . . alter ego between the two."). Rather, it requires an examination of the operational realities between the two entities to determine if they are truly so integrated as to warrant characterization as "alter egos" or a "single business enterprise." *See, e.g.*, *Poch*, 405 S.C. at 372–74, 747 S.E.2d at 763–65; *Monroe*, 531 F. Supp. at 434; *Jones*, 383 S.C. at 268, 678 S.E.2d at 824; *Walbeck*, 426 S.C. at 527, 827 S.E.2d at 365. This is consistent with an interpretation of *Poch* that views the first two factors as gatekeepers and places greater weight on the last six as the true indicators of operational integration or separation between two entities. (*See* Opening Br. at 15–17).

Moreover, the ultimate tests applied by the three different doctrines are remarkably similar, with each focusing on the closeness of the entities' relationship:

***Poch* Test**[1]	**Liability Alter Ego Test**[2]	**Single Enterprise Test**[3]
Whether "two corporations are so integrated and commingled that neither can be realistically viewed as a separate economic entity."	Whether there is "total domination and control of one entity by another."	Whether "multiple corporations have unified their business operations and resources to achieve a common business purpose."

Likewise, the factors courts consider in determining whether an "alter ego" relationship or "single business enterprise" exists for liability purposes overlap significantly with the *Poch* factors, as the following chart illustrates:

***Poch* Alter Ego Factor**[4]	**Liability Alter Ego Factor**[5]	**Single Enterprise Factor**[6]
Corporate identities	Identity of logo	Blurring of identities
High-level leadership	Officers and directors	Officers and directors
Location of operation		Location of operation
Hiring/payment of employees	Payment of salaries	Shared employees
Representation to employees	Plaintiff's knowledge of subsidiaries existence	Written representations
Books and records	Financing of subsidiary	
Tax number and returns	Maintenance of formalities of separate corporate structure	

[1] *Poch*, 405 S.C. at 372–73, 747 S.E.2d at 765.

[2] *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465.

[3] *Pertuis*, 423 S.C. at 652–53, 817 S.E.2d at 279.

[4] *See Poch*, 405 S.C. at 372–73, 747 S.E.2d at 765; *Monroe*, 531 F. Supp. at 434.

[5] *See Jones*, 383 S.C. at 268, 678 S.E.2d at 824.

[6] *See Walbeck*, 426 S.C. at 527, 827 S.E.2d at 365*; Magnolia*, 397 S.C. at 359, 725 S.E.2d at 118.

In light of this doctrinal overlap, any interpretation of the *Poch* test generally and each of its factors specifically will have significant implications for the other two doctrines. Broadly speaking, courts assessing whether one entity exercises "total domination and control of" another, or whether "multiple corporations have unified their business operations and resources to achieve a common business purpose," will naturally look to case law on whether "two corporations are so integrated and commingled that neither can be realistically viewed as a separate economic entity." *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465; *Pertuis*, 423 S.C. at 652–53, 817 S.E.2d at 279; *Poch*, 405 S.C. at 372–73, 747 S.E.2d at 765. More narrowly, cases analyzing the evidence on each specific *Poch* factor will also be a natural source of guidance for similar factors in the liability context, giving rise to more "alter ego" and "single business enterprise" findings overall.

Consequently, despite their differing roots, it is a mistake to assume that *Poch* and cases interpreting it will not have wider ramifications for veil piercing law in general. Defendants' emphasis on the *second* element of traditional veil piercing theories—the inequity element—misses the point. As outlined above, the "control" and "unified business operations" elements of both the "alter ego" and "single business enterprise" theories of veil piercing overlap significantly with the *Poch* analysis. *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465; *Pertuis*, 423 S.C. at 652–53, 817 S.E.2d at 279; *Stoneledge*, 425 S.C. at 298, 821 S.E.2d at 520.

