IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

Case No. 3D24-0103

L.T. Case No. 2021-010178-CA-01

S.U.R., LLC,

Appellant,

v.

FONDO DE INVERSIÓN STELLA,

Appellee.

ON APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

Eduardo A. Maura, Esq.
Florida Bar No. 91303
eduardo@ayalalawpa.com
Luis F. Quesada, Esq.
Florida Bar No. 1010305
lquesada@ayalalawpa.com
AYALA LAW, P.A.
2490 Coral Way, Ste 401
Miami, FL 33145
(305) 570-2208
Counsel for Appellee
Fondo de Inversión Stella

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INTRODUCTION

This is an action that arises out of the unauthorized transfer of Appellee Fondo de Inversión Stella's ("FIS") interests in three Florida entities by its former manager, Lizardo Vargas ("Vargas"). Appellant S.U.R., LLC challenges the lower tribunal's order granting summary judgment in favor of FIS. [IB.1].[1] In its order, the trial court granted FIS's request for a declaratory judgment that FIS had an ownership interest in S.U.R., LLC and that the purported transfer of this interest was void. [A.716]. The lower court also found S.U.R., LLC improperly denied FIS access to its records and ordered S.U.R., LLC to "produce records demanded by [FIS] for inspection and copying" and "pay the costs, including attorney's fees, reasonably incurred by [FIS]." [*Id.*] In this appeal, S.U.R., LLC seeks reversal of the trial court's order based on "disputed material facts" and "procedural deficiencies," which are being raised for the first time on appeal. [IB.1-2].

[1] "IB.#" refers to Appellant's Initial Brief; "R.#" refers to the Record on Appeal; "A.#" refers to the Appendix to Appellee's Answer Brief.

CORRECTED STATEMENT OF THE CASE AND FACTS

Because the "Statement of the Case and Facts" in S.U.R., LLC's Initial Brief omits or misstates key facts, it is not satisfactory. Thus, FIS provides a corrected statement of the case and facts for the Court:

I. Factual Background

a. Acquisition of S.U.R. Corp.'s Shares by AES

"Canal SUR" is a Spanish-language TV network, headquartered in Miami, Florida. [A.703]. Before March 2001, Canal SUR was owned between Pacacom Corp., which held 64% of its stock, and Asociación Editorial Stella ("AES"), which held 36% of its stock. [A.169]. Pacacom Corp. moreover owned 100% of S.U.R. Corporation ("S.U.R. Corp.").[2] [*Id.*] In March 2001, Pacacom Corp. and AES agreed to merge Canal SUR and S.U.R. Corp. [*Id.*] After this merger, S.U.R. Corp.'s stock was redistributed between Pacacom Corp. (85%) and AES (15%). [*Id.*]

b. Creation of FIS; Transfer of Shares to FIS

FIS is an investment fund, where both AES and the Institute of the Brothers of the Christian Schools—La Salle (the "Institute") are participants. [A.702]. Before 2004, Vargas managed the assets of AES

[2] S.U.R. Corp. is a Florida corporation, incorporated in 1992, with its principal place of business in Miami-Dade County, Florida. [A.147].

through his own company, Value Investments Perú S.A. ("Valinvest"), pursuant to a Management Mandate. [A.141]. According to the terms of the Management Mandate, Vargas was "authorized to manage the assets . . . according to the criteria of the investor profile that [AES] indicates from time to time." [A.142]. Vargas was allowed to acquire and sell securities only "with the approval of [AES]." [*Id.*] Also, Vargas could only dispose of AES's assets "to carry out the provisions" of the Management Mandate and could not, "under any circumstances, use them as collateral in its favor or in favor of third parties." [*Id.*]

In 2004, Vargas convinced the Institute that the most efficient way to administer its assets would be an investment fund managed by Valinvest. [A.703]. Following Vargas' advice, on July 1, 2004, FIS was established "on the basis of the management mandate contract" between AES and Valinvest. [A.185]. On or about November 25, 2008, AES transferred all its shares in S.U.R. Corp. to the Institute. [A.175]. Then, on December 31, 2009, the Institute assigned all its shares in S.U.R. Corp. to FIS. [A.193].

c. Creation of S.U.R., LLC

On May 8, 2009, Vargas represented to FIS that S.U.R. Corp. would be "changing its corporate form" to a limited liability company.

