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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case Nos. 2023-000667 & 2023-000668

Intellectual Capitol, Inc., Barry Newkirk and Neil Richards, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and South Carolina Workers' Compensation Commission, Respondents.

AND

JMI Sports and JMIS College, LLC, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and Clemson University, Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

JMI Sports and JMIS College, LLC,)

Docket No. 2022-CP-40-02536

Petitioners-Plaintiffs,)

vs.)

ORDER ON ALL
MOTIONS TO DISMISS

Michael B. Spicer, Chief Procurement)
Officer, South Carolina State Fiscal)
Accountability Authority, Division of)
Procurement Services, and Clemson)
University,)

Respondents-Defendants.)

Intellectual Capital, Inc., Berry Newkirk)
And Neil Richards,)

Docket No. 2022-CP-40-02656

Petitioners-Plaintiffs,)

vs.)

Michael B. Spicer, Chief Procurement)
Officer, South Carolina State Fiscal)
Accountability Authority, Division of)
Procurement Services, and South)
Carolina Workers' Compensation)
Commission,)

Respondents-Defendants.)

This matter came before the Court on various motions to dismiss filed by Respondents-Defendants. A hearing was conducted on January 5, 2023 and January 24, 2023 by WebEx. Present at the hearing were John Schmidt, III, Esq. on behalf of Petitioners-Plaintiffs; Manton M. Grier, Jr., Esq. on behalf of Michael B. Spicer, Procurement Officer, State Fiscal Accountability Authority; Boyd Nicholson, Jr., Esq. on behalf of Clemson University; and Michael Montgomery, Esq. on behalf of South Carolina Workers' Compensation Commission ("SCWCC"). Respondents-Defendants Spicer and South Carolina State Fiscal Accountability Authority filed a Motion to Dismiss under Rule 12(B) in lieu of Answer; Clemson University and SCWCC each

filed a Motion to Dismiss or Alternatively for Judgment on the Pleadings pursuant to SCRCP Rules 12(b)(1), 12(b)(6), 12(b)(8) and Rule 12(c).

The grounds for the motions to dismiss are: (1) the General Assembly of the State of the South Carolina has mandated that the Office of the Chief Procurement Officer (“CPO”) is the exclusive forum for deciding contract controversies involving governmental bodies as set forth in S.C. Code Ann. § 11-35-4230 (also referred to herein as the “Contract Controversy Provision”), and (2) JMI and Clemson, the parties to the contract controversy described in one of the complaints, have agreed that “all disputes, claims, or controversies relating to the Agreement [between them] shall be resolved exclusively by the appropriate CPO.” As a result, Respondents-Defendants argue the Court should dismiss this action because Petitioners-Plaintiffs have failed to exhaust their administrative remedies and because the Court lacks subject matter jurisdiction to hear this matter. Respondents-Defendants also argue that the Court should dismiss this action because Petitioner-Plaintiffs have failed to state facts sufficient to constitute a cause of action against Clemson and SCWCC. Finally, and in the alternative, the parties argue that the South Carolina Supreme Court has previously upheld the Contract Controversy Provision that Petitioners-Plaintiffs now challenges in this action. *See Unisys Corp. v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001).

The Contract Controversy Provision, which is part of the State Consolidated Procurement Code, “applies to controversies between a governmental body and a contractor ... which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.” S.C. Code Ann. § 11-35-4230(1). The procedure set forth in the Contract Controversy provision “constitutes the exclusive means of resolving a controversy between a governmental body and a contractor ... concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code.” *Id.* This language is unequivocal and requires that the CPO decide the claims set forth in the Request for Contract Controversy Resolution submitted by Clemson and SCWCC.

The Chief Procurement Officer (CPO), not the circuit court, has exclusive jurisdiction over this dispute between the parties regarding the contracts. Controversies between governmental bodies and contractors arising out of contracts governed by the Procurement Code are resolved pursuant to S.C. Code Ann. § 11-35- 4230, which vests exclusive jurisdiction with the CPO and

the Procurement Review Panel. The Supreme Court affirmed the exclusivity of the CPO's and Panel's jurisdiction in *Unisys v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). Although the Petitioners-Plaintiffs argue that Unisys is wrong because it "never mentions the Separation of Powers," the Court expressly held that there "is *no constitutional provision* limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit. 346 S.C. at 169, 551 S.E.2d at 270 (emphasis added). Here, a contract controversy involving these same parties, "Clemson University v. JMI Sports and JMIS College, LLC, CPO Case No. 2022-116" and "Request for Resolution of a Contract Controversy by South Carolina Worker's Compensation Comm'n, CPO Case No. 2020-213A", are currently pending before the Chief Procurement Officer ("CPO"). The CPO has exclusive jurisdiction over these controversies.

Pointing to Article I, §§ 3 and 8 of the South Carolina Constitution, Petitioners-Plaintiffs also argue that the Contract Controversy Provision violates the Separation of Powers and Due Process Clauses of the South Carolina Constitution with respect to a governmental body's claim against a private entity. The Supreme Court held the opposite in *Unisys*, and Petitioners-Plaintiffs arguments must fail. Analyzing not just Article X, § 10, the Supreme Court addressed the arguments of *Unisys* across the broad sweep of the State Constitution:

The State Constitution is a limitation upon and not a grant of power to the General Assembly. "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions."

346 S.C. at 169, 551 S.E.2d at 269-70 (internal citations omitted). In *Unisys*, while the Supreme Court did not specifically mention Article 1, Section 8 of the State Constitution, the Supreme Court did analyze Article V, Section 11 of the State Constitution which vests in the circuit court general jurisdiction in civil cases. The Supreme Court unequivocally held that "[t]here is *no constitutional provision* limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit." 346 S.C. at 169, 551 S.E.2d at 270 (emphasis added).

Thus, the Supreme Court held, the state's claims against Unisys were properly before the CPO. The limitations set by the legislature under the Procurement Code do not violate the

authority of the judicial branch to adjudicate the legal issues. The CPO has exclusive jurisdiction over the contract controversy between the parties here, and because Petitioners-Plaintiffs have failed to exhaust their administrative remedies, this Court dismisses this action. Petitioners-Plaintiffs claims are premature at this point.

Further, while Plaintiffs assert there is a constitutional issue under Article V, Section 1 vesting judicial power in the state courts, the proceedings under Section 11-35-4230 are not judicial proceedings. Section 11-35-4230 requires the review of any contractual dispute between a governmental body and a contractor to follow provisions of the Procurement Code under which the contract was procured. The means of resolving any contract controversy relates to a dispute based upon the contract itself and does not consider other legal claims that can be asserted by the parties. Further, any decision on the contract is subject to de novo review before the Procurement Review Panel as the final administrative review. S.C. Code Ann. Section 11-35-4410. The decision of the Procurement Review Panel is final as to administrative review. However, the decision of the Procurement Review Panel is subject to judicial review. *See* S.C. Code Ann. Section 11-35-4410. Therefore, the parties are not denied the opportunity to adjudicate the resulting issues before the courts. The parties have the opportunity to challenge the constitutionality of the applicable statutory provisions upon the exhaustion of the administrative remedies.

Petitioners-Plaintiffs also cite to *Carolina Glass Co v. State*, 87 S.C. 270, 69 S.E. 391 (1910)¹ as support for its separation of powers argument. In that case, the Supreme Court determined that the Legislature was not empowered to pass an act declaring that an individual is indebted to the state. The powers of the State Dispensary Commission that adjudicated a claim against the State were declared invalid by the Supreme Court because the Commission did not have authority to *pass final judgment* on the claim in violation of Art. 5, Section 1 of the State Constitution. In this case, there is no final adjudication to be made by the State thereby depriving the parties of judicial review. The statutory provisions of S.C. Code Ann. Sections 11-35-4230 and 11-35-4410 establish the right to judicial review. Ultimately, the courts have the opportunity to determine the rights of the parties and adjudicate any legal claims the parties may have.

¹ *Carolina Glass Co. v. State* was expressly overruled in *McCall v. Batson*, 285 S.C. 243, 251, 329 S.E.2d 741 (1985), “to the extent [it holds] that an action may be maintained against the State without its consent.”

Based upon the foregoing arguments, **IT IS HEREBY ORDERED**, that the motions to dismiss are **GRANTED** on the basis that the parties have failed to exhaust their administrative remedies. Further, any constitutional challenge to the statutory provisions is premature until a resolution of the administrative proceeding. Therefore, these cases are **DISMISSED WITHOUT PREJUDICE**.

AND IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW



Richland Common Pleas

Case Caption: Jmi Sports , plaintiff, et al vs Chief Procurement Officer, defendant, et al
Case Number: 2022CP4002536
Type: Order/Dismissal

IT IS SO ORDERED!

s/ Alison Renee Lee

Electronically signed on 2023-01-31 12:41:41 page 6 of 6

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

JMI Sports and JMIS College, LLC,)

Docket No. 2022-CP-40-02536

Petitioners-Plaintiffs,)

vs.)

ORDER ON ALL
MOTIONS TO DISMISS

Michael B. Spicer, Chief Procurement)
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Intellectual Capital, Inc., Berry Newkirk)
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Based upon the foregoing arguments, **IT IS HEREBY ORDERED**, that the motions to dismiss are **GRANTED** on the basis that the parties have failed to exhaust their administrative remedies. Further, any constitutional challenge to the statutory provisions is premature until a resolution of the administrative proceeding. Therefore, these cases are **DISMISSED WITHOUT PREJUDICE**.

AND IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW



Richland Common Pleas

Case Caption: Jmi Sports , plaintiff, et al vs Chief Procurement Officer, defendant, et al
Case Number: 2022CP4002536
Type: Order/Dismissal

IT IS SO ORDERED!

s/ Alison Renee Lee

Electronically signed on 2023-01-31 12:41:41 page 6 of 6

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP4002536

Jmi Sports et al
PLAINTIFF(S)

South Carolina State Fiscal Accountability Authority et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

This matter came before the Court on Plaintiffs' motion to reconsider dismissal of the case. This Court has reviewed the motions, briefs and arguments of counsel. This Court relies on Unisys Corp. v. South Carolina Budget and Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) which addressed the constitutionality of the State Procurement Code as the exclusive means of resolving a contract controversy governed by the Procurement Code. The Supreme Court specifically stated there is "no constitutional provision" limiting the legislature's power to establish the exclusive forum for deciding contract controversies involving governmental bodies set forth in S.C. Code Ann. Section 11-35-4230. Therefore, the motion to reconsider is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/13/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Jmi Sports , plaintiff, et al vs Chief Procurement Officer, defendant, et al
Case Number: 2022CP4002536
Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ Alison Renee Lee, Chief Administrative Judge

Electronically signed on 2023-04-13 13:03:14 page 3 of 3

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP4002656

Intellectual Capitol Inc et al
PLAINTIFF(S)

South Carolina Workers Compensation Commission et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

This matter came before the Court on Plaintiffs' motion to reconsider dismissal of the case. This Court has reviewed the motions, briefs and arguments of counsel. This Court relies on Unisys Corp. v. South Carolina Budget and Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) which addressed the constitutionality of the State Procurement Code as the exclusive means of resolving a contract controversy governed by the Procurement Code. The Supreme Court specifically stated there is "no constitutional provision" limiting the legislature's power to establish the exclusive forum for deciding contract controversies involving governmental bodies set forth in S.C. Code Ann. Section 11-35-4230. Therefore, the motion to reconsider is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/13/2023 .

Chief Procurement Officer

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Richland Common Pleas

Case Caption: Intellectual Capitol Inc , plaintiff, et al vs Michael B Spicer , defendant,
et al
Case Number: 2022CP4002656
Type: Order/Electronic Form 4

IT IS SO ORDERED!

s/ Alison Renee Lee

Electronically signed on 2023-04-13 13:02:54 page 3 of 3

STATE OF SOUTH CAROLINA	)	BEFORE THE CHIEF PROCUREMENT
	)	OFFICER
COUNTY OF RICHLAND	)	
	)	PROCUREMENT SERVICES
	)	
South Carolina	)	STATE FISCAL ACCOUNTABILITY
Workers' Compensation Commission,	)	AUTHORITY
	)	
Plaintiff,	)	Case No. 2020-213
	)	
vs.	)	
	)	SECOND AMENDED REQUEST FOR
	)	CONTRACT RESOLUTION
	)	
Intellectual Capitol, Inc.;	)	
Intellectual Capitol;	)	
Intellectual Capital;	)	
ICAP Solutions;	)	
Capitol Software;	)	
Barry Newkirk d/b/a ICAP—	)	
Capitol Software;	)	
Neil Richards, d/b/a Intellectual Capital;	)	
	)	
<u>Defendants.</u>	)	

The South Carolina Workers' Compensation Commission ("the Commission"), by and through its undersigned counsel, requests the Chief Procurement Officer to initiate conduct an Administrative Review to resolve a Contract Controversy emanating from Defendants' breach of the contract(s) between the Parties enumerated herein. The Commission makes this request pursuant to S.C. Code Ann. §11-35-4230. The Commission reserves its right to pursue debarment of the defendants pursuant to S.C. Code Ann. §11-35-4220 after the Chief Procurement Officer concludes the administrative review. The Commission adopts without refiling and incorporates the Exhibits filed with its Amended Request for Resolution on December 16, 2020 into this Pleading as if the same were refiled herewith. In making this request for review, the Commission would show the following:

PARTIES

1. The South Carolina Workers' Compensation Commission is a governmental body pursuant to S. C. Code Ann. §11-35-310(18).

2. Defendant Intellectual Capitol, Inc. is a South Carolina Corporation. Its Registered Agent is Barry G. Newkirk, 205 Colony Road, Taylors, South Carolina 29687. Intellectual Capitol, Inc. ("Intellectual Capitol" or "IC") is an approved vendor in the States Small Application Development program contract. Intellectual Capitol is Vendor Number 7000229912, as an approved vendor for its Small Application Development program. Intellectual Capitol is a "Contractor" pursuant to S.C. Code Ann. §11-35-310(10) or is, in the alternative an approved subcontractor for Tapfin pursuant to S.C. Code Ann. §11-35-210(32). Tapfin Process Solutions is that Managed Services Provider for the Small Application Development Contract but is not a party to the Contract for the KERMIT system. Tapfin assisted in procurement and management of the solution but was not a party to the application development.

3. During the contracted for work Defendant executed documents and purportedly performed services under other names and variations of its corporate name. These entities and parties are, upon information and belief Subcontractors as defined by S.C. Code Ann. §11-35-310(32). These parties include defendants:

a. Barry Newkirk Intellectual Capitol – ICAP, which is upon information and belief, an alter ego or related party to IC. This entity appears in the Intellectual Capitol's Proposal at Page 54 of the Exhibits to the Amended Request for Resolution. (Exhibit 2)

b. Intellectual Capital, SCRUM Master – Neil Richards, which is, upon information and belief, an alter ego or related party to IC. Upon further information

and belief, this is an unincorporated entity in South Carolina per the records of the Secretary of State. This entity appears on Change Order 1 included at Page 57 of the Exhibits and Change Order 2 at Page 61 of the Exhibits. (Exhibit 3)

c. Barry Newkirk ICAP – Capitol Software, which is upon information and belief, an alter ego or related party to IC. Upon further information and belief, Capitol Software is an unincorporated entity in South Carolina per the records of the Secretary of State. This entity appears on the termination letter at page 66 of the Exhibits. (Exhibit 6)

d. Intellectual Capitol, which is upon information and belief, an alter ego or related party of IC. This entity appears on invoices and a Job order for Business Analytics App. Found on p 113 et. seq. and at page 180 of the exhibits. (Exhibit 8 and 9)

e. Capitol Software, which is upon information and belief, an alter ego or related party to IC. Upon further information and belief, Capitol Software is an unincorporated entity in South Carolina per the records of the Secretary of State. This entity appears on the termination proposal for Data Analytics Application at page 182 of the Exhibits. (Exhibit 9)

f. ICAP, which is upon information and belief, an alter ego or related party to IC. This entity appears on the “proposal for re initiation” at page 233 of the Exhibits. (Exhibit 16)

g. Intellectual Capitol – ICAP, which is upon information and belief, an alter ego or related party to IC. This entity appears on the proposed NDA at page 245 of the Exhibits. (Exhibit 20)

4. This contract involves a state contract and includes provisions that make all disputes about the Contract subject to the South Carolina Consolidated Procurement Code. The CPO has jurisdiction over this matter pursuant to S.C. Code Ann. §§11-35-4320 and 4340.

NATURE OF CONTRACT CONTROVERSY

5. The Defendants contracted to provide the Commission an electronic filing and case management system which was named “KERMIT”. The Commission and Defendants created a set of specifications which included twenty-two specific performance requirements. The Defendants agreed to develop and deliver the system by November 2019. The Defendants were unable to provide a workable system that met the performance requirements and tried to scale back the system for a partial delivery in January 2020. This scaled back system was referred to as Version 1.5 and was to provide only minimal functionality of 12 of the 22 performance requirements in a working fashion as a bridge to complete the KERMIT project. This included the removal of the seven refactored items as well as three additional requirements that were so faulty that they could not be fixed in time. When this was delivered it was inoperable and not functional. The Commission continued to try and work with Defendants to resolve the issues and complete the project. On February 14, 2020, Defendants abandoned the project and thereafter have worked to hold the project hostage while seeking additional monies and time for completion. The Commission worked with Defendants until December 2020 attempting to develop a path forward to complete the project. Defendants have stalled, stonewalled, and refused to fulfill their contractual obligations. The Commission fully performed its obligations under the agreement and paid Defendants \$2,346,118.06 for the worthless and non-functioning KERMIT system provided.

These amounts more clearly shown on pages 56, 60, and 169 of the exhibits. (Exhibit 3, 4, 8) The Commission files this claim seeking damages as outlined hereinafter.

FACTS

6. The Commission realleges each of the allegations contained in Paragraphs 1-5 of this Complaint as if the same were restated verbatim herein.

7. Between February 2018 and July 2018, the Commission contracted with IC to complete a fact finding/ requirements gathering study to provide an online, multiuser electronic filing, claims processing, compliance, and payments system to integrate with third parties like the Supreme Court's AIS, Insurers and others. This contract was procured under the Small Development Application Process (Small Dev App) contract. This contract was designated as Phase 1 of the KERMIT project.

8. The Phase 1 contract identified and delineated the twenty-two requirements included in the statement of work for Phase 2 of the project. These twenty-two requirements constituted the "Minimal Marketable Feature Set" ("MMFS") to create a workable, working KERMIT system.

9. The purpose of the Phase 2 Contract, which is the subject of this controversy, is to create a claims processing, compliance and payment system that automates every aspect of the processes with required interfaces to other systems that are part of the course of action affecting the claim from its occurrence to its conclusion. (Exhibit 1, p. 2)

10. The Commission issued its Statement of Work ("SOW") for Phase 2 (Exhibit 1) on June 21, 2018.

11. The twenty-two requirements in the statement of work that are defined as “Minimal Marketable Feature Set” include: (Exhibit 1 p.20)

- a. External data access: DEW, NCCI, SOS, South Carolina AIS. The system will provide interface connectivity to receive and send data as needed to external agencies or organizations.
- b. Auto-population of data when creating and submitting a claims form. The system will provide the ability for the collected claims data to pre-populate screens as part of the processes.
- c. Online payments. The system will support the ability to receive payments online for fees, fines, etc., using a variety of methods supported by the commission.
- d. Reminders, ticklers, notifications of case activity. The system will provide the ability to track, remind, notify, and provide an audit trail of activities for cases.
- e. Auto-population of data when creating documents. The system will enable templated documents to be auto populated based on the information required by the document.
- f. Online filing. The system will provide a secure portal to enable online submission of required documents, forms and data related to a claim. All documents/forms and data could be submitted through the portal including EDI.
- g. Ability to activate claims. The system will provide the ability to activate a claim once reviewed.

h. Improved contact information management. The system will provide the ability for stakeholders to self-manage and keep up to date contact information on users from their organization.

i. Claim information view will contain all research criteria for disputes. The system will provide the ability to present information from different sources in the process of managing a medical bill dispute.

j. Schedule Management. The system will provide the ability to dynamically schedule hearings and appeals based on the constraints for stakeholders. This will include Hearings, Informal Conferences and Appeals and all of these must interface to consider attorney protection calendars as a part of the scheduling process.

k. The system should include customizable “easy button” functions – compilation of hearing docs/ communication with parties. The system will provide simplified processes to easily compile the necessary documents and methods to communicate quickly and efficiently with stakeholders.

l. The system will allow parties to serve and receive documents electronically including orders, forms, evidence, and the like. The system will enable and provide the ability for the commission to implement process serving in a more effective manner with the stakeholders.

m. Venue Scheduling. The system will provide the ability to integrate the venue scheduling into the hearing and appeals scheduling process.

n. Workflow Assignment – routing of work items to the correct employee. The system will implement workflows and supporting business rules to route work items to the appropriate parties throughout the claim process.

o. Stakeholder access to portal – claim status / contact management. The system should provide an internal and external portal for all stakeholders.

p. Catastrophic claim notification based on injury type. The system should provide the ability to identify claims that could exceed a threshold potential based on claim type.

q. Fund member management via the portal. The system should provide the ability for the self-insured fund programs to self-manage their membership via the portal.

r. Payment plan process. The system should provide the ability to establish negotiated payment plans as well as track and report progress.

s. Connecting x-files with associated WCC files being created after the fact. The system should enable association and link of Commission investigation files (x-files) and WCC case files without the need to re-key or re-enter data.

t. Dispute process. The system will provide process to manage submitted disputes so that parties involved can submit and review status online.

u. Medical bill reviewer approval process. The system will provide a streamlined process to manage the entities approved to provide medical bill review services within South Carolina.

v. NCCI reporting. The system will enable NCCI reporting without the need to re-key or re-enter data.

12. Defendants acknowledged the requirements of the Minimal Marketable Feature Set (“MMFS”) in their proposal and agreed to deliver those requirements for the specified price.

13. Defendants agreed to provide the MMFS as a deliverable with production release code, user interface functionality for internal and external stakeholders.

14. The Commission received multiple bids on Phase 2 prior to selecting the Defendants as its contractor.

15. On July 17, 2018, the Commission accepted the bid from Intellectual Capitol, Inc., Vendor Number 7000229912, titled “Proposal for South Carolina Workers [sic] Compensation Commission Legacy Modernization” (“the Proposal”) (Exhibit 2).

16. The bid price was \$1,903,204.00.

17. IC agreed to complete the milestone-based contract on or before October 31, 2019.

18. The Commission accepted a change order request #001 proposed by IC on October 23, 2018 (Exhibit 3). This change order was to add a role of data migration architect to plan, map data elements, test and migrate data from the legacy systems to the new data architecture for KERMIT.

19. Change order request 001 added the sum of \$127,914.00 to the contract price.

20. The Commission accepted change order request #002 June 11, 2019 (Exhibit 4). This change order added resources to XML standards for EDI with the insurance industry.

21. The justification for change order #002 was to address the fact that “recent problems with the XML standards and the timetable for resolving the problems affects the development of our new system because of our commitment to the go live date in October”.

22. Change order request 002 added an additional \$315,000 to the contract price of the KERMIT project making the total contract price \$2,346,119.00. (Exhibit 4)

23. No other change orders were paid by the parties in accordance with the Statewide Term Contract- Fixed Price Bid: Small Software Applications Development.

24. The system developed by Defendants was scheduled to “go live” on October 31, 2019. At the request of Defendants, this Commission consented to a delayed “go live” until December 4, 2019.

25. On November 15, 2019, at Defendants’ request, the Commission allowed Defendants to delay the release of Electronic Data Interchange (EDI) claims processing from the features Defendants planned to release on December 4, 2019.

26. On December 4, 2019, Defendants represented to the Commission the truncated system was ready to “go live” to the Commission’s internal and external stakeholders. (Exhibit 7)

27. When “go live” was attempted, the system did not work. There was no workable system delivered. This failure gave the first indication that the system was wrought with extensive technological, foundational, and functional deficits.

28. After trying to onboard external stakeholders and link these stakeholders to their claims for two weeks without success, the KERMIT system implementation had to be paused and converted to view only. Defendants failure to “go live” successfully required the Commission to reactivate the legacy systems at the Commission’s expense to continue providing services to the Commission’s stakeholders.

29. Following their failure to “go live”, Defendants promised to deliver a fully operational set of code (albeit with reduced functionality) in what was informally termed “Release 1.5” on January 31, 2020; this deliverable was missed. (Exhibit 10).

30. Release 1.5 included the delay of ten of the twenty-two components of the MMFS to a later Release 2.0 which was to be the contracted for system.

31. Defendants committed to complete the deliverables in the MMFS by March 31, 2020 as a part of their proposal for Release 1.5.

32. On February 3, 2020 Defendants attempted to deliver “1.5” functionality. Defendants candidly acknowledged they had only fixed 73 of the 105 critical bugs that had been identified and noted in the release notes. The other 32 bugs were still outstanding issues.

33. Testing conducted by the Commission showed many of the 73 bugs were not fixed; this Commission delivered documentation of these deficiencies to the Defendants on February 9, 2020. (Exhibits 11).

34. On February 11, 2020, the Honorable T. Scott Beck, Chairman of the South Carolina Workers’ Compensation Commission, sent a letter to Barry Newkirk, agent of Defendants, requesting specific performance. (Exhibit 5).

35. On February 14, 2020, Mr. Newkirk wrote the Commission that Defendants were “terminating our involvement in this project”, effective immediately. (Exhibit 6).

36. Mr. Newkirk’s termination was allegedly because “we have reached a grave impasse and after repeated attempts to collaborate and solve the issues before us, it is clear that an amenable and fair solution is not available.”

37. There was no impasse with the Commission other than the fact that it required the delivery of the product as contracted for, on the amended dates. Defendants refused to deliver the product and purported to terminate the contract under a willfully false pretense.

38. Defendants instead, attempted to hold the product hostage until the Commission approved additional change orders paying the Defendants more monies for the contracted for product without justification other than defendant’s claimed needs.

39. Such termination was done without cause, in bad faith, without commercially reasonable notice, and left the Commission without the use of any of the MMFS deliverables that Defendants contracted to provide.

40. Since that time, Defendants' have continued to breach the contract, failed to perform, acted in bad faith, engaged in false and misleading conduct for the purpose of avoiding their obligations and have taken every opportunity to frustrate any reasonable resolution to this matter, as described below.

41. On or about February 14, 2020, Defendants provided to the Commission turnover instructions with information for access to the SC Azure Portal Environment within the QA and production cloud tenant. Defendants represented that this gave the Commission access to all data that had been developed under the Contract. (Exhibit 6).

42. Defendants did not protect the sensitive nature of this information and sent the administrator username and password for the Azure environment through an unsecured email.

43. Upon information and belief, Defendants have not given the Commission access to all relevant data housed in their environment.

44. On March 16, 2020, the Commission filed its initial Request for Resolution and Debarment with the Chief Procurement Officer.

45. On March 26, 2020, after the CPO requested that Defendants Answer the Commission's Request for Resolution and Debarment, Mr. Newkirk, on behalf of the Defendants, contacted the Commission and stated he wanted to meet on Monday, March 30, 2020, to discuss finishing the project.

46. The March 30, 2020 meeting was unproductive. Defendants' offer proved to be disingenuous, premised on a misrepresentation of future work but requiring extra-contractual

payments, in bad faith, and only intended to delay the prosecution of the Commission's Request for Resolution and Debarment.

47. Upon information and belief, since March 16, 2020, Defendants have not taken any action or done any work to repair the product and move towards delivering a working system consistent with the Statement of Work although they have attempted to entice the Commission to pay them more money to deliver the project on multiple occasions up to and including December 2020.

48. Due to Defendants' commercially unreasonable termination of the contract and failure to deliver the agreed upon MMFS, the Commission enlisted the services of Microsoft Corporation to perform a Gap Analysis.

49. On or about April 27th, 2020, Microsoft representatives advised the Commission that they would need to see a demonstration of the system by Defendants as part of the Gap Analysis.

50. Initially, Defendants refused to cooperate in performing a demonstration unless Microsoft and/ or the Commission paid Defendants \$8,500.00 that they were not due under any contract. (Exhibit 12).

51. Defendants then agreed to provide a demonstration to Microsoft, but only on the condition that Microsoft bar the Commission from participating in or even viewing the demonstration. Defendants could not articulate any commercially valid reason for excluding the Commission from seeing Defendants present the Commission's data. (Exhibit 13).

52. Following correspondence from the Commission, Defendants allowed the Commission to observe, but not participate in, the demonstration. (Exhibit 14).

53. On June 4, 2020, Defendants presented the requested demo to Microsoft. However, Defendants did not demonstrate a working system. Instead, in a willful attempt to mislead Microsoft and the Commission, Defendants used staged and mocked-up claims information to present a façade of a working system. Defendants used many different claims and submissions to simulate what, with a functioning system, could have been presented as a single continuous process. Because back-end workflows and processes do not initiate and/or complete business processes properly, the demo had to rely on staged and manipulated data to mimic functional sequential business processes. Only a small number of modules were presented and, even with staged data, the system did not meet the Contract requirements.

54. Defendants’ demonstration failed to show how it could process a simple claim from inception to completion, nor did it demonstrate any functionality or ability to transact on migrated claims. (Exhibit 15).

55. On July 9, 2020, the Commission and Mr. Newkirk met at Defendant’s request. Ostensibly, the purpose of this meeting was to give Defendants the opportunity to present their “re-initiation of the KERMIT project proposal”. However, Defendants proposal was nothing more than a “hold-up game”¹ where Defendants demanded the Commission pay them an additional \$10,000.00 without approval by the SFAA for a 1-day meeting to reunite Defendants and Commission staff. By Defendants’ own admission they intended to reframe the scope of the

¹ “A threat to breach a contract is likely to be found to be improper and in bad faith if it is made for no reason other than a desire to force the other party to pay more money for the performance to which he is already entitled. This is sometimes referred to as the ‘hold-up game’”. Claude D. Rohwer, et al., *Contracts in a Nutshell* § 7.2 (7th Ed. 2010). Defendants have been essentially playing a “hold-up game” ever since their February 14, 2020 letter wherein they stated they were terminating their involvement in the project.

project to substantially reduce the features from what was contracted for in the Statement of Work and paid for by the Commission.

56. In their proposed relaunch of the KERMIT system, the Commission would have to pay Defendants even more money than it had paid under the Statement of Work before Defendants would produce this diminished feature-set.

57. This would have required the State to pay Defendants twice for some of the same work while accepting less than the contracted for MMFS.

58. Defendants' plan further required that the only employees of the Commission that could participate in the proposed exercise were "key business stakeholders" defined by the Defendants, which excluded the Commission's executive level management and anyone from the Commission's IT Department. (Exhibit 16).

59. Defendants proposal also included "Independent" Verification and Validation which they insisted be conducted by Raymond Gray, who at the time appeared to be a contractor on Defendants' payroll.

60. On July 20, 2020, Commission Chair T. Scott Beck wrote a letter to Defendants recapping the terms laid out in the July 9, 2020 meeting. Defendants agreed with Chairman Beck's recap of the meeting but would not take a position on the source of the additional requested funds. (Exhibit 17).

61. On October 8, 2020, Microsoft informed the Commission it needed and had requested access to Defendants' Azure development environment, but Defendants would only agree to provide such access if Microsoft would agree to keep their findings secret from the Commission. (Exhibit 18). Microsoft was concerned enough by Defendants' request that they consulted their own attorney to protect Microsoft's interests.

