UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

The Episcopal Church in South Carolina, Plaintiff, v. The Church Insurance Company of Vermont, Defendant.	Case No. 2:19-CV-01672-RMG Case No. 2:19-CV-01713-RMG **TECSC'S MEMORANDUM OF LAW IN SUPPORT OF AND IN OPPOSITION TO THE FOLLOWING:** **(1) TECSC'S MOTION TO DISMISS CIC-VT'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT IN CASE NO. 2:19-CV-01672-RMG** **(2) TECSC'S MOTION TO DISMISS CIC-VT'S COMPLAINT IN CASE NO. 2:19-CV-01713-RMG** **(3) CIC-VT'S MOTION FOR JOINDER IN CASE NO. 2:19-CV-01672-RMG** **(4) CIC-VT'S MOTION FOR CONSOLIDATION IN CASE NO. 2:19-CV-01672-RMG** **(5) CIC-VT'S MOTION FOR CONSOLIDATION IN CASE NO. 2:19-CV-01713-RMG**
The Church Insurance Company of Vermont, Plaintiff, v. Episcopal Church of the Redeemer, et. al. Defendants.	

For the convenience of the Court and in the interest of most efficiently responding to many duplicative and related filings in the above captioned cases, The Episcopal Church in South Carolina ("TECSC") submits this memorandum of law in support of its motions to dismiss the declaratory claim pled by The Church Insurance Company of Vermont ("CIC-VT") in both actions in the form of a complaint, counterclaim, and third-party complaint, and to oppose CIC-VT's motions for joinder and consolidation. More particularly, this memorandum of law supports or opposes the following motions: (1) TECSC's motion to dismiss CIC-VT's counterclaim and third-party complaint in Case No. 2:19-CV-01672-RMG (Dkt. TBD) ; (2) TECSC's motion to dismiss

CIC-VT's complaint in Case No. 2:19-CV-01713-RMG (Dkt. TBD); (3) CIC-VT's motion for joinder in Case No. 2:19-CV-01672-RMG (Dkt. 12); (4) CIC-VT's motion for consolidation in Case No. 2:19-CV-01672-RMG (Dkt. 11); and (5) CIC-VT's motion for consolidation, as amended, in Case No. 2:19-CV-01713-RMG (Dkt. 7 and 10).

TABLE OF CONTENTS

INTRODUCTION

CIC-VT is a captive insurance company that owes duties to exclusively insure and process claims for The Episcopal Church and its affiliates, including TECSC.

On June 11, 2019, TECSC filed a bad faith action against CIC-VT for secretly funding TECSC's disaffiliated adversaries in litigation against TECSC. In response, three days later, CIC-VT filed a parallel action seeking a declaratory judgment to attempt to justify the decision it already made to do so. CIC-VT then filed the same declaratory judgment claim in the form of both a counterclaim and third-party complaint in the bad faith action. CIC-VT also filed motions for consolidation and joinder.

This memorandum of law explains why CIC-VT's declaratory claim, pled in both actions, should be dismissed on the pleadings as a matter of law and equity, and why CIC-VT's motions for consolidation and joinder should therefore be denied as moot and futile.

Briefly summarized, CIC-VT's claim in both actions for a declaratory judgment attempting to justify the decision it already made to fund TECSC's disaffiliated adversaries in litigation against TECSC is barred as a matter of law and equity on several grounds, including: (i) judicial estoppel; (ii) statute of limitations; (iii) laches; (iv) *res judicata*; and (v) ripeness (as to the inconsequential and hypothetical question of indemnity coverage only).

Dismissal is proper on the face of CIC-VT's pleadings because the requisite facts prompting dismissal are all admitted by CIC-VT in such pleadings and in prior litigation in this Court (which CIC-VT conspicuously fails to mention in any of its recent filings). As early as 2013, CIC-VT received insurance claims and demands from TECSC's disaffiliated adversaries. CIC-VT initially denied them coverage. In turn, in 2015, TECSC's disaffiliated adversaries sued CIC-VT for breach of contract and bad faith. In its defensive pleading in that 2015 action, CIC-VT took the correct position that **"only affiliates of The Episcopal Church are eligible for**

coverage from CIC-VT." *Church of the Redeemer, et. al. v. The Church Insurance Company, et. al.*, Case No. 2:15-CV-02590-PMD (D.S.C.), CIC-VT's Answer to Amended Complaint filed August 10, 2015 (Dkt. 22 at ¶22). Instead of taking the opportunity then to obtain a declaratory judgment to confirm its correct position, CIC-VT chose to avoid further litigation of the issues and quickly settle that action under a **"joint stipulation of dismissal with prejudice."** *Id.*, Joint Stipulation of Dismissal With Prejudice filed November 11, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 30). CIC-VT subsequently provided insurance coverage to TECSC's disaffiliated adversaries and funded their litigation against TECSC. Now, several years later, in response to TECSC's bad faith action (which was filed soon after TECSC learned of a report published by one of its disaffiliated adversaries revealing that it had received funding from CIC-VT), CIC-VT is barred from seeking declaratory relief to reverse its position and avoid the consequences of its own choice to settle that prior action with prejudice.

As additional grounds for dismissal, CIC-VT's complaint in the parallel action should be dismissed under the first-filed rule. Also, CIC-VT's third-party complaint in the bad faith action should be dismissed because it fails to allege that TECSC's disaffiliated adversaries are liable to it for all or part of the claims against it by TECSC. And finally, by law, CIC-VT is not authorized or licensed to transact business or sell insurance in this State, as required, by the South Carolina Secretary of State and the South Carolina Department of Insurance. Accordingly, CIC-VT should not have filed and cannot maintain any action in this State. As a further consequence of its status as an unauthorized insurer in this State, before CIC-VT can file any pleading in this Court, CIC-VT is required by law to post a bond in an amount to be fixed by this Court sufficient to secure the payment of any final judgment which may be rendered.

Given that CIC-VT's duplicative declaratory claim should be dismissed in both actions, it follows that CIC-VT's motions for consolidation and joinder should therefore be denied as moot

and futile. *No further analysis is required. CIC-VT's declaratory claim ends.* Nevertheless, in addition to being moot and futile, CIC-VT's motions for consolidation and joinder should also be denied because the addition of numerous parties to the bad faith action initiated by TECSC against CIC-VT is unnecessary and would unduly complicate and prolong that case and burden and prejudice TECSC.

