IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D24-0103
L.T. CASE NO.: 2021-10178-CA 01

S.U.R. LLC,

APPELLANT,

-VS.-

FONDO DE INVERSIÓN STELLA

APPELLEE.

APPELLANT'S INITIAL BRIEF

On Appeal From The Circuit Court of The Eleventh Judicial Circuit In And For Miami-Dade County, Florida

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Rules

INTRODUCTION

This is an appeal from a summary judgment order entered in favor of Plaintiff-Appellee, Fondo de Inversion Stella ("FIS" or "Appellee"), and against Defendants-Appellants,[1] S.U.R. LLC and S.U.R. Corporation (collectively, "S.U.R. Entities"). R.3009-27; 2371-82.

In the proceedings below, FIS sought declaratory judgment regarding the ownership of the S.U.R. Entities, alleging that while acting as FIS's investment fund manager in Peru, Mr. Lizardo Vargas Revilla engaged in a series of unauthorized transfers of the ownership interest in the entities, and the trial court should void those transfers. *Id.* FIS also sought enforcement of its alleged shareholder/membership rights to access corporate records under Florida law, arguing that the S.U.R. Entities improperly withheld access to said records from FIS's liquidator, Mr. Erick Iriarte Ahon. R.3014-15. On December 18, 2023, the trial court granted FIS's summary judgment motion on all counts against the S.U.R. Entities and awarded costs, including attorney's fees to FIS despite unmistakable evidence of disputed

[1] S.U.R. Corp. is an appellant in Case No. 3D24-0105, also before this Third District Court of Appeals.

material facts and several procedural deficiencies.

As a threshold matter, following the hearing on the motion for summary judgment but prior to the rendering of the order at issue, FIS filed two amended pleadings raising additional allegations against the S.U.R. Entities and joining an additional defendant and indispensable party to the lawsuit, Atrium Global Investments, Inc. ("Atrium"). Admittedly, FIS's first Amended Complaint (deemed filed on June 24, 2022 (R.1187)) was the controlling pleading at the time the Motion for Summary Judgment was filed. However, on May 5, 2023, three days after the hearing on the Motion, FIS filed a Second Amended Complaint. R.1860-2007;2958. Thereafter, on October 12, 2023, two months prior to the rendering of the order, FIS filed a Third Amended Complaint. R.2090-2311. In effect, the amended complaints superseded the pleading in place at the time the motion was filed and heard, and FIS's actions constituted a waiver of the motion for summary judgment.

Moreover, prior to the rendering of the order, FIS dismissed Atrium, an indispensable party, due to multiple unsuccessful attempts to serve process. Lastly, the order granting summary

judgment reflects that the trial court improperly engaged in weighing of the evidence and credibility of the parties, took all facts from FIS's motion in reaching its conclusions, and erroneously determined that heavily contested evidence of record was insufficient to create issues of material fact for a jury to determine.

STATEMENT OF THE CASE AND FACTS

a. The Structure and Creation of Fondo de Inversion Stella as an Investment Fund to Hold a Private Equity Portfolio.

On July 1, 2004, FIS was created as a private investment fund for the management of assets of two religious organizations: the Institute of the Brothers of the Christian Schools (the "Institute" or "La Salle") and Asociación Editorial Stella ("AES"). R.34. FIS's management and operations were and still are governed by the terms of Participation Regulations and a pre-existing Management Mandate Contract between AES and Value Investments Peru SAFI S.A. ("Valinvest"), established in 1999 under the leadership of Mr. Lizardo Vargas Revilla. R.1415-17.

Before the fund was created, Appellant, S.U.R. Corp. was part of AES's private equity investment portfolio administered by

Valinvest's precursor entity, VIP, and in the business of broadcasting Latin American TV programs to the U.S. Spanish-speaking community. R.2992. After FIS was created, on or around November 25, 2008, AES transferred its 15% interest in S.U.R. Corp. to FIS, for administration by Valinvest. R.1383; 2454-62.

FIS's Participation Regulations specify that the Institute and AES are the fund's participants as the parties holding participation shares, but under Peruvian law, FIS is considered autonomous and the owner of its assets independent from the participants. R.1459-1462. The Regulations also specify that the highest body of the investment fund is the General Assembly of Participants, with the responsibility of making critical decisions, including the renewal of FIS's initial term, which consisted of five (5) years from July 1, 2004. R.1459. Valinvest was to manage the fund with the support of two key committees: the Oversight Committee and the Investment Committee. R.1459-60. The Oversight Committee was responsible for monitoring the fund's activities and ensuring compliance with the established guidelines and regulations. *Id.* The Investment Committee in turn evaluated and approved investment decisions proposed by Valinvest, ensuring that they aligned with the fund's objectives

and risk profile. *Id*.

Corporate records reflect that FIS's term was renewed by the Assembly of Participants until March 31, 2014. R.1865. Thereafter, however, the liquidation and closure of FIS was proposed by Mr. Vargas Revilla in December 2016 (R.2516-21) and preparations were underway until the Fund's Participants decided to remove Valinvest from its management of the fund in 2020 (R.2526-28). Although FIS has repeatedly claimed that the closing of FIS was impeded by Valinvest's refusal to liquidate and call an Assembly of Participants, this contention is disputed as the record shows that the recommendation came from Mr. Vargas Revilla in 2016 and the Participants did not oppose the operations of the investment fund.

b. Valinvest's Restructuring of the Private Equity Portfolio Entities.