62. To alleviate Microsoft's concerns, on October 14, 2020, the Commission requested Defendants agree via a short acknowledgement to grant Microsoft access to their development environment for purposes of completing the Gap Analysis and allow Microsoft to disclose its findings to the Commission. (Exhibit 19).

63. Defendants responded by demanding that all parties enter a sweeping, boilerplate "Mutual Non-Disclosure Agreement" that Mr. Newkirk downloaded from the internet. (Exhibit 20). The proposed agreement would have been in direct violation of S.C. Code Ann. Regs. 19-445.2010.

64. The Commission wrote Defendants on October 21, 2020, explaining why it could not enter into the proposed agreement. (Exhibit 21). Defendants promised to provide a revised agreement to alleviate the Commission and Microsoft's concerns.

65. On October 27, 2020, Defendants responded with a "revised" proposed NDA that was essentially the same document, but with even more restrictive language, still in violation of Reg. 19-445.2010. (Exhibit 23). This document would have provided Defendants an untoward advantage in this litigation by preventing the Commission from disclosing the findings made by Microsoft in the Gap Analysis to the Chief Procurement Officer and/ or Procurement Review Panel and prevented the Commission from even disclosing the existence of the NDA as the reason why such evidence was missing.

66. A comprehensive Gap Analysis would already be complete, but for the bad conduct of Defendants. The Commission anticipates that extensive discovery will have to be compelled from Defendants to allow Microsoft to complete a comprehensive Gap Analysis.

67. To date, the Commission has paid Defendants \$2,346,118.06 in accordance with the original Contract and subsequent change orders. (Exhibit 4)

68. Defendants either deficiently performed or did not perform unit testing or acceptance testing. Defendants did not deploy a product capable of user acceptance testing. Defendants either deficiently performed or did not perform regression testing as new development was deployed. Despite having not produced the agreed upon services even in the most minimal of standards, the Defendants still accepted payment for regarding the same.

69. At the time of each progress payment, Defendants falsely represented that the work in the module was complete and would integrate with the remaining modules. When Defendants made these representations, they knew or should have known that they were false.

70. Defendants intended that the Commission rely upon these false statements.

71. Defendants either deficiently performed or did not perform continuous module integration. Specifically, Defendants failed throughout the development process to consider the impact of code modifications on existing modules.

72. Defendants have not delivered the system contracted for. The Contract called for the use of an “Agile” methodology based on minimal marketable feature set consisting of twenty-two items. The Contract included fourteen scheduled milestones with Milestone Planned Deliverables and associated payments.

73. Defendants failed to deliver the contracted for claims processing, compliance and payment system that automates every aspect of the processes with required interfaces to other systems that are part of the course of action affecting the claim from its occurrence to its conclusion. (Exhibit 1, p. 2.) A functioning claims processing, compliance and payment system that replaces the Commission’s legacy system is the heart of this project. This functioning system necessarily included the twenty-two item MMFS being fully integrated and operational.

74. The Commission made good faith efforts to provide all input necessary for Defendants to develop Just in Time Requirements (“JITRs”). The Commission fully participated in all Milestone Review meetings. It was not until the modules were assembled in the production environment and Defendants attempted to “go live” that the Commission discovered the myriad of issues including technical cloud issues, performance and environment issues, data issues, functional issues, workflow and integration issues.

75. The Commission made repeated attempts to resolve the dispute without the involvement of external parties, making numerous temporary concessions regarding timeframes, deadlines, and functionality. *See Exhibit 7.* The Commission made ongoing, good faith efforts to work with Defendants to complete the project, going so far as to have Commission staff undertake, at the Commission’s expense, work that the Commission had contracted Defendants to perform, including, but not limited to, extensive unit testing. Following Defendants’ abject failure to deliver minimum marketable features on December 4, 2019, the Commission agreed to temporarily accept far less than was originally promised for a “Release 1.5” to be delivered by January 31, 2020, in hopes of getting something functional delivered to stakeholders. Defendants failed to meet even these lowered expectations. *See Exhibit 7.*

76. An outline containing a more detailed timeline is included as an exhibit (Exhibit 7). The invoices submitted and paid in relation to this project are also included as an exhibit (Exhibit 8).

77. The Commission is left with a system that is inoperable, incapable of being utilized and not salvageable. The Commission will be forced to start over to develop a system that should have been in place and working had Defendants fulfilled their obligations under the Contract.

78. Defendants have left the Commission without minimum marketable feature sets of any of the modules described in the milestones listed in the contract.

79. To obtain a working KERMIT system, the Commission will incur additional costs more than the original amounts listed in the contract and change orders to put the Commission in the place where it would have been had Defendants' performed as they promised.

80. In addition to the loss of performance of the Contract because of Defendant's actions, the Commission has been forced to continue running, licensing, supporting, and maintaining the legacy systems the Contract was intended to replace.

81. These increased costs are a direct and proximate result of the Defendants' failure to perform as promised.

82. A list of the substantial deficiencies in the twenty-two item MMFS is shown in the table below, indexed by MMFS requirement as enumerated in the Statement of Work:

ID	Requirement	Notes from SOW	WCC Issues
01	External data access: DEW, NCCI, SoS	The system will provide interface connectivity to receive and send data as needed to external agencies or organizations.	DEW: 1) The data for employer records that were to be automatically integrated on a quarterly basis was never established. 2) In addition to the employer records, the process to receive additional detailed employer records via subpoena was never illustrated to WCC. NCCI: 1) WCC saw a return of inconsistent, inaccurate, and incomplete data. WCC worked at length with ICAP to identify the issues. 2) Due to EDI not being implemented, the requirement to retain EDI/POC daily transmissions was not met. SoS: WCC saw high level information returned with no ability to drill down for compliance investigations. AIS: There was no process to reconcile differences for validation of attorney log ins with AIS as compared to legacy data. This caused many mismatched attorney/claim links. The detailed AIS data was not provided to WCC until immediately before go-live for comparison.
02	Auto-population of data when creating and submitting a claims form.	The system will provide the ability for the collected claims data to pre-populate screens as part of the processes. <i>(Listed as 2 Requirements in the JOQ; combined in development stories.)</i>	Improper, inaccurate, and internal data was populated. Some data was never captured or populated. Naming conventions were unclear, causing users difficulty understanding what filings related to each other or what filings should follow.

ID	Requirement	Notes from SOW	WCC Issues
03	Online payments	The system will support the ability to receive payments online for fees, fines, etc., using a variety of methods supported by the commission.	1) While the system was to require filings fees for multiple submissions, some fees were duplicated, some fees were never assessed, and some forms were submitted without payment. 2) Fine assessments were never implemented. 3) No way to reconcile or track payments in the portal.
04	Reminders, ticklers, notifications of case activity.	The system will provide the ability to track, remind, notify, and provide an audit trail of activities for cases.	1) Emails were being sent to a "catch all" account and notifications could not be validated or verified by WCC during testing. At go live, Carriers were never linked to their claims and therefore never received notifications. Attorney stakeholders were able to act on notifications multiple times which created duplicate records of documents and unnecessary filing fees. The system made no provisions for handling notifications if the party didn't exist in the system. 2) No complete audit trail exists. 3) No reminders/ticklers were ever illustrated to WCC.
05	Auto-population of data when creating docs	The system will enable templated documents to be auto populated based on the required information for the document.	When the system would create a document, improper and inaccurate data was populated. In addition, some commission internal codes were displayed in lieu of meaningful user data. Some data was never captured or populated. Legal documents were not accurate. Metadata for document submission was inaccurate or missing. Not every templated document was created.

ID	Requirement	Notes from SOW	WCC Issues
			Combinations of these issues caused both workflow issues and inaccurate status updates.
06	Online filing	The system will provide a secure portal to enable online submission of required documents, forms, data related to a claim.	1) Role based user access management was not perfected causing many issues including questionable security and incorrect claim access based on Org User module, rights, etc. 2) Not all forms were developed and/or implemented. No EDI transactions could be processed. InRule (business rules engine) that was to be used to validate data on all forms, submissions and EDI transactions was never fully implemented.
07	Ability to activate claims	The system will provide the ability to activate a claim once reviewed.	The system was to first run a duplicate review process however this process did not function at go-live for any of the submission types. Claim activation should occur when an EDI FROI is filed, and no duplicate is located. Since EDI was never implemented, this method never created active claims. A Form 50 or Letter of Representation should also activate a claim when no duplicate is located. While the system was able to generate a claim number from these submissions, there was no Pro Se process functioning (only attorneys could file), and the

ID	Requirement	Notes from SOW	WCC Issues
			workflow process between the paralegal and attorney had many issues as did the workflow process to WCC staff.
08	Improved contact information management	The system will provide the ability for stakeholders to self-manage and keep up to date contact information on users from their organization.	Many to many relationships were not established properly and caused issues with: - Carrier/TPA/claim linking - Employer/Carrier/Attorney relationships - Attorney/Paralegal relationships The system blended the concepts of Contact management, email notifications, and Certificate of Service. This complexity without clear rules created conflict. A major example of this was that due to system design constraints, a distribution list for carrier service addresses was not allowed. No rules established for reconciling conflicts in user/contact data from external sources. WCC had no way to manage external stakeholder information to include the initial approval of the organization.
09	Claim information view contains all research criteria for disputes	The system will provide the ability to present information from different sources in the process of managing a medical bill dispute.	The Medical Bill Dispute process was refactored based on ICAP's request/inability to deliver more critical processes.

ID	Requirement	Notes from SOW	WCC Issues
10	Schedule management	The system will provide the ability to dynamically schedule hearings and appeals based on the constraints for stakeholders.	Docketing module was not functioning properly. This module was to include docketing for Hearings, Informal Conferences, and Appeals. All of these were to include creation and management of attorney protection. Below were the statuses in February 2020: 1) Hearings (including Rule to Show Cause): multiple errors. 2) Informal Conferences: Functionality was never illustrated to WCC. 3) Appeals: Refactored based on ICAP's request/inability to deliver more critical processes. 4) Attorney Protection: attorneys (but not paralegals) were able to mark calendars for protected dates but because scheduling was not working, functionality could not be confirmed.
11	Customizable easy button functions – compilation of hearing docs/communication with parties	The system will provide simplified processes to easily compile the necessary documentation and communication methods to the stakeholders.	Functionality for a user to group documents within a claim or Judicial Activity Record (JAR) was never implemented. While the document attempted to group associated documents, other system defects (lack of document naming standards, multiple docs created for 1 submission, breaking Certificate of Service (COS) apart from filing, etc.) rendered any sort of document list useless. The ability to contact all case parties with a single click and generate automatic notifications (for event rescheduling, updated notices, and orders) was never illustrated to WCC. For these to

ID	Requirement	Notes from SOW	WCC Issues
			take place, contact management would need to be set up and functioning properly which never happened.
12	Serving and receiving docs electronically-orders, forms, evidence, etc.	The system will enable and provide the ability for the commission to implement process serving in a more effective manner with the stakeholders	There were no rules established for reconciling data sources and there were significant contact management issues, so COS did not consistently point to the correct address for service. The COS was changed multiple times without demonstration and acceptance from WCC. In addition, serving Orders and sending out hearing notifications were never implemented.
13	Venue scheduling process	The system will provide the ability to integrate the venue scheduling with the hearing and appeals scheduling process.	Module was linked incorrectly to the Administrative Assistant role rather than Judicial role. The existing venue data that was migrated from WCC was displayed inaccurately and incompletely within the portal. The presentation of data rendered the module unusable. (Ex. Inactive venues were able to be selected for a hearing site location.)
14	Workflow Assignment – routing of work items to correct employee	The system will implement workflows and supporting business rules to route work items to the appropriate parties throughout the claim process.	The functionality of Workflows is to pass claim data and documents from one module to another, or from one user to another, as defined and driven by business rules. The proper integration would sequence transactions and users to move a claim through all business processes from initiation to completion. The KERMIT modules had some working functionality when evaluated independently. However, when integrated with other modules, the filings didn't consistently advance to the next users work queue. The next proper business action was not

ID	Requirement	Notes from SOW	WCC Issues
			consistently triggered. Data did not flow from one module to another. User roles were not adequately defined or implemented so sequential business processes did not connect. Users could not consistently track actions, update, or reroute submissions as appropriate. No administrative workflow management or audit trail access was provided. Statuses did not consistently update with Workflows. The status of a claim and the status of a submission were co-mingled/indistinguishable.
15	Stakeholder access to portal – claim status/contact management	The system should provide an internal and external portal for all stakeholders.	The system failed to establish organization and claim relationships rendering it dysfunctional. Every module within the stakeholder portal had issues reported. These included: contact management issues; many to many relationship issues; status issues; data issues; data presentation issues; data clarity issues; etc.
16	Catastrophic claim notification based on injury type	The system should provide the ability to identify claims that could exceed a threshold potential based on claim type.	The Catastrophic claim notification was refactored based on ICAP's request/inability to deliver more critical processes.
17	Fund member management via the portal	The system should provide the ability for the Fund programs to self-manage their membership via the portal.	The Self-Insurance Fund member management was refactored based on ICAP's request/inability to deliver more critical processes.
18	Payment Plan Process	The system should provide the ability to establish negotiated payment plans as well as track and report progress.	Employer Compliance Payment Plan process was refactored based on ICAP's request/inability to deliver more critical processes.

ID	Requirement	Notes from SOW	WCC Issues
19	Connecting x-files with associated WCC files being created after the fact.	The system should enable association and link of x-files and WCC case files without the need to rekey data.	This functionality was never demonstrated.
20	Dispute Process	The system will provide process to manage submitted disputes, so parties involved can submit and review status online.	Medical Billing Dispute process was refactored based on ICAP's request/inability to deliver more critical processes.
21	Med Bill Reviewer Approval Process	The system will provide a streamlined process to manage the entities approved to provide medical bill review services within SC.	The Med Bill Reviewer Approval process was refactored based on ICAP's request/inability to deliver more critical processes.
22	NCCI reporting	The system will enable NCCI reporting without the need to rekey data.	NCCI reporting for State Accident Fund, Self-Insured Employers and Funds was refactored based on ICAP's request/inability to deliver more critical processes.

83. Because of Defendants' breach, the Commission will be forced to use its time and personnel resources to restart a project that should have been complete, all to its detriment.

84. The non-working system was not developed using application development directory best practices.

85. Although the Commission purchased In-Rule based on the Defendants' specific justification establishing sustainable modifications to workflows and business rules, Defendants never implemented the program in accordance with the justifications submitted for its use. (Exhibit 24)

86. Upon information and belief, Defendants misrepresented their qualifications and ability to construct and deliver the system.

87. The Commission is informed and believes that the only way that it can obtain a working system is to have the system rewritten from scratch at substantial cost and with further delays which would not have been necessary had Defendants performed and delivered as they agreed.

88. The Commission will suffer additional cost in money and staff time to obtain the system that it contracted with Defendants to construct.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

89. Plaintiff realleges every allegation contained in paragraphs 1 – 88 of this Complaint as if the same were repeated verbatim herein.

90. Defendants agreed to deliver the Commission a working KERMIT system that included the agreed upon minimum marketable feature set fully functioning.

91. Defendants have failed to deliver the KERMIT system as agreed.

92. The Commission has fulfilled all its contractual obligations, including, but not limited to paying Defendants the full contract price of \$2,346,118.06 and providing staff, resources, and assistance as required to fulfill its contractual obligations.

93. The Commission paid the Defendants an additional \$104,000.00 for the first milestone of a subsequent contract, the Business Intelligence Project, (Exhibit 9). Defendants did not perform any work on this contract and breached this second contract by their express termination and nonperformance. Moreover, the Business Intelligence Project could not be implemented unless and until the KERMIT system was operating with the MMFS.

94. As a direct and proximate result of the Defendants' breach of the contract and failure to deliver KERMIT as promised, the Commission has suffered the loss of its entire

investment in Phase 2 and the Business Intelligence Project, for a total of \$2,450,118.06; has been required to restore and utilize its legacy systems costing tens of thousands of dollars every month of the delay, has be required to hire and retain staff and been unable to deliver services as required by its mandate all in amounts to be proven in a hearing before a trier of fact in this matter. The Commission will also be required to contract with another vendor at a likely cost greater than the contract price with Defendants which will result in additional costs, loss of time and goodwill with its stakeholders, loss of staff time and other pecuniary losses.

95. Due to of the Defendants' breach of the contract with the Commission, the Commission has been required to engage and pay outside counsel fees and expenses to prosecute this matter. The Commission asserts that pursuant to S.C. Code Ann. §11-35-4320 the recovery of these costs and fees are necessary to resolve the controversy as allowed by the terms of the contract or by applicable law and that the CPO should award the Commission its costs and attorney fees in this matter.

96. The Commission is further entitled to expectation damages in an amount not yet fully determined, but no less than the actual costs the Commission will incur to buy substitute performance to complete the tasks Defendants had promised to perform.

97. The Commission is further entitled to an award of damages in an amount not yet fully determined but no less than the actual costs incurred by the Commission to continue running, licensing, supporting, and maintaining the legacy systems the Contract was intended to replace until such time as the system can be implemented as a functional system.

98. The Commission is entitled to a judgment against defendants jointly and severally in an amount to be determined by the Chief Procurement Officer encompassing all these elements.

FOR A SECOND CAUSE OF ACTION

Breach of Contract Accompanied by a Fraudulent Act

99. Plaintiff realleges every allegation contained in paragraphs 1 – 98 of this Complaint as if the same were repeated verbatim herein.

100. Defendants failed to deliver the working KERMIT system including the MMFS as required by the Contract and thereby breached the Contract.

101. Contemporaneously with and as an integral part of their breach of contract, the Defendants made material misrepresentations about the function of the KERMIT system, stating, inter alia, that the system operated, that the only problems were communications issues between the Commission and Defendants, that Defendants required additional payment to complete KERMIT and that Defendants wished to continue to work to solve the problems.

102. These misrepresentations were false.

103. The Defendants knew these misrepresentations were false.

104. The Defendants intended the Commission to rely upon these misrepresentations.

105. The Commission had a right to rely upon these representations and did in fact rely upon these representations.

106. The Commission suffered additional damages because of the delay and expense caused by these fraudulent misrepresentations.

107. The Defendants conduct constituted fraudulent acts accompanying their breach of the contract.

108. These acts were specifically related to the breach of the contract by the Defendants and not to entry into or performance of the contract.

109. The Commission is entitled to an award of actual and exemplary damages in amounts to be determined by the CPO for the Defendants' breach of the contract accompanied by a fraudulent act.

FOR A THIRD CAUSE OF ACTION
Fraud

110. Plaintiff realleges every allegation contained in paragraphs 1 – 109 of this Complaint as if the same were repeated verbatim herein.

111. The Commission paid Defendants progress payments as an integral part of the contract.

112. With every progress payment request, the Defendants certified that milestones were met so that they could qualify for these payments.

113. Standard review meetings between the Commission and Defendants were held throughout the project in accordance with the terms of the SOW and the Proposal. These included bi-weekly reviews called Sprints and monthly reviews of milestones accomplishments, which were associated with payments to Defendants.

114. At milestone reviews, not all deliverables listed for the milestones were functional. Defendants promised that the deliverables were in development and would be provided later, relying on the "continuous integration" and "refactoring" concepts of the "Agile" approach as an excuse for their continuing failure to deliver.

115. The Commission continued to make good faith payments in accordance with the schedule in the Contract, relying on the promises by Defendants that additional follow-up would address the incomplete deliverables on or before the "go live" date.

116. The Defendants never completed their work, yet Defendants have not returned any of the unearned funds paid to it by the Commission.

117. Defendants provided Milestone Reviews throughout the project lifecycle presenting design concepts and development of various modules in the system. The purpose of these sessions was to provide a forum for the project team to review the functional design considerations, the application features developed within the current Sprint and allow the Commission to provide feedback such that design and development issues were caught sooner than later.

118. Defendants illustrated work was being done on the independent modules but when the modules were assembled, the system did not function. Milestone Review sessions were only to look at the scope of design and development within the four-week period, not to test the functionality. Therefore, the Commission continued to rely on the promises of Defendants that they would deliver functionality at “go live”.

119. Defendants failed to perform their obligations to “go live” by the end of October 2019, as originally contracted. The Commission agreed to delay implementation of the new system until December 4, 2019, relying on promises from Defendants that performance would be delivered on that date. (Exhibit 7)

120. Defendants failed to deliver a working product on December 4, 2019.

121. Defendants again promised the Commission they would deliver at another later date, January 31, 2020, and the Commission relied to its detriment on this promise.

122. On January 31, 2020, Defendants did not deliver a working product.

123. The Commission provided Defendants with an additional extension until February 3, 2020. The Commission has relied, to its detriment, on the promises of Defendants, but still has not received a usable product.

124. The certifications and representations both verbally and in writing were false as the modules / programming for the milestones was not complete.

125. The Defendants knew that their representations were false or else made the representations with a reckless disregard for the truth as the product neither worked nor was capable of being integrated to make the KERMIT system operable as required by the contract.

126. Defendants knew that the product was inoperable, but nevertheless gave these false certifications for payment.

127. The representations for the payment were material. Without the representation, no payment would be made.

128. Defendants intended that the Commission rely upon these certifications and issue payment to Defendants.

129. The Commission had a right to rely upon these certifications and relied on these certifications in issuing and approving payments to the Defendants.

130. The Commission was not aware that the certifications were false.

131. The Commission relied upon the truth of the certifications in making payments of more than \$2,300,000.00 to the Defendants.

132. The Commission suffered actual pecuniary damages as a direct and proximate result of Defendants misrepresentations and fraud including the benefit of the bargain – a working system – at the agreed price as well as the loss of value of all the monies paid for a system that is unfit, unsalvageable and does not work for the purpose contract.

133. The Commission is entitled to an award for its actual losses and exemplary damages in amounts determined by the CPO after a hearing on the facts.

FOR A FOURTH CAUSE OF ACTION PLEADING IN THE ALTERNATIVE

Unjust Enrichment

134. Plaintiff realleges every allegation contained in paragraphs 1 – 133 of this Complaint as if the same were repeated verbatim herein.

135. If the CPO were to find that the Commission's legal causes of action were insufficient, the Commission is entitled to and does plead in the alternative for equitable relief as follows.

136. Defendants have unjustly enriched themselves by accepting money for work they have not completed, terminating their involvement in the projects, and not making any arrangements to return the unearned funds to the Commission.

137. The Commission has made payments to the Defendants totaling more than \$2,450,000.00 for work on the KERMIT project.

138. Defendants abandoned the project after failing to deliver the agreed upon solution and MMFS required by the contract in any working fashion.

139. As a result of the Defendants accepting payment without performing the contract, they have been unjustly enriched.

140. The Commission is entitled to recovery of the funds paid which were unjustly retained without consideration as well as interest at the statutory rate, litigation costs and attorney fees.

FOR A FIFTH CAUSE OF ACTION

Breach of the Statutory Covenant of Good Faith and Fair Dealing

141. Plaintiff realleges every allegation contained in paragraphs 1 – 140 of this Complaint as if the same were repeated verbatim herein.

142. For a fourth cause of action, the Commission asserts Defendants have breached the implied covenant of good faith and fair dealing in the performance of its obligations under the contract.

143. S.C. Code Ann. §11-35-20 provides ‘Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. “Good faith” means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

144. A party to a contract is entitled to “commercially reasonable notice” of the termination of services by a contractor. *See In Re: Caption Colorado, LLC v. Office of Regulatory Staff*, SCPD 2010-7 (S.C. Procure. Rev. Panel) 2011 WL 194254

145. Defendants’ letter of February 14, 2020, immediately terminated their services, provided the Commission no advance notice, left the Commission without an operable integrated information system, without a contractor, and without the money it had paid to Defendants.

146. Defendants breached the implied covenant of good faith and fair dealing in the performance of its obligations under the contract, particularly in its conduct beginning with the abject failure of its promise to “go live” on December 4, 2019, and continuing through the date of this pleading, as outlined above.

147. Because of the Defendants’ breach of the contract with the Commission, the Commission has been required to engage and pay outside counsel fees and expenses to prosecute this matter. The Commission asserts that pursuant to S.C. Code Ann. §11-35-4320 the recovery of these costs and fees are necessary to resolve the controversy as allowed by the terms of the contract or by applicable law and that the CPO should award the Commission its costs and attorney fees in this matter.

148. The Commission is entitled to a judgment against defendants jointly and severally in an amount to be determined by the Chief Procurement Officer.

FOR A SIXTH CAUSE OF ACTION

Audit

149. Plaintiff realleges every allegation contained in paragraphs 1 – 148 of this Complaint as if the same were repeated verbatim herein.

150. S.C. Code Ann. §11-35-2210 provides, inter alia, that “The State shall be entitled to audit the books and records of a contractor or subcontractor under any negotiated contract or subcontract other than a firm fixed price contract to the extent that such books and records relate to the performance of such contract or subcontract.

151. The Small Application Development Contract is not a firm fixed price contract.

152. The Commission is entitled to an Audit of the Defendants’ books and records to determine how the Defendants used or misused the monies paid by the Commission.

PRAYER FOR RELIEF

153. The Commission requests that the Chief Procurement Officer issue an Order awarding the Commission the following relief:

a. On the Cause of Action for Breach of Contract: Entering Judgment for the Commission in an amount of actual damages determined by the CPO for its breach of contract including, but not limited to the sums paid by the Commission to defendants together with interests, costs and attorney fees together with the costs of obtaining a working system and the additional staff and licensing fees together with other expenses necessary to maintain the Commission’s legacy system

pending placing a new operating system with the MMFS that the Defendants failed to deliver.

b. On the Cause of Action for Breach of Contract Accompanied by a Fraudulent Act. Entering Judgment for the Commission in the amount of actual and exemplary damages determined by the CPO considering all the injury and harm suffered by the Commission as a direct and proximate result of Defendants' wrongful conduct.

c. On the Cause of Action for Fraud. Entering Judgment for the Commission in the amount of actual and exemplary damages determined by the CPO considering all the injury and harm suffered by the Commission as a direct and proximate result of Defendants' wrongful conduct.

d. On the cause of Action for Unjust Enrichment, in the alternative, entering Judgment for the Commission in the amount of actual damages determined by the CPO.

e. On the cause of Action for Breach of the Statutory Covenant of Good Faith and Fair Dealing. Entering Judgment for the Commission in an amount of actual damages determined by the CPO for its breach of contract including, but not limited to the sums paid by the Commission to defendants together with interests, costs and attorney fees together with the costs of obtaining a working system and the additional staff and licensing fees together with other expenses necessary to maintain the Commission's legacy system pending placing a new operating system with the MMFS that the Defendants failed to deliver.

f. On the Cause of Action for Audit. Entering judgment for the Commission and Ordering a procurement Audit of the contract.

g. Entering an Order requiring the preservation of all source code, development code, programs, and the development environment pendente lite.

h. For such further and other relief as the CPO deems just and proper.

Respectfully Submitted,

MONTGOMERY WILLARD, LLC

s/ Michael H. Montgomery

By: Michael H. Montgomery

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Attorneys for the South Carolina Workers'
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Columbia, South Carolina
February 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-_____
	)	
Intellectual Capitol, Inc., Barry Newkirk,	)	
and Neil Richards,	)	
	)	
Petitioners-Plaintiffs,	)	
	)	
vs.	)	SUMMONS
	)	
Michael B. Spicer, Chief Procurement	)	
Officer, South Carolina State Fiscal	)	
Accountability Authority, Division of	)	
Procurement Services; and South Carolina	)	
Workers' Compensation Commission,	)	
	)	
Respondents-Defendants.	)	
_____	)	

TO THE RESPONDENTS/DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition and Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Petition and Complaint upon the subscriber at the address shown below, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Petition and Complaint, judgment by default will be rendered against you for the relief demanded in the Petition and Complaint.

Schmidt & Copeland, LLC

s/ John E. Schmidt, III

John E. Schmidt, III (S.C. Bar No. 4973)

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Attorney for Petitioners-Plaintiffs

Columbia, South Carolina
May 20, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-_____
	)	
Intellectual Capitol, Inc., Barry Newkirk,	)	
and Neil Richards,	)	
	)	
Petitioners-Plaintiffs,	)	<u>COMPLAINT AND PETITION</u>
	)	<u>FOR DECLARATORY AND</u>
vs.	)	<u>INJUNCTIVE RELIEF –</u>
	)	<u>UNCONSTITUTIONALITY OF</u>
Michael B. Spicer, Chief Procurement	)	<u>LAW AND DEPRIVATION OF</u>
Officer, South Carolina State Fiscal	)	<u>CONSTITUTIONAL RIGHTS</u>
Accountability Authority, Division of	)	
Procurement Services; and South Carolina	)	
Workers’ Compensation Commission,	)	
	)	
Respondents-Defendants.	)	
_____	)	

Petitioners above named, Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards (“Petitioners”), by and through their undersigned attorneys, pursuant to S.C. Code Ann. § 15-53-10 *et seq.*, and Article I, Section 8 (“Separation of Powers Clause”), Article V, Section 11 (Establishing the Exclusive Powers of the Judicial Branch), Article I, Section 22 (“Due Process Clause”) of the South Carolina Constitution, and S.C.R.Civ.P. 65, respectfully file this Complaint and Petition for Declaratory and Injunctive Relief for a declaration of the partial unconstitutionality of S.C. Code Ann. § 11-35-4230, as well as to restrain the conduct of Respondents/Defendants and all other State agencies or officers acting pursuant to said unconstitutional law.

I. PROCEDURAL HISTORY

Respondent South Carolina Workers’ Compensation Commission (“WCC”) initiated an Executive Branch administrative proceeding (“Executive Branch Proceeding”) against Petitioners in March of 2020 by filing a “Request for Resolution” of a “Contract Controversy” under S.C. Code Ann. § 11-35-4230 with an Executive Branch official, Respondent Michael B. Spicer, the

“Chief Procurement Officer” (“CPO”), an employee of the South Carolina Fiscal Accountability Authority’s (“SFAA”) Division of Procurement Services.

Although S.C. Code § 11-35-4230 purports to authorize this Executive Branch Proceeding, this proceeding is specifically unlawful and unconstitutional under Article I, Section 8 (“Separation of Powers Clause”) of the South Carolina Constitution and Article V, Section 11 (Establishing the Exclusive Powers of the Judicial Branch) of the South Carolina Constitution. This ongoing proceeding is unlawful because it is not a proceeding to address “claims against the State” (as authorized by Article X, Section 10 of the Constitution), but is instead claims by the State against private parties for the recovery of money for “breach of contract” and “fraud.”

This unlawful Executive Branch Proceeding under S.C. Code Ann. § 11-35-4230 is specifically in the nature of *claims asserted by the WCC as against private parties (Petitioners) for the recovery of damages* in claims at law and in equity brought before and to be “heard” and “decided” by the CPO, an employee or office of the Executive Branch, rather than before the Courts of the State, in violation of the Separation of Powers Clause of the Constitution. To the extent that S.C. Code Ann. § 11-35-4230 provides that it is the exclusive means for claims by the State against private parties, it is unconstitutional, and the Executive Branch administrative proceeding underway as against Petitioners under that law constitutes an immediate and irreparable violation and deprivation of the constitutional rights of Petitioners. The pursuit and handling of such claims on the part of the WCC, and the actions, decisions, and orders of the CPO, and any other state agency in furtherance of same, are an immediate and irreparable deprivation of Petitioners’ rights guaranteed and assured by the South Carolina Constitution.

