THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000065

Lower Court Case No. 2020-CP-40-04603

South Carolina Public Interest Foundation, and John Crangle, Individually and on behalf of all others similarly situated, Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Respondents.

RECORD ON APPEAL
VOLUME THREE

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J. Emory Smith, Jr., S.C. Bar No. 5262
Alan Wilson, S.C. Bar No. 71754
Robert D. Cook, S.C. Bar No. 1373
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29211
Tel. (803) 734-3680

Attorneys for Respondent Attorney General

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
Tel. (803)779-4600

J. Todd Rutherford, S.C. Bar No. 12097
RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
Tel. (803) 256-3003

Gerald Malloy, S.C. Bar No.12033
MALLOY LAW FIRM
P.O. Box 1200
Hartsville, South Carolina 29551
Tel. (843) 339-3000

Attorneys for Respondent Willoughby & Hoefer, P.A.

James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
P.O. Box 999 (29202)
Tel. (803) 744-0800

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 East North Street
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083

Attorneys for Appellants

Kenneth P. Woodington, S.C. Bar No. 6213
DAVIDSON, WREN & DEMASTERS, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, South Carolina 29202
Tel. (803) 806-8222

Attorneys for Respondent Davidson, Wren & DeMasters, P.A.

September 3, 2024

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May 17 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,

Respondents.

APPELLANTS' RESPONSE TO RESPONDENTS' MOTION FOR CERTIFICATION

In response to Respondents' Motion for Certification, Appellants South Carolina Public Interest Foundation ("SCPIF") and John Crangle ("Crangle") hereby incorporate their Memorandum in Support of Appellants' Motion to Certify Case for Review.

For the reasons stated therein, certification is appropriate because the case involves issues of significant public interest and legal principles of major importance.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

s/ James M. Griffin

James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 East North Street
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083

May 17, 2021

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, ... Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., ... Respondents.

REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR CERTIFICATION AND RETURN TO APPELLANTS' MOTION TO CERTIFY CASE FOR REVIEW

Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A. (Respondent Law Firms), pursuant to Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b), and in accordance with Rule 240, SCACR, submit this joint Reply in Support of Respondents' Motion for Certification and Return to Appellants' Motion to Certify Case for Review.

On May 5, 2021, Respondent Law Firms filed their Motion for Certification and Memorandum in Support requesting certification of the above-captioned appeal for review by this Honorable Court. On May 13, 2021, Respondent Alan Wilson, Attorney General for the State of South Carolina, filed his Return to Respondent Law Firms' Motion for Certification, concurring with the requested certification. For the reasons set forth in these prior filings with this Court, Respondent Law Firms submit that certification of this appeal is appropriate.

On May 17, 2021, Appellants filed their own Motion to Certify Case for Review and Memorandum in Support as well as their Response to Respondent Law Firms' Motion for Certification. By this Return, Respondent Law Firms agree that certification of this appeal is appropriate, but this is the absolute extent of Respondent Law Firms' agreement with Appellants. Indeed, Appellants' Memorandum in Support of Motion to Certify Case for Review is notable in its failure to address the legitimate reasons for which certification is appropriate in this case. Appellants simply repeat arguments on the merits of their claims made before—and rejected by—the circuit court and also republish false (if not defamatory) allegations against Respondents.[1] These arguments are, of course, improper and irrelevant to this Court's consideration of the standard under Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b). Moreover, Appellants' Motion to Certify Case for Review and Memorandum in Support is inappropriate, procedurally defective, and duplicative given that Respondent Law Firms have already moved for certification, which Appellants do not oppose; therefore, it should be disregarded.

For the reasons discussed above and in Respondent Law Firms' Motion for Certification and Memorandum in Support, Respondent Law Firms respectfully request that this Court exercise its discretion to certify this appeal for its immediate review; that this Court expedite its consideration of the straightforward legal issues presented, including the consideration and granting of Respondents' pending Motion to Dismiss; and that the Respondent Law Firms be granted such other and further relief as is just and proper.

[1] Respondent Law Firms will not address the litany of misstatements of fact and law set forth in Appellants' Memorandum in Support of Motion to Certify Case for Review as they have no bearing on the issue of certification now before this Court, are therefore irrelevant at this stage, and will be explained at the appropriate time if it becomes relevant to do so. Suffice it to say, however, the majority of Appellants' factual allegations are false—and were in fact discredited in the proceedings below—and their legal conclusions are wrong.

Respectfully submitted,

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
(803) 779-4600
jsimmons@simmonslawfirm.com

s/ J. Todd Rutherford,
J. Todd Rutherford, S.C. Bar No. 12097
THE RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
(803) 256-3003
todd@therutherfordlawfirm.com

Gerald Malloy, S.C. Bar No. 12033
MALLOY LAW FIRM
Post Office Box 1200
Hartsville, South Carolina 29551
(843) 339-3000
gmalloy@bellsouth.net

Attorneys for Respondent
Willoughby & Hoefer, P.A.

AND

DAVIDSON, WREN & DEMASTERS, P.A.

s/ William H. Davidson, II
WILLIAM H. DAVIDSON, II #1558
KENNETH P. WOODINGTON #6213
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222
wdavidson@DML-LAW.com
kwoodington@DML-LAW.com

Attorneys for Respondent Davidson, Wren & DeMasters, P.A.

May 24, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
S.C. PUBLIC INTEREST FOUNDATION, et al.,	)	Case No.: 20-CP-40-4603
Plaintiffs,	)	
-vs-	)	TRANSCRIPT OF RECORD (VIA WEBEX)
ALAN WILSON, et al.,	)	
Defendants.	)	

January 26, 2021
Columbia, South Carolina

BEFORE:

HONORABLE R. Kirk Griffin, Judge

A P P E A R A N C E S:

James G. Carpenter, Esq.
James M. Griffin, Esq.
Badge Humphries, Esq.
Attorney for the Plaintiffs

J. Emory Smith, Jr., Esq.
Jeff Young, Esq.
Robert D. Cook, Esq.
Attorneys for Alan Wilson, Attorney General

J. Todd Rutherford, Esq.
John S. Simmons, Esq.
Gerald Malloy, Esq.
John S. Simmons, Esq.
Attorneys for Willoughby & Hoefer, P.A.

Kenneth Woodington, Esq.
William H. Davidson, Esq.
Attorneys for Davidson, Wren & DeMasters, P.A.

T. Dayton Grainger, Jr.
Court Reporter

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS

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EXHIBITS

NO.	DESCRIPTION	ID.	EV.

(There were no exhibits marked.)

THE COURT: It is my plan, upon the request of our members of the Legislature to handle the matters relating to case number 2020-CP-40-04603, South Carolina Public Interest Foundation versus Alan Wilson, et al.

There are multiple motions with regard to this case, motions to dismiss and then, motions to intervene, and folks, I'll be happy to take these motions in any order which y'all see fit, but before we get started I do want to make something known to all of the parties who are involved with that case.

One of the partners in Davidson, Wren & DeMasters, Michael Wren, was a college classmate of mine. We were in the same fraternity, and we are participants in a fantasy football league together.

I certainly don't feel like that has any bearing on my ability to be fair and impartial, but I do feel like it is the kind of thing that litigants need to be made aware of.

Mr. Wren and I are friends, but we don't see each other routinely. So, I just wanted to make that aware to everybody who is involved in that case, and if anybody has any issues I just felt like that would be the type of thing that the canons require me to disclose

MR. CARPENTER: Can you tell us again your relation – which person this is?

THE COURT: Michael Wren, who is a partner in Davidson, Wren & LeMasters (sic) -- DeMasters, excuse me. So, he is a partner in that law firm, and ---

MR. CARPENTER: He's not participating in this hearing?

THE COURT: No, but he is – I believe he's a member of one of the

Defendants in the lawsuit. He's not an active participant as a lawyer, but he is a partner in one of the law firms who is a party to the case.

MR. GRIFFIN: Judge Griffin, it looks like we have lost Jim Carpenter for a minute.

THE COURT: I see him. He's on.

MR. RUTHERFORD: Is that mine?

THE COURT: To be clear for the record, did everybody hear the disclosure I made with regard to my knowledge and being a college classmate of a lawyer who is a member of one of these law firms that are the Defendants in this matter?

(No response.)

THE COURT: Folks, with that disclosure being made, are there issues that anyone feels necessary to be heard on?

MR. RUTHERFORD: None from us, Your Honor.

MR. SMITH: Your Honor, Emory Smith for the Attorney General's Office. I believe that the motion for protective order that I made is the first one on the list, but the reason for making it was because of the pendency of motions to dismiss, and so, I would suggest that it be at the end of the motions, and we would respectfully let Willoughby & Hoefer and Davidson firms go first in their arguments concerning the motion, and we would follow them.

THE COURT: All right.

MR. SMITH: If there's no objection to that procedure.

THE COURT: All right, and any objections whatsoever to me hearing this matter? I certainly believe I can be fair and impartial, but I did want to

– I thought it was incumbent upon me based on the judicial canons to disclose my attending college and being friends with Michael Wren, who is a member of one of the Defendant law firms.

MR. SMITH: None from the Attorney General's Office, Your Honor.

MR. GRIFFIN: Your Honor, this is Jim Griffin. Jim Carpenter, I'll defer to you. You know it's kind of – Judge, I will say it's put us in a tough spot since we can't consult with our clients in this sort of fractured environment, and – but anyway, that's all. Jim, can you hear us, Jim Carpenter?

MR. CARPENTER: The sound is going in and out some, but I hear nearly all of it. I'm not going to make any objection.

THE COURT: All right. Thank you, folks, and like I said, I don't feel that there's any issue with my ability to be fair and impartial, but out of an abundance of caution I did feel that the canons would require this disclosure. With that issue being covered, I will be glad to hear the motions to dismiss and be glad to hear from ---

MR. CARPENTER: Judge, I'm still getting about ---

THE COURT: All right. I'm going – is anybody else having any trouble hearing me?

MR. RUTHERFORD: Not at the moment, Judge. I can hear you.

MR. CARPENTER: Yes, I am. I'm having trouble. I lose the pictures. I sometimes see a spinning circle where your picture should be, and sometimes when I hit audio I hear every other syllable. Sometimes I don't hear anything.

THE COURT: Mr. Carpenter, I think that may be an issue on your

end, because I'm seeing what you're seeing. Sometimes your picture is fading in and out, and I don't believe I'm losing anyone else. Are you hearing what I'm saying now?

MR. CARPENTER: Yes, right now I am, and your picture just popped up.

THE COURT: Okay. Well, we're going to move forward, and if you are having trouble hearing me just gesture or let me know. I just don't know that there's any way that I can – I don't know of a way to repair the issue that we're having with these technical matters. So, we're just going to have to do the best we can with the technology that we have been provided.

MR. GRIFFIN: Jim, -- Your Honor, may I offer Jim a suggestion? Maybe if you dial in with a landline and just keep your video on your device and mute the sound you may be able to hear better, if you have got a landline there, but there is a landline number associated with this call, with this hearing.

MR. CARPENTER: Okay. I'll try it that way.

MR. WOODINGTON: Your Honor, while that's going on -- this is Ken Woodington. My name is showing up as Will Davidson, but I'm Ken Woodington at the Davidson law firm. We finally managed to get one of us in as a participant.

THE COURT: All right. Well, we're going to give Mr. Carpenter a moment to try and call in, and folks, again, I'm sorry that this -- we haven't been able to get started in a manner that we hoped to. You know these technical issues have popped up from here and there, but as soon as Mr. Carpenter calls in we will get started with the motions. We will be at ease

until we hear from Mr. Carpenter.

MR. GRIFFIN: Judge, he's calling in now. I looked the number up. Hopefully we'll hear from him momentarily.

THE COURT: All right. I think he has just come in as a call-in user.

MR. CARPENTER: Judge, I'm on my phone. I changed the settings on my phone. Let's try it like this. It seems to be working better.

THE COURT: Okay. Can you hear me better now?

MR. CARPENTER: Yes, much better. Thank you.

THE COURT: All right. Thankfully, we appear to have the technical -- well, we seem to have lost Mr. Malloy and Rutherford. Gentlemen, I apologize for these problems. It seems now that we have totally lost Mr. Rutherford and Mr. Malloy. Let's see if we can rectify the situation, and I'll be back with you in a few moments.

(There was a short recess.)

MR. RUTHERFORD: This is Todd. Can you hear me?

THE COURT: Yes, sir, I can hear you.

MR. RUTHERFORD: Okay. Can everybody else hear me?

THE COURT: Can everybody else hear?

THE COURT: All right, and Senator Malloy is there with you?

MR. RUTHERFORD: Senator Malloy had to walk back into the chamber, but he's here in spirit. So, we're good.

THE COURT: Okay. We are able to proceed without him?

MR. RUTHERFORD: Yes.

THE COURT: All right. Let's take up the motions to dismiss first, and Mr. Rutherford, I'll be glad to hear from you or any of the other defense

attorneys. It makes no difference to me which order we go.

MR. RUTHERFORD: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, sir.

MR. RUTHERFORD: We make a motion to dismiss based on the fact that the Honorable Judge Alison Lee on more than one occasion – in fact, on October 14, 2020, when she denied the Plaintiffs' motion for a preliminary injunction and then, again, on December 17, 2020 when she denied the Plaintiffs' motion to alter or amend, she stated on both occasions that the Plaintiffs lacked standing in this case, and that motion and her decision was wide-ranging based on everything they had presented. They have no standing in this case, and this question at this point is moot in our opinion, because Judge Alison Lee is a circuit court judge. She has ruled on this, and that should be the end of it.

We respectfully request that you dismiss this case with prejudice based on Judge Lee's findings and the fact that the Plaintiffs lack standing to bring any claims at this point.

THE COURT: Thank you, Mr. Rutherford. Mr. Griffin or Mr. Humphries, response to Mr. Rutherford's argument?

MR. GRIFFIN: Your Honor, Mr. Carpenter's going to argue the standing issue. I would address the law of the case issue on the front end, and Your Honor, as we had briefed in our memorandum, the rulings – the only ruling that is law of the case is her ruling denying our motion for preliminary injunction.

The case law that we have cited, both the U.S. Supreme Court and the

South Carolina Supreme Court, stand for the proposition that collateral findings or findings made in connection with a ruling in a motion for preliminary injunction are not binding on the merits of the case, and then, Your Honor, I would specifically bring your attention to the Shirley Iron Works v. City of Union, which was cited in our brief. It's at 403 S.C. 560, and in our view, Your Honor, the Supreme Court decision issued in 2013 controls the question of whether the law of the case doctrine bars us from arguing against their motion to dismiss.

The significance of the Shirley Iron Works case, Your Honor, is – and it takes a little bit of explanation, but the issue in that case was whether a subcontractor, who did not get paid by his general contractor on a job bidded out by the City of Union, where the subcontractor had a lawsuit against the City of Union for failing to comply with the Subcontractors' and Supplier Payments Protection Act. That's a mouthful, but basically what happened, there was intermediate rulings by two judges, one Judge Steven John and one Judge Paul Short striking the Plaintiff's complaint seeking attorney's fees and prejudgment interest.

Both Judge Short and Judge Steven John ruled that the case sounded in tort, and therefore, because it was a tort claim they could not get attorney's fees or prejudgment interest.

The South Carolina Supreme Court ruled that Plaintiff's claim was a third-party beneficiary claim and that – and that they pled a third-party beneficiary case.

The City of Union argued, oh, but Judge Short and Judge Steven (sic) said it was a tort case, and therefore, they were denied attorney's fees, and

what the Supreme Court said we cited in the quote of the Supreme Court in our brief, but what's interesting is that what the Supreme Court ultimately ruled was that Judge Short and Judge Steven John, the only issue before them was a motion to strike, and the only ruling that they made as law in the case is striking attorney's fees.

The fact that they concluded that there was only a tort claim and no third-party beneficiary claim was immaterial to the ultimate outcome in the case, and the same situation arises here. The only issue before Judge Alison Lee was whether she was going to grant or deny our motion for preliminary injunction. She denied our motion for preliminary injunction. That's the law of the case. We're not asking you to revisit that ruling. What we're asking you to do is to deny the Defendant's motion to dismiss on the merits, and I'll pass it back to Mr. Carpenter on the argument to address standing.

THE COURT: Thank you, Mr. Griffin.

MR. CARPENTER: Thank you, Your Honor. I'm Jim Carpenter. I also represent the Plaintiffs. I'd like to address the issue of public important standing. We referenced this and addressed it in pages 24 to 26 of our memorandum.

The current statement of the test for public important standing has been set out in two recent cases. The Defendants in their motion cite a lot of other cases, and the way this test has been articulated over the last 15 to 20 years has changed in the way it's articulated, but in the two most recent cases there seems to have developed a three-part test for public important standing.

The two cases are Adams v. McMaster, which is the recent case finalized last month in which people challenged the Governor's use of federal funds to make scholarships for students at private schools, and the three element test is, number one, does the issue involve the expenditure of public funds, and number two, is this addressing action by a government entity, and number three, is it likely to recur, and in that case the Supreme Court ruled unanimously that the Plaintiff should be granted public importance standing and had to do with about 32 to $40 million that the Governor was going to put into a fund to give to students, ultimately to the schools themselves at the choosing of individual students for scholarship money from federal funds related to COVID.

This case relied – the Adams case relied heavily on the other case I'm going to cite to you, which is a 2017 case called South Carolina Public Interest Foundation v. South Carolina Department of Transportation, and that's found at 421 S.C. 110, and in that case the South Carolina Public Interest Foundation challenged some actions by the Department of Transportation when they went out and used public funds to inspect bridges on private property.

The foundation contended that was an unlawful use of public funds because it was spent on private property, and public funds have to be spent for public purposes and not private purposes.

That case used the same three factor test. That was from 2017, and then, the paragraph reads as follows: "The issue of whether the SCDOT may inspect bridges within private gated communities is one of public importance, as it involves, one, both the conduct of a government entity and

two, the expenditure of public funds." Then, later in the paragraph the Court said, "Additionally, future guidance is needed since there's no judicial guidance addressing the issue, and there is evidence that the SCDOT will inspect this type of property in the future."

So, the three-element test that comes with the two most recent cases from the Supreme Court addressing public importance standing is, does it involve public funds? Does it involve the actions of a government entity, and is it likely to recur?

In this case I think we meet all three elements of the three-part test. This obviously involves the conduct of a government entity, the Attorney General. It involves $75 million that was obtained from the federal government for the State of South Carolina. So, there's public funds, and three, it's likely to recur.

In our memorandum we cited to a website showing that the Attorney General plans to continue to do these kind of cases where he hires outside counsel on a contingency fee basis, apparently with the intent of paying them out of the proceeds of whatever they recoup in the case.

So, the Defendants have cited a lot of older cases and a lot of cases that are distinguishable because they don't involve these three elements, but when you look at these three elements I think this is an issue of great public importance. The statutes require that all public funds received from the federal government be paid into the State Treasurer and that you have got in effect the Attorney General appropriating $75 million without a Court Order and without the actions of the General Assembly. We contend that's an unlawful act on the part of the Attorney General.

Now, one thing I noticed was that the Attorney General in his brief cites a case from a few years ago decided by Judge G. Thomas Cooper called Cephalon v. McMaster, who was the Attorney General at the time. One thing I note from that case is that Judge Cooper says over and over again that this – that the contingency fee agreement there was permissible, but one element that was present in the Cephalon case that is not present here is that the Court was wanting to review the award of attorneys' fees, and I think that makes a difference, and that's an element we don't have here. Nobody – neither a Court nor the General Assembly had reviewed the appropriateness of a $75 million payment of attorneys' fees in the case, and I think Mr. Griffin will address this more thoroughly as he addresses the merits of the case, but as far as standing, we meet the three-element test. It involves the conduct of a public official. It involves the expenditure of public funds, and it is likely to recur, because the Attorney General has several other of these kind of contracts outstanding. So, for that reason we think that the Plaintiffs have made a good case for public importance standing.

THE COURT: Thank you, Mr. Carpenter. Mr. Rutherford, any response to the defense's argument?

MR. RUTHERFORD: Yes, Your Honor, several, and I apologize for not objecting when they initially started talking, but I don't feel it's appropriate to object over WebEx. It's a little bit difficult to do so. So, I did let them continue despite the fact that, Your Honor, unfortunately, these are all arguments that were heard before, and Mr. Carpenter stated that we are referencing older cases, but I will cite for you a more recent case, and it is South Carolina Public Interest Foundation, et al. v. Wilson, et al, and it is

this case we are talking about, because they argued these same facts in front of Circuit Judge Lee, and she stated they did not have standing, and as you listen to everything they have said thus far it is the same thing that she listened to, and so, they're taking two bites at the apple, and it's well settled law in South Carolina that you don't appeal from one circuit court judge to another, and that is what they are attempting to do, but getting to the merits of the motion to dismiss, she dismissed this case, Your Honor, because they lack standing, public interest standing, as they state, standing overall; she denied everything and said that they lack standing, and that's what we're asking Your Honor to do and to again dismiss it with prejudice, because how many times are we going to go in front of another circuit court judge arguing the exact same thing? If Your Honor were to pull the transcript it would be the exact same arguments over and over again, and so, again, I apologize for not objecting. That would probably be the proper way to handle it, but I didn't want to be rude to anyone, but suffice it to say that we stand on our motion to dismiss and believe it is well settled law.

THE COURT: Thank you, Mr. Rutherford. Based on what I have read so far it seems that these motions are all founded on the same legal principles in terms of why the Defendants are requesting this suit to be dismissed, but we do have three motions. So, I'll be happy to hear from the remaining lawyers for the other Defendants with regard to their motions if they feel that necessary.

MR. WOODINGTON: Your Honor for the Davidson Law Firm we don't have anything to add. We're basically a me too Defendant in this case.

THE COURT: All right, and let's see, Mr. Simmons, anything you'd

like to add?

MR. SIMMONS: Nothing, Your Honor, and I also represent Willoughby & Hoefer with Mr. Rutherford and Mr. Malloy. Thank you.

THE COURT: All right. Folks, there also are motions for – motion to intervene on my roster, but I don't see any representatives from Bamberg or Colleton County who made the motion. Can anybody shed some light on whether those motions are ripe to be heard this afternoon?

MR. RUTHERFORD: Your Honor, again, this is Todd Rutherford, and my computer had frozen. So, I'm going through the phone now. Can everybody hear me?

THE COURT: We can hear you, Mr. Rutherford.

MR. RUTHERFORD: Our contention would be that their motions to intervene hinge on our motion to dismiss, and we believe that if you would grant the motion to dismiss that the motions to intervene would be moot.

THE COURT: I understand that, and Mr. Smith, the motion that you have with regard to protection from discovery, is that in the same posture in terms of the motions to dismiss?

MR. SMITH: Your Honor, Emory Smith here, and I want to note that Chief Deputy Attorney General Jeff Young is with me.

