THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-04-00752

Appellate Case No. 2020-000182

Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gudrun Kornett, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, Diane Bernat, and William Schaidle,

Plaintiffs / Respondents,

v.

Chris Dixon; Samuel J. Dixon; Black Harbor Wealth Management, LLC; Faw Casson & Co., LLP; Shurwest, LLC; and Pacific Life Insurance Company,

Of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,

Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendant / Respondent.

And

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-04-02151

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Appellate Case No. 2020-000187

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William and Karen Rich,

Plaintiffs / Respondents,

v.

J. Christopher Dixon; Christopher J. Dixon; Black Harbor Wealth Management, LLC; and Shurwest, LLC,

Of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,

Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendant / Respondent.

And

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-04-00479

Appellate Case No. 2020-000188

Elizabeth Billings, Pamela Bott, Devon and Barbara Corley, Thomas Dantzler, Jane Downing, Thomas and Laura Eliason, Dennis Ellis, Bobby Floyd, Steven Ganley, Stanley Hix, Suzanne Hofford, Robert Johnson, Jerome and Robin Karnowski, Jerry and Kerry Kelley, Christine Lawson, Robert Manning, Diane Mayfield, Kelley McGraw Gray, Jeff Mitchell, Fred Myette, Mary Orem, Drucilla Perry, Dennis and Maxine Pierson, "Dennis and Maxine Pierson Living Trust," Earl Switzer, Alan Weeks, John and Mary Wendorf, and Virginia Howard,

Plaintiffs / Respondents,

v.

Chris Dixon; Black Harbor Wealth Management, LLC; Faw Casson & Co., LLP; and Shurwest, LLC,

Of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,

Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendant / Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly find Appellant is subject to personal jurisdiction in South Carolina where Shurwest has systematic and continuous contacts with South Carolina and where exercising jurisdiction over Shurwest does not offend due process?

2. Did the circuit court properly find the third-party complaint should be partially stricken where Shurwest's claims for breach of contract and breach of fiduciary duty against Schulze-Miller were not derivative and where inclusion of these claims would unnecessarily complicate this action and prejudice the Individual Respondents?

3. Did the circuit court properly find res judicata bars two causes of action in the third-party complaint where Shurwest previously brought identical claims for breach of contract and breach of fiduciary duty against Schulze-Miller in Arizona and ultimately dismissed them with prejudice?

STATEMENT OF THE CASE AND THE FACTS[1]

As alleged by the Individual Respondents,[2] this action arises out of Shurwest's integral involvement in encouraging and inducing the Individual Respondents to (1) use their hard-earned retirement funds to purchase unnecessary and inappropriate Indexed Universal Life ("IUL") insurance policies and (2) fund those expensive IUL policies with a structured cash flow provided by Future Income Payments, LLC ("FIP")—a Ponzi scheme that subsequently collapsed, decimating the Individual Respondents' retirement savings and leaving the Individual Respondents unable to continue making the exorbitant annual IUL policy premiums Shurwest and its agents induced them to purchase. (R. pp. 110–18, 124, 464–66). The Individual Respondents, elderly individuals who have already lost much of their retirement savings by virtue of the collapse of FIP, are now faced with the possibility of losing their remaining retirement savings that have been invested in IUL policies due to policy lapse. (R. pp. 117, 124–26, 132).

In an effort to recover damages related to both the purchase of IUL policies and FIP investments, the Individual Respondents filed suit against Shurwest; Black Harbor Wealth Management, LLC ("Black Harbor"); J. Christopher Dixon ("Dixon"); Samuel J. Dixon; Faw

[1] The Individual Respondents combine the statement of the case and statement of the facts to eliminate repetition due to considerable overlap between the procedural history and facts in this case. Further, as noted in Shurwest's brief and Melanie Schulze-Miller/MJSM's brief, this is a consolidated appeal concerning three separate cases in front of the circuit court with substantially identical filings. (App. Br. at 3 n.1; Resp. Schulze-Miller Br. at 1 n.2). The Individual Respondents likewise only cite to the filings in the *Ayers* case for the sake of simplicity and consistency.

[2] The Individual Respondents include: Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Diane Bernat, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gudrum Kornett, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, William Schaidle, Elizabeth Billings, Pamela Bott, Thomas Dantzler, Dennis and Maxine Pierson Living Trust, Davon and Barbara Corley, Jane Downing, Dennis Ellis, Bobby Floyd, Steven Ganley, Kelley McGraw Gray, Stanley Hix, Suzanne Hofford, Virginia Howard, Jerome and Robin Karnowski, Jerry and Kerry Kelley, John and Mary Wendorf, Robert Johnson, Christine Lawson, Robert Manning, Dianne Mayfield, Jeff Mitchell, Fred Myette, Mary Orem, Drucilla Perry, Earl Switzer, Thomas and Laura Eliason, Alan Weeks, and William and Karen Rich.

Casson & Co., LLP; Minnesota Life Insurance Company ("Minnesota Life"); Pacific Life Insurance Company ("Pacific Life"); Melanie Schulze-Miller ("Schulze-Miller"); and MJSM Financial, LLC ("MJSM") in April 2019.[3] (R. p. 110). As alleged in the Complaint, Shurwest implemented the Life Insurance Retirement Strategy a/k/a the IRA Reboot Program ("IRA Reboot Program") to advise potential customers, like the Individual Respondents, to utilize third-parties, such as FIP, to provide funding mechanisms so they could purchase IUL policies at a higher target level. (R. p. 111).

In an IUL policy, "any premium payments above the cost of insurance (the cost of the policy's death benefit) are directed into an internal investment account by the insurance company" that "would be available for policyholders to access by taking out tax-free loans." (R. pp. 122–23). The policyholders would not have to pay back these loans because the amount of the loans was limited to the cash value of the policy and the insurance company would use the death benefit to pay off any accrued interest. (R. p. 123). Thus, the IRA Reboot Program encouraged policyholders to pay high premium payments in order to raise the cash value of their policies so that they would be able to access this cash value once the policy was fully funded. (R. p. 123). As alleged by the Complaint, the purchase of IUL policies "was grossly inappropriate for an individual who did not have an insurable need, especially given its substantial, expensive continuing annual premium, including costs and fees, . . . and was prohibitively costly and unsuitable" for the Individual Respondents. (R. p. 124). In order to afford the high policy premiums, the IRA Reboot Program encouraged the Individual Respondents to use funding provided by FIP. (R. p. 125). As alleged by the Complaint, this further shows the IUL policies were inappropriate and irresponsible

[3] The Individual Respondents dismissed Schulze-Miller and MJSM from these actions on September 30, 2019. (R. pp. 1919–20). The Individual Respondents settled their claims against Minnesota Life, Black Harbor, and Dixon. (R. pp. 1921–22, 1963–64).

because it exposed the Individual Respondents to "unreasonable risk of loss" as "they could not independently fund the life insurance policy premiums." (R. p. 125).

> FIP worked by having individuals such as [the Individual Respondents] execute a process where they would pay a lump sum to FIP to purchase a monthly income stream that represented the total amount paid to FIP plus a pre-determined rate of return . . . . For example, a policyholder might pay FIP $100,000 to acquire a monthly income stream for period of 3 years at a 5% rate of return. . . .
>
> FIP funded the cash flows it sold to individuals such as [the Individual Respondents] by "purchasing" future income from individual pensioners, including retired teachers, police officers, and military personnel. FIP offered pensioners up-front, lump-sum payments in exchange for receiving a portion of their monthly pension payments over a specific term[.] FIP would purchase these pension payments at a "discount," such that the total of the monthly payments made by the individual pensioners to FIP far exceeded the amount of the lump-sum he or she received, amounting to an effective interest rate of nearly 100% in some cases.