II. BACKGROUND

This case involves the unconstitutionality of the law under which the Executive Branch Proceedings making claims for recovery of money by a state agency were filed against Petitioners asserting breach of contract and fraud, among other things. The claim purports to be brought before the “Chief Procurement Officer” an employee of SFAA, a State Executive Branch administrative agency, under S.C. Code Ann. § 11-35-4230, which provides:

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. *The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor*, when the subcontractor is the real party in interest, concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code. On behalf of any governmental body or South Carolina public procurement unit that participates in a multiagency, term, or cooperative contract awarded by or under the authority of a chief procurement officer, the Division of Procurement Services may initiate and pursue resolution of any contract controversy which arises under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. (emphasis added)

The claims allege that the WCC, in or around July of 2018, awarded a state contract to one or more Petitioners for the provision of certain computer services and that one or more Petitioners allegedly “breached” that contract and/or committed “fraud” in connection with that contract.

The claims, filed with the CPO to be heard and decided, demand an “award” of millions of dollars in favor of the WCC as against the Petitioners (despite the fact that there is no mechanism in law for an Executive Branch agency to enter a monetary judgment or to enforce, for example, any sort of lien.)

Despite the lack of merit of these claims, the fact that they are brought and pursued before an Executive Branch officer, who is not a judge, and who has no judicial power whatsoever under the Constitution, and the fact that Petitioners are being forced to participate in such process to protect their common law rights, is causing ongoing, immediate, and irreparable harm to Petitioners in the form of violations of their constitutional rights. Such participation places Petitioners at great risk and causes Petitioners needless, irrecoverable expense.

Petitioners are entitled to rely on the constitutional Separation of Powers to provide that claims against them will be adjudicated by the professional Judicial Branch. The Judicial Branch was granted that exclusive power to do so in our Constitution. Petitioners prefer adjudication in the courts, rather than by an employee of the Executive Branch, which branch is, at the same time, the “claimant” in the very “case” to be decided.

1. The Exclusive Powers of the Judicial Branch

Article V, *providing for the Judicial Branch*, in Section 11 of the South Carolina Constitution, states:

SECTION 11. Jurisdiction of Circuit Court.

The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.

2. Separation of Powers

The Separation of Powers Clause, Article I, Section 8 of the South Carolina Constitution, provides:

SECTION 8. Separation of powers.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the

functions of one of said departments shall assume or discharge the duties of any other.

Thus, without some constitutional exception, it is simply unconstitutional for a branch of government other than the Judicial Branch to exercise judicial power, the most fundamental form of which is the handling of claims among parties. There is such a constitutional exception ***only as to claims against the State, not for claims by the State.***

3. The Unconstitutional Statute

S.C. Code Ann. § 11-35-4230 purports to govern two types of claims: 1) claims by private parties against the State under state-issued contracts, as well as 2) claims by the State against private parties under state-issued contracts.

A. Claims Against the State are Excepted from Separation of Powers Clause by Article X, Section 10 and Article XVII, Section 2.

Notwithstanding the prohibition of the Separation of Powers Clause, there is an express constitutional exception stated as to the first type of claims – ***claims against the State***: The South Carolina Constitution Article X, Section 10 provides: "Claims *against State*. The General Assembly may direct, by law, in what manner *claims against the State* may be established and adjusted" (emphasis added). Likewise, Article XVII, Section 2 provides "Claims *against State*. The General Assembly may direct, by law, in what manner *claims against the State* may be established and adjusted" (emphasis added).

As a result, the portion of S.C. Code Ann. § 11-35-4230 concerning claims against the State is valid and constitutional. The Constitution expressly authorizes that limited intrusion on the power of the Judicial Branch. That limited intrusion (for claims *against the State*) is expressly carved out by an express constitutional authorization for management per legislative direction.

B. Claims By the State Are Not Excepted from The Separation of Powers Clause's Prohibition.

There is no express carve out in the Constitution that permits the other branches of government to invade the province of the Judicial Branch such as by the handling of civil claims asserted *by the State* for recovery of monetary damages. Yet S.C. Code Ann. § 11-35-4230 unlawfully purports to authorize such a direct intrusion into the power of the Judicial Branch, in direct violation of the Separation of Powers Clause.

C. The Carolina Glass Decision Controls the Separation of Powers Analysis

The Separation of Powers Clause Prohibition was addressed directly in the decision of *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910). *Carolina Glass* involved a very similar statute to the one at issue here, which also purported to authorize Executive Branch management of *claims by the State*. That decision is on point, and is controlling authority. In that case, the Supreme Court held: “***We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the claim of the State against the plaintiff, it is unconstitutional, null and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void.***”

Carolina Glass squarely holds that, due to the Separation of Powers Clause of the Constitution, the legislature may not enact a law that permits a state Executive Branch agency (such as the CPO) to hear and decide a monetary claim *by the State against a contractor*. As a consequence, it firmly establishes that the CPO can have no jurisdiction over such a claim, and as a consequence, a law such as S.C. Code Ann. § 11-35-4230 is unconstitutional. It is important to remember that our Supreme Court has held that “the principle of the separation of the powers of

government is fundamental to the very existence of constitutional government as established in the United States.” *State ex rel. MccLeod v. Yonce*, 274 S.C. 81, 261 S.E. 2d 303, 306 (1979).

D. The Unisys Decision Did Not Address this Constitutional Separation of Powers Issue

It is simply false to assert that the issue presented here has been “decided” by *Unisys Corporation v. Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). There is inaccurate *dicta* in *Unisys* which confuses the issue, only minimally, because the *dicta* is wrong. The *Unisys* decision never mentions Separation of Powers, the Separation of Powers Clause, or the controlling *Carolina Glass* decision. Careful examination of the *Unisys* decision and its record shows very clearly that, although the parties in that case raised *other grounds* to invalidate the law (which the Court decided and are not at issue here), *they simply did not argue or present to the Court the issue raised here – the Separation of Powers Clause*. It was overlooked or ignored.

This omission by the parties in *Unisys* clearly explains why the Supreme Court somehow overlooked the Court’s crucial and clear failure to take note of the Separation of Powers Clause as an obstacle when the *Unisys* Court absurdly pronounced, in obviously erroneous *dicta*: “*There is no constitutional provision limiting the legislature’s power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.*” Plainly, the Legislature does not have plenary power to assign to a state agency the role to determine how common law claims by the State will be addressed. That is the role of the Judicial Branch under the Constitution, and the Separation of Powers Clause forbids any intrusion on judicial power unless expressly authorized by the Constitution itself.

Petitioners have been notified that the CPO is in the process of undertaking a “review” of the claims with the evident purpose and intent to render a “decision” on the claims of the WCC as against Petitioners. Petitioners seek in this action: 1) an order declaring S.C. Code Ann. § 11-35-

4230 unconstitutional insofar as it authorizes an employee of the Executive Branch to hear and decide claims for monetary and other judicial relief by the State or a state agency, in this case the WCC, as against private parties such as Petitioners; 2) an order staying and enjoining all such proceedings and all acts in furtherance thereof; 3) attorneys' fees and costs associated with the deprivation of Petitioners' constitutional rights; 4) and such other and further relief as may be just and warranted.

Petitioners would show and allege as follows:

III. PARTIES

1. Petitioner Intellectual Capital, Inc. ("ICAP") is a business entity organized and existing under the laws of the State of South Carolina. ICAP provides certain contractual services to private industry and to government customers. ICAP was awarded a contract by WCC to perform certain computer services for WCC in or around July of 2018.

2. Respondent South Carolina Workers' Compensation Commission ("WCC") is an agency of the Executive Branch of the government of the State of South Carolina. It is or was the intended "using agency" of the State of South Carolina as to services to be provided by ICAP under the contract at issue in this matter.

3. Respondent Michael B. Spicer ("CPO") is an employee of SFAA, Division of Procurement Services and the Executive Branch, and was, at all relevant times herein, an interim designated Chief Procurement Officer to hear certain claims filed under S.C. Code Ann. § 11-35-4230. WCC filed its claims for relief as against Petitioners with the CPO. A copy of those claims, as amended, is attached hereto as Exhibit A. The CPO is currently, on information and belief, conducting a "review" of those claims with an intent and purpose to "decide" those claims, the merits thereof, and any "damages" to be "awarded" to the WCC thereunder.

4. Petitioners herein seek a declaration of rights and the constitutionality of laws and government action as described herein and a stay and injunctive relief to preserve Petitioners' rights and the status quo during the pendency of this matter.

5. WCC and the CPO are officers or agencies of the Executive Branch of government. *See Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 363 S.E. 2d 683 (1987).

6. Jurisdiction and venue of this action are proper in this Court.

IV. FACTS AND ALLEGATIONS

7. All of the foregoing paragraphs of this Complaint And Petition For Declaratory And Injunctive Relief – Unconstitutionality Of Law And Deprivation Of Constitutional Rights, whether numbered or unnumbered, are realleged and reiterated as if repeated herein verbatim.

8. In March of 2020, WCC filed with the CPO its initial claims as against Petitioners in the form of a “Request for Resolution” (Exhibit B). WCC filed an “Amended Request for Resolution” in December of 2020 (Exhibit A).

9. In January of 2021, Petitioners filed with the CPO their Motion to Dismiss the claims asserted in the Amended Request for Resolution, including on the grounds that the Separation of Powers Clause of the South Carolina Constitution precluded the CPO from exercising “jurisdiction” to “hear” and “decide” claims at law asserted by the State as against private parties for the recovery of monetary damages and other judicial relief (Exhibit C).

10. On or about February 12, 2021, WCC filed its Second Amended Request for Contract Resolution with the CPO (Exhibit D).

11. On or about March 1, 2021, Respondents filed their Motion to Dismiss the claims asserted in the Second Amended Request for Resolution, including on the grounds that the Separation of Powers Clause of the South Carolina Constitution precluded the CPO from

exercising “jurisdiction” to “hear” and “decide” claims at law asserted by the State as against private parties for the recovery of monetary damages and other judicial relief (Exhibit E).

12. To Petitioners’ knowledge, no action was taken on the matters addressed in the claim until mid-March of 2022.

13. On or about March 18, 2022, the CPO issued an email to parties and counsel to the parties in connection with the WCC’s claims, stating (Exhibit F):

I apologize for the delay in addressing this matter, as more pressing matters intervened. However, I have finally had some time to review the filings and documentation that has been provided thus far and I requesting some additional documentation for the record: I would like:

A copy of the agreed upon objectives for each sprint, agreed upon milestones, agreed upon deliverables, actual deliverables, milestone acceptance documentation, and exceptions documentation, user acceptance testing documentation and results.

Thank you for your attention to this request.

14. On or about April 3, 2022, Petitioners also moved to dismiss the claims of WCC on the grounds of spoliation, because, on information and belief, WCC had destroyed the essential evidence regarding its claims, which would be the best evidence to prove those claims to be meritless.

15. Because the CPO has not dismissed WCC’s claims on the motions of Petitioners, has not addressed those motions in any respect for over a year, and has indicated an intention to proceed to “hear” and “decide” the disputes raised by the claims and specifically to decide whether to grant WCC’s claim for an award of monetary “damages” against Petitioners for breach of contract and fraud, Petitioners bring this action to protect their constitutional rights as alleged herein.

16. The process set forth in S.C. Code Ann. § 11-35-4230 for the handling of “claims” by the State and its agencies as against private persons for judicial relief such as for the recovery

of “damages” for “breach of contract” and “fraud” claims is unconstitutional, in violation of constitutional provisions including the Separation of Powers Clause, is illegal, and is specifically illegal and unconstitutional as applied to the circumstances of this matter.

17. The statute that permits the Respondents to proceed with a state contract claim for claims by the State against private parties is unconstitutional. Specifically, S.C. Code Ann. § 11-35-4230 is unconstitutional.

18. As can be readily seen, S.C. Code Ann. § 11-35-4230 specifically contradicts Article I, Section 8 (Separation of Powers Clause), Article V, Section 11 (Powers of the Courts Clause), and Article I, Section 22 (Due Process Clause) of the South Carolina Constitution, in that it purports to permit a process under which an employee or agency of the Executive Branch may “hear” and “decide” claims by the State for recovery of money damages as against private parties, despite the obvious fact that such claims are the sole and exclusive province of the Judicial Branch of government.

19. Petitioners are entitled to the declaratory and injunctive relief sought herein as against Respondents under S.C. Code Ann. § 15-77-300 and otherwise because the unlawful and unconstitutional actions of Respondents have been taken and pursued without substantial justification, and an award of such fees and costs is just.

V. REQUEST FOR DECLARATORY JUDGMENT

20. All of the foregoing allegations of this Complaint and Petition are realleged as if repeated verbatim.

21. This is an action for Declaratory relief and Declaratory Judgment under the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10, *et seq.*

22. This matter presents a bona fide, actual, and practical need for a declaration as to the matters sought herein, including the constitutionality of S.C. Code Ann. § 11-35-4230 (“the statute”) in view of the Separation of Powers Clause of the South Carolina Constitution.

23. There is an actual, concrete, and substantial controversy as to the constitutionality of the statute, and such controversy requires an immediate determination as to whether Respondents’ immediate conduct regarding the handling of the WCC’s claims by the CPO is unconstitutional, illegal, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

24. Declaratory relief is appropriate here because such judgment will serve a useful purpose in clarifying and settling the legal relations between the parties as they relate to the WCC’s claims.

25. Declaratory relief will terminate and afford relief of uncertainty, insecurity, and controversy concerning the parties’ rights as they relate to the WCC’s claims.

26. Declaratory relief is appropriate because all of the adverse and antagonistic interests are before the Court.

27. There is no requirement to “exhaust administrative remedies” because these claims seek declaratory relief in the form of declaring a statute unconstitutional, and an administrative agency has no power to issue declaratory relief or to rule on the constitutionality of a law under which it operates. *Weinberger v. Salfi*, 422 US 749 764-5, (1975); *Finnerty v. Cowan*, 508 F. 2nd 979, 982 (2d Cir. 1974); *S.C. Tax Comm’n v. S.C. Tax Bd. Of Review*, 278 S.C. 556, 299 S. 2d 489 (1983).

28. Accordingly, there is not another “action” already pending for the same claims between the same parties.

29. Petitioners seek an Declaratory Order of the Court, under the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10, *et seq*, that S.C. Code Ann. § 11-35-4230 is unconstitutional, and that the WCC, the CPO, and all other State agencies and officers are to be restrained, by the Separation of Powers Clause, from invoking or so exercising the judicial power assigned to the Judicial Branch alone; that Respondents should be responsible to Petitioners for the costs and attorneys' fees incurred in connection with this, their only recourse for obtaining protection of constitutionally granted rights, and all other remedies provided under law, and such costs and attorney's fees and such other relief as this Court may deem proper.

**VI. REQUEST FOR STAY AND PRELIMINARY
AND PERMANENT INJUNCTIVE RELIEF**

30. All of the foregoing allegations of this Complaint and Petition are realleged as if repeated verbatim.

31. This is an action for Stay and for Preliminary and Permanent Injunctive Relief, including under Rule 65 of the South Carolina Rules of Civil Procedure.

32. Petitioners will be irreparably harmed by the Respondents' ongoing violations of Petitioners' constitutional rights as alleged and asserted herein.

33. Petitioners will be irreparably harmed by the Respondents' ongoing violations of Petitioners' constitutional rights by the initiation, maintenance, pursuit, and handling of the contract controversy claims of the WCC as against Petitioners, because Petitioners are entitled, by the Separation of Powers Clause of the South Carolina Constitution, to have claims for recovery of damages as against Petitioners, for breach of contract as against Petitioners, and for alleged fraud as against Petitioners, and other like claims at law to be heard and decided by the Judicial Branch of the government.

34. Petitioners will be irreparably harmed by the Respondents' ongoing violations of Petitioners' constitutional rights by the initiation, maintenance, pursuit, and handling of the contract controversy claims of the WCC as against Petitioners, because Petitioners will incur needless unrecoverable costs including excessive time and expense as well as attorneys' fees and costs in the defense of an action before an Executive Branch official who lacks the judicial power to hear and decide such claims by the State.

35. The public interest favors the grant of a stay and injunctive relief because there is an important public interest in upholding the constitutional separation of powers of the separate branches of government.

36. Respondents will suffer no cognizable harm by virtue of the granting of a stay and injunction because the State and its agencies and employees can have no valid interest in the violation of the law and the Constitution.

37. Petitioners also seek a stay and preliminary and permanent injunctive relief herein as against the Respondents in regard to the application or carrying out of duties under the unconstitutional statute, insofar as they relate to claims brought by the State or any of its agencies, and in regard to continued violations of the constitutional rights of participants, including Petitioners, that appear before them, and in regard to any further acts toward or in furtherance of such statutory role, which is contrary to Petitioners' rights under law.

38. Petitioners are informed and believe, and on the basis of that information and belief allege that, unless restrained or enjoined by Order of this Court, the WCC and the CPO will continue to engage in the same constitutional violations alleged herein and will attempt to enforce as against Petitioners unauthorized and unlawful decisions and orders, despite requirements of law and the Constitution.

39. Such conduct will result in irreparable harm to Petitioners, in that Petitioners will be deprived of important constitutional rights, which deprivation constitutes per se irreparable harm in this instance.

40. The threat of such irreparable and permanent damage justifies the issuance by this Court of a temporary restraining order, a temporary injunction, and/or a permanent injunction, as against WCC and the CPO.

41. There exists a strong likelihood that the Petitioners will succeed on the merits due to the fact that the Respondents' conduct in violation of the constitutional rights of Petitioners, as well as others, has been well-documented, and because the constitutional prohibition of the Separation of Powers Clause and its application in the controlling *Carolina Glass* precedent is so clear.

42. Petitioners have no adequate remedy at law for such irreparable harm which they have suffered and will continue to suffer in the future in the event that the WCC and the CPO, and all other State agencies and officers acting in furtherance of same are not so enjoined. Petitioners will suffer an irrecoverable deprivation of constitutional rights, will by necessity be deprived of their constitutional right that "*In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other,*" and Petitioners will further be deprived of their right to the fruits of a meritorious appeal if a stay and injunction are not now issued, because the Respondents may, unless stayed or enjoined, choose to proceed to enforce and act on orders to be issued, contrary to Petitioners' rights and interests notwithstanding the pendency of this Petition for Judicial Review,

and will proceed with actions to Petitioners' detriment in respect to the matters at hand, precluding any meaningful review or relief whatsoever.

43. Petitioners seek a temporary and permanent injunction enjoining the WCC, the CPO, and all other State agencies and officers from taking any action regarding the rights of Petitioners, until such time as the constitutional rights of Petitioners and the constitutional issues raised hereunder, and the obligations of the WCC and the CPO under law, are finally adjudicated and resolved.

WHEREFORE, the Petitioners seek an Order:

1) declaring S.C. Code Ann. § 11-35-4230 unconstitutional insofar as it authorizes the CPO or any other employee or agency of the Executive Branch of government to hear and decide claims for monetary and other judicial relief brought *by the State or a State agency*, in this case, the WCC, as against private parties such as Petitioners;

2) staying and enjoining all such proceedings and all acts in furtherance thereof during the pendency of this matter;

3) granting an award of Petitioners' attorneys' fees and costs associated with the deprivation of Petitioners' constitutional rights pursuant to applicable law including but not limited to S.C. Code Ann. § 15-77-300 and otherwise; and

4) and such other and further relief as may be just and proper.

Schmidt & Copeland, LLC

s/ John E. Schmidt, III

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Attorney for Petitioners-Plaintiffs

Columbia, South Carolina
May 20, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE: 2022-CP-40-02656

Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards,	)	DEFENDANT SOUTH CAROLINA
	)	WORKER'S COMPENSATION
	)	COMMISSION'S MOTION TO
Plaintiffs-Petitioners.	)	DISMISS COMPLAINT OR IN THE
	)	THE ALTERNATIVE FOR
vs	)	JUDGMENT ON THE
	)	PLEADINGS

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and South Carolina Workers' Compensation Commission	)	Rule 12(b)(1) SCRCF
	)	Rule 12(b)(6) SCRCF
	)	Rule 12(b)(8) SCRCF
	)	Rule 12(c) SCRCF
	)	
Respondents-Defendants.	)	

TO: JOHN E. SCHMIDT, III and MELISSA J. COPELAND, ATTORNEYS FOR PLAINTIFFS - PETITIONERS

Defendant South Carolina Workers' Compensation Commission (SCWCC) by and through its undersigned counsel moves this Court to be heard on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, pursuant to South Carolina Rule of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(8) for an order dismissing Plaintiff's Complaint or in the alternative for an Order granting the Defendants judgment on the pleadings pursuant to Rule 12(c), SCRCF.

The grounds for this motion are that:

A. Plaintiffs-Respondents failed to exhaust their administrative remedies under the South Carolina Consolidated Procurement Code.

Because Plaintiffs failed to exhaust their administrative remedies, Plaintiff's complaint fails as a matter of law. In *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 551 S.E.2d 263 (2001), the Supreme Court interpreted nearly identical statutory provisions dealing with the same subject matter as requiring exhaustion of administrative remedies and providing exclusive jurisdiction for the administrative appeals process to the State Budget and Control Board¹. After reviewing the statute, the Court held that because the claimant "is required to exhaust administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper." *Id.* at 176, 273 (emphasis added). *See also Evans v. State of South Carolina*, 344 S.C. 60, 543 S.E.2d 547 (2001) (holding that the circuit court erred by not requiring state retirement program claimants to exhaust administrative remedies before filing lawsuit); *Hyde v. South Carolina Department of Mental Health*, 314 S.C. 207, 442 S.E.2d 582 (1994) (holding that trial judge abused his discretion by holding that plaintiff did not have to exhaust administrative remedies); *Southern Railway Co. v. Order of Railway Conductors of America*, 210 S.C. 121, 41 S.E.2d 774 (1947) (holding that exhaustion of administrative remedies precludes court from hearing case when remedies have not been exhausted and statute providing for exhaustion, by its express terms, gives exclusive jurisdiction to administrative agency). Because the exhaustion of administrative remedies requirement is mandatory, it cannot be ignored. Accordingly, Plaintiff's Complaint should be dismissed for failure to exhaust administrative remedies.

¹ The State Fiscal Accountability Authority is the statutory successor to the Budget and Control Board.

B. The Chief Procurement Officer (CPO) and the Procurement Review Panel have exclusive jurisdiction over contract controversies pursuant to S.C. Code Ann. §11-35-10, et. seq.

The Plaintiffs-Petitioners are asking this Court to assume jurisdiction over a contract controversy and supersede the process established by the Legislature. The Legislature granted the Chief Procurement Officer exclusive authority to resolve contract and breach of contract controversies in *S.C. Code Ann.* §11-35-4230. That statute gives the CPO authority to resolve “controversies between the State and a contractor or subcontractor when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. The procedure set forth in this section shall constitute the exclusive means of resolving a controversy between the State and a contractor or subcontractor concerning a contract solicited and awarded under the provisions of the South Carolina Consolidated Procurement Code.”². Appeals from the CPO’s decisions are subject to a further administrative review by the by the Procurement Review panel under *S.C. Code Ann.* 11-35-4410.

The legislature did not limit the controversies to monetary claims only against the State. It made the statute the “exclusive means” to resolve contract controversies of every kind.

This Court has used the terms "exclusive means," "exclusive remedy," and "exclusive jurisdiction" synonymously when discussing the Workers' Compensation Act. *See S.C. Code Ann.* § 42-1-540 (1985) (providing the rights and remedies provided under that Act "shall exclude all other rights and remedies)." *See, e.g., Loges v. Mack Trucks, Inc.*, 308 S.C. 134, 417 S.E.2d 538 (1992) (exclusive means); *Carter v. Florentine Corp.*, 310 S.C. 228, 423 S.E.2d 112 (1992)

² In *Quintech Sec. Consultants, Inc. v. Intralot USA, Inc.* 2011 U.S. Dist. LEXIS 124895, 2011 WL 5105446, the United States District Court found that “the Procurement Code is the exclusive means of resolving the dispute at hand.”

(exclusive remedy); *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991) (exclusive jurisdiction). Thus, the term "exclusive means" has been used to indicate exclusivity of jurisdiction. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158,170 (S.C. 2001).

Plaintiffs-Petitioners argue in their complaint that the Court in *Unisys* did not address their constitutional claims that the CPO and Procurement Review Panel have no authority to resolve the State's claims against them. Notably, the Court in *Unisys* comments "Accordingly the legislature has clearly indicated its intent that the administrative proceeding under the Procurement Code applies to the State's claims in this case for fraud in the inducement, which involves misrepresentations, and punitive damages. (cite omitted) *Unisys, supra* at 346 S.C. 176.

C. The Complaint fails to Allege a Cause of Action Against Defendant SCWCC upon which relief can be granted.

A clear reading of the Complaint does not reflect that it seeks any relief against SCWCC. It seeks a declaration that a statute is unconstitutional, a stay of actions before the CPO and an award of attorneys' fees and costs "associated with the deprivation of Petitioners' constitutional rights pursuant to applicable law . . ."

The SCWCC is not a necessary party to adjudicate any of these claims or causes of action and has acted only in compliance with applicable law as interpreted by our Courts. As the Plaintiff makes no claim against SCWCC for which this Court may grant relief, the Court should dismiss SCWCC as a party to this action.

D. The Court of Appeals has Exclusive Jurisdiction Over Appeals Concerning Decisions by the Procurement Review Panel and this Court lacks Subject Matter Jurisdiction.

Even assuming for the sake of argument that Plaintiffs did exhaust their administrative remedies under the Consolidated Procurement Code, which they did not, appeals involving claims under the Procurement Code are under the exclusive jurisdiction of the Court of Appeals. Accordingly, this Court lacks subject matter jurisdiction. Pursuant to *S.C. Code Ann.* § 11-35-4410(6) “the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the court of appeals pursuant to Section 1-23-380, and the filing of an appeal does not stay a decision of the panel.” Because the Court of Appeals has exclusive jurisdiction over appeals involving claims under the Procurement Code, this Court lacks subject matter jurisdiction over the Plaintiff’s particular complaint³. Moreover, judicial economy dictates that the Plaintiffs can preserve their arguments that the statute is invalid before the CPO and Panel and then appeal that issue directly to the Court of Appeals without the necessity of this Court becoming involved in an effort to overturn long settled law.

Because this Court lacks subject matter jurisdiction and dismissing the case advances the cause of judicial economy the Court should dismiss Plaintiffs-Petitioners’ action.

E. The Parties Contracted to Resolve their Disputes utilizing the Process identified in S.C. Code Ann. §11-35-4230 and that Contract moots Plaintiffs-Petitioners’ Claims.

The contract between the parties (which is incorporated by the Plaintiffs’ reference thereto in the Complaint)⁴ contains a Choice-of-Forum clause that provides:

³ We note the authority in *Ward v. State*, 343 S.C. 14 (2000) and *Dove v. Gold Kist, Inc.*, 314 S.C. 235 (1994) that distinguish this type of subject matter jurisdiction and finds that exhaustion of administrative remedies is an issue of prematurity as opposed to jurisdiction. However, because the statute has changed since *Unisys* and The Court of Appeals now hears appeals from the Procurement Review Panel, we believe that the statutory change affects this Court’s jurisdiction.

⁴ The Plaintiff refers to the Contract in the introduction (The claims allege that the WCC, in or around July of 2018 awarded a state contract to one or more Petitioners) The contract is also referenced in Paragraphs 1 and 2 of the Complaint.

All disputes, claims or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement officer in accordance with Title 11, Chapter 37, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in Richland County, State of South Carolina.” . . .

“The primary concern of the court interpreting a contract is to give effect to the intent of the parties.” *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014). Here, the Parties’ contract unambiguously provides that all disputes are to be resolved exclusively pursuant to the Procurement Code. In the contract, the Parties have agreed to an alternative method of dispute resolution akin to Arbitration. In *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115 (2013), the contract between the parties contained an election among various methods of dispute resolution akin to the Choice of Forum clause in the instant contract. There, the parties selected arbitration as a binding method of dispute resolution just like the Choice of Forum clause defines how disputes under the contract between SCWCC and the Plaintiffs-Petitioners are to be resolved. In *Cape Romain*, the Court determined that “contractual provisions should be enforced in accordance with their unambiguous terms. *See Dean Witter*, 470 U.S. at 221 (noting that the “preeminent concern” in construing arbitration agreements is to protect the contractual rights of the parties, which requires courts to enforce “rigorously” those terms upon which private parties have agreed); *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363-64 (holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms)”. *Cape Romain, supra* at 405 S.C. 126.

The Plaintiffs-Petitioners cannot escape the fact that the contract they entered unambiguously adopts the Consolidated Procurement Code as the exclusive means to resolve contractual disputes. Their Constitutional claims are nothing but an obvious attempt by the

Plaintiffs – Petitioners to avoid their unambiguous contractual obligations. This Court should dismiss their Complaint.

F. If the Court does not Dismiss the case, it Should Grant Judgment on the Pleadings to the Defendants.

No matter what set of facts Plaintiffs – Petitioners posit, our Supreme Court has unequivocally opined that *S.C. Code Ann.* §11-35-4230 is constitutional and affords the Government the legal authority to institute a contract claim against a vendor. Moreover, in this instance, the parties’ contract specifies that disputes will be resolved utilizing the process detailed in the Consolidated Procurement Code⁵. The Court can decide the issues raised by the Complaint following the clear authority of *Unisys* and declare that *S.C. Code Ann.* §11-35-4230 is constitutional and that the Workers’ Compensation commission properly followed the Code and its contractual obligations when it instituted its Contract Controversy claims against the Plaintiffs-Petitioners.

G. Conclusion

For the foregoing reasons, Defendants’ motion to dismiss pursuant to SCRCP 12(b)(1), 12(b)(6) and 12(b)(8) should be granted or in the alternative the Court should grant judgment on

⁵ Unlike the contract as issue before the Court here, which specifies that an action pursuant to the Procurement Code is an exclusive remedy for both parties, the Contract in *Unisys* provided that “Any action at law, suit in equity or judicial proceeding for the enforcement of this contract or any provision thereof shall be instituted only in the Circuit Court in the County of Richland, State of South Carolina.” *Unisys* at 346 S.C. 171. The Court held that the statutory mandate of the Procurement Code overrode the express language of the contract there. Here, the express language of the contract requires the resolution of any action on the contract by way of the Procurement Code.

the Pleadings based upon SCRCP 12(c) as the *Unisys* case and the parties' unambiguous contract is entirely dispositive of Plaintiffs' claims.

This Motion is supported by the pleadings, the South Carolina Rules of Civil Procedure, the applicable law and such further briefing as this Defendant shall submit to the Court prior to any scheduled hearing.

Respectfully Submitted,

MONTGOMERY WILLARD, LLC

s/ Michael H. Montgomery

Michael H. Montgomery

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ATTORNEYS FOR THE DEFENDANT

SOUTH CAROLINA WORKERS'

COMPENSATION COMMISSION

June 16, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-02656
	)	
Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards	)	
	)	
Petitioners-	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services; and	)	
South Carolina Workers' Compensation Commission,	)	
	)	
	)	
Respondents-	)	
Defendants.	)	
	)	

PETITIONERS-PLAINTIFFS'
RESPONSE TO DEFENDANT
SOUTH CAROLINA WORKER'S
COMPENSATION
COMMISSION'S MOTION TO
DISMISS COMPLAINT OR IN
THE ALTERNATIVE FOR
JUDGMENT ON THE
PLEADINGS

Petitioners above named, Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards ("Petitioners"), hereby respond to Defendant South Carolina Worker's Compensation Commission's ("WCC") Motion to Dismiss Complaint or in the Alternative for Judgment on the Pleadings.