MR. YOUNG: Hello, Your Honor.

MR. SMITH: And Solicitor General Bob Cook is listening in my phone. On that protection order, it's based upon the fact that the motions to dismiss are pending, and so, we have asked that discovery be stayed including in particular responding to requests for production until this Court rules on the pending motions to dismiss.

I would note, too, Your Honor, that we do have a motion to dismiss for the Attorney General's Office, and I wasn't sure exactly with the order of things whether there was going to be an additional response or argument regarding the Willoughby/Hoefer motion to dismiss, but I would like an opportunity to argue mine when you're ready to hear it.

THE COURT: Well, -- and this is one of the particular challenges of conducting court via WebEx with multiple lawyers and multiple motions. So, if I have gotten ahead of myself I apologize. Mr. Smith, I'll be happy to hear your motion with regard to the motion to dismiss.

MR. SMITH: Your Honor, I'm going to refer to our brief and also the Willoughby/Hoefer brief, and we concur with the legal argument in it, unless you would like for me to go through, I'm not going to go through everything in detail.

Our position is – well, first of all, let me say, they have set forth a lengthy chronology in the memorandum in opposition submitted by the Plaintiffs in this case. We believe that that's irrelevant, that the statutes in this case authorize the Attorney General to pay the money, which he did do.

We're also concerned that the chronology in the Plaintiffs' memorandum is presented in such a way to suggest that this was inappropriately handled. It was not, and they have mischaracterized things.

As a more minor example here, Your Honor, they have said repeatedly in filings in this court and of the Supreme Court that we objected to a hearing in this case on the temporary injunction motion on Tuesday. That is not correct. We agreed to the hearing on Tuesday.

When this matter first came up for scheduling I suggested that it be

heard that week on a Wednesday by Judge Newman, who was hearing something in another case about a different aspect of the settlement funds, and not Thursday afternoon because I had a conflict.

The conflict was, I had to put my dog into the veterinarian's office for surgery that morning, but when Judge McCaslin said she preferred Tuesday, she wasn't sure about Judge Newman's ability to take this matter up, we agreed to that. There has never been an objection, but they keep saying there was. There wasn't, but as for the merits, we – three judges, three circuit court judges, have upheld the authority of the Attorney General to pay fees from settlement proceeds, the Cepholan case, the Lilly case by Judges G. Thomas Cooper and Judge Couch, and most importantly in this case twice by Judge Lee in her order denying the temporary injunction and in her order denying the motion to alter or amend.

Those orders were regarding a motion for a temporary injunction, but she essentially addressed the merits in there. In a very firm way she found that the Attorney General had the authority to make these payments citing the various statutes that have been presented in these memoranda, and there's no way we believe, Your Honor, to depart from her rulings and depart from the rulings of the judges in the Cephalon and the Lilly cases, and the Attorney's General's payment of these fees should be upheld.

We also believe, Your Honor, that the Plaintiffs lack standing. They clearly lack constitutional standing, including taxpayer standing. Mr. Carpenter refers to the need for future guidance, which is a criteria for public importance standing, but on public importance standing, Your Honor, there has to be need for future guidance, and there is no need here.

He says, well, maybe they'll be other agreements, other settlement proceeds to pay from. That's already been decided by the Courts in Cephalon and the Eli Lilly and in this case by Judge Lee, and so, we believe that with these orders and the clear language of these statutes, Your Honor, that there is no need for further guidance and that this Court should dismiss this case for these reasons.

If I may, Your Honor, I'm going to – I'd like to put myself on mute for a moment and consult with the other counsel here, and I may be at the end of my argument.

THE COURT: Yes, sir, Mr. Smith. Take all of the time you need.

MR. SMITH: Your Honor, just very briefly. Standing -- the failure of standing causes this lawsuit to fail at the outset and deprives this Court of subject matter jurisdiction. Not only do they fail as a constitutional standing and public interest standing, they also fail because they don't have derivative standing, which was a somewhat peculiar argument they made. They based it upon cases involving counties, not involving the State.

The Attorney General has been recognized over and over by the Supreme Court as being the State's chief legal officer. He had authority to act for the State with respect to these attorneys' fees. The Plaintiffs are not – were not a party to the case which resulted in these fees, nor were they a party for the settlement agreement. The Attorney General had authority to act as he did.

They have no authority to step into his shoes, the shoes of the State legal officer, and act here. So, for these reasons, this failure of standing, which deprives this Court of a case of controversy and subject matter

jurisdiction, we believe that it should be dismissed, but if this Court believes that it should go to the merits of the legal issues, we believe we win there for all of the reasons set forth in our memoranda, and Willoughby & Hoefer has covered it thoroughly in theirs as well, Your Honor.

If you have any questions I'll be glad to answer them; otherwise, that's the conclusion of my argument right now subject to any right of reply.

THE COURT: Thank you, Mr. Smith. Mr. Griffin or Mr. Carpenter, I'll be happy to hear from either or both of you.

MR. GRIFFIN: Thank you, Your Honor. I'll address all of the standing and Mr. Carpenter will address the standing (sic), but back to the law of the case doctrine which Mr. Rutherford repeated in argument previously, and we have heard the same from Mr. Smith, in our brief in page seven and eight we address this issue; that would direct the Court's attention to the University of Texas v. Camenisch decision, a 1981 decision from the U.S. Supreme Court, which – which explained that given the haste that is often necessary when addressing a motion for preliminary injunction the findings of fact and conclusions of law made by a Court are not binding at trial on the merits. I mean, we're not even at the trial on the merits, but we are at that merits state on a motion to dismiss, and the U.S. Supreme Court, in applying the federal rules, -- we have adopted the – our State rules are patterned after the federal rules and is persuasive authority. I explained the Shirley Iron Works, which is really on all fours there. Both – two judges had ruled -- one said it was the law of the case – that there's no claim for attorneys' fees or interest because it's a tort case.

Judge Few at the trial court level, when he was a trial court judge, he

likewise ruled it was a tort case. It goes up to the Supreme Court, and the City argues, well, there's been rulings it's a tort case, and the Supreme Court said, no, the only ruling was a motion to strike attorneys' fees, and it was granted. That's not the ruling the – the ruling that was premised upon is not law of the case. It's exactly what they're doing here. Oh, Judge Lee ruled that there's no standing and there's no claim, and therefore, that's the law of the case. No, Judge Lee ruled that the Plaintiffs are not entitled to preliminary injunction. That's the law of the case, no more, no less.

We also cited Rule 54 of the South Carolina Rules of Civil Procedure, which says, In the absence of the Court directing entry of a final judgment as to one or more but fewer than all claims, any order or other form of decision, however adjudicated, however designated, which adjudicates fewer than all claims shall not terminate the action as to any of the claims. The order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and rights and liabilities of all of the parties. That's Rule 54(b), which we cite on page seven.

We also point out that this motion that Your Honor is hearing, Judge Griffin, which – Judge Griffin, I enjoy staying that. I'll never be able to say it to myself, but the motion that – that is pending before Your Honor, they filed it right on the heals of Judge Lee's ruling. They sent it to Judge Lee, and they asked her to rule on it, and we have attached her reply in our response where she refused.

Not only did she refuse to rule on the – on that motion to dismiss, but she had the opportunity to direct entry of judgment for the Defendants, which she did not do, and so, you are not – we are not appealing Judge

Lee's rulings to Your Honor. They were not law of the case.

We are not asking you to address her ruling with regard to denial of our motion for preliminary injunction, end of story. That's as far as the law of the case goes in this matter.

With regard to prior decisions, Your Honor, the issue that's pending before the Court has never been addressed in a prior case. The Cephalon case is – was – that's Judge Cooper's case, as Mr. Carpenter said before, and I look at page 13 of – 13 and 14 of – well, maybe that's just how it's printed out, but the – in the Cephalon case Judge Cooper says, with regard – he concludes that it's appropriate for the Attorney General to hire outside counsel on a contingency fee contingent agreement, but significantly he says, the litigation retention agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the fees he will ultimately see the Court approve and provides notice that any fee that is approved by the Court will be paid from outside counsel's contingent fee rather than the State's recovery, and so, -- and he also says that the contingency fee agreement operates as a cap on the amount of fees that the Attorney General may seek from the Defendant in the litigation. He does not address the question of, does the Attorney General have unfettered discretion to award an amount of attorneys' fees to outside counsel without – without following the dictates of 150(b) that we rely upon.

The Eli Lilly decision is further afield than that. In the Eli Lilly case, which was before Judge Crouch, the issue before Judge Crouch was, should counsel – outside counsel be disqualified because it's unconstitutional; it

violates their due process rights and a host of other reasons, and basically the holding from Eli Lilly is that their argument is speculative and not ripe for adjudication, and Judge Crouch said, Section 1-7-150 gives the Attorney General the right to withhold certain funds from the proceedings. There's been no recovery at this time, and there's no showing that – any investigative costs, and therefore, -- and there's no showing that the Defendants have shown any prejudice.

What Judge Crouch does not address, and you know, the issue in this case, is, can the Attorney General take funds that were part of a settlement to be paid to the State of South Carolina and have unfettered discretion to pay attorneys of his choosing, percentage amounts of his choosing without any supervision; 150 says specifically, "All funds received by judgment or settlement shall be deposited in the State's general fund." Then, the exception, "... exception for investigative costs and litigation costs awarded by Court Order or settlement," and we pled that there's been no award of fees by a Court, and the settlement agreement does not award any attorneys' fees. Frankly, the settlement agreement says on its face, "Each party shall be responsible for their own fees and costs," end of story.

There's a lot of other arguments made in the briefs that we have addressed in our briefs, and I won't repeat them here, Your Honor, but I would just want to be clear for the record that we're not abandoning any of the arguments in our briefs, and we are incorporating them, and I'm sure Your Honor has spent the time to read everything, and I won't – but if you have any questions about any of the arguments on the merits of the case I'll be happy to answer them, and otherwise, I'll pass it off to Mr. Carpenter to

address their arguments on standing.

THE COURT: Thank you, Mr. Griffin, and certainly, I wouldn't take your failure to argue any points raised in any brief or memorandum as abandoning those arguments. So, don't worry about that. I'm going to certainly reread all of the items which were submitted for my review before I make a final decision.

So, just because it wasn't argued on the record doesn't mean the argument has been abandoned. So, don't worry about that. Mr. Carpenter, I would be happy to hear from you with regard to any other matters on this issue.

MR. CARPENTER: Your Honor, I just reiterate the Adams v. McMaster case sets out the three-part test, and we think we have – for reasons stated before we think we have met the three-part test for public important standing.

This is an issue of great public importance, because it involves $75 million that belongs to the State of South Carolina, if -- in effect appropriated by the Attorney General and not by the General Assembly, and we think this is an issue of great public importance.

Judge Cooper said in his order that's been cited so many times, there is no appellate court ruling. Despite all of the claims by the representative of the Attorney General and the other defense counsel, there is no appellate court ruling in this state that addresses whether the Attorney General has unfettered discretion in how much he pays on a contingency basis from public funds.

The statute referenced by Mr. Griffin, 1-7-150, says that it has to be

awarded by Court Order. Judge Cooper's case talks about the Court approving the attorneys' fees, and we also cited the Layman case, which they had a contingency fee agreement. This was the case where several prominent attorneys from Columbia represented retirees, and there was an issue about how the retirees' benefits were calculated, and they had a contingency – allegedly had a contingency fee agreement with the retirees that would have gotten them several million dollars in attorneys' fees, and the Supreme Court did not accept that contingency fee but made them justify their work on an hourly basis, and it used the Lodestar analysis, gave them a multiplier I think of 1.25 percent, but they made them justify it on an hourly basis, and that is the appropriate methodology.

We referenced in our brief where the Supreme Court says, whether it is on a statute that requires the payment of the fees from one side going to the other or whether it's the common fund method, the essential factor is that it must be a reasonable fees, and our contention here is that what the Attorney General has awarded to these private attorneys is far, far in excess of anything that would be reasonable under any Lodestar analysis, and we think this is an issue of great public importance and needs to be addressed by the Courts of this State; therefore, we believe that public importance standing is appropriate for the Plaintiffs.

THE COURT: Mr. Smith, any reply?

MR. SMITH: Yes, Your Honor. The Order of Judge Lee, regardless of whether it's the law of the case, -- even assuming that it's not the law of the case, it was certainly her ruling, her opinion, of the merits of this case and the lack of standing.

It was a – she did not simply say, motion denied. She gave specific reasons why, including the lack of standing and the lack of merit of the case, the lack of likelihood of success on the merits of the case.

Standing doesn't change, standing during the suit. The failure to have standing at the outset of this suit when she heard the motion is still present today, and she ruled, Your Honor, in effect on the merits. She said, the Attorney General is the State's chief legal officer, and he properly exercised his authority to contract with the W and A law firm and to pay them pursuant to that contract from the settlement proceeds.

She said, contrary to Plaintiff's assertion, the fees were awarded by settlement under 1-7-50. She said, the settlement provided that each party bears its own fees thereby allowing payment to be made from settlement proceeds, and the understanding is ratified by the parties to the settlement in the agreement to voluntarily dismiss the appeal filed with the federal court, which states that the settlement agreement is inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from the payment of the settlement amount.

Plaintiffs apply a strained hypertechnical reading to these statutes. Judge Lee did not see it that way. The ordinary rule of statutory construction is you give statutes a reasonable construction consistent with legislative intent. The legislature clearly authorized the Attorney General to pay these fees from this settlement. He had a contingency fee contract to pay it. The Cephalon case and the Lilly case support the Attorney General's payment of settlement – attorneys' fees from settlement agreements.

I believe in one of those agreements it did require Court approval or

state that that would be done. It was not a requirement in this one. It's not imposed by statute. There's no requirement that the Court review and pass on the fees here. They were a contract. The Attorney General has the right to honor that contract and for his office to make that payment pursuant to it.

We – there is no reason for a hearing on the merits beyond what we're hearing today. Judge Lee covered it all in her order. It's a statutory question applied to this case, and we believe that the Court should dismiss it.

If you would – oh, and one other brief point. They said that she refused to rule on the motion to dismiss. They didn't tell you the whole story there. The reason why she said she was not going to rule on the motion to dismiss is because she had not yet ruled on the Rule 59 motion to alter or amend. She later did that just before Christmas, and she denied that motion affirming what she had previously ruled.

So, she has twice ruled against them on the standing and on the merits, and we respectfully request that Your Honor do so also. If I may just briefly consult with the – I think I'm done, Your Honor.

THE COURT: Yes, sir.

MR. SMITH: Thank you, Your Honor. That's all for now.

THE COURT: All right. Thank you, Mr. Smith. Now, folks, are there any other matters with regard to this particular case that we need to take up before we adjourn this hearing?

MR. SMITH: Your Honor, if – Emory Smith again. On that motion for protective order, we would ask that Your Honor issue a protective order for

purposes of discovery until Your Honor rules on the motions to dismiss in this case.

THE COURT: All right, and I was going to do that, Mr. Smith. I'm going to take the matters under advisement. I'll have a decision by February 12, which is a couple of Fridays from now, and while these motions to dismiss are under advisement any pending motions and discovery will be stayed until the Court makes a decision on the outstanding motions to dismiss.

MR. GRIFFIN: Your Honor, may I ask one point of clarification, please?

THE COURT: Yes, sir.

MR. GRIFFIN: The South Carolina Public Interest Foundation has submitted a FOIA request to the Attorney General under FOIA. We paid -- we got a response. They said, send us $70 so we can research. My question to you is, we think that your order of protection is not intended to preclude the South Carolina Public Interest Foundation from pursuing its rights under FOIA; would I be fair in that assumption?

THE COURT: Yes, sir, Mr. Griffin. I think the FOIA request is separate and apart from the motions and the discovery in the civil case. So, any FOIA requests which were appropriately made can be responded to. Certainly, if there's anything that the Attorney General's Office believes to be not subject to FOIA they can certainly serve those defenses to the FOIA requests, but my protection order just covers any further motion hearings and the discovery while this matter is outstanding, and hopefully, I'll have a decision before February 12. I'm just giving myself an absolute deadline, so

I don't let this matter sit and get stale. I try to get my rulings out quickly, so I don't leave lawyers wondering whether I'm going to ever get to their matter. So, that February 12 deadline is more for my calendaring purposes. I hope to have it decided before then.

MR. SMITH: Thank you, Your Honor.

THE COURT: Yes, sir. Thank everyone. Thank y'all for being patient as we deal with these technology issues. Sometimes they are a pretty high hurdle to overcome. So, I appreciate everybody's patience and flexibility and willingness to make this thing happen this afternoon. So, thank y'all very much.

MR. MALLOY: Thank you, Your Honor.

THE COURT: Yes, sir. This matter is adjourned.

--- END OF TRANSCRIPT OF RECORD ---

I, the undersigned, T. Dayton Grainger, Jr., Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case via WebEx, on the 26th Day of January, 2021.

I do further certify that I am neither of kin, counsel or interest to any party.

April 8, 2021



T. Dayton Grainger, Jr.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
R. Kirk Griffin, Circuit Court Judge
Circuit Court Case 2020CP4004603

Appellate Case No. 2021-000343

South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, ... Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A. , ... Respondents,

---

RETURN OF ATTORNEY GENERAL TO APPELLANTS' MOTION FOR CERTIFICATION

Alan Wilson, Attorney General for the State of South Carolina, concurs only that Certification is appropriate; however, he disagrees with many of the factual allegations and legal arguments in Appellants' Motion and Memorandum and will not address them now as they have no bearing on whether certification should be granted.

Respectfully submitted,

/s J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

[Signature block continues next page]

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211)
(803) 734-3680; (803)734-3677 (Fax)
esmith@scag.gov

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

May 24, 2021

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EXHIBIT 6

Record on Appeal, Vols. One & Two
S. C. Pub. Interest Found. v. Wilson et al.,
No. 2021-00343 (S.C. Sup. Ct. Oct. 25, 2021)

PART 2
VOLUME TWO, Part 1

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,

Respondents.

RECORD ON APPEAL
VOLUME TWO

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J. Emory Smith, Jr., S.C. Bar No. 5262
Alan Wilson, S.C. Bar No. 71754
Robert D. Cook, S.C. Bar No. 1373
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29211
Tel. (803) 734-3680

Attorneys for Respondent Attorney General

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
Tel. (803)779-4600

J. Todd Rutherford, S.C. Bar No. 12097
RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
(803) 256-3003

Gerald Malloy, S.C. Bar No.12033
MALLOY LAW FIRM
P.O. Box 1200
Hartsville, South Carolina 29551
(843) 339-3000

Attorneys for Respondent Willoughby & Hoefer, P.A.

James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
P.O. Box 999 (29202)
Tel. (803) 744-0800

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 East North Street
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083

Attorneys for Appellants

Kenneth P. Woodington, S.C. Bar No. 6213
DAVIDSON, WREN & DEMASTERS, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Attorneys for Respondent Davidson, Wren & DeMasters, P.A.

October 25, 2021

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EXHIBIT 1

Agreement for Dismissal

State of SC v. U.S.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE OF SOUTH CAROLINA,	)	
	)	
Appellant,	)	
	)	
v.	)	19-2324
	)	
THE UNITED STATES,	)	
	)	
Appellee.	)	

AGREEMENT TO VOLUNTARY DISMISSAL OF APPEAL

Pursuant to Rule 42 of the Federal Rules of Appellate Procedure, appellant, the State of South Carolina, and appellee, the United States, stipulate and agree that this appeal should be dismissed with prejudice, with each side to bear its own costs.

This dismissal is made as part of an agreement to resolve and settle a number of disputes, including the issue presented on appeal. The settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs. Such payment has been made, and with this requirement now being satisfied, the parties request dismissal of this appeal with prejudice.

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Respectfully submitted,

Of Counsel:

Alan Wilson
South Carolina Attorney General
Robert D. Cook
Solicitor General
ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA
Post Office Box 11549
Columbia, South Carolina 29211-1549
awilson@scag.gov
bcook@scag.gov
Telephone: (803) 734-3970
Facsimile: (803) 734-3524

Attorney of Record:

/s/Randolph R. Lowell
Randolph R. Lowell
John W. Roberts
WILLOUGHBY & HOEFER, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
rlowell@willoughbyhoefer.com
jroberts@willoughbyhoefer.com
Telephone: (843) 619-4426
Facsimile: (843) 619-4430

Attorneys for Appellant

September 29, 2020

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Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Tara K. Hogan
TARA K. HOGAN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-2228
Tara.Hogan@usdoj.gov

Attorneys for Appellee

September 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Randolph R. Lowell
Randolph R. Lowell
Counsel for Plaintiff-Appellant

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 155 words, according to the count of Microsoft Word.

/s/Randolph R. Lowell
Randolph R. Lowell

EXHIBIT 2

Executive Budget Office Approval

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admin
THE SOUTH CAROLINA DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

This form is used to request an interim increase of Other Funds budget authorization. Approval is subject to the review of the Joint Other Funds Oversight Committee and the approval of the Executive Budget Office. A budget entry in SCEIS should accompany this request.

AGENCY: E200 - Attorney General **DATE**: 9/17/2020

AMOUNT REQUESTED: 75,000,000.00

Please provide responses to the questions below. Attached additional documentation if necessary.

1. Please provide a description of your request.

   RESPONSE: One-time other funds authorization increase to support the payment of outside counsel fees and litigation cost in the U.S. Department of Energeny v. State of SC settlment agreement. All supporting documentation is attached.

2. What expenses will be paid with this requested authorization?

   RESPONSE: Cost and fees for civil litigation-USDOE v. State of SC settlement agreement

3. What funding source will be used to fulfill this request?

   RESPONSE: Other funds received from USDOE settlement agreement

4. Why is the agency's existing Other Funds authorization level not sufficient to cover this request? Why was this authorization not requested during the previous budget cycle?

   RESPONSE: This is a very sustancial one time litigation settlement requiring payment far beyond the agency's current level of other funds authorization.

5. Is all or part of the expenditure authorization supported by actual cash received and brought forward from the previous fiscal year?

   RESPONSE: No, all current funds

6. Is all or part of the expenditure authorization request supported by an increase in projected revenue? If yes, explain in detail.

   RESPONSE: Yes, increase in revenue of other funds due to settlement agreement (600.42m). Agency will be retaining between 10-15m from settlement for cost, fees and fines and all ther funds will be disbursed to outside counsel (75m) and State Litigation Recovery Account (remainder).

7. Is this request for a recurring initiative or a one-time request? ☐ Recurring ☒ One-time

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admin
THE SOUTH CAROLINA DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

8. If this is a recurring initiative, has additional authority been requested in the budget cycle for the upcoming fiscal year? ☐ Yes ☒ No

9. **Cabinet Agencies:** Has this request been reviewed with the Governor's Office? ☐ Yes ☒ No

AGENCY CERTIFICATION

The agency certifies that the cash identified is sufficient and available. The agency also acknowledges that, if approved, this adjustment is only in effect until the end of the current fiscal year.