[A.208]. On June 24, 2010, Vargas informed FIS that S.U.R. Corp. allegedly had been "liquidated" and that a new entity—S.U.R., LLC—had been created. [A.225]. Notwithstanding Vargas' representations, S.U.R. Corp. continues to be an active company. [A.147].

d. Creation of Parmenia; Transfer of Shares to Parmenia

On October 7, 2011, Parmenia, LLC ("Parmenia") was organized as a single-member limited liability company, entirely owned by FIS. [A.153]. On October 14, 2011, FIS appointed Vargas as manager of Parmenia to represent FIS's interests vis-à-vis Parmenia and S.U.R., LLC. [A.243]. On January 6, 2012, Vargas sent a letter to S.U.R., LLC to inform of FIS's "intention to transfer all of our shares in SUR, LLC, . . . which make up 15% of our participation in the capital stock of SUR, LLC, in favor of our subsidiary Parmenia." [A.248]. As stated by Vargas, this transfer of shares from FIS to Parmenia did "not imply a change of ownership." [*Id.*]

e. Liquidation of FIS

According to its Participation Regulation, FIS had a term of five years, starting July 1, 2004, that could be renewed by agreement of FIS's participants. [A.186]. After FIS's last term expired on March 31, 2014, Valinvest refused to liquidate FIS. [A.704]. Given this situation,

FIS's Investment Committee was summoned on December 5, 2016. [A.268]. At this meeting, Vargas claimed that Valinvest would arrange a Participants' Assembly to approve the liquidation of FIS. [A.269]. However, this later meeting never took place. [A.704].

Given Valinvest's refusal to liquidate FIS,[3] in accordance with Peruvian law, FIS's Oversight Committee started the liquidation of FIS by calling a Participants' Assembly in September 2020. [A.276]. On September 16, 2020, the Participants' Assembly met and agreed unanimously to liquidate FIS and appoint Erick Iriarte ("Iriarte") as liquidator. [A.282].

f. Unauthorized Transfer of FIS's Stock to Atrium

Unbeknownst to FIS, while the liquidation of the fund was being discussed, Vargas directed S.U.R. Corp. and S.U.R., LLC to transfer FIS's ownership interests in both entities to Vargas' company, Atrium Global Investments Inc. ("Atrium"). [A.705]. On September 14, 2020,

[3] S.U.R., LLC alleges that this contention is "disputed" because "the record shows that the recommendation [to liquidate] came from Mr. Vargas Revilla in 2016." [IB.5]. S.U.R., LLC's claim is belied by the fact that four years after Vargas' "recommendation," the Participants' Assembly had not yet been called by Valinvest, forcing the Oversight Committee to act. While S.U.R., LLC claims that some "agreed-upon closure procedures moved forward" [IB.9], an arbitration tribunal in Peru later found there was no such agreement. [A.386].

two days before being formally removed as FIS manager, Vargas sent a letter to S.U.R. Corp. claiming Valinvest had reached an agreement with Atrium for a "transfer of all the shares held by FIS in Sur Corp." [A.299]. Vargas directed S.U.R. Corp. to register Atrium as "the new owner of the shares that FIS had registered as a shareholder of Sur Corp." [*Id.*] Vargas signed this letter on behalf of both Valinvest and Atrium. [*Id.*]

On September 14, 2020, Vargas also sent a letter to S.U.R., LLC to "inform" it of the "transfer of all the shares representing the capital stock of Parmenia" to Atrium. [A.304]. Vargas stated that Atrium was owned by Valinvest, and he was Atrium's president. [*Id.*] According to Vargas, Atrium was the new shareholder in S.U.R., LLC, "with 15% of the shares representing the capital stock of Sur LLC." [*Id.*] Vargas claimed the transfer from Parmenia to Atrium was due to allegedly "illegal" actions taken by FIS's participants "without the participation or authorization" of Valinvest. [*Id.*] Vargas stated the shares would be returned to FIS once the alleged controversy between Valinvest and FIS's participants was resolved. [A.305].