Thus, an expansive reading of *Poch* will lead courts to find *more* alter ego relationships and *more* single business enterprises, lowering the bar plaintiffs must satisfy before moving on to the inequity inquiry and creating more circumstances where courts may pierce the corporate veil. A narrow reading, by contrast, will better preserve these protections and more faithfully follow the Supreme Court's instruction to only pierce the veil after "substantial reflection." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

B. A broad reading of *Poch* will undermine the interests underlying the WCA.

Defendants rationalize their appeal to interpret *Poch* broadly by highlighting the "policy of South Carolina courts to resolve jurisdictional doubts in favor of inclusion of employers and employees under the [WCA]." (Resp. Br. at 13; *see also id.* at 12–15); *Poch*, 405 S.C. at 367, 747 S.E.2d at 761. But far from advancing the true policy interests of the WCA, a broad reading of *Poch* would only serve to undermine them. Defendants' attempt to cloak their broad application of the *Poch* test with the legislative policy favoring broad application of worker's compensation coverage is—upon careful inspection—actually a false equivalence.

The General Assembly enacted the WCA "to protect industrial workers against the hazards of their employment." *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825, 836 (1939). Prior to its passage, the only way employees could recover for work-related injuries was to sue their employers and establish liability, a slow, risky, expensive process. *See id.* To streamline workers' recovery, the legislature passed the WCA, "supplant[ing] tort law [and] providing a no-fault system focus[ed] on quick recovery, relatively ascertainable awards, and limited litigation." *Machin v. Carus Corp.*, 419 S.C. 527, 534, 799 S.E.2d 468, 471 (2017). Under this system, "[t]he employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee." *Id.* The WCA is thus a two-way street: if a plaintiff can obtain worker's compensation benefits from a particular entity under the statute, that entity also receives immunity from suit. But if the employee cannot obtain benefits from the entity, there is no reason to immunize it. *See Freeman Mech., Inc. v. J.W. Bateson Co., Inc.*, 316 S.C. 95, 98, 447 S.E.2d 197, 199 (1994) ("[O]ne who has obligations under the Act enjoys the immunities under the Act."); *Harrell v. Pineland Plantation, Ltd.*, 329 S.C. 185, 191 n.3, 494 S.E.2d 123, 126 n.3 (Ct. App. 1997) (similar).

To this end, the WCA contains an important, *express* provision that extends coverage beyond direct employers to "statutory employers." *See Olmstead v. Shakespeare*, 354 S.C. 421, 423, 581 S.E.2d 483, 484 (2003); *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 217–18, 661 S.E.2d 395, 399 (Ct. App. 2008). That provision provides:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400.

Critically, the "statutory employer" inquiry under this provision is distinct from the veil piercing inquiry outlined in *Poch*. *Compare Poch*, 405 S.C. at 368–69, 747 S.E.2d at 761–62 (outlining and applying the "three tests" used to determine whether an entity is a statutory employer, which ask whether an employee's activity "(1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; or (3) has previously been performed by the owner's employees") *with id.* at 370–74, 747 S.E.2d at 763–65 (adopting and applying *Monroe*'s eight-factor alter ego test). The presumption Defendants trumpet favoring the "inclusion of employers and employees under the [WCA]" evolved not through *Poch* or its predecessors but through interpretations of the "statutory employer" provision. *See, e.g.*, *Posey*, 378 S.C. at 218–19, 661 S.E.2d at 399–400; *Edens v. Bellini*, 359 S.C. 433, 442–44, 597 S.E.2d 863, 868–69 (Ct. App. 2004); *Marchbanks*, 190 S.C. 336, 2 S.E.2d at 836. By applying the presumption in favor of coverage to this provision, courts extend the WCA's protection to more employees and advance the statute's chief purpose: the protection of workers. *See Marchbanks*, 190 S.C. 336, 2 S.E.2d at 836.