For these reasons, as detailed below, CIC-VT's declaratory claim, in both actions, should be dismissed and its motions for consolidation and joinder should be denied. Further, TECSC should be entitled to reasonable attorneys' fees and costs in connection with these proceedings.[1]

BACKGROUND

On June 11, 2019, TECSC filed a bad faith action against CIC-VT in this Court. We incorporate by reference and refer the Court to the complaint in that bad faith action for a full background of the facts at issue in this dispute. TECSC's Complaint filed June 11, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 1).

TECSC's complaint in the bad faith action describes in detail how CIC-VT willfully and recklessly breached and consciously disregarded its contractual and fiduciary duties owed to its insured, TECSC, under a long-standing annually renewed diocesan program master policy. That master policy includes duties and restrictions provided by applicable captive insurance company law and CIC-VT's corporate charter, which respectively provide as follows:

S.C. Code Ann. §38-90-20

> "A captive insurance company, when permitted by its articles of incorporation, articles of organization, operating agreement, or charter, may apply to the director for a license to provide any and all insurance, except workers' compensation insurance written on a direct basis, authorized by this title; however: (1) a pure captive

[1] CIC-VT also violated additional procedural rules. For instance, CIC-VT named additional parties in its counterclaim in the bad faith action without leave from the Court. CIC-VT twice amended its complaint in the parallel action without leave from the Court. And CIC-VT has improperly burdened TECSC and this Court with a multitude of duplicative filings.

> insurance company *may not insure* any risks other than those of its parent, affiliated companies, controlled unaffiliated business, risks assumed from a risk pool for the purpose of risk sharing, or a combination of them; (2) an association captive insurance company *may not insure* any risks other than those of the member organizations of its association and their affiliated companies…". (emphasis added).

CIC-VT's Corporate Charter[2]

> "The Corporation [CIC-VT] is organized and *shall be operated exclusively* for charitable and religious purposes as a supporting organization under §509(a)(3) of the Internal Revenue Code of 1986, as now in effect or as may hereafter be amended (the "Code"), *to carry out the charitable and religious purposes of [TEC] the Protestant Episcopal Church in the United States of America (the "Church")*, which is exempt from federal income tax and described in §501(c)(3) of the Code, and which is not a private foundation under §509(a)(1) of the Code. *The Corporation shall accomplish these purposes by providing, or entering into arrangements with third parties who will provide insurance and reinsurance coverage for various property and casualty risks of the Church and its provinces, dioceses, parishes, missions, agencies, institutions and other entities connected with the Church,* each of which shall be exempt from federal income tax and described in §501(c)(3) of the Code. The Corporation may engage in any and all other charitable activities within the meaning of §501(c)(3) of the Code and shall engage in any and all lawful activities incidental to the foregoing purposes, including any lawful act or activity permitted by insurance companies under the laws of the State of Vermont, as may from time to time be amended." (emphasis added).

TECSC's complaint in the bad faith action further describes how, in disregard of such duties and restrictions, CIC-VT secretly, knowingly, and wrongfully made payments and misdirected insurance proceeds to TECSC's disaffiliated adversaries to fund their litigation efforts against TECSC; and to aid and abet them in depriving TECSC of valuable trust property that the

[2] This Court may take judicial notice of matters of public record, including CIC-VT's corporate charter filed with the Vermont Secretary of State and made publicly available online at https://www.sec.state.vt.us. *See Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) ("In reviewing a Rule 12(b)(6) dismissal, we may properly take judicial notice of matters of public record.") (citing *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004) (noting it was proper during Rule 12(b)(6) review to consider "publicly available [statistics] on the official redistricting website of the Virginia Division of Legislative Services.")).

policy was intended to protect and cover for the benefit of TECSC. TECSC's Complaint filed June 11, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 1).

On the same day the bad faith action was filed, counsel for TECSC forwarded a copy of the summons and complaint by e-mail to an attorney that had been serving as an authorized representative of CIC-VT in connection with attempts made by TECSC to engage in related pre-litigation settlement discussions in this matter over the course of the prior month. A telephone call followed the same day during which CIC-VT proposed that TECSC withdraw its complaint prior to formal service in favor of allowing CIC-VT to file a declaratory judgment action. TECSC did not agree to do so.

The next day, on June 12, 2019, TECSC deposited the summons and complaint in the bad faith action in the mail to The South Carolina Secretary of State, The South Carolina Department of Insurance, and CIC-VT's registered agent in Vermont. On June 14, 2019, the Secretary of State accepted service for CIC-VT. Acceptance of Service, Case No. 2:19-CV-01672-RMG (Dkt. 5).

On June 14, 2019, CIC-VT filed the parallel declaratory judgment action. In its complaint, CIC-VT admits to providing insurance coverage to TECSC's disaffiliated adversaries to fund litigation against TECSC. CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶29) ("CICVT is and has been providing the Disassociated Parishes a defense in the Underlying Action under a reservation of rights pursuant to the applicable Policy issued to each of them."); CIC-VT's Second Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶31) ("That CICVT has accepted the defense of the Disassociated Parishes to the Underlying Action under a reservation-of-rights and is currently paying their defense costs."). The only cause of action in CIC-VT's complaint is one for declaratory judgment "advising it as to its rights and duties" with respect to having done so. CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶31); CIC-VT's Second Amended

Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶33). These issues were already before this Court in the bad faith action, described above. CIC-VT acknowledged this in its Local Rule 26.01 answers. CIC-VT's Local Rule 26.01 Interrogatory Answers filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 2) ("Response to Interrogatory E: Yes. *The Episcopal Church in South Carolina v. Church Insurance Company of Vermont*, 2:19-CV-01672-RMG. The instant action and the related matter involve common questions of law and facts in that they arise from the same transactions, happenings and events and involve the identical parties and would entail substantial duplication of labor if heard by different judges."); CIC-VT's Second Amended Local Rule 26.01 Interrogatory Answers filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 9) (same).

On July 6, 2019, CIC-VT filed the same declaratory claim in the form of a counterclaim and a third-party complaint in the bad faith action. CIC-VT's Answer and Counterclaim filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 8); CIC-VT's Third-Party Complaint filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 10); CIC-VT's Local Rule 26.01 Interrogatory Answers filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 9).