9-17-2020

Authorized Agency Representative / Date

JOINT OTHER FUNDS OVERSIGHT COMMITTEE RECOMMENDATION

APPROVE	DISAPPROVE	MEETING DATE
☐	☐	

EXECUTIVE BUDGET OFFICE RECOMMENDATION

APPROVE	DISAPPROVE	SIGNATURE	DATE
☒	☐		
		ANALYST, EXECUTIVE BUDGET OFFICE	
		Brian J. Gaines	9/25/2020
		DIRECTOR, EXECUTIVE BUDGET OFFICE	

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Emory Smith

From: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Sent: Friday, September 25, 2020 9:13 AM
To: Kim Buckley
Subject: RE: [External] FW: MOX

It has been approved. Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account. Will you let me know when this is done?

Lauren Parker Wright
Budget/Research Analyst, Executive Budget Office

The South Carolina
Department of Administration
1205 Pendleton Street, Suite 529, Columbia, SC 29201
(803) 734-7216 | (803) 734-0645 fax

The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.

-----Original Message-----
From: Kim Buckley <KBuckley@scag.gov>
Sent: Thursday, September 24, 2020 5:17 PM
To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Subject: Re: [External] FW: MOX

Thanks, Lauren. I think the Chief Deputy AG may be reaching out to Brian to check on the status. He asked for his contact info. Just to give a heads up. I know these things take time and relayed that to them. They have been asking me daily. Appreciate your help with this!

Kim

Sent from my iPhone

> On Sep 24, 2020, at 3:32 PM, Parker, Lauren <Lauren.Parker@admin.sc.gov> wrote:
>
> I believe we are waiting on the higher ups- as soon as I hear anything I'll let you know. I have no idea why its taking so long.
>
> Lauren Parker Wright
> Budget/Research Analyst, Executive Budget Office
>
> The South Carolina
> Department of Administration
> 1205 Pendleton Street, Suite 529, Columbia, SC 29201
> (803) 734-7216 | (803) 734-0645 fax
>

> The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.
>
> -----Original Message-----
> From: Kim Buckley <KBuckley@scag.gov>
> Sent: Thursday, September 24, 2020 3:31 PM
> To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
> Subject: [External] FW: MOX
>
> Lauren,
>
> I hope you are doing well. So sorry to bother but has there been any movement on authorization approval?
>
> Best,
>
> Kimberly Buckley
> Finance Director
> SC Attorney General's Office
> 803-734-3771
> kbuckley@scag.gov
>
>

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EXHIBIT 3

Cephalon Order

The Honorable G. Thomas Cooper

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007317

Cephalon Inc
PLAINTIFF(S)

Alan Wilson
South Carolina State Attorney General
DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **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

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

RICHLAND COUNTY FILED 2014 JUN -6 PM 12:36

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Stephen F. McKinney
I.S. Leevy Johnson
Sarah Patrick Spruill
Brian James Kern
Kenneth M. Suggs
John W. McIntosh
James Todd Rutherford

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

SCRCP Form 4C (10/2011)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
CEPHALON, INC.,	)	Civil Action No.: 2012-CP-40-07317
Plaintiff,	)	
v.	)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
ALAN WILSON, in his capacity as Attorney General for the State of South Carolina,	)	
Defendant.	)	

RICHLAND COUNTY FILED
2014 JUN -6 PM 3:37
JEANETTE W. WALKER C.C.P. & G.S.

THIS CAUSE came before me on cross-motions for summary judgment. Oral argument was heard on April 21, 2014. After considering the arguments of both parties, I hereby **GRANT** the Attorney General's motion for summary judgment and **DENY** Cephalon's motion for summary judgment.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Rule 56(c), SCRCP. In the matter before me there are no genuine issues of material fact. The only disputed issues are questions of law.

Having carefully considered the motions and memoranda of law submitted by the parties as well as the arguments of counsel, I find as follows:

FACTUAL BACKGROUND

Following unsuccessful settlement negotiations between Cephalon, Inc. ("Cephalon"), a pharmaceutical company, and the Attorney General's Office, Attorney General Alan Wilson filed suit on behalf of the State of South Carolina on June 2, 2011 seeking damages, equitable remedies and civil penalties under the South Carolina Unfair Trade Practices Act ("SCUTPA"). This complaint was filed

SCANNED

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solely by the Attorney General and his staff. Cephalon answered on July 5, 2011. On July 26, 2011 the Attorney General entered into a Litigation Retention Agreement with outside counsel.[1] On February 13, 2012, the Attorney General, with outside counsel, filed an Amended Complaint that added a claim for damages on behalf of the State Health Plan. The original claims, remedies, and causes of action were unchanged.

Cephalon filed the present Declaratory Judgment action on October 30, 2012. Specifically, Cephalon seeks a declaration that its due process rights are violated by the contingent fee arrangement in place in the Attorney General's enforcement action, a declaration that the allocation of fees violates the separation of powers doctrine, and an injunction barring prosecution of the enforcement action by the Attorney General and outside counsel under the Litigation Retention Agreement. Both parties moved for summary judgment on Cephalon's claims.

Cephalon advances several arguments as to why the Litigation Retention Agreement violates its constitutional rights. First, Cephalon argues that because the enforcement action is akin to a criminal proceeding, any use of contingent fee counsel is a *per se* violation of due process. Second, even if the enforcement action is not akin to a criminal proceeding, outside counsel must be subject to the control of neutral and conflict-free government lawyers, and the Attorney General's financial interest in the litigation's outcome invalidates his neutrality. Finally, Cephalon asserts that both the Attorney General's retention of attorneys' fees and payment of attorneys' fees to outside counsel does not comply with South Carolina law and thus violates separation of powers.

The Attorney General argues that the enforcement action against Cephalon is not a criminal prosecution, as his claims under SCUTPA are designated as civil by the General Assembly and not so punitive in effect as to be deemed criminal. Further, even if the enforcement action is quasi-criminal in nature, the use of contingency fee counsel is not prohibited *per se*, and both the provisions of the

[1] The agreement is entitled, "Litigation Retention Agreement with Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq." Special counsels are Kenneth M. Suggs of Janet, Jenner & Suggs, LLC and J. Todd Rutherford of the Rutherford Law Firm.

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Litigation Retention Agreement and the Attorney General's actual control over the litigation satisfy the heightened level of neutrality required in a quasi-criminal case. Finally, the Attorney General maintains that South Carolina law permits the Attorney General to retain attorneys' fees and pay attorneys' fees to outside counsel directly from any recovery, and therefore there is no separation of powers issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons set forth in greater detail below, I agree with the Attorney General that his enforcement action against Cephalon is civil in nature, that he has maintained the requisite control over outside counsel in the handling of that litigation, and that the Attorney General may withhold attorneys' fees from any recovery both for his Office and for outside counsel. I find that based on the facts and the record in this case, there has been no violation of either Cephalon's due process rights under the Federal or State constitutions or the separation of powers doctrine.

A. The Attorney General's Enforcement Action Against Cephalon Is Civil in Nature

Cephalon argues that the underlying case, though nominally civil, is akin to a criminal proceeding because civil penalties are sought pursuant to the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.* The Attorney General maintains that the clear language of the statute demonstrates the General Assembly's intent to provide for civil, not criminal, remedies and the civil penalties available under SCUTPA do not transform the statute into a criminal one.

In determining whether a statutory scheme is criminal or civil, the South Carolina Supreme Court articulated: "a court looks at the face of a statute to determine if it establishes a criminal or civil penalty, and then determines if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty." *State v. Price*, 333 S.C. 267, 271, 510 S.E.2d 215, 218 (1998) (citing *Hudson v. United States*, 522 U.S. 93 (1997)).

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i. The General Assembly clearly and unambiguously intended SCUTPA to be a civil statute.

It is clear that the General Assembly wrote SCUTPA as a civil statute providing civil remedies. The penalties for willful violations of SCUTPA that Cephalon complains about are expressly referred to as civil, not criminal. *See* S.C. Code § 39-5-110(a); *see also Hudson*, 522 U.S. at 103 (finding an action by the Office of the Comptroller of the Currency was civil in nature, in part, because "both [statutes], which authorize the imposition of monetary penalties for violations . . . expressly provide that such penalties are 'civil.'"). These penalties are only awarded where the court finds that an entity either knew or should have known that its conduct was a violation of SCUTPA and the Attorney General petitions the court to award civil penalties. S.C. Code § 39-5-110(a). The injunctive relief available to the Attorney General is sought by filing an action in the court of common pleas. *See* S.C. Code § 39-5-50(a). If such an injunction is violated, the court of common pleas retains jurisdiction to award additional civil penalties. *See* S.C. Code § 39-5-110(b). The Attorney General has the right under SCUTPA to accept assurances of voluntary compliance, as long as those assurances are in writing and filed with and, importantly, subject to the approval of the court of common pleas. *See* S.C. Code § 39-5-60. Actions to enforce or to challenge investigative demands served by the Attorney General are filed in the court of common pleas. *See* S.C. Code §§ 39-5-70; 39-5-100. SCUTPA was codified as part of Title 39, entitled Trade and Commerce, rather than with Title 16, Crime and Offenses. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (the State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State]'s probate code, instead of the criminal code."). These and other provisions of SCUTPA all demonstrate that the General Assembly intended actions brought by the Attorney General under SCUTPA, and the civil penalties available in certain cases, as purely civil in nature.

ii. SCUTPA is not so punitive in purpose and effect as to overrule the General Assembly's clear and unambiguous intent.

Because I find the General Assembly intended SCUTPA to be a civil statute with civil remedies, the question then is whether that statutory scheme is so punitive in purpose and effect that the legislature's

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intent should be overridden. "Only the ***clearest proof*** will suffice to override legislative intent." ***In re Justin B.***, 405 S.C. 391, 399, 747 S.E.2d 774, 778 (2013) (citing *Smith v. Doe*, 538 U.S. 84, 92(2003)) (emphasis added). I find that the penalties available under SCUTPA and sought in the underlying case are not so punitive in purpose and effect that the unambiguous legislative intent to create a civil remedy should be overridden.

The Supreme Court has outlined several factors that may be considered in determining whether, subject to the clearest proof, a civil regulatory scheme has been transformed into a scheme that imposes a criminal penalty:

(1) "[w]hether the sanction involves an affirmative disability or restraint";
(2) "whether it has historically been regarded as punishment";
(3) "whether it comes into play only on a finding of *scienter*";
(4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";
(5) "whether the behavior to which it applies is already a crime";
(6) "whether an alternative purpose to which it may rationally be connected in assignable for it"; and
(7) "whether it appears excessive in relation to the alternative purpose assigned."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). The Supreme Court has instructed that "these factors must be considered in relation to the statute on its face." *Id.* at 169. Further, these factors are neither "exhaustive nor dispositive," but are instead "useful guideposts." *Smith*, 538 U.S. at 97. After carefully considering these factors and the arguments of both parties, I find that Cephalon has not shown by clearest proof that SCUTPA is "so punitive in effect as to negate the intention to deem it civil." *See Justin B.*, 405 S.C. at 405, 747 S.E.2d at 781 (citing *Hendricks*, 521 U.S. at 361).

As to the first factor, SCUTPA does not impose an affirmative disability or restraint. SCTUPA "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. Regardless of the outcome of the enforcement action against Cephalon, no one will be or can be imprisoned as a result of that litigation. Cephalon argues that the injunctive relief sought in the enforcement action constitutes a disability or restraint. This argument fails for three primary reasons. First, the Attorney General seeks a permanent

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injunction only to prohibit Cephalon from committing further violations of SCUTPA. Second, Cephalon is not subject to any physical restraint, nor does an injunction "'resemble imprisonment,' the archetypal affirmative disability." *Justin B.*, 405 S.C. at 406, 747 S.E.2d at 782. Lastly, the Supreme Court has already ruled that the "sanction[] of occupational debarment" is nonpunitive. *Smith*, 538 U.S. at 86; *see also Hudson*, 522 U.S. at 94 ("While petitioners have been prohibited from further participating in the banking industry, this is 'certainly nothing approaching the "infamous punishment" of imprisonment.'") (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

With regard to the second factor, Cephalon argues that the civil penalties sought by the Attorney General under S.C. Code § 39-5-110 of up to $5,000 per violation have been historically regarded as punishment. Cephalon is incorrect; the Supreme Court has again made clear that "neither money penalties nor debarment has historically been viewed as punishment." *Hudson*, 522 U.S. at 104.

Cephalon is correct that civil penalties can only be assessed upon a finding by the court that it "knew or should have known that [its] conduct was a violation of Section 39-5-20." S.C. Code § 39-5-110. However, *scienter* is not required for a threshold finding that Cephalon violated SCUTPA or the entry of a permanent injunction against Cephalon for future unfair or deceptive acts and practices. As in *Smith*, this factor is "of little weight in this case." *Smith*, 538 U.S. at 87. Analyzing the fifth factor—whether Cephalon's behavior is a crime—I agree that the Attorney General has alleged that Cephalon's marketing and promotion of its drugs for off-label uses is illegal under federal law and resulted in a federal guilty plea. Again however, this factor is of "little weight" and does not rise to the level of clear proof necessary to override the General Assembly's clear intent to craft SCUTPA as a civil statute.

The fourth and sixth *Mendoza-Martinez* factors are closely linked. While Cephalon is correct that the Attorney General's enforcement of SCUTPA may indeed deter individuals and corporations from engaging in unfair or deceptive trade practices, this is far from dispositive. "[T]he mere presence of a deterrent purpose does not render a sanction 'criminal.'" *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778 (citing *Smith*, 538 U.S. at 102). "Though deterrence may serve criminal goals, the principle may also

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support civil goals." *Justin B.*, 405 S.C. at 407, 747 S.E.2d at 782. Indeed, "to find that the mere presence of a deterrent purpose rendered a sanction 'criminal,' would severely undermine the state's ability to engage in effective regulation." *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778; *see also Hudson*, 522 U.S. at 105 ("To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation[.]"). The presence of a deterrent purpose in SCUTPA is in support of civil, not criminal, goals.

SCUTPA has an undeniable connection to a clear nonpunitive purpose—protecting the public from unfairness and deception. *See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) ("The legislature intended in enacting the UTPA to control and eliminate 'the large scale use of unfair and deceptive trade practices within the state of South Carolina.'") (citation omitted). Indeed, the Attorney General is required, prior to commencing an action seeking injunctive relief, to have reasonable cause to believe that such an action "would be in the public interest." S.C. Code § 39-5-50; *see also* S.C. Code § 39-5-70 (authorizing the Attorney General to serve an investigative demand "when he believes it to be in the public interests that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article[.]"). Similarly, a private individual must show, in order to recover under SCUTPA, that the defendant's "unfair or deceptive act affected [the] public interest." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)). The public interest purpose of SCUTPA, as recognized by both the statutes and the courts of this state, is nonpunitive.[2]

[2] Even if SCUTPA is not narrowly drawn to achieve this purpose, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103; *see also Justin B.*, 405 S.C. at 407, 747 S.E.2d at 783 ("Perhaps the General Assembly could have created a scheme more narrow in scope and still accomplished its non-punitive purpose. Perhaps it could not have. In any event, however, a statute is not deemed punitive due to the absence of a 'close or perfect' fit with its non-punitive purpose.") (citing *Smith*, 538 U.S. at 103).

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The last factor, whether the sanction is excessive in relation to the nonpunitive purpose, also does not transform SCUTPA into a criminal statute. SCUTPA provides for a maximum civil penalty of $5,000 per violation. S.C. Code § 39-5-110(a). This penalty only arises for violations which are willful—that is, when the offender knew or should have known that its conduct was an unfair or deceptive trade practice. S.C. Code § 39-5-110(c). While Cephalon is greatly concerned with the magnitude of a penalty award, there is no evidence in the record in this case as to how many violations of SCUTPA may have occurred. While a court may award the maximum penalty per violation, a court may award far less depending on the severity of the conduct. As no penalties have yet to be awarded in the enforcement case against Cephalon, a consideration of the possible total amount of penalty is premature. The injunctive relief available to and sought by the Attorney General in the underlying case is, pursuant to § 39-5-50, is limited to enjoining continued unfair and deceptive acts or practices. Given the importance of the nonpunitive purpose of SCUTPA, these sanctions are not excessive.

The General Assembly drafted SCUTPA with the unambiguous intent that it be a civil, not criminal, statute. Cephalon has not shown, with the clear proof needed, that SCUTPA is so punitive in both purpose and effect that the Attorney General's enforcement action should be treated as a criminal or quasi-criminal case. I find that the enforcement action against Cephalon is a civil proceeding.

B. The Attorney General Has the Authority to Appoint and Compensate Special Counsel on a Contingency Fee Basis

South Carolina Code § 1-7-170 provides that the Attorney General shall approve the engagement of any attorney on a fee basis by any department of agency of state government. The statute further provides that the Attorney General must approve the fee to be paid to an attorney so engaged. S.C. Code § 1-7-170. In addition, § 1-7-85 permits the Attorney General to "obtain reimbursements for its costs . . . in representing the State and its officers and agencies in civil and administrative proceedings." In that statute, costs are defined to include attorneys' fees. S.C. Code § 1-7-85. However, the Attorney General's ability in this regard is not created solely by these statutes. As the South Carolina Supreme

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Court recognized in the case of *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 447-48 (1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State.

While the South Carolina appellate courts have not directly considered the Attorney General's right to appoint special counsel on a contingency fee basis, the appellate courts of other states have expressly approved of such an arrangement. In *West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 651 (W.Va. 2013), the Supreme Court of West Virginia held that "the Attorney General has common law authority to provide for compensation to be paid to special assistant attorneys general through a court-approved award of attorney's fees taken directly from the losing opponent in the litigation." Similarly, the Supreme Court of Rhode Island held that,

> [T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view that the ability of the Attorney General to enter into such relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable.

Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 475 (R.I. 2008) (internal quotes and citations omitted). The Supreme Court of Missouri reached the same conclusion in *Missouri ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000), holding that, "[i]n the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general."

In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case.

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C. Cephalon's Rights to Due Process Are Not Violated by the Attorney General's Use of Outside Counsel on a Contingency Fee Basis.

Although largely abandoned by Cephalon in its briefing on the cross-motions for summary judgment, because Cephalon's complaint raises the issue of whether the Attorney General is constitutionally permitted to use outside counsel on a contingency fee basis in the enforcement action against Cephalon, I address the issue here and find that no due process violation has occurred.

The parties disagree as to the standard of neutrality required of the Attorney General in both civil enforcement actions and quasi-criminal enforcement actions. The Litigation Retention Agreement provides adequate safeguards which require control over the litigation by the Attorney General. Because the Attorney General has exercised actual control over this litigation throughout, I find that the Attorney General's retention of outside counsel on a contingency fee basis does not violate Cephalon's constitutional right to due process.

i. There is no *per se* ban on the use of contingency fee counsel in enforcement actions and such arrangements are proper as long as the Attorney General retains control of the litigation.

Cephalon argues that an Attorney General's contingency fee arrangement with outside counsel in cases that are akin to criminal proceedings is a *per se* violation of due process. I have already ruled that the enforcement action brought by the Attorney General against Cephalon is civil in nature. However, even assuming *arguendo* that the enforcement proceedings are quasi-criminal in nature, Cephalon is incorrect as to what the law requires. Specifically, Cephalon relies on the Supreme Court case of *Young v. U.S. ex rel. Vuitton et. Fils S.A.*, 481 U.S. 787 (1987). *Young* involved an actual criminal contempt proceeding brought by attorneys appointed by the court to prosecute defendants for alleged violations of a court order. *Id.* at 791-92. The appointed attorneys were also the attorneys for the beneficiaries of the court order at issue and civil plaintiffs in a related case against the defendants. *Id.* The court did not decide the case on constitutional grounds, but rather used its inherent supervisory power to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a

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contempt action alleging violation of that order." *Id.* at 807. Nowhere did the Supreme Court construct a *per se* bar on the use of contingency fee attorneys in cases akin to criminal prosecutions.

Instead, the courts that have directly considered whether contingency fee counsel may be employed by state Attorneys General, including in cases where civil penalties are sought, have approved of such arrangements provided that the government attorneys retain control of the litigation. The Texas Court of Appeals considered this issue in *International Paper Co. v. Harris County*, __ S.W.3d __, 2013 WL 3864317 (Tex. App. July 25, 2013). Harris County filed an environmental enforcement action relating to contamination of a river and sought "civil penalties of up to $25,000 per day for violations of laws regulating the disposal of industrial waste." *Id.* at *2. The county retained outside counsel on a contingency fee basis. *Id.* The defendants asserted that the use of contingency fee counsel violated their due process right to a fair and neutral prosecution, characterizing the environmental enforcement action as quasi-criminal in nature. *Id.* at *2. The court closely analyzed the case law and rejected the defendants' argument that the due process clause imposed a *per se* bar on a governmental entity's engagement of outside counsel on a contingent fee basis to pursue civil litigation seeking recovery of civil penalties. *Id.* at *7. As the court noted, "[n]o court that Defendants have cited, or that we can find, has interpreted the due process clause in the manner urged by Defendants, *i.e.*, as adopting a blanket prohibition against a governmental entity retaining private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought is civil penalties." *Id.* at *15.

In *Merck Sharp & Dohme Corp. v. Conway*, 947 F.Supp.2d 733 (E.D. Ky. 2013), the court addressed a challenge to the Attorney General's use of contingency fee counsel to bring a claim under the Kentucky Consumer Protection Act against Merck relating to Merck's marketing and distribution of a prescription drug—a strikingly similar context. The Attorney General and outside counsel sought the maximum civil penalties of $2,000 per violation and $10,000 per violation targeted to individuals over the age of 65. *Id.* at 735. Merck challenged the use of contingency fee counsel on due process grounds, and both sides filed cross-motions for summary judgment. The court again declined to adopt a *per se*

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prohibition. "An attorney general does not necessarily violate a defendant's due process rights by hiring outside counsel on a contingency-fee basis." *Id.* at 739. "Thus, as long as the required safeguards are in place, a government entity may engage contingency-fee counsel to assist in a civil prosecution without infringing on the defendant's due process rights." *Id.* The key test—according to the judge in *Merck*—was whether the Attorney General retained full control over the litigation. Thus, so long as the retention agreement contained sufficient safeguards to vest control with the Attorney General, and the Attorney General actually controlled the litigation, the use of contingency-fee counsel to assert consumer protection claims against the defendant was constitutionally permissible. *Id.* at 739-740. Because both elements of control were present, the court denied Merck's motion for summary judgment and granted the Attorney General's motion for summary judgment. *Id.* at 752.

ii. The terms of the Litigation Retention Agreement make clear that the Attorney General controls the enforcement action against Cephalon, and the Attorney General has exercised actual control over that action.