WCC on on page 4 of its Motion contends as follows:

The SCWCC is not a necessary party to adjudicate any of these claims or causes of action and has acted only in compliance with applicable law as interpreted by our Courts. As the Plaintiff makes no claim against SCWCC for which this Court may grant relief, the Court should dismiss SCWCC as a party to this action.

WCC's Motion, p. 4.

Petitioners hereby consent to WCC's requested relief to dismiss WCC from this matter.

This consent dismissal thereby renders the remainder of WCC's Motion to Dismiss Complaint or

in the alternative for Judgment on the Pleadings moot. This consent dismissal also renders moot WCC's Motion to Consolidate.¹

Accordingly, the Petitioners request that the Court enter an Order dismissing Defendant South Carolina Worker's Compensation Commission from this action and an Order dismissing the remainder of Defendant South Carolina Worker's Compensation Commission's Motion to Dismiss Complaint or in the alternative for Judgment on the Pleadings and Motion to Consolidate as moot.

Schmidt & Copeland LLC

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Attorney for Petitioners-Plaintiffs

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June 21, 2022

¹ To the extent that WCC's Motions are not dismissed as moot, Petitioners reserve the right to file a brief in response to such Motions prior to any hearing in this matter.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
) Intellectual Capitol, Inc., Barry Newkirk,
And Neil Richards,)
) Petitioners-Plaintiffs,)
) vs.)
) Michael B. Spicer, Chief Procurement)
Officer, South Carolina State)
Fiscal Accountability Authority,)
Division of Procurement Services; and)
South Carolina Workers' Compensation)
Commission,)
) Respondents-Defendants.)
)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2022-CP-40-02656

MOTION TO DISMISS

Pursuant to South Carolina Rule of Civil Procedure 12(b)(1) and (6) Respondent-Defendant Defendant Michael B. Spicer, in his official capacity as Chief Procurement Officer (CPO) of the Division of Procurement Services of the State Fiscal Accountability Authority, moves to dismiss the Complaint. The grounds for this motion are as follows:

1. The Chief Procurement Officer (CPO), not the circuit court, has exclusive jurisdiction over this dispute. Controversies between governmental bodies and contractors arising out of contracts governed by the Procurement Code are resolved pursuant to § 11-35-4230, which vests exclusive jurisdiction with the CPO and the Procurement Review Panel. The Supreme Court affirmed the exclusivity of the CPO's and Panel's jurisdiction in *Unisys v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). Although the Complaint argues that *Unisys* is wrong because it "never mentions the Separation of Powers," the Court expressly held that there "is *no constitutional provision* limiting the legislature's power

to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit. *Id.* at 169, 551 S.E.2d at 270 (emphasis added). Here, a contract controversy involving the same parties, *Request for Resolution of a Contract Controversy by South Carolina Worker's Compensation Comm'n*, CPO Case No. 2020-213A, is currently pending before CPO Spicer. The CPO has exclusive jurisdiction over this controversy.

2. Petitioners-Plaintiffs have failed to exhaust their administrative remedies. Although an administrative body generally cannot rule on the constitutionality of statutes, the Supreme Court has already addressed the constitutionality of § 11-35-4230 in *Unisys*, 346 S.C. 158, 551 S.E.2d 263.

3. Petitioners-Plaintiffs have failed to state a claim upon which relief may be granted. They are asking the circuit court to declare as unconstitutional a statute that the Supreme Court has already expressly held that there “is no constitutional provision limiting the legislature’s power” to enact § 11-35-4230. *Id.* at 169, 551 S.E.2d at 270

For the above reasons, the Court should dismiss Plaintiffs-Petitioner’s Complaint. This Motion is supported by the pleadings, the applicable law, and any memoranda filed before the hearing.

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June 21, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-02656
	)	
Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards	)	
	)	
Petitioners-	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services; and	)	
South Carolina Workers' Compensation Commission,	)	
	)	
	)	
Respondents-	)	
Defendants.	)	
	)	

PETITIONERS-PLAINTIFFS'
SUPPLEMENTAL RESPONSE
TO RESPONDENTS MOTIONS
TO DISMISS COMPLAINT OR
IN THE ALTERNATIVE FOR
JUDGMENT ON THE
PLEADINGS

This case arises from a breach of contract claim brought by Respondent South Carolina Workers' Compensation Commission ("WCC"), an agency of the State of South Carolina against Petitioners, one of whom is a state contractor. WCC brought the claim before an executive branch officer, the Respondent Chief Procurement Officer ("CPO"), pursuant to S.C. Code Ann. § 11-35-4230. However, Petitioners have asserted that Article I § 8 (Separation of Powers Clause) of the South Carolina Constitution prohibits the General Assembly's enactment of the provisions of S.C. Code § 11-35-4230 which provide that claims made by the State (rather than only claims made *against* the State) must be heard by the CPO, an officer of the executive branch rather than by the Courts. Respondents disagree.

This case, brought by Petitioners against both Respondents, seeks a declaration that Section 11-35-4230 is unconstitutional under the Separation of Powers Clause, Article I § 8 of the South

Carolina Constitution, and an order enjoining against the proceedings before the Chief Procurement Officer.

As this case presents a question of law, Respondents have made motions to dismiss and for judgment as a matter of law. Those motions are before the Court.¹

I. WCC Sought Dismissal Because there was No Claim for Recovery Separately As Against It, and Petitioners Consent to WCC's Dismissal on this One Ground.

WCC moved to dismiss Petitioners' Complaint as to WCC on the separate basis that the Petitioners assert no claim "against WCC" and so WCC can be dismissed from the case:

The SCWCC is not a necessary party to adjudicate any of these claims or causes of action and has acted only in compliance with applicable law as interpreted by our Courts. As the Plaintiff makes no claim against SCWCC for which this Court may grant relief, the Court should dismiss SCWCC as a party to this action.

WCC Motion to Dismiss at 4. Petitioners consent to WCC's motion to dismiss on this one ground alone, and as such, WCC must be dismissed from this matter. Petitioners' request for relief as against the remaining party, the CPO, is complete and adequate. Petitioners do not consent to any other matters in the WCC motions.

II. Article I § 8 of the S.C. Constitution, The Separation of Powers Clause, is a constitutional prohibition against the General Assembly's enactment of relevant provision of S.C. Code § 11-35-4230.

Respondents' entire remaining argument is based on the flawed assertion that "the *Unisys* case already decided this issue." It did not. The language on which the Respondents motions rely

¹ WCC also moved to consolidate the claims in this matter with claims involving other parties in a similar, ongoing matter. Petitioner does not oppose limited consolidation of the merits hearings (primarily legal argument and briefing, due to the fact that each of the cases raise a question of law, with no disputed facts) under S.C. R. Civ. P. 42, but requests that a separate final order for each case is warranted due to the lack of identity of parties and circumstances. This approach affords almost all of the economies available for management of the cases.

is found in *Unisys Corporation v. Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). However, the *Unisys* Court was specifically **not** presented the issue presented here: namely, whether the ***Separation of Powers Clause*** in Article I § 8 of the South Carolina Constitution is a prohibition against the General Assembly's power to enact the law at issue, S.C. Code § 11-35-4230, which provides that an executive branch administrative officer, rather than a Court of the Judicial Branch, shall decide legal claims made ***by the State***.

The *Unisys* Court instead addressed numerous other constitutional issues raised by the parties in that case, but not the Separation of Powers Clause, which was obviously overlooked by all. In doing so, the Court stated:

The State Constitution is a limitation upon and not a grant of power to the General Assembly. *Army Navy Bingo, Garrison No. 2196 v. Plowden*, 281 S.C. 226, 314 S.E.2d 339 (1984). "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). ***There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.***

We conclude art. X, § 10, simply limits claims against the State to those allowed by the legislature and does not invalidate § 11-35-4230.

Unisys at 270.

The key problem with the *Unisys* Court's assertion is that it did not consider, or decide, whether the ***Separation of Powers Clause*** of the Constitution is in fact a "***constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.***" We show below that, quite simply, the

Separation of Powers Clause is indeed such a prohibitory constitutional provision, and it should present no challenge for this Court to observe that.

The Separation of Powers Clause, Article I § 8, states as follows:

SECTION 8. Separation of powers.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other....

In simple words, this constitutional provision is a clear and unambiguous “constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.”

But this Court need not merely rely on the express words of the constitution – if that were not enough. Instead, there is actually controlling precedent from the South Carolina Supreme Court, which was also overlooked in the *Unisys* decision, because the Separation of Powers Clause limitation was not raised or briefed by the parties in *Unisys*.

In the controlling decision in *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910), the South Carolina Supreme Court conducted a detailed Separation of Powers Clause analysis², and held:

² “The Constitution ordains (Art. I, Sec. 14) that ‘the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.’ This language is as strong as it is simple and clear. ***The Legislature therefore cannot assume to itself the exercise of judicial powers.*** *Segars v. Parrott*, 54 S.C. 1. ***Nor can it confer ‘judicial powers,’ in the sense in which those words are used in the Constitution, upon any other body than the Courts*** mentioned and provided for in Section I, Article V, of the Constitution, which provides that ‘the judicial power of this State shall be vested in’ the Courts therein specifically mentioned and provided for. The few instances in which judicial power is vested elsewhere are provided for in the Constitution itself, and with these few exceptions, the whole of the element of sovereignty known as judicial power was vested by the people in their Courts, and none of it was left to be lodged elsewhere. In fact, every person exercising the functions of either of the other departments of the government are forbidden to assume or discharge those vested in the Courts. ...”

We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the ***claim of the State against the plaintiff, it is unconstitutional***, null and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void.

Carolina Glass at 293 (emphasis added).

Respondents have made no response to this analysis other than to assert that they disagree, and that there is “language” in *Unisys* on which they rely. No explanation is made for how, in fact, the Separation of Powers Clause is avoided in this analysis. No explanation is made for why the Supreme Court in *Carolina Glass* explicitly recognized the limit of the Separation of Powers Clause to the very type of enactment that is at issue here. But the detailed analysis made in *Carolina Glass* is on point and cannot be refuted.

If presented with this very issue and analysis, the State Supreme Court would properly clarify its statement in *Unisys* as *dicta*, and would reaffirm the holding in *Carolina Glass*, invalidating S.C. Code Ann. § 11-35-4320 to the extent it purports to allow the Chief Procurement

“It follows that ***any attempt to confer upon the Commission judicial powers, except in so far as the exercise of such powers may be necessarily incident to the duty of investigating and ascertaining the truth with respect to the management of the dispensary, and the just liabilities of the State growing out of dealings with the dispensary, is violative of the Constitution.***”

“It would not be contended for a moment that the Legislature could, even upon the fullest, fairest and most deliberate investigation, after due notice, pass a valid act declaring that a particular individual is indebted to the State in a given amount, and by legislative fiat create a lien upon his property. Such an act would not only be an unwarranted usurpation of judicial power, but would also be an infringement of the constitutional guaranty that no person shall be deprived of his property without due process of law or be denied the equal protection of the law. If, then, the Legislature itself could not pass such a judgment, it cannot confer upon a commission the power to do so. The creature cannot be greater than the creator. ...”

Carolina Glass at 290- 293. (emphasis added).

Officer to hear and decide legal claims made by the State for recovery as are presented in this case. Under the Separation of Powers Clause of the Constitution, such claims are to be heard and decided by the judicial branch alone. This is merely recognition that the Respondents are misreading the *Unisys* decision, and ignoring the Separation of Powers Clause and *Carolina Glass*. The CPO can have no lawful jurisdiction over WCC's breach of contract claims against Petitioners. If it were not so, the General Assembly could quickly pass laws to eradicate almost all, if not all, power and jurisdiction of the Judicial Branch. It is not hard to see why the Respondents' reading of *Unisys* cannot survive.

Unlike the parties in *Unisys*, Petitioners here have asserted this action based on the Separation of Powers Clause and on *Carolina Glass*. Petitioners are entitled to a declaratory ruling on these issues under law. Based on the above, there is simply no basis or justification for the motions to dismiss or for judgment as a matter of law in favor of Respondents.

III. The Disputes Clause Respondents Rely on Specifically Expects "Absence of Jurisdiction" which is specifically asserted here.

WCC mistakenly asserts in opposition that Petitioners in effect waived the subject matter jurisdiction issue and "agreed" to the CPO forum, quoting a contract term set forth below - but ignoring its most relevant clause. WCC's argument fails first because, as a matter of law, subject matter jurisdiction cannot be waived. *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996). But the contract clause WCC quoted exposes another failure in WCC's argument. By ignoring the most relevant and operative clause, highlighted in yellow below, WCC exposes the error in its argument:

DISPUTES (JAN 2006)

(1) Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina...

WCC failed to mention this key, operative part of the Contract Clause it asserted.

The absence of jurisdiction, based on the Separation of Powers Clause of the S.C. Constitution, is exactly what is at issue here, as shown above. Thus, WCC's argument is meritless.

**IV. An Unconstitutional "Administrative Remedy" is No Remedy at all and Need
Not be Exhausted.**

The Respondents mistakenly assert that Petitioners failed to exhaust administrative remedies. But when the issue presented is, as in this case, that the administrative remedy is an unconstitutional deprivation of Petitioners' constitutional rights, there is no obligation to exhaust such and unlawful administrative remedy. Indeed, Courts uniformly recognize that "irreparable harm" is visited on one who is forced to endure the mandates of a law that deprives them of constitutional rights. *See Garden State Equal. v. Dow*, 433 N.J. Super. 347, 79 A.3d 479 (Super. Ct. 2013). Further, it is well-recognized that the Court should excuse any exhaustion obligation when the dispositive issue is solely one of law. *Andrews Bearing Corp. v Brady*, 261 S.C. 533, 201 S.E. 2d 241 (1973).

Notably, in the *Unisys* case on which Respondents rely, the Circuit Court (Judge J.C. Nicholson, Jr., Order dated February 10, 2000, Richland County Common Pleas Civ. Action 98-CP-40-3945) specifically declined to adopt the exhaustion of administrative remedies argument as against Unisys' request for an injunction of CPO proceedings, and indeed, he enjoined the CPO proceedings pending appeal to the State Supreme Court, for the reasons set forth herein.

This litigation involves more than just the mere existence of constitutional issues to be raised, postponed and decided by the Circuit Court on appeal. It is a constitutional challenge to the very statute creating or enabling the administrative body and the procedure under which it acts. The CPO properly concedes that raising these constitutional issues before the CPO or Procurement Review Panel would be futile, because they have repeatedly acknowledged a lack of authority to review the constitutionality of the Procurement Code. Other courts have recognized that "[b]ecause an administrative agency cannot pass upon the constitutionality of the legislation under which it acts (citations omitted), a party seeking judicial review of the constitutionality of an agency's enabling legislation need not exhaust its administrative remedies." *Fred Schmid Appliance & Television Co. v. Denver*, 811 P.2d 31, 33 (Colo. 1991). In *Moore v. Sumter County Council*, 300 S.C.270,274, 387 SE.2d 455, 458 (1990), the South Carolina Supreme Court recognized this general exception to the exhaustion requirement "when a party demonstrates that a pursuit of (the remedy] would be a vain or futile act."

Moreover, Petitioners are specifically challenging the jurisdiction of the administrative body. The Counsel for the State Budget and Control Board, predecessor to SFAA, has acknowledged that excusing the exhaustion requirement is particularly appropriate when the dispositive legal issue relates to the basic jurisdiction of the agency." *Exhaustion of Administrative Remedies: Overview of South Carolina Law*, Edwin E. Evans, 8 S. Carolina Lawyer 25, 26 (January/February 1997). *See also Ex parte Allstate Ins. Co.*, 248 S.C.550, 151 S.E. 2d 849 (1966). Oddly, Respondents even seek to extend S.C. Code Ann. § 11-35-4320 by applying it to certain of the Petitioners who were neither contractors nor subcontractors to the state contract at issue. This misconduct clearly exceeds even the bounds of the unconstitutional law as written, and must be

prohibited. It shows yet another reason why an administrative official of the Executive Branch should not be extended judicial power.

V. Conclusion

For these reasons, the remaining motions of Respondents to dismiss and for Judgment should be denied and judgment should be entered in favor of Petitioners.

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Columbia, South Carolina
January 2, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-02656
	)	
Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards	)	
	)	
Petitioners-	)	<u>PETITIONERS-PLAINTIFFS'</u>
Plaintiffs,	)	<u>REQUEST FOR</u>
	)	<u>RECONSIDERATION</u>
vs.	)	
	)	
Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services; and	)	
South Carolina Workers' Compensation Commission,	)	
	)	
Respondents-	)	
Defendants.	)	
	)	

This case, brought by Petitioners against both Respondents, seeks only a declaration under *S.C. Code Ann. § 15-53-10* et seq. (“The Uniform Declaratory Judgment Act”) that *S.C. Code Ann. § 11-35-4230* is unconstitutional under the Separation of Powers Clause, *Article I § 8 of the South Carolina Constitution*.

Respondents moved to dismiss Petitioners’ declaratory judgment act claim, asserting Petitioners had not “exhausted their administrative remedies” before the Chief Procurement Officer (“CPO”) under *S.C. Code Ann. § 11-35-4230*, the challenged law. On January 31, 2023, the Court issued an Order dismissing Petitioners declaratory judgment case because Petitioners had not “exhausted their administrative remedies” before the CPO under *S.C. Code Ann. § 11-35-4230*.

Petitioners request reconsideration of the Court's Order, based on *Ward v. State*, 343 S.C. 14, 548 S.E. 2d 245 (2000) and *Video Gaming Consultants, Inc., v. South Carolina Dep't of Revenue*, 342 S.C.34, 535 S.E.2d 642 (2000).

The Uniform Declaratory Judgment Act in *S.C. Code Ann. § 15-53-20* provides that Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. (emphasis added).

Even the unconstitutional law does not attempt to give the CPO the power or authority to decide cases under the Uniform Declaratory Judgment Act, or to decide whether any of the laws of the State are unconstitutional. As was found in *Ward* and *Video Gaming*:

Requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense[] and certainly is not effective or appropriate. Here, declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. The agency and the ALJ cannot rule on the constitutionality issue. In fact, requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.

Ward at 247-8. The *Ward* decision stated the rule: “as a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling. The basis for our decision was that Administrative Law Judges (ALJs) come under the executive branch and must follow the laws as written. Allowing ALJs to rule on the constitutionality of a statute would violate the separation of powers doctrine.”¹

¹ Note that in the *Unisys* case cited in the Court's Order, Unisys had not only applied for declaratory relief, but it had also initiated a *breach of contract claim against the state* in the Circuit Court in the same action – despite the law requiring them to bring their contract claim before the CPO first. This is the reason the Circuit Court in *Unisys* considered (but rejected) the exhaustion of remedies doctrine in that case. No such breach of contract claim has been asserted by Petitioners in this Circuit Court case.

As written, this Court's Order of Dismissal demands that Petitioners first apply to the CPO for resolution of the Uniform Declaratory Judgment Act claim – a claim over which no party asserts the CPO has any power or authority whatsoever. As the Court in *Ward* recognized, this requirement would itself demand an act in violation of the Separation of Powers Clause – that an Executive Branch official should rule a statute unconstitutional in the first instance, *even when an appeal from such ruling it permitted*.

For these reasons, Petitioners request reconsideration of the Order of dismissal, and a ruling that the motions of Respondents to dismiss and for Judgment should be denied.

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February 2, 2023

STATE OF SOUTH CAROLINA	)	
COUNTY OF RICHLAND	)	
	)	BEFORE THE
Clemson University,	)	CHIEF PROCUREMENT OFFICER
	)	
	)	REQUEST FOR RESOLUTION
v.	)	OF CONTRACT CONTROVERSY
	)	
JMI Sports and JMIS College, LLC	)	
_____	)	

Clemson University (“Clemson”), by and through its undersigned counsel, asserts its request for resolution of a contract controversy and claims against JMI Sports and JMIS College, LLC (“JMI”) pursuant to S.C. Code Ann. § 11-35-4230, as follows:

The Parties, Jurisdiction and Venue

1. Clemson University is a South Carolina public university created pursuant to S.C. Code Ann. § 59-119-10.

2. JMI is a private corporation that engages in the business of sports and campus marketing.

3. Clemson and JMI entered into an agreement (the “Contract”) in connection with Clemson Solicitation #68301548-1.

4. With respect to disputes between Clemson and JMI, the Contract provides in part:

Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United State's Constitution. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation.

4. The Chief Procurement Officer has exclusive jurisdiction pursuant to S.C. Code Ann. § 11-35-4230 and under the Contract to decide all disputes between Clemson and JMI arising out of or touching upon the Contract.

General Allegations -- Facts

The Solicitation and Resulting Contract

5. In early 2016, Clemson advertised, pursuant to the South Carolina Consolidated Procurement Code, a Request for Proposals (RFP) for Total Campus Marketing Services.

6. The definition of the term Total Campus Marketing Services is on the first page of the RFP, and it says in part:

A Total Campus Marketing Initiative Solution can be defined as an expansion and coordination of typical multi-media rights practices used within the collegiate athletic market place to new, approved multi-media opportunities across a University to include Business Affairs, Advancement, Student Affairs and where deemed appropriate, Academic Areas, including Economic Development, PSA and Research (information on these areas can be obtained by visiting www.clemson.edu).

7. The RFP also noted, however, that this definition was not open ended, and that some parts of Clemson were not included in the definition of Total Campus Marketing Services, to wit:

Total Campus Marketing Initiative (CTCMI) shall not cross into IPTAY Annual Fund, University Development, Annual Fund Raising, Research Grants or Research Gift-In-Kind opportunities currently provided through other areas of Clemson University (information on these areas can be obtained by visiting www.clemson.edu). Clemson is poised to be a leader in Total Campus Marketing with the overall goal of obtaining new and creative revenue streams while simplifying and better managing the total University inventory. The second goal is to identify and investigate new, creative and innovative opportunities to co-brand Clemson University with first-class partners, understanding that there may be opportunities Clemson selects not to pursue based on the specific potential partner/sponsor.

8. The RFP later made absolutely clear that Clemson has the unilateral right to approve or reject any marketing opportunity related to campus only (non-athletic) marketing:

Any opportunity for potential non-athletic related marketing opportunities is subject to the prior approval of Clemson's Vice President for Finance and Operation or his designee prior to being pursued for a sponsorship contract.

9. The RFP also provided that there were certain types of products and activities over which that Clemson had the sole discretion to approve or disapprove for marketing opportunities:

As Clemson is an academic institution, beer, wine, alcohol, tobacco, firearms, religious, call to action gambling or political advertisements will require rigorous review and like all advertising (athletic or campus wide) will require the prior written consent of Clemson. If permission is granted, the beer advertisements must be educational and branding advertisements and if gambling advertisement is approved, they must highlight the educational component of the SC Educational Lottery. In each case, there shall be no call to action advertisements.

10. When Clemson advertised the RFP, Learfield Sports (“Learfield”) was the incumbent provider of sports marketing services for Clemson and was and continues to be arguably the largest provider of sports and campus marketing services in the country.

11. Also during this time, Clemson was one of the top college football programs in the country, having completed an undefeated season before losing to Alabama in the National Championship game of the first ever Division I College Football Playoff.

12. Both Learfield and JMI, among others, submitted proposals.

13. JMI’s proposal included minimum payment guarantees to Clemson that were the highest among all proposers: \$65,000,000 for athletics marketing and \$3,000,000 for campus marketing over a seven-year period.

14. JMI was the presumptive winner of the solicitation, and Learfield protested.

15. Following a re-solicitation and another Learfield protest, Clemson awarded the Contract to JMI.

16. During the solicitation and award period, JMI requested certain changes to the contract documents, and Clemson agreed to some of these changes. At no time, however, did JMI ever seek any change to the RFP itself, including the definition of Total Campus Marketing Services and the related limitations on that definition as described above.

JMI’s Work under the Contract

17. After Clemson awarded the Contract to JMI, Clemson continued to have incredible success in college football, winning two national championships, playing for another one, and making the College Football Playoff four years in a row.

18. From the moment JMI started working under the Contract there were issues, and during that time of Clemson’s success on the field, JMI experienced almost complete turnover of its personnel in this short amount of time. For example:

A. JMI’s first General Manager’s last day on the job was September 28, 2018, and his replacement did not start until January 2019. During this timeframe,

Clemson won its second National Championship in football in three years, but JMI had no lead GM during this time and no one truly focused on selling Clemson during this peak performance period.

B. JMI took roughly an entire year to fill two key sales roles. Thus, during the twelve-month period when Clemson was winning another National Championship and then basking in the glow of that championship, JMI was missing critical personnel.

C. As a result of this turnover, JMI not only was inadequately staffed to take advantage of Clemson's unprecedented run of success, but it meant that JMI did not take the time to understand the current sales market in the State of South Carolina, did not understand Clemson University and its make-up, and it led JMI to make questionable hires in leadership and sales positions.

The Dispute

19. In November 2019, during a Clemson home football game, JMI made verbal statements to Clemson that Clemson was failing to act according to the Contract. JMI gave no specific examples of such failure, but said that it wanted to meet to discuss these issues. This was the first time JMI had ever made any such statement of this type.

20. In late January 2020 (at the National Championship Football Game in New Orleans), Clemson and JMI met, during which time JMI provided Clemson a one-page document.

A. In the first section, labeled "The Situation", it stated:

JMI Sports is proud to be associated with Clemson University and privileged to have been selected as the university's MMR and Total Campus Marketing partner. We continue to believe in the mission of the university and its incredible athletics programs. JMI Sports values the relationship with Clemson University tremendously and we aspire to continue being a great partner.

However, an extensive internal review identified numerous specific instances where the changes at the university since the RFP have adversely impacted our ability to achieve financial goals for the property. Simply, the property is not viable because Clemson has moved away from the original design and intent of its unique partnership with JMI Sports.

B. The next section, labeled “The Challenges”, stated:

Changes that have occurred at Clemson since the RFP have materially devalued the rights JMI Sports bid so aggressively to acquire.

Although we do not believe that Clemson has been malicious, it is undeniable that Clemson has not lived up to their responsibilities in our partnership.

The numerous examples of Clemson blocking our ability to monetize our rights are profound and the financial viability of the property has been severely impaired.

The Clemson Sport & Campus Marketing has spent an unreasonable amount of time managing the relationship and responding to Clemson requests which has dramatically diminished our ability to spend the necessary time to drive revenue for our partnership.

As a result, JMI Sports has suffered significant financial harm, the university has diminished the value of their Total Campus Marketing rights, and Athletics has lost significant financial opportunity.

C. In the last section, labeled “The Proposed Solution”, JMI proposed radically changing the financial terms of the Contract, including:

- (1) Converting the 2019-2020 contract year into one in which JMI was “assured no worse than a break-even financial result.”
- (2) Extending the Contract such that a new seven-year term would commence July 1, 2020.
- (3) Doing away with guaranteed payments and converting to a “fee based model” where Clemson would keep “100% of annual sponsorship and advertising revenues after it pays JMI Sports the following:
 - annual (and mutually approved expenses)
 - \$1,000,000 per year management fee, plus
 - An incentive of %10 of all revenues above \$12 million per year throughout the term.” (emphasis added)

21. During and several times after this meeting Clemson asked for specific examples of how Clemson had been violating the Contract, but JMI repeatedly stated that JMI did not want to dwell on the past but instead wanted to focus on the future.

22. On June 15, 2020, payment became due to Clemson from JMI for the minimum revenue share guarantees, performance bonuses and other payments due under the Agreement for fiscal year 2019-2020, as follows:

Guaranteed Minimum for Athletics Revenue Share (See Financial Proposal and Record of Negotiation #2)	\$8,300,000
Guaranteed Minimum for Campus Revenue Share (See Record of Negotiation #5)	\$600,000
Support of Two FTE positions for Digital Network (See Record of Negotiation #5)	\$150,000
Performance Bonus -- ACC Championship Game (See Section IV (D), Scope of Work)	\$15,000
Performance Bonus -- College Playoff (See Section IV (D), Scope of Work)	\$100,000
Balance of Coke Pass-Through Payment (Campus)	\$466,356
Balance of Coke Pass-Through Payment (Athletics)	\$775,000
Total	\$10,256,356

23. JMI refused to make this payment, and insisted on Clemson agreeing to new terms of the Contract before making any payment.

24. On July 15, 2020 Clemson sent a demand letter to JMI.

25. After several more weeks JMI made a partial payment of \$4,500,000, leaving a balance of \$5,756,356. After months of unfruitful negotiations, Clemson sent JMI a letter on February 24, 2021, demanding payment of \$5,756,356 and reserving the right to terminate the contract if payment is not made on or before the thirty-day cure period.

26. Thereafter, JMI sent its own termination letter and claimed that it had suffered damage by Clemson's alleged failure to follow the Contract. No specific damages numbers were provided, although JMI claimed that its damages exceed \$24,400,000.

27. Effective July 29, 2021, after several months of meetings and mediations, Clemson and JMI agreed to a partial settlement and to terminate the Contract for convenience. See Partial Settlement Agreement attached.

28. On September 30, 2021, JMI sent to Clemson a demand for termination costs in the amount of \$910,419.07, but JMI also stated “[t]hese costs are current through September 30, 2021 and could change after this date due to continuing fees.”

29. Clemson responded to this demand on October 26, 2021, agreeing to \$61,575.07 of these costs, but disputing the remainder.

30. Clemson has yet to receive any monies for fiscal year 2020-2021, or any of the other monies owed for this year, to wit:

Guaranteed Minimum for Athletics Revenue Share (See Financial Proposal and Record of Negotiation #2)	\$8,700,000
Guaranteed Minimum for Campus Revenue Share (See Record of Negotiation #5)	\$600,000
Support of Two FTE positions for Digital Network (See Record of Negotiation #5)	\$150,000
Performance Bonus -- ACC Championship Game (See Section IV (D), Scope of Work)	\$15,000
Performance Bonus -- College Playoff (See Section IV (D), Scope of Work)	\$25,000
Balance of Coke Pass-Through Payment (Campus)	\$619,432
Balance of Coke Pass-Through Payment (Athletics)	\$161,000
Total	\$10,270,432

31. JMI has received at least \$125,000 in pre-payments from sponsors for fiscal year 2021-2022 that rightly belong to Clemson and should be paid to Clemson.

Contract Controversy and Requested Relief

32. Clemson is owed \$5,756,356 plus interest for fiscal year 2019-2020, and it requests that the Chief Procurement Officer resolve this contract controversy by finding that JMI owes Clemson these amounts.

33. Clemson is owed \$10,270,432 plus interest for fiscal year 2020-2021, and it requests that the Chief Procurement Officer resolve this contract controversy by finding that JMI owes Clemson these amounts.

34. Clemson is owed at least \$125,000 plus interest for items pre-paid for fiscal year 2021-2022, and it requests that the Chief Procurement Officer resolve this contract controversy by finding that JMI owes Clemson these amounts and more that may be owing.

35. JMI claims that Clemson owes JMI damages for breach of contract. Clemson requests that the Chief Procurement Officer resolve this contract controversy by finding that Clemson did not breach the contract, or in the alternative, that JMI suffered no damages.