At the same time CIC-VT filed its counterclaim in the bad faith action, CIC-VT filed a motion for joinder. CIC-VT's Motion for Joinder filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 12).[3]

CIC-VT also filed motions for consolidation in both the bad faith action and the parallel action. CIC-VT's Motion for Consolidation filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 11); CIC-VT's Motion to Consolidate filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 7 and 10).

[3] CIC-VT named additional parties in its counterclaim in the bad faith action without leave from the Court.

CIC-VT's duplicative declaratory claim in both pending actions also relates to another prior action filed in 2015 by TECSC's disaffiliated adversaries against CIC-VT for breach of contract and bad faith (which CIC-VT omits to mention in any of its recent filings). Case No. 2:15-CV-02590-PMD. In its defensive pleading in that 2015 action: CIC-VT admitted that it received claims and demands from TECSC's disaffiliated adversaries as early as 2013; CIC-VT admitted that it denied them coverage; and CIC-VT admitted that its denial letters were attached to the complaint. CIC-VT's Answer to Amended Complaint filed August 10, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 22 at ¶¶35-38, 41-45, 47).[4] In defense of such denials of coverage to TECSC's disaffiliated adversaries, CIC-VT further took the position in its pleading that "only affiliates of The Episcopal Church are eligible for coverage from CIC-VT." CIC-VT's Answer to Amended Complaint filed August 10, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 22 at ¶22). Instead of then obtaining a declaratory judgment to confirm that correct position, CIC-VT chose to quickly settle that action in 2015 and agreed to file a "joint stipulation of dismissal with prejudice." Joint Stipulation of Dismissal With Prejudice filed November 11, 2015, Case No.

[4] The annually renewed diocesan program master policy at issue in both pending actions is the same one that was at issue in the 2015 action. For the year 2012, it was identified by the reference number VPP00002971. For the year 2013, it was renewed and identified by the reference number VPP0012879. These reference numbers and corresponding years were admitted by CIC-VT in the 2015 action. CIC-VT's Answer to Amended Complaint filed August 10, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 22 at ¶¶1-13). It appears that CIC-VT confused these reference numbers and corresponding years in its pleadings in the pending actions, misstating that VPP0012879 was in effect in 2012, when, in fact, it was in effect in 2013. CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶22); CIC-VT's Second Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶23); CIC-VT's Answer and Counterclaim filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 8 at ¶62); CIC-VT's Third-Party Complaint filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 10 at ¶22). Regardless, this apparent mistake is of no event because TECSC's bad faith action encompasses all effective years between 2012 and 2019 and any identifying numbers relating to the diocesan program master policy, including any reference numbers identifying participants in that policy. TECSC's Complaint filed June 11, 2019, Case No. 2:19-cv-01672-RMG (Dkt. 1).

2:15-CV-02590-PMD (Dkt. 30).

As CIC-VT admits in its pleadings in both pending actions, it subsequently provided insurance coverage to TECSC's disaffiliated adversaries and funded their ongoing litigation against TECSC. CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶29) ("CICVT is and has been providing the Disassociated Parishes a defense in the Underlying Action under a reservation of rights pursuant to the applicable Policy issued to each of them."); CIC-VT's Second Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶31) ("That CICVT has accepted the defense of the Disassociated Parishes to the Underlying Action under a reservation-of-rights and is currently paying their defense costs."); CIC-VT's Answer and Counterclaim filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 8 a at ¶67) ("That CICVT has accepted the Disassociated Parishes' claims under a reservation-of-rights and is currently paying their defense costs."); CIC-VT's Third-Party Complaint filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 10 at ¶31) ("That CICVT has accepted the Disassociated Parishes' claims under a reservation-of-rights and is currently paying their defense costs.").

Now, several years later, and only in response to being sued by TECSC for bad faith (which suit was filed soon after TECSC learned of a report published by one of its disaffiliated adversaries revealing that it had received funding from CIC-VT), CIC-VT seeks a declaratory judgment to attempt to reverse its position and avoid the consequences of its own choice to settle the prior action against it with prejudice.

LEGAL STANDARD

1. Dismissal

On a motion to dismiss under Rule 12(b)(6), FRCP, a "complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'" *Giarratano v.*

Johnson, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In reviewing a motion to dismiss an action pursuant to Rule 12(b)(6) . . . [a court] must determine whether it is plausible that the factual allegations in the complaint are 'enough to raise a right to relief above the speculative level.'" *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). "In considering a motion to dismiss, [the court] accept[s] the complainant's well-pleaded allegations as true and view[s] the complaint in the light most favorable to the non-moving party." *Stansbury v. McDonald's Corp.*, 36 F. App'x 98, 98-99 (4th Cir. 2002) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)).

"In reviewing a Rule 12(b)(6) dismissal, [the court] may properly take judicial notice of matters of public record." *See Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). Further, "[w]hen entertaining a motion to dismiss on the ground of *res judicata*, a court may take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact…" *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 1999).

2. Joinder

A defendant desiring to join counterclaim defendants to an action may not do so on its own accord; it must first make a motion to the Court. *See* Rule 21, FRCP ("On motion or on its own, the court may at any time, on just terms, add or drop a party.").

A motion for joinder should be denied as moot and futile where the claim upon which the motion for joinder is based is subject to dismissal. *See Perkins v. U.S.*, 55 F.3d 910, 917 (4th Cir. 1995) ("[T]he addition of a . . . claim would be futile because the case would still fail to survive a motion to dismiss."); *Garcia-Hicks v. Vocational Rehab. Admin.*, 25 F.Supp.3d 204, 211 (D. P.R., 2014) ("[T]he Court GRANTS defendant's motion to dismiss . . . Joinder of the [additional parties] pursuant to Rule 19(a) would be futile for the same reasons.").

Joinder is otherwise required under Rule 19(a)(A) and (B), FRCP, if "(A) in that person's

absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

3. Consolidation

A motion for consolidation should likewise be denied as moot and futile where the claim upon which the motion for consolidation is based is subject to dismissal. *See Perkins*, 55 F.3d at 917; *Garcia-Hicks*, 25 F.Supp.3d at 211.

Consolidation of multiple actions is otherwise a matter for the Court's discretion under Rule 42(a), FRCP, "if actions before the court involve a common question of law or fact."