(R. p. 114–15). *See also United States v. Kohn*, No. 6:19-cr-239-BHH (D.S.C. Mar. 12, 2019) (Indictment, ECF No. 2, ¶¶ 4, 7; Second Superseded Indictment, ECF No. 219). In April 2018, FIP collapsed, ceasing operations and owing approximately $310 million to investors. *United States v. Kohn*, No. 6:19-cr-239-BHH (D.S.C. Mar. 12, 2019) (Indictment, ECF No. 2, ¶ 14). Accordingly, the Individual Respondents were left without the structured cash flow that they purchased and relied on to pay their IUL policy premiums. (R. p. 126).

The Individual Respondents have alleged claims against Shurwest for negligence, breach of fiduciary duty, and aiding and abetting the breach of fiduciary duty, asserting Shurwest is liable for the losses the Individual Respondents suffered due to the collapse of FIP and also the losses they have suffered from purchasing inappropriate IUL policies. (R. pp. 126–30). On June 15, 2020, Shurwest filed a Motion to Dismiss pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, alleging that it was not subject to personal jurisdiction in South Carolina. (R. pp. 408–63). In its Memorandum in Support, Shurwest argued the Individual Respondents' claims did not have "anything to do with Shurwest" because Schulze-Miller—an employee of Shurwest—

marketed and sold FIP on her own without Shurwest's involvement. (R. pp. 410, 418). The Individual Respondents filed a Memorandum in Opposition on June 26, 2020, submitting additional evidence to the circuit court to show that Shurwest is subject to personal jurisdiction in South Carolina.

This evidence shows that Shurwest, an organization that markets insurance products to insurance agents and financial planners, has had an ongoing relationship with South Carolina for at least twenty years. (R. pp. 517–21). In April 2016, Shurwest sponsored Dixon's appointment as a producer under Minnesota Life so that he would be able to sell the IRA Reboot Program to South Carolina residents. (R. pp. 522–38). Shurwest asked Minnesota Life to appoint Dixon under Shurwest's "Master Broker General Agent," and Minnesota Life confirmed that Dixon's producer appointment was set up "under Shurwest." (R. pp. 522–42). Importantly, this allowed Shurwest to receive a portion of every commission Minnesota Life paid to the agent whenever Dixon sold a Minnesota Life IUL Policy. (R. pp. 522–42).

Dixon first reached out to Shurwest after learning about Shurwest's involvement in marketing a strategy to help potential policyholders "turbocharge [their] IUL into an IRA reboot." (R. p. 621). He testified Shurwest's program was enticing because it would allow potential policyholders to use their 401(k) or other retirement savings to fund an IUL policy when they normally would not have cash on hand to fund one. (R. p. 622). He explained, the IRA reboot program allowed a person to

> take an IRA or a 401(k) or qualified monies, eventually get it into the IUL, pull out the taxes via a loan through the IUL to pay the income taxes, and then, at the end of four or five years, [they] would have converted [their] IRA or 401k or tax-deferred monies, and now, it's all of a sudden non-qualified, so any monies you pull out is tax[-]free.

(R. p. 621). Dixon testified a friend, who was also an agent for Shurwest, told him about the

program and that he needed "to talk to Shurwest." (R. pp. 621–22). Dixon then established a relationship with Shurwest, its employee Schulze-Miller, and various other Shurwest employees. (R. pp. 631–32, 650).

After numerous conversations with Dixon using her Shurwest email address and her Shurwest telephone number, Schulze-Miller flew to South Carolina in May 2016 to train Chris Dixon and his staff on structured cash flows through FIP.[4] (R. pp. 624–25, 627, 655). Schulze-Miller never told Dixon she was promoting FIP outside of her employment with Shurwest, and Dixon "look[ed] at her as Shurwest." (R. pp. 625, 650–51). A few months later, in August 2016, Shurwest paid to fly Dixon and his secretary to Arizona for three days to attend further training under Shurwest's direction. (R. pp. 627, 629–30). He "[g]ot the big tour, [was] wine[d] and dine[d]" and attended trainings in the Shurwest conference room with numerous Shurwest employees. (R. p. 630). He remembered Jim Maschek, who was Schulze-Miller's manager and the head of distribution, being present throughout his time in Arizona, as well as Shurwest employees Kyle Pesch, Rachel Brooks, Angela Hofrichter, and Nick Johnson. (R. p. 630). Ron Shurts, owner of Shurwest, even appeared at some point during the training. (R. p. 630).

As Dixon explained, he "was there to talk about the IUL reboot, how you turbocharge it using FIP and how all the piece parts work together." (R. p. 630). Dixon further testified, he "went to Shurwest to get contracted for Minnesota Life, and [FIP] was the component that made the IRA reboot, which [was Shurwest's] marketing collateral, work." (R. p. 631). During the trip to Arizona, Schulze-Miller told Dixon that Ron Shurts knew of FIP and Shurwest's involvement

[4] Dixon testified that, although some emails from Schulze-Miller were from an email address outside of Shurwest, the majority of emails from Schulze-Miller were from her Shurwest email account, and he communicated with five to eight other employees of Shurwest via their Shurwest email account. (R. pp. 631, 651, 655).

in FIP. (R. p. 631). For the next two years until FIP's collapse in April 2018, Dixon worked with Schulze-Miller and other Shurwest employees to sell Minnesota Life IUL policies that were funded by FIP. (R. pp. 645, 653). Throughout this time, Shurwest's employees never stopped providing Dixon guidance in dealing with customers, illustrations of the program, and materials to share with customers. (R. pp. 113, 143–45, 631–32, 650–51). If Schulze-Miller went on vacation, other Shurwest employees would fill in for her as Dixon's point of contact. (R. p. 651). Between 2016 and 2017, Dixon sold approximately 60 Minnesota Life IUL policies through Shurwest. (R. p. 656). These IUL policies were all funded with FIP, as Shurwest offered no other funding alternatives to FIP. (R. p. 637). Dixon testified he personally knew five or six other advisors around the country that were also selling these products by Shurwest, but he believed there were at least sixty others. (R. p. 633).

To be sure, each and every time Dixon sold a Minnesota Life IUL policy, Shurwest made money. (R. p. 629). Although Dixon did not know if Shurwest made a commission off FIP directly, he explained the relationship between IUL policies and FIP was symbiotic—a package deal. (R. p. 629). By using FIP as a funding mechanism, policyholders were able to purchase IUL policies at a higher rate than they would have been if they were funding them out-of-pocket. (R. p. 111). Therefore, Shurwest directly benefited from the increased funding levels through FIP by receiving higher commissions on the IUL policies. (R. pp. 629, 1841–42). Shurwest admits that it promoted IUL policies in South Carolina but denies it recommended FIP as a funding mechanism. (App. Br. at 5, 14).

The circuit court held a hearing on Shurwest's Motion to Dismiss on June 23, 2020. (R. pp. 1891–1918). On July 24, 2020, the circuit court issued an Order denying Shurwest's Motion. (R. pp. 1–8). The circuit court found Shurwest was subject to general jurisdiction in South

Carolina because it was registered with the South Carolina Department of Insurance and the South Carolina Secretary of State's Office for many years. (R. p. 5). The circuit court further found Shurwest was subject to specific jurisdiction in South Carolina because the Individual Respondents "presented ample evidence to support their allegations that Shurwest purposefully directed activities toward South Carolina and that [their] causes of action arise out of those activities." (R. p. 5). The circuit court cited to Shurwest's relationship with South Carolina, Dixon's contact with Schulze-Miller and other Shurwest employees, Schulze-Miller's trip to South Carolina to meet with Dixon, and Dixon's trip to Arizona to the Shurwest headquarters. (R. p. 6). The circuit court aptly found,

> From the facts before the Court, it appears that Shurwest directed activities related to the "IRA Reboot" program to South Carolina, that Shurwest was aware that its agents and employees were recommending FIP as a funding mechanism for the IUL policies, that the use of FIP as a funding mechanism was, in part, to purchase and fund IUL policies at higher levels, and that Shurwest received commissions from the sale of IUL policies and thus benefitted from the sale of IULs and the increased funding levels provided by FIPs.