S.U.R., LLC falsely claims "Valinvest advised FIS's Participants on September 14, 2020," that it intended to transfer the capital stock

of Parmenia in favor of Atrium. [IB.10]. As support for this baseless allegation, S.U.R., LLC cites to FIS's Motion for Summary Judgment, which references the letters to S.U.R. Corp. and S.U.R., LLC, not any communication to FIS's participants. [R.1385].

On September 21, 2020, Iriarte sent a letter to Arturo Delgado ("Delgado"), S.U.R., LLC's manager, to inform him of the liquidation of FIS and of Iriarte's appointment as liquidator. [A.309]. As stated in Iriarte's letter, any transaction involving FIS and any company under Delgado's management had to be approved by Iriarte, "thus revoking any previous appointment" to Vargas and/or Valinvest. [*Id.*]

g. Arbitrations in Peru

In its Initial Brief, S.U.R., LLC states that "during the closure process, two arbitration proceedings were instituted." [IB.9-10]. Both arbitration proceedings were in fact filed by Vargas ***after*** his removal as manager of the fund, on September 24, 2020,[4] and March 5, 2021,

[4] Arbitration Case No. 0413-2020-CCL was not filed on "November 5, 2020," as wrongly stated in the Initial Brief. [IB.11]. It should also be noted that there are no documents in the record on appeal from this first arbitration. Therefore, S.U.R., LLC's references to the same are improper and must be disregarded. *See Supinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 532 (Fla. 5th DCA 2003) ("It is elemental that appellate courts will not consider evidence that was not presented to the trial court for its consideration in making its decisions.").

respectively. [A.358]. Although S.U.R., LLC describes certain actions of FIS and Iriarte as "improper" and "irregular" [IB.10], the arbitration tribunal found Vargas' claims—repeated here by S.U.R., LLC—to be largely unsupported. [A.381].

In particular, in the second arbitration, Valinvest "sought to be restored as FIS's manager," arguing that the Participants' Assembly was "invalid" and that Iriarte "was not qualified to act as liquidator." [IB.12]. On December 10, 2021, however, the arbitration tribunal in Peru issued a judgment in favor of AES and the Institute and against Valinvest. [A.394-96]. The tribunal concluded that "the appointment of the liquidator has been done in accordance with the provisions of the Law and the Regulations of Funds." [A.388]. Accordingly, it was "not appropriate to reinstate Valinvest as administrator of FIS." [*Id.*] As the legally appointed liquidator, Iriarte has the exclusive power to act on behalf of FIS. [A.706].

h. FIS's Request for Records from S.U.R., LLC

Given FIS's uncertainty regarding its investment in S.U.R., LLC and suspicion of mismanagement, waste, or wrongdoing, FIS sought certain books and records from S.U.R., LLC [A.414]. On March 24, 2021, FIS sent a letter to S.U.R., LLC, demanding to inspect and copy

certain records, as provided by Fla. Stat. § 605.0410. [A.414-17]. On April 9, 2021, S.U.R., LLC responded to FIS's letter, rejecting FIS's request for an inspection of records. [A.419]. S.U.R., LLC stated that "FIS is not a member of S.U.R., LLC and has not been a member since at the latest 2015 when its earlier transfer of its membership interest to Parmenia, LLC was ratified." [*Id.*]

II. Course of Proceedings Below

On April 29, 2021, FIS filed its initial Complaint against S.U.R., LLC, S.U.R. Corp., Parmenia, and Vargas. [A.5]. FIS brought claims against S.U.R., LLC for a declaratory judgment and for inspection of records pursuant to Fla. Stat. § 605.0411. [A.10-12; 16-18]. On June 28, 2021, S.U.R., LLC filed a Motion to Stay and/or Dismiss, arguing the action should be stayed pending resolution of the arbitration in Peru and that FIS had failed to state a claim upon which relief could be granted. [A.26-29]. Contrary to S.U.R., LLC's assertion, it did not raise the issues of "forum non conveniens" or "international comity" in this motion. [IB.13]. On September 20, 2021, the trial court denied S.U.R., LLC's motion to dismiss. [A.41]. On October 8, 2021, S.U.R., LLC filed its Answer and Affirmative Defenses. [A.43].

