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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000182

Case No. 2019-CP-04-00752

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, Defendants,

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

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-000187

Case No. 2019-CP-04-02151

William and Karen Rich, Plaintiffs / Respondents,

v.

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

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

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-000188

Case No. 2019-CP-04-00479

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,.....Defendants,

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.

RECORD ON APPEAL VOLUME 5 of 5

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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 commissions. The characterization of this as the activity of that of a single rogue employee is further undercut by the volume of correspondence and the fact that much of it involves other Shurwest employees.

Finally, the Court is mindful that Plaintiffs are simply required to make a *prima facie* showing of jurisdiction when challenged by a Motion to Dismiss under Rule 12(b)(2). *Sullivan v. Hawker Beechcraft Corp.* 397 S.C. 143, 723 S.E.2d 835, (Ct. App. 2012). At times, Shurwest argues that many of Plaintiffs' allegations are not accurate and offers up alternative allegations of its own. These arguments are unavailing, as the Court must take the allegations and available evidence relating to personal jurisdiction in the light most favorable to the plaintiff. Moreover, they are unpersuasive in the face of substantial evidence offered by Plaintiffs in support of their jurisdictional allegations and the allegations in the Complaint.

For these reasons, the Court finds that Shurwest has purposefully availed itself of forum benefits in South Carolina, and that its contacts in doing so are sufficient to subject Shurwest to suit in South Carolina. The contacts considered by the Court relate to Shurwest's enduring relationships with South Carolina, its marketing and sales of the "IRA Reboot" program to agents in South Carolina, and to these Plaintiffs and other South Carolinians. This controversy arises out of those contacts with South Carolina. Finally, the assertion of personal jurisdiction over Shurwest in this matter comports with the concepts of fair play and substantial justice. South Carolina has an interest in protecting

its citizens and residents from predatory insurance practices such as the ones alleged in Plaintiffs' Complaint, and providing them a redress for their injuries.

(RUM) Nothing contained in this order is intended to be a finding of fact and shall not be considered a finding of fact in any subsequent hearing nor at trial except that the motion to dismiss for lack of personal jurisdiction was denied.

CONCLUSION

For these reasons, Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is **DENIED**.

July 24, 2020

[Signature]
s/ _____
The Hon. R. Lawton McIntosh

Anderson, SC

FILED ELECTRONICALLY BY: 2020 JUL 28 11:50 AM - ANDERSON - COMMON PLEAS - CASE# 2019CP0400752

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

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,

vs.

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

Defendants.

Case No.: 2019-CP-04-00752

**STIPULATION OF DISMISSAL WITH
PREJUDICE AS TO DEFENDANTS
CHRIS DIXON AND BLACK HARBOR
WEALTH MANAGEMENT, LLC ONLY**

The Plaintiffs and Defendants, Chris Dixon and Black Harbor Wealth Management, LLC, have settled and compromised the claims between them. Therefore, pursuant to Rule 41(a)(1), SCRPC, Plaintiffs hereby dismiss with prejudice all claims filed or which could have been filed against Chris Dixon and Black Harbor Wealth Management, LLC only with each party to bear their own attorneys' fees and costs.

Plaintiffs' claims against all other Defendants named in this action (Samuel J. Dixon, Faw Casson & Co., LLP, Shurwest, LLC, and Pacific Life Insurance Company) are not affected by this Dismissal and the case shall remain on the Court's active docket with respect to the remaining claims.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Robert G. Rikard

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March 18, 2021

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

Chris Dixon, Black Harbor Wealth Management, LLC, Faw Casson & Co., LLP, ShurWest LLC, MJSM Financial, LLC Melanie Schulz-Miller, and Minnesota Life Insurance Company,

Defendants.

Case No.: 2019-CP-04-0479

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE AS TO
MELANIE SCHULZ-MILLER AND
MJSM FINANCIAL, LLC ONLY**

Pursuant to Rule 41(a)(1) SCRPC, Plaintiff hereby files this stipulation of dismissal of the claims asserted in this action against the defendants Melanie Schulz-Miller and MJSM Financial, LLC only. Neither, Melanie Schulz-Miller, nor MJSM Financial, LLC has filed a responsive pleading to the service of the complaint in this matter. Therefore, their consent is not necessary pursuant to Rule 41(a)(1). The case shall continue against the remaining defendants listed as follows: Chris Dixon, Black Harbor Wealth Management,

LLC, Faw Casson & Co., LLP, ShurWest LLC. The dismissal of the Complaint against these defendants in this action is without prejudice.

Respectfully submitted,

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September 30, 2019

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Elizabeth Billings, et al

Plaintiffs,

vs.

Chris Dixon, Black Harbor Wealth Management, LLC, Faw Casson & Co., LLP, ShurWest LLC, and Minnesota Life Insurance Company,

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-00479

**STIPULATION OF DISMISSAL AS TO
DEFENDANT MINNESOTA LIFE
INSURANCE COMPANY ONLY**

**STIPULATION OF DISMISSAL WITH PREJUDICE AGAINST MINNESOTA LIFE
INSURANCE COMPANY ONLY PURSUANT TO RULE 41(a)(1), SCRPC**

The Plaintiffs and Defendant, Minnesota Life Insurance Company, have settled and compromised the claims between them. Therefore, pursuant to Rule 41(a)(1), SCRPC, the Plaintiffs hereby dismiss and end this action with prejudice as to all claims filed or which could have been filed against Minnesota Life Insurance Company only. The case continues against all other defendants named in this action which are the following: Chris Dixon, Black Harbor Wealth Management, LLC, Faw Casson & Co., LLP, and Shurwest, LLC. This is with the consent of Minnesota Life Insurance Company.

[Signature block to follow]

s/ S. Brook Fowler

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-_____

Case No. 2019-CP-04-00479

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,.....Defendants,

of whom Shurwest, LLC is the Appellant.

and

Shurwest, LLC,Third-Party Plaintiff / Appellant,

v.

MJSM Financial, LLC and Melanie
Schulze-MillerThird-Party Defendant / Respondent.

NOTICE OF APPEAL

Shurwest, LLC appeals the circuit court's order of February 3, 2021 granting Plaintiffs / Respondents' motion to strike the third-party complaint and the circuit court's order of February 3, 2021 granting Third-Party Defendant / Respondent's motion to dismiss the third-party complaint (as modified by the February 12, Form 4 Order). Shurwest, LLC received written notice of both orders on February 3, 2021.

Shurwest, LLC also appeals the circuit court's order of July 24, 2020 denying its motion to dismiss for lack of personal jurisdiction. Shurwest, LLC received written notice of this order on July 24, 2020. Although orders denying motions to dismiss for lack of personal jurisdiction are typically not immediately appealable, the personal jurisdiction question "can be considered when other appealable issues are presented to an appellate court." *QZO, Inc. v. Moyer*, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct. App. 2004).

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-_____

Case No. 2019-CP-04-00479

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, Defendants,

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 SERVICE

I certify that the NOTICE OF APPEAL was served on all counsel of record via electronic mail, pursuant to Supreme Court Order 2020-03-20-01, § (g)(3), on February 23, 2021, and a copy of that electronic mail is attached to this certificate:

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Attachments: Billings Notice of Appeal.pdf

Counsel:

Please find attached Shurwest's notice of appeal, which will be filing shortly with the court of appeals and with the circuit court. I look forward to working with you on this appeal.

Regards,
Grayson Lambert

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-00479

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

Plaintiffs,

vs.

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

Defendants.

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION TO STRIKE
SHURWEST'S THIRD PARTY
COMPLAINT OR IN THE ALTERNATIVE
TO SEVER**

Before the Court is Plaintiffs' Motion to Strike or in the Alternative to Sever Shurwest's Third Party Complaint. The matter has been fully briefed by Plaintiffs, Shurwest, and Third-Party Defendants, Melanie Schulze-Miller ("Miller") and MJSM Financial, LLC ("MSJM"). A hearing was held on the matter on Wednesday January 20, 2021 beginning at 4:00 PM with the following appearances: Robert Rikard of Rikard & Protopapas, LLC on behalf of Plaintiffs; I.S. Leevy Johnson of Johnson Toal and Batiste, PA and Jason Hopkins of DLA Piper on behalf of the Defendant Shurwest; and Deborah

Barbier of Deborah B. Barbier, Attorney at Law on behalf of the Third-Party Defendants. Having fully considered the matter, including the motion, the parties' briefs and memoranda, and oral arguments, it is hereby **ORDERED** that Plaintiffs' Motion to Strike or in the Alternative to Sever is **GRANTED IN PART** for the reasons set forth in more detail below.

BACKGROUND

Plaintiffs move to strike or in the alternative to sever Shurwest's Third Party Complaint against Third-Party Defendants Miller and MSJM on the grounds that Shurwest's third-party claims are not derivative of Plaintiffs' underlying claims, because Miller cannot be liable to Shurwest, and because of the potential for prejudice to Plaintiffs case and underlying claims. Shurwest argues that res judicata does not apply to its third-party claims against Miller and that they are true third-party claims that are derivative of Plaintiffs' underlying claims.

A detailed summary of the factual background of the case is included in the Court's July 24, 2020 Order Denying Shurwest's Motion to Dismiss. In the interest of brevity, the Court refers to that summary in lieu of repeating here.

LEGAL STANDARD

"The question of whether to grant a motion to strike a third-party claim, whether filed with or without the leave of court, is addressed to the sound discretion of the trial court." *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). A trial court is accorded wide discretion in determining whether to permit third party procedure, however, "the third-party claim must be 'derivative' of the plaintiff's claim". *Thompson v. UFP Eastern Div., Inc.*, 2012 WL 3686064, at *1 (D.S.C. 2012)

ANALYSIS

Here, the evidence before the Court establishes that Plaintiffs’ Motion to Strike should be Granted, in part, as set forth below.

A. Shurwest’s Third-Party Claims Are Not Derivative

For a third-party claim to be derivative of a plaintiff’s claim, “the non-party must be potentially liable to the third party plaintiff” and “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 Eastern*, 2012 WL 3686064, at *2 (quoting *Tetra Tech EC/Tsoro Joint Venture v. Sam Temples Masonry, Inc.* No. 10-1597, 2011 WL 1048964, at *3 (D.S.C. 2011)).¹

Shurwest’s claims against Miller and MSJM do not satisfy either of these conditions. As explained by another court, “[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*, 117 F.R.D. at 578. That is what Shurwest is arguing here, that Miller is responsible for the conduct that harmed Plaintiffs, not Shurwest. The Third-Party Complaint explicitly states that “Shurwest is not responsible for any of the Plaintiffs’ alleged damages relating to the promotion or sale of FIP products. Schulze-Miller and MJSM are.” Third-Party Compl., at ¶ 12. Accordingly, Ms. Miller and MSJM’s liability to

¹ S.C. R. Civ. P. “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. Comment to Rule 14 S.C. R. Civ. P.

Shurwest is not “dependent on the outcome of” Plaintiffs’ claims against Shurwest. *Laughlin v. Dell Fin. Svcs, L.P.*, 465 F.Supp.2d 563, 566 (D.S.C. 2006).

B. Shurwest’s Breach of Contract and Breach of Fiduciary Claims Are Barred By Issue Preclusion

“Issue preclusion bars the relitigation of only the particular issues that were actually litigated and decided in the prior suit.” *Catawba Indian Nation v. State of S.C.*, 407 S.C. 526, 537, 756 S.E.2d 900, 907 (2014). It appears to this Court that the breach of contract and breach of fiduciary claims that Shurwest has asserted in its Third-Party Complaint are substantially the same as the breach of contract and breach of fiduciary duty claims that Shurwest asserted against Ms. Miller in the 2018 Arizona state court case, No.: CV2018-004665.

The evidence before the Court shows that Shurwest agreed to dismiss the Arizona claims with prejudice in September 2018. As such, Shurwest is barred from relitigating those issues here.

C. Shurwest’s Third-Party Claims Will Unduly Complicate This Litigation and Prejudice Other Parties

“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 v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989) (citing 6 C. WRIGHT AND A. MILLER, *Federal Practice and Procedure* § 1460 at 320-21 (1971)).

Based on the evidence and arguments presented here, the Court finds that continued joinder of the Third-Party Defendants will complicate the litigation and prejudice the Plaintiffs in a substantial way, including, but not limited to the likelihood that continued joinder of Miller and MSJM will cause this case to be stayed because of Receivership proceedings that are currently pending in the Federal Court. See, *In Re. Receiver for S. Kohn et al.*, C.A. 6:19-cv-01112 (D.S.C.).