(R. p. 6). The circuit court found "the evidence and argument by Shurwest that Melanie Schulze-Miller was a rogue employee operating without Shurwest's knowledge or permission [was] not credible." (R. p. 6). Specifically, the circuit court believed Shurwest's claim was not credible

> in light of the overwhelming evidence that Shurwest was aware of the use of FIP to fund higher levels of IUL, that Schulze-Miller and other employees did so as part of [their] employment with Shurwest while using Shurwest e-mail and with Shurwest training and resources at its offices in Arizona, and that Shurwest ultimately profited from the increased IUL amounts via commission.

(R. pp. 6–7). The circuit court also noted the "volume of correspondence" that shows other Shurwest employees were involved, finding Shurwest's arguments were unpersuasive against the "substantial evidence" submitted by the Individual Respondents. (R. p. 7). Thus, the circuit court found the Individual Respondents met their burden to make a *prima facie* showing of jurisdiction.

(R. p. 7).

On July 27, 2020, Shurwest filed a Third-Party Summons and Complaint against Schulze-Miller and MJSM, asserting causes of action for equitable indemnification against Schulze-Miller and MJSM, breach of contract against Schulze-Miller, and breach of fiduciary duty against Schulze-Miller. (R. pp. 165–73). Shurwest then filed a Motion pursuant to Rule 14(c) of the South Carolina Rules of Civil Procedure on August 6, 2020, asking the circuit court to designate Schulze-Miller and MJSM as additional defendants in these actions. (R. pp. 720–24). The Individual Respondents filed a Motion to Strike or in the Alternative to Sever Shurwest's Third-Party Complaint on September 25, 2020. (R. pp. 725–57). Schulze-Miller and MJSM filed a Motion to Dismiss the Third-Party Complaint on December 4, 2020. (R. pp. 758–810).

The circuit court held a hearing on January 20, 2021, on the motions related to Shurwest's Third-Party Complaint. (R. pp. 1854–90). On February 3, 2021, the circuit court issued an Order Granting in Part the Individual Respondents' Motion to Strike or in the Alternative to Sever, striking Shurwest's claims for breach of contract and breach of fiduciary duty and severing Shurwest's claim for equitable indemnification from the instant cases.[5] (R. pp. 25–31). The circuit court found Shurwest's claims for breach of contract and breach of fiduciary duty were not proper because (1) they were not derivative claims, (2) they were barred by issue preclusion because they were asserted previously against Schulze-Miller in Arizona, and (3) they would unduly complicate the litigation and prejudice the other parties. (R. pp. 27–29). Finally, the circuit court severed Shurwest's claim for equitable indemnification, finding it was not ripe for consideration until after a trial on the Individual Respondent's underlying claims. (R. p. 29).

[5] Shurwest has not appealed the circuit court's decision to sever the equitable indemnification claim. (App. Br. 18 n.8).

The same day, the circuit court issued an Order granting Schulze-Miller and MJSM's Motion to Dismiss the Third Party Claim as to the breach of contract and breach of fiduciary duty claims. (R. pp. 9–24). The circuit court held these claims were barred by res judicata because Shurwest previously raised these claims in an action in Arizona and dismissed these claims with prejudice. (R. p. 13, 15–20). Specifically, the circuit court found Shurwest previously filed an action against Schulze-Miller in Arizona for breach of an employment agreement, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty "related to the FIP circumstances at issue in this action." (R. p. 13). The circuit court noted:

> the parties share identity because Shurwest sued Schulze-Miller in both actions for her conduct and on behalf of MJSM [and] the subject matter is also identical, as Shurwest now seeks damages for injuries allegedly arising from Schulze-Miller's violation of the Employment Agreement and fiduciary duties in promoting the FIP products to [the Individual Respondents] through MJSM, which it also sought in the Arizona Lawsuit.

(R. p. 16). The circuit court disagreed with Shurwest's argument that res judicata did not apply because MJSM was not a party to the Arizona lawsuit. (R. p. 19). The circuit court found, "Schulze-Miller is the sole member of MJSM, LLC. As MJSM and Schulze-Miller represent the same legal interests, they were in privity for the purposes of Shurwest's claims." (R. p. 19). As to Shurwest's argument that Arizona law applied instead of South Carolina law, the circuit court found that Shurwest's claims were barred by res judicata regardless of whether South Carolina or Arizona law applied. (R. p. 20).

On February 23, 2021, Shurwest filed an appeal from the circuit court's orders denying Shurwest's Motion to Dismiss, granting the Individual Respondents' Motion to Strike or in the Alternative to Sever the Third-Party Complaint, and granting Schulze-Miller and MJSM's Motion to Dismiss the Third-Party Complaint. (R. pp. 1923–62, 1969–2010, 2013–51).

STANDARD OF REVIEW

Rule 12(b)(2) of the South Carolina Rules of Civil Procedure allows a court to dismiss an action for lack of personal jurisdiction. "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cribb v. Spatholt*, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009). This Court will not reverse a circuit court's decision on the question of personal jurisdiction unless it is "unsupported by the evidence or influenced by an error of law." *Id.* Therefore, the Court will not disturb the circuit court's "findings of fact unless found to be without evidence that reasonably supports" them. *Kemp v. Rawlings*, 358 S.C. 28, 34, 594 S.E.2d 845, 848 (2004). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a [*prima facie*] showing of jurisdiction either in the complaint or in affidavits." *Cribb*, 382 S.C. at 496, 676 S.E.2d at 717–18 (quoting *Cockrell v. Hillerich & Bradsby Co.*, 362 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)). *Prima facie* "is a Latin phrase and literally means at first view; on the first appearance." *Mack v. Branch No. 12, Post Exch., Fort Jackson*, 207 S.C. 258, 35 S.E.2d 838, 844 (1945). "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Cribb*, 382 S.C. at 496, 676 S.E.2d at 718 (quoting *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 663 (Ct. App. 2008)).

"The question of whether to grant a motion to strike a third-party claim, whether filed with or without leave of the court, is addressed to the sound discretion of the [circuit] court." *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). An appellate court "applies the same standard of review that was implemented by the" circuit court when reviewing the dismissal of an action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). A motion to dismiss will be

sustained where "the facts alleged and the inferences reasonably deducible from the pleadings" would not entitle the plaintiff to relief on any theory of the case. *Id.* at 233, 553 S.E.2d at 499. "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Id.*

ARGUMENT

I. The circuit court properly found Shurwest is subject to personal jurisdiction in South Carolina

Throughout its brief, Shurwest grossly misstates and mischaracterizes the Individual Respondents' claims in an effort to minimize Shurwest's extensive and purposeful relationship with South Carolina where it targeted and profited off of South Carolina citizens. It now seeks to avoid its responsibility for the loss of the Individual Respondents' retirement savings and prevent our courts from providing fair and necessary redress to its injured citizens. As the circuit court found, Shurwest's attempt to distance itself from its own employees' actions is contrary to the substantial evidence in the record. (R. pp. 5–7). *See Cribb*, 382 S.C. at 496, 676 S.E.2d at 717 (explaining the Court should not reverse a circuit court's determination on personal jurisdiction unless "unsupported by the evidence or influenced by an error of law"); *Kemp*, 358 S.C. at 34, 594 S.E.2d at 848 (explaining the Court is bound by a circuit court's factual findings unless there is no "evidence that reasonably supports" them). As such, this Court should affirm the circuit court and find that the Individual Respondents have made a *prima facie* case that Shurwest is subject to personal jurisdiction in South Carolina. *See Cribb*, 382 S.C. at 496, 676 S.E.2d at 717–18 (explaining a plaintiff only need to make a *prima facie* showing of jurisdiction at the pretrial stage). The substantial evidence in the record clearly transcends the Individual Respondents' burden of making a *prima facie* showing of jurisdiction.