This is not the case for *Poch*. Unlike cases that broadly construe the "statutory employer" provision or liberally apply its tests, neither *Poch* nor any of its predecessors *expands* the scope of the WCA to allow for more *employee recovery* under the statute. *See Poch*, 405 S.C. at 370–74, 747 S.E.2d at 763–65; *Monroe*, 531 F. Supp. at 434; *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). None of these cases holds, for example, that an employee may recover workers' compensation benefits from their employer's parent company. *See id. Poch* only allows parent companies to take advantage of their subsidiary's immunity. *See Poch*, 405 S.C. at 370–74, 747 S.E.2d at 763–65. Unlike the "statutory employer" provision, *Poch* is a one-way street. Consequently, the legislative policy of resolving doubts in favor of coverage is inapplicable.

The reason for this conclusion is obvious. While the WCA expressly permits workers to recover from their "statutory employers," *see* S.C. Code § 42-1-400, nothing in the statute allows them to recover from their employer's owner. *See* S.C. Code § 42-1-10 *et seq.* As such, there is no statutory basis to expand employee protections under *Poch*. By its terms, moreover, *Poch* did not extend immunity to parent companies based on the need to enhance these protections but on the entities' operational overlap, a typical rationale used to justify veil piercing in the liability context. *See Poch*, 405 S.C. at 371, 747 S.E.2d at 763 ("[T]he alter ego theory functions on the premise that when two corporations operate essentially as one, they should be considered as one for workers' compensation purposes."). For these reasons, a broad reading of *Poch* will not advance the same interests as the "statutory employer" provision. Quite the opposite, it would undermine those interests by blocking an employee's recovery from a third party.

The problems with a broad reading of *Poch* do not end there. As the *Monroe* court ruled, a company that takes advantage of the corporate form should also accept its risks:

> There are benefits to be derived by the parent corporation maintaining a separate identity from that of the subsidiary, included among them is the general rule that the parent corporation is not liable for the contracts or torts of its subsidiary. Having retained whatever benefits may be available to themselves as separate and distinct corporations, associated corporations may be estopped to deny their separate existence.

Monroe, 531 F. Supp. at 432 (citations omitted). Put differently, once an owner receives the advantages of the corporate form, "principles of reciprocity" dictate that it should also absorb the burdens that come with it. *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979). Defendants' proposed broad reading of *Poch* would fly in the face of these principles.

Accordingly, the presumption Defendants cite favoring inclusion of employers within the scope of the WCA does not apply to veil piercing under *Poch*. Instead, that decision represents a narrow exception permitting parents to invoke a subsidiary's immunity in rare circumstances where the eight factors firmly demonstrate the two companies "operated as one economic entity." *See Poch*, 405 S.C. at 375, 747 S.E.2d at 765 (seven of eight factors demonstrated integration); *Mickle v. Boyd Bros.' Transp., Inc.*, 2015-UP-068, 2015 WL 576711, at *2 (S.C. Ct. App. Feb. 11, 2015) (similar). Absent such rare situations, the "general rule" applies: the "parent corporation is . . . not immune from an action in tort by an injured employee of its subsidiary by virtue of the employee's entitlement to workers' compensation." *Poch*, 405 S.C. at 370–71, 747 S.E.2d at 763.

II. Each Defendant's relationship with Charleston must be assessed separately.

As set forth in Plaintiffs' Opening Brief, courts assessing whether an alter ego relationship exists for worker's compensation purposes confine their analysis to the relationship between the *defendant entity* and the plaintiff's employer. (*See* Opening Br. at 18–19 (citing *Monroe*, 531 F. Supp. at 434; *Brown*, 239 S.C. at 608–09)). The trial court, however, conflated its analysis of the Kraft-Charleston relationship with the Paper-Charleston relationship, an error warranting remand. (*See id.*)

Defendants offer hardly any response to this argument. They inaccurately claim that there is no case law to support the proposition that each relationship must be examined separately, ignoring *Monroe* and *Brown*'s targeted treatment of the defendant's relationship with the plaintiff's employer to the exclusion of other entities. (*See* Resp. Br. at 20–21). Eschewing authority, Defendants employ fallacious "transitive logic" to oversimply the inquiry:

> If a parent entity "A" [Paper] is integrated with subsidiary "B" [Kraft], and subsidiary "B" is integrated with its own subsidiary "C" [Charleston] then parent "A" is integrated with subsidiary "C." And any variation of this logic results in the same conclusion (if A=B and A=C, then B=C).