D. Shurwest’s Equitable Indemnification Claim is Premature

To recover on an equitable indemnification cause of action, Shurwest must prove: 1) Schulze-Miller and MJSJ are liable for Plaintiffs’ damages; 2) Shurwest was exonerated from any liability for those damages; and 3) Shurwest suffered damages as a result of Plaintiffs’ claims against Shurwest, which were eventually proven to be the fault of Schulze-Miller and MJSJ. *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011). Shurwest will not be able to make that showing until Plaintiffs’ claims have been resolved. Accordingly, the claim for equitable indemnification is premature and should be severed so that it does not complete the trial of Plaintiffs’ underlying claims.

CONCLUSION

For these reasons, Plaintiffs’ Motion to Strike is **GRANTED** as to Shurwest’s Third-Party claims for breach of contract and fiduciary duty. Plaintiffs’ Motion to Strike is **DENIED** as to Shurwest’s third-party claim for equitable indemnification. Plaintiffs’ Motion in the Alternative to Sever is **GRANTED** as to Shurwest’s third-party claim for equitable indemnification.

The Clerk of Court is hereby directed to assign a new and separate civil action number to Shurwest's equitable indemnification claim and Third-Party Complaint.

February ____, 2021

s/_____
The Hon. R. Lawton McIntosh

Anderson, SC



Anderson Common Pleas

Case Caption: Elizabeth Billings , plaintiff, et al VS Chris Dixon , defendant, et al
Case Number: 2019CP0400479
Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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FILED ELECTRONICALLY FILED - 2021 FEB 23 12:31 PM - ANANDHERSON - COMMON PLEAS - CASE#2019CP0400479

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

Defendants.

Shurwest, LLC

Third-Party Plaintiff,

vs.

MJSM Financial, LLC and Melanie Schulze-Miller,

Third-Party Defendants.

Civil Action No. 2019-CP-04-00479

ORDER

Before the Court is Third-Party Defendants Melanie Schulze-Miller (“Schulze-Miller”) and MJSM Financial, LLC’s (“MJSM”) (collectively “Third-Party Defendants”) Motion to

Dismiss the Third-Party Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6). The matter has been fully briefed by both Third-Party Defendants and Third-Party Plaintiff Shurwest, LLC (“Shurwest”), and a hearing was held on the matter on January 20, 2021. Having fully considered the matter, including the motion, the parties’ briefs and memoranda, exhibits, and oral arguments, it is hereby **ORDERED** that Third-Party Defendants’ Motion to Dismiss is **GRANTED** for the reasons set forth in more detail below.

BACKGROUND

The instant lawsuit was filed on April 17, 2019, by Plaintiffs Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gundrun Kornet, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, Diane Bernat and William Schaidle, consumers who had purchased structured cash flows sold by Future Income Payments, LLC, (“FIP”). FIP has been deemed a Ponzi scheme. Plaintiffs assert claims against the insurance agents who sold them the FIP products, Christopher J. Dixon and Samuel J. Dixon, and their company Black Harbor Wealth Management, LLC, (collectively “Dixon”) and the issuers of indexed universal life insurance policies that Plaintiffs funded using the FIP product, Defendants Minnesota Life Insurance Company (“MLIC”) and Pacific Life Insurance Company (“Pac Life”). (See Plaintiffs’ Complaint). Plaintiffs also named as a defendant Shurwest, LLC, an Arizona corporation that previously employed Schulze-Miller. On September 30, 2019, Plaintiffs dismissed Schulze-Miller and MJSM from this suit without prejudice. (See Stipulation for Dismissal of Schulze-Miller and MJSM).

Plaintiffs’ Complaint alleges that Dixon, with advice, recommendation, and education provided by Shurwest and Schulze-Miller, failed to conduct proper due diligence in facilitating the sale of life insurance products in conjunction with certain funding mechanisms administered by

third parties, including FIP, which Plaintiffs refer to as the “Life Insurance Retirement Strategy a/k/a IRA Reboot Program” (the “Program”), allegedly causing harm to Plaintiffs in the form of financial losses. (Plaintiff’s Compl. ¶¶ 3-5, 84-87.) Plaintiffs also allege that Schulze-Miller “was an employee and/or agent of Shurwest” and that at “all times complained of herein acted within the scope of her employment as National Sales Director for Life Insurance for Shurwest.” (*Id.* ¶¶ 55-56.)

On July 27, 2020, Shurwest filed a Third-Party Complaint against Schulze-Miller and MJSM alleging that Schulze-Miller, MJSM, and Dixon failed to conduct proper due diligence on the FIP products and negligently disregarded risks associated with the FIP program. (Third-Party Complaint ¶ 7.) Shurwest alleges that Schulze-Miller and MJSM are responsible for the damages claimed against Shurwest by the Plaintiffs in this action arising from investments with FIP. (*Id.* ¶ 1.) Shurwest claims that it rejected Schulze-Miller’s request to promote FIP products to Shurwest clients, and, despite this, Schulze-Miller thereafter formed MJSM and marketed FIP products to agents, including Dixon. (*Id.* at ¶ 6.) Shurwest denies any knowledge of Schulze-Miller’s and MJSM’s alleged conduct. (*Id.* at ¶¶ 6,8.)

Specifically, in its Third-Party Complaint, Shurwest asserts three causes of action for: 1) equitable indemnification against Schulze-Miller and MJSM; 2) breach of contract against Schulze-Miller; and 3) breach of fiduciary duty as to Schulze-Miller. In its first claim, Shurwest seeks equitable indemnification of “any” of Plaintiffs’ alleged damages, which arise from Schulze-Miller’s alleged conduct in dealing with Plaintiffs, Dixon, and others, including the alleged dealings with FIP as part of the Program. (Third-Party Complaint ¶ 12.) In its second claim, Shurwest alleges that Schulze-Miller breached an employment agreement with Shurwest by misusing Shurwest’s confidential information in relation to the Plaintiffs’ claims. (*Id.* ¶ 15.) In its

third claim, Shurwest alleges that Schulze-Miller breached a fiduciary duty to Shurwest by engaging in and concealing her unauthorized business related to FIP through MJSM, with resulting harm to Shurwest’s reputation and business. (*Id.* ¶¶ 18-20.)

PROCEDURAL HISTORY

Shurwest first sued Schulze-Miller on May 15, 2018, in *Shurwest, LLC v. Melanie Schulze-Miller, et al.*, Maricopa County (Arizona) Superior Court Case No. CV2018-004665 (the “Arizona Lawsuit”). (*See* Mot. to Dismiss, Ex. 1; Shurwest’s Resp. to Mot. to Dismiss, Ex. A at 1.)¹ In the Arizona complaint, Shurwest alleged that Schulze-Miller was a Shurwest employee from June 2012 to May 2018 and the company’s National Sales Director for Life Insurance. (Mot. to Dismiss, Ex. 1 ¶ 6.) The terms of her employment were based on an At-Will Employment and Restrictive Covenants Agreement (the “Employment Agreement”). (*Id.* ¶ 7.)

Shurwest alleged that the Employment Agreement restricted Schulze-Miller’s ability to access and use Shurwest’s confidential information, including information about Shurwest’s “Clients,” except in the ordinary course of her employment. (*Id.* ¶ 8.) By Shurwest’s definition, “Clients” included, among other things: “Clients, consumers, and individuals who hold insurance or annuity policies distributed by or through [Shurwest or its affiliates]” (*Id.* ¶ 9.)

Shurwest claimed that in April 2018 it discovered Schulze-Miller had breached the Employment Agreement and violated her fiduciary duties by allegedly marketing, promoting, or selling the FIP products at issue in the instant action. (Mot. to Dismiss, Ex. 1 ¶ 13.) Shurwest

¹In analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider documents incorporated into the complaint by reference, including judicial notice of court orders. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) (holding motion to dismiss not converted into motion for summary judgment where trial court relied on transcripts and court orders in underlying class action lawsuit).

alleged that Schulze-Miller was not authorized to engage in these FIP activities, and that she concealed her actions from Shurwest. (*Id.* ¶ 16.) Shurwest also alleged that Schulze-Miller formed MJSM to conduct the FIP activities without Shurwest’s knowledge, and that she used Shurwest’s confidential Client information in connection with her FIP activities. (*Id.* ¶¶ 17-18.) Shurwest asserted these actions could have implied a relationship between FIP and Shurwest, and that Shurwest’s reputation was harmed because FIP was under governmental scrutiny. (*Id.* ¶¶ 19, 22.) Shurwest terminated Schulze-Miller for these allegedly unauthorized actions related to FIP. (*Id.* ¶ 21.)

Based on these allegations, Shurwest asserted claims in the Arizona lawsuit against Schulze-Miller for breach of the Employment Agreement (Mot. to Dismiss, Ex. 1 ¶¶ 25-30), breach of the implied covenant of good faith and fair dealing under the Employment Agreement (*Id.* ¶¶ 31-36), and breach of fiduciary duty arising from her employment with Shurwest and related to the FIP circumstances at issue in this action (*Id.* ¶¶ 37-43). Schulze-Miller answered the complaint on June 11, 2018, and denied all wrongdoing. (Mot. to Dismiss, Ex. 2.) She also asserted several counterclaims against Shurwest for declaratory judgment, breach of Shurwest’s obligation to pay wages to her under the Employment Agreement, and breach of the covenant of good faith and fair dealing. (*Id.* ¶¶ 42-138)

On September 12, 2018, the parties entered a settlement agreement (“Settlement”) in which the parties agreed that they would seek an order dismissing “all claims and counterclaims in the Lawsuit with prejudice with each side to bear its/his/her own costs and attorneys’ fees.” (Third-Party Pl.’s Response to Mot. to Dismiss, Ex. 1 at 1-2). Thereafter, on September 14, 2018, the parties filed a stipulation to dismiss the Arizona Lawsuit with prejudice as to all claims and counterclaims, each side to bear its own costs and attorneys’ fees. (*See* Mot. to Dismiss, Ex. 3.)

Following that stipulation, on September 20, 2018, the Arizona (Maricopa County) Superior Court dismissed with prejudice the Arizona Lawsuit. (*See* Mot. to Dismiss, Ex. 4.)

LEGAL STANDARD

Under Rule 12(b)(6), SCRCP, a complaint should be dismissed if it fails “to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRCP. “Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” *Brown v. Theos*, 338 S.C. 305, 309-10, 526 S.E.2d 232, 235 (Ct. App. 1999), *aff’d*, 345 S.C. 626, 550 S.E.2d 304 (2001) (*quoting Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998)).

The general rule is well established that once a person has had a full and fair opportunity to litigate a claim, the person is precluded, under the doctrine of res judicata, from relitigating it. *See New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). “When claims arising out of a particular transaction or occurrence are adjudicated, res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit.” *Judy v. Judy*, 383 S.C. 1, 8, 677 S.E.2d 213, 217 (Ct. App. 2009), *aff’d*, 393 S.C. 160, 712 S.E.2d 408 (2011) (emphasis added); *see also Taylor v. Taylor*, 241 S.C. 462, 128 S.E.2d 910, 913 (1962) (“The doctrine of res judicata has been generally said to bar relitigation not only of issues actually decided in the former proceeding, but also of such issues as could have been there presented for decision.”).

“[A]ll questions which were actually litigated in the prior action and determined by the judgment are conclusive in any subsequent action between the parties, or their privies, regardless of whether the subsequent action involves the same or a different cause of action.” *Lowe v. Clayton*, 264 S.C. 75, 82, 212 S.E.2d 582, 585–86 (1975). Further, “simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subjects of the two actions.” *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (citing *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999)).

“To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. “A case that is dismissed ‘with prejudice’ indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication.” *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) (emphasis added).

ANALYSIS

1. **Issue preclusion bars Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty.**

Third-Party Defendants move to dismiss the Third-Party Complaint on the ground that it is barred by res judicata because the parties, subject matter, and issues in Shurwest’s Third-Party Complaint are identical and indistinguishable from claims that were made the Arizona Lawsuit that was dismissed with prejudice. In its response, Shurwest argues that res judicata does not apply because the claims in the Third-Party Complaint are entirely different from the claims Shurwest previously asserted against Schule-Miller in the Arizona Lawsuit, arise out of a separate set of occurrences, and will require distinct and additional evidence at trial. Shurwest also contends that

the claims it raises in the Third-Party Complaint relate to and arise out of Schulze-Miller and MJSM’s conduct with respect to consumers and their losses.

As discussed below in detail, applying the principles of res judicata set forth above, the Court finds that Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty are barred by res judicata because they were previously asserted (or could have been asserted) in prior litigation between the parties and were dismissed with prejudice in the Arizona Lawsuit. Further, the Court finds that, as to these two claims, the parties share identity because Shurwest sued Schulze-Miller in both actions for her conduct and on behalf of MJSM. Finally, the Court finds that 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 Plaintiffs through MJSM, which it also sought in the Arizona Lawsuit.