On April 25, 2022, FIS moved for leave to amend the Complaint in order to include Atrium as a defendant. [A.54]. On June 23, 2022, FIS filed its Amended Complaint. [A.58]. FIS amended its two claims against S.U.R., LLC for a declaratory judgment and for inspection of records pursuant to Fla. Stat. § 605.0411. [A.67-68; 73-75]. On July 5, 2022, S.U.R., LLC moved to dismiss the Amended Complaint for failure to state a cause of action. [A.87-92].

On September 22, 2022, Atrium moved to dismiss the Amended Complaint on lack of personal jurisdiction. [A.95-100]. On September 23, 2022, Atrium moved to dismiss on *forum non conveniens* grounds. [A.103-05].

On October 31, 2022, FIS filed its Motion for Partial Summary Judgment. [A.107]. FIS argued, *inter alia*, that there was no genuine dispute as to whether FIS had an ownership interest in S.U.R., LLC and any purported transfer of FIS's interest in S.U.R., LLC to Atrium was void, and that S.U.R., LLC had improperly denied FIS access to its records. [A.121-24].

On December 9, 2022, the trial court entered an order denying S.U.R., LLC's motion to dismiss FIS's Amended Complaint. [A.437].

On December 19, 2022, S.U.R., LLC filed its Answer and Affirmative Defenses to the Amended Complaint. [A.439].

On April 5, 2023, the lower tribunal granted Atrium's motion to dismiss for lack of personal jurisdiction. [A.451]. The trial court gave FIS twenty days to file an amended complaint. [*Id.*]

On May 2, 2023, the lower court held a hearing on FIS's Motion for Partial Summary Judgment. [A.702].

On May 5, 2023, FIS filed a Second Amended Complaint, which included additional jurisdictional allegations as to Atrium. [A.608]. FIS's claims against S.U.R., LLC for declaratory judgment and for an inspection of records remained unchanged, however. [A.619-20; 626-28]. On May 15, 2023, S.U.R., LLC filed its Answer and Affirmative Defenses to the Second Amended Complaint. [A.632].

On June 19, 2023, Atrium again moved to dismiss the Second Amended Complaint based on lack of personal jurisdiction. [A.647-51]. On July 18, 2023, the lower tribunal granted Atrium's Motion to Dismiss the Second Amended Complaint without prejudice. [A.655]. The trial court gave FIS 60 days to conduct jurisdictional discovery and 20 days thereafter to file an amended complaint. [*Id.*]

On October 12, 2023, FIS filed its Third Amended Complaint, which included more jurisdictional allegations as to Atrium. [A.657]. FIS's claims against S.U.R., LLC for declaratory judgment and for an inspection of records remained unchanged. [A.669-70; 676-78].

On November 1, 2023, Atrium again moved to dismiss the Third Amended Complaint on lack of personal jurisdiction. [A.687-92]. On November 15, 2023, Atrium filed another motion to dismiss based on *forum non conveniens* grounds. [A.697-699]. On November 22, 2023, FIS filed a voluntary dismissal without prejudice of its claims against Atrium. [A.701].

III. Disposition of the Lower Tribunal

On December 18, 2023, the trial court entered an order granting FIS's Motion for Summary Judgment against S.U.R., LLC [A.702]. In its order, the lower court granted FIS's request for a declaration that FIS had an ownership interest in S.U.R., LLC and any alleged transfer of this interest was void. [A.716]. The trial court also found S.U.R., LLC improperly denied FIS access to company records and ordered S.U.R., LLC to "produce records demanded by [FIS] for inspection and copying" and to "pay the costs, including attorney's fees, reasonably

incurred by [FIS].” [*Id.*] S.U.R., LLC then filed its Notice of Appeal on January 16, 2024. [A.719]. This appeal ensued.