Id. at 10. The goal of this fallacious logic is to show that both Defendants get immunity if only one of them satisfies the *Poch* test, obviating the need for the other to independently do so.

Defendants' oversimplification ignores the fact that the *reasons* behind the integration may differ between the relationships in critical ways. If, for example, parent company "A" is integrated with subsidiary "B" for one set of reasons (A=B because X) and with subsidiary "C" for a different set of reasons (A=C because Y), then it *does not* follow that "B" and "C" are integrated with one another (because X≠Y). It all depends on the reasons behind the integration.

Substituting the third *Poch* factor for Defendants' vague use of the phrase "integrated with" more vividly exposes the fallacy in their reasoning. If both parent "A" and subsidiary "B" transact business from location "X" (Northbrook) (A=B because X), and subsidiaries "B" and "C" transact business from location "Y" (the Charleston Mill) (B=C because Y), that *does not* imply that "A" and "C" transact business from the same location (A=C), which is not true in this example. It just means B operates from two locations. Thus, on this factor, the inquiry into whether A and B are "integrated" differs from the inquiry into whether A and C are "integrated." This holds true across all the individual *Poch* factors and, consequently, for the *Poch* inquiry overall. Each relationship must be examined independently.

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

Like the trial court, Defendants make no effort to independently analyze each entity's relationship with Charleston. Nor do they engage Plaintiffs' arguments as to why the evidence the trial court cited fails to establish integration. Instead, they mechanically repeat the trial court's recitation of the evidence that allegedly supports them, ignoring the overwhelming proof that tips the balance in Plaintiffs' favor.

A. The operational factors establish separation between Kraft and Charleston.

For the reasons set forth in Plaintiffs' Opening Brief, the operational factors firmly indicate separation between Kraft and Charleston. (Opening Br. at 20–25). Kraft and Charleston transact business from different locations, hire and pay their own employees, hold themselves out to their employees as separate entities, maintain separate books and records, and file separate tax returns. (*Id.*). Defendants barely argue otherwise. In fact, on three of these five factors—hiring and payment, self-representation to employees, and bookkeeping—Defendants (like the trial court) rely entirely on irrelevant evidence that is specific to the *Paper*-Charleston relationship, so those factors plainly indicate separation. (*See* Resp. Br. at 26–30 (citing Paper-specific evidence on hiring, payment, and self-representation); *id.* at 32–34 (same for bookkeeping); *see also* R. pp. 19–24).

On the remaining factors, Defendants simply repeat the evidence the trial court cited that purportedly suggests Kraft and Charleston transacted business from the same location and filed a joint tax return. (*Compare* Resp. Br. at 24–26 (location), 34–35 (taxes) *with* R. pp. 17–19 (location), 24 (taxes)). But rather than addressing the errors in the trial court's reasoning, Defendants just double down on them. (*See* Opening Br. at 20–21, 25). These arguments are unpersuasive.

A handful of employees and equipment leases at the Charleston Mill does not rise to the *Poch* level of operational overlap on the third factor, especially given that the bulk of Kraft's operations took place at the Roanoke Rapids Mill. (*See id.* at 20–21).

Likewise, it remains true that the three entities had different tax identification numbers and that the tax return Paper and Kraft filed did not include Charleston. (*See* Opening Br. at 25 (citing R. pp. 3150–3376 (no mention of Charleston))). The only evidence Defendants cite to the contrary—a duplicate of Paper's 2016 tax return—suffers the same deficiency. (*See* Resp. Br. at 34–35 (citing R. pp. 3519, 3535) (no mention of Charleston)).