As noted above, the Arizona Complaint included causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty against Schulze-Miller—all arising from the Employment Agreement. A comparison of the allegations in Shurwest’s Third-Party Complaint for its breach of contract and breach of fiduciary duty claims and its allegations in the Arizona Lawsuit clearly illustrate that these claims concern the same conduct and are the same claims:

ARIZONA LAWSUIT

THIRD-PARTY COMPLAINT

“Ms. 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, in violation of . . . the Employment Agreement.” (Mot. to Dismiss, Ex. 1 ¶ 27.)

“Schulze-Miller materially breached the employment agreement by misusing Shurwest’s confidential information for her own selfish benefit and to Shurwest’s detriment, in violation of the employment agreement’s terms.” (Third-Party Compl. ¶ 15.)

“Under Arizona law, Ms. Schulze-Miller owed a fiduciary duty to Shurwest as a Shurwest employee, which included duties of loyalty, utmost good faith, honesty and full disclosure.” (Mot. to Dismiss, Ex. 1 ¶ 38.)

“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.” (Mot. to Dismiss, Ex. 1 ¶ 39.)

“Ms. Schulze-Miller breached her fiduciary duties of utmost good faith and loyalty by misusing Shurwest 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.” (Mot. to Dismiss, Ex. 1 ¶ 40.)

“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

“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.” (Third-Party Compl. ¶ 18.)

“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.” (Third-Party Compl. ¶ 19.)

or its products.” (Mot. to Dismiss, Ex. 1 ¶ 41.)

Moreover, in the Arizona Lawsuit, Shurwest alleged that “Ms. Schulze-Miller further breached the implied covenant by secretly acting to personally profit at the expense of Shurwest and its Clients.” (Mot. to Dismiss, Ex. 1 ¶ 34). All of these claims arise from the same alleged conduct—injury and damages to Shurwest and its clients resulting from Schulze-Miller’s allegedly unauthorized actions regarding marketing and promoting the FIP products to Plaintiffs. Shurwest voluntarily dismissed the claims in the Arizona Lawsuit with prejudice. (See Mot. to Dismiss, Exs. 3 and 4.)

Here, res judicata bars the Third-Party Complaint because the claims in both actions are the same, arise out of the same underlying circumstances, and were conclusively adjudicated and dismissed with prejudice in the prior Arizona Lawsuit. *See RIM Assocs.*, 359 S.C. at 184 (Ct. App. 2004) (“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 these parties”) (emphasis in the original).²

²Shurwest argues that the law of Arizona, not South Carolina, applies when determining whether res judicata bars the Third-Party Complaint because a judgment is to be given the res judicata effect that the judgment would be afforded in the state in which it was rendered, which here was Arizona. Even applying Arizona law, however, the Third-Party Complaint would be barred by res judicata. Under Arizona law on res judicata, a final judgment on the merits is conclusive as to every point decided and “every point decided [in the first action] and also as to every point raised by the record which could have been decided” as to the parties and their privies in all other actions. *Fuller v. Hartford Accident & Indem. Co.*, 601 P.2d 1360, 362 (Ariz. Ct. App. 1979) (quoting *Hoff v. City of Mesa*, 344 P.2d 1013, 1014 (Ariz. 1959); see also *Pettit v. Pettit*, 189 P.3d 1102, 1105 (Ariz. Ct. App. 2008) (res judicata bars a new claim based not only upon the facts litigated in the first lawsuit but also upon all matters that might have been litigated). In deciding whether an action

Moreover, simply because Shurwest’s second claim for relief in the Arizona Lawsuit (bad faith) is not identical to its claims in the present action does not preclude application of res judicata because the same conduct was at issue. The primary claim that Schulze-Miller allegedly conducted unauthorized FIP activities and associated claims were raised in the Arizona Lawsuit and the action was dismissed with prejudice. *See Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992) (res judicata barred action arising from dispute over payment of insurance premiums because the trial court previously resolved the primary accounting issue).

Shurwest also contends that res judicata does not apply because MJSM was not a party to the Arizona Lawsuit and lacks privity. Shurwest cites to numerous cases that stand for the proposition that an LLC is a distinct legal entity from its members. However, “[f]or purpose of res judicata . . . the concept of privity rests not on the relationship between the parties asserting it, but rather on each party’s relationship to the subject matter of the litigation.” *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citing *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986)); *see also Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 665 S.E.2d 222, 228 (S.C. Ct. App. 2008) (holding that “while the traditional use of collateral estoppel

is the same cause of action for res judicata purposes, Arizona courts use the “same evidence” test. *Pettit*, 189 P.3d at 1105. Under this test, “the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action.” *Id.* (quoting Restatement of Judgments § 61 (1942)). Further, “[u]nlike issue preclusion, which applies only to issues that were actually litigated, a second claim is precluded ‘not only upon facts actually litigated but also upon those points which might have been litigated.’” *Id.* at 1106 (citing *Gilbert v. Bd. of Med. Exam’rs*, 745 P.2d 617, 622 (Ariz. Ct. App. 1987) (internal citations omitted)); *see also Best v. Ceja*, 2019 WL 4271848 (Ariz. Ct. App. Sept. 10, 2019). Here, all of Shurwest’s claims involve Schulze-Miller’s allegedly acting outside the scope of her employment by promoting and selling FIP products. The evidence needed to sustain the claims raised in the Third-Party Complaint would have sustained the claims raised in the Arizona Lawsuit. Moreover, because Schulze-Miller is the sole member of MJSM, LLC, there is privity between these parties. *See Eden v. Deublein*, 2017 WL 929747, *3 (Ariz. Ct. App. Mar. 9, 2017).

required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.”). “The term ‘privity’, when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.” *Richburg*, 290 S.C. at 434, 351 S.E.2d at 166. 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. *See James v. Wright*, C.A. No. 1:13-1438-TMC, 2014 WL 2612487, at *4 (D.S.C. June 9, 2014) (finding individual defendant SCDC employees and the SCDC were in privity for res judicata purposes). Although MJSM was not involved in the first suit, it and Schulze-Miller were in privity, and therefore, MJSM’s legal interests were litigated in the first action.

In sum, because Shurwest’s breach of contract and breach of fiduciary duty claims in this action are substantially identical and arise from the same facts and circumstances as the claims it asserted in the Arizona Lawsuit, res judicata precludes Shurwest from re-litigating these claims and allegations in this case. Therefore, the Court strikes Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty in their entirety as barred by res judicata. *See Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997). (“In a subsequent suit between the same parties on a different claim, the former judgment is conclusive as to those issues actually determined in the prior action.”) Doing so “effectuates the fundamental purpose of res judicata, which is to ensure that ‘no one should be twice sued for the same cause of action.’” *Judy*, 393 S.C. at 173, 712 S.E.2d at 414 (*quoting First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

Accordingly, Third-Party Defendants’ Motion to Dismiss is **GRANTED** as to Shurwest’s breach of contract and breach of fiduciary duty claims.

2. Shurwest’s Third-Party cause of action for equitable indemnification.

Third-Party Defendants Schulze-Miller and MJSM argue that the equitable indemnity claim is indistinguishable from the subject matter of the Arizona Lawsuit because it arises from the same alleged conduct—injury and damages to Shurwest resulting from Schulze-Miller’s allegedly unauthorized actions regarding the FIP products to Plaintiffs. Shurwest argues in opposition that the equitable indemnity claim survives the Motion to Dismiss because it did not exist at the time of the Arizona Lawsuit. Shurwest contends that this claim and all the facts relating to it arose in January 2019 after Plaintiffs brought their action against Shurwest.³

The Court finds that the claim for equitable indemnification is to be severed, with that claim to be tried upon the issue becoming ripe for adjudication.

Neither side addressed in its moving papers the salient issue regarding Shurwest’s claim for equitable indemnity, which is that the claim is not ripe for adjudication. “[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.” *Colleton County Taxpayers Ass’n v. Sch. Dist. Of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). Here, Shurwest’s indemnity claim is that it is not responsible for Plaintiffs’ alleged damages in this action, and that Third-Party Defendants are liable to Shurwest for Plaintiffs’ damages based on Third-Party Defendants’ alleged conduct in dealing with Plaintiffs. Thus, an adjudication on

³In its Third-Party Complaint, Shurwest cites to an order from a United States District Judge in Arizona entering summary judgment in a declaratory judgment action, *Landmark American Insurance Company v. Shurwest*, No. 2:19-cv-04743-SRB (D. Ariz.), and states that “[a] federal judge has ruled that, as a matter of law, Schulze-Miller acted on her own behalf and concealed her activities from Shurwest.” (Third-Party Compl. 1 ¶ 9). Schulze-Miller was not a party to the declaratory action and is not bound by any findings made there. The issues decided there—coverage under the Landmark American policy—are irrelevant to the issues before this Court.

Shurwest’s indemnification claim is premature because it is contingent on the Plaintiffs successfully proving their claims against Shurwest.

Accordingly, it is **ORDERED** that Shurwest’s claim for equitable indemnity is severed from this case, to be tried upon the issue becoming ripe for adjudication.

3. Attorneys’ fees and costs.

Pursuant to the South Carolina Frivolous Civil Proceedings Sanction Act (“FCPSA”), Third-Party Defendants Schulze-Miller and MJSM also request an award of their attorneys’ fees and costs for having to bring this motion and respond to the precluded claims, which Shurwest knew were unwarranted based on its undisputed knowledge of the Arizona Lawsuit and its dismissal with prejudice. *See* S.C. Code Ann. § 15-36-10(A)(4). “The [FCPSA] provides for liability for attorney fees and costs of frivolous suits.” *Ex parte Gregory*, 378 S.C. 431, 438, 663 S.E.2d 46, 50 (2008). The FCPSA provides:

Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney’s fees and court costs of the other party if:

- (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and
- (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10. To be awarded attorney’s fees and costs under the FCPSA, a litigant must show: “(1) the other party has procured, initiated, continued, or defended the civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings; (4) the aggrieved person has incurred attorney’s fees and court costs; and (5) the amount of the fees and costs set

forth in item (4).” *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 98, 637 S.E.2d 316 (Ct. App. 2006) (citing § 15-36-10). The FCPSA utilizes a reasonable attorney standard to determine whether sanctions are warranted. *See SE Site Prep. LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011).

Here, in its Third-Party Complaint, Shurwest alleges causes of action for the same conduct that was raised (or could have been) in the previous Arizona Lawsuit. Having granted Third-Party Defendants’ Motion to Dismiss on the ground of res judicata as to the claims for breach of contract and breach of fiduciary duty, as well as severing Shurwest’s claim for equitable indemnity for lack of a ripe justiciable controversy, Third-Party Defendants are entitled to an award of attorney’s fees and costs under the FCPSA.

Further, it is inconceivable that Shurwest reasonably believed that its breach of contract and breach of fiduciary duty claims against Third-Party Defendants, which had previously been dismissed with prejudice, were valid. *See Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 98, 637 S.E.2d 316 (Ct. App. 2006) (finding sanctions were warranted under the FCPSA against plaintiff for bringing frivolous causes of action “for the same complaint as in previous lawsuits”).

Accordingly, the Court will award Third-Party Defendants their attorney fees and costs. Third-Party Defendants are to file an affidavit setting forth the amount of such fees and costs within ten days of the filing of this Order.

CONCLUSION

For these reasons, Third-Party Defendants’ Motion to Dismiss the Third-party Complaint based on res judicata is **GRANTED**. It is therefore **ORDERED** that Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty are stricken in their entirety on

issue preclusion grounds, and Shurwest’s cause of action for equitable indemnity is severed from this case, to be tried upon the issue becoming ripe for adjudication.