LEGAL ARGUMENT

1. Dismissal

A. CIC-VT's declaratory claim, pled in both actions (in the form of a complaint, a counterclaim, and a third-party complaint), should be dismissed based on the allegations in the pleadings because it is barred as a matter of law and equity.

i. Judicial estoppel

CIC-VT is judicially estopped from asserting its declaratory judgment claim in both actions. "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "The purpose of judicial estoppel is to protect the integrity of the courts, not to protect litigants from allegedly improper or deceitful conduct by their adversaries." *State v. McCall*, 612 S.E.2d 453, 364 S.C. 205 (2005) (citing *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003) and *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Anderson, J., concurring) (providing a thorough discussion of the history,

purpose, and application of judicial estoppel)). "Judicial estoppel in South Carolina generally applies only to inconsistent statements of fact, not inconsistent positions of law." *McCall*, 612 S.E.2d 453, 364 S.C. 205 (citing *Carrigg v. Cannon*, 347 S.C. 75, 82-83, 552 S.E.2d 767, 771 (Ct. App. 2001). The South Carolina Supreme Court has further elaborated on the rationale behind judicial estoppel as follows:

> In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence.

Hayne, 327 S.C. at 251–52, 489 S.E.2d at 477. "The elements of judicial estoppel are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent." *McCall*, 612 S.E.2d 453, 364 S.C. 205 (citing *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

Applying these legal principles and elements here, CIC-VT is judicially estopped, as follows.

(1) "two inconsistent positions taken by the same party or parties in privity with one another"

CIC-VT has taken two inconsistent positions. CIC-VT's previous position was to deny

coverage to TECSC's disaffiliated adversaries as early as 2013, and to then formally assert in a defensive pleading against them in this Court in 2015 that "only affiliates of The Episcopal Church are eligible for coverage from CIC-VT." CIC-VT's Answer to Amended Complaint filed August 10, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 22 at ¶22). CIC-VT quickly settled that action under a "joint stipulation of dismissal with prejudice." Joint Stipulation of Dismissal With Prejudice filed November 11, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 30).

Now, TECSC takes the inconsistent position in its declaratory judgment claim in both pending actions that it is unclear and undetermined whether it can provide coverage to TECSC's disaffiliated adversaries. *See* CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶¶30, 31); CIC-VT's First Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 6 at ¶¶32, 33); CIC-VT's Second Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶¶32, 33); CIC-VT's Answer and Counterclaim filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 8 at ¶¶68, 69); CIC-VT's Third-Party Complaint filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 10 at ¶¶28, 29).

CIC-VT's objective, of course, is to obtain a declaratory judgment justifying the decision it already made to fund TECSC's disaffiliated adversaries, which in turn, CIC-VT contends would render the bad faith action "completely resolved." CIC-VT's Amended Memorandum in Support of its Motion to Consolidate, Case No. 2:19-CV-01713-RMG (Dkt. 10-1 at 12) ("The issues in the [bad faith action] are inherently intertwined with the outcome of the [parallel action] in that they are based on allegations that CICVT has been improperly paying the defense costs to the Disassociated Parishes. If the Disassociated Parises are entitled to reimbursement of their defense costs, the [bad faith action] should be completely resolved.").

(2) "the positions are taken in the same or related proceedings involving the same party or parties in privity with one another"

CIC-VT's declaratory claim in both pending actions is related to the 2015 action. The same parties are involved, namely CIC-VT and TECSC's disaffiliated adversaries.[5] The same issue is involved, that issue being whether TECSC's disaffiliated adversaries are eligible for coverage from CIC-VT.

(3) "the party taking the position must have been successful in maintaining that position and received some benefit"

CIC-VT was successful in maintaining its position in the 2015 action and received some benefit in that the breach of contract and bad faith claims filed against CIC-VT by TECSC's disaffiliated adversaries were dismissed with prejudice. Joint Stipulation of Dismissal With Prejudice filed November 11, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 30).

(4) "the inconsistency must be part of an intentional effort to mislead the court"

In its recent filings in both pending actions, CIC-VT makes no mention of its 2013 denials of coverage, or the 2015 action, or its position in the 2015 action, or its choice to settle that case with prejudice. Instead, CIC-VT intentionally misleads this Court, presenting the same coverage issue to this Court as if it were an issue for which CIC-VT has taken no position and must be decided in the first instance. Moreover, as detailed already, CIC-VT filed its declaratory claim in both actions as a direct response to and in attempt to interfere with the bad faith action. CIC-VT now belatedly and misleadingly seeks a declaratory judgment inconsistent with its own prior position from several years ago only to try to avoid liability for its bad faith conduct with respect to TECSC. This type of behavior is exactly what the doctrine of judicial estoppel prohibits. "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those

[5] For purposes of analyzing this element, it does not matter that TECSC was not a party to the 2015 action; nevertheless, we would note that TECSC is in a position of privity because the master policy at issue in both actions is TECSC's and the trust property protected and insured by that policy is held in trust for TECSC.

facts when the initial version no longer suits him." *Hayne*, 327 S.C. at 251–52, 489 S.E.2d at 477.

(5) "the two positions must be totally inconsistent"

Whether TECSC's adversaries are eligible for coverage from CIC-VT is a question that begs an answer of either yes or no. CIC-VT previously took the position that the answer to that question is no. It is totally inconsistent to seek a declaration judgment to answer that question with a yes. And again, that is clearly CIC-VT's objective, as it believes such a declaration would render the bad faith action against it "completely resolved." CIC-VT's Amended Memorandum in Support of its Motion to Consolidate, Case No. 2:19-CV-01713-RMG (Dkt. 10-1 at 12) ("The issues in the [bad faith action] are inherently intertwined with the outcome of the [parallel action] in that they are based on allegations that CICVT has been improperly paying the defense costs to the Disassociated Parishes. If the Disassociated Parises are entitled to reimbursement of their defense costs, the [bad faith action] should be completely resolved.").

ii. <u>Statute of limitations</u>

CIC-VT's declaratory judgment claim in both actions is barred under the applicable three-year statute of limitations. In South Carolina, a declaratory judgment action arising out of obligations owed under an insurance contract is subject to a three-year statute of limitations, pursuant to S.C. Code Ann. § 15-3-530(1). *See Medlin v. S.C. Farm Bureau Mut. Ins. Co.,* 325 S.C. 195, 196, 480 S.E.2d 739, 740 (1997) (affirming the trial judge's granting of a motion to dismiss a declaratory judgment action against an insurer pursuant to S.C. Code Ann. § 15-3-530(1), where such action was brought more than three years after the incident in question). "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Hedgepath v. Am. Tel. & Tel. Co.,* 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001).