After reviewing carefully the terms of the Litigation Retention Agreement, I find that this agreement contains adequate safeguards to ensure that the Attorney General retains control of the enforcement action against Cephalon and serves as the ultimate decision maker. The agreement specifically provides that "[t]he Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General." Furthermore, "[a]ll pleadings, motions, briefs and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft form in a reasonable and timely manner for review." Outside counsel agree to communicate regularly with the Attorney General and his staff to keep them fully informed.

From the record in this case, I find that the Attorney General has exercised actual control over the enforcement action against Cephalon from its inception. Despite taking the depositions of Attorney General Alan Wilson, former Attorney General Henry McMaster, Chief Deputy Attorney General John McIntosh, Assistant Deputy Attorney General Sonny Jones (the head of the consumer protection and

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antitrust division and the Attorney General's "designated assistant" to oversee the litigation) and other members of the Attorney General's office, Cephalon has provided no evidence to suggest otherwise.

Even assuming that a heightened level of neutrality is required because of the nature of the enforcement action against Cephalon, I find that Cephalon's due process rights have not been violated by the Attorney General's retention of outside counsel on a contingency fee basis.

D. The Attorney General Has the Authority to Seek Attorneys' Fees on a Contingency Fee Basis

A key premise of Cephalon's argument is that the Litigation Retention Agreement creates an improper financial interest in the litigation for the Attorney General's office. However, the Attorney General's right to seek attorneys' fees is not created by the Litigation Retention Agreement. Rather, S.C. Code § 1-7-85 provides, in pertinent part:

> Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation awarded by court order or settlement[.]

S.C. Code § 1-7-85. This statute specifically provides that the Attorney General may obtain attorneys' fees and costs for representing the State in civil proceedings. The statute does not limit the ways in which the attorneys' fees for the Attorney General could be calculated. The Attorney General's authority to seek attorneys' fees is inherent in his powers under the South Carolina Constitution and common law.

The terms of the Litigation Retention Agreement do not create the Attorney General's ability to seek attorneys' fees. The fee calculation agreed to by the Attorney General and outside counsel operates as a ceiling to the fees the Attorney General can ultimately seek. In the absence of this language, the Attorney General would have the unfettered right under § 1-7-85 to seek attorneys' fees in the event the enforcement action against Cephalon is settled or a judgment is entered in favor of the State. Similarly, if the Attorney General had continued this action without outside counsel, he would still have the statutory

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authority to seek attorneys' fees calculated in the same manner as set forth in the Litigation Retention Agreement.

I find that the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85. The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees he will ultimately seek the court approve, and provides notice that any fees approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery.

E. Cephalon's Rights to Due Process Are Not Violated by the Attorney General's Retention of a Portion of Outside Counsel's Attorneys' Fees.

Cephalon urges that its constitutional rights are violated because the Attorney General retains a portion of any attorneys' fees awarded to outside counsel on a contingency fee basis.[3] Pursuant to the terms of the Litigation Retention Agreement, the below table breaks down the fees ultimately received by outside counsel and the Attorney General's office in the event of any recovery:

Amount of recovery	Contingent percentage (outside counsel)	Contingent percentage (Attorney General)
From $0.00 to $5,000,000.00	22.5%	2.5%
From $5,000,000.01 to $10,000,000.00	19.8%	2.2%
From $10,000,000.01 to $25,000,000.00	16.2%	1.8%
From $25,000,000.01 to $50,000,000.00	13.5%	1.5%
From $50,000,000.01 to $100,000,000.00	10.8%	1.2%
Greater than $100,000,000.00	9.0%	1.0%

Because of the Attorney General's financial interest in the outcome of the enforcement action, Cephalon argues, the Attorney General cannot satisfy the heightened level of neutrality required in that

[3] Cephalon continually refers to the Attorney General's contingency fee as the "10%." Under the undisputed terms of the Litigation Retention Agreement, the Attorney General receives 10% of outside counsel's fee, not 10% of any settlement or judgment. The Attorney General's fee is thus, at most, 2.5% of the overall recovery. And because the Litigation Retention Agreement operates on a sliding scale, with the contingent fee percentage decreasing as the recovery increases, the Attorney General's ultimate fee as a percentage of the total decreases as well for any settlement or judgment in excess of five million dollars.

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action. Although I have already ruled that this enforcement action is civil, not quasi-criminal, in nature, even under that higher standard, the Attorney General's contingency fee interest does not rise to the level of a due process violation.

The Attorney General is "entitled to a presumption that he is pursuing the [enforcement] action in a manner consistent with this duty to seek justice as well as his ethical and professional obligations to the [State]." *Merck*, 947 F.Supp.2d at 744; *see also County of Santa Clara v. Superior Court*, 235 P.3d 21, 38 (Cal. 2010). I find that the Attorney General's contingency fee interest in the enforcement action against Cephalon is constitutionally permissible under the Supreme Court's decision in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

The similarities between the facts in *Marshall* and the present case are readily apparent. In the enforcement action against Cephalon, the Attorney General performs no judicial or quasi-judicial functions. He cannot assess any penalties against Cephalon; any civil penalties would be awarded by a judge after a finding that Cephalon willfully violated SCUTPA. The undisputed evidence before me demonstrates that no salaries are tied to the civil penalties received in this or any other enforcement case. Furthermore, the uncontradicted testimony from the Attorney General's office established that, even where money is received by the Attorney General as a result of a settlement or judgment in an enforcement action under SCUTPA, the Attorney General may not spend that money unless and until the General Assembly appropriates it for the Attorney General's use. Because the Attorney General's office can only spend what the General Assembly has appropriated, any recovery, including penalties, the Attorney General ultimately receives do not increase his budget without authorization by the General Assembly to retain and spend those funds.

Cephalon offers no evidence to the contrary. Indeed, its greatest point of emphasis is that, in the exceptional case, the Attorney General's contingency fee could amount to several million dollars, which could comprise a significant portion of his yearly budget. For that proposition, Cephalon craves reference to the trial court's decision in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 2007-

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CP-42-1438 (June 3, 2011), where the judge imposed civil penalties of over $327,000,000. However, Cephalon's reliance on this decision is misplaced for four principal reasons. First, the civil penalties in that case were imposed by the neutral finder of fact, not the Attorney General. Second, that penalty award is currently on appeal to the South Carolina Supreme Court, which may reduce or eliminate the penalty altogether. Third, even if the South Carolina Supreme Court affirms the ruling of the trial court, the Attorney General must still seek an award of attorneys' fees from the court, which would have the discretion to reduce the fees awarded. Finally, even if the impartial trial court approves the full fee, the Attorney General cannot spend any of it without an appropriation by the General Assembly.

Notably, the concept that a prosecutor may retain a portion of the funds received from a successful prosecution arises in several other contexts under South Carolina law. For example, the Attorney General is permitted to retain the first $750,000 of securities fines imposed by his office in enforcement actions. *See* S.C. Code § 35-1-702(c). Similarly, the Attorney General and SLED share equally the first $500,000 of money recovered in insurance fraud cases. *See* S.C. Code § 38-55-560(D). More generally, prosecuting agencies are statutorily authorized to retain 20% of the value of all real or personal property subject to forfeiture that is seized and forfeited. *See* S.C. Code § 44-53-530(e).

In short, Cephalon has offered no evidence at all that the "[Attorney General]'s contingent-fee interest in this case has caused [the Attorney General] to be overzealous in its prosecution of the underlying lawsuit, to act improperly or with a bias other than that inherent in the adversarial system, or to otherwise act in a manner contrary to the public interest." *See International Paper*, 2013 WL 3864317, at *14. As in *Marshall*, there is no realistic possibility that the Attorney General's contingent interest will affect his judgment in the enforcement action against Cephalon. As the Texas Court of Appeals stated, "[w]e reject the contention that simply because a lawyer will be paid a contingent fee in a civil case means that lawyer will disregard any heightened standards to which a lawyer performing government functions is subject." *International Paper*, 2013 WL 3864317, at *14. If judgment is entered against it,

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Cephalon retains the opportunity to challenge the fees awarded to the Attorney General if it believes that this fee is unconstitutionally excessive.

The provisions of the Litigation Retention Agreement pertaining to the retention of attorneys' fees by the Attorney General are not constitutionally defective. As discussed above, there are numerous safeguards that must be satisfied before the Attorney General can actually spend any attorneys' fees it may ultimately acquire from its enforcement action against Cephalon. First, assuming the matter does not settle, the neutral finder of fact must determine that Cephalon violated SCUTPA. Second, with regard to civil penalties, the neutral finder of fact must determine that Cephalon knew or should have known that its conduct violated SCUTPA and, upon petition by the Attorney General, the court must determine both the number of violations and the amount of penalty to impose for each. Third, the court must approve the attorneys' fees to be awarded both to the Attorney General and outside counsel. Finally, the General Assembly must appropriate those funds for use by the Attorney General's office. Consequently, Cephalon has not shown any infringement upon its constitutional due process rights.

F. The Litigation Retention Agreement Does Not Violate Separation of Powers

Cephalon argues that the contingency fee agreement violates the Separation of Powers Doctrine in that it allegedly diverts state funds to the Attorney General's office and to private counsel. I find this argument to be without merit. In support of this argument, Cephalon relies on S.C. Code § 1-7-150(B). This statute provides, in pertinent part,

> All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State, except . . . where some other disposition is required by law.

S.C. Code § 1-7-150(B). According to Cephalon's argument, the Attorney General violates this statute—and therefore the separation of powers doctrine—anytime he hires outside counsel because a portion of the proceeds from the settlement or judgment are paid to outside counsel rather than deposited in the general fund. Further, Cephalon argues that the Attorney General violates this statute by retaining a

portion of outside counsel's fees as attorneys' fees for his office.

Cephalon's argument, however, ignores the plain language of the statute itself. The statute provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund. And under the clear and unambiguous terms of § 1-7-85, discussed above, the Attorney General has the statutory authority to seek attorneys' fees "[n]otwithstanding any other provision of law." S.C. Code § 1-7-85.

CONCLUSION

For the reasons set forth hereinabove, Cephalon Inc.'s Motion for Summary Judgment is **DENIED**. The Attorney General's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Columbia, South Carolina
June 2, 2014

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

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Exhibit A

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No. 2020-CP-40-04603 **AFFIDAVIT OF JAMES M. GRIFFIN**

Comes James M. Griffin and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. That the Willoughby & Hoefer firm were notified on Friday, September 25 at 11:10 a.m. that an injunction had been set in Barnwell for today.

3. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Amended Complaint filed concurrently herewith.

Exhibit 1	Settlement Agreement, *South Carolina v. United States*, Fed. Cir. No. 19-2324 (Aug. 28, 2020)
Exhibit 2	Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General (Aug. 30, 2020)
Exhibit 3	Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General (Sept. 10, 2020)
Exhibit 4	Order, *South Carolina v. United States et al.*, Civil Action No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76

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Exhibit 5	Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
Exhibit 6	Federal Court Docket Sheets for *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS
Exhibit 7	Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility
Exhibit 8	Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility (June 13, 2019)
Exhibit 9	*South Carolina v. United States*, 912 F.3d 720 (2019)
Exhibit 10	Petition for Writ of Certiori, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
Exhibit 11	Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
Exhibit 12	*South Carolina v. United States*, 140 S. Ct. 392 (2019)
Exhibit 13	Email from V. Ware to Willoughby Hoefer counsel re Injunction Hearing Sept. 30 at 10:00 A.M. Barnwell County et al. v. Alan Wilson (Sept. 25, 2020)
Exhibit 14	Email from J. Carpenter to Judge Lee regarding Hearing on Temporary and Preliminary Injunction (Sept. 25, 2020) (requesting hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 15	Email thread between Judge McCaslin law clerk and counsel for all parties re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (scheduling hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 16	Email thread between B. Humphries, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (agreement to accept service of Summons and Complaint)
Exhibit 17	Email thread between J. Griffin, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (discussing temporary hold on payment to counsel)
Exhibit 18	Email thread between counsel for Defendant, counsel for Plaintiffs, and Judge McCaslin re SCPIF v. Wilson 2020CP4004603 (Sept. 29, 2020)

(following WebEx hearing and discussing status of payment of attorneys' fees to law firms)

Exhibit 19 Email thread between J. Griffin and Judge McCaslin and counsel re SCPIF v. Wilson 2020CP4004603 (Sept. 30, 2020) (discussing confirmation from State Treasurer that funds were wired to Willoughby & Hoefer just hours prior to hearing)

Further Affiant sayeth naught.

Dated this 30th day of September, 2020.

James M. Griffin (S.C. Bar No. 9995)
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Subscribed and sworn to before me
by James M. Griffin on this
the 30th day of September 2020.

Notary Public, State at Large, South Carolina
My Commission Expires September 12, 2029

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EXHIBIT 1

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

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production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

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d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

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multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

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7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

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pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

AGREED TO:

UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section

TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

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EXHIBIT 2

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HENRY MCMASTER
GOVERNOR

August 30, 2020

The Honorable Alan M. Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Attorney General Wilson:

I recently received a copy of the Settlement Agreement you executed with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). As you know, I did not receive the Settlement Agreement until late last week, at which point you had already signed it on behalf the State. Having carefully reviewed the document and your outside counsel's responses to my immediate questions regarding the same, I am compelled to express my concerns regarding the Settlement Agreement.

First, I am not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner. Currently, federal law provides that all defense plutonium transported into the State between 2002 and the present must be removed from SRS by January 1, 2022. However, under the Settlement Agreement, it appears that DOE will not be required to remove this plutonium until January 1, 2037. And if DOE only removes half of the total amount currently at SRS by this new deadline, the State of South Carolina will be forced to forgo legal action until January 1, 2042. I understand that settlement negotiations are inherently fluid in nature and that the transfer of defense plutonium is not an expeditious process, but the Settlement Agreement does not appear to align with previous discussions. At bottom, I cannot support a compromise that extends the existing removal deadline by up to twenty years.

Second, after reviewing your counsel's responses to my questions regarding the anticipated use of the settlement proceeds, I must note my concerns regarding the payment of attorneys' fees. After years of DOE repeatedly ignoring its obligations and abandoning the MOX project, President Trump and his Administration have demonstrated their commitment to removing surplus plutonium from our State. Secretary Brouillette's willingness to address these inherited issues is

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noted and most appreciated. However, the federal government's relatively recent attention to this important issue is due in no small part to our zealous advocacy and coordination with members of the congressional delegation. Accordingly, while I recognize that this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims, I simply cannot endorse the payment of $75 million in attorneys' fees under the circumstances.

To be clear, I appreciate your efforts to recover the economic and impact assistance payments owed to the State and your pursuit of this litigation more generally. However, as I have repeatedly conveyed, it is of paramount importance that South Carolina not become a permanent plutonium waste repository. Therefore, I cannot support a Settlement Agreement that extends DOE's existing removal deadlines by up to twenty years and potentially sidelines South Carolina's future leadership by restricting the State's ability to enforce its legal rights.

Yours very truly,



Henry McMaster

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EXHIBIT 3

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

140 N. Main St., Suite 102
Summerville, SC 29484
(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842

Courthouse, Amelia Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

DAVID M. PASCOE
Solicitor

September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

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State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses*.

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

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private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

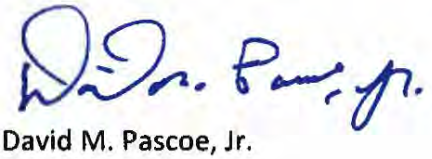
Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,



David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

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EXHIBIT 4

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

State of South Carolina, Plaintiff, v. United States; United States Department Of Energy; Dr. Ernest Moniz, *in his official Capacity as Secretary of Energy*; National Nuclear Security Administration; *and* Lt. General Frank G. Klotz, *in his official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security*, Defendants.	Civil Action No. 1:16-cv-00391-JMC **ORDER**

On April 25, 2016, Defendants United States, the United States Department of Energy ("DOE"), Dr. Ernest Moniz, the National Nuclear Security Administration ("NNSA"), and Lieutenant General Frank G. Klotz (collectively "Defendants") filed a motion to dismiss the complaint filed by Plaintiff, the State of South Carolina (the "State"), arguing, among other things, that the third cause of action in the complaint, seeking review of Defendants' alleged failure to act in compliance with 50 U.S.C. § 2566(d), should be dismissed because the court lacked subject-matter jurisdiction over it. (ECF No. 17.) Specifically, Defendants contended that sovereign immunity had not been waived with respect to the third cause of action because the only potential waiver applicable to that cause of action—that found in the Administrative Procedures Act, 5

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U.S.C. § 701, *et seq.*—is not available where, as here, another court, such as the Court of Federal Claims ("CFC") provides an adequate remedy for the challenged agency action at issue. (*See id.* at 30-34.)

By order entered October 31, 2016, the court agreed with Defendants that the court lacked subject matter jurisdiction over the State's third cause of action because, pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346, 1491, the CFC provides an adequate remedy for the agency action challenged in that cause of action and, therefore, Defendants had not waived sovereign immunity from suit in this court with respect to the complaint's third cause of action. (*See* ECF No. 56.) The court subsequently denied the State's motion for reconsideration of its rulings in the October 31, 2016 order. (*See* ECF No. 75.) Because the court was uncertain whether it should dismiss the third cause of action without prejudice to the State's ability to prosecute it in an original action filed with the CFC or instead should transfer the cause of action to the CFC, pursuant to 28 U.S.C. § 1631, the court directed the parties to file supplemental briefing on the issue and declined to decide Defendants' motion to dismiss the third cause of action until the briefs had been submitted. (*See* ECF No. 56 at 24-31.)

The parties have since filed their supplemental briefs. (ECF Nos. 63, 64.) The parties agree that the court should dismiss the cause of action without prejudice to the State's ability to prosecute it in an original action filed in the CFC rather than transfer it. (*See* ECF Nos. 63, 64.) Accordingly, for the reasons stated in the court's October 31, 2016 order (ECF No. 56), as well as in its order denying the State's motion for reconsideration (ECF No. 75) and in the parties' supplemental briefs, Defendants' motion to dismiss the complaint (ECF No. 17) is hereby **GRANTED IN**

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PART.[1] The third cause of action in the State's complaint (ECF No. 1 ¶¶ 97-112) is hereby **DISMISSED** without prejudice to the State's ability to prosecute it an original action filed in the Court of Federal Claims.

IT IS SO ORDERED.

J. Michelle Childs

United States District Court Judge

February 7, 2017
Columbia, South Carolina

[1] The court notes that Defendants' motion to dismiss is not fully disposed by this order. Defendants have moved to dismiss the first and second causes of action in the State's complaint on grounds that the court has yet to address. (*See* ECF No. 17.)

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EXHIBIT 5

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In the United States Court of Federal Claims

No. 18-38C
(Filed: August 20, 2019)

STATE OF SOUTH CAROLINA,	*	
	*	
Plaintiff,	*	50 U.S.C. § 2566; Appropriations;
	*	Cross-Motions for Summary Judgment;
v.	*	Economic and Impact Assistance Payments;
	*	Judgment Fund; RCFC 56
THE UNITED STATES,	*	
	*	
Defendant.	*	

Randolph R. Lowell, Columbia, SC, for plaintiff.

Tara K. Hogan, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff, the State of South Carolina, seeks an award of economic and impact assistance payments for 2016 and 2017 pursuant to 50 U.S.C. § 2566, which directs such payments if the United States Department of Energy ("DOE") fails to meet certain deadlines related to the processing and disposition of surplus defense plutonium stored at the DOE's Savannah River Site ("SRS").[1] Specifically, plaintiff contends that 50 U.S.C. § 2566(d) requires the DOE to pay it $1 million per day, up to a statutory cap of $100 million per year, for a total of $200 million. Both plaintiff and defendant move for summary judgment. For the reasons set forth below, the court grants defendant's motion and denies plaintiff's motion.

I. BACKGROUND

A. Facts

Following the end of the Cold War, the United States was challenged with finding a safe, secure method to dispose of large amounts of weapons-grade nuclear material, including weapons-grade plutonium, from both foreign and domestic nuclear weapons production

[1] The SRS is a federally owned and operated facility that processes and stores nuclear material in support of national defense, nonproliferation, research, and environmental missions. Pl.'s Mot. App. 145.

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facilities. Am. Compl. Ex. 3 at 2. The need to securely store these materials in a safe environment was paramount; however, there was also great promise in reprocessing this material into fuel for nuclear reactors. Id. at 3. If possible, enriched nuclear material would be repurposed into lower-grade fuel, and if the material was not suitable for conversion into fuel, it would be "immobilized" to render it difficult to use as a weapon.[2] Pl.'s Mot. App. 10. To comply with the terms of an agreement with the Russian Federation, which required irradiation to dispose of the material, the DOE determined that the best option would be irradiating the material in a nuclear reactor to degrade it. Id. at 9-10, 13, 19. See generally Am. Compl. Ex. 7.

In early 2000, the DOE selected the SRS to reprocess the material. Pl.'s Mot. App. 68, 77. Simultaneously, the DOE, interested in cost savings through facility closures, wanted to move the plutonium from the Rocky Flats DOE facility near Denver, Colorado, to the SRS. Id. at 82-86. While legislation for these activities was being considered, the governor of South Carolina expressed concern to the DOE regarding the storage of large amounts of weapons-grade nuclear material within the state's borders. Id. at 93-94 (letter from South Carolina Governor Jim Hodges to DOE Secretary Spencer Abraham, dated April 10, 2002). The governor's primary concern was that an agreement brokered between the state and the DOE to remove or reprocess the material would not be legally enforceable:

> I must insist on an ironclad agreement that is fully enforceable in a court of law. The stakes are too high to accept mere political assurances. I will not risk the health and welfare of South Carolina by allowing the enforceability of any agreement to be bound only by federal departmental policy that changes according to political considerations beyond our control.

Id. at 93; see also id. at 103-09 (agreement enclosed in April 11, 2002 letter from DOE Secretary Spencer Abraham to South Carolina Governor Jim Hodges).

Ultimately, on December 2, 2002, Congress enacted a statute, later codified at 50 U.S.C. § 2566, addressing the disposition of weapons-grade plutonium stored at the SRS. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3182, 116 Stat. 2458, 2747-50 (2002) (codified at 50 U.S.C. § 2566 (Supp. III 2004)). The statute provided for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility ("MOX facility") at the SRS to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors, id.; the MOX facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually, Pl.'s Mot. App. 146. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019. § 3182(a)(1)-(2), (g)(1), 116 Stat. at 2747-50. If the DOE did not meet the MOX production objective by

[2] Immobilization is a process of encasing fissile material in glass or ceramics, making it stable for storage and difficult to recover for use in a nuclear weapon. Pl.'s Mot. App. 16. Defense plutonium that was converted into fuel would be "irradiated" in a nuclear reactor. Id. Both methods render nuclear material difficult to transport, conceal, and process into a nuclear weapon. Id.