February ____, 2021

The Honorable R. Lawton McIntosh
Anderson, SC



Anderson Common Pleas

Case Caption: Elizabeth Billings , plaintiff, et al VS Chris Dixon , defendant, et al
Case Number: 2019CP0400479
Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-04-00479

ELIZABETH BILLINGS, PAMELA BOTT, DEVON & BARBARA CORLEY, THOMAS DANTZLER, JANE DOWNING, THOMAS & LAURA ELIASON, DENNIS ELLIS, BOBBY FLOYD, STEVEN GANLEY, MICHAEL & DEBRA GOULDING, DEBBIE GRANT, STANLEY HIX, SUZANNE HOFFORD, ROBERT JOHNSON, JEROME & ROBIN KARNOWSKI, JERRY & KEEY KELLEY, CHRISTINE LAWSON, ROBERT MANNING, DIANE MAYFIELD, KELLY MCGRAW GRAY, JEFF MITCHELL, FRED MYETTE, MARY OREM, DRUCILLA PERRY, DENNIS & MAXINE PIERSON "DENNIS & MAXINE PIERSON LIVING TRUST", EARL SWITZER, ALAN WEEKES, JOHN & MARY WENDORF, AND VIRGINIA HOWARD,

CHRIS DIXON AND BLACK HARBOR WEALTH MANAGEMENT, LLC, FAW CASSON & CO., LLP, AND SHURWEST, LLC

PLAINTIFF(S)

DEFENDANT(S)

SHURWEST, LLC
THIRD PARTY PLAINTIFFS

MJSM FINANCIAL, LLC AND MELANIE SCHULZE-MILLER,
THIRD PARTY DEFENDANTS

Submitted by: Attorney for : [] Plaintiff [] Defendant or [] Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- [] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
[] ACTION DISMISSED (CHECK REASON): [] Rule 12(b), SCRPC; [] Rule 41(a), SCRPC (Vol. Nonsuit); [] Rule 43(k), SCRPC (Settled); [] Other
[] ACTION STRICKEN (CHECK REASON): [] Rule 40(j), SCRPC; [] Bankruptcy; [] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [] Other
[] STAYED DUE TO BANKRUPTCY
[] DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): [] Affirmed; [] Reversed; [] Remanded; [] Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: [] See attached order (formal order to follow) [X] Statement of Judgment by the Court:

ORDER INFORMATION

ORDER FILED ON FEBRUARY 3, 2021 AT 3:36 P.M. SHALL BE RESCINDED AS TO MATTER OF ATTORNEY FEES ONLY. ALL OTHER MATTERS IN THIS ORDER SHALL REMAIN IN FULL EFFECT.

This order [] ends [X] does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

FILED ELECTRONICALLY FILED - 2/3/21 11:40:21 AM - ANDERSON COUNTY COMMON PLEAS - CASE# 2019CP0400479



Anderson Common Pleas

Case Caption: Elizabeth Billings , plaintiff, et al VS Chris Dixon , defendant, et al
Case Number: 2019CP0400479
Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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FILED ELECTRONICALLY FILED - 2021 FEB 12 2011 PM 1 - ANANDHERSON - COMMON PLEAS - CASE#2019CP0400479

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

Defendants.

Case No.: 2019-CP-04-00479

**ORDER DENYING SHURWEST, LLC'S
MOTION TO DISMISS**

Before the Court is Shurwest, LLC's Motion to Dismiss for Lack of Personal Jurisdiction. The matter has been fully briefed by both Shurwest and Plaintiffs. On Wednesday July 1, 2020, this Court held a hearing on the same motion in a different case styled *Robert Ayers, et al. v. Chris Dixon, et al.*, 2019-CP-04-00752. Robert Rikard of Rikard & Protopapas, LLC appeared at that hearing on behalf of the Ayers plaintiffs and I.S. Leevy Johnson of Johnson Toal and Batiste, PA and Jason Hopkins of DLA Piper

FILED ELECTRONICALLY FILED - 2020 Feb 28 11:33 AM - ANDERSON - COMMON PLEAS - CASE#2019CP0400479

appeared on behalf of the defendant Shurwest. Mr. Rikard also represents the Plaintiffs and Mr. Leevy Johnson and Mr. Hopkins also represent Shurwest in this case. During the *Ayers* hearing, counsel for both parties agreed that the issues presented by the motion to dismiss filed by Shurwest in the *Ayers* case were identical to the issues raised by the Motion to Dismiss filed by Shurwest in the present case. Accordingly, the parties further agreed that a second hearing on those issues was not necessary and that their respective arguments on the Motion to Dismiss filed by Shurwest in this case would be the same as the arguments presented in the *Ayers* hearing. Having fully considered the matter, including the motion, the parties' briefs and memoranda, supplemental filings and oral arguments, it is hereby **ORDERED** that Shurwest's Motion to Dismiss for Lack of Personal Jurisdiction is **DENIED** for the reasons set forth in more detail below.

BACKGROUND

Defendant Shurwest moves to dismiss Plaintiffs' Complaint on the ground that the Court lacks personal jurisdiction – both general and specific – over Shurwest. Plaintiffs argue that they have sufficiently pled facts and causes of action against Shurwest that establishes the Court has both general and specific jurisdiction over Shurwest for purposes of this matter.

This case arises out of Plaintiffs' loss of retirement savings. Plaintiffs were sold indexed universal life insurance policies (IUL) as a financial planning and retirement tool, which they contend were inappropriate for their needs. The IULs were the central component of a marketing and sales strategy designed by Shurwest that was known as the "IRA Reboot Program". To help fund the IULs, Plaintiffs also purchased structured cash flow products through Future Income Payments, LLC ("FIP"). Plaintiffs allege that

their insurance agent, Chris Dixon, advised them to purchase FIP to allow them to fund the IULs at higher levels and that Dixon's advice was based on the recommendation, education and training that Shurwest provided to Dixon. Plaintiffs allege that Shurwest and Melanie Shulze-Miller, National Life Director at Shurwest, were the architects of the IRA Reboot Program.

Plaintiffs further allege that Shurwest was aware that Melanie Shulze-Miller and other Shurwest employees were recommending FIP to its network of insurance agents and brokers in order to fund purchases of IULs (and fund them at higher levels) and that Shurwest received commissions on the purchase and sale of the IULs and therefore benefitted from the IRA Reboot Program.

Shurwest denies these allegations. Shurwest further argues that Shurwest never made any money from FIP, that the IUL policies are legitimate and legal and that Melanie-Shulze-Miller was a rogue employee who was operating outside the scope of her employment with Shurwest.

LEGAL STANDARD

At this stage, a plaintiff need only make a *prima facie* showing of jurisdiction, either in the allegations of the complaint, evidence presented to court, or both. *Sullivan v. Hawker Beachcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012). The plaintiff bears the burden of proving the existence of grounds for jurisdiction by the preponderance of the evidence under Rule 12(b)(2). *See Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996).

When a motion to dismiss attacks the allegations of the complaint on the issue of personal jurisdiction, the court is not confined to the allegations of the complaint but may

also consider affidavits or other evidence. *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 562-63, 683 S.E.2d 486, 490 (2009).

Personal jurisdiction is exercised as “general jurisdiction” or “specific jurisdiction.” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478. S.C. Code Ann. § 36–2–802 governs general jurisdiction and states: “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.” A court may assert general jurisdiction if the defendant has an “enduring relationship” with the forum state. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005). To establish an “enduring relationship,” the defendant’s contacts must be “continuous and systematic” as well as “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.” See *Id.* at 17, 655 S.E.2d at 479 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

S.C. Code Ann. § 36–2–803 governs specific jurisdiction and provides that a court may exercise personal jurisdiction over a person who acts directly “as to a cause of action arising from the person’s: (1) transacting any business in this state; . . . (4) causing tortious injury or death in this State by an act or omission outside this State if the regularly does or solicits business” in this state. South Carolina’s long-arm statute extends to the constitutional limits of due process, and, as a result, state law analysis collapses into constitutional analysis. Thus, the question becomes whether the non-resident defendant has sufficient “minimum contacts” with South Carolina such that the maintenance of the suit in South Carolina does not offend traditional notions of fair play and substantial

justice. *Young v. Jones*, 1992, 816 F.Supp. 1070, *affirmed* 103 F.3d 1180, *cert. denied* 118 S.Ct. 329, 522 U.S. 928, 139 L.Ed.2d 255.

Due Process permits the exercise of specific personal jurisdiction over a defendant if “the defendant [has] purposefully established minimum contacts in the form State such that it should reasonably anticipate being hailed into court there.” *Perdue Foods LLC v. BRF S.A.*, 814 F.3d 185, 189 (4th Cir. 2016). Specific jurisdiction can be exercised if “the defendant has purposefully directed his activities at residents of the forum, and the litigation results from the alleged injuries that arise out of or relate to those activities.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

ANALYSIS

Here, the evidence before the Court establishes that Plaintiffs have made a *prima facie* showing that Shurwest is subject to both general and specific personal jurisdiction in South Carolina.

A. General Jurisdiction

Plaintiffs have alleged and shown that Shurwest is registered with the South Carolina Department of Insurance and the South Carolina Secretary of State’s Office and has been for many years. **Exhibits 4 & 5** to Pls’ Memo. in Opposition. As such, Shurwest has an “enduring relationship” with South Carolina and its contacts with the State are “substantial, continuous and systematic” to justify suit against Shurwest on causes of action that are not related Shurwest’s specific activities in South Carolina. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005); *Coggeshall v.*

Reproductive Endocrine Associates of Charlotte, 376 S.C. 17, 655 S.E.2d 476, 479 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

B. Specific Jurisdiction

Plaintiffs have presented ample evidence to support their allegations that Shurwest purposefully directed activities toward South Carolina and that Plaintiffs' causes of action arise out of those activities. As noted above, Shurwest is and has been registered with the South Carolina Department of Insurance and the South Carolina Secretary of State's Office for some time. **Exhibits 4 & 5** to Pls' Memo. in Opposition. Christopher Dixon proposed a retirement planning strategy for Plaintiffs that paired the purchase of Indexed Universal Life Insurance Policies with FIP as a funding mechanism designed to generate income for Plaintiffs that could be used to pay the IUL policy premiums. (Compl. ¶¶ 4, 6). Dixon and a member of his staff traveled to Shurwest's offices in Arizona to meet with Melanie Shulze-Miller and to learn more about the IRA Reboot Program. (Compl. ¶ 7). Melanie Shulze-Miller also traveled to South Carolina to visit Christopher Dixon and his staff to provide education, training and in person illustrations regarding the IRA Reboot program. (Compl. ¶ 6). Following these trips, Shulze-Miller remained Dixon's contact person at Shurwest and she and a team of Shurwest employees continued to answer questions and provide assistance to Dixon and his staff related to Plaintiffs' participation in the IRA Reboot Program. (Compl. ¶ 13). Plaintiffs ultimately participated in the IRA Reboot Program and claim that they have suffered harm as a result. (See, generally Compl.)

From the facts before the Court, it appears clear that Shurwest directed activities related to the "IRA Reboot" program to South Carolina, that Shurwest was aware that is

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 sales of IULs and the increased funding levels provided by FIP.

The evidence and argument by Shurwest that Melanie Shulze-Miller was a rogue employee operating without Shurwest's knowledge or permission is not credible in light of the overwhelming evidence that Shurwest was aware of the use of FIP to fund higher levels of IUL, that Shulze-Miller and other employees did so as part of her 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 commissions. The characterization of this as the activity of that of a single rogue employee is further undercut by the volume of correspondence and the fact that much of it involves other Shurwest employees.

Finally, the Court is mindful that Plaintiffs are simply required to make a *prima facie* showing of jurisdiction when challenged by a Motion to Dismiss under Rule 12(b)(2). *Sullivan v. Hawker Beechcraft Corp.* 397 S.C. 143, 723 S.E.2d 835, (Ct. App. 2012). At times, Shurwest argues that many of Plaintiffs' allegations are not accurate and offers up alternative allegations of its own. These arguments are unavailing, as the Court must take the allegations and available evidence relating to personal jurisdiction in the light most favorable to the plaintiff. Moreover, they are unpersuasive in the face of substantial evidence offered by Plaintiffs in support of their jurisdictional allegations and the allegations in the Complaint.

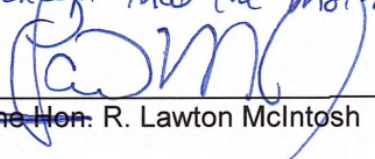
For these reasons, the Court finds that Shurwest has purposefully availed itself of forum benefits in South Carolina, and that its contacts in doing so are sufficient to subject Shurwest to suit in South Carolina. The contacts considered by the Court relate to Shurwest's enduring relationships with South Carolina, its marketing and sales of the "IRA Reboot" program to agents in South Carolina, and to these Plaintiffs and other South Carolinians. This controversy arises out of those contacts with South Carolina. Finally, the assertion of personal jurisdiction over Shurwest in this matter comports with the concepts of fair play and substantial justice. South Carolina has an interest in protecting its citizens and residents from predatory insurance practices such as the ones alleged in Plaintiffs' Complaint, and providing them a redress for their injuries.