There are two ways for a South Carolina court to exercise jurisdiction over a nonresident defendant—general or specific jurisdiction. Both are appropriate under the facts of this case.[6] "A court may assert general jurisdiction if the defendant has an 'enduring relationship' with the forum state." *Cockrell*, 363 S.C. at 495, 611 S.E.2d at 510; *see also* S.C. Code Ann. § 36-2-802 ("A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action."). "General jurisdiction attaches even when the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts are both 'continuous and systematic.'" *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–13 nn.8–9 (1984)). "These contacts must be 'so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely different from those activities.'" *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

"Specific jurisdiction over a cause of action arising from a defendant's contacts with the state is granted pursuant to the long arm statute." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. South Carolina's long-arm statute provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
> (1) transacting any business in this State;

[6] In fact, numerous other circuit courts in our state have found that South Carolina has both general and specific jurisdiction over Shurwest in cases with nearly identical facts. *See* July 31, 2020 Order Denying Shurwest, LLC's Motion to Dismiss, *Stegelin, et al. v. Chris Dixon, et al.*, C/A No. 2019-CP-40-00507 (Richland Cty. Ct. Cm. Pls.); April 15, 2021 Order Denying Shurwest, LLC's Motion to Dismiss, *Deretchin, et al. v. Edward Storer*, C/A No. 2019-CP-23-02042 (Greenville Cty., Ct. Cm. Pls.); April 5, 2021 Order Denying Shurwest, LLC's Motion to Dismiss, *Hess, et al. v. Edward Storer, et al.*, C/A No. 2018-CP-23-04010 (Greenville Cty., Ct. Cm. Pls.); April 5, 2021 Order Denying Shurwest, LLC's Motion to Dismiss, *Burgess v. Edward Storer, et al.*, C/A No. 2018-CP-23-04197 (Greenville Cty., Ct. Cm. Pls.).

> (2) contracting to supply services or things in the State;
> (3) commission of a tortious act in whole or in part in this State;
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
> (5) having an interest in, using, or possessing real property in this State;
> (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
> (7) entry into a contract to be performed in whole or in part by either party in this State; or
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803(A). "South Carolina's long-arm statute, which includes the power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. "Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process." *Id.*

"Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* "In conducting th[e due process] inquiry, the court must find that the defendant has the requisite minimum contacts with the forum." *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). "A minimum contacts analysis requires a court to find that the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities." *Id.* "A single act that causes harm in this State may create sufficient minimum contacts where the harm arises out of or relates to that act." *Id.* at 260–

61, 423 S.E.2d at 131. "The court must also find that the exercise of jurisdiction is 'reasonable' or 'fair.'" *Id.* (quoting *State v. Ford*, 208 S.C. 379, 38 S.E.2d 242 (1946)).

> Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction.

Cockrell, 363 S.C. at 492, 611 S.E.2d at 508. "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state." *Id.* at 492, 611 S.E.2d at 509. "Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.*

Initially, the Individual Respondents note Shurwest concedes that it is subject to personal jurisdiction in South Carolina. (App. Br. 14 ("If this case were about IUL policies, Shurwest would be subject to personal jurisdiction in South Carolina. Shurwest did recommend that investment strategy to Dixon, who in turn recommended it to Plaintiffs.")). Throughout its brief, Shurwest attempts to morph the Individual Respondents' claims against Shurwest to be solely about FIP. However, Shurwest's attempts to rewrite the Individual Respondents' claims are incongruous with the record before this Court. The Individual Respondents have always maintained that this case is about Shurwest's involvement in marketing and recommending inappropriate IUL policies as well as recommending the Individual Respondents invest in FIP to fund those policies. For example, in the Complaint, the Individual Respondents alleged "Defendants . . . recommended that each Plaintiff commit a substantial amount of their hard-earned and irreplaceable financial assets to purchase these IUL policies which Defendant Dixon represented was appropriate for each of the Plaintiffs' age, life expectancy, financial, and retirement needs" despite these policies being "grossly inappropriate[,] prohibitively costly[,] and unsuitable." (R. p. 123–24). The Individual

Respondents further alleged "Shurwest, Miller, and Dixon's Life Insurance Strategy was inappropriate and irresponsible and fell below the standard of care that Defendants owed to Plaintiffs [and] placed Plaintiffs in a position where they could not independently fund the life insurance policy premiums." (R. p. 125).

Further, at all times before the circuit court, the Individual Respondents have reiterated their allegations that IUL "was a negligently sold product" and "caused them financial harm." (R. pp. 465–67, 1861, 1903–04). The Individual Respondents' claims have always been about both the IUL policies and FIP. As such, Shurwest's concession alone is dispositive of Shurwest's appeal as to the personal jurisdiction issue, and the Court need not consider the remaining arguments as to personal jurisdiction. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address all issues on appeal when its decision on one issue is dispositive).

Shurwest alleges the circuit court erred in finding it was subject to general jurisdiction in South Carolina because it based its decision on the fact that Shurwest is licensed to do business in South Carolina. (App. Br. at 11–12). "There is no universal formula for determining what constitutes 'doing business' to subject a foreign entity to personal jurisdiction; the question must be resolved on the facts of each case." *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 17, 655 S.E.2d 476, 479 (2007). Shurwest argues a corporation can only be subject to general jurisdiction in the state where it is incorporated or where its principal place of business is. (App. Br. at 11). This is incorrect. As *Daimler AG v. Bauman* makes clear, these are just typical examples of where corporations may be subject to jurisdiction, not the only examples. 571 U.S. 117, 127 (2014) ("*Goodyear* [*Dunlap Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)] did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is

incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums."). Shurwest has been registered with the South Carolina Secretary of State since December 7, 2001, and has been licensed with the South Carolina Department of Insurance since February 27, 2002. (R. pp. 518–522). Thus, Shurwest's contacts with South Carolina have been continuous and systematic for the past twenty years. Further, throughout this time, Shurwest directly targeted and profited off residents of South Carolina. For example, the record shows Shurwest secured Dixon's appointment as a producer under Minnesota Life so that he would be able to sell the IRA Reboot Program directly to South Carolina residents. (R. pp. 523–43, 631). Thereafter, Dixon sold over 60 IUL policies under this appointment, and Shurwest profited off each and every one. (R. pp. 629, 656). This shows that, not only were Shurwest's contacts with South Carolina continuous and systematic, it specifically and deliberately sought out business in South Carolina such that it is subject to this State's general jurisdiction. Shurwest should not be allowed to target the citizens of South Carolina in such a deliberate and systematic way but avoid facing claims by these same citizens in our courts.

Even if the Court does not believe Shurwest should be subject to general jurisdiction in South Carolina, the record supports the circuit court's finding that Shurwest is also subject to specific jurisdiction in South Carolina. In arguing that there is not specific jurisdiction in this case, Shurwest relies on its misrepresentation that the Individual Respondents' allegations are solely about FIP, Jim Maschek's testimony that Shurwest did not know of Schulze-Miller's FIP-related activities, and a previous declaration given by Schulze-Miller related to the settlement of the Arizona case Shurwest brought against her.[7] (App. Br. at 13–17). Shurwest cites to *Landmark*

[7] Importantly, Schulze-Miller has since disavowed this declaration. On April 17, 2021, Schulze-Miller signed an affidavit wherein she testified that she agreed to sign the declaration solely to facilitate the settlement of the Arizona action and that Shurwest was aware of her and other

Am. Ins. Co. v. Shurwest LLC, No. CV-19-04743-PHX-SRB, 2020 WL 5434550, at *15 (D. Ariz. July 23, 2020) in support of its argument that Schulze-Miller was a "rogue" employee.[8] (App. Br. at 14). However, the circuit court considered Shurwest's arguments based on the Maschek affidavit and found these arguments "not credible." (R. p. 6).