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January 1, 2011, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2011, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to the site between April 15, 2002 and January 1, 2017, by January 2017. Id. § 3182(c)(1)-(2), 116 Stat. at 2749. The DOE would also be required to remit economic and impact assistance payments to plaintiff in the amount of $1 million per day for each day that certain milestones went unmet, up to a maximum of $100 million per year. Id. § 3182(d)(1), 116 Stat. at 2749. These payments would come "from funds available to the Secretary [of the DOE] . . . ." Id.

In subsequent enactments of the statute, Congress changed deadlines for both MOX processing and material removal, and also changed the funding source for payment of economic and impact assistance. In 2005, Congress amended 50 U.S.C. § 2566 to make payment of economic and impact assistance "subject to the availability of appropriations." See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 313(4)(A)(ii), 119 Stat. 2247, 2280-81 (2005). This language was retained in the versions of the statute reenacted in 2013 and 2014. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3116, 126 Stat. 1632, 2172-73; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3142(f), 128 Stat. 3292, 3900 (2014). The current version of 50 U.S.C. § 2566 provides that if the MOX production objective was not met, the DOE would be required to remove from South Carolina at least one metric ton of plutonium by January 1, 2016, and an amount of plutonium equal to all unprocessed plutonium shipped to the site from April 15, 2002, to January 1, 2022, no later than January 1, 2022. See 50 U.S.C. § 2566(c) (2012 & Supp. II 2015). It further provides that if the DOE missed the January 1, 2016 deadline, the DOE would be required to make economic and impact assistance payments to plaintiff beginning in 2016. Id. § 2566(d)(1).

In 2002, the DOE began shipping plutonium to the SRS. Am. Compl. ¶ 41; Answer ¶ 41. In 2016 and 2017, the DOE failed to achieve the MOX production objective, did not remove one ton of plutonium from South Carolina, and did not provide economic and impact assistance payments to plaintiff as specified in 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45.

B. Procedural History

On January 8, 2018, plaintiff filed a complaint in the United States Court of Federal Claims, seeking $100 million in economic and impact assistance payments it alleges it is owed for 2016, prejudgment and postjudgment interest, costs and attorneys' fees, and any further relief deemed proper. On March 6, 2018, plaintiff amended its complaint to add a claim for the $100 million of economic and impact assistance payments it alleges is owed for 2017.

Ten days after defendant filed its answer, plaintiff moved for summary judgment. Defendant then cross-moved for summary judgment. Briefing is now complete and, deeming oral argument unnecessary, the court is prepared to rule.

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II. STANDARD OF REVIEW

Both plaintiff and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Contessa Food Prods., Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002) ("On summary judgment, the question is not the 'weight' of the evidence, but instead the presence of a genuine issue of material fact . . . .") (abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008) (en banc)); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment."); Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) ("[T]he Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues."). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Commerce Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

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III. DISCUSSION

The parties have differing views concerning the issue now pending before the court. Plaintiff states that the issue is whether the United States is liable to make economic and impact assistance payments for 2016 and 2017 under 50 U.S.C. § 2566(d)(1), and suggests that the funds to satisfy the liability may come from appropriations already authorized or the Judgment Fund. Pl.'s Mot. Summ. J. 12, 15-16. Defendant argues that the issue is whether the United States is liable to make economic and impact assistance payments if Congress did not appropriate funds for the payments. Def.'s Cross-Mot. Summ. J. 7-8.

The parties agree that the DOE has not met critical milestones to process or dispose of plutonium as required by 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45. Defendant also agrees that had Congress appropriated funds for economic and impact assistance payments, the DOE would be required to remit those funds to plaintiff in accordance with the statute. See Def.'s Cross-Mot. Summ. J. 8. However, the parties disagree as to whether economic and impact assistance payments may be made from: (1) certain appropriated funds for activities already authorized or funds reprogrammed from those activities; or (2) the Judgment Fund. See id. at 11-22; Pl.'s Mot. Summ. J. 12, 15-16. Because these questions turn on the interpretation of law rather than findings of fact, this case is properly before the court on summary judgment.

A. Relevant Legal Standards

Central to the parties' competing contentions is the meaning of 50 U.S.C. § 2566(d)(1). Thus, the court turns to the text of that statute to ascertain how it should be construed. As originally enacted, this section provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2011, the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina each year beginning on or after that date through 2016 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of--
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. III 2004) (emphasis added).

In 2005, the background of 50 U.S.C. § 2566 and the purpose of the economic and impact assistance payments in 50 U.S.C. § 2566(d)(1) was discussed in the United States Senate:

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> In a sign of good faith to the State of South Carolina, language was negotiated . . . that required the [DOE] to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors by 2011 or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. It has never been the intention of South Carolina to receive penalty payments; the residents . . . simply sought reassurances that weapons-grade plutonium would not remain at [the] SRS indefinitely. South Carolina would not have accepted [the defense] plutonium without this statute.

151 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Later in that session, a "technical correction" to 50 U.S.C. § 2566(d)(1) was proposed:

> It is also my intention to make a technical correction, in the future, to language contained in the conference report to the Fiscal Year 2006 Energy and Water Appropriations Act. This conference report contains a change to important authorizing language that would make these penalty payments "subject to the availability of appropriations."

Id. (statement of Sen. Graham).

The technical correction was made to the version of 50 U.S.C. § 2566 enacted in 2005; subsection (d) of that statute provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2014, the Secretary shall, subject to the availability of appropriations, pay to the State of South Carolina each year beginning on or after that date through 2019 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of–
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. V 2006) (emphasis added).

Subsequent versions of 50 U.S.C. § 2566 enacted on January 2, 2013, and December 19, 2014, retained the phrase "subject to the availability of appropriations" in subsection (d)(1). See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). Notably, other

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parts of the statute remained essentially unchanged from the version originally enacted, with the exception of the deadlines. For example, 50 U.S.C. § 2566(d)(2)(A) has consistently provided:

> (A) If, as of January 1, 2022, the MOX facility has not processed mixed-oxide fuel from defense plutonium and defense plutonium materials in the amount of not less than—
>
> (i) one metric ton, in each of any two consecutive calendar years; and
>
> (ii) three metric tons total,
>
> the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the removal by the Secretary from the State of South Carolina of an amount of defense plutonium or defense plutonium materials equal to the amount of defense plutonium or defense plutonium materials transferred to the Savannah River Site between April 15, 2002, and January 1, 2022, but not processed by the MOX facility.

50 U.S.C. § 2566(d)(2)(A) (2012 & Supp. II 2015) (emphasis added).

If defendant is liable to plaintiff under 50 U.S.C. § 2566(d)(1), funds to satisfy the obligation in the statute must come from a congressionally sanctioned source because, pursuant to the Appropriations Clause of the United States Constitution, the federal government may only spend money that Congress has appropriated. See U.S. Const. art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Congress may also require that funds only be used for specific programs or purposes. See Nutt v. United States, 837 F.3d 1292, 1295 (Fed. Cir. 2016) ("According to the Constitution's Appropriations Clause, 'funds may be paid out [by the Treasury] only on . . . the express terms of a specific statute.'" (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990) (alteration in original))). If Congress specifies a purpose for appropriated funds, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2012).

If Congress elects to provide unrestricted, or "lump-sum," appropriations to an agency, those appropriations are normally allocated at the agency's discretion. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); see also U.S. Government Accountability Office, Principles of Appropriations Law—Vol. II ("GAO Redbook") 6-5 (3d ed. 2006) ("A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object

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described.").[3] The normally broad agency discretion to direct lump-sum appropriations may be limited when an agency is bound by a contract; in such circumstances, an agency may not avoid contractually obligated payments if unrestricted, i.e., lump-sum, funds are available. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636-38 (2005). Agency discretion is also limited by line-item appropriations, in which Congress places conditions on how an appropriation may be spent. To determine whether an expenditure is permitted for a particular line item, agencies perform a "necessary expense" analysis. See GAO Redbook, supra, at 3-14 to 3-15. "Under the necessary expense doctrine, '[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.'" U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting GAO Redbook, supra, at 4-20). For an expense to be found necessary, (1) there must be a logical relationship between the expenditure and the appropriation; (2) the expenditure must not be prohibited; and (3) the expenditure must not be provided for in another appropriation. GAO Redbook, supra at 3-14 to 3-17.

B. Plaintiff May Not Receive Economic and Impact Assistance Absent a Congressional Appropriation for That Purpose

Although plaintiff and defendant agree that the DOE did not comply with the statute, they disagree as to whether any funds are available to satisfy the DOE's statutory obligation. See Pl.'s Mot. Summ. J. 12, 15-16; Def.'s Cross-Mot. Summ. J. 11-22. Defendant argues that, absent an appropriation, the DOE is not liable to plaintiff for any payments and, alternatively, that any liability that flows from the statute is limited to the amount Congress appropriated for economic and impact assistance. Def.'s Reply 1-2, 12. Plaintiff appears to concede that no funds were specifically appropriated for economic and impact assistance. See Pl.'s Reply 3. However, the lack of a specific appropriation does not per se remove the DOE's liability for economic and impact assistance payments. Rather, defendant's obligation to make economic and impact assistance payments manifested when it failed to comply with the terms of 50 U.S.C. § 2566. See Greenlee Cty. v. United States, 487 F.3d 871, 880 (Fed. Cir. 2007) ("We conclude that defendant's liability for . . . payments was limited to the amounts appropriated by Congress." (emphasis added)). The question remaining is the extent of defendant's liability, a question that is purely legal in nature.

Plaintiff advances two theories under which the DOE could remit economic and impact assistance payments without an additional congressional appropriation to the DOE: (1) the DOE could use existing lump-sum appropriations or (2) the DOE could reprogram funds Congress appropriated for other purposes. Pl.'s Mot. Summ. J. 15-25. The court examines them in turn.

[3] The first three chapters of the GAO Redbook are in the GAO Redbook's fourth edition, while the remaining chapters are in the third edition. Citations to the GAO Redbook are to the most recent version.

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1. Congress Did Not Provide Lump-Sum Appropriations in the Consolidated Appropriations Acts of 2016 and 2017

Under its first theory, plaintiff initially contends that there are lump-sum appropriations available to made the economic and impact assistance payments for 2016 and 2017. Pl.'s Mot. Summ. J. 15, 22. It primarily relies on the observation in Greenlee County that the United States Supreme Court ("Supreme Court") addressed the question of "what appropriation amounts are available?" in Cherokee Nation–in the context of a contract case–"that the presence of sufficient unrestricted lump-sum appropriations (not specifically appropriated for the program at issue) to meet the government's contractual obligation qualified as available appropriations." 487 F.3d at 880 & n.3, quoted in Pl.'s Mot. Summ. J. 15. In essence, plaintiff is suggesting that the principle espoused in Cherokee Nation–that a court can order an agency to use its lump-sum appropriations to satisfy a contractual obligation–should be extended to situations in which the government's obligation is only statutory in nature. See Pl.'s Reply 6.

Both Greenlee County and a related case, Prairie County, concern a government benefits program enacted to reimburse local governments for lost property tax revenues caused by the federal government's ownership of large amounts of land in their communities. See Prairie Cty. v. United States, 782 F.3d 685 (Fed. Cir. 2015); Greenlee Cty., 487 F.3d at 871. Because the federal government does not pay property taxes to local communities, Congress created a "Payment in Lieu of Taxes" ("PILT") program to compensate local governments for lost tax revenue. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 873-74. Although Congress designated a formula for reimbursing local governments, appropriations for the PILT program were insufficient to reimburse all qualifying communities to the amount yielded by the formula. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 874. Greenlee County and Prairie County, whose compensation fell short when appropriations for PILT were exhausted, separately filed suits in the United States Court of Federal Claims, followed by appeals to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Prairie Cty., 782 F.3d at 687-88; Greenlee Cty., 487 F.3d at 874-75.

In Greenlee County, the Federal Circuit observed that obligations in contractual relationships were distinguishable from obligations flowing from benefits programs. 487 F.3d at 878-79. While contractual obligations could not be avoided if unrestricted appropriations were available for payment, noncontractual statutory obligations, i.e., benefits, could be avoided if Congress circumscribed its liability in the statute itself. See id. at 879 ("The conclusion that [the statute] limits defendant's liability to the amount appropriated is particularly appropriate because [the statute] . . . involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." (emphasis added)). Eight years later, the Federal Circuit in Prairie County again focused on the plain language of the statute: "Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability . . . or whether [the statute] imposes a statutory obligation to pay the full amount . . . regardless of appropriations by Congress." 782 F.3d at 690 (quoting Star-Glo Assocs., LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005)). Even in a contractual relationship, however, payment requires an appropriation. See Greenlee Cty., 487 F.3d at 878 ("The Supreme Court has noted that, even in the contract context, the 'subject to the availability of appropriations' language means that the government is not contractually bound except to the extent that appropriations are available."

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(citing Cherokee Nation, 543 U.S. at 643)); see also id. ("[A] statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress. . . . [I]t is undisputed that if [a statute] use[s] the phrase 'subject to the availability of appropriations,' [plaintiff's] right to recover would be limited to the amount appropriated.").

The Federal Circuit has also distinguished between the analysis of language limiting liability in contractual relationships from the analysis of similar language in benefit payment statutes, concluding in the latter that congressional intent plays a larger role:

> [When] the government is not seeking to limit contractual liability, but to limit benefit payments, . . . considerations of predictability are far less significant, and . . . there is greater room to rely on other indicia of Congressional intent, such as legislative history, to ascertain the congressional purpose.

Star-Glo Assocs., LP, 414 F.3d at 1355.

The relationship between the plaintiff and the government in Cherokee Nation was contractual, unlike the relationship between the plaintiff and the government here. Compare Cherokee Nation, 543 U.S. at 639, with 28 U.S.C § 2566 (2012 & Supp. II 2015). Plaintiff concedes that defendant's liability in this case is based upon a statute and not a contract. See Pl.'s Reply 6-7 ("The State has not (yet) asserted a contract claim against the United States. . . . [T]his case is only about DOE's failure to meet its statutory obligation to provide the economic and impact assistance payments. . . ."). In the absence of any binding precedent or other legal support for extending the holding of Cherokee Nation to a purely statutory obligation, the court declines to do so. Nevertheless, it is necessary to examine whether 50 U.S.C. § 2566 allows for the use of lump-sum appropriations for economic and impact assistance and, if so, whether Congress made such appropriations in the pertinent Consolidated Appropriations Acts.

When a statute creates a right to compensation, but also limits the government's liability to the amount appropriated, the court must determine "whether there are appropriations available to satisfy the government's liability by considering whether the statute in fact limits the government's liability to the amount appropriated," and "what appropriations are available . . . to satisfy that liability." Greenlee Cty., 487 F.3d at 878. In this case, the statute conditions defendant's payments to plaintiff as "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). This language was first enacted in 2005, well before the DOE's violation of the statute in 2016. See § 313, 119 Stat. at 2280-81. Moreover, this specific language is directly addressed in Greenlee County: "'[S]ubject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." 487 F.3d at 878. Also important is the fact that the less restrictive "from funds available to the Secretary" in the originally enacted version of 50 U.S.C. § 2566(d)(1) was later changed to the more restrictive "subject to the availability of appropriations." Compare 50 U.S.C. § 2566(d)(1) (Supp. V 2006), with 50 U.S.C. § 2566(d)(1) (Supp. III 2004).

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (collecting cases). Here, Congress twice reenacted 50 U.S.C. § 2566 following the 2005 addition of the "subject to the availability of appropriations" language and the Federal Circuit's 2007 explanation of that language in Greenlee County, retaining that verbiage each time. See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). The court therefore may presume that Congress was aware that courts interpreted the phrase "subject to the availability of appropriations" as limiting the government's liability to the amount appropriated, and purposely retained this more restrictive language in subsequent reenactments.

Given the above, a plain reading of 50 U.S.C. § 2566(d)(1) evidences Congress's intent that payments for economic and impact assistance can only be made if (1) there is a specific appropriation for that purpose, or (2) there is a lump-sum appropriation that the DOE could use for that purpose. The parties do not dispute that Congress did not appropriate funds for the specific purpose of economic and impact assistance payments. Pl.'s Reply 9; Def.'s Reply 2. Plaintiff argues, however, that funds were available through lump-sum appropriations "legally available" to satisfy statutory obligations. Pl.'s Reply 3.

As plaintiff notes, "Congress appropriated approximately $18.59 billion and $19.69 billion to DOE for its 'Atomic Energy Defense Activities' for fiscal years 2016 and 2017, respectively." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 248-50 (fiscal year 2017). Of those amounts, "Congress directed that approximately $1.9 billion would be for 'Defense Nuclear Nonproliferation' each year." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 250-51 (fiscal year 2017). Congress further directed that the $1.9 billion be allocated to certain, specified programs, including:

- Global Material Security
- Material Management and Minimization
  - Nuclear Material Removal
  - Material Disposition
- Nonproliferation and Arms Control
- Defense Nuclear Nonproliferation R&D
- Nonproliferation Construction

Pl.'s Mot. Summ. J. 19-20; Pl.'s Mot. App. 195. Plaintiff asserts that the funds Congress allocated to these programs were lump-sum appropriations that the DOE could use to make economic and impact assistance payments. Pl.'s Mot. Summ. J. 19-20.

Defendant contends that the funds Congress provided for these programs were not lump sums. See Def.'s Cross-Mot. Summ. J. 13-14. In support of its argument, defendant relies on the 2016 and 2017 Consolidated Appropriations Acts, id., which incorporate, by reference, tables allocating funds for specific programs (as plaintiff recognizes). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 301(d), 129 Stat. 2242, 2417 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 301(d), 131 Stat. 135, 320; Pl.'s Mot. App. 166; see also Pl.'s Mot. App. 166, 186-201 (containing the tables). Defendant contends that the

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"DOE's appropriated funds are limited to the specific purposes and amounts provided in the tables contained within the explanatory statements accompanying the relevant [Consolidated Appropriations Acts]." Def.'s Cross-Mot. Summ. J. 14; see also id. at 15 ("'When an appropriation specifies the purpose for which funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds for the specified purpose.'" (quoting GAO Redbook, supra, at 4-11)).

Defendant is correct. The tables incorporated by reference into the Consolidated Appropriations Acts specify funding for specific programs, evidencing that the appropriations for Defense Nuclear Nonproliferation and its constituent programs were not lump-sum appropriations, which, by definition, fund multiple programs. GAO Redbook, supra, at 6-5. Plaintiff fails to acknowledge the import of the tables. See Pl.'s Reply 12 ("[T]hese subprogram appropriations are 'lump-sum' appropriations because they 'cover a number of specific programs, projects, or items.'"). Because of Congress's level of precision, the court is not persuaded that these appropriations were in fact "lump-sum appropriations." Consequently, the appropriations could not be used for economic and impact assistance payments.

2. Reprogramming Is Not Available for Economic and Impact Assistance Payments

Plaintiff alternatively argues that the economic and impact assistance payments could be provided from other funds that Congress appropriated to the DOE via a discretionary reallocation known as "reprogramming." Id. at 16-17. "Reprogramming" refers to "the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation." GAO Redbook, supra, at 2-44. Reprogramming, however, is subject to guidelines to prevent abuse or the allocation of funds to activities that are too far removed from Congress's intended purpose in providing the funds. See id. at 2-44 ("[A]gencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation."); see also id. at 2-45 ("Though agencies generally have authority to reprogram funds, Congress may limit this authority."). These limitations accord with the principle that funds appropriated for a particular purpose may not be used for any other purpose. See 31 U.S.C. § 1301(a)-(b).

Defendant argues that reprogramming funds for economic and impact assistance would effectively create a new program or activity because the purpose of economic and impact assistance is substantially different from the purposes of programs identified in the 2016 and 2017 Consolidated Appropriations Acts. Def.'s Reply 11. Defendant notes that those Acts "prohibit DOE from reprogramming funds to create, initiate, or eliminate a 'program, project, or activity.'" Id. (quoting § 301(f)(1), 129 Stat. at 2417; § 301(f)(1), 131 Stat. at 320). Defendant also observes that § 301(d) of each of these Acts incorporates, by reference, a table that specifically allocates appropriations to individual programs, projects, and activities. Def.'s Cross-Mot. Summ. J. 15. Defendant argues that because the purpose of economic and impact assistance payments are not reasonably related to the purposes for which Congress made appropriations in the 2016 and 2017 Consolidated Appropriations Acts, the funds appropriated in those Acts are not available to pay plaintiff or to be reprogrammed to pay plaintiff. Id. at 15-17.

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As an initial matter, plaintiff provides no legal support for the proposition that this court has the authority to direct an agency to reprogram funds appropriate for one purpose to another purpose. Nor is the court aware of any.[4] Moreover, even if the court could review an agency's decision to reprogram, or not to reprogram, appropriated funds, the record lacks any evidence indicating whether the DOE considered reprogramming funds or conducted an analysis to determine the feasibility of reprogramming funds. In other words, the court lacks the necessary administrative record to review the propriety of the DOE's decision.

Plaintiff also argues that a "necessary expense" analysis supports its contention that economic and impact assistance payments may be made from appropriations in the 2016 and 2017 Consolidated Appropriations Acts. See Pl.'s Reply at 13-14 ("The determinative issue in this case is whether the statutorily-mandated economic and impact assistance payments have a 'logical,' 'reasonable,' or 'sufficient' relationship to, and therefore constitute a necessary expense of, any of DOE's appropriations."). Id. But plaintiff gets ahead of itself. As noted above, an agency performs a "necessary expense" analysis to determine whether a prospective expenditure comports with appropriations Congress has provided. GAO Redbook, supra, at 3-17. As with its request that the court direct the DOE to reprogram funds to make economic and impact assistance payments, plaintiff provides no legal support for the proposition that the court has the authority to conduct a "necessary expense" analysis, and the court is unable to locate any. Moreover, even if the court could conduct such an analysis, the record lacks evidence that would be necessary for the court to proceed. Thus, the court declines to conduct the analysis.

Ultimately, to the extent that the DOE could exercise its discretion to make economic and impact assistance payments, the payments would need to be consistent with the purpose restrictions in the appropriation to be charged because the DOE is required to obey the restrictions Congress places on appropriations. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation . . . .'" (quoting UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))). In the 2016 and 2017 Consolidated Appropriations Acts, the DOE was restricted from using appropriations to create or initiate a program, project, or activity. Thus, the DOE's reprogramming authority was limited to shifting funds within programs, projects, or activities that already existed. And both parties admit that no appropriations for economic and impact assistance were made in the 2016 and 2017 Appropriations Acts. Consequently, Congress provided the DOE with no mechanism through which it could reprogram funds to make economic and impact assistance payments.