36. JMI claims that Clemson owes JMI \$910,419.07 for termination costs, and has reserved the right to seek more. Clemson requests that the Chief Procurement Officer resolve this contract controversy by finding that Clemson owes JMI no more than \$61,575.07 for termination costs.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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Attorneys for Clemson University

November 8, 2021
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-_____
	)	
JMI Sports and JMIS College, LLC,	)	
	)	
Petitioners-Plaintiffs,	)	
	)	
vs.	)	<u>SUMMONS</u>
	)	
Michael B. Spicer, Chief Procurement	)	
Officer, South Carolina State	)	
Fiscal Accountability Authority, Division of	)	
Procurement Services; and	)	
Clemson University,	)	
	)	
Respondents-Defendants.	)	
_____	)	

TO THE RESPONDENTS/DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition and Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Petition and Complaint upon the subscriber at the address shown below, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Petition and Complaint, judgment by default will be rendered against you for the relief demanded in the Petition and Complaint.

Schmidt & Copeland, LLC

s/ John E. Schmidt, III
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Attorney for Petitioners-Plaintiffs

Columbia, South Carolina
 May 13, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JMI Sports and JMIS College, LLC,)
Petitioners-Plaintiffs,)
vs.)
Michael B. Spicer, Chief Procurement)
Officer, South Carolina State)
Fiscal Accountability Authority, Division of)
Procurement Services; and)
Clemson University,)
Respondents-Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2022-CP-40-_____

**COMPLAINT AND PETITION
FOR DECLARATORY AND
INJUNCTIVE RELIEF –
UNCONSTITUTIONALITY OF
LAW AND DEPRIVATION OF
CONSTITUTIONAL RIGHTS**

Petitioners above-named, JMI Sports and JMIS College, LLC (“Petitioners”), by and through their undersigned attorneys, pursuant to S.C. Code Ann. § 15-53-10 *et seq.*, and Article I, Section 8 (“Separation of Powers Clause”), Article V, Section 11 (Establishing the Exclusive Powers of the Judicial Branch), Article I, Section 22 (“Due Process Clause”) of the South Carolina Constitution, and S.C.R.Civ.P. 65, respectfully file this Complaint and Petition for Declaratory and Injunctive Relief for a declaration of the partial unconstitutionality of S.C. Code Ann. § 11-35-4230, as well as to restrain the conduct of Respondents/Defendants and all other State agencies or officers acting pursuant to said unconstitutional law.

I. PROCEDURAL HISTORY

Respondent Clemson University (“Clemson”) initiated an Executive Branch administrative proceeding ("Executive Branch Proceeding") against Petitioners on November 8, 2021 by filing a “Request for Resolution” of a “Contract Controversy” under S.C. Code Ann. § 11-35-4230 with an Executive Branch official, Respondent Michael B. Spicer, the “Chief

Procurement Officer” (“CPO”), an employee and official of the South Carolina Fiscal Accountability Authority’s (“SFAA”) Division of Procurement Services.

Although S.C. Code Ann. § 11-35-4230 purports to authorize this Executive Branch Proceeding, this proceeding is specifically unlawful and unconstitutional under Article I, Section 8 (“Separation of Powers Clause”) of the South Carolina Constitution and Article V, Section 11 (Establishing the Exclusive Powers of the Judicial Branch) of the South Carolina Constitution. This ongoing proceeding is unlawful because it is not a proceeding to address “claims against the State” (as authorized by Article X, Section 10 of the Constitution), but is instead claims by the State against private parties for the recovery of money for “breach of contract” and “fraud.”

This unlawful Executive Branch Proceeding under S.C. Code Ann. § 11-35-4230 is specifically in the nature of *claims asserted by Clemson as against private parties (Petitioners) for the recovery of damages* in claims at law and in equity brought before and to be “heard” and “decided” by the CPO, an employee and state officer of the Executive Branch, rather than before the Courts of the State, in violation of the Separation of Powers Clause of the Constitution. To the extent that S.C. Code Ann. § 11-35-4230 provides that it is the exclusive means for claims by the State against private parties, it is unconstitutional, and the Executive Branch administrative proceeding underway as against Petitioners under that law constitutes an immediate and irreparable violation and deprivation of the constitutional rights of Petitioners. The pursuit and handling of such claims on the part of Clemson, and the actions, decisions, and orders of the CPO, and any other state agency in furtherance of same, are an immediate and irreparable deprivation of Petitioners’ rights guaranteed and assured by the South Carolina Constitution.

II. BACKGROUND

This case involves the unconstitutionality of the law under which the Executive Branch Proceeding, making claims for recovery of money by a state agency, was filed against Petitioners alleging breach of contract. The claim purports to be brought before the “Chief Procurement Officer,” an employee of SFAA, a State Executive Branch administrative agency, under S.C. Code Ann. § 11-35-4230, which provides:

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. *The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor*, when the subcontractor is the real party in interest, concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code. On behalf of any governmental body or South Carolina public procurement unit that participates in a multiagency, term, or cooperative contract awarded by or under the authority of a chief procurement officer, the Division of Procurement Services may initiate and pursue resolution of any contract controversy which arises under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

The claims allege that Clemson, in or around July of 2016, awarded a state contract to one or more Petitioners for the provision of certain marketing services, and that one or more Petitioners allegedly “breached” that contract and/or committed “fraud” in connection with that contract.

The claims, filed with the CPO to be heard and decided in a matter named “Case No. 2022-116” by the CPO, demand an “award” of millions of dollars in favor of Clemson as against the Petitioners, (despite the fact that there is no mechanism in law for an Executive Branch

Agency to enter a monetary judgment award of any kind, or to enforce, for example, any sort of lien.)

Despite the lack of merit of these claims, the fact that they are brought and pursued before an Executive Branch officer who is not a judge and who has no judicial power whatsoever under the Constitution, and the fact that Petitioners are being forced to participate in such process to protect their common law rights, is causing ongoing, immediate, and irreparable harm to Petitioners in the form of deprivations and violations of their constitutional rights. Such participation places Petitioners at great risk and causes Petitioners needless, irrecoverable expense.

Petitioners are entitled to rely on the constitutional separation of powers to provide that claims against them will be adjudicated by the professional Judicial Branch. The Judicial Branch was granted that exclusive power to do so in the South Carolina Constitution. Petitioners prefer adjudication in the courts, rather than by an employee of the Executive Branch, which branch is, at the same time, the “claimant” in the very “case” to be decided.

1. The Exclusive Powers of the Judicial Branch

Article V, *providing for the Judicial Branch*, in Section 11 of the South Carolina Constitution, states:

SECTION 11. Jurisdiction of Circuit Court.

The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.

2. Separation of Powers

The Separation of Powers Clause, Article I, Section 8 of the South Carolina Constitution, provides:

SECTION 8. Separation of powers.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Thus, without some constitutional exception, it is simply unconstitutional for a branch of government other than the Judicial Branch to exercise judicial power, the most fundamental form of which is the handling of claims among parties. There is such a constitutional exception ***only as to claims against the State, not for claims by the State.***

3. The Unconstitutional Statute

S.C. Code Ann. § 11-35-4230 purports to govern two types of claims: 1) claims by private parties against the State under State-issued contracts, as well as 2) claims by the State against private parties under State-issued contracts.

A. Claims Against the State are Excepted from Separation of Powers Clause by Article X, Section 10 and Article XVII, Section 2.

Notwithstanding the prohibition of the Separation of Powers Clause, there is an express constitutional exception stated as to the first type of claims – ***claims against the State***: S.C. Constitution, Article X, Section 10 provides: "Claims *against State*. The General Assembly may direct, by law, in what manner *claims against the State* may be established and adjusted" (emphasis added). Likewise, Article XVII, Section 2 provides: "Claims *against State*. The General Assembly may direct, by law, in what manner *claims against the State* may be established and adjusted (emphasis added)."

As a result, the portion of S.C. Code Ann. § 11-35-4230 concerning claims against the State is valid and constitutional. The Constitution expressly authorizes that limited intrusion on the power of the Judicial Branch. That limited intrusion (for claims *against the State*) is

expressly carved out by an express constitutional authorization for management per legislative direction.

B. Claims By the State Are Not Excepted from The Separation of Powers Clause's Prohibition.

There is no express carve out in the Constitution that permits the other branches of government to invade the province of the Judicial Branch such as by the handling of civil claims asserted *by the State* for recovery of monetary damages. Yet S.C. Code Ann. § 11-35-4230 unlawfully purports to authorize such a direct intrusion into the power of the Judicial Branch, in direct violation of the Separation of Powers Clause.

C. The Carolina Glass Decision Controls the Separation of Powers Analysis

The Separation of Powers Clause Prohibition was addressed directly in the decision of *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910). *Carolina Glass* involved a very similar statute to the one at issue here; the statute also purported to authorize Executive Branch management of *claims by the State*. That decision is on point, and is controlling authority. In that case, the Supreme Court held: “***We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the claim of the State against the plaintiff, it is unconstitutional, null and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void.***”

Carolina Glass squarely holds that due to the Separation of Powers Clause of the Constitution, the legislature may not enact a law that permits a state Executive Branch agency (such as the CPO) to hear and decide a monetary claim *by the State against a contractor*. As a consequence, it firmly establishes that the CPO can have no jurisdiction over such a claim, and as a consequence, a law such as S.C. Code Ann. § 11-35-4230 is unconstitutional. It is important

to remember that our Supreme Court has held that “the principle of the separation of the powers of government is fundamental to the very existence of constitutional government as established in the United States.” *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 261 S.E. 2d 303, 306 (1979).

D. The Unisys Decision Did Not Address this Constitutional Separation of Powers Issue

It is simply false to assert that the issue presented here has been “decided” by *Unisys Corporation v. Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). There is inaccurate *dicta* in *Unisys* which confuses the issue, only minimally, because the *dicta* is wrong. The *Unisys* decision never mentions Separation of Powers, the Separation of Powers Clause, or the controlling *Carolina Glass* decision. Careful examination of the *Unisys* decision and its record shows very clearly that, although the parties in that case raised *other grounds* to invalidate the law (which the Court decided and are not at issue here), *they simply did not argue or present to the Court the issue raised here – the Separation of Powers Clause*. It was overlooked or ignored.

This omission by the parties in *Unisys* clearly explains why the Supreme Court somehow overlooked the Court’s crucial and clear failure to take note of the Separation of Powers Clause as an obstacle when the *Unisys* Court absurdly pronounced, in obviously erroneous *dicta*: “*There is no constitutional provision limiting the legislature’s power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.*” Plainly, the legislature does not have plenary power to assign to a state agency the role to determine how common law claims by the State will be addressed. That is the role of the Judicial Branch under the Constitution, and the Separation of Powers Clause forbids any intrusion on judicial power unless expressly authorized by the Constitution itself.

Petitioners have been notified that the CPO is in the process of undertaking a “review” of the claims with the evident purpose and intent to render a “decision” on the claims of Clemson as against Petitioners. Petitioners seek in this action: 1) an order declaring S.C. Code Ann. § 11-35-4230 unconstitutional insofar as it authorizes an employee of the Executive Branch to hear and decide claims for monetary and other judicial relief by the State or a state agency, in this case, Clemson, as against private parties such as Petitioners; 2) an order staying and enjoining all such proceedings and all acts in furtherance thereof; 3) attorneys' fees and costs associated with the deprivation of Petitioners' constitutional rights; 4) and such other and further relief as may be just and warranted.

Petitioners would show and allege as follows:

III. PARTIES

1. Petitioner JMI Sports and JMIS College, LLC (“JMI”) are business entities organized and existing under the laws of a state other than the State of South Carolina. JMI provides certain marketing services to private industry and to government customers. JMI was awarded a contract by Clemson to perform certain marketing services for Clemson to commence in or around July of 2016.

2. Respondent Clemson University (“Clemson”) is a public university created by statute and is an agency of the Executive Branch of the government of the State of South Carolina. It is or was the intended “using agency” of the State of South Carolina as to services to be provided by JMI under the contract at issue in this matter.

3. Respondent Michael B. Spicer (“CPO”) is an employee of SFAA, Division of Procurement Services and the Executive Branch, and was, at all relevant times herein, an interim and acting designated Chief Procurement Officer (a state officer pursuant to S.C. Code Ann. §

11-35-810) appointed to hear certain claims filed under S.C. Code Ann. § 11-35-4230. Clemson filed its claims for relief as against Petitioners with the CPO. A copy of the claim at issue is attached hereto as Exhibit A. The CPO is currently, on information and belief, conducting a “review” of those claims with an intent and purpose to “decide” whether (and to what extent) JMI may owe money to Clemson for an alleged breach of contract.

4. Petitioners herein seek a declaration of rights and the constitutionality of laws and government action as described herein and a stay and injunctive relief to preserve Petitioners' rights and the status quo during the pendency of this matter.

5. Clemson and the CPO are officers or agencies of the Executive Branch of government. *See Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 363 S.E. 2d 683 (1987).

6. Jurisdiction and venue of this action are proper in this Court.

IV. FACTS AND ALLEGATIONS

7. All of the foregoing paragraphs of this Complaint And Petition For Declaratory And Injunctive Relief – Unconstitutionality Of Law And Deprivation Of Constitutional Rights, whether numbered or unnumbered, are realleged and reiterated as if repeated herein verbatim.

8. On or about November 8, 2021, Clemson filed with the CPO its initial claim as against Petitioners in the form of a “Request for Resolution of Contract Controversy” (Exhibit A).

9. On November 30, 2021, Petitioners filed with the CPO their Motion to Dismiss the claims asserted in the Request for Resolution of Contract Controversy, including on the grounds that the Separation of Powers Clause of the South Carolina Constitution precluded the

CPO from exercising “jurisdiction” to “hear” and “decide” claims at law asserted by the State as against private parties for the recovery of monetary damages and other judicial relief (Exhibit B).

10. To Petitioners’ knowledge, no action was taken on the matters addressed in the claim until mid-March of 2022.

11. On or about March 17, 2022, the CPO issued an email to parties and counsel to the parties in connection with Clemson’s claims, stating (Exhibit C):

I have reviewed the documents listed below and I believe that a full briefing, with exhibits, would be beneficial in expediting resolution of this matter. Please advise when your schedules would allow submission of a full brief and exhibits not already in the record.

12. Because the CPO has not dismissed Clemson’s claims on the motion of Petitioners, has not addressed those motions in any respect for over a year, and has indicated an intention to proceed to “review” and “resolve” the disputes raised by the claims and specifically to decide whether to grant Clemson’s claim for an award of money as against Petitioners for breach of contract and fraud, Petitioners bring this action to protect their constitutional rights as alleged herein.

13. The process set forth in S.C. Code Ann. § 11-35-4230 for the handling of “claims” by the State and its agencies as against private persons for judicial relief such as for the recovery of money under contract is unconstitutional, in violation of constitutional provisions including the Separation of Powers Clause, and is illegal, and is specifically illegal and unconstitutional as applied to the circumstances of this matter.

14. The statute that permits the Respondents to proceed with a state contract claim for claims by the State against private parties is unconstitutional. Specifically, S.C. Code Ann. § 11-35-4230 is unconstitutional.

15. As can be readily seen, S.C. Code Ann. § 11-35-4230 specifically contradicts Article I, Section 8 (Separation of Powers Clause), Article V, Section 11 (Powers of the Courts Clause) and Article I, Section 22 (Due Process Clause) of the South Carolina Constitution, in that it purports to permit a process under which an employee or agency of the Executive Branch may “hear” and “decide” claims by the State or its agencies for recovery of money damages as against private parties despite the obvious fact that such claims are matters within the sole and exclusive province of the Judicial Branch of government.

16. Petitioners are entitled to the declaratory and injunctive relief sought herein as against Respondents under S.C. Code Ann. § 15-77-300 and otherwise because the unlawful and unconstitutional actions of Respondents have been taken and pursued without substantial justification, and an award of such fees and costs is just.

17. Petitioners are entitled to their attorney’s fees and costs as well as declaratory and injunctive relief sought herein as against Respondents under S.C. Code Ann. § 15-77-300 and otherwise, because the law enacted, namely S.C. Code Ann. § 11-35-4230 is unconstitutional, and the actions of the state agencies and officials thereunder as described herein is unlawful and unconstitutional. Because all such actions of Respondents have been taken and pursued without substantial justification, and an award of such fees and costs to Petitioners is just.

V. REQUEST FOR DECLARATORY JUDGMENT

18. All of the foregoing allegations of this Complaint and Petition are realleged as if repeated verbatim.

19. This is an action for Declaratory relief and Declaratory Judgment under the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10 *et seq.*

20. This matter presents a bona fide, actual, and practical need for a declaration as to the matters sought herein, including the constitutionality of S.C. Code Ann. § 11-35-4230 (“the statute”) in view of the Separation of Powers Clause of the South Carolina Constitution.

21. There is an actual, concrete, and substantial controversy as to the constitutionality of the statute, and such controversy requires an immediate determination as to whether Respondents’ immediate conduct regarding the handling of Clemson’s claims by the CPO is unconstitutional, illegal, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

22. Declaratory relief is appropriate here because such judgment will serve a useful purpose in clarifying and settling the legal relations between the parties as they relate to Clemson’s claims.

23. Declaratory relief will terminate and afford relief of uncertainty, insecurity, and controversy concerning the parties’ rights as they relate to Clemson’s claims.

24. Declaratory relief is appropriate because all of the adverse and antagonistic interests are before the Court.

25. There is no requirement to “exhaust administrative remedies” because these claims seek declaratory relief in the form of declaring a statute unconstitutional, and an administrative agency has no power to issue declaratory relief or to rule on the constitutionality of a law under which it operates. *Weinberger v. Salfi*, 422 US 749 764-5, (1975); *Finnerty v. Cowan*, 508 F. 2nd 979, 982 (2d Cir. 1974); *S.C. Tax Comm’n v. S.C. Tax Bd. Of Review*, 278 S.C. 556, 299 S. 2d 489 (1983).

26. Accordingly, there is not another “action” already pending for the same claims between the same parties.

27. Petitioners seek an declaratory Order of the Court, under the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10 *et seq*, that S.C. Code Ann. § 11-35-4230 is unconstitutional, and that Clemson, the CPO, and all other State agencies and officers are to be restrained, by the Separation of Powers Clause, from invoking or so exercising the judicial power assigned to the Judicial Branch alone; that Respondents should be responsible to Petitioners for the costs and attorneys' fees incurred in connection with this, their only recourse for obtaining protection of constitutionally granted rights, and all other remedies provided under law, and such costs and attorney's fees and such other relief as this Court may deem proper.

**VI. REQUEST FOR STAY AND PRELIMINARY
AND PERMANENT INJUNCTIVE RELIEF**

28. All of the foregoing allegations of this Complaint and Petition are realleged as if repeated verbatim.

29. This is an action for Stay and for Preliminary and Permanent Injunctive Relief, including under Rule 65 of the South Carolina Rules of Civil Procedure.

30. Petitioners will be irreparably harmed by the Respondents' ongoing violations of Petitioners' constitutional rights as alleged and asserted herein.

31. Petitioners will be irreparably harmed by the Respondents' ongoing violations of Petitioners' constitutional rights by the initiation, maintenance, pursuit, and handling of the contract controversy claims of Clemson as against Petitioners, because Petitioners are entitled, by the Separation of Powers Clause of the South Carolina Constitution to have claims for recovery of damages as against Petitioners, for breach of contract as against Petitioners, and for alleged fraud as against Petitioners, and other like claims at law to be heard and decided by the Judicial Branch of the government.

32. Petitioners will be irreparably harmed by the Respondents' ongoing violations of Petitioners' constitutional rights by the initiation, maintenance, pursuit, and handling of the contract controversy claims of Clemson as against Petitioners, because Petitioners will incur needless unrecoverable costs, including excessive time and expense as well as attorneys' fees and costs in the defense of an action before an Executive Branch official who lacks the judicial power to hear and decide such claims by the State.

33. The public interest favors the grant of a stay and injunctive relief because there is an important public interest in upholding the constitutional separation of powers of the separate branches of government.

34. Respondents will suffer no cognizable harm by virtue of the granting of a stay and injunction because the State and its agencies and employees can have no valid interest in the violation of the law and the Constitution.

35. Petitioners also seek a stay and preliminary and permanent injunctive relief herein as against the Respondents in regard to the application or carrying out of duties under the unconstitutional statute, insofar as they relate to claims brought by the State or any of its agencies, and in regard to continued violations of the constitutional rights of participants, including Petitioners, that appear before them, and in regard to any further acts toward or in furtherance of such statutory role, which is contrary to Petitioners' rights under law.

36. Petitioners are informed and believe, and on the basis of that information and belief allege that, unless restrained or enjoined by Order of this Court, Clemson and the CPO will continue to engage in the same constitutional violations alleged herein and will attempt to enforce as against Petitioners unauthorized and unlawful decisions and orders, despite the requirements of law and the Constitution.

37. Such conduct will result in irreparable harm to Petitioners, in that Petitioners will be deprived of important constitutional rights, which deprivation constitutes per se irreparable harm in this instance.

38. The threat of such irreparable and permanent damage justifies the issuance by this Court of a temporary restraining order, a temporary injunction, and/or a permanent injunction, as against Clemson and the CPO.

39. There exists a strong likelihood that the Petitioners will succeed on the merits due to the fact that the Respondents' conduct in violation of the constitutional rights of Petitioners, as well as others, has been well-documented, and because the constitutional prohibition of the Separation of Powers Clause and its application in the controlling *Carolina Glass* precedent is so clear.

40. Petitioners have no adequate remedy at law for such irreparable harm which they have suffered and will continue to suffer in the future in the event that Clemson and the CPO, and all other State agencies and officers acting in furtherance of same are not so enjoined. Petitioners will suffer an irrecoverable deprivation of constitutional rights, will by necessity be deprived of their constitutional right that *"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other,"* and Petitioners will further be deprived of their right to the fruits of a meritorious appeal if a stay and injunction are not now issued, because the Respondents may, unless stayed or enjoined, choose to proceed to enforce and act on orders to be issued, contrary to Petitioners' rights and interests notwithstanding the pendency of this Petition

for Judicial Review, and will proceed with actions to Petitioners' detriment in respect to the matters at hand, precluding any meaningful review or relief whatsoever.

41. Petitioners seek a temporary and permanent injunction enjoining Clemson and the CPO and all other State agencies and officers from taking any action regarding the rights of Petitioners, until such time as the constitutional rights of Petitioners and the constitutional issues raised hereunder, and the obligations of Clemson and the CPO under law, are finally adjudicated and resolved.

WHEREFORE, the Petitioners seek an Order:

1) declaring S.C. Code Ann. § 11-35-4230 unconstitutional insofar as it authorizes the CPO or any other employee, officer or agency of the Executive Branch of government to hear and decide claims for monetary and other judicial relief brought *by the State or a State agency*, in this case, Clemson, as against private parties such as Petitioners;

2) staying and enjoining all such proceedings and all acts in furtherance thereof during the pendency of this matter;

3) granting an award of Petitioners' attorneys' fees and costs associated with the deprivation of Petitioners' constitutional rights pursuant to applicable law including but not limited to S.C. Code Ann. § 15-77-300 and otherwise; and

4) and such other and further relief as may be just and proper.

Schmidt & Copeland LLC

s/ John E. Schmidt, III

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Attorney for Petitioners-Plaintiffs

Columbia, South Carolina
May 13, 2022

STATE OF SOUTH CAROLINA	)	
COUNTY OF RICHLAND	)	
	)	BEFORE THE
Clemson University,	)	CHIEF PROCUREMENT OFFICER
	)	
	)	REQUEST FOR RESOLUTION
v.	)	OF CONTRACT CONTROVERSY
	)	
JMI Sports and JMIS College, LLC	)	
_____	)	

Clemson University ("Clemson"), by and through its undersigned counsel, asserts its request for resolution of a contract controversy and claims against JMI Sports and JMIS College, LLC ("JMI") pursuant to S.C. Code Ann. § 11-35-4230, as follows:

The Parties, Jurisdiction and Venue

1. Clemson University is a South Carolina public university created pursuant to S.C. Code Ann. § 59-119-10.

2. JMI is a private corporation that engages in the business of sports and campus marketing.

3. Clemson and JMI entered into an agreement (the "Contract") in connection with Clemson Solicitation #68301548-1.

4. With respect to disputes between Clemson and JMI, the Contract provides in part:

Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United State's Constitution. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation.

Exhibit A

4. The Chief Procurement Officer has exclusive jurisdiction pursuant to S.C. Code Ann. § 11-35-4230 and under the Contract to decide all disputes between Clemson and JMI arising out of or touching upon the Contract.

General Allegations -- Facts

The Solicitation and Resulting Contract

5. In early 2016, Clemson advertised, pursuant to the South Carolina Consolidated Procurement Code, a Request for Proposals (RFP) for Total Campus Marketing Services.

6. The definition of the term Total Campus Marketing Services is on the first page of the RFP, and it says in part:

A Total Campus Marketing Initiative Solution can be defined as an expansion and coordination of typical multi-media rights practices used within the collegiate athletic market place to new, approved multi-media opportunities across a University to include Business Affairs, Advancement, Student Affairs and where deemed appropriate, Academic Areas, including Economic Development, PSA and Research (information on these areas can be obtained by visiting www.clemson.edu).

7. The RFP also noted, however, that this definition was not open ended, and that some parts of Clemson were not included in the definition of Total Campus Marketing Services, to wit:

Total Campus Marketing Initiative (CTCMI) shall not cross into IPTAY Annual Fund, University Development, Annual Fund Raising, Research Grants or Research Gift-In-Kind opportunities currently provided through other areas of Clemson University (information on these areas can be obtained by visiting www.clemson.edu). Clemson is poised to be a leader in Total Campus Marketing with the overall goal of obtaining new and creative revenue streams while simplifying and better managing the total University inventory. The second goal is to identify and investigate new, creative and innovative opportunities to co-brand Clemson University with first-class partners, understanding that there may be opportunities Clemson selects not to pursue based on the specific potential partner/sponsor.

8. The RFP later made absolutely clear that Clemson has the unilateral right to approve or reject any marketing opportunity related to campus only (non-athletic) marketing:

Any opportunity for potential non-athletic related marketing opportunities is subject to the prior approval of Clemson's Vice President for Finance and Operation or his designee prior to being pursued for a sponsorship contract.

9. The RFP also provided that there were certain types of products and activities over which that Clemson had the sole discretion to approve or disapprove for marketing opportunities:

As Clemson is an academic institution, beer, wine, alcohol, tobacco, firearms, religious, call to action gambling or political advertisements will require rigorous review and like all advertising (athletic or campus wide) will require the prior written consent of Clemson. If permission is granted, the beer advertisements must be educational and branding advertisements and if gambling advertisement is approved, they must highlight the educational component of the SC Educational Lottery. In each case, there shall be no call to action advertisements.

10. When Clemson advertised the RFP, Learfield Sports (“Learfield”) was the incumbent provider of sports marketing services for Clemson and was and continues to be arguably the largest provider of sports and campus marketing services in the country.

11. Also during this time, Clemson was one of the top college football programs in the country, having completed an undefeated season before losing to Alabama in the National Championship game of the first ever Division I College Football Playoff.

12. Both Learfield and JMI, among others, submitted proposals.

13. JMI’s proposal included minimum payment guarantees to Clemson that were the highest among all proposers: \$65,000,000 for athletics marketing and \$3,000,000 for campus marketing over a seven-year period.

14. JMI was the presumptive winner of the solicitation, and Learfield protested.

15. Following a re-solicitation and another Learfield protest, Clemson awarded the Contract to JMI.

16. During the solicitation and award period, JMI requested certain changes to the contract documents, and Clemson agreed to some of these changes. At no time, however, did JMI ever seek any change to the RFP itself, including the definition of Total Campus Marketing Services and the related limitations on that definition as described above.

JMI’s Work under the Contract

17. After Clemson awarded the Contract to JMI, Clemson continued to have incredible success in college football, winning two national championships, playing for another one, and making the College Football Playoff four years in a row.

18. From the moment JMI started working under the Contract there were issues, and during that time of Clemson’s success on the field, JMI experienced almost complete turnover of its personnel in this short amount of time. For example:

A. JMI’s first General Manager’s last day on the job was September 28, 2018, and his replacement did not start until January 2019. During this timeframe,

Clemson won its second National Championship in football in three years, but JMI had no lead GM during this time and no one truly focused on selling Clemson during this peak performance period.

B. JMI took roughly an entire year to fill two key sales roles. Thus, during the twelve-month period when Clemson was winning another National Championship and then basking in the glow of that championship, JMI was missing critical personnel.

C. As a result of this turnover, JMI not only was inadequately staffed to take advantage of Clemson's unprecedented run of success, but it meant that JMI did not take the time to understand the current sales market in the State of South Carolina, did not understand Clemson University and its make-up, and it led JMI to make questionable hires in leadership and sales positions.

The Dispute

19. In November 2019, during a Clemson home football game, JMI made verbal statements to Clemson that Clemson was failing to act according to the Contract. JMI gave no specific examples of such failure, but said that it wanted to meet to discuss these issues. This was the first time JMI had ever made any such statement of this type.

20. In late January 2020 (at the National Championship Football Game in New Orleans), Clemson and JMI met, during which time JMI provided Clemson a one-page document.

A. In the first section, labeled "The Situation", it stated:

JMI Sports is proud to be associated with Clemson University and privileged to have been selected as the university's MMR and Total Campus Marketing partner. We continue to believe in the mission of the university and its incredible athletics programs. JMI Sports values the relationship with Clemson University tremendously and we aspire to continue being a great partner.

However, an extensive internal review identified numerous specific instances where the changes at the university since the RFP have adversely impacted our ability to achieve financial goals for the property. Simply, the property is not viable because Clemson has moved away from the original design and intent of its unique partnership with JMI Sports.

B. The next section, labeled “The Challenges”, stated:

Changes that have occurred at Clemson since the RFP have materially devalued the rights JMI Sports bid so aggressively to acquire.

Although we do not believe that Clemson has been malicious, it is undeniable that Clemson has not lived up to their responsibilities in our partnership.

The numerous examples of Clemson blocking our ability to monetize our rights are profound and the financial viability of the property has been severely impaired.

The Clemson Sport & Campus Marketing has spent an unreasonable amount of time managing the relationship and responding to Clemson requests which has dramatically diminished our ability to spend the necessary time to drive revenue for our partnership.

As a result, JMI Sports has suffered significant financial harm, the university has diminished the value of their Total Campus Marketing rights, and Athletics has lost significant financial opportunity.

C. In the last section, labeled “The Proposed Solution”, JMI proposed radically changing the financial terms of the Contract, including:

- (1) Converting the 2019-2020 contract year into one in which JMI was “assured no worse than a break-even financial result.”
- (2) Extending the Contract such that a new seven-year term would commence July 1, 2020.
- (3) Doing away with guaranteed payments and converting to a “fee based model” where Clemson would keep “100% of annual sponsorship and advertising revenues after it pays JMI Sports the following:
 - annual (and mutually approved expenses)
 - \$1,000,000 per year management fee, plus
 - An incentive of %10 of all revenues above \$12 million per year throughout the term.” (emphasis added)

21. During and several times after this meeting Clemson asked for specific examples of how Clemson had been violating the Contract, but JMI repeatedly stated that JMI did not want to dwell on the past but instead wanted to focus on the future.