Although Shurwest wishes to persuade the Court that it had no involvement or knowledge of its own employees' actions, the substantial evidence in the record proves otherwise. First, most of the email communications from Schulze-Miller to Dixon came from her Shurwest email address, and Dixon always orally communicated with Schulze-Miller by her Shurwest telephone number. (R. pp. 631, 651, 655). Further, Dixon testified he communicated with five to eight other employees at Shurwest, and these employees were involved in each transaction from end-to-end. (R. pp. 631–32, 651, 655). Shurwest employees also took over for Schulze-Miller when she would go on vacation. (R. pp. 632, 651).

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employees' promotion of FIP, allowed her to market FIP, and hosted trainings on FIP. *See Page v. Minnesota Life Insurance Company, et al.*, Doc. No. 190, June 17, 2021, Exhibit 2 to Plaintiffs' Request for Status Conference, Case No. 8:18-cv-01208-JAK-KES (C.D. Cal.). Although this affidavit was not considered by the circuit court because it was signed after the circuit court's Order, the Individual Respondents request the Court take judicial notice of the fact the Schulze-Miller has since disavowed the declaration so heavily relied upon by Shurwest. *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011). Accordingly, to the extent the Court believes the Individual Respondents have not made a *prima facie* showing of jurisdiction, the Individual Respondents request the Court remand the case to the circuit court to allow for jurisdictional discovery as requested previously by the Individual Respondents. (R. p. 469).

[8] The *Landmark* case involved an insurance coverage dispute in which Schulze-Miller was not a party. Further, courts in other jurisdictions have denied Shurwest's jurisdictional arguments based on similar allegations. *See Zelinski v. Shurwest, LLC*, No. 219CV804FTM28MRM, 2021 WL 765469, at *4 (M.D. Fla. Feb. 26, 2021) (finding the court had personal jurisdiction over Shurwest and noting Shurwest's arguments as to whether Schulze-Miller was a rogue employee was "a matter left for another day"); *Rodillas v. Shurwest, LLC*, No. B304834, 2021 WL 2008502, at *2–8 (Cal. Ct. App. May 20, 2021) (finding the plaintiffs were entitled to jurisdictional discovery, and noting even if "the evidence was insufficient to prove that Schulze-Miller [and others] were Shurwest's agents," Shurwest could still be subject to jurisdiction; "[I]t is not clear to us that the former employees' declarations definitively establish that Shurwest had no legal involvement . . . .").

While Shurwest has had a continuous relationship with South Carolina for over twenty years, the relationship between Shurwest and Dixon began in 2016—when Shurwest facilitated Dixon's appointment as a producer with Minnesota Life to sell IUL policies in South Carolina—and continued until FIP's collapse in April 2018. Schulze-Miller flew to South Carolina to train Dixon on the IRA Reboot Program in May 2016, and Shurwest paid for Dixon to fly to Arizona in August 2016 to obtain further training on the IRA Reboot Program. (R. pp. 624–25, 627, 629–30, 655). As Dixon explained, he "was there to talk about the IUL reboot, how you turbocharge it using FIP and how all the piece parts work together." (R. p. 630). While he was attending training at Shurwest's offices in Arizona, Dixon met with numerous Shurwest employees and received training on FIP. At no point did Schulze-Miller inform Dixon that she was not acting in the course and scope of her employment in marketing FIP, and she even informed him that the owner of Shurwest knew of FIP and approved Shurwest's promotion of it. (R. pp. 625, 650–51).

Schulze-Miller had numerous conversations with Maschek and others at Shurwest about FIP, and even informed them she was sending FIP applications and contracting agents to proceed with the applications. (R. pp. 544–65). Although Shurwest has presented the affidavit of Maschek wherein he testified that Shurwest denied Schulze-Miller's request to promote and sell FIP products, Shurwest has not produced any independent evidence of this denial and the circuit court specifically found this evidence "not credible." (R. p. 6). Further, Shurwest worked with other agents besides Dixon to market the IRA Reboot Program and the use of FIP. (R. pp. 656, 663–70). Further, in August 2017, Maschek received an email from a Shurwest agent expressing concern about FIP and Consumer Financial Protection Bureau complaints against it. (R. pp. 682–89). This is further evidence that Maschek and Shurwest were aware of their employees' promotion of FIP.

Shurwest's arguments are directed toward the weight it believes the circuit court should have given the evidence in the record. However, at the pretrial stage, the Individual Respondents are only required to make a *prima facie* showing of jurisdiction, and any disputes about the weight of the evidence should be determined by a fact finder. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) ("[W]here jurisdictional facts are intertwined with the facts central to the merits of the dispute[, i]t is the better view that . . . the entire factual dispute is appropriately resolved only by a proceeding on the merits."). Further, as the circuit court correctly noted, any factual disputes must "be resolved in favor of the non-moving party." *M.B. Kahn Const. Co. v. Three Rivers Bank & Tr. Co.*, 354 S.C. 412, 415, 581 S.E.2d 481, 482 (2003). At this stage of the litigation, the Individual Respondents have more than satisfied this *prima facie* showing of jurisdiction.

The record is clear that Shurwest transacted business in South Carolina and the Individual Respondents suffered significant damages as a result of both Shurwest's recommendation of IUL policies and marketing of FIP as a funding mechanism. Shurwest purposefully directed its activities to the Individual Respondents and other residents of South Carolina, and the harm alleged in this case arose out of Shurwest's extensive contacts with this state. In *Clark v. Key*, the South Carolina Supreme Court found personal jurisdiction existed where a nonresident defendant solicited a South Carolina resident to participate in an out-of-state venture, set the framework of the transaction, and earned a commission on the transaction. 304 S.C. 497, 499–500, 405 S.E.2d 599, 600–01 (1991). The *Clark* court explained, "jurisdiction cannot be avoided merely because the nonresident defendant never entered the state." *Id.* at 501, 405 S.E.2d at 601. However, the instant case is even stronger than *Clark* because Shurwest targeted South Carolina residents by ensuring that Dixon was able to sell Minnesota Life IUL policies in South Carolina, sent its employee to South Carolina to provide training to Dixon, flew Dixon to Arizona to provide

additional training, and continued to provide assistance to Dixon and his South Carolina customers for two years.

> It is both reasonable and fair to exercise jurisdiction over Shurwest in South Carolina.
>
> Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction.

Cockrell, 363 S.C. at 492, 611 S.E.2d at 508. Shurwest has had a continuous relationship with South Carolina for at least twenty years and participated in the activities complained of in the instant actions for two years. If the Court were to refuse to confer jurisdiction over Shurwest, the Individual Respondents would be inconvenienced and at an extreme disadvantage by being required to litigate their claims in another jurisdiction. The Individual Respondents have already lost much of their retirement savings by virtue of Shurwest's actions, and it would be unfair to require them to expend more money and effort to litigate in an unfamiliar and far-away jurisdiction. Further, South Carolina has an immense interest in providing a redress for its injured citizens in South Carolina. *See Spingmasters, Inc. v. D & M Mfg.*, 303 S.C. 528, 533, 402 S.E.2d 192, 195 (Ct. App. 1991) ("South Carolina has a legitimate interest in providing its citizens a forum to resolve claims.").

Accordingly, because the circuit court's finding that the Individual Respondents made a *prima facie* showing that Shurwest is subject to personal jurisdiction in South Carolina is both supported by the evidence and the law, the Individual Respondents respectfully request the Court affirm the circuit court's denial of Shurwest's Motion to Dismiss.[9] *See Cribb*, 382 S.C. at 496,

[9] If the Court disagrees with the circuit court's finding that Shurwest is subject to personal jurisdiction in South Carolina, the Individual Respondents request the Court remand the case to allow for jurisdictional discovery to occur. The Individual Respondents requested jurisdiction

676 S.E.2d at 717 ("The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law."); *Clark*, 304 S.C. at 500, 405 S.E.2d at 600–01 ("This Court is bound by the [circuit] court's findings that a nonresident defendant is subject to jurisdiction, unless there is no evidentiary support.").