Here, the statute of limitations began to run in 2013, or at the latest in 2015. Either way, the time has expired. The coverage question at issue in CIC-VT's declaratory claim in both pending actions was known (or reasonably ought to have been discovered) by CIC-VT in 2013, or at the latest, 2015. As already detailed above, in 2013, CIC-VT began denying such coverage to TECSC's disaffiliated adversaries. In 2015, CIC-VT defended itself in an action brought by TECSC's disaffiliated adversaries, asserting the position that "only affiliates of The Episcopal Church are eligible for coverage from CIC-VT," and ultimately settling that action under a "joint stipulation of dismissal with prejudice." CIC-VT's Answer to Amended Complaint filed August 10, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 22 at ¶22); Joint Stipulation of Dismissal With Prejudice filed November 11, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 30). CIC-VT's declaratory judgment claim in both actions is therefore barred under the applicable three-year statute of limitations.

iii. Laches

CIC-VT's declaratory judgment claim in both cases should be dismissed because it is barred by laches. "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 371 S.E.2d 525 (1988) (citing *Byars v. Cherokee County*, 237 S.C. 548, 118 S.E.2d 324 (1961)). "Whether a claim is barred by laches is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." *Hallums*, 296 S.C. 195, 371 S.E.2d 525 (citing *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E.2d 357 (Ct. App. 1985). "In sum, the [defendant] must establish the following elements to prove laches: (1) delay, (2) unreasonable delay, (3) prejudice." *Hallums*, 296 S.C. 195, 371 S.E.2d 525.

As already set forth above with respect to the statute of limitations analysis, CIC-VT has

delayed since 2013, and at the latest, 2015. This delay is unreasonable and prejudicial. CIC-VT stood before this Court in 2015 with an opportunity to obtain a declaratory judgment to confirm its correct position that it could not provide coverage to TECSC's disaffiliated adversaries, but instead chose to settle. At great prejudice to TECSC, CIC-VT then provided coverage to TECSC's disaffiliated adversaries to fund their litigation efforts against TECSC and to aid and abet them in depriving TECSC of valuable trust property that the policy was intended to protect and cover for the benefit of TECSC. Now, several years later, the doctrine of laches bars CIC-VT from seeking declaratory relief to attempt to reverse its position and avoid the consequences of its own choice to settle that prior action with prejudice.

iv. *Res Judicata*

CIC-VT's declaratory claim in both actions is further barred pursuant to *res judicata* because CIC-VT attempts to now relitigate issues previously adjudicated. "*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999). "*Res judicata* applies where there is identity of parties, identity of subject matter, and an adjudication of the issue in the former suit. A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.,* 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) (internal citations omitted). "*Res judicata* is a rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to a subsequent action." *In re Crews*, 389 S.C. 322, 339, 698 S.E.2d 785, 794 (2010) (citing Black's Law Dictionary 1174 (5th ed. 1979)).

A voluntary dismissal with prejudice is an adjudication on the merits for purposes of *res judicata*. *See Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 505, 121 S. Ct. 1021, 1026–27, 149 L. Ed. 2d 32 (2001) (recognizing that dismissal "'with prejudice' is an acceptable form of shorthand for an adjudication upon the merits" and that "'with prejudice' evinces '[t]he intention of the court to make [the dismissal] on the merits."); *Kenny v. Quigg*, 820 F.2d 665, 669 (4th Cir. 1987) ("Because a voluntary dismissal with prejudice is a valid, final judgment on the merits, *see* 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice p 0.409[1.-2], at 317 (2d ed. 1984), Kenny's voluntary dismissal of her counterclaim with prejudice had potential res judicata effect."); *Havee v. Belk*, 775 F.2d 1209, 1222 n.18 (4th Cir. 1985) ("Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective not only on the immediate parties but also on their privies…") (quoting 9 Wright & Miller, Fed. Prac. & Proc. §2367, pp. 185-186 (1971 ed.)).

Here, CIC-VT attempts to now relitigate the issue of whether TECSC's disaffiliated adversaries are eligible for coverage from CIC-VT. As already explained, this issue was raised and adjudicated on the merits in the 2015 action between CIC-VT and TECSC's disaffiliated adversaries, which they settled and jointly dismissed with prejudice.[6] CIC-VT should have obtained a declaratory judgment to confirm its correct position during that litigation, along with any other related issues. The final judgment on the merits in the 2015 action absolutely bars the present declaratory judgment action over the same issue (or any issues which might have been raised in the former suit).

v. <u>Ripeness (as to the inconsequential and hypothetical question of indemnity coverage only)</u>

[6] *See supra* note 5. For purposes of *res judicata* as applied against CIC-VT, it does not matter that TECSC was not a party to the 2015 action; nevertheless, we would note that TECSC is in a position of privity because the master policy at issue in both actions is TECSC's and the trust property protected and insured by that policy is held in trust for TECSC.

CIC-VT's duplicative declaratory claim in both actions seeks an answer to the fundamental question of whether TECSC's adversaries are eligible for coverage from CIC-VT. CIC-VT's pleadings inconsequentially parse that fundamental question into two coverage issues: (1) defense and (2) indemnity. CIC-VT's pleadings also pose several sub-questions relating to those two coverage issues. *See* CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶¶30, 31); CIC-VT's First Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 6 at ¶¶32, 33); CIC-VT's Second Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶¶32, 33); CIC-VT's Answer and Counterclaim filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 8 at ¶¶68, 69); CIC-VT's Third-Party Complaint filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 10 at ¶¶28, 29).

All such coverage issues are resolved by answering the fundamental question of whether TECSC's adversaries are eligible for coverage from CIC-VT. As explained above, in 2015, CIC-VT took a position that the answer to this fundamental question is no, but nevertheless chose to reach a settlement to dismiss the action with prejudice. CIC-VT's Answer to Amended Complaint filed August 10, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 22 at ¶22); Joint Stipulation of Dismissal With Prejudice filed November 11, 2015, Case No. 2:15-CV-02590-PMD (Dkt. 30). That dismissal with prejudice unquestionably applies to the *defense* coverage issues that were before this Court in 2015.