SUMMARY OF ARGUMENT

S.U.R., LLC argues that the lower tribunal's summary judgment "must be reversed on substantive and procedural grounds." [IB.19]. However, S.U.R., LLC failed to preserve these issues for appeal and has therefore waived them by not raising them below. As this Court cannot consider issues presented for the first time on appeal, it must summarily affirm the trial court's ruling. Even if S.U.R., LLC had not waived its arguments on appeal, they nonetheless lack merit. First, although FIS amended its Complaint twice after the hearing on the Motion for Summary Judgment, FIS's allegations and claims against S.U.R., LLC remained unchanged. Therefore, S.U.R., LLC suffered no prejudice by the amendments, nor is the summary judgment in any way deficient because of the amendments. S.U.R., LLC's claim that it was "deprived of an opportunity to seek dismissal of the complaint" [IB.21] lacks any support, since the lower court had the power under Florida law to determine who owned S.U.R., LLC, even in the absence of Atrium. Moreover, S.U.R., LLC's claim that Atrium "was deprived of an opportunity to defend its interest by the court's decision" [IB.20-21] is belied by the fact that Atrium actively sought to avoid the trial court's jurisdiction.

S.U.R., LLC also fails to point to any evidence demonstrating a genuine dispute of any material fact. Instead, S.U.R., LLC points to documents that are not part of the record, and cannot be considered by this Court, and which in any case do not relate to a ***material*** fact. Finally, S.U.R., LLC challenges the lower tribunal's finding of FIS's entitlement to costs and fees. However, this Court lacks jurisdiction to address this part of the appeal, since no amount of costs and fees was set by the trial court's order. Because all the arguments raised by S.U.R., LLC in this appeal have been waived and lack merit, this Court should affirm the lower court's order granting final summary judgment in favor of FIS.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's order granting final summary judgment. *See Ibarra v. Ross Dress for Less, Inc.*, 350 So. 3d 465, 467 (Fla. 3d DCA 2022). Summary judgment is appropriate whenever "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). A dispute of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Navarro v. Borges*, 2024 WL 1422996, at *2 (Fla. 3d DCA Apr. 3, 2024). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Nembhard v. Universal Prop. & Cas. Ins. Co.*, 326 So. 3d 760, 764 (Fla. 3d DCA 2021). "[I]t is incumbent upon the non-moving party to come forward with evidentiary material demonstrating that a genuine issue of fact exists as to an element necessary for the non-movant to prevail at trial." *Rich v. Narog*, 366 So. 3d 1111, 1118 (Fla. 3d DCA 2022). If the evidence presented by the non-movant is "merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*

ARGUMENT

I. The trial court did not err in granting summary judgment after amendment of pleadings.

S.U.R., LLC argues that the trial court erred in granting FIS's Motion for Summary Judgment because the motion was "directed at a pleading that was superseded." [IB.23]. As a threshold matter, this argument has been waived by S.U.R., LLC due to its failure to raise the issue below and preserve it for appeal. "It is well established that issues not properly preserved are waived." *State v. Clark*, 373 So. 3d 1128, 1131 (Fla. 2023). "For an issue to be preserved for appeal, it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation." *Pesce v. Morgan*, 49 Fla. L. Weekly D1082 (Fla. 3d DCA May 22, 2024). "A party cannot raise an issue before this court in the first instance." *Allied Prop. Group, Inc. v. Micor LLC*, 338 So. 3d 1024, 1026 (Fla. 3d DCA 2022).

Here, it is indisputable that even if S.U.R., LLC's argument had any merit—and it does not—S.U.R., LLC took no steps to bring the issue before the trial court. In particular, S.U.R., LLC did not raise this issue after FIS filed its Second Amended Complaint on May 5,

2023, or its Third Amended Complaint on October 12, 2023. S.U.R., LLC did not raise this issue after FIS voluntarily dismissed Atrium on November 22, 2023. Finally, S.U.R., LLC did not raise this issue after the lower tribunal entered its order on the summary judgment motion by timely moving for rehearing. *See Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) ("Under rule 1.530, a party may move for rehearing of final orders in order to give the trial court an opportunity to consider matters which it overlooked or failed to consider."). Consequently, S.U.R., LLC failed to preserve this issue for appeal. *Cf. Coffman Realty, Inc. v. Tosohatchee Game Pres., Inc.*, 381 So. 2d 1164, 1166 (Fla. 5th DCA 1980) (where record did not show that party made or preserved any objection to filing of summary judgment motion after complaint was dismissed but before amended complaint was filed, issue was waived).