II. The circuit court did not err in striking two causes of action in Shurwest's Third-Party Complaint where Shurwest's claims against Schulze-Miller would unnecessarily complicate the litigation and are not derivative of the Individual Respondents' claims

The circuit court did not abuse its discretion in striking Shurwest's third-party claims for breach of contract and breach of fiduciary duty because they are not derivative of the Individual Respondents' claims and they would unnecessarily complicate the litigation. *See Beach*, 298 S.C. at 426, 380 S.E.2d at 871 ("The question of whether to grant a motion to strike a third-party claim, whether filed with or without leave of the court, is addressed to the sound discretion of the [circuit] court.").

Pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure, "[a]ny party may move to strike a third-party claim, or for its severance or separate trial."

> When considering a request to strike or to sever a third-party claim, the court may properly consider "the effect the additional parties and claims will have on the adjudication of the main action-in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way."

Beach, 298 S.C. at 426, 380 S.E.2d at 871 (quoting 6 C. WRIGHT AND A. MILLER § 1460 at 319).

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discovery in response to Shurwest's Motion to Dismiss and are entitled to this discovery if the Court believes they have not yet made a *prima facie* case for personal jurisdiction. (R. p. 469). *See Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012) ("When the plaintiff can show that discovery is necessary in order to meet [a] defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless [the] plaintiff's claim appears to be clearly frivolous.").

The circuit court did not abuse its discretion in finding the inclusion of the third-party claims would unduly complicate the litigation. The circuit court is within bounds to consider what effect a third-party claim "will have on the adjudication of the main action" and "whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Id.* at 426, 380 S.E.2d at 871 (quoting 6 C. WRIGHT AND A. MILLER § 1460 at 319). In *Beach*, this Court found the circuit court did not abuse its discretion in striking a third-party complaint in its entirety. *Id.* at 426–27, 380 S.E.2d at 870–71. The Court explained,

> In our view, the assertion against four additional parties of seven additional causes of action in the third-party complaint, involving as those causes of action do allegations, among other things, of fraud, negligence, recklessness, outrage, and unfair trade practices, treble damages, and repeated demands for punitive damages, will unduly complicate the adjudication of the relatively simple contract action brought by the plaintiffs. Indeed, the causes of action asserted by Hudson, if tried alongside the plaintiffs' claim, would all but submerge the plaintiffs' claim.

Id. at 426–27, 380 S.E.2d at 871. The Court noted that it did not need to consider whether the causes of action raised in the third-party complaint were properly "dependent on the outcome of the plaintiffs' claim" because of its finding on whether the third-party complaint would unduly complicate the litigation. *Id.* at 427, 380 S.E.2d at 871.

As explained in *Beach*, a circuit court has wide discretion in determining what effect a third-party complaint will have on the existing litigation. This is because a third-party complaint is permissive, not mandatory. *See* Rule 14(a) (explaining a defendant in an action *may* file a third-party complaint). Therefore, had Shurwest's claims not been also barred by res judicata, nothing would stop Shurwest from filing them separately in another action after the circuit court struck them. The circuit court noted the inclusion of the third-party claims could potentially cause the case to be stayed and found this, as well as other reasons, could result in substantial prejudice to the Individual Respondents. (R. pp. 28–29).

Further, unlike *Beach* where a simple contract action was involved, these actions are already complicated without the inclusion of Shurwest's additional third-party claims against non-parties. These actions involve complicated insurance matters as well as the relationships between and among various defendants. Each action has numerous plaintiffs that have asserted six different causes of action against seven different defendants. There is no need to add in Shurwest's three causes of action against two additional parties. Furthermore, Shurwest's assertion of its own independent claims against Schulze-Miller and MJSM—two non-parties to the Individual Respondents' claims that are likely to be mentioned at any trial of this case—is very likely to confuse the issues before the jury. Like in *Beach*, any claims Shurwest has against Schuzle-Miller and MJSM would unnecessarily and unfairly complicate the issues and would detract from the Individual Respondents' claims. The Individual Respondents are the "architects of their own complaint," and Shurwest should not be allowed to add Schulze-Miller and MJSM under the guise of a third-party complaint to deprive the Individual Respondents of the right to bring their case against the defendants of their own choosing.[10] *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015); *see also Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010) ("It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue.").

Further, the circuit court refused to strike Shurwest's claim for equitable indemnification and merely severed this claim, finding it was not ripe until Shurwest was found to be liable to the Individual Respondents. Shurwest does not object to the treatment of its equitable indemnification

[10] The Court need only look to the Preliminary Statement of Shurwest's Third-Party Complaint to see that Shurwest is really attempting to thwart the Individual Respondents' right to be the architect of their own Complaints. (R. p. 168 ("This third-party complaint seeks to hold the true wrongdoers in this case accountable, something Plaintiffs – who voluntarily dismissed Schulze-Miller and MJSM – are not interested in doing.")).

claim. Thus, Shurwest still has an avenue of relief against Schulze-Miller and MJSM, and it is not prejudiced by the circuit court striking its other claims because they would unduly complicate the litigation. As in *Beach*, the Court need not consider whether the third-party claims are derivative if it finds the circuit court did not abuse its discretion in striking the claims because they would unduly complicate the litigation. *Id.* at 427, 380 S.E.2d at 871.

However, the circuit court also did not abuse its discretion in striking the third-party claims for breach of contract and breach of fiduciary duty because they are not derivative of the Individual Respondents' claims. "Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994). "The outcome of the principal claim must impact the third-party defendant's liability; however, no right exists to implead a third-party defendant who is directly liable to the plaintiff." *Id*.

Derivative liability is "liability for a wrong that a person other than the one wronged has a right to redress" whereas secondary liability is "liability that does not arise unless the primarily liable party fails to honor its obligation." *Laughlin v. Dell Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006) (quoting Black's Law Dictionary 926 (7th ed. 1999)).[11] "[A] third-party claim is only viable 'where a proposed third-party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third-party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff.'" *Id.* (quoting *Watergate Landmark Condo. Unit Owners' Ass'n v. Wiss, Janey, Elstner Assoc., Inc.*, 117 F.R.D. 576 (E.D. Va. 1987)). Therefore, in order for a third-party claim to be acceptable,

[11] "Rules 14(a) through (c) are substantially the same as the Federal Rule, except for the omission of references to admiralty and maritime practice, and the addition of Rule 14(c) as to joinder." Notes to Rule 14, SCRCP.

> First, the non-party must be potentially liable to the third[-]party plaintiff. Second, the non-party's liability must relate to the plaintiff's claim against the defendant/third party plaintiff such that the third[-]party defendant's liability arises only if the defendant/third-party plaintiff is first held liable to plaintiff.

Thompson v. UFP E. Div., Inc., No. 2:11-CV-1170, 2012 WL 3686064, at *1–2 (D.S.C. Aug. 24, 2012) (quoting *Tetra Tech EC/Tsoro Joint Venture v. Sam Temples Masonry, Inc.*, No. 10–1597, 2011 WL 1048964, at *3 (D.S.C. Mar. 21, 2011)). "In other words, a third[-]party claim is not appropriate where the defendant and putative third party plaintiff says, in effect, 'It was him, not me.'" *Watergate Landmark Condo. Unit Owners' Ass'n*, 117 F.R.D. at 578.

In the Third-Party Complaint, Shurwest seeks to place the blame solely on Schulze-Miller instead of Shurwest. Throughout the Third-Party Complaint, Shurwest alleges it never authorized the promotion of FIP products and that Schulze-Miller and MJSM acted on their own behalf in promoting FIP products. (R. pp. 169–70). The first cause of action for equitable indemnification in the Third-Party Complaint alleges that "Shurwest is not responsible for any of the Plaintiffs' alleged damages related to the promotion or sale of FIP products. Schulze-Miller and MJSM are. As a result, Schulze-Miller and MJSM are liable to Shurwest." (R. p. 170). Although the circuit court severed this cause of action, it reveals Shurwest's real intentions in attempting to bring the other claims against Schulze-Miller. Shurwest's motivation is further confirmed by the Preliminary Statement in the Third-Party Complaint:

> As Plaintiffs' own complaint clearly alleges, Schulze-Miller and MJSM were responsible for Plaintiffs' decision to invest with Future Income Payments, LLC ("FIP") and the losses that resulted from the decision. *This third-party complaint seeks to hold the true wrongdoers in this case accountable*, something Plaintiffs – who voluntarily dismissed Schulze-Miller and MJSM – are not interested in doing.