On May 8, 2009, FIS's Investment Committee, relying on advice of U.S. attorneys and Mr. Vargas Revilla, approved a restructuring plan for S.U.R. Corp. to transition to a limited liability company, as this would allow the shareholders to avoid double taxation. R.1482. On June 24, 2010, as shown in the Investment Committee minutes, Mr. Vargas Revilla advised the Committee that S.U.R. Corp. had been

liquidated and S.U.R. LLC had been formed and would be owning the assets and liabilities of S.U.R. Corp. as the entity extinguished. R.1499. The minutes of this meeting also reflect that the year prior, on December 17, 2009, the Investment Committee agreed to delay receipt of dividends due from S.U.R. Corp. to allow for the entity's liquidation and change. *Id.*

S.U.R., LLC was created to purchase the assets of S.U.R. Corp., which consisted of the contracts with cable operators in the United States, in exchange for funds that S.U.R. Corp. would employ to pay for the liquidation of its debts, including debt owed to FIS. R.1822-23. In turn, FIS maintained the same 15% percent ownership interest in S.U.R., LLC as it had in S.U.R. Corp. without paying for the ownership interest. R.1823. As part of the restructuring, S.U.R., LLC took over all business activity of S.U.R. Corp., operating three TV stations with content distributed in the United States through the cable system. R.1822. In other words, FIS's 15% interest in S.U.R. Corp. was transferred to a 15% interest in the new company, S.U.R., LLC, with S.U.R. Corp. limiting its activities to winding down.

Thereafter, on October 14, 2011, the Investment Committee

reported that dividend payments owed by S.U.R. Corp. from its operations had resumed through S.U.R. LLC. R.1517. The same day, FIS's Committee ratified the formation of another entity, Parmenia LLC, upon recommendation of the fund's U.S. counsel and Mr. Vargas Revilla. R.1517. The Investment Committee also gave Mr. Vargas Revilla, "authority to sign all public and private documents in order to formalize the incorporation of the entity and to act on behalf of FIS in all and any general meeting of the shareholders of Parmenia LLC, and to exercise all and any of the rights of FIS in its capacity as shareholder in Parmenia LLC, including the right to voice and vote and even the waive the fund's rights." R.1516-17. On January 6, 2012, in a letter issued by Mr. Vargas Revilla as FIS's duly authorized manager, FIS gave instructions to transfer its 15% membership interest in S.U.R., LLC to Parmenia, LLC. R.1893-94. Thus, by FIS's own doing, FIS stopped being a member of S.U.R. LLC.

Throughout this time, S.U.R. LLC took over the payment of dividends owed by S.U.R. Corp., which had to be approved by FIS's Investment Committee and General Assembly per the Participant Regulations. By Appellee's own admission, in May 2011, S.U.R. LLC began making $10,000 monthly distributions to FIS to pay the

dividends owed (R.1014) and payments increased to $20,000 monthly from April 2012 to March 2013. *Id.* Then, payments increased to $30,000 from April 2013 to July 2014. R.1015. In February 2014, Parmenia LLC also began receiving $10,000 monthly. R.1015.

c. The Fund's Expiration and Liquidation Dispute.

On December 5, 2016, FIS's Investment Committee, composed of representatives from the Institute and AES, held a meeting to receive a status update on the portfolio. R.2516-21. At this meeting, Mr. Vargas Revilla indicated that given the conditions of FIS as an investment fund, it was time to set a date for its conclusion and by extension, the conclusion of Valinvest's administration of the fund. R.2517. Mr. Vargas Revilla also advised that the end date of the fund had to be fixed at a General Assembly of the Participants, as required by the fund's rules, which Valinvest would call at a later following completion of certain steps approved by the Committee *Id.*

The Committee's President remarked that "the Institute of the Brothers of the Christian Schools — La Salle expresse[d] *its gratitude for the management provided by Mr. Lizardo Vargas Revilla and*

Valinvest since 1998 in favor of [AES] and since 2004 in favor of FIS." R.2515 (emphasis added). The Investment Committee then entered resolutions establishing the closure plan and designating Mr. Iriarte Ahon, Mr. Tito Vargas, and Mr. Alberto Zarak to prepare the legal documentation necessary to close FIS, which would then be submitted to the General Assembly of Participants for final approval. R.2517. Per the minutes, FIS would be dissolved without being liquidated at the date approved by the General Assembly, which consequently would extinguish the fund. R.2518.

Following the December 5, 2016, meeting, the agreed-upon closure procedures moved forward, as shown by subsequent correspondence between Mr. Iriarte Ahon and Mr. Vargas Revilla. R.2631-32.[2] However, during the closure process, two arbitration

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[2] Mr. Alberto Zarak Alvarado, who was the general manager of AES on October 11, 2018, an external advisor and member of the La Salle board of directors, and an active part in the respective closing negotiations, stated in his written testimony in arbitration proceedings, that he held a meeting on September 17, 2018, at the request of brothers Marco Salazar, Maximo Sagredo, and Miguel Luna, the highest authorities of La Salle, in which he was commissioned to close FIS. R.2631.