Congress could have appropriated money for economic and impact assistance, or it could have broadened the DOE's discretion to reprogram funds. But it did neither. The court cannot ignore the limiting language in the statute–"subject to the availability of appropriations"–which courts have consistently held to limit government liability. The unique mention of economic and impact assistance payments in 50 U.S.C. § 2566, as well as the detail in the appropriations

[4] To the extent that reprogramming decisions are subject to judicial review, they would be reviewable under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 702 (2012), but this court lacks jurisdiction to adjudicate APA claims, see Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

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Congress provided in 2016 and 2017, persuade the court that had Congress intended to appropriate funds for these payments, it would have made a specific appropriation. There is also evidence in the record that the purpose of the economic and impact assistance payments was to assure plaintiff that weapons-grade plutonium would not be stored at the SRS indefinitely. See Pl.'s Mot. App. 93, 100; see also 51 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). These facts support the DOE's failure to use existing appropriations to satisfy the obligation resulting from its failure to meet the MOX production objective.

Agencies must comply with the law and, where Congress has given direction on how to do so, agencies are not free to improvise. Although Congress originally provided that the DOE was required to make economic and impact assistance payments "from funds available to the Secretary [of the DOE]," 50 U.S.C. § 2566(d)(1) (Supp. III 2004), it subsequently narrowed the DOE's discretion, providing that economic and impact assistance payments were "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (Supp. IV 2006); 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). When Congress originally enacted 50 U.S.C. § 2566, the DOE arguably could have had discretion to reprogram funds to make economic and impact assistance payments, but the court cannot ignore that Congress has since intentionally and consistently restricted the DOE's discretion.

C. The Judgment Fund Is Not Available for Economic and Impact Assistance Payments

Finally, plaintiff argues that the economic and impact assistance payments could be paid from the Judgment Fund if there are no legally available appropriations. Pl.'s Mot. Summ. J. 12. Plaintiff is incorrect. Pursuant to the Appropriations Clause, "no money can be paid out of the Treasury unless it has been appropriated by Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). "The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States." 31 C.F.R. § 256.1(a) (2015); accord 31 U.S.C. § 1304 (providing that the Judgment Fund can be used "to pay final judgments, award compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"). Significantly, the Judgment Fund may only be used when "payment is not otherwise provided for . . . ." 31 U.S.C. § 1304(a)(1). "Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment." GAO Redbook, supra, at 14-39.

The Judgment Fund was designed to expedite the administration of justice by enabling courts to issue awards without the need to obtain separate appropriations. Slattery v. United States, 635 F.3d 1298, 1316-17 (Fed. Cir. 2011) (en banc); see also United States v. Maryland ex rel. Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965) ("The obvious purposes of the [Judgment Fund] are (1) to enable . . . prompt payment without awaiting a special appropriation, and (2) to relieve the United States of the obligation of paying interest, or of a bad conscience as it were for not doing so, while the principal remains unpaid.").

Plaintiff effectively seeks to exploit the flexibility of the Judgment Fund to circumvent Congress's failure to appropriate funds for economic and impact assistance. But, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

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Two facts are fatal to plaintiff's argument: First, there is clear statutory language limiting the DOE's liability to the amount appropriated, and no funds were subsequently appropriated. Second, there is no contractual relationship available to complement the statutory language and thereby overcome the lack of an appropriation and that limiting language. Given these facts, to resort to the Judgment Fund would ignore the apparent Congressional intent not to appropriate for economic and impact assistance payments.

Congress created a benefit of economic and impact assistance in 50 U.S.C. § 2566 and outlined the circumstances under which plaintiff could receive payment. Congress then did not appropriate funds to make payments, choosing instead to fund other priorities. The record indicates that Congress did make restricted appropriations to the DOE that not only reserved funds for particular purposes, but also prohibited those funds from being used for other, unrelated purposes.

The Judgment Fund is a separate appropriation which is available to furnish awards when other appropriations are not legally available. But plaintiff is not merely asking for a damages award. Plaintiff is effectively asking for the Judgment Fund to be used to create an appropriation where none was made by Congress. Resorting to the Judgment Fund, however, bypasses the case's central question, answered above: Did Congress make any appropriations available to pay economic and impact assistance? The answer is clearly "no." The Judgment Fund cannot be manipulated to change the answer to this question from "no" to "yes." To hold otherwise would enable courts to circumvent congressional decisions not to act. Most importantly, allowing resort to the Judgment Fund in a case where Congress has also clearly limited the government's liability entangles the court in decisions reserved to Congress by the United States Constitution. The court declines to become so entangled.

Under the circumstances of this case, plaintiff's proper course to obtain economic and impact assistance is to request an appropriation from Congress.

IV. CONCLUSION

As set forth in more detail above, the court **DENIES** plaintiff's motion for summary judgment and **GRANTS** defendant's cross-motion for summary judgment. Plaintiff's complaint is **DISMISSED**. Each party shall bear its own costs. The clerk of court shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

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EXHIBIT 6

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U.S. District Court
District of South Carolina (Aiken)
CIVIL DOCKET FOR CASE #: 1:16-cv-00391-JMC

State of South Carolina v. United States et al
Assigned to: Honorable J Michelle Childs
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/09/2016
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

State of South Carolina represented by

Alan Wilson
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803-734-3656
Email: agwilson@scag.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Benjamin Parker Mustian
Willoughby and Hoefer
PO Box 8416
Columbia, SC 29202-8416
803-252-3300
Fax: 803-256-8062
Email: bmustian@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John William Roberts
Willoughby and Hoefer
PO Box 8416
Columbia, SC 29202-8416
803-252-3300
Email: jroberts@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kenneth Paul Woodington
Davidson Morrison and Lindemann
PO Box 8568
Columbia, SC 29202-8568
803-806-8222
Fax: 803-806-8855
Email: kwoodington@dml-law.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Randy Lowell
Willoughby and Hoefer
PO Box 8416
Columbia, SC 29202-8416
803-252-3300
Fax: 803-256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert Dewayne Cook
SC Attorney General's Office
PO Box 11549

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Columbia, SC 29211
803−734−3792
Fax: 803−734−3524
Email: bcook@scag.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas Parkin C Hunter
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803−734−6151
Email: phunter@scag.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

William Henry Davidson , II
Davidson and Lindemann
PO Box 8568
Columbia, SC 29202−8568
803−806−8222
Fax: 803−806−8855
Email: wdavidson@dml−law.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Movant

Southern Carolina Regional Development Alliance
TERMINATED: 05/25/2016

represented by **Robert Yates Knowlton**
Haynsworth Sinkler Boyd
PO Box 11889
Columbia, SC 29211−1889
803−779−3080
Fax: 803−765−1243
Email: bknowlton@hsblawfirm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Samuel Ross Beheler Shealy
Haynsworth Sinkler Boyd PA
1201 Main Street
22nd Floor
Columbia, SC 29201
803−540−7959
Email: rshealy@hsblawfirm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

United States

represented by **Barbara Murcier Bowens**
US Attorneys Office
1441 Main Street
Suite 500
Columbia, SC 29201
803−929−3000
Fax: 803−252−2759
Email: barbara.bowens@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Martin Mason Tomlinson
Wyche PA
44 E Camperdown Way
Greenville, SC 29601
202-353-4556
Fax: 202-616-8470
Email: martin.m.tomlinson@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer J Aldrich
US Attorneys Office (Cola)
1441 Main Street
Suite 500
Columbia, SC 29201
803-929-3000
Fax: 803-733-5966
Email: jennifer.aldrich@usdoj.gov
ATTORNEY TO BE NOTICED

Raphael Ortega Gomez
US Department of Justice (Cv Federal Programs Branch)
PO Box 883
Washington, DC 20044
202-514-1318
Email: raphael.gomez@usdoj.gov
PRO HAC VICE
ATTORNEY TO BE NOTICED

Spencer Elijah Wittman Amdur
US Department of Justice (Cv Federal Programs Branch)
PO Box 883
Washington, DC 20044
202-616-7420
Email: spencer.amdur@usdoj.gov
TERMINATED: 02/13/2017
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

Dr Ernest Moniz
in his official capacity as Secretary of Energy

represented by

Barbara Murcier Bowens
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin Mason Tomlinson
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer J Aldrich
(See above for address)
ATTORNEY TO BE NOTICED

Raphael Ortega Gomez
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Spencer Elijah Wittman Amdur
(See above for address)

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TERMINATED: 02/13/2017
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

National Nuclear Security Administration

represented by **Barbara Murcier Bowens**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin Mason Tomlinson
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer J Aldrich
(See above for address)
ATTORNEY TO BE NOTICED

Raphael Ortega Gomez
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Spencer Elijah Wittman Amdur
(See above for address)
TERMINATED: 02/13/2017
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

Dr General Frank G Klotz
in his official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security

represented by **Barbara Murcier Bowens**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin Mason Tomlinson
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer J Aldrich
(See above for address)
ATTORNEY TO BE NOTICED

Raphael Ortega Gomez
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Spencer Elijah Wittman Amdur
(See above for address)
TERMINATED: 02/13/2017
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

United States Department of Energy

represented by **Barbara Murcier Bowens**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin Mason Tomlinson

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(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer J Aldrich
(See above for address)
ATTORNEY TO BE NOTICED

Raphael Ortega Gomez
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Spencer Elijah Wittman Amdur
(See above for address)
TERMINATED: 02/13/2017
PRO HAC VICE
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/09/2016	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0420−6390222.), filed by State of South Carolina. Service due by 5/12/2016 (Attachments: # 1 Table of Exhibits to Complaint, # 2 Exhibit 1 (Am. Interim Action Determination), # 3 Exhibit 2 (SPD Supplemental EIS Factsheet), # 4 Exhibit 2 (SPD Supplemental EIS Factsheet), # 5 Exhibit 4 (Final Surplus Plutonium Disposition Supplemental Environmental Impact, # 6 Exhibit 5 (Excerpt from History of the U.S. Weapons−Usable Plutonium Disposition, # 7 Exhibit 6 (Report to Congress: Disposition of Surplus Defense Plutonium at Savan, # 8 Exhibit 7 (Record of Decision for PEIS), # 9 Exhibit 7 (Record of Decision for PEIS), # 10 Exhibit 9 (Excerpt from Surplus Plutonium Disposition Final EIS, Summary), # 11 Exhibit 10 (Record of Decision for SPD EIS), # 12 Exhibit 11 (PMDA), # 13 Exhibit 12 (Congressional Research Serv., Mem., U.S.−Russia Plutonium Management, # 14 Exhibit 13 Exhibit NRC EIS, # 15 Exhibit 14 (Press Release, No. PR−02−007), # 16 Exhibit 15 (Am. ROD for PEIS & SPD EIS), # 17 Exhibit 16 (Am. SPD EIS ROD), # 18 Exhibit 17 (Storage of Surplus Plutonium Materials at the Savannah River Site Su, # 19 Exhibit 18 (NRC Construction Authorization No. CAMOX−001), # 20 Exhibit 19 (DOE/NNSA Report to Congress), # 21 Exhibit 20 (Excerpt from Draft SPD Supp. EIS), # 22 Exhibit 21 (PMDA as amended by 2010 Protocol), # 23 Exhibit 22 (Letter to Secretary Moniz), # 24 Exhibit 22 (Letter to Secretary Moniz), # 25 Exhibit 24 (Letter of Atty General Wilson to Secretary Moniz), # 26 Exhibit 25 (FY2015 Budget Justification))(asni,) (Entered: 02/09/2016)
02/09/2016	2	Summons Issued as to United States Department of Energy, Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, U.S. Attorney and U.S. Attorney General. (asni,) Modified to edit text on 2/10/2016 (asni,). (Entered: 02/09/2016)
02/09/2016	3	Local Rule 26.01 Answers to Interrogatories by State of South Carolina.(asni,) (Entered: 02/09/2016)
02/18/2016	5	NOTICE of Appearance by William Henry Davidson, II on behalf of State of South Carolina (Davidson, William) (Entered: 02/18/2016)
03/31/2016	6	MOTION to Intervene by Southern Carolina Regional Development Alliance. Response to Motion due by 4/18/2016. (Attachments: # 1 Exhibit A − Complaint, # 2 Exhibit 1 to Complaint (Affidavit of Danny Black), # 3 Exhibit 2 to Complaint (South Carolina Promise Zone Fact Sheet))No proposed order.(Shealy, Samuel) (Entered: 03/31/2016)
04/06/2016	7	MOTION for Extension of Time to File Answer re 1 Complaint by Frank G Klotz, Ernest Moniz, United States, United States Department of Energy and National Nuclear Security Administration. Response to Motion due by 4/25/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) Modified to add filers on 4/7/2016 (asni,). (Entered: 04/06/2016)

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04/06/2016	8	**ORDER granting 7 Motion for Extension of Time to Answer Frank G Klotz answer due 4/25/2016; Ernest Moniz answer due 4/25/2016; United States answer due 4/25/2016; United States Department of Energy answer due 4/25/2016, National Nuclear Security Administration answer due 4/25/2016. Signed by Honorable J Michelle Childs on 4/6/2016.(asni,)** (Main Document 8 replaced on 4/6/2016) (asni,). Modified to edit text on 4/7/2016 (asni,). (Entered: 04/06/2016)
04/06/2016	9	SUMMONS Returned Executed by State of South Carolina. All Defendants. (Attachments: # 1 Summons Service on DOE, # 2 Summons Service on NNSA, # 3 Summons Service on Moniz, # 4 Summons Service on Klotz, # 5 Summons Service on Lynch, # 6 Summons Service on Nettles)(Lowell, Randy) (Entered: 04/06/2016)
04/06/2016	10	MOTION for Summary Judgment by State of South Carolina. Response to Motion due by 4/25/2016. (Attachments: # 1 Memo in Support, # 2 Exhibit Table of Exhibits, # 3 Exhibit 1 (Excerpt from D.J. Spellman et al., History of the U.S. Weapons–Usable Plutonium Disposition Program Leading to DOEs Record of Decision), # 4 Exhibit 2 (Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site), # 5 Exhibit 3 (Record of Decision (ROD) for Storage and Disposition of Weapons–Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)), # 6 Exhibit 4 (Excerpt from Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), Vol. I Part A), # 7 Exhibit 5 (ROD for SPD EIS), # 8 Exhibit 6 (Plutonium Management and Disposition Agreement (PMDA)), # 9 Exhibit 7 (Release No. PR–02–007), # 10 Exhibit 8 (Aff. of Jessie Hill Roberson (ECF No. 10), 1:02–cv–01426–CMC), # 11 Exhibit 9 (Ltr. of Hodges to Abraham (Apr. 6, 2001)), # 12 Exhibit 10 (Ltr. of Hodges to Abraham (Apr. 24, 2001)), # 13 Exhibit 11 (Ltr. of Hodges to Abraham (Jun. 13, 2001)), # 14 Exhibit 12 (Ltr. of Abraham to Hodges (Jun. 26, 2001)), # 15 Exhibit 13 (Ltr. of Card to Hodges, Peeler, and Wilkins (Aug. 27, 2001)), # 16 Exhibit 14 (Ltr. of Hodges and Condon to Abraham (Aug. 30, 2001)), # 17 Exhibit 15 (Ltr. of Abraham to Hodges (Sept. 21, 2001)), # 18 Exhibit 16 (Ltr. of Hodges to Abraham (Oct. 26, 2001)), # 19 Exhibit 17 (Ltr. of Hodges to Abraham (Apr. 10, 2002)), # 20 Exhibit 18 (Ltr. of Abraham to Hodges (Apr. 11, 2002)), # 21 Exhibit 19 (Ltr. of Hodges to Abraham (Apr. 11, 2002)), # 22 Exhibit 20 (Ltr. of Bates to Otis (Apr. 11, 2002)), # 23 Exhibit 21 (Am. ROD for SPD EIS), # 24 Exhibit 22 (Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis), # 25 Exhibit 23 (Ltr. of Trice to Congressman Wilson (Oct. 9, 2015)), # 26 Exhibit 24 (Amended PMDA), # 27 Exhibit 25 (CRS PMDA Report), # 28 Exhibit 26 (Excerpt from Draft SPD Supplemental EIS), # 29 Exhibit 27 (Excerpt from FY 2014 DOE Budget Justification), # 30 Exhibit 28 (Excerpt from FY 2015 DOE Budget Justification), # 31 Exhibit 29 (Ltr. to Moniz (Mar. 6, 2014)), # 32 Exhibit 30 (Excerpt from Consolidated Appropriations Act 2016), # 33 Exhibit 31 (Consolidated Appropriations Act FY 2016 Explanatory Statement), # 34 Exhibit 32 (Excerpt from FY 2017 DOE Budget Justification), # 35 Exhibit 33 (High Bridge Associates, Inc., Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP), # 36 Exhibit 34 (Excerpt from Senate Armed Services Strategic Forces Subcommittee Hearing Transcript (Feb. 24, 2016)), # 37 Exhibit 35 (Excerpt from Senate Appropriations Subcommittee Hearing Transcript (March 16, 2016)), # 38 Exhibit 36 (Ltr. of Wilson to Moniz (Sept. 4, 2015)), # 39 Exhibit 37 (Ltr. of Haley to Moniz (Dec. 14, 2015)), # 40 Exhibit 38 (Ltr. of Moniz to Haley (Jan. 19, 2016)), # 41 Exhibit 39 (DOE/NNSA Report to Congress (Oct. 3, 2011)), # 42 Exhibit 40 (Environmental Assessment for Gap Material Plutonium Transport, Receipt, and Processing))No proposed order.(Lowell, Randy) (Entered: 04/06/2016)
04/18/2016	11	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by State of South Carolina.Reply to Response to Motion due by 4/28/2016 (Attachments: # 1 Exhibit)(Lowell, Randy) (Entered: 04/18/2016)
04/18/2016	12	MOTION for Extension of Time to File Response/Reply as to 6 MOTION to Intervene by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/18/2016)
04/19/2016	13	**TEXT ORDER granting 12 Motion for Extension of Time to File Response/Reply re 6 MOTION to Intervene Response to Motion due by 5/2/2016. Signed by Honorable J Michelle Childs on 4/19/2016.(asni,)** (Entered: 04/19/2016)

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04/21/2016	14	MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/9/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/21/2016)
04/21/2016	15	RESPONSE in Opposition re 14 MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment Response filed by State of South Carolina.Reply to Response to Motion due by 5/2/2016 (Lowell, Randy) (Entered: 04/21/2016)
04/22/2016	16	**ORDER granting 14 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment Response to Motion due by 5/25/2016. Signed by Honorable J Michelle Childs on 4/22/2016.(asni,)** (Entered: 04/22/2016)
04/25/2016	17	MOTION to Dismiss by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/12/2016. (Attachments: # 1 Exhibit A, MOX February 2013−14 Report, # 2 Exhibit B, HQ Signed Report 2015)No proposed order.(Bowens, Barbara) (Entered: 04/25/2016)
04/28/2016	19	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 04/28/2016)
05/02/2016	20	MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/19/2016. No proposed order.(Bowens, Barbara) (Entered: 05/02/2016)
05/02/2016	21	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 5/12/2016 (Bowens, Barbara) (Entered: 05/02/2016)
05/10/2016	25	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 05/11/2016)
05/11/2016	24	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 5/31/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/11/2016)
05/11/2016	26	**ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/11/2016.(asni,)** (Entered: 05/11/2016)
05/12/2016	27	RESPONSE in Opposition re 17 MOTION to Dismiss Response filed by State of South Carolina.Reply to Response to Motion due by 5/23/2016 (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1 (Deadlines Table), # 3 Exhibit 2 (Hodges Ltr), # 4 Exhibit 3 (COA Table), # 5 Exhibit 4 (Transcript Excerpt))(Lowell, Randy) (Entered: 05/12/2016)
05/17/2016	28	Joint MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment , 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by State of South Carolina. Response to Motion due by 6/3/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/17/2016)
05/18/2016	29	**ORDER granting 28 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment, 20 MOTION to Stay Proceedings on Plaintiff's Motion for Summary Judgment Response to Motion to Stay due by 5/24/2016, Response to Motion for Summary Judgment due by 6/10/2016. Signed by Honorable J Michelle Childs on 5/18/2016.(asni,)** (Entered: 05/18/2016)
05/23/2016	31	Consent MOTION for Leave to File Excess Pages by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 6/9/2016. No proposed order.(Bowens, Barbara) (Entered: 05/23/2016)

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05/23/2016	32	**TEXT ORDER granting 31 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/23/2016.(asni,)** (Entered: 05/23/2016)
05/23/2016	33	REPLY to Response to Motion re 17 MOTION to Dismiss Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/23/2016)
05/24/2016	34	NOTICE of Hearing on Motion 10 MOTION for Summary Judgment, 6 MOTION to Intervene, 20 MOTION to Stay, 17 MOTION to Dismiss : Motion Hearing set for 6/30/2016 10:00 AM in Columbia # 3, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable J Michelle Childs. ***Please note this hearing will include all pending motions not ruled upon prior to the date of the hearing***(asni,) (Entered: 05/24/2016)
05/24/2016	35	RESPONSE in Opposition re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by State of South Carolina.Reply to Response to Motion due by 6/3/2016 (Lowell, Randy) (Entered: 05/24/2016)
05/25/2016	36	**ORDER AND OPINION denying 6 Motion to Intervene. Signed by Honorable J Michelle Childs on 5/25/2016.(asni,)** (Entered: 05/25/2016)
05/25/2016	37	REPLY to Response to Motion re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/25/2016)
06/10/2016	38	RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Exhibit 1, Record of Decision, Surplus Plutonium Disposition, 81 Fed. Reg. 19588 (Apr. 5, 2016), # 2 Exhibit 2, Declaration of Henry A. Gunter, # 3 Exhibit 3, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No., # 4 Exhibit 4, Department of Energy, Preferred Alternative for Certain Quantities of Plutonium, 80 Fed. Reg. 80348 (Dec. 24, 2015), # 5 Exhibit 5, Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, div. D, tit. III, Dec. 18, 2015, # 6 Exhibit 6, Explanatory Table, 114 Cong. Rec. 161, H10108–H10123 (daily ed. Dec. 17, 2015), # 7 Exhibit 7, Explanatory Statement, 114 Cong. Rec. 161, H10056, H10102–H10107 (daily ed. Dec. 17, 2015), # 8 Exhibit 8, Declaration of Peter H. Hanlon, # 9 Addendum Table of Exhibits)(Bowens, Barbara) (Entered: 06/10/2016)
06/15/2016	39	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 7/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 06/15/2016)
06/16/2016	40	**ORDER granting 39 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 6/16/2016.(asni,)** (Entered: 06/16/2016)
06/20/2016	42	REPLY to Response to Motion re 10 MOTION for Summary Judgment Response filed by State of South Carolina. (Attachments: # 1 Exhibit, # 2 Exhibit 1 (Ltr. of Del Vecchio), # 3 Exhibit 2 (Moniz Senate Test.), # 4 Exhibit 3 (Fact Sheet), # 5 Exhibit 4 (Rpt. to Congress), # 6 Exhibit 5 (DOE FY16 Budget Excerpt))(Lowell, Randy) (Entered: 06/20/2016)
06/20/2016	41	CORRECTED RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Corrected Memorandum in Opposition) Re–filed by Clerk to correct event type.(mdea) Modified on 6/21/2016 to correct entry number (mdea,). (Entered: 06/21/2016)
06/21/2016	43	**TEXT ORDER denying 20 Motion to Stay: This matter is before the court on Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on Plaintiffs pending Motion for Summary Judgment (ECF No. 10) until the court adjudicates Defendants pending Motion to Dismiss (ECF No. 17). In support of their Motion to Stay, Defendants assert that all Plaintiffs claims are subject to dismissal on jurisdictional or other legal grounds and, therefore, concerns for judicial**