22. On June 15, 2020, payment became due to Clemson from JMI for the minimum revenue share guarantees, performance bonuses and other payments due under the Agreement for fiscal year 2019-2020, as follows:

Guaranteed Minimum for Athletics Revenue Share (See Financial Proposal and Record of Negotiation #2)	\$8,300,000
Guaranteed Minimum for Campus Revenue Share (See Record of Negotiation #5)	\$600,000
Support of Two FTE positions for Digital Network (See Record of Negotiation #5)	\$150,000
Performance Bonus -- ACC Championship Game (See Section IV (D), Scope of Work)	\$15,000
Performance Bonus -- College Playoff (See Section IV (D), Scope of Work)	\$100,000
Balance of Coke Pass-Through Payment (Campus)	\$466,356
Balance of Coke Pass-Through Payment (Athletics)	\$775,000
Total	\$10,256,356

23. JMI refused to make this payment, and insisted on Clemson agreeing to new terms of the Contract before making any payment.

24. On July 15, 2020 Clemson sent a demand letter to JMI.

25. After several more weeks JMI made a partial payment of \$4,500,000, leaving a balance of \$5,756,356. After months of unfruitful negotiations, Clemson sent JMI a letter on February 24, 2021, demanding payment of \$5,756,356 and reserving the right to terminate the contract if payment is not made on or before the thirty-day cure period.

26. Thereafter, JMI sent its own termination letter and claimed that it had suffered damage by Clemson's alleged failure to follow the Contract. No specific damages numbers were provided, although JMI claimed that its damages exceed \$24,400,000.

27. Effective July 29, 2021, after several months of meetings and mediations, Clemson and JMI agreed to a partial settlement and to terminate the Contract for convenience. See Partial Settlement Agreement attached.

28. On September 30, 2021, JMI sent to Clemson a demand for termination costs in the amount of \$910,419.07, but JMI also stated “[t]hese costs are current through September 30, 2021 and could change after this date due to continuing fees.”

29. Clemson responded to this demand on October 26, 2021, agreeing to \$61,575.07 of these costs, but disputing the remainder.

30. Clemson has yet to receive any monies for fiscal year 2020-2021, or any of the other monies owed for this year, to wit:

Guaranteed Minimum for Athletics Revenue Share (See Financial Proposal and Record of Negotiation #2)	\$8,700,000
Guaranteed Minimum for Campus Revenue Share (See Record of Negotiation #5)	\$600,000
Support of Two FTE positions for Digital Network (See Record of Negotiation #5)	\$150,000
Performance Bonus -- ACC Championship Game (See Section IV (D), Scope of Work)	\$15,000
Performance Bonus -- College Playoff (See Section IV (D), Scope of Work)	\$25,000
Balance of Coke Pass-Through Payment (Campus)	\$619,432
Balance of Coke Pass-Through Payment (Athletics)	\$161,000
Total	\$10,270,432

31. JMI has received at least \$125,000 in pre-payments from sponsors for fiscal year 2021-2022 that rightly belong to Clemson and should be paid to Clemson.

Contract Controversy and Requested Relief

32. Clemson is owed \$5,756,356 plus interest for fiscal year 2019-2020, and it requests that the Chief Procurement Officer resolve this contract controversy by finding that JMI owes Clemson these amounts.

33. Clemson is owed \$10,270,432 plus interest for fiscal year 2020-2021, and it requests that the Chief Procurement Officer resolve this contract controversy by finding that JMI owes Clemson these amounts.

34. Clemson is owed at least \$125,000 plus interest for items pre-paid for fiscal year 2021-2022, and it requests that the Chief Procurement Officer resolve this contract controversy by finding that JMI owes Clemson these amounts and more that may be owing.

35. JMI claims that Clemson owes JMI damages for breach of contract. Clemson requests that the Chief Procurement Officer resolve this contract controversy by finding that Clemson did not breach the contract, or in the alternative, that JMI suffered no damages.

36. JMI claims that Clemson owes JMI \$910,419.07 for termination costs, and has reserved the right to seek more. Clemson requests that the Chief Procurement Officer resolve this contract controversy by finding that Clemson owes JMI no more than \$61,575.07 for termination costs.

Respectfully submitted,

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Attorneys for Clemson University

November 8, 2021
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND	)	
	)	
Clemson University	)	
	)	MOTION TO DISMISS
vs.	)	
	)	
JMI Sports and JMIS College, LLC	)	
_____	)	

JMI Sports (“JMI Sports”) and JMIS College, LLC (“JMIS”)(collectively “JMI” or “Defendants”), by and through undersigned counsel, move to dismiss the Contract Controversy claims (“Claims”) asserted by Clemson University (“Clemson”) on the grounds set forth herein.

Background

By way of background, this case involves claims by Clemson, an agency of the State, asserting an alleged breach of contract claim at law as against private parties, JMI and JMIS, for recovery of money due to an alleged breach of a Total Campus Marketing (“TCM”) contract (“Contract”) between Clemson and JMI.

A. The TCM Concept

Historically, colleges and universities grant multi-media rights (broadcasting, social media, publications, corporate sponsorship opportunities, etc.) for their intercollegiate athletics programs. A TCM solution provides an opportunity for a university to leverage its brand across university-wide assets to maximize total revenue for the entire university, not just for its athletics program. When Clemson issued its request for proposal for total campus marketing (the “RFP”), it sought to expand its athletics-only “licensing strategy” to include the entire university. The RFP was clear that Clemson was committed to a new innovative approach when obtaining potential corporate sponsors in an effort to increase the overall value of the Clemson brand. In the RFP,

Exhibit B

Clemson provided broader rights to its TCM partner so that it could sell rights related to not only Clemson athletics, but also rights related to the entire university (campus and athletics).

B. The Contract

The Contract is not a typical service provider agreement with the State. Under the terms of the Contract, Clemson granted a plethora of multi-media and marketing related rights to JMI in exchange for JMI paying substantial royalty payments to Clemson. The multi-media and marketing related rights that Clemson granted to JMI can be divided into two categories: athletics and campus (with athletics rights focused on sponsorship and other revenue generating opportunities related to Clemson athletics and campus related to sponsorship and other revenue generating opportunities related to the Clemson campus). Nearly all of the athletic rights granted to JMI were exclusive. The campus rights that Clemson granted to JMI were non-exclusive. Upon execution of the Contract, JMI paid an initial advance royalty of \$2,600,000 and under the terms of the Contract committed to paying a minimum of \$68,225,000 in royalties to Clemson over the life of the Contract (naturally, assuming Clemson performed its contractual obligations in good faith).

C. Clemson's Breach and Misconduct

The bid that JMI made for Clemson's multi-media rights¹ (including the minimum royalty payments that it committed to paying Clemson) was based upon a model where Clemson would embrace an innovative approach to monetizing these assets (including the bundling of athletics with campus marketing opportunities). In fact, Clemson acknowledged in the RFP that it was seeking to create a new and innovative relationship with a marketing partner. Unfortunately,

¹ The bid itself is expressly incorporated into, and made a part of, the Contract. See Clemson University Standard Terms of Purchase – Revision C (Revised for Solicitation 68301548 only) at section titled "CONTRACT DOCUMENTS & ORDER OF PRECEDENCE". JMI's bid is set forth in its technical response and financial response to the RFP.

despite its stated objectives in the RFP, Clemson managed the Contract and its relationship with JMI so as to maintain the status quo in its multi-media rights and to forego any innovative approach in marketing and promoting the multi-media and marketing rights that JMI paid handsomely to obtain. The effect of Clemson's altered approach is that many opportunities to monetize the multi-media and marketing right were not available to JMI.

After JMI signed the Contract, Clemson started literally competing with JMI in obtaining corporate sponsorships for campus and athletics through its Development department, IPTAY, and its Office of Corporate Partnerships and Strategic Initiatives (OCPSI was formed after Clemson and JMI signed the Contract). In addition, Clemson restricted JMI's sales efforts and negotiations with potential sponsors who were interested in acquiring certain multi-media rights.

The totality of Clemson's behavior and actions destroyed the essential purpose of the Contract between the parties and made it impossible for JMI to realize the financial benefits it bargained for under the Contract. In short, JMI denies that it breached the Contract in any way and denies any and all liability to Clemson.

D. COVID – *Force Majeure*

Separately, it is noteworthy that Clemson's claim under the TCM Contract spans a period in which, under COVID, saw unprecedented governmental prohibition and *force majeure conditions*. As such, performance under the Contract by JMI was rendered impossible, through no fault of JMI.

Indeed, *during this period, Clemson literally closed down its campus and athletics activities significantly*, further rendering performance by JMI impossible. For example, Clemson advanced to the 2nd round of the *ACC Men's Basketball Post-season Tournament – but that tournament was cancelled prior to start of 2nd round play*. Then, as of *March 11, 2020, all remaining*

Clemson spring sports were cancelled for rest of the season – only about 50% of the Clemson Tigers Baseball regular season home games were completed.

As of March 19, 2020, Clemson University's campus was literally closed – five (5) weeks prior to the end of the 2020 Spring Semester. ***Digital network signage was determined to be used only for COVID safety messaging and all advertising was eliminated from rotation.*** The May 2020 commencement ceremonies were postponed, and graduation was rescheduled to November 2020 at Bon Secours Arena in Greenville, SC. ***Clemson's campus did not even begin a phased re-opening approach with only essential staff returning until June 1st, 2020. No on-site campus sponsor activations were allowed.***

In September of 2020, Clemson Fall sports began regular season play ***with limited capacity, adjusted operations protocol and very limited sponsor integrations.*** Events permitted only a 23% of typical capacity attendance for football and 21% for men's and women's basketball. The August 2020 commencement was rescheduled to Bon Secours arena for November of 2020.

On August 19, 2020, the ***Clemson 2020 Fall Semester began with online-only classes. No on-site campus sponsor activations were allowed.*** On September 21, 2020, Clemson resumed classes on campus with goal of approx. 75% of all courses to have ***some class periods dedicated to in-person interactions*** among instructors and students, but in-person attendance was low. Exams were administered online in December 2020.

These facts, already known to South Carolinians all too well, make it clear that the circumstances of COVID created the quintessential *force majeure* circumstance.

The Basis of this Motion

Notwithstanding the breaches, defaults, bad faith and misconduct of Clemson under the Contract, and the numerous factual defenses of JMI relative to the claims, the grounds for this

motion are based on simple and indisputable legal principles of the highest order. Defendants assert first that the CPO has no judicial power or jurisdiction, under the South Carolina Constitution, over any persons or the subject matter of any claims asserted by Clemson (an agency of the State) against private parties for the recovery of alleged damages.

Defendants also assert and do not waive the defense that Clemson was the first to materially breach the Contract at issue, and therefore Clemson is barred from any recovery for any subsequent alleged breach by any defendant under the Contract in any venue. Clemson first materially breach because, through the Contract, Clemson granted JMI certain exclusive rights, which formed the very basis of Clemson's consideration under the Contract; however, from the outset of the term of the Contract and throughout, Clemson denied JMI those very rights and violated them, thereby depriving JMI of the benefit of its bargain. After the Contract was entered, under which Clemson granted JMI rights, Clemson soon thereafter, in bad faith, established a new program under which it methodically competed with JMI for the very rights it had granted to JMI, and used this program and other coordinated acts to interfere with and disrupt JMI's efforts under the Contract, and JMI's opportunities for remuneration, and even went so far as to poach, for its own exclusive benefit, opportunities that JMI had established in JMI's performance under the Contract – valuable opportunities that would have provided contractually anticipated remuneration to JMI. In so doing, Clemson acted in bad faith, violated JMI's Contract rights, and withheld its own contractually required performance. This activity spanned the duration of the Contract period despite efforts by JMI to secure Clemson compliance with the Contract. And as stated, Defendants also assert *force majeure* and impossibility due to COVID and the unprecedented governmental actions and other consequences thereof, all of which rendered performance under the Contract by JMI impossible, through no fault on the part of JMI.

JMI reserves all of its claims relative to Clemson's breach, bad faith and misconduct, and reserves all rights and remedies available to them under such circumstances. JMI does not concede that Clemson's effort to set forth JMI's claims is valid, accurate or complete. JMI, not Clemson, will handle the assertion of JMI's claims as well as its defenses.

Notwithstanding the above and without waiving any rights, Defendants move to dismiss the Claims for the grounds and reasons that follow, and such other grounds as may be offered prior to or at the hearing of this motion, including the following:

1) This case presents Claims by an agency of state government for monetary relief for "breach of contract" as against private parties, and has been brought before the CPO, an official under the Executive Branch of State government. The CPO, as a member of the Executive Branch, lacks power, jurisdiction (personal and subject matter), and authority to hear and decide any claims, at law or in equity, *by the State* or any governmental body as against a private contractor or other person for the recovery of monetary relief for breach of contract or otherwise. The only power of any person or agency outside the Judicial Branch to hear and decide contract related claims under the South Carolina Constitution is, by express terms, limited to "*claims against the State*." This limitation is expressed not once but *twice* in the highest law of our State, the Constitution. *S.C. Const. Art X § 10*. "Claims against State. The General Assembly may direct, by law, in what manner *claims against the State* may be established and adjusted." and *Art. XVII § 2*. "Claims against State. The General Assembly may direct, by law, in what manner *claims against the State* may be established and adjusted."

Any laws, including but not limited to S.C. Code Ann §§ 11-35-4230, 11-35-4320 and 11-35-4220, that purport to allow such breach of contract disputes to be brought *by the State* (not against the State) before the CPO to be heard and decided, violate the South Carolina

Constitution's *Separation of Powers Clause*, and violate *Due Process*. Any law passed by the General Assembly that purports to grant to the Executive Branch such a power granted solely to the Judicial Branch violates the *Separation of Powers Clause* of the South Carolina Constitution, and must be stricken down as unconstitutional²;

2) Any act or law purporting to permit the CPO to hear and decide any such claims asserted by the State is unconstitutional and is void *ab initio* as being in clear violation of the Separation of Powers Clause, Article I Section 8 of the South Carolina Constitution:

SECTION 8. Separation of powers.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other,

² Note: the Supreme Court in *Unisys v. Budget and Control Board*, did not decide the issue presented here. In that case the Court stated:

Article X, § 10, of our State Constitution provides: "The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." Unisys contends this section limits the General Assembly to providing for jurisdiction in matters against the State and therefore does not authorize § 11-35-4230 because that statute applies as well to suits brought by the State.

The State Constitution is a limitation upon and not a grant of power to the General Assembly. *Army Navy Bingo, Garrison No. 2196 v. Plowden*, 281 S.C. 226, 314 S.E.2d 339 (1984). "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). ***There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.***

We conclude art. X, § 10, simply limits claims against the State to those allowed by the legislature and does not invalidate § 11-35-4230.

Note that fatal flaw on the Court's analysis is in ***italic bold***, above. The *Unisys* decision is most remarkable in the fact that the Court overlooked entirely Article I Section 8 of the Constitution, and Article V of the Constitution (the *Separation of Powers Clause*) which are exactly the laws that ***"limit the legislature's power to establish jurisdiction for actions brought by the State."*** They expressly forbid the Legislative Branch and Executive Branch from exercising functions of the Judicial Branch, with the *sole exception* of "claims against the State."

and Article V, *providing for the Judicial Department*, in Section 11 of the South Carolina Constitution, states:

SECTION 11. Jurisdiction of Circuit Court.

The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law;

SECTION 23. Change of venue.

It shall be the duty of the General Assembly to pass laws for the change of venue in all cases, civil and criminal, upon proper showing, supported by affidavit, that a fair and impartial trial cannot be had in the county where such action or prosecution was commenced.

Only the Circuit Court may have jurisdiction over breach of contract claims against persons other than the State or its agencies. Moreover, it is clear that the General Assembly has made no law for a change of venue in an obviously unfair circumstance as here, where the Executive Department of the State has instituted ***before its own Executive Department officer to decide***, a claim *on its own behalf, for monetary recovery under a claim at law against a private party, and therefore there is no power or jurisdiction in the CPO to hear and decide a breach of contract claim or other claim for recovery of damages by a State agency. Further, it is axiomatic that a litigant cannot be also the adjudicator of the same claim it asserts, at any level, as such circumstance violates Due Process;*

3) The Claims fail to state a claim upon which relief can be granted because they fail to:

- a) attach and quote the relevant Contract under which a Claims are made;
- b) cite or quote a specific clause of such Contract that was allegedly breached;
- c) identify how and by what action such Contract was purportedly breached;
- d) assert that Clemson fully performed all its precedent

obligations under the Contract; and e) fails to specify with particularity all alleged damages purportedly flowing from the alleged breach;

4) By way of Defense, Defendants assert that Clemson was the first to materially breach the Contract at issue and therefore Clemson is barred from recovery under the Contract it first materially breached for an alleged subsequent breach by a Defendant. In this case, Clemson, through the Contract, granted JMI certain exclusive rights which formed the very basis of Clemson's consideration under the Contract; however, from the outset of the term of the Contract and throughout, Clemson denied JMI those rights and violated them, depriving JMI of the benefit of its bargain, and undermining the central benefit of the Contract to JMI, and therefore, JMI is entitled to rescission;

5) The CPO lacks power and jurisdiction over contractual disputes involving the parties,, and lacks jurisdiction over the person of JMI, as well as over the subject matter of the Claims;

6) Defendant has fully performed its contractual obligations and Clemson has failed to meet all of its precedent obligations for further performance, having specifically violated the core rights it was to have granted JMI as the foundation of the Contract, from the initiation of the Contract through its completion, and therefore Clemson may not recover on its claim;

7) The Claims overtly state that the damages claimed are unknown and are therefore and for all other reasons are purely speculative, and an award on a claim of speculative damages cannot be sustained;

8) The Claims must fail due to force majeure and impossibility, defenses which Defendants hereby assert fully. Given the unprecedented circumstances of COVID which arose through no fault of Defendants, Defendants are specifically excused from performance of the obligations at issue and alleged;

9) Without waiving any rights, Defendants assert by way of defense all other defenses and avoidances available to them in law and in equity, including but not limited to failure to state a claim on which relief may be granted, lack of duty, lack of breach, lack of damages, rescission, and setoff;

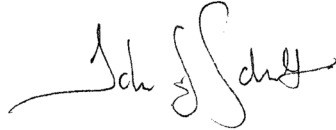
10) Without waiving any rights, Defendants further reserve the right to assert by way of separate claim or by counterclaim all claims they may have with respect to Clemson's precedent and other breach of the Contract, and for all other remedies allowed by law and in equity.

By asserting this motion as a complete defense, Defendants do not waive, but instead expressly reserve all other defenses, objections, denials and avoidances available to it in law or in equity, such matters to be heard by the Courts of this State as is provided for by the Constitution. Subject to these motions and without waiving them, Defendants deny all material allegations of the Claims.

Defendants object to, and specifically do not consent, to subject matter jurisdiction, personal jurisdiction, venue, process and service of process, or authority of the CPO to hear and decide the claims whether at law, in equity or otherwise asserted, and hereby move to dismiss the Claims for lack of subject matter jurisdiction, personal jurisdiction, venue, insufficient process and failure of service of process, and for such other reasons as set forth herein or may be advanced at a later time and because the CPO lacks to hear and decide the claims at law against them over such Claims. Notably, as quoted in paragraph 4 of Clemson's own Claim, the very Contract between Clemson and JMI recognizes that JMI has this right to contest the CPO's jurisdiction, providing for jurisdiction in the Court of Common Pleas in Richland County "*in the absence of jurisdiction*" on the part of the CPO.

WHEREFORE, having so moved, Defendants ask that the CPO to promptly issue an order dismissing the Claims of the Clemson, and awarding Defendants their attorneys' fees and costs. Defendants request a hearing and an opportunity to fully brief and argue to the CPO on these crucial issues prior to any further activity on this matter, given that allowing Clemson to proceed further is itself a violation and unlawful deprivation of Defendants' State and Federal constitutional rights, which violations put the State itself at needless risk. Subject to these motions and without waiving them, or any other rights for recovery and for attorneys' fees and costs, Defendants demand a jury trial.

Schmidt & Copeland LLC



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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina
 November 30, 2021

JURY TRIAL DEMANDED

From: Spicer, Michael mspicer@mmo.sc.gov
Subject: Request for Resolution of a Contract Controversy by Clemson University, Case 2022-116
Date: March 17, 2022 at 1:34 PM
To: Nicholson, Nick nnicholson@hsblawfirm.com, John Schmidt (john@schmidtcoeland.com) john@schmidtcoeland.com
Cc: Grier, Manton mgrier@ogc.sc.gov, Mike Nebesky mnebesk@clemson.edu

MS

Gentlemen,

I have reviewed the documents listed below and I believe that a full briefing, with exhibits, would be beneficial in expediting resolution of this matter. Please advise when your schedules would allow submission of a full brief and exhibits not already in the record.

Currently in the Record

Solicitation 68301548-1

Scope of Work

Clemson University Standard Terms of Purchase

Modifications to Terms and Conditions

Record of Negotiation 1

Record of Negotiation 2

Record of Negotiation 3

Record of Negotiation 4

Record of Negotiation 5

Record of Negotiation 6

Addendum #2 – Response to Questions

JMI Sports online response

JMI Sports Clemson Financial Proposal

JMI Sports Clemson Technical Proposal

Reinstatement – Intent to Award

Request for Resolution of Contract Controversy

JMI Motion to Dismiss Request for Resolution of Contract Controversy

CU Response to JMI Motion to Dismiss

Thank you.



Michael B. Spicer | Information Technology Management Officer
Division of Procurement Services | SC State Fiscal Accountability Authority
 1201 Main Street, Suite 600 | Columbia, SC 29201 | Office: (803) 896-5225 | mspicer@mmo.sc.gov

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-02536
	)	
JMI Sports and JMIS College, LLC,	)	
	)	
Petitioners-Plaintiffs,	)	
	)	
vs.	)	
	)	<u>MOTION TO DISMISS</u>
Michael B. Spicer, Chief Procurement	)	
Officer, South Carolina State	)	
Fiscal Accountability Authority,	)	
Division of Procurement Services; and	)	
Clemson University,	)	
	)	
Respondents-Defendants.	)	
	)	
_____	)	

Pursuant to South Carolina Rule of Civil Procedure 12(b)(1) and (6) Respondent-Defendant Defendant Michael B. Spicer, in his official capacity as Chief Procurement Officer (CPO) of the Division of Procurement Services of the State Fiscal Accountability Authority, moves to dismiss the Complaint. The grounds for this motion are as follows:

1. The Chief Procurement Officer (CPO), not the circuit court, has exclusive jurisdiction over this dispute. Controversies between governmental bodies and contractors arising out of contracts governed by the Procurement Code are resolved pursuant to § 11-35-4230, which vests exclusive jurisdiction with the CPO and the Procurement Review Panel. The Supreme Court affirmed the exclusivity of the CPO's and Panel's jurisdiction in *Unisys v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). Although the Complaint argues that *Unisys* is wrong because it "never mentions the Separation of Powers," the Court expressly held that there "is *no constitutional provision* limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such

actions as it sees fit. *Id.* at 169, 551 S.E.2d at 270 (emphasis added). Here, a contract controversy involving the same parties, *Clemson University v. JMI Sports and JMIS College, LLC*, CPO Case No. 2022-116, is currently pending before CPO Spicer. The CPO has exclusive jurisdiction over this controversy.

2. Petitioners-Plaintiffs have failed to exhaust their administrative remedies. Although an administrative body generally cannot rule on the constitutionality of statutes, the Supreme Court has already addressed the constitutionality of § 11-35-4230 in *Unisys*, 346 S.C. 158, 551 S.E.2d 263.

3. Petitioners-Plaintiffs have failed to state a claim upon which relief may be granted. They are asking the circuit court to declare as unconstitutional a statute that the Supreme Court has already expressly held that there “is no constitutional provision limiting the legislature’s power” to enact § 11-35-4230. *Id.* at 169, 551 S.E.2d at 270

For the above reasons, the Court should dismiss Plaintiffs-Petitioner’s Complaint. This Motion is supported by the pleadings, the applicable law, and any memoranda filed before the hearing.

/s/ Manton M. Grier Jr.
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June 15, 2022

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

JMI Sports and JMIS College, LLC ,

Plaintiffs,

v.

Michael B. Spicer, Chief Procurement
Officer, South Carolina State Fiscal
Accountability Authority, Division of
Procurement Services; and Clemson
University,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C.A. No.: 2022-CP-40-02536

**DEFENDANT CLEMSON UNIVERSITY'S
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, FOR JUDGMENT ON
THE PLEADINGS**

Defendant Clemson University (“Clemson”), by and through its undersigned counsel, hereby moves to dismiss this action filed by Plaintiffs JMI Sports and JMIS College, LLC (collectively “JMI”). Clemson makes this motion pursuant to Rules 12(b)(1), 12(b)(6) and 12(b)(8), SCRCF. In the alternative, Clemson moves for judgment on the pleadings pursuant to Rule 12(c), SCRCF. The grounds for this motion are (1) that the General Assembly of the State of the South Carolina has mandated that the Office of the Chief Procurement Officer (“CPO”) is the exclusive forum for deciding contract controversies involving governmental bodies as set forth in S.C. Code Ann. § 11-35-4230 (also referred to herein as the “Contract Controversy Provision”), and (2) JMI and Clemson, the parties to the contract controversy described in JMI’s complaint, have agreed that all “disputes, claims, or controversies relating to the Agreement [between them] shall be resolved exclusively by the appropriate CPO.” As a result, the Court should dismiss this action because JMI has failed to exhaust its administrative remedies and because the Court lacks subject matter jurisdiction to hear this matter. The Court should also dismiss this action because JMI has failed to state facts sufficient to constitute a cause of action against Clemson. Finally, and

in the alternative, the South Carolina Supreme Court has previously upheld the Contract Controversy Provision that JMI now challenges in this action. *See Unisys Corp. v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). This motion is based further on the pleadings of record, a memorandum in support of the motion to be filed prior to a hearing on this motion, and the following:

I. JMI Has Failed to Exhaust its Administrative Remedies and the Court Lacks Subject Matter Jurisdiction.

A. The Contract Controversy Provision, S.C. Code Ann. § 11-35-4230, Is the Exclusive Forum for Contract Controversies Between a Governmental Body and a Contractor.

The Contract Controversy Provision, which is part of the State Consolidated Procurement Code, “applies to controversies between a governmental body and a contractor ... which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.” S.C. Code Ann. § 11-35-4230(1). The procedure set forth in the Contract Controversy provision “constitutes the exclusive means of resolving a controversy between a governmental body and a contractor ... concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code.” *Id.* This language is unequivocal and requires that the CPO decide the claims set forth in Clemson’s Request for Contract Controversy Resolution. Binding and persuasive precedent from the South Carolina Supreme Court likewise requires this result.

B. The South Carolina Supreme Court’s Opinion in *Unisys* Confirms the Exclusivity of the CPO’s Jurisdiction.

In *Unisys*, the South Carolina Supreme Court held that the term “exclusive means” in the Contract Controversy provision with respect to the resolution of contract controversies “must

therefore be strictly construed to limit suits on contracts with the State to the forum provided in § 11–35–4230.” 346 S.C. at 170, 551 S.E.2d at 270.

1. *Unisys* squarely addressed JMI’s non-viable argument that the Contract Provision only applies to claims against a governmental body.

Pointing to Article X, §10¹ of the South Carolina Constitution, JMI argues that only claims against Clemson are covered by the Contract Controversy provision, but that any claims by Clemson must be filed in circuit court. The petitioner in *Unisys* raised this same issue, to no avail: “*Unisys* contends [Article X, § 10] limits the General Assembly to providing for jurisdiction in matters against the State and therefore does not authorize § 11–35–4230 because that statute applies as well to suits brought by the State.” 346 S.C. at 169, 551 S.E.2d at 269. The Supreme Court clearly and unequivocally held this argument had no merit: “We conclude art. X, § 10, simply limits claims against the State to those allowed by the legislature and does not invalidate § 11–35–4230.” *See id.* at 170, 551 S.E.2d at 270.

2. *Unisys* holds that the Contract Controversy Provision withstands any constitutional challenge.

Pointing to Article I, §§ 3 and 8 of the South Carolina Constitution, JMI also argues that the Contract Controversy Provision violates the Separation of Powers and Due Process Clauses of the South Carolina Constitution with respect to a governmental body’s claim against a private entity. The Supreme Court held the opposite in *Unisys*, and thus JMI’s arguments must fail. Analyzing not just Article X, § 10, as discussed above, the Supreme Court addressed the arguments of *Unisys* across the broad sweep of the State Constitution:

The State Constitution is a limitation upon and not a grant of power to the General Assembly. “The

¹ JMI also points to Article XVII, § 2, which states the exact same thing as Article X, § 10: “The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.” Thus, the discussion herein about Article X will apply equally to Article XVII.

legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions."

346 S.C. at 169, 551 S.E.2d at 269-70 (internal citations omitted). Having analyzed the State Constitution in its entirety, the Supreme Court held unequivocally that "[t]here is **no constitutional provision** limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit." 346 S.C. at 169, 551 S.E.2d at 270 (emphasis added). Thus, the Supreme Court held, the state's claims against Unisys were properly before the CPO. *Id.*

The CPO has exclusive jurisdiction over the contract controversy between Clemson and JMI, and because JMI has failed to exhaust its administrative remedies, the Court should dismiss this action. Moreover, given the CPO's exclusive jurisdiction, the Court should also dismiss this action because it lacks subject matter jurisdiction.

II. JMI Agreed with Clemson to Resolve all Contract Controversies before the CPO.

Unlike *Unisys*, where the parties agreed to resolve disputes in circuit court, Clemson and JMI agreed to resolve all disputes relating to their agreement before the CPO. The agreement contains the following dispute resolution clause:

Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United State's Constitution. As used in this

paragraph, the term “Agreement” means any transaction or agreement arising out of, relating to, or contemplated by the solicitation.

South Carolina courts have long recognized the freedom of parties to choose the forum in which they will resolve disputes. *See, e.g., Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). The choice of Clemson and JMI to resolve its disputes before the CPO must likewise be upheld, and therefore, the Court should dismiss this action.

III. JMI’s Complaint Makes No Allegations Against Clemson Upon which Relief Can Be Granted Against Clemson.

In the Complaint JMI does not seek any relief against Clemson. Instead, JMI seeks a declaration that a statute is unconstitutional, a stay of actions before the CPO and an award of attorneys’ fees and costs “associated with the deprivation of Petitioners’ constitutional rights pursuant to applicable law . . .” As the Plaintiff makes no claim against Clemson for which this Court may grant relief, the Court should dismiss Clemson as a party to this action.

IV. The South Carolina Supreme Court’s Opinion in *Unisys* Forecloses JMI’s Constitutional Arguments.

As discussed above in Section I(B), the South Carolina Supreme Court has unequivocally held that the Contract Controversy Provision is constitutional. Although the Court should dismiss this action for the reasons discussed above in Sections I through III, the Court could also grant judgment to Clemson on the pleadings based upon the holding in *Unisys*.

Based on the foregoing and Clemson’s forthcoming memorandum in support (which will be filed prior to a hearing on this Motion), Clemson respectfully requests that the Court dismiss this action pursuant to Rules 12(b)(1), 12(b)(6) and 12(b)(8), SCRCP, or in the alternative, that the

Court grant judgment on the pleadings in Clemson's favor pursuant to Rule 12(c), SCRCP, and such other relief as the Court deems appropriate.

Respectfully submitted,

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/s/ Boyd B. Nicholson, Jr.