CONCLUSION

For these reasons, Defendant's Motion to Dismiss for Lack of Personal Jurisdiction

RLM

is DENIED. Nothing contained in this order is intended to be a binding finding of fact and shall not be considered a finding of fact in any subsequent hearing nor at trial except that the motion to dismiss for lack of personal jurisdiction July 24, 2020 was denied.

s/ 
The Hon. R. Lawton McIntosh

Anderson, SC

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

William and Karen Rich,

Plaintiffs,

Case No.: 2019-CP-04-02151

vs.

**STIPULATION OF DISMISSAL AS TO
DEFENDANTS MINNESOTA LIFE
INSURANCE COMPANY ONLY**

J. Christopher Dixon, Black Harbor
Wealth Management, LLC, Christopher J.
Dixon, Shurwest LLC, and Minnesota Life
Insurance Company,

Defendants.

**STIPULATION OF DISMISSAL WITH PREJUDICE AGAINST MINNESOTA LIFE
INSURANCE COMPANY, ONLY PURSUANT TO RULE 41(a)(1), SCRPC**

The Plaintiffs and Defendants, Minnesota Life Insurance Company have settled and compromised the claims between them. Therefore, pursuant to Rule 41(a)(1), SCRPC, the Plaintiffs hereby dismiss and end this action with prejudice as to all claims filed or which could have been filed against Minnesota Life Insurance Company only. The case continues against all other defendants named in this action which are the following: J. Christopher Dixon, Black Harbor Wealth Management, LLC, Christopher J. Dixon, and Shurwest, LLC.

Respectfully submitted,

s/ Robert G. Rikard
Robert G. Rikard (SC Bar No.: 12340)
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Attorneys for Plaintiffs

May 8, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-_____

Case No. 2019-CP-04-02151

William and Karen Rich, Plaintiffs / Respondents,

v.

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

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.

NOTICE OF APPEAL

Shurwest, LLC appeals the circuit court’s order of February 3, 2021 granting Plaintiffs / Respondents’ motion to strike the third-party complaint and the circuit court’s order of February 3, 2021 granting Third-Party Defendant / Respondent’s

motion to dismiss the third-party complaint (as modified by the February 12, Form 4 Order). Shurwest, LLC received written notice of both orders on February 3, 2021.

Shurwest, LLC also appeals the circuit court's order of July 30, 2020 denying its motion to dismiss for lack of personal jurisdiction. Shurwest, LLC received written notice of this order on July 30, 2020. Although orders denying motions to dismiss for lack of personal jurisdiction are typically not immediately appealable, the personal jurisdiction question "can be considered when other appealable issues are presented to an appellate court." *QZO, Inc. v. Moyer*, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct. App. 2004).

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-_____

Case No. 2019-CP-04-00752

Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt
Blaettler, Vandy Kim, Glenn Kornett, Gudrum 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,.....Defendants,

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 SERVICE

I certify that the NOTICE OF APPEAL was served on all counsel of record via electronic mail, pursuant to Supreme Court Order 2020-03-20-01, § (g)(3), on February 23, 2021, and a copy of that electronic mail is attached to this certificate:

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Subject: Rich v. Dixon - Shurwest, LLC's Notice of Appeal
Attachments: Rich Notice of Appeal.pdf

Counsel:

Please find attached Shurwest's notice of appeal, which will be filing shortly with the court of appeals and with the circuit court. I look forward to working with you on this appeal.

Regards,
Grayson Lambert

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

William and Karen Rich,

Plaintiffs,

Vs.

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

Defendants.

Civil Action No: 2019-CP-04-02151

**ORDER GRANTING IN PART PLAINTIFFS’
MOTION TO STRIKE SHURWEST’S THIRD
PARTY COMPLAINT OR IN THE
ALTERNATIVE TO SEVER**

Before the Court is Plaintiffs’ Motion to Strike or in the Alternative to Sever Shurwest’s Third Party Complaint. The matter has been fully briefed by Plaintiffs, Shurwest, and Third-Party Defendants, Melanie Schulze-Miller (“Miller”) and MJSM Financial, LLC (“MSJM”). A hearing was held on the matter on Wednesday January 20, 2021 beginning at 4:00 PM with the following appearances: Robert Rikard of Rikard & Protopapas, LLC on behalf of Plaintiffs; I.S. Leevy Johnson of Johnson Toal and Batiste, PA and Jason Hopkins of DLA Piper on behalf of the Defendant Shurwest; and Deborah Barbier of Deborah B. Barbier, Attorney at Law on behalf of the Third-Party Defendants. Having fully considered the matter, including the motion, the parties’ briefs and memoranda, and oral arguments, it is hereby **ORDERED** that Plaintiffs’ Motion to Strike or in the Alternative to Sever is **GRANTED IN PART** for the reasons set forth in more detail below.

BACKGROUND

Plaintiffs move to strike or in the alternative to sever Shurwest’s Third Party Complaint against Third-Party Defendants Miller and MSJM on the grounds that

Shurwest’s third-party claims are not derivative of Plaintiffs’ underlying claims, because Miller cannot be liable to Shurwest, and because of the potential for prejudice to Plaintiffs case and underlying claims. Shurwest argues that res judicata does not apply to its third-party claims against Miller and that they are true third-party claims that are derivative of Plaintiffs’ underlying claims.

A detailed summary of the factual background of the case is included in the Court’s July 24, 2020 Order Denying Shurwest’s Motion to Dismiss. In the interest of brevity, the Court refers to that summary in lieu of repeating here.

LEGAL STANDARD

“The question of whether to grant a motion to strike a third-party claim, whether filed with or without the leave of court, is addressed to the sound discretion of the trial court.” *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). A trial court is accorded wide discretion in determining whether to permit third party procedure, however, “the third-party claim must be ‘derivative’ of the plaintiff’s claim”. *Thompson v. UFP Eastern Div., Inc.*, 2012 WL 3686064, at *1 (D.S.C. 2012)

ANALYSIS

Here, the evidence before the Court establishes that Plaintiffs’ Motion to Strike should be Granted, in part, as set forth below.

A. Shurwest’s Third-Party Claims Are Not Derivative

For a third-party claim to be derivative of a plaintiff’s claim, “the non-party must be potentially liable to the third party plaintiff” and “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 Eastern*, 2012 WL 3686064, at *2 (quoting *Tetra Tech EC/Tsoro Joint Venture v. Sam Temples Masonry, Inc.* No. 10-1597, 2011 WL 1048964, at *3 (D.S.C. 2011)).¹

Shurwest's claims against Miller and MSJM do not satisfy either of these conditions. As explained by another court, "[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*, 117 F.R.D. at 578. That is what Shurwest is arguing here, that Miller is responsible for the conduct that harmed Plaintiffs, not Shurwest. The Third-Party Complaint explicitly states that "Shurwest is not responsible for any of the Plaintiffs' alleged damages relating to the promotion or sale of FIP products. Schulze-Miller and MJSM are." Third-Party Compl., at ¶ 12. Accordingly, Ms. Miller and MSJM's liability to Shurwest is not "dependent on the outcome of" Plaintiffs' claims against Shurwest. *Laughlin v. Dell Fin. Svcs, L.P.*, 465 F.Supp.2d 563, 566 (D.S.C. 2006).

B. Shurwest's Breach of Contract and Breach of Fiduciary Claims Are Barred By Issue Preclusion

"Issue preclusion bars the relitigation of only the particular issues that were actually litigated and decided in the prior suit." *Catawba Indian Nation v. State of S.C.*, 407 S.C. 526, 537, 756 S.E.2d 900, 907 (2014). It appears to this Court that the breach of contract

¹ S.C. R. Civ. P. "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. Comment to Rule 14 S.C. R. Civ. P.

and breach of fiduciary claims that Shurwest has asserted in its Third-Party Complaint are substantially the same as the breach of contract and breach of fiduciary duty claims that Shurwest asserted against Ms. Miller in the 2018 Arizona state court case, No.: CV2018-004665.

The evidence before the Court shows that Shurwest agreed to dismiss the Arizona claims with prejudice in September 2018. As such, Shurwest is barred from relitigating those issues here.

C. Shurwest’s Third-Party Claims Will Unduly Complicate This Litigation and Prejudice Other Parties

“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 v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989) (citing 6 C. WRIGHT AND A. MILLER, Federal Practice and Procedure § 1460 at 320-21 (1971)).

Based on the evidence and arguments presented here, the Court finds that continued joinder of the Third-Party Defendants will complicate the litigation and prejudice the Plaintiffs in a substantial way, including, but not limited to the likelihood that continued joinder of Miller and MSJM will cause this case to be stayed because of Receivership proceedings that are currently pending in the Federal Court. See, *In Re. Receiver for S. Kohn et al.*, C.A. 6:19-cv-01112 (D.S.C.).

D. Shurwest’s Equitable Indemnification Claim is Premature

To recover on an equitable indemnification cause of action, Shurwest must prove: 1) Schulze-Miller and MJSJ are liable for Plaintiffs’ damages; 2) Shurwest was

exonerated from any liability for those damages; and 3) Shurwest suffered damages as a result of Plaintiffs' claims against Shurwest, which were eventually proven to be the fault of Schulze-Miller and MJSM. *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011). Shurwest will not be able to make that showing until Plaintiffs' claims have been resolved. Accordingly, the claim for equitable indemnification is premature and should be severed so that it does not complete the trial of Plaintiffs' underlying claims.

CONCLUSION

For these reasons, Plaintiffs' Motion to Strike is **GRANTED** as to Shurwest's Third-Party claims for breach of contract and fiduciary duty. Plaintiffs' Motion to Strike is **DENIED** as to Shurwest's third-party claim for equitable indemnification. Plaintiffs' Motion in the Alternative to Sever is **GRANTED** as to Shurwest's third-party claim for equitable indemnification.

The Clerk of Court is hereby directed to assign a new and separate civil action number to Shurwest's equitable indemnification claim and Third-Party Complaint.

February ____, 2021

s/ _____
The Hon. R. Lawton McIntosh

Anderson, SC



Anderson Common Pleas

Case Caption: William Rich , plaintiff, et al VS J. Christopher Dixon , defendant, et al
Case Number: 2019CP0402151
Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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ELECTRONICALLY FILED - 2021 FEB 03 12:30 PM - ANDERSON - COMMON PLEAS - CASE# 2019CP0402151

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

William and Karen Rich,

Civil Action No. 2019-CP-04-02151

Plaintiffs,

ORDER

vs.

J. Christopher Dixon, Black Harbor Wealth
Management, LLC, Christopher J. Dixon,
Shurwest, LLC, and Minnesota Life Insurance
Company,

Defendants.

Shurwest, LLC

Third-Party Plaintiff,

vs.

MJSM Financial, LLC and Melanie Schulze-
Miller,

Third-Party Defendants.

Before the Court is Third-Party Defendants Melanie Schulze-Miller (“Schulze-Miller”) and MJSM Financial, LLC’s (“MJSM”) (collectively “Third-Party Defendants”) Motion to Dismiss the Third-Party Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6). The matter has been fully briefed by both Third-Party Defendants and Third-Party Plaintiff Shurwest, LLC (“Shurwest”), and a hearing was held on the matter on January 20, 2021. Having fully considered the matter, including the motion, the parties’ briefs and memoranda, exhibits, and oral arguments, it is hereby **ORDERED** that Third-Party Defendants’ Motion to Dismiss is **GRANTED** for the reasons set forth in more detail below.

BACKGROUND

The instant lawsuit was filed on April 17, 2019, by Plaintiffs Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gundrun Kornet, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, Diane Bernat and William Schaidle, consumers who had purchased structured cash flows sold by Future Income Payments, LLC, (“FIP”). FIP has been deemed a Ponzi scheme. Plaintiffs assert claims against the insurance agents who sold them the FIP products, Christopher J. Dixon and Samuel J. Dixon, and their company Black Harbor Wealth Management, LLC, (collectively “Dixon”) and the issuers of indexed universal life insurance policies that Plaintiffs funded using the FIP product, Defendants Minnesota Life Insurance Company (“MLIC”) and Pacific Life Insurance Company (“Pac Life”). (See Plaintiffs’ Complaint). Plaintiffs also named as a defendant Shurwest, LLC, an Arizona corporation that previously employed Schulze-Miller. On September 30, 2019, Plaintiffs dismissed Schulze-Miller and MJSM from this suit without prejudice. (See Stipulation for Dismissal of Schulze-Miller and MJSM).

Plaintiffs’ Complaint alleges that Dixon, with advice, recommendation, and education provided by Shurwest and Schulze-Miller, failed to conduct proper due diligence in facilitating the sale of life insurance products in conjunction with certain funding mechanisms administered by third parties, including FIP, which Plaintiffs refer to as the “Life Insurance Retirement Strategy a/k/a IRA Reboot Program” (the “Program”), allegedly causing harm to Plaintiffs in the form of financial losses. (Plaintiff’s Compl. ¶¶ 3-5, 84-87.) Plaintiffs also allege that Schulze-Miller “was an employee and/or agent of Shurwest” and that at “all times complained of herein acted within the scope of her employment as National Sales Director for Life Insurance for Shurwest.” (*Id.* ¶¶ 55-56.)