Even if S.U.R., LLC had not waived this argument, it still lacks merit. Contrary to S.U.R., LLC's claim, this Court's opinion in *Babb v. Lincoln Auto Fin. Co.*, 133 So. 2d 566 (Fla. 3d DCA 1961), is not in fact "controlling." [IB.25]. In *Babb*, the amended complaint at issue added a whole new cause of action, new defendants, and "constituted an abandonment of the original complaint." *Id.* at 568. By contrast,

here, there are no differences in the allegations and claims against S.U.R., LLC in the operative pleading at the time of the hearing on summary judgment and FIS's two later amendments. [A.67-68; 73-75; 619-20; 626-28; 669-70; 676-78]. Hence, the trial court did not err in granting summary judgment. *Cf. Soho Realty, LLC v. Alexander Condo. Ass'n, Inc.*, 282 So. 3d 953, 956 (Fla. 3d DCA 2019) (finding the trial court "did not procedurally err by adjudicating the summary judgment motion filed prior to the supplemental complaint").

II. The trial court did not err in granting summary judgment in the absence of Atrium.

S.U.R., LLC also claims "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." [IB.26]. Yet, nothing prevented S.U.R., LLC from raising this issue before the trial court, either after FIS voluntarily dismissed Atrium or in a timely motion for rehearing after the summary judgment was entered. Again, S.U.R., LLC's failure to do so means the issue was waived. *See Gold, Vann & White, P.A. v. Friedenstab*, 831 So. 2d 692, 697 (Fla. 4th DCA 2002) ("The defense of failure to join an indispensable party may not be

raised after an adjudication on the merits and, thus, could not be raised for the first time on appeal."); *Ivens Corp. v. Hobe Cie Ltd.*, 555 So. 2d 425, 426 (Fla. 3d DCA 1989) (defendant did not properly plead failure to join indispensable party in motion to dismiss or in answer, and consequently "waived the point for appellate review"); *Valparaiso Realty Co. v. City of Valparaiso*, 473 So. 2d 1, 2 (Fla. 1st DCA 1985) (concluding defense of failure to join indispensable party was "waived for failure to timely raise it below, since non-joinder of parties is not a jurisdictional defect which may be raised at any time").

Even if S.U.R., LLC had not waived this argument, it still lacks merit. It is well settled that "a suit against non-resident stockholders to determine ownership of certain shares of stock is a quasi-in-rem proceeding,"[5] and that "personal jurisdiction of the defendants is not a condition precedent in order to maintain a quasi-in-rem action and prosecute it to final judgment." *Wolf v. Indus. Guar. Bancorp.*, 281 So. 2d 598, 599 (Fla. 3d DCA 1973). S.U.R., LLC's reliance on the case *Greater Miami Expressway Agency v. Miami-Dade Cnty. Expressway*

[5] In quasi-in-rem proceedings, "the judgment deals with the status, ownership, or liability of particular property." *Gribbel v. Henderson*, 10 So. 2d 734, 738 (Fla. 1942).

Auth., 48 Fla. L. Weekly D2069 (Fla. 3d DCA Oct. 25, 2023), is also misplaced. [IB.28]. S.U.R., LLC states that following the analysis in *Greater Miami Expressway Agency*, "treating an action as *in rem* does not make a party any less indispensable to the case." [IB.29]. Yet, as mentioned *supra*, the determination of ownership of stock is a "quasi-in-rem," not an *in rem*, proceeding. *Wolf*, 281 So. 2d at 599. This is significant since in a quasi-in-rem proceeding, "the rights of owners to property placed within the lower court's territorial borders may be adjudicated without regard to residence or presence of its owners." *Escudero v. Hasbun*, 689 So. 2d 1144, 1146 n.3 (Fla. 3d DCA 1997). Given this well-established precedent, it is clear that the lower court could enter a judgment determining the ownership of S.U.R., LLC's stock, even in the absence of Atrium. Thus, the trial court did not err in granting summary judgment.