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Attorneys for Defendant Clemson University

June 15, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-02536
	)	
JMI Sports and JMIS College, LLC	)	
	)	
Petitioners-	)	<u>PETITIONERS-PLAINTIFF'S</u>
Plaintiffs,	)	<u>RESPONSE TO DEFENDANT</u>
	)	<u>CLEMSON UNIVERSITY'S</u>
vs.	)	<u>MOTION TO DISMISS, OR IN</u>
	)	<u>THE ALTERNATIVE, FOR</u>
Michael B. Spicer, Chief Procurement	)	<u>JUDGMENT ON THE</u>
Officer, South Carolina State	)	<u>PLEADINGS</u>
Fiscal Accountability Authority, Division of	)	
Procurement Services; and	)	
Clemson University,	)	
	)	
Respondents-	)	
Defendants.	)	
	)	

Petitioners above named, JMI Sports and JMIS College, LLC ("Petitioners"), hereby respond to Defendant Clemson University's ("Clemson") Motion to Dismiss, or in the Alternative, for Judgment on the Pleadings.

Clemson on on page 5 of its Motion contends as follows:

In the Complaint JMI does not seek any relief against Clemson. Instead, JMI seeks a declaration that a statute is unconstitutional, a stay of actions before the CPO and an award of attorneys' fees and costs "associated with the deprivation of Petitioners' constitutional rights pursuant to applicable law . . ." As the Plaintiff makes no claim against Clemson for which this Court may grant relief, the Court should dismiss Clemson as a party to this action.

Clemson's Motion, p. 5.

Petitioners hereby consent to Clemson's requested relief to dismiss Clemson from this matter. This consent dismissal thereby renders moot the remainder of Clemson's Motion. This consent dismissal also renders moot Clemson's Motion to Consolidate.¹

Accordingly, the Petitioners request that the Court enter an Order dismissing Defendant Clemson University from this action by consent, and an Order dismissing the remainder of Defendant Clemson University's Motion to Dismiss, or in the alternative, for Judgment on the Pleadings and Clemson University's Motion to Consolidate as moot.

Schmidt & Copeland LLC

s/ John E. Schmidt, III
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Attorney for Petitioner-Plaintiffs

Columbia, South Carolina
 June 21, 2022

¹ To the extent that Clemson's Motions are not dismissed as moot, Petitioners reserve the right to file a brief in response to such Motions prior to any hearing in this matter.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-02536
	)	
JMI Sports and JMIS College, LLC	)	
	)	
Petitioners-	)	
Plaintiffs,	)	
	)	<u>Petitioners' Supplemental Brief on</u>
vs.	)	<u>Motions</u>
	)	
Michael B. Spicer, Chief Procurement	)	
Officer, South Carolina State	)	
Fiscal Accountability Authority, Division of	)	
Procurement Services; and	)	
Clemson University,	)	
	)	
Respondents-	)	
Defendants.	)	
	)	

This case arises from a breach of contract claim brought by Respondent Clemson University ("Clemson"), an agency of the State of South Carolina against Petitioner, a state contractor. Clemson brought the claim before an executive branch officer, the Respondent Chief Procurement Officer ("CPO"), pursuant to S.C. Code Ann. § 11-35-4230. However, Petitioner has asserted that Article I § 8 of the South Carolina Constitution prohibits the General Assembly's enactment of the provisions of S.C. Code § 11-35-4230 which provide that claims made by the State (rather than only claims made *against* the State) must be heard by the CPO, an officer of the executive branch rather than by the Courts. Respondents disagree.

This case, brought by Petitioners against both Respondents, seeks a declaration that Section 11-35-4230 is unconstitutional under the Separation of Powers Clause, Article I § 8 of the South Carolina Constitution, and an order enjoining against the proceedings before the Chief Procurement Officer.

As this case presents a question of law, Respondents have made motions to dismiss and for judgment as a matter of law. The motion to dismiss is before the Court.¹

I. Clemson Sought Dismissal Because there was No Claim for Recovery Separately As Against It, and Petitioner Consented to Clemson’s Dismissal on this One Ground.

Clemson additionally moved to dismiss Petitioners’ Complaint as to Clemson on the separate basis that the Petitioners assert no claim “against Clemson” and so Clemson can be dismissed from the case:

In the Complaint JMI does not seek any relief against Clemson. Instead, JMI seeks a declaration that a statute is unconstitutional, a stay of actions before the CPO and an award of attorneys’ fees and costs “associated with the deprivation of Petitioners’ constitutional rights pursuant to applicable law . . .” As the Plaintiff makes no claim against Clemson for which this Court may grant relief, the Court should dismiss Clemson as a party to this action.

*Clemson Motion to Dismiss at 5. **Petitioner has already filed a consent to Clemson’s motion to dismiss on this one ground alone, and as such, Clemson must be dismissed from this matter.***

Petitioners’ request for relief as against the remaining party, the CPO, is complete and adequate.

Petitioners do not consent to any other matters in the Clemson motions.

II. Article I § 8 of the S.C. Constitution, The Separation of Powers Clause, is a constitutional prohibition against the General Assembly’s enactment of relevant provision of S.C. Code § 11-35-4230.

¹ Clemson also moved to consolidate the claims in this matter with claims involving other parties in a similar, ongoing matter. Petitioner does not oppose limited consolidation of the merits hearings (primarily legal argument and briefing, due to the fact that each of the cases raise a question of law, with no disputed facts) under S.C. R. Civ. P. 42, but requests that a separate final order for each case is warranted due to the lack of identity of parties and circumstances. This approach affords almost all of the economies available for management of the cases.

Respondents' entire remaining argument is based on the flawed assertion that "the *Unisys* case already decided this issue." It did not. The language on which the Respondents motions rely is found in *Unisys Corporation v. Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). However, the *Unisys* Court was not specifically presented the issue presented here: namely, whether the ***Separation of Powers Clause*** in Article I § 8 of the South Carolina Constitution is a prohibition against the General Assembly's power to enact the law at issue, S.C. Code § 11-35-4230, which provides that an executive branch administrative officer, rather than a Court of the Judicial Branch, shall decide legal claims made ***by the State***.

The *Unisys* Court instead addressed numerous other constitutional issues raised by the parties in that case, but not the Separation of Powers Clause, which was obviously overlooked by all. In doing so, the Court stated:

The State Constitution is a limitation upon and not a grant of power to the General Assembly. *Army Navy Bingo, Garrison No. 2196 v. Plowden*, 281 S.C. 226, 314 S.E.2d 339 (1984). "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). ***There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.***

We conclude art. X, § 10, simply limits claims against the State to those allowed by the legislature and does not invalidate § 11-35-4230.

Unisys at 270.

The key problem with the *Unisys* Court's assertion is that it did not consider, or decide, whether the ***Separation of Powers Clause*** of the Constitution is in fact a "***constitutional provision***

limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.” We show below that, quite simply, the Separation of Powers Clause is indeed such a prohibitory constitutional provision, and it should present no challenge for this Court to observe that.

The Separation of Powers Clause, Article I § 8, states as follows:

SECTION 8. Separation of powers.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other....

In simple words, this constitutional provision is a clear and unambiguous “constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.”

But this Court need not merely rely on the express words of the constitution – if that were not enough. Instead, there is actually controlling precedent from the South Carolina Supreme Court, which was also overlooked in the *Unisys* decision, because the Separation of Powers Clause limitation was not raised or briefed by the parties in *Unisys*.

In the controlling decision in *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910), the South Carolina Supreme Court conducted a detailed Separation of Powers Clause analysis², and held:

² “The Constitution ordains (Art. I, Sec. 14) that ‘the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.’ This language is as strong as it is simple and clear. ***The Legislature therefore cannot assume to itself the exercise of judicial powers. Segars v. Parrott***, 54 S.C. 1. ***Nor can it confer ‘judicial powers,’ in the sense in which those words are used in the Constitution, upon any other body than the Courts*** mentioned and provided for in Section I, Article V, of the Constitution, which provides that ‘the

We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the ***claim of the State against the plaintiff, it is unconstitutional***, null and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void.

Carolina Glass at 293 (emphasis added).

Respondents have made no response to this analysis other than to assert that they disagree, and that there is “language” in *Unisys* on which they rely. No explanation is made for how in fact the Separation of Powers Clause is avoided in this analysis. No explanation is made for why the Supreme Court in *Carolina Glass* explicitly recognized the limit of the Separation of Powers Clause to the very type of enactment that is at issue here. But the detailed analysis made in *Carolina Glass* is on point and cannot be refuted.

judicial power of this State shall be vested in’ the Courts therein specifically mentioned and provided for. The few instances in which judicial power is vested elsewhere are provided for in the Constitution itself, and with these few exceptions, the whole of the element of sovereignty known as judicial power was vested by the people in their Courts, and none of it was left to be lodged elsewhere. In fact, every person exercising the functions of either of the other departments of the government are forbidden to assume or discharge those vested in the Courts. ...”

“It follows that ***any attempt to confer upon the Commission judicial powers, except in so far as the exercise of such powers may be necessarily incident to the duty of investigating and ascertaining the truth with respect to the management of the dispensary, and the just liabilities of the State growing out of dealings with the dispensary, is violative of the Constitution.***”

“It would not be contended for a moment that the Legislature could, even upon the fullest, fairest and most deliberate investigation, after due notice, pass a valid act declaring that a particular individual is indebted to the State in a given amount, and by legislative fiat create a lien upon his property. Such an act would not only be an unwarranted usurpation of judicial power, but would also be an infringement of the constitutional guaranty that no person shall be deprived of his property without due process of law or be denied the equal protection of the law. If, then, the Legislature itself could not pass such a judgment, it cannot confer upon a commission the power to do so. The creature cannot be greater than the creator. ...”

Carolina Glass at 290- 293. (emphasis added).

If presented with this very issue and analysis, the State Supreme Court would properly clarify its statement in *Unisys* as *dicta*, and would reaffirm the holding in *Carolina Glass*, invalidating S.C. Code Ann. § 11-35-4320 to the extent it purports to allow the Chief Procurement Officer to hear and decide legal claims made by the State for recovery as are presented in this case. Under the Constitution, such claims are to be heard and decided by the judicial branch alone. This is merely recognition that the Respondents are misreading the *Unisys* decision, and ignoring the Separation of Powers Clause and *Carolina Glass*. The CPO can have no lawful jurisdiction over Clemson's breach of contract claims against Petitioners. If it were not so, the General Assembly could quickly pass laws to eradicate almost all, if not all, power and jurisdiction of the Judicial Branch. It is not hard to see why the Respondents' reading of *Unisys* cannot survive.

Unlike the parties in *Unisys*, Petitioners here have asserted this action based on the Separation of Powers Clause and on *Carolina Glass*. Petitioners are entitled to a declaratory ruling on these issues under law. Based on the above, there is simply no basis or justification for the motions to dismiss or for judgment as a matter of law in favor of Respondents.

III. The Disputes Clause Respondents Rely on Specifically Expects "Absence of Jurisdiction" which is specifically asserted here.

Clemson mistakenly asserts in opposition that Petitioners in effect waived the subject matter jurisdiction issue and "agreed" to the CPO forum, quoting a contract term set forth below - but ignoring its most relevant clause. Clemson's argument fails first because, as a matter of law, subject matter jurisdiction cannot be waived. *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996).

But the contract clause Clemson quoted exposes another failure in Clemson's argument. By ignoring the most relevant and operative clause, highlighted in yellow below, Clemson exposes the error in its argument:

DISPUTES (JAN 2006)

(1) Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina...

Clemson failed to mention this key, operative part of the Contract Clause it asserted.

The absence of jurisdiction, based on the Separation of Powers Clause of the S.C. Constitution, is exactly what is at issue here, as shown above. Thus, Clemson's argument is meritless.

IV. An Unconstitutional "Administrative Remedy" is No Remedy at all and Need

Not be Exhausted.

The CPO mistakenly asserts that Petitioners failed to exhaust administrative remedies. But when the issue presented is, as in this case, that the administrative remedy is an unconstitutional deprivation of Petitioners' constitutional rights, there is no obligation to exhaust such and unlawful administrative remedy. Indeed, Courts uniformly recognize that "irreparable harm" is visited on one who is forced to endure the mandates of a law that deprives them of constitutional rights. *See Garden State Equal. v. Dow*, 433 N.J. Super. 347, 79 A.3d 479 (Super. Ct. 2013). Further, it is well-recognized that the Court should excuse any exhaustion obligation when the dispositive issue is solely one of law. *Andrews Bearing Corp. v Brady*, 261 S.C. 533, 201 S.E. 2d 241 (1973).

Notably, in the *Unisys* case on which Respondents rely, the Circuit Court (Judge J.C. Nicholson, Jr., Order dated February 10, 2000, Richland County Common Pleas Civ. Action 98-CP-40-3945) specifically declined to adopt the exhaustion of administrative remedies argument as against Unisys' request for an injunction of CPO proceedings, and indeed, he enjoined the CPO proceedings pending appeal to the State Supreme Court, for the reasons set forth herein.

This litigation involves more than just the mere existence of constitutional issues to be raised, postponed and decided by the Circuit Court on appeal. It is a constitutional challenge to the very statute creating or enabling the administrative body and the procedure under which it acts. The CPO properly concedes that raising these constitutional issues before the CPO or Procurement Review Panel would be futile, because they have repeatedly acknowledged a lack of authority to review the constitutionality of the Procurement Code. Other courts have recognized that "[b]ecause an administrative agency cannot pass upon the constitutionality of the legislation under which it acts (citations omitted), a party seeking judicial review of the constitutionality of an agency's enabling legislation need not exhaust its administrative remedies." *Fred Schmid Appliance & Television Co. v. Denver*, 811 P.2d 31, 33 (Colo. 1991). In *Moore v. Sumter County Council*, 300 S.C.270,274, 387 SE.2d 455, 458 (1990), the South Carolina Supreme Court recognized this general exception to the exhaustion requirement "when a party demonstrates that a pursuit of (the remedy] would be a vain or futile act."

Moreover, Petitioners are specifically challenging the jurisdiction of the administrative body. The Counsel for the State Budget and Control Board, predecessor to SFAA, has acknowledged that excusing the exhaustion requirement is particularly appropriate when the dispositive legal issue relates to the basic jurisdiction of the agency." *Exhaustion of Administrative*

Remedies: Overview of South Carolina Law, Edwin E. Evans, 8 S. Carolina Lawyer 25, 26 (January/February 1997). *See also Ex parte Allstate Ins. Co.*, 248 S.C.550, 151 S.E. 2d 849 (1966).

V. Conclusion

For these reasons, the remaining motions of Respondents to dismiss and for Judgment should be denied and judgment should be entered in favor of Petitioners.

Schmidt & Copeland LLC

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Columbia, South Carolina
January 2, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JMI Sports and JMIS College, LLC)
Petitioners-)
Plaintiffs,)
vs.)
Michael B. Spicer, Chief Procurement)
Officer, South Carolina State)
Fiscal Accountability Authority, Division of)
Procurement Services; and)
Clemson University,)
Respondents-)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2022-CP-40-02536

**Petitioners' Motion for
Reconsideration**

This case, brought by Petitioners against both Respondents, seeks only a declaration under *S.C. Code Ann. § 15-53-10* et seq. (“The Uniform Declaratory Judgment Act”) that *S.C. Code Ann. § 11-35-4230* is unconstitutional under the Separation of Powers Clause, *Article I § 8 of the South Carolina Constitution*.

Respondents moved to dismiss Petitioners’ declaratory judgment act claim, asserting Petitioners had not “exhausted their administrative remedies” before the Chief Procurement Officer (“CPO”) under *S.C. Code Ann. § 11-35-4230*, the challenged law. On January 31, 2023, the Court issued an Order dismissing Petitioners' declaratory judgment case because Petitioners had not “exhausted their administrative remedies” before the CPO under *S.C. Code Ann. § 11-35-4230*.

Petitioners request reconsideration of the Court’s Order, based on *Ward v. State*, 343 S.C. 14, 548 S.E. 2d 245 (2000) and *Video Gaming Consultants, Inc., v. South Carolina Dep't of Revenue*, 342 S.C.34, 535 S.E.2d 642 (2000).

The Uniform Declaratory Judgment Act in *S.C. Code Ann. § 15-53-20* provides that Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. (emphasis added).

Even the unconstitutional law does not attempt to give the CPO the power or authority to decide cases under the Uniform Declaratory Judgment Act, or to decide whether any of the laws of the State are unconstitutional. As was found in *Ward* and *Video Gaming*:

Requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense[] and certainly is not effective or appropriate. Here, declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. The agency and the ALJ cannot rule on the constitutionality issue. In fact, requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.

Ward at 247-8. The *Ward* decision stated the rule: “as a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling. The basis for our decision was that Administrative Law Judges (ALJs) come under the executive branch and must follow the laws as written. Allowing ALJs to rule on the constitutionality of a statute would violate the separation of powers doctrine.”¹

As written, this Court’s Order of Dismissal demands that Petitioners first apply to the CPO for resolution of the Uniform Declaratory Judgment Act claim – a claim over which no party asserts the CPO has any power or authority whatsoever. As the Court in *Ward* recognized, this requirement would itself demand an act in violation of the Separation of Powers Clause – that an

¹ Note that in the *Unisys* case cited in the Court’s Order, Unisys had not only applied for declaratory relief, but it had also initiated *a breach of contract claim against the state* in the Circuit Court in the same action – despite the law requiring them to bring their contract claim before the CPO first. This is the reason the Circuit Court in *Unisys* considered (but rejected) the exhaustion of remedies doctrine in that case. No such breach of contract claim has been asserted by Petitioners in this Circuit Court case.

Executive Branch official should rule a statute unconstitutional in the first instance, *even when an appeal from such ruling it permitted.*

For these reasons, Petitioners request reconsideration of the Order of dismissal, and a ruling that the motions of Respondents to dismiss and for Judgment should be denied.

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February 2, 2023

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
JMI Sports, LLC and JMIS College, LLC)
a/k/a JMI Sports College, LLC,)
)

BEFORE THE CPO

CASE NO. 2022-CPO-____

CONTRACT CONTROVERSY
CLAIM PURSUANT TO S.C.
CODE 11-35-4230 AND S.C.
CONST. ART. X § 10

Claimants,)
)
vs.)
)
Clemson University,)
)
Respondent)
_____)

Claimants above named, JMI Sports, LLC and JMIS College, LLC (also known as “JMI Sports College, LLC”)¹ (collectively, the “Claimants”), by and through their undersigned attorneys, pursuant to S.C. Code Ann. § 11-35-4230 and Article X Section 10 of the South Carolina Constitution, file this Claim as a contractor against Clemson University, an agency or subdivision of the State of South Carolina,² for the egregious breach of the parties contract addressed herein, perpetrated by Clemson from the outset of the contract period when Clemson began to compete directly with Claimants for the very media rights which it granted to Claimants under the contract

¹ JMIS College, LLC was mis-identified as JMI Sports College, LLC and that was then corrected in the Record of Negotiations Amendment #1.

² Claimants file this claim before the CPO as a contractor asserting claims against an agency of the State, as specifically authorized by Article X Section 10 of the S.C. Constitution. By so doing, Claimants in no way waive their pending asserted motions and assertions in other matters that a claim *by the State* may not be lawfully heard and decided by the CPO under the Separation of Powers Clause. Claimants note that the Supreme Court decision in *Carolina Glass v. State*, 87 S.C. 270, 69 S.E. 391 (1910) holds that the Separation of Powers Clause specifically prohibits a state agency official, such as the CPO, from hearing and deciding a counterclaim by the State in this matter.

causing Claimants to incur damages in excess of Twenty-eight Million, Five Hundred Thousand Dollars:

1. Claimant JMI Sports, LLC (“JMI”) is a business entity organized and existing under the laws of a State other than the State of South Carolina. JMI provides certain marketing services such as those sought by Clemson in the government contract at issue in this matter.

2. Claimant JMIS College, LLC (also known as “JMI Sports College, LLC”) (“JMIS”) is a business entity organized and existing under the laws of a State other than the State of South Carolina. JMIS provides certain marketing services such as those sought by Clemson in the government contract at issue in this matter. JMI and JMIS are “Claimants” herein.

3. Respondent Clemson University (“Clemson”) is a public university created by statute and is an agency or subdivision of the Executive Branch of the government of the State of South Carolina. It is or was the intended “using agency” of the State of South Carolina as to the contract at issue.

4. Jurisdiction and venue of this action for the claims of Claimants as against the State, only, are proper before the CPO under S.C. Code Ann. § 11-35-4230 and Article X Section 10 of the South Carolina Constitution.

FACTS AND ALLEGATIONS

5. This controversy involves a State contract that was initially awarded to Claimants in 2016, finally awarded March 3, 2017 and commenced thereafter in 2017 under a government-issued solicitation, Clemson Solicitation No. 68301548-1 (“RFP”), for certain Total Campus Marketing (“TCM”) services. This was Clemson’s first-ever effort to engage a TCM solution to be provided to Clemson. Per the RFP, the TCM contract consisted of the RFP, any amendments, Claimant’s proposal, any negotiation documents, and the award document (the “TCM Contract”).

Per the RFP (Clemson University Standard Terms of Purchase – Revision C (Revised for Solicitation 68301548 only)) at section titled “CONTRACT DOCUMENTS & ORDER OF PRECEDENCE.” Claimants’ bid is set forth in its technical response and financial response to the RFP (as modified by the Record of Negotiations), the RFP is the final authority only where the Claimants’ proposal is in conflict with the RFP.

6. Claimants commenced performance of the services required by the TCM Contract in 2017. Claimants’ last work performed under the contract was June 30, 2021.

7. Almost immediately upon initiation of the TCM Contract, Clemson began to treat the TCM Contract as a nullity, disregarding the essential purposes thereof for its sole benefit.

8. Historically, colleges and universities grant multi-media rights (broadcasting, social media, publications, corporate sponsorship opportunities, IP, rights to marks and logos, co-branding, official association, experimental marketing activations, tickets and hospitality, B2C and B2B engagement, etc.) for their intercollegiate athletics programs. A TCM solution provides an opportunity for a university to leverage its brand across university-wide assets to maximize total revenue for the entire university, not just for its athletics program. The RFP defined TCM as follows:

A Total Campus Marketing Initiative Solution can be defined as an expansion and coordination of typical multi-media rights practices used within the collegiate athletic market place to new, approved multi-media opportunities across a University to include Business Affairs, Advancement, Student Affairs and where deemed appropriate, Academic Areas, including Economic Development, PSA and Research. Clemson Total Campus Marketing Initiative (CTCMI) shall not cross into IPTAY Annual Fund, University Development, Annual Fund Raising, Research Grants or Research Gift-In-Kind opportunities currently provided through other areas of Clemson University. Clemson is poised to be a leader in Total Campus Marketing with the overall goal of obtaining new and creative revenue streams while simplifying and better managing the total University inventory. The second goal is to identify and

investigate new, creative and innovative opportunities to co-brand Clemson University with first-class partners, understanding that there may be opportunities Clemson selects not to pursue based on the specific potential partner/sponsor.

9. By definition, the TCM concept Clemson specifically sought requires complete integration of all marketing efforts to succeed. Here is how Clemson's CFO at the time, Brett Dalton, presented the TCM concept to Clemson's Board of Trustees on September 14, 2017:

WHAT IS TCM?:

- Clemson chose to expand its Athletic-only "licensing strategy" to include the entire university. This expansion leverages Clemson's strong and valuable brand to create and expand revenue to fund the university's priorities.
- Historically, an Athletic-only multi-media rights contract allowed Clemson to leverage our brand across all sports to maximize total Athletic Revenue – but NOT total University revenue.
- Total Campus Marketing is allowing Clemson to leverage our brand across University-wide assets to maximize total revenue to the entire university, not just athletics.
- Careful market analysis revealed that Clemson was leaving millions of dollars in untapped revenue in the market as a result of focusing only on athletic assets.

WHAT ARE THE BENEFITS OF TCM:

- A single entity managing and leveraging university marketing and sponsorship opportunities. Clemson, a national and global brand, has national and global partner reach that was largely untapped.
- This ends the extremely costly and very ineffective strategy of individual departments "begging for money" primarily in the local community.
- It simplifies the way corporations conduct business with Clemson; makes it easy for them to work with ALL of Clemson at once as they no longer have to deal with individual department focused only on their area
- It allows for Clemson to bundle assets for major sponsors, and enables the University to then maximize revenue from a bundle of assets instead of small one-off deals.
- It maximizes revenue. Revenue guarantee is DOUBLE the previous contract for Athletics alone.
- Pre-TCM - Athletics marketing revenue = \$35M over 7 years & non-Athletic revenue was minimal (perhaps \$500K total but virtually unable to substantiate this)

- TCM - total guaranteed University revenue = ~\$70M – essentially doubling what Clemson was previously yielding

JMI SPORTS

- JMI Sports is a full-service collegiate marketing firm with proven experience in innovative programs in both collegiate and professional sports markets
- Cutting edge approach on TCM
- The value they bring to Clemson include:
 - Single point for managing ALL University marketing rights – maximizes value to Clemson and our partners
 - Creating custom, innovative partnerships for potential marketing sponsors that align the interests and values between partners and Clemson University
 - Creating a lean process that leverages ALL Clemson assets to meet partner needs while simplify how Clemson manages our total program
 - TCM opportunities will be aligned with University strategic direction and values while simultaneously enhancing the experience of students, alumni and all members of the Clemson University family. No group/mix of advertisers can deliver the single direction Clemson wants to present.

10. When Clemson issued its RFP for Total Campus Marketing, it sought, by the express language in the RFP, to expand its previous athletics-only sponsorship and marketing rights to include the entire university.

11. For this reason, the RFP was clear that Clemson was committed to the new, innovative TCM approach when obtaining potential corporate sponsors to increase the overall value of the Clemson brand. In the RFP, Clemson provided broader rights to Claimants, its TCM partners, so that the TCM partner could sell rights related to not only Clemson athletics, but also rights related to the entire university (campus and athletics).

12. The TCM Contract is not a typical service provider agreement with the State. Under the terms of the TCM Contract, Clemson granted broad multi-media and marketin-related

rights to Claimants in exchange for *Claimants paying substantial royalty payments to Clemson, nearly doubling what Clemson was previously yielding.*

13. The multi-media and marketing-related rights that Clemson granted to Claimants can be divided into two categories: athletics and campus (with athletics rights focused on sponsorship and other revenue-generating opportunities related to Clemson athletics and campus rights related to sponsorship and other revenue-generating opportunities related to the Clemson campus).

14. Nearly all of the *athletic rights* granted to Claimants were exclusive. The *campus rights* that Clemson granted to Claimants were non-exclusive, but only to a degree. Specifically, those rights included, but are not limited to, on-campus digital advertising, sampling and engagement with students, faculty and staff, advertising on Clemson-owned buses, other advertising opportunities on campus such as bus shelters, advertising opportunities related to campus-related social media and websites, and sponsorship opportunities.

15. Upon execution of the TCM Contract, Claimants paid an initial advance royalty of \$2,600,000 and under the terms of the TCM Contract committed to paying a minimum of \$68,225,000 in royalties to Clemson over the life of the TCM Contract (provided that Clemson performed its contractual obligations in good faith). Claimants also provided opportunities to Clemson Athletics to earn additional royalties if revenues exceeded certain thresholds. Claimants were committed to paying Clemson a percentage of all revenues generated for the portion of sponsorships allocated to Campus inventory and assets. Claimants were explicit in the proposal, which Clemson accepted and which specifically became a part of the contract, that

Partnering to build a powerful Total Campus Marketing platform that enhances the Clemson Family experience and generates significant new revenues and opportunities for the University through the strategic implementation of a:

- Multi-Media Rights program for Clemson Athletics that expands broadcast media partnerships and programming delivers new digital and social media offerings, adds value to corporate sponsors, enhances the game-day experience, strengthens the Tiger's brand, and expands its fan base;
- Campus-Wide Sponsorships initiative that creates mutual benefits business partnership offerings: co- branded promotions, on-campus activations, student/alumni, employment, joint community initiatives, collaborative R&D programs, B2B product/service agreements; naming rights; and
- Campus Digital Network that enhances the campus experience, updates the campus appearance, improves way-finding, strengthens campus security, broadly distributes emergency alerts, facilitates campus communications, and provides interactive commercial messaging.

A true marketing partnership will involve many provisions that can enhance the University's brand and its campus experience. For example, JMIS will seek internship and employment opportunities with sponsors as part of their package. Where appropriate, JMIS will seek equipment and capital investments in conjunction with Clemson Procurement. We will also look for ways that sponsors can promote the University. JMI Sports has identified some initial sponsorship assets, as listed below. However, we will work with the University, including the various departmental corporate partner programs, to create more assets based upon the feedback of existing and potential sponsors as well as the needs of the various University constituents:

- Official Partner Status
- Use of Marks
- Joint Affinity Programs
- Building Naming Rights
- Department Sponsorships
- On-Campus Activation
- Co-Branded Promotions
- Digital Advertising/Engagement
- Couponing & Display
- Product Sampling
- B2B Equipment/Service Agreements
- Joint Community Initiatives
- Speaking Opportunities
- Collaborative R&D Programs
- Intern & Employee Pool
- State-Wide Extension Office Relations
- On-Campus Events (non-athletics)

- Opt-In User Data

In arriving at the agreed contract that included these specific proposed items, Clemson never questioned, disavowed or disputed any of these agreed components. At no time during the RFP process and subsequent negotiations leading to the final notification of award and execution of the TCM Contract did Clemson indicate that it would be putting together its own campus sponsorship group, nor that Claimants would be required to obtain permission from an internal group, with competing interests, before meeting with a prospective corporate sponsor, partner, or opportunity for Campus and Athletics. Had Claimants been aware of a plan for such internal competition, it would never have bid what it bid for the bundled athletics and campus rights.

16. The bid that Claimants made for Clemson's multi-media rights³ (including the minimum royalty payments that it committed to paying Clemson) was based upon a model under which Clemson would embrace an innovative approach to monetizing these assets (including the bundling of athletics with campus marketing opportunities). In fact, Clemson acknowledged in the RFP that it was seeking to create a new and innovative relationship with a marketing partner. All of the Claimants's responses and commitments were based on the ability to bundle sponsorship opportunities to include Campus and Athletics – *i.e., Total Campus Marketing* -- in order to maximize Clemson's revenues and enhance the offerings and results for sponsors.

17. Soon after Claimants signed the TCM Contract, Clemson started directly and improperly competing with Claimant in obtaining corporate sponsorships for campus and athletics through its Development department and its Office of Corporate Partnerships and Strategic Initiatives (OCPSI was formed after Clemson and Claimants signed the TCM Contract) which the

³ The bid itself is expressly incorporated into, and made a part of, the TCM Contract. See Clemson University Standard Terms of Purchase – Revision C (Revised for Solicitation 68301548 only) at section titled "CONTRACT DOCUMENTS & ORDER OF PRECEDENCE". Claimants' bid is set forth in its technical response and financial response to the RFP, (as modified by the Record of Negotiations).

TCM Contract prohibited. In addition, Clemson restricted Claimants' sales efforts and negotiations with potential sponsors who were interested in acquiring certain multi-media rights. Clemson ignored Claimants' list of prospects from its RFP response (which, pursuant to the terms of the TCM Contract, was included as part of the TCM Contract) and began telling Claimants to whom they could and could not present opportunities, and Clemson started to insist that it take the lead on sales presentations, sometimes without input or involvement from Claimants.