On July 27, 2020, Shurwest filed a Third-Party Complaint against Schulze-Miller and MJSM alleging that Schulze-Miller, MJSM, and Dixon failed to conduct proper due diligence on the FIP products and negligently disregarded risks associated with the FIP program. (Third-Party Complaint ¶ 7.) Shurwest alleges that Schulze-Miller and MJSM are responsible for the damages claimed against Shurwest by the Plaintiffs in this action arising from investments with FIP. (*Id.* ¶ 1.) Shurwest claims that it rejected Schulze-Miller’s request to promote FIP products to Shurwest clients, and, despite this, Schulze-Miller thereafter formed MJSM and marketed FIP products to agents, including Dixon. (*Id.* at ¶ 6.) Shurwest denies any knowledge of Schulze-Miller’s and MJSM’s alleged conduct. (*Id.* at ¶¶ 6,8.)

Specifically, in its Third-Party Complaint, Shurwest asserts three causes of action for: 1) equitable indemnification against Schulze-Miller and MJSM; 2) breach of contract against Schulze-Miller; and 3) breach of fiduciary duty as to Schulze-Miller. In its first claim, Shurwest seeks equitable indemnification of “any” of Plaintiffs’ alleged damages, which arise from Schulze-Miller’s alleged conduct in dealing with Plaintiffs, Dixon, and others, including the alleged dealings with FIP as part of the Program. (Third-Party Complaint ¶ 12.) In its second claim, Shurwest alleges that Schulze-Miller breached an employment agreement with Shurwest by misusing Shurwest’s confidential information in relation to the Plaintiffs’ claims. (*Id.* ¶ 15.) In its third claim, Shurwest alleges that Schulze-Miller breached a fiduciary duty to Shurwest by engaging in and concealing her unauthorized business related to FIP through MJSM, with resulting harm to Shurwest’s reputation and business. (*Id.* ¶¶ 18-20.)

PROCEDURAL HISTORY

Shurwest first sued Schulze-Miller on May 15, 2018, in *Shurwest, LLC v. Melanie Schulze-Miller, et al.*, Maricopa County (Arizona) Superior Court Case No. CV2018-004665 (the “Arizona Lawsuit”). (See Mot. to Dismiss, Ex. 1; Shurwest’s Resp. to Mot. to Dismiss, Ex. A at 1.)¹ In the Arizona complaint, Shurwest alleged that Schulze-Miller was a Shurwest employee from June 2012 to May 2018 and the company’s National Sales Director for Life Insurance. (Mot. to Dismiss, Ex. 1 ¶ 6.) The terms of her employment were based on an At-Will Employment and Restrictive Covenants Agreement (the “Employment Agreement”). (*Id.* ¶ 7.)

Shurwest alleged that the Employment Agreement restricted Schulze-Miller’s ability to access and use Shurwest’s confidential information, including information about Shurwest’s “Clients,” except in the ordinary course of her employment. (*Id.* ¶ 8.) By Shurwest’s definition, “Clients” included, among other things: “Clients, consumers, and individuals who hold insurance or annuity policies distributed by or through [Shurwest or its affiliates]” (*Id.* ¶ 9.)

Shurwest claimed that in April 2018 it discovered Schulze-Miller had breached the Employment Agreement and violated her fiduciary duties by allegedly marketing, promoting, or selling the FIP products at issue in the instant action. (Mot. to Dismiss, Ex. 1 ¶ 13.) Shurwest alleged that Schulze-Miller was not authorized to engage in these FIP activities, and that she concealed her actions from Shurwest. (*Id.* ¶ 16.) Shurwest also alleged that Schulze-Miller formed MJSM to conduct the FIP activities without Shurwest’s knowledge, and that she used Shurwest’s confidential Client information in connection with her FIP activities. (*Id.* ¶¶ 17-18.) Shurwest asserted these actions could have implied a relationship between FIP and Shurwest, and that

¹In analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider documents incorporated into the complaint by reference, including judicial notice of court orders. See *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) (holding motion to dismiss not converted into motion for summary judgment where trial court relied on transcripts and court orders in underlying class action lawsuit).

Shurwest’s reputation was harmed because FIP was under governmental scrutiny. (*Id.* ¶¶ 19, 22.) Shurwest terminated Schulze-Miller for these allegedly unauthorized actions related to FIP. (*Id.* ¶ 21.)

Based on these allegations, Shurwest asserted claims in the Arizona lawsuit against Schulze-Miller for breach of the Employment Agreement (Mot. to Dismiss, Ex. 1 ¶¶ 25-30), breach of the implied covenant of good faith and fair dealing under the Employment Agreement (*Id.* ¶¶ 31-36), and breach of fiduciary duty arising from her employment with Shurwest and related to the FIP circumstances at issue in this action (*Id.* ¶¶ 37-43). Schulze-Miller answered the complaint on June 11, 2018, and denied all wrongdoing. (Mot. to Dismiss, Ex. 2.) She also asserted several counterclaims against Shurwest for declaratory judgment, breach of Shurwest’s obligation to pay wages to her under the Employment Agreement, and breach of the covenant of good faith and fair dealing. (*Id.* ¶¶ 42-138)

On September 12, 2018, the parties entered a settlement agreement (“Settlement”) in which the parties agreed that they would seek an order dismissing “all claims and counterclaims in the Lawsuit with prejudice with each side to bear its/his/her own costs and attorneys’ fees.” (Third-Party Pl.’s Response to Mot. to Dismiss, Ex. 1 at 1-2). Thereafter, on September 14, 2018, the parties filed a stipulation to dismiss the Arizona Lawsuit with prejudice as to all claims and counterclaims, each side to bear its own costs and attorneys’ fees. (*See* Mot. to Dismiss, Ex. 3.) Following that stipulation, on September 20, 2018, the Arizona (Maricopa County) Superior Court dismissed with prejudice the Arizona Lawsuit. (*See* Mot. to Dismiss, Ex. 4.)

LEGAL STANDARD

Under Rule 12(b)(6), SCRC, a complaint should be dismissed if it fails “to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRC. “Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” *Brown v. Theos*, 338 S.C. 305, 309-10, 526 S.E.2d 232, 235 (Ct. App. 1999), *aff’d*, 345 S.C. 626, 550 S.E.2d 304 (2001) (quoting *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998)).

The general rule is well established that once a person has had a full and fair opportunity to litigate a claim, the person is precluded, under the doctrine of res judicata, from relitigating it. *See New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). “When claims arising out of a particular transaction or occurrence are adjudicated, res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit.” *Judy v. Judy*, 383 S.C. 1, 8, 677 S.E.2d 213, 217 (Ct. App. 2009), *aff’d*, 393 S.C. 160, 712 S.E.2d 408 (2011) (emphasis added); *see also Taylor v. Taylor*, 241 S.C. 462, 128 S.E.2d 910, 913 (1962) (“The doctrine of res judicata has been generally said to bar relitigation not only of issues actually decided in the former proceeding, but also of such issues as could have been there presented for decision.”).

“[A]ll questions which were actually litigated in the prior action and determined by the judgment are conclusive in any subsequent action between the parties, or their privies, regardless of whether the subsequent action involves the same or a different cause of action.” *Lowe v. Clayton*, 264 S.C. 75, 82, 212 S.E.2d 582, 585-86 (1975). Further, “simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of

the subjects of the two actions.” *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (citing *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999)).

“To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. “A case that is dismissed ‘with prejudice’ indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication.” *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) (emphasis added).

ANALYSIS

1. Issue preclusion bars Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty.

Third-Party Defendants move to dismiss the Third-Party Complaint on the ground that it is barred by res judicata because the parties, subject matter, and issues in Shurwest’s Third-Party Complaint are identical and indistinguishable from claims that were made the Arizona Lawsuit that was dismissed with prejudice. In its response, Shurwest argues that res judicata does not apply because the claims in the Third-Party Complaint are entirely different from the claims Shurwest previously asserted against Schule-Miller in the Arizona Lawsuit, arise out of a separate set of occurrences, and will require distinct and additional evidence at trial. Shurwest also contends that the claims it raises in the Third-Party Complaint relate to and arise out of Schulze-Miller and MJSM’s conduct with respect to consumers and their losses.

As discussed below in detail, applying the principles of res judicata set forth above, the Court finds that Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty are barred by res judicata because they were previously asserted (or could have been asserted) in prior litigation between the parties and were dismissed with prejudice in the Arizona

Lawsuit. Further, the Court finds that, as to these two claims, the parties share identity because Shurwest sued Schulze-Miller in both actions for her conduct and on behalf of MJSM. Finally, the Court finds that 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 Plaintiffs through MJSM, which it also sought in the Arizona Lawsuit.

As noted above, the Arizona Complaint included causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty against Schulze-Miller—all arising from the Employment Agreement. A comparison of the allegations in Shurwest’s Third-Party Complaint for its breach of contract and breach of fiduciary duty claims and its allegations in the Arizona Lawsuit clearly illustrate that these claims concern the same conduct and are the same claims:

ARIZONA LAWSUIT

THIRD-PARTY COMPLAINT

“Ms. 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, in violation of . . . the Employment Agreement.” (Mot. to Dismiss, Ex. 1 ¶ 27.)

“Schulze-Miller materially breached the employment agreement by misusing Shurwest’s confidential information for her own selfish benefit and to Shurwest’s detriment, in violation of the employment agreement’s terms.” (Third-Party Compl. ¶ 15.)

“Under Arizona law, Ms. Schulze-Miller owed a fiduciary duty to Shurwest as a Shurwest employee, which included duties of loyalty, utmost good faith, honesty and full disclosure.” (Mot. to Dismiss, Ex. 1 ¶ 38.)

“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

“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.” (Mot. to Dismiss, Ex. 1 ¶ 39.)

“Ms. Schulze-Miller breached her fiduciary duties of utmost good faith and loyalty by misusing Shurwest 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.” (Mot. to Dismiss, Ex. 1 ¶ 40.)

“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.” (Mot. to Dismiss, Ex. 1 ¶ 41.)

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.” (Third-Party Compl. ¶ 18.)

“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.” (Third-Party Compl. ¶ 19.)

Moreover, in the Arizona Lawsuit, Shurwest alleged that “Ms. Schulze-Miller further breached the implied covenant by secretly acting to personally profit at the expense of Shurwest and its Clients.” (Mot. to Dismiss, Ex. 1 ¶ 34). All of these claims arise from the same alleged conduct—injury and damages to Shurwest and its clients resulting from Schulze-Miller’s allegedly unauthorized actions regarding marketing and promoting the FIP products to Plaintiffs. Shurwest voluntarily dismissed the claims in the Arizona Lawsuit with prejudice. (See Mot. to Dismiss, Exs. 3 and 4.)

Here, res judicata bars the Third-Party Complaint because the claims in both actions are the same, arise out of the same underlying circumstances, and were conclusively adjudicated and

dismissed with prejudice in the prior Arizona Lawsuit. *See RIM Assocs.*, 359 S.C. at 184 (Ct. App. 2004) (“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 these parties”) (emphasis in the original).²

Moreover, simply because Shurwest’s second claim for relief in the Arizona Lawsuit (bad faith) is not identical to its claims in the present action does not preclude application of res judicata because the same conduct was at issue. The primary claim that Schulze-Miller allegedly conducted unauthorized FIP activities and associated claims were raised in the Arizona Lawsuit and the action was dismissed with prejudice. *See Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C.