To the extent the *indemnity* coverage issue was not ripe or before the Court at that time and thus not also resolved in 2015, it is still not ripe. The underlying trademark litigation referenced in CIC-VT's pleadings is ongoing. There has been no determination of liability or award of damages against TECSC's adversaries to trigger any hypothetical indemnity coverage. Accordingly, CIC-VT's declaratory claim in both actions cannot survive as to the limited issue of indemnity coverage because it is not ripe. *See Ellett Brothers v. US. Fidelity & Guaranty Co.*, 275

F.3d 384, 388 (4th Cir. 2001) ("First, under South Carolina law, while the duty to defend is based on the allegations in the complaint, *see Earnhardt*, 282 S.E.2d at 857, the duty to indemnify is based on evidence found by the factfinder, *see Jourdan v. Boggs/Vaughn Contracting, Inc.*, 476 S.E.2d 708, 711 (S.C. Ct. App. 1986). Because no findings of fact have been made in the four lawsuits against Ellett, the indemnity claim is not ripe and the district court correctly dismissed it.").

B. CIC-VT's complaint in the parallel action should be dismissed under the first-filed rule

"A case in federal court 'may be dismissed for reasons of wise judicial administration whenever it is duplicative of a parallel action already pending in another federal court.'" *Blackwell v. Midland Credit Mgmt., Inc.*, 2:18-cv-2205-RMG, 2018 WL 4963166 at *2 (D.S.C. Oct. 15, 2018) (quoting *Nexsen Pruet, LLC v. Westport Ins. Corp.*, No. CIV.A. 3:10-895-JFA, 2010 WL 3169378, at *2 (D.S.C. Aug. 5, 2010) (citations omitted)). "Where the two suits are based on the same factual issues, the Fourth Circuit has recognized the 'first to file' rule, giving priority to the first filed suit absent a showing that the balance of convenience favors the second suit." *Blackwell*, 2:18-cv-2205-RMG, 2018 WL 4963166 at *2 (citing *Ellicott Mack Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 n. 2 (4th Cir.1974); *Learning Network, Inc. v. Disc. Comm., Inc.*, 11 Fed. App'x 297 (4th Cir. 2001) (same)). "This Court has held that '[s]uits are parallel if substantially the same parties litigate substantially the same issues in different forums." *Blackwell*, 2:18-cv-2205-RMG, 2018 WL 4963166 at *2 (citing *Nexsen Pruet, LLC*, 2010 WL 3169378, at *2 citing *New Beckley Min. Corp. V. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991)). "The same exact identity of the parties is not required for the first to file rule, and instead the parties must be substantially similar." *Blackwell*, 2:18-cv-2205-RMG, 2018 WL 4963166 at *2 . "Indeed, multiple courts have applied the first to file rule even where different actions include or omit additional defendants." *Id.* (citing *Kohn Law Grp., Inc. v. Auto Parts Mfg.*

Mississippi, Inc., 787 F.3d 1237, 1240 (9th Cir. 2015) ("the omission of [a defendant] from the present action does not defeat application of the first-to-file rule."); *Bewley v. CVS Health Corp.*, No. C17-802RSL, 2017 WL 5158443, at *2 (W.D. Wash. Nov. 7, 2017) ("the presence of one additional defendant, however, does not change the fact that the parties on the whole are substantially similar."); *Rudolph & Me, Inc. v. Ornament Cent., LLC*, No. 8:11-CV-670-T-33EAJ, 2011 WL 3919711 (M.D. Fla. 2011) (applying first to file rule where second action had "six additional defendants" yet four of those entities were either acquired by or shared "an interest" with the other defendant); *Vertical Computer Sys., Inc. v. Interwoven, Inc.*, No. 2:10-CV-490, 2011 WL 13141016, at *2 (E.D. Tex. 2011) ("a party cannot circumvent the policies underlying the first-to-file rule by merely tacking on an additional defendant in a later, duplicative action."). "[T]he first to file rule applies even where both actions are pending in the same district." *Blackwell*, 2:18-cv-2205-RMG, 2018 WL 4963166 at *2 (citing *Walton v. N. Carolina Dep't of Agric. & Consumer Servs.*, No. 5:09-CV-443-D, 2010 WL 11561770, at *2 (E.D.N.C. Mar. 1, 2010) (applying the first to file rule and holding that, "the fact that [the two cases] are before different courts in the same district does not obviate applying the rule....") (citing *Ellicott Mach. Corp*, 502 F.2d at 180 n.2).

The grounds for dismissing a later filed action are further supported where a declaratory judgment action is involved. "The [Declaratory Judgment] Act does not impose a mandatory obligation upon the federal courts to make such declarations of rights." *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998). "Rather, a district court's decision to entertain a claim for declaratory relief is discretionary." *Id.* "[D]istrict courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions." *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir.1996). Declaratory judgment actions "should not be used 'to try a controversy by piecemeal, or to try particular issues without settling the entire

controversy, or to interfere with an action which has already been instituted.'" *Id.* (quoting *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937)).

Here, the bad faith action was filed first, on June 11, 2019. TECSC's Complaint filed June 11, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 1). The parallel declaratory action was filed three days later, on June 14, 2019. CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1). Furthermore, CIC-VT had actual notice of the bad faith action on the day it was filed, June 11, 2019. That same day, CIC-VT proposed to TECSC that TECSC withdraw its complaint prior to formally serving CIC-VT in favor of allowing CIC-VT to file a declaratory judgment action. TECSC did not agree to do so. CIC-VT nevertheless went ahead and filed the parallel action. Accordingly, it is manifest that CIC-VT filed the parallel action as a direct response to and in attempt to interfere with the bad faith action.

The two actions indisputably involve the same factual issues. CIC-VT expressly acknowledges this in its Local Rule 26.01 answers and its motions to consolidate in both actions. CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 10-1 at 11) ("[T]he [later-filed parallel] action and the [first-filed bad faith action] are virtual mirror images of one another. Both suits arise from the same operative facts…"); CIC-VT's Local Rule 26.01 Interrogatory Answers filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 2) ("Response to Interrogatory E: Yes. *The Episcopal Church in South Carolina v. Church Insurance Company of Vermont*, 2:19-CV-01672-RMG. The instant action and the related matter involve common questions of law and facts in that they arise from the same transactions, happenings and events and involve the identical parties and would entail substantial duplication of labor if heard by different judges.").