(R. p. 168 (emphasis added)). According to Shurwest's Third-Party Complaint, it believes Schulze-Miller and MJSM are the true wrongdoers, not Shurwest. Thus, their third-party claims

are simply, "It was Schulze-Miller/MJSM, not me." This is the exact situation the case law makes clear is inappropriate. *See Watergate Landmark Condo. Unit Owners' Ass'n*, 117 F.R.D. at 578.

In the breach of contract cause of action, Shurwest alleges Schulze-Miller breached an employment agreement with Shurwest by "misusing Shurwest's confidential information for her own selfish benefit and to Shurwest's detriment." (R. p. 170–71). This cause of action is not dependent on the Individual Respondents' claims. It is wholly independent of whether Shurwest is found to be liable to the Individual Respondents. Regardless of whether Shurwest is liable to the Individual Respondents, the allegations against Schulze-Miller that she marketed FIP without Shurwest's involvement stand. In fact, that is Shurwest' s exact argument as to why it cannot be liable to the Individual Respondents in this case.

Similarly, turning to the breach of fiduciary duty claim, Shurwest alleges Schulze-Miller and MJSM acted without Shurwest's knowledge and "engag[ed] in unauthorized business dealings with FIP." (R. p. 171). Shurwest alleges this conduct "damaged Shurwest's reputation, perceptions of its integrity, and its business and client relationships." (R. p. 171). This allegation is also wholly independent of the Individual Respondents' claims against Shurwest and is another attempt by Shurwest to argue that Schulze-Miller acted on her own and without Shurwest's authority or knowledge. Further, the fact that Shurwest brought identical allegations against Schulze-Miller in Arizona years before attempting to bring their third-party claims also shows that their claims are not dependent on the Individual Respondents' recovery. (R. pp. 735–53).

Accordingly, the circuit court did not abuse its discretion in striking the two causes of action from the Third-Party Complaint.[12] *See Beach*, 298 S.C. at 426, 380 S.E.2d at 871 ("The

[12] As this issue is dispositive, the Court need not consider whether the claims were also validly struck and dismissed due to res judicata. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (stating an appellate court need not address all issues on appeal when its decision on one issue is dispositive).

question of whether to grant a motion to strike a third-party claim, whether filed with or without leave of the court, is addressed to the sound discretion of the [circuit] court.").

III. The circuit court did not err in partially striking and dismissing the Third-Party Complaint because the claims are barred by res judicata

The circuit court further did not abuse its discretion in striking Shurwest's third-party claims for breach of contract and breach of fiduciary duty because they are barred by res judicata.[13] *See Beach*, 298 S.C. at 426, 380 S.E.2d at 871 ("The question of whether to grant a motion to strike a third-party claim, whether filed with or without leave of the court, is addressed to the sound discretion of the [circuit] court.").

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *S.C. Pub. Int. Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (quoting *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.* (quoting *Judy*, 393 S.C. at 172, 712 S.E.2d at 414).

> A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action.

Beall v. Doe, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984). "Res judicata's

[13] The circuit court also granted Schulze-Miller and MJSM's Motion to Dismiss these claims as barred by res judicata. Regardless of whether this Court applies an abuse of discretion standard under the motion to strike or a standard viewing all allegations in a light most favorable to Shurwest under the motion to dismiss, the result is the same. *See Williams*, 347 S.C. at 233, 553 S.E.2d at 500 (explaining a decision to dismiss will be affirmed where "the facts alleged and the inferences reasonably deducible from the pleadings" would not entitle the plaintiff to relief on any theory of the case).

fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *S.C. Pub. Int. Found.*, 401 S.C. at 386, 737 S.E.2d at 507 (quoting *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012)). "[P]ublic interest requires an end to litigation." *Id.* (quoting *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007)).

"To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "[F]or purposes of res judicata, 'cause of action' is not the form of action in which a claim is asserted but, rather the 'cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'" *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co.*, 334 S.C. at 35 n.4, 512 S.E.2d at 109 n.4)).

On May 15, 2018, Shurwest initiated an action against Schulze-Miller and her husband in Arizona. (R. pp. 735–53). In the Arizona Complaint, Shurwest alleged claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty arising out of Schulze-Miller's promotion of FIP. (R. pp. 739–43). In the Arizona breach of contract claim, Shurwest alleged there was an employment agreement between Schulze-Miller and Shurwest and that Schulze-Miller "materially breached the Employment Agreement by misusing Shurwest's confidential information, including Client information, for her own selfish benefit and to Shurwest's severe detriment." (R. p. 741). In the Arizona breach of fiduciary duty claim, Shurwest alleged

> Schulze-Miller owed a fiduciary duty to Shurwest as a Shurwest employee, which included duties of loyalty, utmost good faith, honesty and full disclosure . . . . Ms. Schulze-Miller breached her fiduciary duties of honesty and full disclosure to Shurwest by engaging in business dealings with FIP on her own account while she was employed by Shurwest without disclosing her actions to Shurwest and knowing that Shurwest would not do business with FIP . . . . Ms. Schulze-Miller breached

> her fiduciary duties of utmost good faith and loyalty by misusing Shurwest's confidential information to personally profit at Shurwest's expense and jeopardizing Shurwest's business, reputation, and its relationship with Shurwest Clients. Ms. Schulze-Miller recklessly acted to benefit herself at the expense of Shurwest. . . . Ms. Schulze-Miller's actions damaged Shurwest's reputation, perceptions of its integrity, and its business and Client relationships by falsely suggesting that Shurwest approved, promoted, endorsed, distributed or was associated with FIP or its products.

(R. p. 743). On September 14, 2018, Shurwest, Schulze-Miller, and her husband filed a stipulation dismissing the Arizona lawsuit with prejudice as to all claims and counterclaims. (R. pp. 806–10). Following that stipulation, the Arizona Superior Court dismissed the Arizona lawsuit with prejudice and all claims made or that could have been made related to that action. (R. pp. 1784–86).

Shurwest attempted to bring identical claims against Schulze-Miller here. In the Third-Party Complaint, Shurwest attempted to raise causes of action for breach of contract and breach of fiduciary duty against Schulze-Miller only. (R. pp. 741–43). In the breach of contract cause of action, Shurwest alleged Schulze-Miller breached an employment agreement with Shurwest by "misusing Shurwest's confidential information for her own selfish benefit and to Shurwest's detriment." (R. p. 739). In the breach of fiduciary duty cause of action, Shurwest alleged,

> Schulze-Miller owed a fiduciary duty to Shurwest, including duties of loyalty, utmost good faith, honesty, and full disclosure. Schulze-Miller breached those duties by engaging in unauthorized business dealings with FIP through her undisclosed, separately created LLC while she was still employed by Shurwest, and concealing her actions from Shurwest knowing that Shurwest would not do business with FIP. She also breached those duties by misusing Shurwest confidential information to personally profit at Shurwest's expense, jeopardizing Shurwest's business, reputation, and its relationship with clients, and by recklessly acting to benefit herself at the expense of Shurwest.

(R. p. 740). These are identical to those raised in the Arizona Complaint.