²Shurwest argues that the law of Arizona, not South Carolina, applies when determining whether res judicata bars the Third-Party Complaint because a judgment is to be given the res judicata effect that the judgment would be afforded in the state in which it was rendered, which here was Arizona. Even applying Arizona law, however, the Third-Party Complaint would be barred by res judicata. Under Arizona law on res judicata, a final judgment on the merits is conclusive as to every point decided and “every point decided [in the first action] and also as to every point raised by the record which could have been decided” as to the parties and their privies in all other actions. *Fuller v. Hartford Accident & Indem. Co.*, 601 P.2d 1360, 362 (Ariz. Ct. App. 1979) (quoting *Hoff v. City of Mesa*, 344 P.2d 1013, 1014 (Ariz. 1959); *see also Pettit v. Pettit*, 189 P.3d 1102, 1105 (Ariz. Ct. App. 2008) (res judicata bars a new claim based not only upon the facts litigated in the first lawsuit but also upon all matters that might have been litigated). In deciding whether an action is the same cause of action for res judicata purposes, Arizona courts use the “same evidence” test. *Pettit*, 189 P.3d at 1105. Under this test, “the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action.” *Id.* (quoting Restatement of Judgments § 61 (1942)). Further, “[u]nlike issue preclusion, which applies only to issues that were actually litigated, a second claim is precluded ‘not only upon facts actually litigated but also upon those points which might have been litigated.’” *Id.* at 1106 (citing *Gilbert v. Bd. of Med. Exam ’rs*, 745 P.2d 617, 622 (Ariz. Ct. App. 1987) (internal citations omitted)); *see also Best v. Ceja*, 2019 WL 4271848 (Ariz. Ct. App. Sept. 10, 2019). Here, all of Shurwest’s claims involve Schulze-Miller’s allegedly acting outside the scope of her employment by promoting and selling FIP products. The evidence needed to sustain the claims raised in the Third-Party Complaint would have sustained the claims raised in the Arizona Lawsuit. Moreover, because Schulze-Miller is the sole member of MJSM, LLC, there is privity between these parties. *See Eden v. Deublein*, 2017 WL 929747, *3 (Ariz. Ct. App. Mar. 9, 2017).

467, 419 S.E.2d 217 (1992) (res judicata barred action arising from dispute over payment of insurance premiums because the trial court previously resolved the primary accounting issue).

Shurwest also contends that res judicata does not apply because MJSM was not a party to the Arizona Lawsuit and lacks privity. Shurwest cites to numerous cases that stand for the proposition that an LLC is a distinct legal entity from its members. However, “[f]or purpose of res judicata . . . the concept of privity rests not on the relationship between the parties asserting it, but rather on each party’s relationship to the subject matter of the litigation.” *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citing *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986)); see also *Snavelly v. AMISUB of S.C., Inc.*, 379 S.C. 386, 665 S.E.2d 222, 228 (S.C. Ct. App. 2008) (holding that “while the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.”). “The term ‘privity’, when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.” *Richburg*, 290 S.C. at 434, 351 S.E.2d at 166. 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. See *James v. Wright*, C.A. No. 1:13-1438-TMC, 2014 WL 2612487, at *4 (D.S.C. June 9, 2014) (finding individual defendant SCDC employees and the SCDC were in privity for res judicata purposes). Although MJSM was not involved in the first suit, it and Schulze-Miller were in privity, and therefore, MJSM’s legal interests were litigated in the first action.

In sum, because Shurwest’s breach of contract and breach of fiduciary duty claims in this action are substantially identical and arise from the same facts and circumstances as the claims it

asserted in the Arizona Lawsuit, res judicata precludes Shurwest from re-litigating these claims and allegations in this case. Therefore, the Court strikes Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty in their entirety as barred by res judicata. *See Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997). (“In a subsequent suit between the same parties on a different claim, the former judgment is conclusive as to those issues actually determined in the prior action.”) Doing so “effectuates the fundamental purpose of res judicata, which is to ensure that ‘no one should be twice sued for the same cause of action.’” *Judy*, 393 S.C. at 173, 712 S.E.2d at 414 (quoting *First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

Accordingly, Third-Party Defendants’ Motion to Dismiss is **GRANTED** as to Shurwest’s breach of contract and breach of fiduciary duty claims.

2. Shurwest’s Third-Party cause of action for equitable indemnification.

Third-Party Defendants Schulze-Miller and MJSM argue that the equitable indemnity claim is indistinguishable from the subject matter of the Arizona Lawsuit because it arises from the same alleged conduct—injury and damages to Shurwest resulting from Schulze-Miller’s allegedly unauthorized actions regarding the FIP products to Plaintiffs. Shurwest argues in opposition that the equitable indemnity claim survives the Motion to Dismiss because it did not exist at the time of the Arizona Lawsuit. Shurwest contends that this claim and all the facts relating to it arose in January 2019 after Plaintiffs brought their action against Shurwest.³

³In its Third-Party Complaint, Shurwest cites to an order from a United States District Judge in Arizona entering summary judgment in a declaratory judgment action, *Landmark American Insurance Company v. Shurwest*, No. 2:19-cv-04743-SRB (D. Ariz.), and states that “[a] federal judge has ruled that, as a matter of law, Schulze-Miller acted on her own behalf and concealed her activities from Shurwest.” (Third-Party Compl. 1 ¶ 9). Schulze-Miller was not a party to the declaratory action and is not bound by any findings made there. The issues decided there—coverage under the Landmark American policy—are irrelevant to the issues before this Court.

The Court finds that the claim for equitable indemnification is to be severed, with that claim to be tried upon the issue becoming ripe for adjudication.

Neither side addressed in its moving papers the salient issue regarding Shurwest's claim for equitable indemnity, which is that the claim is not ripe for adjudication. "[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton County Taxpayers Ass'n v. Sch. Dist. Of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). Here, Shurwest's indemnity claim is that it is not responsible for Plaintiffs' alleged damages in this action, and that Third-Party Defendants are liable to Shurwest for Plaintiffs' damages based on Third-Party Defendants' alleged conduct in dealing with Plaintiffs. Thus, an adjudication on Shurwest's indemnification claim is premature because it is contingent on the Plaintiffs successfully proving their claims against Shurwest.

Accordingly, it is **ORDERED** that Shurwest's claim for equitable indemnity is severed from this case, to be tried upon the issue becoming ripe for adjudication.

3. Attorneys' fees and costs.

Pursuant to the South Carolina Frivolous Civil Proceedings Sanction Act ("FCPSA"), Third-Party Defendants Schulze-Miller and MJSM also request an award of their attorneys' fees and costs for having to bring this motion and respond to the precluded claims, which Shurwest knew were unwarranted based on its undisputed knowledge of the Arizona Lawsuit and its dismissal with prejudice. *See* S.C. Code Ann. § 15-36-10(A)(4). "The [FCPSA] provides for liability for attorney fees and costs of frivolous suits." *Ex parte Gregory*, 378 S.C. 431, 438, 663 S.E.2d 46, 50 (2008). The FCPSA provides:

Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10. To be awarded attorney’s fees and costs under the FCPSA, a litigant must show: “(1) the other party has procured, initiated, continued, or defended the civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings; (4) the aggrieved person has incurred attorney’s fees and court costs; and (5) the amount of the fees and costs set forth in item (4).” *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 98, 637 S.E.2d 316 (Ct. App. 2006) (*citing* § 15-36-10). The FCPSA utilizes a reasonable attorney standard to determine whether sanctions are warranted. *See SE Site Prep. LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011).

Here, in its Third-Party Complaint, Shurwest alleges causes of action for the same conduct that was raised (or could have been) in the previous Arizona Lawsuit. Having granted Third-Party Defendants’ Motion to Dismiss on the ground of res judicata as to the claims for breach of contract and breach of fiduciary duty, as well as severing Shurwest’s claim for equitable indemnity for lack of a ripe justiciable controversy, Third-Party Defendants are entitled to an award of attorney’s fees and costs under the FCPSA.

Further, it is inconceivable that Shurwest reasonably believed that its breach of contract and breach of fiduciary duty claims against Third-Party Defendants, which had previously been dismissed with prejudice, were valid. *See Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 98, 637 S.E.2d 316 (Ct. App. 2006) (finding sanctions were warranted

under the FCPSA against plaintiff for bringing frivolous causes of action “for the same complaint as in previous lawsuits”).

Accordingly, the Court will award Third-Party Defendants their attorney fees and costs. Third-Party Defendants are to file an affidavit setting forth the amount of such fees and costs within ten days of the filing of this Order.

CONCLUSION

For these reasons, Third-Party Defendants’ Motion to Dismiss the Third-party Complaint based on res judicata is **GRANTED**. It is therefore **ORDERED** that Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty are stricken in their entirety on issue preclusion grounds, and Shurwest’s cause of action for equitable indemnity is severed from this case, to be tried upon the issue becoming ripe for adjudication.

February ____, 2021

The Honorable R. Lawton McIntosh
Anderson, SC



Anderson Common Pleas

Case Caption: William Rich , plaintiff, et al VS J. Christopher Dixon , defendant, et al
Case Number: 2019CP0402151
Type: Order/Other

S/R. LAWTON McINTOSH

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FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-04-02151

WILLIAM AND KAREN RICH

J. CHRISTOPHER DIXON, BLACK HARBOR
 WEALTH MANAGEMENT, LLC,
 CHRISTOPHER J. DIXON, SHURWEST, LLC,
 AND MINNESOTA LIFE INSURANCE
 COMPANY,

PLAINTIFF(S)

DEFENDANT(S)

SHURWEST, LLC
 THIRD PARTY PLAINTIFFS

MJSM FINANCIAL, LLC AND MELANIE
 SCHULZE-MILLER,
 THIRD PARTY DEFENDANTS

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

ORDER FILED ON FEBRUARY 3, 2021 AT 3:29 P.M. SHALL BE RESCINDED AS TO MATTER OF ATTORNEY FEES ONLY. ALL OTHER MATTERS IN THIS ORDER SHALL REMAIN IN FULL EFFECT.

This order ends does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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		\$
		\$

FILED ELECTRONICALLY FILED - 2/2/21 11:40:21 AM - ANDERSON COUNTY COMMON PLEAS - CASE# 2019CP0402151



Anderson Common Pleas

Case Caption: William Rich , plaintiff, et al VS J. Christopher Dixon , defendant, et al
Case Number: 2019CP0402151
Type: Order/Form 4

S/R. LAWTON McINTOSH

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

William and Karen Rich,

Plaintiffs,

Civil Action No: 2019-CP-04-02151

Vs.

**ORDER DENYING SHURWEST, LLC'S
MOTION TO DISMISS**

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

Defendants.

Before the Court is Shurwest, LLC's Motion to Dismiss for Lack of Personal Jurisdiction. The matter has been fully briefed by both Shurwest and Plaintiffs. A hearing was held on the matter on Tuesday June 23, 2020 beginning at 10:00 AM with Robert Rikard and Jescelyn Spitz of the Rikard & Protopapas, LLC firm appearing on behalf of Plaintiffs and I.S. Leevy Johnson of Johnson Toal and Batiste, PA and Jason Hopkins of DLA Piper appearing on behalf of the Defendant Shurwest. Having fully considered the matter, including the motion, the parties' briefs and memoranda, supplemental filings and oral arguments, it is hereby **ORDERED** that Shurwest's Motion to Dismiss for Lack of Personal Jurisdiction is **DENIED** without prejudice for the reasons set forth in more detail below.

BACKGROUND

Defendant Shurwest moves to dismiss Plaintiffs' Complaint on the ground that the Court lacks personal jurisdiction – both general and specific – over Shurwest. Plaintiffs argue that they have sufficiently pled facts and causes of action against Shurwest that

establishes the Court has both general and specific jurisdiction over Shurwest for purposes of this matter.

This case arises out of Plaintiffs' loss of retirement savings. Plaintiffs were sold indexed universal life insurance policies (IUL) as a financial planning and retirement tool, which they contend were inappropriate for their needs. The IULs were the central component of a marketing and sales strategy designed by Shurwest that was known as the "IRA Reboot Program". To help fund the IULs, Plaintiffs also purchased structured cash flow products through Future Income Payments, LLC ("FIP"). Plaintiffs allege that their insurance agent, Chris Dixon, advised them to purchase FIP to allow them to fund the IULs at higher levels and that Dixon's advice was based on the recommendation, education and training that Shurwest provided to Dixon. Plaintiffs allege that Shurwest and Melanie Schulze-Miller, National Life Director at Shurwest, were the architects of the IRA Reboot Program.

Plaintiffs further allege that Shurwest was aware that Melanie Schulze-Miller and other Shurwest employees were recommending FIP to its network of insurance agents and brokers in order to fund purchases of IULs (and fund them at higher levels) and that Shurwest received commissions on the purchase and sale of the IULs and therefore benefitted from the IRA Reboot Program.

Shurwest denies these allegations. Shurwest further argues that Shurwest never made any money from FIP, that the IUL policies are legitimate and legal and that Melanie-Schulze-Miller was a rogue employee who was operating outside the scope of her employment with Shurwest.

LEGAL STANDARD

At this stage, a plaintiff need only make a *prima facie* showing of jurisdiction, either in the allegations of the complaint, evidence presented to court, or both. *Sullivan v. Hawker Beachcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012). The plaintiff bears the burden of proving the existence of grounds for jurisdiction by the preponderance of the evidence under Rule 12(b)(2). See *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996).