No minutes of this meeting were drawn up, but he sent an email to Valinvest with a copy to Mr. Erick Iriarte and brothers Salazar, Sagredo and Luna, in which he recorded the order received to reach

proceedings were instituted. On September 9, 2020, Valinvest alerted the Institute of the improper withdrawal of over USD 1.5 million from one of FIS's accounts by representatives of the fund's Participants. R.2602-45. This withdrawal prompted Valinvest's concerns about FIS's assets being depleted with two outstanding claims that needed liquidation. *Id.* In a notarial letter sent years prior, dated December 5, 2014, Valinvest had requested that an arbitration be had as provided in Article 14 of the Management Mandate to determine the amount of variable fees and credits owed to Valinvest for management of FIS. R.2602-45. Additionally, FIS's participants improperly terminated an investment project in 2017 and caused substantial financial losses to another investment fund that was created to facilitate the venture, the Delta Investment Fund, which was also under Valinvest's management. *Id.* Valinvest attributed the losses to irregular actions of Mr. Iriarte Ahon. *Id.*

Valinvest advised FIS's Participants on September 14, 2020,

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an agreement on the closing procedure of the fund, without having been objected by any. *Id.* In addition, he confirmed that, by email dated September 20, 2018, he submitted the terms of the closure agreement for validation by Messrs. Erick Iriarte and Mr. Lizardo Vargas Revilla. *Id.*

that Valinvest intended to transfer the capital stock of Parmenia LLC in favor of a custodial entity, Atrium Global Investments Inc., opining that an irregular loss of equity due the improper depletion of the fund's assets could generate eventual legal responsibilities for Valinvest. R.1385. The letter confirmed that the capital stock of Parmenia LLC would be returned to FIS once the controversy with Fondo de Inversion Delta had been resolved or, in the event the shares of Parmenia LLC were the subject of a transaction or jurisdictional resolution. *Id.*

On September 16, 2020, the Assembly of Participants held a meeting to set a date for the liquidation of FIS and to appoint Mr. Iriarte Ahon as the liquidator of the fund. R.1552-57. Valinvest considered that the unauthorized withdrawal of the funds and the appointment of the liquidator were breaches of the Management Mandate, and filed Arbitration Case No. 0413-2020-CCL on November 5, 2020, seeking compensation for the losses incurred by the Delta Fund as well as payment of the unpaid credits and management fees accumulated over several years due to non-recognition by the participants of FIS. *Id.* Thereafter, on March 5, 2021, Valinvest presented additional claims before the arbitration tribunal of the Lima Chamber

of Commerce (Peru) in the case of *Value Investments Peru SA. v. Asociación Editorial Stella et al.* R.785-873. In this second arbitration, Valinvest also sought to be restored as FIS's manager. R.1386. Valinvest argued that the Participants' Assembly was invalid and that Mr. Iriarte Ahon was not qualified to act as liquidator. *Id.*

d. Procedural Background of the Case.

On April 29, 2021, FIS filed a complaint in the Circuit Court of Miami-Dade County (Case No. 21-10178 CA) against Parmenia LLC, S.U.R. LLC, S.U.R. Corporation, and Mr. Vargas Revilla, alleging fraudulent acts and interference with several shareholder rights. R.33-65. The initial Complaint raised three counts against the S.U.R. entities: (i) Count I for declaratory judgment as to FIS's ownership interest in both entities (R.38-40); (ii) Count VI for inspection of S.U.R., LLC's corporate books and records pursuant to section §605.0410(1) of the Florida Statutes (R.44-6); and (iii) Count VII for inspection of S.U.R. Corp.'s books and records pursuant to section 607.1601(1), of the Florida Statutes (R.46-8).

FIS sought declaratory judgment establishing that any purported transfer of FIS's interest in S.U.R. Corp. and S.U.R. LLC ***to***

Atrium was void, and that FIS, either directly or indirectly, had an ownership interest in both S.U.R. Entities. R.1827-28. With respect to the financial records of the S.U.R. Entities, FIS claimed that the primary purpose of the request was to investigate mismanagement, waste, or wrongdoing, and to take appropriate action if any wrongdoing was revealed. R.44-6. In addition, FIS claimed that it wanted to investigate the handling of dividends and other payments and ensure the proper discharge of fiduciary duties by S.U.R. Corp.'s officers and directors. R.1193-1194.

In response to the initial Complaint, S.U.R. LLC and S.U.R. Corp. filed motions to dismiss or stay the lawsuit on June 28, 2021, on grounds of *forum non conveniens*, international comity, and failure to state a claim under Florida statutes for review of the records. R.66-73. The S.U.R. Entities maintained that legal control of FIS, authorization for the filing of the lawsuit, and authorization for FIS's demand of books and records, would be determined by the Lima Chamber of Commerce in the ongoing arbitration proceedings. R.66-180; 181-296. Following a hearing on September 14, 2021, the court denied the S.U.R. Entities' motions to stay or dismiss. R.486-87.

On April 25, 2022, FIS filed a motion for leave to amend the complaint to raise additional claims and allegations with respect to the S.U.R. Entities. R.893-1030. The Amended Complaint added Atrium Investments as a defendant and disputed ownership of the S.U.R. Entities in three counts: (i) Count I for declaratory judgment against S.U.R. Corp. and Atrium; (ii) Count II for declaratory judgment against S.U.R. LLC and Atrium; and (iii) Count III for declaratory judgment against Parmenia LLC and Atrium. R.1827. The Amended Complaint was deemed filed on June 24, 2022. R.1187.