B. The operational factors establish separation between Paper and Charleston.

Defendants' arguments relating to the Paper-Charleston relationship fare no better. Again, they commit the same errors of reasoning as the trial court and make no effort to address them. The operational factors firmly establish separation between Kraft and Charleston.

Factor 3. On the third *Poch* factor—whether the two entities transacted business from the same location—Defendants primarily emphasize the services Paper provided remotely from its office in Northbrook. (*See* Resp. Br. at 24–26). But Paper did not begin to provide many of these services until *after* the accident occurred. (*See* R. p. 178). More importantly, even if Paper did provide shared services to its subsidiaries in 2016 from the Northbrook office, its provision of those services would not imply that *Paper* transacted business *from all its subsidiaries' locations*. Rather, it would simply confirm the obvious: Paper transacted business from Northbrook. Northbrook, Illinois is not Charleston, South Carolina.

Apart from a few IT personnel, Defendants cite no evidence that any Paper employees worked at the Charleston Mill. (*See* Resp. Br. at 26 (citing R. pp. 2016–2070); *see also* R. p. 2595). Nor do they supply any evidence that *Charleston* employees worked from Northbrook because there is none. (*See* Resp. Br. at 24–26). All they have to even conceivably support that

point is Charleston's registered address, but, despite that formality, Charleston only operates from its Charleston Mill. (R. pp. 206–07, 2016–2070).

At bottom, therefore, the evidence irrefutably establishes that Charleston employees worked at the Charleston Mill while Paper employees worked at the Northbrook office. That is, Paper and Charleston "transact[ed] business from different locations," indicating separation. *Poch*, 405 S.C. at 372. (*See* Opening Br. at 29–30).

Factor 4. On the fourth factor—whether the entities hire and pay their own employees—Defendants again follow the trial court's lead in citing Paper's alleged financing of Charleston employees' salary, wages, and benefits. (Resp. Br. at 26–27). Like the trial court, however, Defendants expressly admit that Charleston *hired* its own employees. (*See id.*). And they do not deny that any "financing" Paper provides comes from revenue that Charleston generates. (*Compare id. with* Opening Br. at 31). Thus, Charleston alone "hire[d] and pa[id] [its] own employees" in every meaningful sense of the word. *Poch*, 405 S.C. at 372.

Factor 5. On the fifth factor—whether Kraft and Charleston held themselves out to their employees as separate entities—Defendants provide a laundry list of documents that Charleston employees would receive at the outset of their employment or on rare occasions thereafter, such as "employment applications," "policies and procedures," and "offers of employment," among other documents. (Resp. Br. at 28–29). This is, once again, the evidence the trial court cited, and it is a poor indicator of how Paper and Charleston held themselves out to their employees throughout their employment. (*See* Opening Br. at 31–32). As we explained in the Opening Brief (without contradiction from Defendants), the documents Charleston employees received most regularly during the course of their employ signaled that *Charleston alone* was their employer. (*Id.*). The same is true of Paper for Paper employees. (*See id.*). Unsurprisingly, Charleston

employees view Charleston as their employer and Paper employees view Paper as their employer. (*Id.*). Defendants offer no counter to any of this evidence. (*See* Resp. Br. at 28–29).

Factor 6. On the sixth factor, Defendants cannot avoid the undeniable fact that Paper and Charleston engage in different business activities, so they ignore it. (*Compare* Opening Br. at 32–34 *with* Resp. Br. at 30–32). Instead, Defendants commit the same error as the trial court, arguing that Paper and Charleston (collectively with numerous others) were "engaged in the business of manufacturing, selling, and distributing kraft paper products." (Resp. Br. at 37). *Monroe* and *Brown* foreclose this reasoning, as both of those cases involved a defendant entity that contributed to a single owner's collective enterprise, yet that fact did not imply that the defendant engaged in the same business activity as the owner. (*See* Opening Br. at 33). The analysis turns on the specific business activity each entity performed. (*Id.*). *Poch* proves this to be the rule, as the parent and subsidiary in that case engaged in the exact same business activity. *See* 405 S.C. at 374, 747 S.E.2d at 765. That is not the case here. Paper and Charleston plainly "engage[d] in different business activities," again demonstrating separation. *Id.*