III. The trial court did not err in finding there were no genuine disputes of material fact.

S.U.R., LLC further argues the trial court "erred in finding no issues of material fact where the allegations in this case are heavily contested." [IB.30]. S.U.R., LLC then claims:

> 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.

[*Id.*] S.U.R., LLC's summary of the issues is strange, to say the least. For starters, "whether [Vargas'] handling of the assets over the years nullifies Valinvest's claims for fees based on the value of the assets" has never been an issue in this case. Not only is Valinvest not a party in this action, but whatever claims it may have had against AES and the Institute are completely irrelevant to FIS's claims against S.U.R., LLC. The only relevant issue for the trial court was whether Vargas had the authority to transfer FIS's interest in S.U.R., LLC to Atrium. Rather than address the pertinent issue squarely, S.U.R., LLC goes on tangents trying to fabricate an issue of fact.

For example, S.U.R., LLC contends FIS's claims of wrongdoing against Vargas are "contradicted by the record." [IB.31]. Specifically, S.U.R., LLC references the minutes of the Investment Committee on December 5, 2016, wherein the Institute "expressed its gratitude for the management provided by Mr. Lizardo Vargas Revilla." [*Id.*] Even so, it should go without saying that this document from 2016 cannot and does not prove Vargas had the authority to transfer FIS's assets to himself in September 2020.

S.U.R., LLC also states, in conclusory fashion, that Vargas and Valinvest "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." [IB.32]. However, S.U.R., LLC fails to present any evidence that FIS's participants consented to Vargas' transfer of FIS's assets to himself in September 2020, just as it failed to do before the trial court. S.U.R., LLC also makes reference to some "correspondence" between Iriarte, "La Salle representatives with the highest level of authority," and Vargas allegedly showing "the closing of the fund was underway as of September 20, 2018." [IB.33]. First, this email is not part of the record on appeal and therefore cannot be considered by this Court. *See Supinski*, 853 So. 2d at 532. Second, as mentioned above, the arbitration tribunal in Peru found that these communications did not constitute an enforceable agreement to close the fund. [A.386].

Summary judgment is appropriate when a movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). "A fact is 'material' if the fact could affect the outcome of the lawsuit." *Brevard Cnty. v. Waters Mark Dev. Enterprises, LC*, 350 So. 3d 395,

398 (Fla. 5th DCA 2022). In other words, a material fact is one "that is essential to the resolution of the legal questions raised in the case." *Custom Design Expo, Inc. v. Synergy Rents, Inc.*, 327 So. 3d 427, 432 (Fla. 2d DCA 2021). While S.U.R., LLC grasps at straws in order to present an alleged issue of fact, it is patently clear that these "issues" would not affect the outcome of the action. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Casey v. Mistral Condo. Ass'n, Inc.*, 380 So. 3d 1278, 1286 (Fla. 1st DCA 2024). Factual disputes that are "irrelevant or unnecessary" will not prevent summary judgment. *Id.* Since S.U.R., LLC has failed to present any evidence of a genuine dispute of any material fact, the trial court did not err in granting summary judgment in favor of FIS.

IV. The trial court did not err in finding that FIS was entitled to costs and attorneys' fees.

Finally, S.U.R., LLC argues the lower court "erred as it ordered the S.U.R. Entities to cover costs, including attorneys' fees, incurred by FIS in pursuing the corporate records." [IB.34]. However, it is well settled that "[a]n order granting entitlement to attorney's fees but not determining amount of fees or costs is a non-final, non-appealable

order." *Yampol v. Turnberry Isle S. Condo. Ass'n, Inc.*, 250 So. 3d 835, 837 (Fla. 3d DCA 2018). Here, this Court is "without jurisdiction to address the portion of the appeal relating to attorney's fees . . . because no amount has been fixed by the trial court." *Diaz v. Citizens Prop. Ins. Corp.*, 227 So. 3d 735, 736 (Fla. 3d DCA 2017).[6]