On September 22, 2022, Atrium moved to dismiss based on lack of personal jurisdiction (R.1360-71), and on September 23, 2022, moved to dismiss based on *forum non conveniens* (R.1376-80). Independently, on July 5, 2022, S.U.R. LLC and S.U.R. Corp. also filed motions to dismiss raising arguments about the inadequacy of FIS's allegations to state claims for which relief could be granted. R.1189-1215.

Thereafter, before the motions to dismiss were considered or responsive pleadings were filed, on October 31, 2022, FIS moved for partial summary judgment. R.1381. On December 9, 2022, the

motions to dismiss were denied. R.1744. On April 5, 2023, however, the trial court granted Atrium's motion to dismiss the Amended Complaint for lack of personal jurisdiction and granted Plaintiff twenty days to file an amended complaint. R.1818-19. On December 19, 2022, the S.U.R. Entities filed their answers and affirmative defenses disputing FIS's entitlement to corporate records, the reasonableness of the requests, and Mr. Iriarte Ahon's standing to bring and pursue the lawsuit on FIS's behalf. R.1746-70.

On April 10, 2023, the S.U.R. Entities filed their opposition brief to the motion for summary judgment as the hearing had already been set on the matter. R.1820-45. On May 2, 2023, the court heard arguments as to FIS's Motion for Partial Summary Judgment. R.3010-25.

Three days later, on May 5, 2023, FIS filed its Second Amended Complaint. R.1860-2007. On July 18, 2023, the court granted Atrium's motion to dismiss the Second Amended Complaint and gave FIS sixty (60) days to conduct jurisdictional discovery and amend the pleading. R.2078. Following the completion of the discovery, Plaintiff filed a Third Amended Complaint on October 12, 2023. R.2090-2311.

However, on November 22, 2023, FIS voluntarily dismissed Atrium from the lawsuit. R.2351. **Thereafter**, on December 18, 2023, the court entered an order against Parmenia LLC, granting FIS's motion for summary judgment (heard on May 2, 2023) and awarding attorney's fees and costs. R.2371-2382. The same day, the court entered an order against the S.U.R. Entities reaching the same result as to all counts, and awarding FIS attorney's fees and costs. R.3010-26.

e. The Summary Judgment Orders.

The court determined that Mr. Vargas Revilla did not have actual authority to transfer the stock in Parmenia to the custody of Atrium by virtue of his position as FIS's manager. R.2377-78. The court noted that, "[w]hile FIS could dispose of its membership interest in Parmenia freely, Vargas had no right to transfer FIS's membership interest in Parmenia to Atrium without FIS's approval . . . [which is of special significance given that] Atrium is owned in its entirety by Vargas." R.2378. The court rejected Parmenia's argument that the court lacked subject matter jurisdiction to void the transfer because Atrium was not before the court, reasoning that, pursuant to Florida

law, a member's interest in a limited liability company is considered personal property and a lawsuit to determine ownership of stock is a *quasi-in-rem* proceeding. R.2379. As a result, FIS was recognized as the sole member and owner of Parmenia. *Id.*

The court determined that there was no genuine dispute as to whether FIS had an ownership interest in S.U.R. Corp. even if the stock was transferred to Atrium months prior to the records request. R.3016. The court further reasoned that although Mr. Vargas Revilla represented at the Investment Committee meeting on June 24, 2010, that the entity had been liquidated, S.U.R. Corp. continues to be an active company to this day. R.3016. The court further noted that although Mr. Vargas Revilla directed S.U.R. Corp. to register Atrium as "[t]he new owner of the shares that FIS had registered as a shareholder of S.U.R. Corp.," he did not have actual authority to authorize the transfer by virtue of his position as FIS's manager. R.3017. Similarly, the court did not find a genuine dispute as to FIS's ownership of S.U.R. LLC, reasoning that even if FIS stopped being a member of the entity in 2012, the interest was transferred to Parmenia, LLC where FIS was the sole owner. R.3014-18. Therefore, FIS indirectly owned S.U.R. LLC through Parmenia. R.3020-21. Notably, the lower

court also ruled that there was no evidence of record showing that "any consideration provided to FIS for the transfer of shares to Atrium." R.3018.

The court noted that FIS's intention was to transfer all of the shares in S.U.R., LLC, in favor of Parmenia, but the court entered a separate order declaring that the purported transfer of ownership in Parmenia to Atrium was void and FIS was the sole member of the entity. R.3021. Because the Court had declared the purported transfer of FIS's interest in Parmenia to Atrium to be void, the transfer of FIS's indirect ownership interest in S.U.R. LLC was likewise void. R.3021.

With respect to Count VI, the court ordered S.U.R. Corp. to produce the records demanded by FIS for inspection and copying and pay the costs, including attorneys' fees, reasonably incurred by FIS in obtaining the order. R.3020. With respect to Count VII, the court ruled that "as a member of S.U.R. LLC, Parmenia (and by extension FIS) ha[d] the right to inspect and copy the records described in Fla. Stat. § 605.0410(1), in addition to other records regarding the activities, affairs, financial condition, and other circumstances of S.U.R.

LLC." R.3022. The court ordered "S.U.R. LLC to produce the records demanded for inspection and copying and pay the costs, including attorneys' fees, reasonably incurred by FIS in obtaining this [o]rder." R.3023-24.