The only ostensible point of distinction between the bad faith action and CIC-VT's parallel action is that CIC-VT named TECSC's adversaries as additional parties. But this is not enough.

"[A] party cannot circumvent the policies underlying the first-to-file rule by merely tacking on an additional defendant in a later, duplicative action." *Vertical*, 2011 WL 13141016, at *2. To be sure, as detailed herein, TECSC's disaffiliated adversaries are not necessary to the bad faith action, in which TECSC seeks monetary damages and other relief solely from CIC-VT for breaching its duties to TECSC.

The first-filed rule therefore dictates that the bad faith action is entitled to priority to the exclusion of the parallel declaratory action, which should be dismissed.

C. CIC-VT's third-party complaint in the bad faith action should be dismissed because it fails to allege that TECSC's disaffiliated adversaries are liable to it for all or part of the claim against it by TECSC

Rule 14, FRCP, provides that a "defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it." "The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against [him] by the original plaintiff. The mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough." *Stewart v. American Intern. Oil & Gas Co.*, 845 F.2d 196, 199-200 (9th Cir. 1988) (quoting 6 Wright & Miller, Fed. Prac. & Proc. § 1446 at 257 (1971 ed.)). "The third-party procedure is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel, but independent, actions, or separate and independent claims, or for changing the cause of action as asserted, or substituting another action for it, and is not a device for bringing into an action any controversy which may have some relation to it." *F.O. Majors v. American National Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970) (quoting 35A C.J.S. Federal Civil Procedure § 118). "The question whether a defendant's demand presents an appropriate occasion for the use of impleader or else constitutes a separate claim has been resolved consistently by permitting impleader only in cases where the

third party's liability was in some way derivative of the outcome of the main claim. In most such cases it has been held that for impleader to be available the third party defendant must be 'liable secondarily to the original defendant in the event that the latter is held liable to the plaintiff.'" *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967) (collecting cases) (citations omitted).

Here, CIC-VT's third-party complaint in the bad faith action is duplicative of its counterclaim, as well as its complaint in the parallel action. As detailed above, all three filings ask the Court to declare that CIC-VT was correct in deciding to fund TECSC's disaffiliated adversaries in litigation against TECSC. CIC-VT's third-party complaint does not allege a derivative transfer of liability, as required by Rule 14, FRCP. More particularly, CIC-VT's third-party complaint does not allege that TECSC's disaffiliated adversaries would have liability to CIC-VT in the event that the Court awards compensatory and punitive damages to TECSC in the bad faith action. Such a claim, moreover, would be inconsistent with CIC-VT's decision to settle the 2015 action with TECSC's disaffiliated adversaries and to secretly and knowingly fund them in litigation against TECSC. TECSC's disaffiliated adversaries are clearly not to blame for CIC-VT's breaching its own duties, as a captive insurance company, to TECSC.

D. CIC-VT is not authorized or licensed to transact business, sell insurance, or maintain an action in this State, as required by law, by the South Carolina Secretary of State, and by the South Carolina Department of Insurance; additionally, CIC-VT must post a bond before it can file any pleadings in this Court.

Under South Carolina law, all insurers (including captives) doing business in this State must be authorized and licensed by the Secretary of State and the Department of Insurance. Failure to do so affects an insurer's ability to maintain an action in this State, and it has other consequences, including a requirement that the insurer post a bond in *any* litigation. The applicable statutory provisions include but are not limited to the following:

- S.C. Code Ann. §33-15-102(a): "A foreign corporation transacting business in this State without a certificate of authority may not maintain a proceeding in any court in this State until it obtains a certificate of authority."
- S.C. Code Ann. §38-5-110: "It is unlawful for the Secretary of State to issue any charter or grant any amendments of charter to any insurer or permit any foreign or alien insurer to do business within this State without the written approval of the director or his designee."
- S.C. Code Ann. §38-90-60(B): "No captive insurance company shall do any business in this State unless it first obtains from the director a certificate of authority authorizing it to do business in this State."
- S.C. Code Ann. §38-5-10: "Every insurer doing business in this State must be licensed and supervised by the director or his designee…"
- S.C. Code Ann. §38-25-540: "An unauthorized insurer is not permitted to maintain any action, suit, or proceeding in this State to enforce a right, claim, or demand arising out of the transaction of insurance business until the insurer has obtained a certificate of authority to transact insurance business in this State."
- S.C. Code Ann. §38-25-550(a): "Before an unauthorized insurer files or causes to be filed any pleading in any court action, suit, or proceeding or any notice, order, pleading, or process in an administrative proceeding before the director or his designee instituted against the person or insurer, the insurer shall either: (1) Deposit with the clerk of court in which the action, suit, or proceeding is pending, or with the director or his designee in administrative proceedings before the director or his designee, cash or securities, or file with the clerk of court or the director or his designee a bond with good and sufficient sureties, to be approved by the clerk or

> director or his designee, in an amount to be fixed by the court or director or his designee sufficient to secure the payment of any final judgment which may be rendered in the action or administrative proceeding. (2) Procure a certificate of authority to transact the business of insurance in this State…"

These state statutes apply to this federal Court in diversity cases. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Applying them here, CIC-VT admits in its pleadings in both actions that it is a "corporation organized and existing pursuant to the laws of the State of Vermont" and that it "insures interests in South Carolina." *See* CIC-VT's Complaint filed June 14, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 1 at ¶¶1, 24); CIC-VT's First Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 6 at ¶¶1, 26); CIC-VT's Second Amended Complaint filed July 5, 2019, Case No. 2:19-CV-01713-RMG (Dkt. 8 at ¶¶1, 26); CIC-VT's Answer and Counterclaim filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 8 at ¶64); CIC-VT's Third-Party Complaint filed July 6, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 10 at ¶¶1, 24).