Even if the Court had jurisdiction to consider this issue, S.U.R., LLC's arguments lack merit. Under Florida's Revised Limited Liability Company Act, S.U.R., LLC has an obligation to keep certain company records. *See* § 605.0410(1), Fla. Stat. As the trial court found, FIS is a member of S.U.R., LLC through its subsidiary, Parmenia. [A.713]. As S.U.R., LLC's member, FIS has the right to inspect and copy the records described in § 605.0410(1), plus other records regarding the activities, affairs, financial condition, and circumstances of S.U.R., LLC. *See* § 605.0410(3), Fla. Stat.

On March 24, 2021, FIS sent a letter to S.U.R., LLC, asking to inspect certain records, as provided by Fla. Stat. § 605.0410. [A.414]. On April 9, 2021, S.U.R., LLC responded to FIS's letter, rejecting the request for an inspection of records. [A.419]. As grounds for rejection,

[6] Together with this brief, FIS is filing a motion to dismiss this portion of the appeal.

S.U.R., LLC claimed "FIS is not a member of S.U.R., LLC and has not been a member since at the latest 2015 when its earlier transfer of its membership interest to Parmenia, LLC was ratified." [*Id.*] However, S.U.R., LLC was aware the transfer of shares from FIS to Parmenia did "not imply a change of ownership." [A.248]. Consequently, this was not a proper basis to deny FIS's request. Moreover, even if FIS were not a current member of S.U.R., LLC, the trial court could order S.U.R., LLC to produce the records requested by FIS under Fla. Stat. § 605.0410(4), which provides that a person dissociated as a member "may have access to information to which the person was entitled while a member" if information pertains to the period during which the person was a member and the person "seeks the information in good faith." § 605.0410(4), Fla. Stat.

S.U.R., LLC's claim that it "had grounds to deny the request to preserve crucial information that may have led to additional depletion of assets by an unauthorized liquidator" [IB.38] is belied by the fact it continued to deny FIS access to records, even after the arbitration tribunal in Peru found the appointment of Iriarte as liquidator had been appropriate. When a limited liability company does not allow a member to inspect records, the circuit court "may summarily order

inspection and copying of the records demanded, at the limited liability company's expense." § 605.0411(1), Fla. Stat. If the circuit court orders inspection and copying of the records, "it shall also order the limited liability company to pay the costs, including reasonable attorney fees, reasonably incurred by the member . . . to obtain the order and enforce its rights." § 605.0411(2), Fla. Stat. Accordingly, the trial court did not err in finding that FIS was entitled to recover its costs and attorneys' fees from S.U.R., LLC.

CONCLUSION

For the reasons stated, the Court should affirm the lower court's order granting summary judgment in favor of Appellee.

Dated: July 24, 2024

Respectfully submitted,

Eduardo A. Maura, Esq.
Florida Bar No. 91303
eduardo@ayalalawpa.com
Luis F. Quesada, Esq.
Florida Bar No. 1010305
lquesada@ayalalawpa.com
AYALA LAW, P.A.
2490 Coral Way, Ste 401
Miami, FL 33145
(305) 570-2208
Counsel for Appellee
Fondo de Inversión Stella

CERTIFICATE OF SERVICE

I hereby certify that this brief was served via the Florida Courts E-Filing Portal on July 24, 2024 upon the following:

Carlos Nunez-Vivas, Esq.
Leidy M. Morejon, Esq.
WASERSTEIN & NUNEZ, PLLC
1124 Kane Concourse
Bay Harbor Is, FL 33154
carlos@wnlawgroup.com
lm@wnlawgroup.com
Counsel for Appellant

By: *s/Eduardo A. Maura*
Eduardo A. Maura, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements in Florida Rule of Appellate Procedure 9.045(b) and the word count limit in Florida Rule of Appellate Procedure 9.210(a)(2)(B).

By: *s/Eduardo A. Maura*
Eduardo A. Maura, Esq.