SUMMARY OF THE ARGUMENTS

The trial court's summary judgment must be reversed on substantive and procedural grounds. As a threshold matter, the summary judgment was based on allegations raised in a pleading that was superseded by multiple amended complaints. To succeed on its motion for summary judgment, FIS needed to show that no material issue of fact existed regarding whether Mr. Vargas Revilla lacked authorization to transfer the interest in the S.U.R. Entities or whether FIS was entitled to access the corporate records of the entities under Florida law. However, the terms of the Management Mandate and record evidence consisting of correspondence between Mr. Vargas Revilla and the individuals appointed by the Investment Committee to prepare the required legal documents for review and approval at the General Assembly of Participants, present a genuine factual dispute.

Additionally, the demand letters for inspection of records by FIS

were legally insufficient as FIS was not a member of S.U.R. LLC or a shareholder of S.U.R. Corp at the time of the demands. R.1827-1828. FIS transferred its 15% interest in S.U.R. LLC to Parmenia in January 2012, as authorized by FIS itself at the time. Subsequently, in September 2020, Mr. Vargas Revilla, acting under the authority of FIS, transferred ownership of Parmenia and S.U.R. Corp. to Atrium. FIS plainly admitted that Mr. Vargas Revilla transferred the investment fund's interest in Parmenia to Atrium while he was the lawful manager of the fund. R.1848. The transfer occurred before Mr. Iriarte Ahon was confirmed as the liquidator of FIS, and solely for the purpose of preventing any irregular depletion of the assets. *Id.* FIS was therefore not entitled to summary judgment on the two counts based on statutory record requests. The trial court's failure to recognize this clear lack of standing constitutes reversible error.

Additionally, the court erred in disposing of the claims while an indispensable party to this action was absent. The Florida Rules of Civil Procedure require that all persons materially interested in the subject matter of a suit be made parties to ensure a complete and binding decree. Fla. R. Civ. P. 1.140. FIS voluntarily dismissed Atrium (R.2351). Thus, an indispensable party was deprived of an

opportunity to defend its interest by the court's decision, and the S.U.R. Entities were deprived of an opportunity to seek dismissal of the complaint.

STANDARD OF REVIEW

This Court reviews a trial court's summary judgment de novo. *Stav Software, LLC v. Lederman Investments, LLC*, 3D23-0361, 2024 WL 2743707, at *2 (Fla. 3d DCA May 29, 2024) (citing *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)).

To prevail on a motion for summary judgment, the movant must show that (1) "there is no genuine dispute as to any material fact" and (2) "the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). In applying this standard, the Court must view the record and reasonable inferences in the light most favorable to the nonmovant. *Navarro v. Borges*, 3D23-0175, 2024 WL 1422996, at *2 (Fla. 3d DCA Apr. 3, 2024) (citing *VME Grp. Int'l, LLC v. Grand Condo. Ass'n, Inc.*, 347 So. 3d 461, 466 (Fla. 3d DCA 2022)).

The moving party must identify "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." *Romero v. Midland Funding, LLC*, 358 So. 3d 806 (Fla. 3d

DCA 2023). Once the movant satisfies this initial burden, the burden then shifts to the nonmoving party to come forward with evidence demonstrating that a genuine dispute of material fact exists. *Borges*, 3D23-0175, 2024 WL 1422996, at *2 (internal quotations omitted). The nonmoving party must go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 [106 S.Ct. 2548, 91 L.Ed.2d 265] (1986)) (internal citations omitted). This Court has ruled that although the "new Florida Rule of Civil Procedure 1.510 indubitably endows the trial court with considerably broader authority to resolve a case on summary judgment . . . 'the general rule remains intact: credibility determinations and weighing the evidence are jury functions, not those of a judge.'" *Id.* at *2 (internal quotations omitted). Thus, "competing material evidentiary showings are incapable of resolution on summary judgment." *Id.*

A lower court's application of a foreign jurisdiction's law is also reviewed de novo. *Compañía Gen. Financiera y Desarrollo, S.A. v. BNP Paribas, S.A.*, 320 So. 3d 317, 321 (Fla. 3d DCA 2021).

ARGUMENTS

I. The Trial Court Erred in Granting the Motion for Summary Judgment Where the Motion was Directed at a Pleading that Was Superseded.

The trial court, *sua sponte* and without affording any of the defendants the opportunity to be heard on the matter, decided to deem the Motion for Summary Judgment filed in October 2022, as directed at the Second Amended Complaint filed on May 5, 2023. In its decision granting the Motion for Summary Judgment against the S.U.R. Entities, the trial court noted,

> Plaintiff's Amended Complaint, filed on June 23, 2022, was the operative pleading at the time Plaintiff's Motion for Partial Summary Judgment came before the Court on May 2, 2023. *See* D.E. 108. On May 5, 2023, Plaintiff filed its Second Amended Complaint in order to include additional allegations regarding the Court's jurisdiction over certain non-resident defendants. *See* D.E. 190. However, Plaintiff's allegations and causes of action against Parmenia remain largely the same. Thus, the Court will deem Plaintiff's Motion to be directed toward the Second Amended Complaint. *Cf Lebron v. Royal Caribbean Cruises, Ltd*, 2018 WL 5098972, at *3 n.2 (S.D. Fla. Aug. 14, 2018).

R.3024.

However, the court's treatment of the pleadings was fundamentally flawed in its factual basis. Although the Amended Complaint

(deemed filed on June 24, 2022) was the controlling pleading at the time the Motion for Summary Judgment was filed (R.1187), the Second Amended Complaint was not the controlling pleading at the time the S.U.R. Entities filed their Opposition to the Motion for Summary Judgment, at the time the Motion was heard, or at the time the court ruled on the Motion. More importantly, the Third Amended Complaint, which was the controlling pleading at the time of the trial court's entry of the order granting summary judgment, was fatally deficient due to FIS's dismissal of an indispensable party to the action.