Factor 7. On the seventh factor—whether the two entities maintained separate books, bank accounts, and payroll records—Defendants cite the same centralized bookkeeping arrangement as the trial court. But they refuse to grapple with the inconvenient law from *Brown* that explicitly found a "central bookkeeping arrangement" insufficient to support an alter ego finding where the books were *maintained* separately for each entity. *See* 239 S.C. at 608–09, 124 S.E.2d at 49–50. Paper's maintenance of *additional* books and records that combined the information of all its entities does not change the fact that Paper itself viewed its entities as distinct and kept their records separate in the first instance, just like in *Brown*. *See id.* Where this is the case, the seventh factor may still support an alter ego finding if the parent is "entirely responsible for the financial

operation" of the subsidiary, but that is not true here. *Poch*, 405 S.C. at 374, 747 S.E.2d at 765. Defendants concede that Paper finances Charleston's operations with Charleston's own coin.

Factor 8. Finally, on the eighth factor, Defendants cite the same deficient evidence for Paper as they did for Kraft: their 2016 tax return. (Resp. Br. at 34 (citing R. pp. 3519, 3535)). As explained above, Charleston is not included in this return. *See supra* § III.A.

C. Defendants repeat the trial court's erroneous reasoning on the first two threshold factors.

Defendants offer no real counter to *Brown*, *Poch*, or *Gordon*, where the application of the relevant factors indicated that the operational factors carry the most weight and the first two—whether each Defendant shared a corporate identity or executive leadership with Charleston—were treated as threshold inquiry. (*See* Opening Br. at 15–18). Instead, they highlight *Poch*'s examination of *additional* factors concerning the companies' respective operations as proof that operations do not carry more weight than formalities. (Resp. Br. at 18–20). Defendants' argument proves the point. The operational factors matter most.

In their substantive analysis of the first and second factors, meanwhile, Defendants fail to distinguish each of their individual relationships with Charleston. Again, they reference the same evidence as the trial court without attempting to overcome the serious problems with that evidence. (Resp. Br. at 20–24). Like the trial court, they make no effort to grapple with the strong countervailing evidence that neither of them shared a corporate identity with Charleston. (*Compare id. with* Opening Br. at 26–27, 35–36). Nor do Defendants attempt to address the serious credibility and relevance issues with the evidence purporting to show shared executive leadership, which stems entirely from a single, unverified document showing the companies' officers in the year *after* the accident. (*Compare* Resp. Br. at 23–24 *with* Opening Br. at 27–28, 36). In short, the evidence on the first factor is conflicting, the second irrelevant, and Defendants offer no

argument to the contrary. Together, therefore, the first two factors come nowhere close to outweighing the operational separation between Defendants and Charleston demonstrated by the other six factors.

D. Defendants' post-accident integration establishes pre-accident separation.

Finally, Defendants contend that the post-accident One KapStone program reinforces many of their earlier points on the individual factors, arguing that it provides further evidence of a pre-accident "shared corporate identity," "overlapping management," "consolidated books," and "unified operational goals." (Resp. Br. at 35–41). These arguments fail for the same reasons as Defendants' chief evidence on each individual factor.

Defendants first cite Paper's identification of an "EBITDA gap" between the Mill and Container divisions as further proof that Paper maintained "consolidated books" for all its subsidiaries under the seventh factor. (Resp. Br. at 36–37). As noted, however, a "central bookkeeping arrangement" does not tip this factor in favor of an alter ego finding where the parent still keeps the records of its subsidiaries separately. *Brown*, at 608–09, 124 S.E.2d at 49–50. An additional system that consolidates disparate sets of records does not change the fact that Paper separately monitored its subsidiaries and maintained distinct books for each of them. (*See* Opening Br. at 24).