As a matter of public record for which this Court may take judicial notice,[7] CIC-VT does not have a certificate of authority from the Secretary of State, as required by S.C. Code Ann. §33-15-102(a). Further, CIC-VT is not licensed and authorized to do business as a captive insurance company or to otherwise sell insurance in this State by the Department of Insurance, as required by S.C. Code Ann. §38-90-60(B) and S.C. Code Ann. §38-5-10. Accordingly, it would be unlawful for the Secretary of State to issue CIC-VT a certificate of authority to transact business in this State, pursuant to S.C. Code Ann. §38-5-110. CIC-VT's failure to obtain a certificate of

[7] *See supra* note 2 (citing *Philips*, 572 F.3d at 180). Here, such public records are made available and searchable to the public online at the official government websites for the South Carolina Secretary of State, https://www.scsos.com, and the South Carolina Department of Insurance, https://www.doi.sc.gov. Searches for CIC-VT return no results.

authority from the Secretary of State, taken together with its legal ineligibility for one because of its failure to be licensed and authorized by the Department of Insurance, are fatal to its capacity to maintain this action in this State. As a further consequence of these failures, before CIC-VT can file any pleading in this Court, CIC-VT must post a bond in an amount to be fixed by this Court sufficient to secure the payment of any final judgment which may be rendered, pursuant to S.C. Code Ann. §38-25-550(a).[8]

2. Joinder and Consolidation

A. CIC-VT's motions for joinder and consolidation should be denied as moot and futile.

Given that CIC-VT's duplicative declaratory claim should be dismissed in both actions, it follows that CIC-VT's motions for consolidation and joinder should therefore be denied as moot and futile. *See Perkins*, 55 F.3d at 917; *Garcia-Hicks*, 25 F.Supp.3d at 211. No further analysis is required. CIC-VT's declaratory claim ends.

B. CIC-VT's motions for joinder and consolidation should furthermore be denied because TECSC's disaffiliated adversaries are not necessary parties.

TECSC's disaffiliated adversaries are not necessary parties, under Rule 19(a)(1)(A) or (B) FRCP. Contrary to CIC-VT's misguided suggestion that TECSC's disaffiliated adversaries are the real parties in interest to TECSC's bad faith action,[9] TECSC's grievance is squarely with CIC-

[8] Of course, so long as CIC-VT's posts the required bond, its failures to be authorized and licensed will not prevent it from "*defending* any proceedings in this State," pursuant to S.C. Code Ann. §33-15-102(e) (emphasis added).

[9] CIC-VT mischaracterizes TECSC's bad faith action as one of "misplaced blame" for the breaches of trust committed by TECSC's disaffiliated adversaries. CIC-VT's Local Rule 26.01 Answers filed July 6, 2019, Case No. 2:19-cv-01672-RMG (Dkt. 9 at 5). This is wholly inaccurate. TECSC's bad faith action makes claims against CIC-VT based on CIC-VT's own duties to TECSC as a captive insurance company, CIC-VT's own culpable knowledge regarding TECSC's disaffiliated adversaries, and CIC-VT's own wrongful actions in secretly funding TECSC's disaffiliated adversaries in litigation against TECSC and aiding and abetting them, causing

VT based upon its own breaches of contractual and fiduciary duties, as a captive insurance company, owed to TECSC. TECSC seeks compensatory and punitive damages solely from CIC-VT. TECSC's Complaint filed June 11, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 1).

Under Rule 19(a)(1)(A), FRCP, complete relief can therefore be accorded between TECSC and CIC-VT, without the involvement of TECSC's disaffiliated adversaries.

Under Rule 19(a)(1)(B)(i), FRCP, CIC-VT is not impeded in its ability to defend against TECSC's bad faith action, without the involvement of TECSC's disaffiliated adversaries.

Under Rule 19(a)(1)(B)(ii), FRCP, there is no risk of double liability. Pursuant to the causes of action at issue in the bad faith case,[10] CIC-VT"s liability for compensatory and punitive damages to TECSC for breaching its duties owed TECSC and causing significant harm to TECSC is independent and different in nature and scope from any obligation CIC-VT secretly and knowingly chose to assume to TECSC's disaffiliated adversaries when it settled with them in 2015 and agreed to wrongfully fund their litigation against TECSC. *See Standard Surety & Casualty Co. v. Baker*, 26 F. Supp. 956, 958 (W.D. Mo. 1939) ("By 'double or multiple liability' is meant 'double or multiple liability' on the same obligation. This plaintiff is not under the same obligation to any two claimants against it."); *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1997) ("Moreover, where two suits arising from the same incident involve different causes of action, defendants are not faced with the potential for double liability because separate suits have different consequences and different measures of damages.").

For these reasons, TECSC's disaffiliated adversaries are not necessary parties to the bad

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significant harm to TECSC. TECSC's Complaint filed June 11, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 1).

[10] TECSC's causes of action in the bad faith case include breach of contract, bad faith, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty. TECSC's Complaint filed June 11, 2019, Case No. 2:19-CV-01672-RMG (Dkt. 1).

faith action against CIC-VT.

C. CIC-VT's motions for consolidation and joinder should further be denied because the addition of TECSC's disaffiliated adversaries to the bad faith action would unduly complicate and prolong the case and burden and prejudice TECSC

As this Court is aware, TECSC is already engaged in enough litigation with its disaffiliated adversaries (funded by CIC-VT). They should not be invited to interfere with, complicate, and prolong TECSC's bad faith action against CIC-VT. Their inclusion in TECSC's bad faith action, whether by joinder or consolidation, would be prejudicial to TECSC. 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." 6 Wright & Miller, Fed. Prac. & Proc. §1460 at 319 (1971 ed.) (quoted in *Beach v. Hudson*, 380 S.E.2d 869, 871, 298 S.C. 424 (S.C. Ct. App. 1989) (discussing Rule 14, SCRCP, "like its federal counterpart").[11] For these additional reasons, CIC-VT's moot and futile motions for joinder and consolidation should be denied.

CONCLUSION

WHEREFORE, as detailed above, CIC-VT's declaratory claim, pled in both actions (in the form of a complaint, counterclaim, and third-party complaint), should be dismissed in both actions, and its motions for joinder and consolidation should be denied. Further, TECSC should be entitled to reasonable attorneys' fees and costs in connection with these proceedings.

[11] CIC-VT's motion for joinder is limited to Rule 19, FRCP, which provides for the mandatory joinder of necessary parties. CIC-VT did not move for permissive joinder under Rule 20, FRCP. Accordingly, Rule 20 is not addressed in this memorandum. To the extent the Court nonetheless considers the standard for permissive joinder under Rule 20, CIC-VT's motion should be denied for the same reasons set forth herein.

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Respectfully submitted,

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