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		economy and litigation efficiency make it appropriate for the [c]ourt to resolve [D]efendants Motion to Dismiss before proceeding to summary judgment. (ECF No. 20 at 4.) Plaintiff opposes the Motion to Stay arguing that Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request. (ECF No. 35 at 1.) When considering a motion to stay, the district court should consider three factors: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non–moving party. Johnson v. DePuy Orthopaedics, Inc., No. 3:12–cv–2274, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012) (granting stay pending a transfer of the case to MDL) (citation omitted). In view of these factors, the court finds that a stay would not serve the interests of judicial economy and could cause prejudice to Plaintiff. In this regard, the court understands that it will first have to address the merits of Defendants Motion to Dismiss asserting a lack of subject matter jurisdiction. In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998) (A federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists, and to dismiss the action if no such ground appears.) (citation omitted). However, the court is also persuaded that judicial economy will be best served by allowing the parties to proceed with their arguments relevant to Plaintiffs Motion for Summary Judgment at the June 30, 2016 hearing (ECF No. 34), even if the court has to allow for discovery and additional briefing subsequent to the hearing. Accordingly, the court DENIES Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20). Signed by Honorable J Michelle Childs on 6/21/16.(alew,) (Entered: 06/21/2016)
06/22/2016	44	MOTION to Appear Pro Hac Vice by Raphael Ortega Gomez by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/22/2016)
06/24/2016	45	MOTION to Appear Pro Hac Vice by Spencer Elijah Wittmann Amdur by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/24/2016)
06/27/2016	46	**TEXT ORDER granting 44 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/27/2016	47	**TEXT ORDER granting 45 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/30/2016	50	**Minute Entry. Proceedings held before Honorable J Michelle Childs: taking under advisement 10 Motion for Summary Judgment; 17 Motion to Dismiss. Motion Hearing held on 6/30/2016. Written order forthcoming. Court Reporter Kathleen Richardson. (mbro,)** (Entered: 06/30/2016)
08/18/2016	51	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Motion hearing held on June 30, 2016, before Judge J. Michelle Childs. Court Reporter/Transcriber Kathleen Richardson, RMR, CRR, Telephone number/E–mail Kathleen_Richardson@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 9/8/2016. Redacted Transcript Deadline set for 9/19/2016. Release of Transcript Restriction set for 11/16/2016. (kari,) (Entered: 08/18/2016)
09/15/2016	53	Letter from Counsel for the State. (Lowell, Randy) (Entered: 09/15/2016)
10/03/2016	55	Letter from Spencer E. Amdur. (Attachments: # 1 Letter, # 2 Press Release)(Bowens, Barbara) (Entered: 10/03/2016)
10/31/2016	56	**ORDER AND OPINION: The court declines to rule on Defendants' Motion to Dismiss 17 for failure to state a claim for which relief could be granted as to the**

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		removal claim under Fed. R. Civ. P. 12(b)(6) until supplemental briefs, herein described are submitted. The parties are DIRECTED to file briefs that address the following issues: 1. Whether the court should transfer the monetary claim to the CFC, pursuant to 28 U.S.C. § 1631. 2. Whether the court should dismiss the monetary claim without prejudice to the State's ability to refile the claim in an action in the CFC. The briefs shall comply with rules governing memoranda in Local Civ. Rule 7 (D.S.C.) and must be filed by November 30, 2016. Signed by Honorable J Michelle Childs on 10/31/2016.(asni,) (Entered: 10/31/2016)
11/18/2016	59	Consent MOTION for Extension of Time by State of South Carolina. Response to Motion due by 12/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 11/18/2016)
11/21/2016	60	**ORDER granting in part and denying in part 59 Motion for Extension of Time. The parties are directed to file their supplemental briefs in response to the court's October 31, 2016 order on or before December 5, 2016. The State is given no additional time by this order in which to file a memorandum in support of a motion to reconsider under Rules 59(e) or 60(b). Signed by Honorable J Michelle Childs on 11/21/2016.(asni,)** (Entered: 11/21/2016)
11/28/2016	62	MOTION for Reconsideration re 56 Order on Motion to Dismiss by State of South Carolina. Response to Motion due by 12/15/2016. (Attachments: # 1 Memo in Support)No proposed order.(Lowell, Randy) (Entered: 11/28/2016)
12/05/2016	63	REPLY by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 56 Order on Motion to Dismiss,,, *Defendants' Supplemental Brief.* (Bowens, Barbara) (Entered: 12/05/2016)
12/05/2016	64	REPLY by State of South Carolina to 56 Order on Motion to Dismiss,,, *State of South Carolina's Supplemental Brief.* (Roberts, John) (Entered: 12/05/2016)
12/16/2016	66	Joint MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 1/3/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 12/16/2016)
12/16/2016	67	RESPONSE in Opposition re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 12/28/2016 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Bowens, Barbara) (Entered: 12/16/2016)
12/19/2016	68	**ORDER granting 66 Motion for Extension of Time. Signed by Honorable J Michelle Childs on 12/19/2016.(mbro,)** (Entered: 12/19/2016)
01/11/2017	70	MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 1/25/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 01/11/2017)
01/11/2017	71	**TEXT ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 1/11/2017.(asni,)** (Entered: 01/11/2017)
01/13/2017	72	REPLY to Response to Motion re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by State of South Carolina. (Roberts, John) (Entered: 01/13/2017)
02/07/2017	75	**ORDER AND OPINION denying 62 Motion for Reconsideration re 56 Order on Motion to Dismiss. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,)** (Entered: 02/07/2017)
02/07/2017	76	**ORDER AND OPINION granting in part 17 Motion to Dismiss. The third cause of action in the State's complaint (ECF No. 1 97–112) is hereby DISMISSED without prejudice to the State's ability to prosecute it an original action filed in**

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		the Court of Federal Claims. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,) (Entered: 02/07/2017)
02/08/2017	77	**CONFERENCE AND SCHEDULING ORDER Rule 26(f) Conference Deadline 2/28/2017, 26(a) Initial Disclosures due by 3/14/2017, Rule 26 Report due by 3/14/2017, Motions to Amend Pleadings due by 4/24/2017, Plaintiffs ID of Expert Witness due by 5/24/2017, Defendants ID of Expert Witnesses Due by 6/23/2017, Records Custodian Affidavit due by 6/23/2017, Discovery due by 7/24/2017, Motion in Limine due by 11/3/2017, Motions due by 8/7/2017, Rule 26(a)(3) Disclosures due by 11/3/2017, Pretrial Briefs due by 11/28/2017, Bench Trial Deadline 12/5/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/08/2017	78	**MEDIATION ORDER Mediation Due by 7/31/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/13/2017	79	NOTICE of Appearance by Barbara Murcier Bowens on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Bowens, Barbara) (Entered: 02/13/2017)
03/10/2017	81	ADR STATEMENT/CERTIFICATION by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	82	Rule 26(f) Report by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	83	**AMENDED SCHEDULING ORDER Mediation concluded by 7/31/2017, Signed by Honorable J Michelle Childs on 3/10/2017. (asni,)** (Entered: 03/10/2017)
03/14/2017	84	**ORDER AND OPINION Defendants' motion to dismiss the State's complaint 17 is hereby GRANTED IN PART, with respect to the complaint's first cause of action, and DENIED IN PART, with respect to the complaint's second cause of action. The first cause of action in the State's complaint (ECF No. 1 at 84–88) is hereby DISMISSED. Signed by Honorable J Michelle Childs on 3/14/2017. (asni,)** (Entered: 03/14/2017)
03/20/2017	86	**ORDER AND OPINION granting in part and denying in part 10 Motion for Summary Judgment. Parties shall submit a joint written statement to the court on or before April 21, 2017, and, after reviewing the statement, the court will determine the need for further submissions or hearings. Signed by Honorable J Michelle Childs on 3/20/2017.(asni,)** Modified to edit text on 3/24/2017 (asni,). (Entered: 03/20/2017)
04/20/2017	88	NOTICE of Appearance by Jennifer J Aldrich on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	89	Consent MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/4/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.(Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	90	**TEXT ORDER granting 89 Motion for Extension of Time for the parties to submit the joint written statement. Signed by Honorable J Michelle Childs on 4/20/2017.(asni,)** (Entered: 04/20/2017)
07/31/2017	96	STATUS REPORT *(Joint Statement)* by State of South Carolina. (Lowell, Randy) supplement 97 added on 8/1/2017 (asni,). supplement added 100 added on 8/14/2017 (asni,). supplements added 103 104 8/22/2017 (asni,). (Entered: 07/31/2017)
07/31/2017	97	SUPPLEMENT by State of South Carolina *Proposing Injunctive Relief*. (Lowell, Randy) (Entered: 07/31/2017)
08/01/2017	98	**TEXT ORDER: By a March 20, 2017 order, the court granted in part the State of South Carolina's (the "State") motion for summary judgment in this matter,**

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specifically granting the State's requested relief for an injunctive order compelling the Secretary of Energy (the "Secretary") to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the State's summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties "to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]." (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that "[i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy." (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant "is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017," and that (2) one of the four attorneys representing them in this matter is "out of the office" on a scheduled one–week vacation in August and is "out of the office" for another week in August and five days in September while "handling depositions in another matter." (Id.) The State objects to Defendants' proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the State's consideration until July 20, and arguing that Defendant's proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the court's March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the court's March 20, 2017 order. (Id. at 2.) In the court's view, Defendants' April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants' proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the court's previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants' April 20, 2017 motion also contemplated that the parties would "propose" deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants' proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be "out of the office" for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants' proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the State's unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a lackadaisical approach on Defendants' part to complying with the court's order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly,

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Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017.: By a March 20, 2017 order, the court granted in part the State of South Carolinas (the State) motion for summary judgment in this matter, specifically granting the States requested relief for an injunctive order compelling the Secretary of Energy (the Secretary) to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the States summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]. (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that [i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy. (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017, and that (2) one of the four attorneys representing them in this matter is out of the office on a scheduled one–week vacation in August and is out of the office for another week in August and five days in September while handling depositions in another matter. (Id.) The State objects to Defendants proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the States consideration until July 20, and arguing that Defendants proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the courts March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the courts March 20, 2017 order. (Id. at 2.) In the courts view, Defendants April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the courts previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants April 20, 2017 motion also contemplated that the parties would propose deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be out of the office for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the States unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a

		lackadaisical approach on Defendants part to complying with the courts order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly, Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017. (Specific Document due by 8/11/2017.) Signed by Honorable J Michelle Childs on 8/1/2017. (asni,) (Entered: 08/01/2017)
08/11/2017	100	SUPPLEMENT by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 98 Order, Set Deadlines,,,

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CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01068-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Cause: 28:1491 Tucker Act

Date Filed: 08/07/2017
Date Terminated: 03/05/2018
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
Fax: (803) 256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
U.S. Department of Justice (C)
Commerical Litigation Branch, Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-2228
Fax: (202) 514-8624
Email: tara.hogan@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/07/2017	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4115693) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 10/6/2017.** (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9

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		Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Civil Cover Sheet, # 16 Exh. List)(ac7) (Entered: 08/07/2017)
08/07/2017	2	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 08/07/2017)
08/07/2017	3	NOTICE of Designation of Electronic Case. (ac7) (Entered: 08/07/2017)
08/18/2017	4	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 08/18/2017)
10/06/2017	5	MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Hogan, Tara) (Entered: 10/06/2017)
10/06/2017	6	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/06/2017)
10/18/2017	7	MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA.**Response due by 11/1/2017.**(Hogan, Tara) (Entered: 10/18/2017)
10/24/2017	8	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/7/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/24/2017)
10/30/2017	9	RESPONSE to 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/6/2017.** (Lowell, Randolph) (Entered: 10/30/2017)
10/31/2017	10	REPLY to Response to Motion re 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA. (Hogan, Tara) (Entered: 10/31/2017)
11/07/2017	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. (Hogan, Tara) (Entered: 11/07/2017)
11/20/2017	12	MOTION for Leave to File Surreply , filed by STATE OF SOUTH CAROLINA.**Response due by 12/4/2017.** (Attachments: # 1 Exhibit A)(Lowell, Randolph) (Entered: 11/20/2017)
11/28/2017	13	ORDER granting 7 Motion to Stay; granting 12 Motion for Leave to File Surreply. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/28/2017)
11/28/2017	14	SUR-REPLY re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 11/28/2017)
02/15/2018	15	SCHEDULING ORDER: **Defendant's Supplemental Brief due by 3/8/2018. Plaintiff's Supplemental Response Brief due by 3/29/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/15/2018)
03/05/2018	16	NOTICE of Voluntary Dismissal without prejudice, filed by STATE OF SOUTH CAROLINA (Lowell, Randolph) (Entered: 03/05/2018)
03/05/2018		Complaint dismissed pursuant to Rule 41(a)(1)(A)(i) this day. (ac7) (Entered: 03/06/2018)

PACER Service Center

Transaction Receipt			
09/01/2020 12:08:29			
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Description:	Docket Report	**Search Criteria:**	1:17-cv-01068-MMS
Billable Pages:	2	**Cost:**	0.20

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18-cv-00038-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Case in other court: 19-02324
Cause: 28:1491 Tucker Act

Date Filed: 01/08/2018
Date Terminated: 08/20/2019
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
Fax: (803) 256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
U.S. Department of Justice (C)
Commerical Litigation Branch, Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-2228
Fax: (202) 514-8624
Email: tara.hogan@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

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01/08/2018	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4403717) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 3/9/2018.** (Attachments: # 1 Exh. List, # 2 Exhibit 1-13, # 3 Civil Cover Sheet)(ac7) (Entered: 01/08/2018)
01/08/2018	2	NOTICE of Directly Related Case(s) [17-1068C], filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 01/08/2018)
01/08/2018	3	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 01/08/2018)
01/08/2018	4	NOTICE of Designation of Electronic Case. (ac7) (Entered: 01/08/2018)
01/25/2018	5	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 01/25/2018)
03/05/2018	6	MOTION to Amend Pleadings - Rule 15 , filed by STATE OF SOUTH CAROLINA.**Response due by 3/19/2018.** (Attachments: # 1 Exhibit A - Proposed Amended Complaint)(Lowell, Randolph) (Entered: 03/05/2018)
03/06/2018	7	ORDER granting 6 Motion to Amend Pleadings - Rule 15(b). **Amended Complaint due by 3/9/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 03/06/2018)
03/06/2018	8	AMENDED COMPLAINT against USA, filed by STATE OF SOUTH CAROLINA. , filed by STATE OF SOUTH CAROLINA.Answer due by 3/20/2018. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit Exhibits 1-14)(Lowell, Randolph) (Entered: 03/06/2018)
03/20/2018	9	ANSWER to 8 Amended Complaint , filed by USA.**JPSR due by 5/8/2018.**(Hogan, Tara) (Entered: 03/20/2018)
03/30/2018	10	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 4/27/2018.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 03/30/2018)
04/23/2018	11	Unopposed MOTION for Extension of Time until 5/18/18 to File Response as to 10 MOTION for Summary Judgment , filed by USA.**Response due by 5/7/2018.**(Hogan, Tara) (Entered: 04/23/2018)
04/24/2018	12	ORDER granting 11 Motion for Extension of Time to File Response re 10 MOTION for Summary Judgment. **Response due by 5/18/2018. Reply due by 6/8/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 04/24/2018)
05/08/2018	13	JOINT PRELIMINARY STATUS REPORT . (Hogan, Tara) (Entered: 05/08/2018)
05/16/2018	14	Unopposed MOTION for Extension of Time until 5/23/18 to File Response , filed by USA.**Response due by 5/30/2018.**(Hogan, Tara) (Entered: 05/16/2018)
05/17/2018	15	ORDER granting 14 Motion for Extension of Time to File Response re: 10 Motion for Summary Judgment. **Response due 5/23/2018. Reply due 6/13/2018.** Signed by Judge Margaret M. Sweeney. (pp) Service on parties made. (Entered: 05/17/2018)
05/23/2018	16	CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA, filed by USA.**Response due by 6/20/2018.**(Hogan, Tara) (Entered: 05/23/2018)
06/12/2018	17	Unopposed MOTION for Extension of Time to File Reply , filed by STATE OF SOUTH CAROLINA.**Response due by 6/26/2018.**(Lowell, Randolph) (Entered:

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		06/12/2018)
06/13/2018	18	ORDER granting 17 Motion for Extension of Time to File Combined Reply in Support of 10 MOTION for Summary Judgment and Response to 16 CROSS MOTION for Summary Judgment. **Plaintiff's Reply and Response due by 6/20/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 06/13/2018)
06/20/2018	19	REPLY to Response to Motion re 10 MOTION for Summary Judgment , 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 06/20/2018)
07/05/2018	20	REPLY to Response to Motion re 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by USA. (Hogan, Tara) (Entered: 07/05/2018)
10/24/2018	21	ORDER Staying Further Consideration of 10 MOTION for Summary Judgment filed by STATE OF SOUTH CAROLINA and 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA filed by USA., ORDER STAYING CASE **Status Report due by 11/26/2018** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 10/24/2018)
11/26/2018	22	JOINT STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 11/26/2018)
01/25/2019	23	JOINT STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 01/25/2019)
03/26/2019	24	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 03/26/2019)
05/28/2019	25	JOINT STATUS REPORT , filed by All Defendants. (Hogan, Tara) (Entered: 05/28/2019)
05/29/2019	26	STATUS REPORT ORDER **Status Report due by 6/28/2019** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 05/29/2019)
06/24/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/24/2019)

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06/28/2019	27	STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Exhibit Ltr of McMaster to Trump, # 2 Exhibit Ltr of Wilson to Barr)(Lowell, Randolph) (Entered: 06/28/2019)
06/28/2019	28	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 06/28/2019)
07/01/2019	29	ORDER LIFTING STAY and ORDER to file supplemental briefs. The stay on proceedings in this case is lifted. **The parties shall file supplemental briefs by Wednesday, July 31, 2019.** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 07/01/2019)
07/20/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402. (dh) (ADI) (Entered: 07/20/2019)
07/31/2019	30	SUPPLEMENTAL BRIEF , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix to Supplemental Brief)(Lowell, Randolph) (Entered: 07/31/2019)
07/31/2019	31	RESPONSE to *Court's order*, filed by USA. (Hogan, Tara) (Entered: 07/31/2019)
08/16/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account**on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/20/2019	32	REPORTED OPINION denying 10 Motion for Summary Judgment; granting 16 Cross Motion. The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 08/20/2019)

08/20/2019	33	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of defendant. Plaintiff' complaint is dismissed. Each party shall bear its own costs. (Service on parties made.) (ac7) (Entered: 08/20/2019)
08/23/2019	34	NOTICE OF APPEAL as to 33 Judgment, filed by STATE OF SOUTH CAROLINA. Filing fee $ 505, receipt number 9998-5597681. Copy to CAFC. (Lowell, Randolph) (Entered: 08/23/2019)
08/26/2019		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 34 Notice of Appeal. (ac7) (Entered: 08/26/2019)
08/28/2019		CAFC Case Number 2019-2324 for 34 Notice of Appeal filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 08/28/2019)

PACER Service Center

Transaction Receipt

09/01/2020 12:04:02

PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:18-cv-00038-MMS
Billable Pages:	4	**Cost:**	0.40

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EXHIBIT 7

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov
Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov
Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov
Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com
Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

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Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

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destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

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4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

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required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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EXHIBIT 8

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

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litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. Article III.B is deleted in its entirety and replaced with the following:

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov
Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov
Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov
Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name: Kenneth P. Woodington
Davidson, Wren & Plyler, P.A.
Address: 1611 Devonshire Drive, Second Floor
Columbia, SC 29204
Phone: 803-806-8222
Email: kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

Date: 6/13/19

SPECIAL COUNSEL

Davidson, Wren & Plyler, P.A.
By: William H. Davidson, II
Its: Shareholder

Date: 6/2/19

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EXHIBIT 9

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912 F.3d 720
United States Court of Appeals, Fourth Circuit.

State of SOUTH CAROLINA,
Plaintiff – Appellee,
v.
UNITED STATES of America; United States Department of Energy; Rick Perry, in His Official Capacity as Secretary of Energy; National Nuclear Security Administration; Lisa E. Gordon-Hagerty, in Her Official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants – Appellants.

No. 18-1684
|
Argued: September 27, 2018
|
Decided: January 8, 2019

Synopsis

Background: State brought action against United States Department of Energy (DOE) and National Nuclear Security Administration (NNSA) and their officials challenging termination of mixed oxide fuel fabrication facility project in state. The United States District Court for the District of South Carolina, No. 1:18-cv-01431-JMC, J. Michelle Childs, J., 329 F.Supp.3d 214, granted state's motion for preliminary injunction, and defendants appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] state did not suffer sufficiently concrete injury-in-fact to support standing to bring action, and

[2] state's claims were not ripe for adjudication.

Vacated and remanded.

West Headnotes (12)

[1] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears burden of establishing standing to assert each of its claims.

1 Cases that cite this headnote

[2] **Federal Courts** Standing

Court of Appeals reviews question of whether plaintiff possesses standing de novo.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to defendant's challenged action; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

To satisfy injury-in-fact requirement for standing, plaintiff must establish realistic danger of sustaining direct injury.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute injury-in-fact; rather, injury-in-fact

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must be concrete in both qualitative and temporal sense. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[6] **Environmental Law** Government entities, agencies, and officials

State did not suffer sufficiently concrete injury-in-fact to support standing to bring action alleging that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state, despite state's contention that DOE's decision meant that it would become permanent repository of weapons-grade plutonium and be subject to environmental, health, and safety risks that entailed, where current environmental impact statement provided that DOE had 28 years to identify alternative method for disposing of nuclear material or otherwise removing it from state, Secretary of Energy had already certified that one potential alternative to MOX program existed, and Congress had put in place contingency plans for removal of plutonium shipped to site to forestall indefinite storage of plutonium in state. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Constitutional Law** Nature and scope in general

Federal Civil Procedure In general; injury or interest

Standing doctrine is built on separation-of-powers principles, and serves to prevent judicial process from being used to usurp political branches' powers.

1 Cases that cite this headnote

[8] **Federal Courts** Ripeness; Prematurity

Ripeness is question of subject matter jurisdiction.