Next, Defendants argue that the One KapStone documents "provide an example of the shared 'KapStone' corporate identity." (Resp. Br. at 37; *see also id.* at 38–40 (contending that Paper took "collective ownership of data across the KapStone corporate family as representative of the whole")). But these documents were prepared exclusively by *Paper*. Thus, they only indicate that Paper believed it shared a corporate identity with its subsidiaries. At *most*, the One KapStone documents might suggest a shared corporate identity between Paper and Charleston, but they say nothing about the relationship between Kraft and Charleston. In any case, whether two

entities share a corporate identity via official policies, forms, trademarks, or presentations is only a threshold inquiry in the *Poch* analysis. (*See* Opening Br. at 15–18). This factor carries little weight compared to the operational factors. (*See id.*).

Defendants also contend the One KapStone program "illustrates pre-existing integration in terms of finances, operations, and management" because the "nature" of the program was to enable Paper and its entities to "collectively engage in efforts to develop greater operational consistency." (Resp. Br. at 37). Absent preexisting integration, they claim, Paper could not have implemented the One KapStone program. (*Id.*) The problem is that the few One KapStone documents that describe the state of Paper's subsidiaries *before* initiation of the program prove the opposite of integration. Paper maintained centralized books and collected revenues from its subsidiaries, which operated with a high level of independence. (*See* R. pp. 2273, 2278, 2494).

The most detailed One KapStone document describing the status quo as of January 2017 confirms this fact. (*See* R. p. 2278). It demonstrates that, prior to implementation of the One KapStone program, each subsidiary was accountable for its own "core operations," and there were no "common standards, best-practices, [or] equipment specs" across all Paper's entities. (*Id.*). "Local engineer[s] at most facilities" managed any engineering or technical issues that might arise however they saw fit rather than deferring to a "centralized engineering/technical org" or using "shared technical resources." (*Id.*). "[C]ompliance" with and "monitoring" of quality, safety, and environmental standards were not "centralized" but "distributed" across subsidiaries. (*Id.*). Subsidiaries handled their respective "sales, marketing, and scheduling" through "local accounts," not "national accounts." (*Id.*). "Procurement and transportation" decisions turned on "local spend[ing] threshold[s] and categories," and subsidiaries could contract for "local services subject to master standards" without following any "centralized master agreements [or] specifications."

(*Id.*). The IT, Finance, and Human Resources "support functions" were also highly localized before implementation of the One KapStone program, which "consolidate[d]" those functions "into [a] central organization with consistent processes and policies" only after the accident. (*Id.*).

Defendants dismiss this powerful evidence of pre-accident separation as nothing more than "costly operational redundancies and inconsistencies between the KapStone mill and container entities' interdependent systems." (Resp. Br. at 40; *see also id.* at 35 n.6; R. p. 26). But this argument mistakes the symptoms for the disease. "[O]perational redundancies and inconsistencies" arose *because* Paper subsidiaries like Charleston and Kraft operated autonomously from one another and from Paper at the time of the accident. Indeed, Paper's growth occurred primarily "through acquisitions" of preexisting companies that operated as their own, independent businesses. (*See* R. p. 2273). Charleston itself, for example, was originally purchased from a company called Meadwest Vaco. (R. p. 202).

It was for this reason that, as of January 2017, Paper "ha[d] not integrated" its subsidiaries "to capture the benefits of the combined mill & container business." (R. p. 2273). Before then, they still effectively functioned as their own businesses, even if under Paper's umbrella. As a result, Paper, Kraft, and Charleston were not "operated as one economic entity" at the time of the accident, *Poch*, 405 S.C. at 374, 747 S.E.2d at 765, and Defendants are not entitled to Charleston's immunity.

CONCLUSION AND PRAYER

Appellants respectfully renew their prayer for relief in the Brief of Appellants.

Respectfully submitted,

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

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