18. By early 2018, Angie Liedinger, of Clemson's Office of Corporate Partnerships and Strategic Initiative ("OCPSI") obtained approval to start the OCPSI division after several presentations to Clemson's Executive Leadership Team and Board of Trustees in 2017 and continued to gain momentum throughout campus as the ultimate authority over "enterprise-wide strategic corporate partnerships." OCPSI's activities moved forward in a manner that literally plagiarized the valuable TCM approach that had been developed and proposed by Claimants, but to the exclusion of Claimants, so that only Clemson would receive the financial and related benefits of such activities. OCPSI literally became Claimants' competitor – but one that Claimants could not defeat because they were a part of Claimants' customer. It is a well-known fact that OCPSI was not pleased with the TCM Contract and that their response was to develop a plan in direct conflict with the rights of the Claimants.

19. Meanwhile, despite significant attempts to identify a mutually beneficial solution and find a way to co-exist with OCPSI, Claimants' contractual rights – and even their minimal involvement - were cast aside. Claimants attempted, without success during this period, to even secure a meeting with Ms. Liedinger to prioritize aligning efforts.

20. Clemson internal records reveal that the "JMI issue" was raised internally within various groups at Clemson several times early on, yet Claimants were not included in their 2019

LEAN Report findings, retreats, or strategy discussions. By the time of the March 17, 2020, Revenue Summit it was clear that while Clemson was still struggling with “how JMI fits,” Clemson simply did not accept that it was responsible for figuring that out, and OCPSI believed it was not OCPSI’s obligation to resolve this matter. Frequently, Clemson expressed the sentiment that it could do whatever it wanted to do, and it should be paid significant sums of money, without regard to contractual obligations, merely because it (then) had a top-ranked football program. This position, while absurd, seemed to make all the sense in the world to Clemson, which developed its own plan to maximize its own opportunity without regard to the Claimants’ rights.

21. Throughout the TCM Contract, Clemson denied Claimants those very rights and violated them, thereby depriving Claimants of the fundamental and essential benefit of their bargain. After the TCM Contract was entered, under which Clemson granted Claimants rights, Clemson soon after that, in bad faith, established a new program under which it improperly, methodically and directly competed with Claimants for the very rights it had granted to Claimants, and used this program and other coordinated acts to interfere with and disrupt Claimants’ efforts under the TCM Contract, and Claimants’ opportunities for remuneration, and even went so far as to poach, for its own exclusive benefit, opportunities that Claimants had established in Claimants’ performance under the TCM Contract – valuable opportunities that would have provided contractually anticipated remuneration to Claimants. In so doing, Clemson acted in bad faith, violated Claimants’ TCM Contract rights, and withheld its own contractually required performance. Clemson’s misconduct had the direct and proximate effect of injuring and damaging Claimants’ athletic rights and campus rights as well. This activity spanned the duration of the TCM Contract despite ongoing efforts by Claimants to secure Clemson’s compliance with the TCM Contract.

22. Unfortunately, despite its stated objectives in the RFP, Clemson managed the TCM Contract and its relationship with Claimants so as to maintain the status quo in its multi-media rights and to forego any innovative approach in marketing and promoting the multi-media and marketing rights that Claimants paid handsomely to obtain. The effect of Clemson's dramatically altered approach is that many opportunities to monetize the multi-media and marketing rights were not available to Claimants for even Athletic rights, let alone TCM rights. Claimants spent much time and effort, including numerous meetings with Clemson, to find ways to try to work together with Clemson's new in-house sponsorship team. Claimants did so despite the fact that the Clemson in-house sponsorship team's fundamental purpose was directly contrary to the Claimants' contractual rights. When that effort failed, Claimants negotiated with Clemson for 22 months in an effort to resolve the conflict. This effort (and the TCM contract period) were adversely affected by the COVID pandemic during which Clemson was literally shut down. Despite these challenges, Claimants offered a number of options that would a) expand inventory, b) provide funding to Athletics, and c) re-structure the arrangement with Campus. Despite extensive efforts by Claimants and encouragement from Clemson, none of those efforts to resolve the conflict succeeded. As a result, Claimants were forced to take legal action against a university partner, which is an unprecedented action in the history of Claimants and their management.

23. By ongoing specific and continuous acts in violation of the rights of Claimants under the TCM Contract, going to the very essence thereof, from the outset of the TCM Contract term, Clemson violated the rights of Claimants, and thereafter wrongly pursued unfounded claims against Claimants in a constitutionally prohibited forum outside the Judicial Department.

24. The totality of Clemson's behavior and actions breached the TCM Contract and destroyed the essential purpose of the TCM Contract between the parties and made it impossible

for Claimants to realize the financial benefits they bargained for under the TCM Contract and for which Claimants paid Clemson millions of dollars.

25. The totality of Clemson's behavior and actions also caused Claimants actual damages, lost revenue, lost opportunity and other damages.

26. Claimants met all their legally enforceable obligations precedent under the TCM Contract at issue.

27. Clemson, by its acts and omissions, failed and refused to meet its obligations under the TCM Contract, and has caused Claimants injury, harm, damages and the loss of the essential benefits of its bargain thereby.

28. Therefore, Clemson has breached the terms and the fundamental purposes of its TCM Contract with Claimants, and ultimately terminated the TCM Contract effective June 30, 2021.

29. As a result, Clemson is liable to Claimants for actual damages totaling more than Twenty-Eight Million, Five Hundred Thousand Dollars (\$28,500,000.00), termination costs and attorneys' fees and costs. Claimants would note that bringing a claim against a school is absolutely against Claimants' best interest in the industry. Still, the Claimants have no choice in presenting this claim due to Clemson's egregious breach and plain misconduct.

30. As a further result, Claimants are entitled to remedies at law and in equity including rescission, and return of all monies paid to Clemson by Claimants to date, amounting to millions of dollars.

WHEREFORE, the Claimants seek a hearing in this matter and an Order :

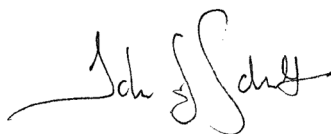
1) that Clemson has breached the TCM Contract and is liable to Claimants for all actual damages and termination costs as may be proven at a hearing on this matter totaling more than Twenty-Eight Million, Five Hundred Thousand Dollars (\$28,500,000.00);

2) finding that Clemson, by its acts and omissions, breached the fundamental and essential purposes of the TCM Contract and therefore, Claimants are entitled to the remedy of rescission, and, as a consequence, the return of all payments made by Claimants to Clemson under the TCM Contract, amounting to millions of dollars, to be adjusted by the actual monetary benefits received by Claimants under the TCM Contract;

3) granting an award of Claimants' attorneys' fees and costs; and

4) granting to Claimants such other and further relief as may be just and proper.

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Columbia, South Carolina
June 17, 2022

From: Lee, Alison Renee ALeEJ@sccourts.org 
Subject: RE: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.
Date: April 5, 2023 at 2:16 PM
To: Michael H. Montgomery mhm@montgomerywillard.com
Cc: Nick Nicholson nnicholson@hsblawfirm.com, Manton Grier mgrier@ogc.sc.gov, Missy Copeland missy@schmidtcopeland.com, Paralegal paralegal@schmidtcopeland.com, John Schmidt john@schmidtcopeland.com, Cristy M. Bradley cbradley@montgomerywillard.com, Keith Roberts keroberts@wcc.sc.gov, Mcree, Kristen KMcree@wcc.sc.gov

AL

Mr. Montgomery,

I do not have the documents in front of me, but if I recall correctly, the Motion to Reconsider makes the argument that exhaustion of administrative remedies is not appropriate in an action for declaratory judgment. I am interested in hearing your response to that argument. The Motion to Reconsider is short. I presume any argument you have would also be brief. If you can get it to me before Friday I would appreciate it. I am working on matters under advisement this week. I'm sure you all would like for me to move this along.

Will be in a murder trial next week.

Thank you in advance.

Alison Renee Lee

Circuit Court Judge
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From: Michael H. Montgomery <mhm@montgomerywillard.com>
Sent: Wednesday, April 5, 2023 10:15 AM
To: Lee, Alison Renee <ALeeJ@sccourts.org>
Cc: Nick Nicholson <nnicholson@hsblawfirm.com>; Manton Grier <mgrier@ogc.sc.gov>; Missy Copeland <missy@schmidtcopeland.com>; Paralegal <paralegal@schmidtcopeland.com>; John Schmidt <john@schmidtcopeland.com>; Cristy M. Bradley <cbradley@montgomerywillard.com>; Keith Roberts <keroberts@wcc.sc.gov>; Mcree, Kristen <KMcree@wcc.sc.gov>
Subject: RE: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Lee,

Customarily, we do not respond to Rule 59(e) motions as they are based entirely on the record before the Court. Rule 59 (c) provides for a response if affidavits are submitted, but that was not the case here. We will happily respond to Mr. Schmidt's motion if the Court wishes, although we do not believe a response is necessary. However, I want to assure the Court that, as it relates to my client, the fact that we did not respond does not indicate our acquiescence to Mr. Schmidt's position (as seems to be implied in his communication). To the contrary, we believe that Unisys is dispositive of this matter and that Mr. Schmidt has failed to exhaust his administrative remedies.

dispositive of this matter and that Mr. Schmidt has failed to exhaust his administrative remedies. Notably, the CPO has scheduled a hearing in our case on April 24 and 25—less than three weeks away.

Thank you for your attention to this matter.

Mike



Michael H. Montgomery
Montgomery Willard, LLC
1002 Calhoun Street (29201)
Post Office Box 11886
Columbia, South Carolina 29211



mhm@montgomerywillard.com

(803) 753-6484 (direct)

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www.montgomerywillard.com



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From: John Schmidt <john@schmidtcopeland.com>

Sent: Wednesday, April 5, 2023 9:10 AM

To: Lee, Alison Renee <ALeeJ@sccourts.org>

Cc: Michael H. Montgomery <mhm@montgomerywillard.com>; Nick Nicholson <nnicholson@hsblawfirm.com>; Manton Grier <mgrier@ogc.sc.gov>; Missy Copeland <missy@schmidtcopeland.com>; Paralegal <paralegal@schmidtcopeland.com>

Subject: Re: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.

Thanks again, your Honor.

I have not gotten any opposition to our motion to reconsider as of this date.

That motion has been pending since February 2.

We appreciate your effort to address that motion.

John Schmidt | Schmidt & Copeland LLC | 1201 Main Street, Suite 1980 Columbia, South Carolina 29201 | John@SchmidtCopeland.com | T:803.348.2984 | www.SchmidtCopeland.com

PLEASE NOTE OUR ADDRESS SUITE NUMBER IS CHANGED from 1100 to 1980.

On Mar 14, 2023, at 2:04 PM, Lee, Alison Renee <ALeeJ@sccourts.org> wrote:

Good afternoon,

I anticipate a decision shortly but I cannot give a time frame at this moment. Unexpectedly, I became Chief Administrative Judge (due to Judge Benjamin's appointment to the US Fourth Circuit Court of Appeals) and have been tied up with handling those matters in addition to what I had pending. Since, I did not receive any emails, briefs, or arguments in opposition to the motion for reconsideration, I will review the information again. Thank you for your patience.

Alison Renee Lee

Circuit Court Judge
1701 Main Street, Suite 324
Post Office Box 192
Columbia, SC 29202
(803) 576-1765

From: John Schmidt <john@schmidtcopeland.com>

Sent: Monday, February 27, 2023 9:19 AM

To: Lee, Alison Renee <ALeeJ@sccourts.org>

Cc: Michael Montgomery <mhm@montgomerywillard.com>; Nick Nicholson <nnicholson@hsblawfirm.com>; Manton Grier <mgrier@ogc.sc.gov>; Missy Copeland <missy@schmidtcopeland.com>; Paralegal <paralegal@schmidtcopeland.com>

Subject: Re: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Lee

I represent Petitioners in the above ICAP and JMI matters

On January 31, 2023, you issued an Order dismissing Petitioners' declaratory judgment cases because Petitioners had not "exhausted their administrative

remedies” before the Chief Procurement Officer under *S.C. Code Ann. § 11-35-4230*. Petitioners each moved for reconsideration February 2, 2023.

Please let us know if any other input or information is desired in order to permit you to rule on the requests for reconsideration.

Thanks,
John

John Schmidt | Schmidt & Copeland LLC | 1201 Main Street, Suite 1980 Columbia, South Carolina 29201 | John@SchmidtCopeland.com | T:803.348.2984
| <https://checkpoint.url-protection.com/v1/url?o=www.SchmidtCopeland.com&g=YzI5YTlmMzMwYTEhNzc5Mg==&h=ZDY4OTNiMGJkOTM5NmJlNjE0MmRlNTkxNGY1ZjRmMzQ2ZWU4ZDM1NTQxNTQwMjQ0MWZmZmEzOWVjMzAwODcyNg==&p=YzJlOnNjanVkaWNpYWw6YzpvOjRlMTMxNWRjYThhYTc5Yzg2ZjcyZDljMTk1ZGY4ZGI3OnYxOnQ6VA==>

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On Jan 31, 2023, at 3:40 PM, Lee, Alison Renee <ALeeJ@sccourts.org> wrote:

Good afternoon,
The cases have retained their separate docket numbers and the order was filed in each case even though the captions were consolidated. I think that addresses your issues. The hearing were consolidated solely for the motions to dismiss. I was aware of Judge Keesley’s order before I heard the motions. I do not intend to do separate orders on each case.

Alison Renee Lee

Circuit Court Judge
1701 Main Street, Suite 324
Post Office Box 192
Columbia, SC 29202
(803) 576-1765

From: John Schmidt <john@schmidtcopeland.com>

Sent: Tuesday, January 31, 2023 3:14 PM

To: Lee, Alison Renee <ALeeJ@sccourts.org>
Cc: Michael Montgomery <mhm@montgomerywillard.com>; Nick
Nicholson <nnicholson@hsblawfirm.com>; Manton Grier
<mgrier@ogc.sc.gov>; Missy Copeland
<missy@schmidtcopeland.com>; Paralegal
<paralegal@schmidtcopeland.com>
Subject: Question on JMI and ICAP Orders

*** **EXTERNAL EMAIL:** This email originated from outside
the organization. Please exercise caution before clicking any links
or opening attachments. ***

Dear Judge Lee,

We received the order(s) today on the JMI and ICAP matters.

Attached are the orders on consolidation of those cases.
For consolidation, the parties had agreed and proposed that the cases
would be heard together but that the cases would each retain their
own docket number and that separate orders would be issued in each
case.

Attached are the orders and this is explicit in the JMI consolidation
order you signed.

We would ask that the court consider re-issuing a separate order of
dismissal in each case (reserving our appeal rights of course) with each
case having its own caption and docket number?

This would allow the orders to conform to the consolidation orders.
I appreciate your kind consideration.

John

John Schmidt | Schmidt & Copeland LLC | 1201 Main Street, Suite 1980
Columbia, South Carolina
29201 | John@SchmidtCopeland.com | T:803.348.2984
| [https://checkpoint.url-protection.com/v1/url?
o=www.SchmidtCopeland.com&g=NmQ2YWMxMjhINWE2Mjg1OQ==&
h=NGZmMmU4ZTU3Yzg4YzFkZTczZjA2MzE1MWQ0NThkNjk0MGE0Yzg5
ZTNiMjhiMzJjMTdjOTM3MGZlZTkzYmJmNA==&p=YzJ1OnNjanVkaWNp
YWw6YzpvOmJhYzhiMmE0NGQyZWZhMzlyOWMyZmJhOWYyNTkyOG
Q0OnYxOnQ6VA==](https://checkpoint.url-protection.com/v1/url?o=www.SchmidtCopeland.com&g=NmQ2YWMxMjhINWE2Mjg1OQ==&h=NGZmMmU4ZTU3Yzg4YzFkZTczZjA2MzE1MWQ0NThkNjk0MGE0Yzg5ZTNiMjhiMzJjMTdjOTM3MGZlZTkzYmJmNA==&p=YzJ1OnNjanVkaWNpYWw6YzpvOmJhYzhiMmE0NGQyZWZhMzlyOWMyZmJhOWYyNTkyOGQ0OnYxOnQ6VA==)

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1980.

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**From:** Michael H. Montgomery mhm@montgomerywillard.com  
**Subject:** RE: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.  
**Date:** April 5, 2023 at 7:01 PM  
**To:** Lee, Alison Renee ALeeJ@sccourts.org  
**Cc:** Nick Nicholson nnicholson@hsblawfirm.com, Manton Grier mgrier@ogc.sc.gov, Missy Copeland missy@schmidtcopeland.com, Paralegal paralegal@schmidtcopeland.com, John Schmidt john@schmidtcopeland.com, Cristy M. Bradley cbradley@montgomerywillard.com, Keith Roberts keroberts@wcc.sc.gov, Mcree, Kristen KMcree@wcc.sc.gov



Judge Lee,

Attached is our response. I attempted to file this via ECF. The Clerk has the case marked "dismissed," so I cannot file this response electronically with the Court.

I am copying all counsel of record on this e-mail.

If you need it filed, kindly advise me, and we will attempt to do so with the Clerk tomorrow.

Thank you for your attention to this matter.

**Mike**



Michael H. Montgomery  
**Montgomery Willard, LLC**  
1002 Calhoun Street (29201)  
Post Office Box 11886  
Columbia, South Carolina  
29211

[mhm@montgomerywillard.com](mailto:mhm@montgomerywillard.com)

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---

**From:** Lee, Alison Renee <ALeeJ@sccourts.org>  
**Sent:** Wednesday, April 5, 2023 2:16 PM  
**To:** Michael H. Montgomery <mhm@montgomerywillard.com>

|                                       |   |                                      |
|---------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS         |
|                                       | ) | FOR THE FIFTH JUDICIAL CIRCUIT       |
| COUNTY OF RICHLAND                    | ) |                                      |
| Intellectual Capitol, Inc., Barry     | ) | CIVIL ACTION NO.: 2022-CP-40-02656   |
| Newkirk and Neil Richards,            | ) |                                      |
|                                       | ) |                                      |
| Petitioners-Plaintiffs,               | ) |                                      |
|                                       | ) |                                      |
| Vs.                                   | ) | South Carolina Workers' Compensation |
|                                       | ) | Commission's Response to Plaintiffs' |
| Michael B. Spicer, Chief Procurement  | ) | Rule 59(e) Motion                    |
| Officer, South Carolina State Fiscal  | ) |                                      |
| Accountability Authority, Division of | ) |                                      |
| Procurement Services, and South       | ) |                                      |
| Carolina Workers' Compensation        | ) |                                      |
| Commission                            | ) |                                      |
|                                       | ) |                                      |
| Respondents-Defendants.               | ) |                                      |
|                                       | ) |                                      |

---

### **Introduction**

On January 31, 2023, the Court issued its Order dismissing this action with prejudice because the Plaintiffs failed to exhaust their administrative remedies. On February 3, 2023, the Plaintiffs filed their motion for reconsideration under Rule 59(e). In that motion, they assert that the Court erred in its finding because the Court and its Order required them to submit their Declaratory Judgment Act claim to the Chief Procurement Officer, which was error because the Plaintiffs had a right to have a Court of record rule on that issue. They cited two tax cases for the year 2000 to support that premise. On April 5, 2023, the Court requested that the Workers' Compensation Commission respond to Plaintiff's motion.

By and through its undersigned counsel, the South Carolina Workers' Compensation files this response per the Court's request.

## Answer

The Court's decision to dismiss the case without prejudice was proper and legally appropriate. It would have also been appropriate, and the Court may wish to consider in this proceeding, granting the Defendants' respective motions for summary judgment the Court heard simultaneously with the Motions to Dismiss.

A review of the record will also reveal that Intellectual Capitol's argument in reconsideration was not made before the Court issued its decision.<sup>1</sup>

Intellectual Capitol's motion for reconsideration cited *Ward v. State*, 343 S.C. 14 (2000) and *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34 (2000) for the proposition that a Court may always intervene in a matter where there is a constitutional challenge to an action by way of a declaratory judgment. However, Intellectual Capitol fails to recognize that unlike in each of those cases, the declaratory judgment was the first action filed challenging the constitutionality of those statutes.<sup>2</sup> The Plaintiffs' motion seeks a declaration relating to the dispute resolution procedures set forth in the South Carolina Consolidated Procurement Code, *S.C. Code Ann.* §11-35-10, et. seq., specifically §11-35-420. Our Supreme Court has previously determined that this statute is constitutional.

---

<sup>1</sup> A party cannot for the first time raise an issue by way of a Rule 59€ motion which could have been raised at trial *Patterson v. Reid*, 318 S.C. 183, 184 (Ct. App. 1995).

<sup>2</sup> Both cases cited by Intellectual Capitol rely upon language in *S. C. Code Ann.* §12-60-3390 which was amended in 2006 to read "If a taxpayer brings an action covered by this chapter in circuit court, the circuit court shall dismiss the case without prejudice." This makes the Revenue Procedures Act an exclusive means of dispute resolution similarly to the Procurement Review Panel and Chief Procurement Officer under the Consolidated Procurement Code. It is unlikely that the cases that Intellectual Capitol relies on in its motion would be decided the same way today that they were in 2000.

In *Unisys Corp. v. S.C. Budget and Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158 (2001)<sup>3</sup>, the Court identified that the Plaintiff there sought a declaratory judgment that the statute in question here was unconstitutional. It noted:

Unisys then filed this action in circuit court seeking . . . , **a declaratory judgment regarding the inapplicability of the Procurement Code on jurisdictional and constitutional grounds...**

*Id.* at 346 S.C. 165. [emphasis added]

In *Unisys*, the South Carolina Supreme Court answered the identical question posed by Intellectual Capitol's Declaratory Judgment Action. The statute is constitutional. The Supreme Court noted:

Since Unisys is required to exhaust its administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper. Further, because an action was pending pursuant to the Procurement Code as required when this action was brought, dismissal was also proper under Rule 12(b)(8).

*Id.* at 346 S.C. 176-177

The Supreme Court disposed of the constitutional questions raised by Intellectual Capitol's declaratory judgment action in *Unisys*. The case that Intellectual Capitol wants this Court to hear, is decided. That precedent binds this Court. In reconsideration, the Court also has the opportunity to choose to grant these Defendants' Motion for Summary judgment which would be an equally proper ruling.

---

<sup>3</sup> It is also reasonable to argue the *Unisys* impliedly reversed the determination in both of those earlier decided cases, at least to the point that it held that the Procurement Code constituted an exclusive means which meant that the CPO and Panel have "exclusivity of jurisdiction." 346 S.C. at 169. That distinguishes the cases relating to the subsequently amended Revenue Procedures Act.

**Conclusion**

The Court should deny Intellectual Capitol's motion and uphold its correct determination to dismiss the case without prejudice. In the alternative responding to the Plaintiffs' request for reconsideration, the Court may amend its Order to grant the Defendants summary judgment and dispose of this case with prejudice.

Respectfully Submitted,

**MONTGOMERY WILLARD, LLC**

s/ Michael H. Montgomery  
Michael H. Montgomery, S.C. Bar No. 4024  
Post Office Box 11886  
Columbia, SC 29211-1886  
(803) 779-3500  
mhm@montgomerywillard.com

Attorneys for the South Carolina Workers'  
Compensation Commission

Columbia, SC  
April 5, 2023

**From:** John Schmidt john@schmidtcopeland.com  
**Subject:** Re: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.  
**Date:** April 5, 2023 at 7:13 PM  
**To:** Lee, Alison Renee ALeeJ@sccourts.org  
**Cc:** Nick Nicholson nnicholson@hsblawfirm.com, Manton Grier mgrier@ogc.sc.gov, Missy Copeland missy@schmidtcopeland.com, Paralegal paralegal@schmidtcopeland.com, Cristy M. Bradley cbradley@montgomerywillard.com, Keith Roberts kerober@wcc.sc.gov, Mcree, Kristen KMccree@wcc.sc.gov, Michael Montgomery mhm@montgomerywillard.com



Your Honor ,

For simplicity I will reply in a limited way.

Contrary to the Respondent's argument, Petitioners did raise this issue below, as you know from reading Petitioner's Supplemental Brief on Motions filed prior to the hearing. In that brief, we argued:

"courts have recognized that "[b]ecause an administrative agency cannot pass upon the constitutionality of the legislation under which it acts (citations omitted), a party seeking judicial review of the constitutionality of an agency's enabling legislation need not exhaust its administrative remedies."

The decisions we cited for that proposition were not the same ones we raised in the post trial motion, but the argument and proposition of law is the same.

We do not address the remaining arguments in Respondent's brief which do not address the motion at hand.

Petitioners will gladly file a reply brief on this point if you prefer.

John Schmidt | Schmidt & Copeland LLC | 1201 Main Street, Suite 1980 Columbia, South Carolina 29201 |  
John@SchmidtCopeland.com | T:803.348.2984 | www.SchmidtCopeland.com

PLEASE NOTE OUR ADDRESS SUITE NUMBER IS CHANGED from 1100 to 1980.

On Apr 5, 2023, at 6:57 PM, Michael H. Montgomery <mhm@montgomerywillard.com> wrote:

Judge Lee,

Attached is our response. I attempted to file this via ECF. The Clerk has the case marked "dismissed," so I cannot file this response electronically with the Court.

I am copying all counsel of record on this e-mail.

If you need it filed, kindly advise me, and we will attempt to do so with the Clerk tomorrow.

Thank you for your attention to this matter.

**Mike**

<image002.jpg>

Michael H.  
Montgomery

Montgomery Willard,  
LLC  
1002 Calhoun Street

[mhm@montgomerywillard.com](mailto:mhm@montgomerywillard.com)

(803) 753-6484 (direct)  
(803) 779-3500  
(803) 799-2755 (Fax)

**From:** Nicholson, Nick [nnicholson@hsblawfirm.com](mailto:nnicholson@hsblawfirm.com)  
**Subject:** RE: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.  
**Date:** April 6, 2023 at 2:19 PM  
**To:** Michael H. Montgomery [mhm@montgomerywillard.com](mailto:mhm@montgomerywillard.com), Lee, Alison Renee [ALeeJ@sccourts.org](mailto:ALeeJ@sccourts.org)  
**Cc:** Manton Grier [mgrier@ogc.sc.gov](mailto:mgrier@ogc.sc.gov), Missy Copeland [missy@schmidtcopeland.com](mailto:missy@schmidtcopeland.com), Paralegal [paralegal@schmidtcopeland.com](mailto:paralegal@schmidtcopeland.com), John Schmidt [john@schmidtcopeland.com](mailto:john@schmidtcopeland.com), Cristy M. Bradley [cbradley@montgomerywillard.com](mailto:cbradley@montgomerywillard.com), Keith Roberts [keroberts@wcc.sc.gov](mailto:keroberts@wcc.sc.gov), Mcree, Kristen [KMcree@wcc.sc.gov](mailto:KMcree@wcc.sc.gov)

NN

Judge Lee,

On behalf of Clemson University, I join in and agree with the response that Mr. Montgomery submitted to Your Honor yesterday evening in this consolidated matter. I will be glad to submit a separate brief or provide others materials to the Court if you wish.

Best regards.

**HAYNSWORTH  
SINKLER BOYD**

**Boyd B. (Nick) Nicholson, Jr.** | Managing Director, Attorney  
Direct 864.240.3247 | [nnicholson@hsblawfirm.com](mailto:nnicholson@hsblawfirm.com)

Haynsworth Sinkler Boyd, P.A.  
ONE North Main, 2nd Floor | Greenville, SC 29601  
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[Web](#) | [Bio](#) | [vCard](#) | [Map](#) | [Linked In](#) | [Blog](#)

---

**From:** Michael H. Montgomery <[mhm@montgomerywillard.com](mailto:mhm@montgomerywillard.com)>  
**Sent:** Wednesday, April 5, 2023 6:57 PM  
**To:** Lee, Alison Renee <[ALeeJ@sccourts.org](mailto:ALeeJ@sccourts.org)>  
**Cc:** Nicholson, Nick <[nnicholson@hsblawfirm.com](mailto:nnicholson@hsblawfirm.com)>; Manton Grier <[mgrier@ogc.sc.gov](mailto:mgrier@ogc.sc.gov)>; Missy Copeland <[missy@schmidtcopeland.com](mailto:missy@schmidtcopeland.com)>; Paralegal <[paralegal@schmidtcopeland.com](mailto:paralegal@schmidtcopeland.com)>; John Schmidt <[john@schmidtcopeland.com](mailto:john@schmidtcopeland.com)>; Cristy M. Bradley <[cbradley@montgomerywillard.com](mailto:cbradley@montgomerywillard.com)>; Keith Roberts <[keroberts@wcc.sc.gov](mailto:keroberts@wcc.sc.gov)>; Mcree, Kristen <[KMcree@wcc.sc.gov](mailto:KMcree@wcc.sc.gov)>  
**Subject:** RE: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.

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I am copying all counsel of record on this e-mail.

If you need it filed, kindly advise me, and we will attempt to do so with the Clerk tomorrow.

Thank you for your attention to this matter.

**From:** Grier, Manton mgrier@ogc.sc.gov   
**Subject:** RE: RE: [External] JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.   
**Date:** April 6, 2023 at 3:03 PM  
**To:** Nicholson, Nick nnicholson@hsblawfirm.com, Michael H. Montgomery mhm@montgomerywillard.com, Lee, Alison Renee ALeeJ@sccourts.org  
**Cc:** Missy Copeland missy@schmidtcopeland.com, Paralegal paralegal@schmidtcopeland.com, John Schmidt john@schmidtcopeland.com, Cristy M. Bradley cbradley@montgomerywillard.com, Roberts, Keith keroberts@wcc.sc.gov, Mcree, Kristen KMcree@wcc.sc.gov

---

Judge Lee:

I represent the CPO in both matters, and I would join in Mr. Montgomery's response to the motion to reconsider. Unisys is directly on point. There is no issue that must be decided – as it has already been decided by the Supreme Court. Regardless of how this matter is resolved – whether it be dismissed or summary judgment granted – JMI and ICAP continue to ask this court to do the impossible and reverse Unisys.

Respectfully,

Manton Grier Jr.



Manton M. Grier Jr. | Assistant General Counsel  
Office of General Counsel | State Fiscal Accountability Authority  
1201 Main Street, Suite 420 | Columbia, SC 29201 | Office: (803) 737-1660 |  
[mgrier@ogc.sc.gov](mailto:mgrier@ogc.sc.gov)

---

**From:** Nicholson, Nick <nnicholson@hsblawfirm.com>  
**Sent:** Thursday, April 6, 2023 2:19 PM  
**To:** Michael H. Montgomery <mhm@montgomerywillard.com>; Lee, Alison Renee <ALeeJ@sccourts.org>  
**Cc:** Grier, Manton <mgrier@ogc.sc.gov>; Missy Copeland <missy@schmidtcopeland.com>; Paralegal <paralegal@schmidtcopeland.com>; John Schmidt <john@schmidtcopeland.com>; Cristy M. Bradley <cbradley@montgomerywillard.com>; Roberts, Keith <keroberts@wcc.sc.gov>; Mcree, Kristen <KMcree@wcc.sc.gov>  
**Subject:** [External] RE: JMI Sports, et al. v. Michael B. Spicer, et al.; and Intellectual Capitol, Inc., et al. v. Michael B. Spicer, et al.

Judge Lee,

On behalf of Clemson University, I join in and agree with the response that Mr. Montgomery submitted to Your Honor yesterday evening in this consolidated matter. I will be glad to submit a separate brief or provide others materials to the Court if you wish.

Best regards.

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

---

Appellate Case Nos. 2023-000667 & 2023-000668

---

Intellectual Capitol, Inc., Barry Newkirk and Neil Richards, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and South Carolina Workers' Compensation Commission, Respondents.

AND

JMI Sports and JMIS College, LLC, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and Clemson University, Respondents.

---

CERTIFICATE OF COUNSEL

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

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