When a motion to dismiss attacks the allegations of the complaint on the issue of personal jurisdiction, the court is not confined to the allegations of the complaint but may also consider affidavits or other evidence to determine jurisdiction. *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 562-63, 683 S.E.2d 486, 490 (2009).

Personal jurisdiction is exercised as “general jurisdiction” or “specific jurisdiction.” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478. S.C. Code Ann. § 36–2–802 governs general jurisdiction and states: “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.” A court may assert general jurisdiction if the defendant has an “enduring relationship” with the forum state. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005). To establish an “enduring relationship,” the defendant's contacts must be “continuous and systematic” as well as “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.” See *Id.* at 17, 655 S.E.2d at 479 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

S.C. Code Ann. § 36–2–803 governs specific jurisdiction and provides that a court may exercise personal jurisdiction over a person who acts directly “as to a cause of action arising from the person’s: (1) transacting any business in this state; . . . (4) causing tortious injury or death in this State by an act or omission outside this State if the regularly does or solicits business” in this state. South Carolina’s long-arm statute extends to the constitutional limits of due process, and, as a result, state law analysis collapses into constitutional analysis. Thus, the question becomes whether the non-resident defendant has sufficient “minimum contacts” with South Carolina such that the maintenance of the suit in South Carolina does not offend traditional notions of fair play and substantial justice. *Young v. Jones*, 1992, 816 F.Supp. 1070, *affirmed* 103 F.3d 1180, *cert. denied* 118 S.Ct. 329, 522 U.S. 928, 139 L.Ed.2d 255.

Due Process permits the exercise of specific personal jurisdiction over a defendant if “the defendant [has] purposefully established minimum contacts in the form State such that it should reasonably anticipate being hailed into court there.” *Perdue Foods LLC v. BRF S.A.*, 814 F.3d 185, 189 (4th Cir. 2016). Specific jurisdiction can be exercised if “the defendant has purposefully directed his activities at residents of the forum, and the litigation results from the alleged injuries that arise out of or relate to those activities.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

ANALYSIS

Here, the evidence before the Court establishes that Plaintiffs have made a *prima facie* showing that Shurwest is subject to both general and specific personal jurisdiction in South Carolina.

A. General Jurisdiction

Plaintiffs have alleged and shown that Shurwest is registered with the South Carolina Department of Insurance and the South Carolina Secretary of State’s Office and has been for many years. **Exhibits 3 & 4**, Memo. In Opp. As such, Shurwest has an “enduring relationship” with South Carolina and its contacts with the State are “substantial, continuous and systematic” to justify suit against Shurwest on causes of action that are not related Shurwest’s specific activities in South Carolina. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005); *Coggeshall v. Reproductive Endocrine Associates of Charlotte*, 376 S.C. 17, 655 S.E.2d 476, 479 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

B. Specific Jurisdiction

Plaintiffs have presented ample evidence to support their allegations that Shurwest purposefully directed activities toward South Carolina and that Plaintiffs’ causes of action arise out of those activities. As noted above, Shurwest is and has been registered with the South Carolina Department of Insurance and the South Carolina Secretary of State’s Office for some time. (**Exhibits 3 & 4**, Memo. In Opp.) Christopher Dixon proposed a retirement planning strategy for Plaintiffs that paired the purchase of Indexed Universal Life Insurance Policies with FIP as a funding mechanism designed to generate income for Plaintiffs that could be used to pay the IUL policy premiums. (Compl. ¶¶ 4, 6). Dixon and a member of his staff traveled to Shurwest’s offices in Arizona to meet with Melanie Schulze-Miller and to learn more about these products. (Compl. ¶ 10). Melanie Schulze-Miller also traveled to South Carolina to visit Dixon and his staff to provide education, training and in person illustrations regarding the IRA Reboot program. (Compl. ¶ 9).

Following these trips, Schulze-Miller remained Dixon's contact person at Shurwest and she and a team of Shurwest employees continued to answer questions and provide assistance to Dixon and his staff related to Plaintiffs' participation in the IRA Reboot Program. (Compl. ¶ 16; **Exhibits 5, 22, 23**, Memo. In Opp.) Plaintiffs ultimately participated in the IRA Reboot Program and claim that they have suffered harm as a result. (See, generally Compl.)

From the facts before the Court, Plaintiffs have alleged 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 IUL policies at higher levels, and that Shurwest received commissions from the sale of IUL policies and thus benefitted from the sale of IUL policies and the increased funding levels provided by FIP.

The evidence and argument by Shurwest that Melanie Schulze-Miller was a rogue employee operating without Shurwest's knowledge or permission is not credible in light of competing evidence offered by Plaintiffs that suggests 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 commissions. The characterization of this as the activity of a single rogue employee is further undercut by the volume of correspondence and the fact that much of it involves other Shurwest employees.

Finally, the Court is mindful that Plaintiffs are simply required to make a *prima facie* showing of jurisdiction when challenged by a Motion to Dismiss under Rule 12(b)(2). Sullivan v. Hawker Beechcraft Corp. 397 S.C. 143, 723 S.E.2d 835, (Ct. App. 2012). At times, Shurwest argues that many of Plaintiffs’ allegations are not accurate and offers up alternative allegations of its own. These arguments are unavailing, as the Court must take the allegations and available evidence relating to personal jurisdiction in the light most favorable to the plaintiff. Moreover, they are unpersuasive in the face of substantial evidence offered by Plaintiffs in support of their jurisdictional allegations and the allegations in the Complaint.

For these reasons, the Court finds that Shurwest has purposefully availed itself of forum benefits in South Carolina, and that its contacts in doing so are sufficient to subject Shurwest to suit in South Carolina. The contacts considered by the Court relate to Shurwest’s enduring relationships with South Carolina, its marketing and sale of the “IRA Reboot” program to agents in South Carolina and to these Plaintiffs and other South Carolinians. This controversy arises out of those contacts with South Carolina. Finally, the assertion of personal jurisdiction over Shurwest in this matter comports with the concepts of fair play and substantial justice. South Carolina has an interest in protecting its citizens and residents from predatory insurance practices such as the ones alleged in Plaintiffs’ Complaint, and providing them a redress for their injuries.

CONCLUSION

For these reasons, Defendant’s Motion to Dismiss is **DENIED** without prejudice. If additional information is revealed during discovery which supports Shurwest’s claim that

the Court lacks personal jurisdiction over Shurwest, Shurwest is free to re-file this motion or otherwise raise the issue of personal jurisdiction with the Court.

July __, 2020

s/ _____
The Hon. J. Cordell Maddox, Jr.

Anderson, SC



Anderson Common Pleas

Case Caption: William Rich , plaintiff, et al VS J. Christopher Dixon , defendant, et al
Case Number: 2019CP0402151
Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

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DECLARATION OF MICHAEL T. SEABOLT

I, Michael T. Seabolt, being duly sworn according to law, declare as follows:

1. My name is Michael T. Seabolt. I am an adult individual who resides in Arizona.

2. I have personal knowledge of the information stated in this Declaration and make the following factual statements herein voluntarily.

3. I was employed by Shurwest, L.L.C. ("Shurwest") from August 2016 until I was terminated in July 2018. Just before my termination, on July 24, 2018, I voluntarily submitted to an interview by Shurwest's legal counsel, Ballard Spahr, at Shurwest's offices in Scottsdale. This Declaration sets forth the information I disclosed during the July 24, 2018 interview.

4. Until May 2018, my direct supervisor at Shurwest was Melanie Schulze-Miller, Shurwest's National Sales Director for Life Insurance. At the time of my termination, my position at Shurwest was Strategic Life Consultant.

5. Shortly after joining Shurwest, I learned about Future Income Payments, LLC ("FIP") from Ms. Schulze-Miller. Without Shurwest's knowledge, Ms. Schulze-Miller recruited me to work for MJSM Financial LLC ("MJSM"), an Arizona limited liability company that she had formed.

6. Ms. Schulze-Miller explained to me that FIP products would be offered or promoted by MJSM. She stated that Shurwest did not approve of, offer or sponsor FIP products and that they were not sold through Shurwest.

7. MJSM paid me a commission to refer financial and insurance advisors ("Advisors") to FIP. All compensation I received relating to my FIP-related activities was paid

to me by MJSM. I understand that Shurwest received no referral fees or other compensation from FIP or MJSM for any FIP-related activities.

8. My activities relating to FIP products were not part of my Shurwest job responsibilities.

9. On behalf of MJSM, I frequently referred Advisors who expressed an interest in FIP to speak directly with Joe Hipp of FIP. My understanding is that Advisors contracted directly with FIP and had a duty to conduct their own due diligence before recommending any products to their clients.

10. Shurwest management did not know about MJSM, my FIP-related activities, my referral fee relationship with MJSM and FIP, or any FIP-related commissions received by me or others.

11. The entirety of my relationship with FIP and all of my FIP-related work was done for MJSM, not for Shurwest.

12. Ms. Schulze-Miller and I told the Advisors that we referred to FIP and others that I dealt with regarding FIP that our work related to FIP was separate from Shurwest. Ms. Schulze-Miller created MJSM email accounts for herself and me to use for all FIP-related activities.

13. Any use of my Shurwest email account for FIP-related issues was inadvertent. I meant to use my MJSM email account for all FIP-related business and instructed Advisors to use my MJSM email for FIP-related business.

14. Without telling or asking Shurwest management, I on occasion asked Shurwest employees who worked under me to perform clerical tasks for the benefit of MJSM. I

DECLARATION OF MICHAEL T. SEABOLT

I, Michael T. Seabolt, being duly sworn according to law, declare as follows:

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3. I was employed by Shurwest, L.L.C. ("Shurwest") from August 2016 until I was terminated in July 2018. Just before my termination, on July 24, 2018, I voluntarily submitted to an interview by Shurwest's legal counsel, Ballard Spahr, at Shurwest's offices in Scottsdale. This Declaration sets forth the information I disclosed during the July 24, 2018 interview.

4. Until May 2018, my direct supervisor at Shurwest was Melanie Schulze-Miller, Shurwest's National Sales Director for Life Insurance. At the time of my termination, my position at Shurwest was Strategic Life Consultant.

5. Shortly after joining Shurwest, I learned about Future Income Payments, LLC ("FIP") from Ms. Schulze-Miller. Without Shurwest's knowledge, Ms. Schulze-Miller recruited me to work for MJSM Financial LLC ("MJSM"), an Arizona limited liability company that she had formed.

6. Ms. Schulze-Miller explained to me that FIP products would be offered or promoted by MJSM. She stated that Shurwest did not approve of, offer or sponsor FIP products and that they were not sold through Shurwest.

7. MJSM paid me a commission to refer financial and insurance advisors ("Advisors") to FIP. All compensation I received relating to my FIP-related activities was paid

to me by MJSM. I understand that Shurwest received no referral fees or other compensation from FIP or MJSM for any FIP-related activities.

8. My activities relating to FIP products were not part of my Shurwest job responsibilities.

9. On behalf of MJSM, I frequently referred Advisors who expressed an interest in FIP to speak directly with Joe Hipp of FIP. My understanding is that Advisors contracted directly with FIP and had a duty to conduct their own due diligence before recommending any products to their clients.

10. Shurwest management did not know about MJSM, my FIP-related activities, my referral fee relationship with MJSM and FIP, or any FIP-related commissions received by me or others.

11. The entirety of my relationship with FIP and all of my FIP-related work was done for MJSM, not for Shurwest.

12. Ms. Schulze-Miller and I told the Advisors that we referred to FIP and others that I dealt with regarding FIP that our work related to FIP was separate from Shurwest. Ms. Schulze-Miller created MJSM email accounts for herself and me to use for all FIP-related activities.

13. Any use of my Shurwest email account for FIP-related issues was inadvertent. I meant to use my MJSM email account for all FIP-related business and instructed Advisors to use my MJSM email for FIP-related business.

14. Without telling or asking Shurwest management, I on occasion asked Shurwest employees who worked under me to perform clerical tasks for the benefit of MJSM. I

DECLARATION OF MICHAEL T. SEABOLT

I, Michael T. Seabolt, being duly sworn according to law, declare as follows:

1. My name is Michael T. Seabolt. I am an adult individual who resides in Arizona.

2. I have personal knowledge of the information stated in this Declaration and make the following factual statements herein voluntarily.

3. I was employed by Shurwest, L.L.C. ("Shurwest") from August 2016 until I was terminated in July 2018. Just before my termination, on July 24, 2018, I voluntarily submitted to an interview by Shurwest's legal counsel, Ballard Spahr, at Shurwest's offices in Scottsdale. This Declaration sets forth the information I disclosed during the July 24, 2018 interview.

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Aug 31 2021

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other materials.



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