First, Shurwest argues the circuit court erred in applying South Carolina law rather than

Arizona law.[14] However, this is a mischaracterization of the circuit court's ruling. The circuit court specifically found that Shurwest's claims were barred under both South Carolina law and Arizona law. Therefore, even if the Court determines the circuit court erred in applying South Carolina law, the circuit court properly found that Arizona law also bars Shurwest's third-party claims. The elements of res judicata in Arizona are the same as in South Carolina: (1) the two suits involve the same parties, (2) the first suit resulted in a final judgment on the merits, and (3) the suits involve the same claims. *See Dressler v. Morrison*, 130 P.3d 978, 981 (Ariz. 2006). However, Shurwest argues Arizona law differs from South Carolina law as to identity of the claims element because Arizona law applies the "same evidence test" to bar claims "only if 'no additional evidence is needed to prevail in the second action than that needed in the first.'" (App. Br. 20 (quoting *Lawrence T. v. Dep't of Child Safety*, 438 P.3d 259, 264 (Ariz. Ct. App. 2019))). As discussed below, res judicata bars Shurwest's third-party claims for breach of contract or breach of fiduciary duty regardless of which law the Court applies.

These claims are clearly barred by res judicata, and the circuit court did not abuse its discretion in striking them for this reason. First, the identity of the parties is the same. Both Shurwest and Schulze-Miller were parties in the Arizona action and are now again parties to the South Carolina Third-Party Complaint. Shurwest argues that the circuit court erred in finding there was privity between the parties, citing to a single sentence from an Arizona case stating "[e]xamples of persons in privity include employers and employees, principals and agents, and

[14] Shurwest cites to the Full Faith and Credit Clause to support its argument that Arizona law must apply. (App. Br. 18). However, the Full Faith and Credit Clause is meant to prevent a defendant from collaterally attacking the validity of a judgment issued in another state. *See Colonial Pac. Leasing Corp. v. Taylor*, 326 S.C. 529, 534, 484 S.E.2d 595, 597 (Ct. App. 1997). Here, no one argues against the validity of the Arizona judgment. Further, this action is pending in South Carolina, not Arizona; therefore, South Carolina law applies to determine whether this valid judgment has a preclusive effect on this South Carolina action.

indemnitors and indemnitees."[15] (App. Br. 19 (quoting *Corbett v. ManorCare of Am., Inc.*, 146 P.3d 1027, 1039 (Ariz. Ct. App. 2006)). Shurwest argues there is no privity between Schulze-Miller and MJSM because corporate entities and their members are legally distinct. (App. Br. 19). However, the Court should ignore this red herring by Shurwest. There is no need for the Court to determine whether there is privity between Schulze-Miller and MJSM because Shurwest did not bring the breach of contract or breach of fiduciary duty claim against MJSM in either the Arizona action or the South Carolina action. Instead, Shurwest named MJSM in the Third-Party Complaint and brought only one cause of action against MJSM—the equitable indemnification cause of action.[16] The breach of contract cause of action and breach of fiduciary duty cause of action are brought solely against Schulze-Miller in South Carolina, as they were in the Arizona action. Therefore, because the causes of action at issue in the Arizona action and the South Carolina action were both brought only against Schulze-Miller, the element of identity between the parties is met regardless of applying South Carolina law or Arizona law.

Second, there is also identity of the subject matter regardless of the application of South Carolina law or Arizona law. It is clear that the allegations to support both the breach of contract cause of action and the breach of fiduciary cause of action are nearly identical in the Third-Party Complaint and the previous Arizona action. Although Shurwest admits that both the Arizona lawsuit and the Third-Party Complaint "involve Schulze-Miller's clandestine promotion of FIP and improper use of Shurwest's information" such that it is "no surprise . . . that the two complaints contain similar allegations" in a "side-by-side comparison," Shurwest argues the Court should

[15] Shurwest appears to concede that, if the Court agrees with the circuit court's application of South Carolina law, this element of res judicata is met as Shurwest makes no argument that the parties are not the same under South Carolina law and only cites to Arizona law in this section.
[16] This cause of action was severed from these cases by the circuit court.

ignore this. (App. Br. 22). Shurwest argues, under Arizona law, there is not identity of claims because in the Arizona action Shurwest would have had to show Schulze-Miller "misused Shurwest's confidential information to surreptitiously promote FIP" to "any client" whereas in the Third-Party Complaint here Shurwest must show Schulze-Miller misused Shurwest's confidential information to promote FIP specifically to the Individual Respondents.[17] (App. Br. 22). This is nonsensical and goes against the policy behind res judicata. For example, acceptance of this irrational argument would allow Shurwest to recover under the broadest possible category of facts and then subsequently file endless other lawsuits specifically targeted to different clients' damages in order to recover again and again and again. This is not and cannot be the law.

Further, a simple reading of Shurwest's Third-Party Complaint shows that even this nonsensical argument is incorrect. In attempting to bring the third-party claims, Shurwest did not tie its claims to the Individual Respondents. Shurwest's allegations in the South Carolina third-party breach of contract claim are that Schulze-Miller misused Shurwest's confidential information in breach of the agreement and that "Shurwest has suffered" damages. (R. p. 739). This is a general claim that is not tied to the Individual Respondents. Shurwest does not allege that the confidential information Schulze-Miller allegedly used was used in relation to the Individual Respondents or that Shurwest's damages are somehow tied to the Individual Respondents' damages. Likewise, in the South Carolina breach of fiduciary duty third-party claim, Shurwest alleges Schulze-Miller "engag[ed] in unauthorized business dealings with FIP" and concealed it from Shurwest which caused Shurwest damages to its "business, reputation, and its relationships

[17] Interestingly, Shurwest seems to concede that, if the circuit court properly applied South Carolina law, this element would be met as it makes no argument as to this element under South Carolina law. (App. Br. 22 ("The circuit court gave these similarities great weight because it was applying South Carolina, rather than Arizona, law.").

with clients." (R. p. 740). Again, this allegation is not tied to any actions with the Individual Respondents or the damages they have suffered. Accordingly, the Court should affirm the circuit court's holding that Shurwest's third-party claims for breach of contract and breach of fiduciary duty are barred by res judicata under either South Carolina or Arizona law.[18]

CONCLUSION

Accordingly, for the foregoing reasons, Respondents respectfully request the Court affirm the circuit court's finding that Shurwest is subject to personal jurisdiction in South Carolina and the circuit court's decision to dismiss and strike Shurwest's improper third-party claims. In the alternative, in the event the Court reverses the circuit court's finding of personal jurisdiction, Respondents request the Court remand the matter for necessary jurisdictional discovery.

(Signature page follows)

[18] Shurwest does not contest the fact that the claims in the Arizona lawsuit were adjudicated.

RESPECTFULLY SUBMITTED,

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August 31, 2021.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-04-00752

_____

Appellate Case No. 2020-000182

_____

Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gudrun Kornett, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, Diane Bernat, and William Schaidle,

Plaintiffs / Respondents,

v.

Chris Dixon; Samuel J. Dixon; Black Harbor Wealth Management, LLC; Faw Casson & Co., LLP; Shurwest, LLC; and Pacific Life Insurance Company,

Of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,

Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendant / Respondent.

And

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-04-02151

_____

Appellate Case No. 2020-000187

_____

William and Karen Rich,

Plaintiffs / Respondents,

v.

J. Christopher Dixon; Christopher J. Dixon; Black Harbor Wealth Management, LLC; and Shurwest, LLC,

Of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,

Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendant / Respondent.

And

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-04-00479

Appellate Case No. 2020-000188

Elizabeth Billings, Pamela Bott, Devon and Barbara Corley, Thomas Dantzler, Jane Downing, Thomas and Laura Eliason, Dennis Ellis, Bobby Floyd, Steven Ganley, Stanley Hix, Suzanne Hofford, Robert Johnson, Jerome and Robin Karnowski, Jerry and Kerry Kelley, Christine Lawson, Robert Manning, Diane Mayfield, Kelley McGraw Gray, Jeff Mitchell, Fred Myette, Mary Orem, Drucilla Perry, Dennis and Maxine Pierson, "Dennis and Maxine Pierson Living Trust," Earl Switzer, Alan Weeks, John and Mary Wendorf, and Virginia Howard,

Plaintiffs / Respondents,

v.

Chris Dixon; Black Harbor Wealth Management, LLC; Faw Casson & Co., LLP; and Shurwest, LLC,

Of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,

Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendant / Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

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