As of April 10, 2023, when the S.U.R. Entities filed their opposition to the Motion for Summary Judgment (R.1820-45), the Amended Complaint was the controlling pleading in the case. On May 2, 2023, the court heard arguments as to FIS's Motion for Partial Summary Judgment. R.3010-25. On May 5, 2023, three days after the hearing on the Motion, FIS filed a Second Amended Complaint. R.1860-2007;2958. Thereafter, on October 12, 2023, two months prior to the rendering of the order, FIS filed a Third Amended Complaint. R.2090-2311.

Effectively, the court relied upon a nullity in reaching its decision. In Florida, it is a long established rule of law that an original pleading is superseded by an amended pleading which does not indicate an intention to preserve any portion of the original pleading. *See Soho Realty, LLC v. Alexander Condo. Ass'n, Inc.*, 282 So. 3d 953 (Fla. 3d DCA 2019) (internal citations omitted); *see also Oceanside Plaza Condo. Ass'n v. Foam King Indus., Inc.*, 206 So. 3d 785, 787 (Fla. 3d DCA 2016). In this case, the trial court plainly ignored these principles, as none of the four complaints filed by FIS indicated an intention to preserve any portion of the original pleading.

This Court's seminal decision in *Babb v. Lincoln Auto Financial Company*, is controlling in the case at hand. 133 So. 2d 566 (Fla. 3d DCA 1961). In *Babb*, the defendant moved for summary judgment and set the motion for hearing before plaintiffs sought and obtained leave to file an amended complaint. *Id.* at 567. The amended complaint was complete in itself and did not refer to or adopt the original complaint. *Id.* at 568. At the hearing on the motion for summary judgment, which took place one day after plaintiffs' filing of the amended complaint, the trial court granted the motion. *Id.* On appeal, this Court reversed, reasoning that the filing of the amended

pleading constituted an abandonment of the original complaint, which was superseded, ceased to be a part of the record and could no longer be used as a pleading. *Id.* (internal citations omitted). The Court determined that when the trial court rendered its order granting summary judgment, plaintiffs' only pleading was the amended complaint. *Id.* Moreover, by entering this order one day after the amended pleading was filed, the trial court deprived plaintiffs of their right to bring to the attention of the court any evidence they might have, if given time, been able to obtain in support of their claim or to establish a material issue of fact. *Id.*

Here, the trial court deprived the defendants of the right to argue that the Third Amended Complaint should have been dismissed after FIS's voluntary dismissal of Atrium because Atrium was an indispensable party to the case. An indispensable party is a party whose interest in the controversy made it impossible to completely adjudicate the matter without affecting its interest or the interests of FIS. *Fla. Dep't of Revenue v. Cummings*, 930 So. 2d 604, 607 (Fla. 2006) (citations omitted); *see also Diaz v. Impex of Doral, Inc.*, 7 So. 3d 591, 594 (Fla. 3d DCA 2009). Atrium had an interest in each of the S.U.R. Entities and adjudicating FIS's claims necessarily led to

the severance of those interests, as shown by a plain reading of the trial court's Summary Judgment order. With respect to FIS's interest in S.U.R. Corp., the trial court's decision hinged on its finding that Mr. Vargas Revilla directed S.U.R. Corp. to register Atrium as "[t]he new owner of the shares that FIS had registered as a shareholder of S.U.R. Corp." when he did not have actual authority to authorize the transfer by virtue of his position as FIS's manager. R.3017. With respect to FIS's ownership of S.U.R. LLC, the trial court's decision hinged on its finding that FIS indirectly owned S.U.R. LLC through Parmenia (R.3020-21), and there was no evidence of record showing "any consideration provided to FIS for the transfer of shares to Atrium." R.3018.

On July 18, 2023, the court granted Atrium's Motion to Dismiss the Second Amended Complaint and gave FIS sixty (60) days to conduct jurisdictional discovery and amend the pleading. R.2078. Following the completion of the discovery, Plaintiff filed a Third Amended Complaint on October 12, 2023. R.2090-2311. Thereafter, on November 22, 2023, FIS voluntarily dismissed Atrium from the lawsuit. R.2351.

The trial court's purported basis to rule on the ownership of the S.U.R. Entities despite Atrium's dismissal from the case is plainly stated in the order granting partial summary judgment against Parmenia. R.2378. Specifically, the court determined that this action was a *quasi-in-rem* action and Atrium was not an indispensable party over which jurisdiction was necessary. *Id.* Recently, this Court rejected a similar premise as it addressed analogous circumstances concerning property rights and failure to join an indispensable party. In *Greater Miami Expressway Agency v. Miami-Dade County Expressway Authority*, the county authority filed an action against the municipal authority and its directors and/or board members, seeking declaratory relief, injunctive relief, and to quiet title concerning its alleged ownership rights to roadways and assets in the county that were either purchased or acquired from the Department of Transportation. 48 Fla. L. Weekly D2069 (Fla. 3d DCA Oct. 25, 2023). The Expressway Authority asserted that the *in rem* action concerned rights to the roadways and assets located in Miami-Dade County that were owned and operated by the authority pursuant to a Transfer Agreement executed in December 1996, or that were acquired following the execution of the Transfer Agreement with the Department of

Transportation. *Id.* Nonetheless, the trial court denied a motion to dismiss filed by the municipal authority and directors and/or board members, for failure to join the Florida Department of Transportation as an indispensable party to the action. *Id.* The trial court subsequently granted the county authority's motion for summary judgment. *Id.* On appeal, this Court determined that the Department was an indispensable party to the underlying action seeking to quiet title to the expressway system itself and ruled that the trial court erred by denying the motion to dismiss for failure to join an indispensable party. *Id.* at *3. Accordingly, this Court reversed the order granting the motion for summary judgment and the final judgment against the defendants and remanded with instructions for the trial court to enter an order granting the motion to dismiss without prejudice. *Id.*

Following the analysis in *Greater Miami Expressway Agency v. Miami-Dade County Expressway Authority*, treating an action as *in rem* does not make a party any less indispensable to the case. Dismissing Atrium from the case would have been grounds for a motion to dismiss the Third Amended Complaint from the S.U.R. Entities before the court ruled on the Motion for Summary Judgment. Thus, in effect, the trial court ruled on the Motion for Summary Judgment

without affording the defendants an opportunity to move to dismiss a fatally deficient pleading.

For this reason, the Court should reverse the order granting summary judgment against the S.U.R. Entities, and remand with instructions to dismiss without prejudice.

II. The Trial Court Erred In Finding That There Were No Issues of Material Fact that Precluded Summary Judgment.

The trial court also erred in finding no issues of material fact where the allegations in this case are heavily contested. The key issue in this case is whether Mr. Vargas Revilla mishandled the assets of FIS without authorization or for an improper motive, and whether his handling of the assets over the years nullifies Valinvest's claims for fees based on the value of the assets.

FIS maintains that in 2004, Mr. Vargas Revilla convinced the Institute that the most efficient way to administer its assets would be an investment fund managed by Valinvest. R.1382. FIS alleges that Mr. Vargas Revilla falsely claimed on June 24, 2010, that S.U.R. Corp. had been "liquidated" and a new entity, S.U.R. LLC, had been created. R.1383. According to FIS, as of June 9, 2014, S.U.R. Corp.

had a book value of roughly $10,532,786.06, and Valinvest refused to liquidate the investment fund at the time the fund was supposed to expire, on March 31, 2014. R.1384. For this reason, FIS's Investment Committee was summoned on December 5, 2016. *Id.*

These assertions are plainly contradicted by the record and would not amount to wrongdoing in any case. The minutes of the Investment Committee meeting held on December 5, 2016, reflect that the committee President "mentioned that the Institute of the Brothers of the Christian Schools — La Salle *expresse[d] its gratitude for the management provided by Mr. Lizardo Vargas Revilla and Valinvest* since 1998 in favor of Asociación Stella and since 2004 in favor of FIS." R.1542-47 (emphasis added). Before the fund was created, Appellant, S.U.R. Corp. was part of AES's private equity investment portfolio administered by Valinvest's precursor entity, VIP, and in the business of broadcasting Latin American TV programs to the U.S. Spanish-speaking community. R.2992. After FIS was created, on or around November 25, 2008, AES transferred its 15% interest in S.U.R. Corp. to FIS, for administration by Valinvest. R.1383; 2454-62.

With this in mind, under Florida law, there is a distinction between the liquidation of a corporation and its dissolution; the officers of the corporation may liquidate the corporation prior to its dissolution. Liquidation is the winding up the business, and includes the collection of assets, the disposal of properties, discharging liabilities and taking related actions, which may include "bringing or defending legal proceedings associated with winding up or liquidation." *Allied Roofing Indus., Inc. v. Venegas*, 862 So.2d 6, 8 (Fla. 3d DCA 2003); *Selepro, Inc. v. Church*, 17 So. 3d 1267, 1269 (Fla. 4th DCA 2009). Even after dissolution, section 607.1405 provides that a corporation continues its corporate existence and has the power to transfer title to its property and do other acts necessary to wind up and liquidate the business. *DGG Dev. Corp. v. Estate of Capponi*, 983 So. 2d 1232, 1234 (Fla. 5th DCA 2008).

Additionally, Mr. Vargas Revilla and Valinvest only operated with the direction and consent of the participants of the fund and the committees formed to communicate the priorities and opinions of the participants. The Participation Regulations provide that the highest body of the investment fund is the General Assembly of Participants, with the responsibility of making critical decisions. R.1459. The two

committees, the Oversight Committee and the Investment Committee, were periodically updated on the status of the assets of the fund, and retroactively ratified Valinvest's actions with respect to the management and restructuring of those assets. R.1459-60.

Corporate records reflect that FIS's term was renewed by the Assembly of Participants until March 31, 2014, but the liquidation and closure of FIS was proposed by Mr. Vargas Revilla in December 2016 (R.2516-21) and preparations were underway until the Fund's Participants decided to remove Valinvest from management of the fund in 2020 (R.2526-28). As shown in correspondence between Mr. Iriarte Ahon, La Salle representatives with the highest level of authority, and Mr. Vargas Revilla, the closing of the fund was underway as of September 20, 2018. R.2631-32.[3] In other words, the evidence

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[3] As discussed earlier, *supra* fn. 2, Mr. Alberto Zarak Alvarado, (general manager of AES, external advisor and member of the La Salle board of directors) stated in his written testimony in arbitration proceedings, that he held a meeting on September 17, 2018, at the request of brothers Marco Salazar, Maximo Sagredo, and Miguel Luna, the highest authorities of La Salle, in which he was commissioned to close FIS. R.2631. No minutes of this meeting were drawn up, but he sent an email to Valinvest (through Mr. Vargas Revilla) with a copy to Mr. Erick Iriarte and brothers Salazar, Sagredo and Luna, in which he recorded the order received to reach an agreement on the closing procedure of the fund. *Id.* Specifically, by email dated September 20,

shows that the participants, even where not directly convoked to approve the closing of FIS, did have notice and understanding of the fund's operations and the ongoing closing processes.

The allegations of wrongdoing and mismanagement are simply refuted by FIS's own internal documents and the approval of the Committees, La Salle's authorities, and Mr. Iriarte Ahon, of every action undertaken by Valinvest for tax purposes and for the purpose of restructuring and boosting profitability of the assets.

III. The Trial Court Erred in Finding that FIS was Entitled to Costs, Including Attorney's Fees, From the S.U.R. Entities.

The trial court also erred as it ordered the S.U.R. Entities to cover costs, including attorneys' fees, incurred by FIS in pursuing the corporate records. The court did not give **any** consideration to the language of the Florida statutes with respect to who was entitled to request and receive the records, which should be strictly construed. Additionally, the court did not consider the good faith basis for denial of the requests. A finding of entitlement was improper under the

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2018, he submitted the terms of the closure agreement for validation by Messrs. Erick Iriarte and Mr. Lizardo Vargas Revilla. *Id.*

Florida Revised Limited Liability Company Act (hereinafter, "LLC Act").

With respect to S.U.R. LLC, FIS was not entitled, by definition, to inspect the business records requested. FIS stopped being a "member" for purposes of the LLC Act on January 6, 2012, when the ownership interest was transferred to Parmenia LLC. Under the LLC Act, "Member" means a person who:

> (a) Is a member of a limited liability company under s. 605.0401 or was a member in a company when the company became subject to this chapter; and
>
> (b) Has not dissociated from the company under s. 605.0602.

Fla. Stat. § 605.0102. The LLC Act specifically provides a member with the following inspection rights:

> (2) In a member-managed limited liability company, the following rules apply:
>
> (a) Upon reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company:
>
> 1. The records described in subsection (1); and
>
> 2. Each other record maintained by the company regarding the company's activities, affairs, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this chapter.
>
> (b) The company shall furnish to each member:

> 1. Without demand, any information concerning the company's activities, affairs, financial condition, and other circumstances that is known to the company and is material to the proper exercise of the member's rights and duties under the operating agreement or this chapter, except to the extent the company can establish that it reasonably believes the member already knows the information; and
>
> 2. On demand, other information concerning the company's activities, affairs, financial condition, and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.
>
> (c) Within 10 days after receiving a demand pursuant to subparagraph (b)2., the company shall provide to the member who made the demand a record of:
>
> 1. The information that the company will provide in response to the demand and when and where the company will provide such information.
>
> 2. For any demanded information that the company is not providing, the reasons that the company will not provide the information.

Fla. Stat. § 605.0410.

Here, the Committee ratified the formation of Parmenia LLC upon recommendation of the fund's U.S. counsel and Mr. Vargas Revilla. R.1517. The Investment Committee also gave Mr. Vargas Revilla, "authority to sign all public and private documents in order to formalize the incorporation of the entity and to act on behalf of FIS in all and any general meeting of the shareholders of Parmenia LLC, and to exercise all and any of the rights of FIS in its capacity as

shareholder in Parmenia LLC, including the right to voice and vote and even the waive the fund's rights." R.1516-17. As such, the Committee and Participants had granted Mr. Vargas Revilla authority on January 6, 2012, when he issued a letter as FIS's duly authorized manager with instructions to transfer its 15% membership interest in S.U.R., LLC to Parmenia, LLC. R.1893-94.

FIS was also not entitled to an award of costs, including attorney's fees, as there was a good faith basis for the denial of the inspection request. The LLC Act provides when the company can prove that it refused inspection of corporate records in good faith based on a reasonable basis for doubt about the right of the requester to access the requested records, the cost of proceedings concerning a request under section 605.0410, including reasonable attorneys' fees, will not be at the LLC's expense. Fla. Stat. § 605.0411.

By the time the request was received, on March 24, 2021, Parmenia LLC was the sole member of S.U.R. LLC, and the entities were legally independent from each other. FIS's interest in Parmenia LLC did not create a right to inspect and review the records of a wholly owned subsidiary. There was also a dispute regarding the liquidator's

authority to request the inspection of the records. Accordingly, S.U.R. LLC had grounds to deny the request to preserve crucial information that may have led to additional depletion of assets by an unauthorized liquidator.

CONCLUSION

WHEREFORE, based on the above facts and legal authorities, Appellant, S.U.R. CORP., respectfully requests this Court reverse the Final Judgment and remand for further proceedings, consistent with the arguments set forth in this Initial Brief.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this June 24, 2024, a true and correct copy of the foregoing was electronically filed through the Florida E-Filing Portal and served via e-mail to all parties on the attached Service List.

By: */s/ Leidy M. Morejon*
Leidy M. Morejon, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045, undersigned counsel hereby certifies that this Initial Brief is submitted in Bookman Old Style 14-point font and contains approximately 8207 words.

By: /s/ Leidy M. Morejon
Leidy M. Morejon, Esq.