10 Cases that cite this headnote

[9] **Federal Courts** Fitness and hardship

Question of whether claim is ripe turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

4 Cases that cite this headnote

[10] **Administrative Law and Procedure** Ripeness; prematurity

In context of claims challenging agency actions, ripeness doctrine's purpose is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5 Cases that cite this headnote

[11] **Administrative Law and Procedure** What constitutes finality in general

To be fit for judicial review, controversy should be presented in clean-cut and concrete form, which occurs when action is final and not dependent on future uncertainties or intervening agency rulings.

5 Cases that cite this headnote

[12] **Environmental Law** Ripeness

State's claims that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state were not ripe for adjudication, where state based its claims on premise that it would be permanent repository of weapons-grade nuclear material currently stored in state, but numerous contingent future events would have to occur before that would occur, including DOE's failure to identify alternative method of disposal and breach its commitment

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to dispose of waste, and failure by Congress and courts to set aside or refuse to enforce statutory mechanisms currently in place to ensure timely removal of nuclear material. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***722** Appeal from the United States District Court for the District of South Carolina, at Aiken. J. Michelle Childs, District Judge. (1:18-cv-01431-JMC)

Attorneys and Law Firms

ARGUED: Andrew Alperin Rohrbach, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Randolph R. Lowell, WILLOUGHBY & HOEFER, PA, Columbia, South Carolina, for Appellee. ON BRIEF: Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Daniel Tenny, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellants.

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge King joined.

WYNN, Circuit Judge:

The State of South Carolina brought this action to enjoin the United States of America and other Defendants[1] (collectively, "the United States") from terminating the construction of a mixed-oxide fuel nuclear processing facility located at the Savannah River Site in South Carolina. South Carolina alleges that the United States Department of Energy unlawfully failed to (1) prepare a supplemental Environmental Impact Statement analyzing the long-term storage of plutonium in the state; and (2) follow statutory waiver provisions for terminating construction of the facility. We conclude that South Carolina ***723** has not established standing to pursue either of these claims. Accordingly, we vacate the preliminary injunction imposed by the district court.

I.

Following the collapse of the Soviet Union and the end of the Cold War, the United States of America and the Russian Federation began a worldwide nuclear nonproliferation effort that included developing plans for the safe disposition of nuclear weapons material. As part of this nonproliferation pact, the Department of Energy began studying the effects of various nuclear waste storage and disposal strategies. In its initial 1996 study, the Department of Energy prepared an Environmental Impact Statement in accordance with Section 4332 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, analyzing the potential environmental consequences associated with the long-term storage of weapons-grade plutonium and highly enriched uranium prior to disposition. The Environmental Impact Statement addressed storage of these materials for a period of up to fifty years.

Ultimately, the Department of Energy determined that the best approach to nuclear waste disposal was a dual strategy involving (1) immobilization of a portion of the surplus plutonium in glass or ceramic; and (2) irradiation of the remaining plutonium in mixed oxide fuel (the "MOX process"). Both strategies would convert the surplus nuclear material into forms that would meet the National Academy of Science's Spent Fuel Standard, meaning that the material would be "inaccessible and unattractive for weapons" use. J.A. 78.

In 1997, the Department of Energy announced its intention to build a new mixed oxide fuel fabrication facility (the "MOX facility") to dispose of some of the nuclear material using the MOX process. Following completion of a supplemental Environmental Impact Statement and a Record of Decision in January of 2000, the Department of Energy announced that the MOX facility would be located at the Savannah River Site along South Carolina's border with Georgia. The facility's original production goals included disposition of up to thirty-three metric tons of nuclear material using the MOX process and immobilization of up to seventeen metric tons of additional nuclear material. As part of its supplemental Environmental Impact Statement, the Department of Energy continued to look at the environmental impacts of long-term plutonium storage.

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In 2002, the Department of Energy decided to drop the immobilization portion of the disposition strategy, leaving the MOX process as the sole plutonium disposal method. That same year, Congress directed the Secretary of Energy to submit a plan for the construction and operation of the MOX facility at the Savannah River site. Pub. L. No. 107-314, § 3182 (2002), *subsequently codified* as 50 U.S.C. § 2566. Congress further authorized the Secretary to take corrective actions if the construction timetable and operation schedule for the MOX facility were not being met. Additionally, Congress also required that in the event the MOX facility failed to achieve its production goals, the Department of Energy remove plutonium shipped to South Carolina for processing. *See* 50 U.S.C. § 2566(c), § 2566(e). Finally, as part of its findings, Congress mentioned the economic benefit that the MOX facility would bring to the State of South Carolina, noting that the economic benefit would not be fully realized unless the facility was built. *See* Pub. L. No. 107-314 at § 3181.

Three years later, in 2005, the Department of Energy began transferring plutonium to the Savannah River Site for conversion, and in 2007, construction began on ***724** the MOX facility. The original cost estimate for construction of the facility was $4.8 billion, with completion anticipated in 2016. And the original production goal estimate for the facility was to have thirty-four metric tons of defense plutonium processed no later than January 1, 2019. 50 U.S.C. § 2566(a)(2)(B).

These original estimates proved grossly inaccurate due to delays and cost overruns in the construction of the MOX facility. The Department of Energy now estimates cost for construction of the facility to be $17.17 billion, with completion now anticipated to be in 2048, over thirty years beyond the original estimated schedule.

Since 2014, the Department of Energy has sought to terminate the MOX program and pursue an alternative method of plutonium disposal known as "Dilute and Dispose," which it contends is less costly, faster, and safer. Under the Dilute and Dispose method, nuclear material would be "downblended" with inhibitor materials to reduce the plutonium content to less than ten percent by weight. Upon completion of the downblending process, the material would then be shipped from the Savannah River Site to the Waste Isolation Pilot Plant near Carlsbad, New Mexico, for permanent disposal.

Thus far, Congress has continued to fund construction of the MOX facility and has, to date, restricted the Department of Energy from utilizing MOX-related appropriations to begin termination of the program. To that end, in 2017, Congress enacted a statute providing that the Secretary of Energy "shall carry out construction and project support activities relating to the MOX facility." Pub. L. 115-91, § 3121(a), 131 Stat. 1283, 1892.

However, Section 3121(b) of that statute allows the Secretary of Energy to discontinue construction of the MOX facility if certain conditions have been met. Specifically, the Secretary of Energy must submit to the Congressional defense committees:

> (A) the commitment of the Secretary [of Energy] to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—
>
> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP-03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office ["GAO"], as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO-09-3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle costs of the mixed oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

§ 3121(b)(1).

Additionally, in exercising his authority to discontinue construction of the MOX facility, the Secretary of Energy

> (1) shall concurrently submit to the Committees on Appropriations of both Houses of Congress the lifecycle

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cost estimate used to make the certification under section 3121(b) of such Act; and

***725** (2) may not use funds provided for the Project to eliminate such Project until the date that is 30 days after the submission of the lifecycle cost estimate required under paragraph (1).

Pub. L. No. 115-141, § 309(c), 132 Stat. 348, 530 (2018).

Pursuant to these provisions, on May 10, 2018, the Secretary of Energy submitted a letter to the Chairman of the House Armed Services Committee that purported to execute the authority of the Secretary of Energy under Section 3121(b) to discontinue construction of the MOX facility. The Secretary of Energy certified, *inter alia*, that (1) the Department of Energy is committed to removing plutonium from South Carolina; (2) an alternative option for carrying out the plutonium disposition, the Dilute and Dispose method, exists and has a lifecycle cost of less than approximately half of the remaining lifecycle cost for the MOX program; (3) the Department of Energy estimated the cost of the Dilute and Dispose approach in a manner compatible with the best practices of the GAO; and (4) the Department of Energy is committed to ensuring a sustainable future for the Savannah River Site. The Secretary of Energy further reported that the Department of Energy expected the total cost of disposition via the Dilute and Dispose method to be $19.9 billion, compared to $49.4 billion for the total cost of construction of the MOX facility and conversion of all the plutonium into MOX fuel.

In accordance with the Secretary of Energy's letter, the Department of Energy and the National Nuclear Security Administration issued a Partial Stop Work Order on May 14, 2018, ending all new contracts and hiring related to the MOX program. The Department of Energy further indicated its intent to issue a Full Stop Work Order and begin winding down the MOX program, including terminating employees currently working on the project, on or about June 11, 2018.

On May 25, 2018, before the Department of Energy issued a full stop work order, South Carolina brought this action in the United States District Court for the District of South Carolina and moved for a preliminary injunction barring the federal government from terminating the MOX program. In its complaint, South Carolina asserted that the United States (1) violated NEPA by failing to prepare a supplemental Environmental Impact Statement covering a period of more than fifty years and (2) failed to satisfy Section 3121(b) because of the alleged insufficiency of the Secretary of Energy's certifications.[2]

On June 7, 2018, the district court granted South Carolina's motion for preliminary injunction. The district court first found that South Carolina had standing due to environmental risks associated with long-term storage at the Savannah River Site, which abuts property owned by South Carolina. As to the merits, the district court held, in pertinent part, that South Carolina was likely to succeed on the merits of its NEPA claim and its claim that the Secretary of Energy's certifications were insufficient. The district court further found that South Carolina would be irreparably harmed absent a preliminary injunction and that the balance of equities tilted in South Carolina's favor. Thus, the district court enjoined the federal government from ceasing construction of the MOX facility and issuing the full stop work order. The United States timely appealed.

***726** After careful review, we dispositively hold that South Carolina failed to establish standing and therefore we do not reach the district court's determination on the merits of this matter.

II.

A.

On appeal, the United States contends that the district court erred in concluding that South Carolina established standing to pursue the two claims that serve as the basis of the district court's preliminary injunction order—the NEPA claim and the claim premised on the alleged insufficiency of the Secretary's certifications. The standing doctrine derives from "the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.' " *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 750–51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Standing implicates the court's subject matter jurisdiction. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 230 (4th Cir. 2008).

[1] **[2]** Here, South Carolina, as plaintiff, bears the burden of establishing standing to assert each of its claims. *See id.*;

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see also Lewis v. Casey, 518 U.S. 343, 359 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (internal quotation marks omitted)). We review the question of whether South Carolina possesses standing de novo. *Frank Krasner Enters.*, 401 F.3d at 234.

[3] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The United States contends South Carolina failed to show it has suffered an injury-in-fact sufficient to give rise to Article III standing.

[4] **[5]** To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "[W]hile it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). "Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' " *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The requirement that an alleged injury be palpable and imminent ensures that the injury "is not too speculative for Article III purposes." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] On appeal, South Carolina contends that it has suffered an injury-in-fact sufficient ***727** to support standing because "[South Carolina] is harmed by being rendered the permanent repository of weapons-grade plutonium as a result of [the Department of Energy's] decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121." Appellee's Br. at 15–16. According to South Carolina, this "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 14. But this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support either of South Carolina's claims.

The Supreme Court has repeatedly held that an alleged harm is too "speculative" to support Article III standing when the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also*, *e.g.*, *Beck*, 848 F.3d at 275 (holding that plaintiffs, who received treatment at a medical center that suffered a data breach and alleged that they were at risk of experiencing identity theft, failed to establish standing because their theory of injury rested on an "attenuated chain of possibilities").

Illustratively in *Clapper*, the Supreme Court considered a challenge to Section 702 of the Foreign Intelligence Surveillance Act, which "authoriz[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401, 133 S.Ct. 1138. The plaintiffs—a group of "attorneys and human rights, labor, legal, and media organizations"—alleged that their work demanded that they "engage in sensitive international communication with individuals who they believe are likely targets of surveillance under" Section 702, rendering it reasonably likely that the government would target and intercept the plaintiffs' communications. *Id.* at 401, 406, 133 S.Ct. 1138.

The Supreme Court held that the plaintiffs failed to establish a concrete injury-in-fact based on the possibility that their communications would be intercepted, explaining that a series of hypothetical events would have to occur before the government would intercept any particular plaintiff's communications. *Id.* at 1148–50, 133 S.Ct. 1138. The Court held that among other steps, the government would have to decide to invoke its Section 702 authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff. *Id.* Thus, the Court held that that the "highly attenuated chain of possibilities, d[id] not satisfy

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the requirement that threatened injury must be certainly impending." *Id.* at 1148, 133 S.Ct. 1138 (citation omitted).

Applying *Clapper*, this Court reached a similar conclusion in *Beck*, in which a putative class of veterans who received medical treatment at a veterans' medical center alleged that they had been injured when two sets of records were stolen from the center. 848 F.3d at 262, 267. Although none of the named plaintiffs alleged any actual or attempted misuse of the personal information contained in their stolen records, they alleged that they suffered cognizable injuries-in-fact because they faced "(1) [an] increased risk of future identity theft, and (2) the costs of protecting against the same." *Id.* at 273. We concluded ***728** that both alleged injuries were too speculative to confer standing. *Id.* at 275–77. As to the alleged increased risk of identity theft, in particular, we explained that plaintiffs' theory of injury required us to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities." *Id.* at 275. "This 'attenuated chain' cannot confer standing," we held. *Id.* We likewise rejected the plaintiffs' costs of mitigation theory of standing as a "repackaged" version of their first theory of standing, amounting to an effort to recoup "costs they incurred in response to a *speculative threat*." *Id.* at 276 (emphasis added) (quoting *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138).

Here, South Carolina's theory of standing—that it will become "the permanent repository of weapons-grade plutonium" and all the environmental, health, and safety risks that entails, Appellee's Br. at 15–16—rests on a similarly "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138. Between now and 2046—when the analysis in the current Environmental Impact Statement governing the risks associated with long-term storage of weapons-grade nuclear material at the Savannah River Site expires—the Department of Energy has twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina. The Secretary of Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method. And the Department of Energy may identify and develop other methods during that twenty-eight-year period. Or the Department of Energy may decide to transfer the plutonium out of South Carolina to another location.

Furthermore, Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina. A federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed. 50 U.S.C. § 2566(c)(2). Notably, because the Department of Energy already has failed to meet certain statutory time limits for disposing of nuclear material at the site, South Carolina has successfully brought suit pursuant to the Administrative Procedure Act to enforce these congressionally mandated deadlines via a mandatory injunction. *See id.* § 2566(c)(1) (requiring removal of one metric ton of plutonium no later than January 1, 2016); *South Carolina v. United States*, 243 F.Supp.3d 673 (D.S.C. 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years).

In sum, for South Carolina's alleged injury—becoming "the permanent repository of weapons-grade plutonium," Appellee's Br. at 15–16—to occur: (1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation. At this juncture, before the Department of Energy has even had an opportunity to finish analyzing the Dilute and Dispose method, this "chain of possibilities" is too speculative to give rise to a sufficiently concrete injury-in-fact.

[7] That several of the links in this "chain of possibilities" the State's standing ***729** theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing. As *Clapper* recognized, the standing doctrine is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408, 133 S.Ct. 1138 (citations omitted); *see also Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 (1984) ("[Article] III standing is built on a single basic idea—the idea of separation of powers."). To confer standing on South Carolina at this juncture based on an alleged injury —becoming the permanent repository of nuclear material— that the political branches already have made written and legally binding commitments to forestall would improperly

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"usurp the powers of the political branches." *Clapper*, 568 U.S. at 408, 133 S.Ct. 1138.

The "highly attenuated chain of possibilities" that must occur for South Carolina to become the permanent repository of nuclear material also sets this case apart from this Court's decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), upon which South Carolina principally relies.

Like the instant case, *Hodges* dealt with the storage of plutonium at the Savannah River Site. *Id.* at 436. In 2002, the Department of Energy issued a Record of Decision authorizing the immediate shipment of six metric tons of plutonium from a nuclear facility in Colorado to the Savannah River Site. *Id.* The Governor of South Carolina sought to enjoin shipment of the plutonium into South Carolina, alleging that the Department of Energy's *existing* Environmental Impact Statement, and its supplemental analyses to the Environmental Impact Statement, related to storage of plutonium at the Savannah River Site violated NEPA in several ways. *Id.* at 445. This Court held that the Governor adequately alleged an injury-in-fact to support his NEPA claims because the South Carolina owned property adjacent to the Savannah River Site. *Id.* "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the Department of Energy's shipment of plutonium to the Savannah River Site and storage of that plutonium there, we explained. *Id.*

Here, unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored—a question that *Hodges* already resolved in the federal government's favor. *Id.* at 446–49. Rather, South Carolina contends it is injured because the termination of the MOX program renders it the *permanent* repository of the nuclear material when the Department of Energy has not issued an Environmental Impact Statement analyzing the environmental impact of the storage of the material at the Savannah River Site *beyond the year 2046*, the year when the existing Environmental Impact Statement's analysis terminates, or, allegedly, satisfies its statutory obligations in terminating the MOX program. There is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*. That distinction is particularly meaningful because, as explained ***730** above, numerous contingencies must occur in order for the plutonium to remain in South Carolina after 2046, the year when South Carolina's alleged injury will mature.

In sum, the single theory of injury[3] that South Carolina relies on to support both of its claims is too speculative at this juncture to support Article III standing. The district court, therefore, was without jurisdiction to enter its preliminary injunction premised on those two claims.

B.

[8] For reasons similar to those that lead us to find that South Carolina lacks standing, we also find that the two claims at issue fail on ripeness grounds. Like standing, the ripeness doctrine "originates in the 'case or controversy' constraint of Article III." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (citations omitted). "Analyzing ripeness is similar to determining whether a party has standing." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). "Although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Id.* (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)). As with standing, ripeness is a question of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citation omitted).

[9] **[10]** The question of whether a claim is ripe "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (citation omitted). In the context of claims challenging agency actions, like the two at issue, the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136,

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148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[11] To be fit for judicial review, a controversy should be presented in a "clean-cut and concrete form." *Miller*, 462 F.3d at 319 (citation omitted). This occurs when the action is "final and not dependent on future uncertainties or intervening agency rulings." *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (citation omitted). On the other hand, just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, a plaintiff's claim is not ripe for judicial review "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

[12] The two claims that South Carolina advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade ***731** nuclear material currently stored at the Savannah River Site. But, numerous "contingent future events," *id.*, must occur before South Carolina becomes the *permanent* repository of the nuclear material, *see supra* Part II.A. In particular, the Dilute and Dispose method must prove unworkable. The Department of Energy must fail to identify an alternative method of disposal and breach its commitment to dispose of the waste. And Congress or the courts must set aside or refuse to enforce the statutory mechanisms currently in place to ensure timely removal of the nuclear material. All of these "future uncertainties," *Franks*, 313 F.3d at 195, lead us to conclude that the two claims at issue are not ripe for review at this time —at least as presented by South Carolina. Accordingly, the ripeness doctrine provides an additional basis for our holding that the district court was without jurisdiction to enter the preliminary injunction.

III.

In sum, the only theory of injury advanced by South Carolina —that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270. In such circumstances, we must conclude that South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review.

That the two claims are not currently justiciable does not mean that they never will be so. If uncertainty as to several links in the chain of possibilities is resolved, then South Carolina's alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review. But until that uncertainty is lifted, the Constitution demands that we withhold judicial review.

Accordingly, we vacate the preliminary injunction imposed by the district court and remand the case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED

All Citations

912 F.3d 720

Footnotes

1 The other Defendants are the United States Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; the National Nuclear Security Administration; and Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration.

2 South Carolina further claimed that the United States violated 50 U.S.C. § 2567 by failing to consult with the governor before deciding to terminate the MOX facility. The district court held that South Carolina failed to establish that that claim was likely to succeed on the merits, and therefore that claim is not before this Court.

3 Because South Carolina has advanced only one theory of injury to support the two claims before this Court—that South Carolina is harmed by becoming the permanent repository of weapons-grade nuclear material—we cannot and do not take any position on whether other theories of injury would presently confer standing on South Carolina to support either of the two claims before us on appeal.

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EXHIBIT 10

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2019 WL 2464930 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
June 7, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

Alan Wilson, Robert D. Cook, T. Parkin Hunter, Attorney General for the, State of South Carolina, Post Office Box 11549, Columbia, SC 29211, (803) 734-3970.

Randolph R. Lowell, Tracey C. Green, John W. Roberts, Willoughby & Hoefer, P.A., Post Office Box 8416, Columbia, SC 29202, rlowell @willoughbyhoefer.com, (803) 252-3300, for petitioner.

***i** QUESTION PRESENTED

The U.S. Department of Energy (DOE) shipped massive amounts of weapons-grade plutonium to South Carolina for a decade in anticipation of building a facility there - the "MOX Facility" - to process it. After running way behind schedule and far over budget, DOE sought to mothball the still-uncompleted MOX Facility. In response, Congress enacted a statute requiring DOE to keep building the MOX Facility unless DOE gets a "waiver" of that requirement. This lawsuit arose from DOE's decision to halt construction of the MOX Facility permanently after purportedly satisfying the statute's requirements for a waiver. South Carolina claims in this suit that DOE's decision violates the statute, which was specifically designed to protect South Carolina's interests, and the National Environmental Policy Act.

The question presented is whether the United States Court of Appeals for the Fourth Circuit erred in holding that South Carolina lacked standing to challenge the DOE's final action and that the challenge is not ripe.

***ii** PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. State of South Carolina, Plaintiff and Petitioner;

2. United States of America, Defendant and Respondent;

3. United States Department of Energy, Defendant and Respondent;

4. Rick Perry, in his official capacity as Secretary of Energy, Defendant and Respondent;

5. National Nuclear Security Administration, Defendant and Respondent;

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6. Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendant and Respondent.

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***1** PETITION FOR A WRIT OF CERTIORARI

Petitioner State of South Carolina (South Carolina or State) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.3d 720. App. 1a-22a. The opinion of the district court is reported at 329 F. Supp. 3d 214. App. 34a-82a. The decision of the United States Secretary of Energy is unreported but is reproduced in the appendix. App. 107a-109a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on January 8, 2019. On March 29, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari up to and including June 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the U.S. Constitution provides in relevant part, "[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83a-106a.

***2** INTRODUCTION

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This case involves the justiciability of a State's claims against the federal government for statutory violations, including violations of provisions expressly designed to protect the State's concrete interests. The decision below, which denied the justiciability of those claims, conflicts with this Court's decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), and provides an excellent vehicle for dispelling continuing confusion among the lower courts about the standing of States to sue the federal government.

South Carolina is home to the Savannah River Site (SRS), where Congress directed the U.S. Department of Energy (DOE) to build a facility to convert weapons-grade plutonium (also known as "defense plutonium") into mixedoxide (MOX) fuel for use in commercial nuclear reactors. App. 3a-4a, 83a.[1] In the statute directing DOE to build this facility - known as the MOX Facility or Project - Congress included multiple provisions designed to address South Carolina's concern about becoming a permanent dumping ground for multiple tons of this admittedly dangerous material. 50 U.S.C. § 2566. Starting in 2014, DOE sought to terminate construction of the MOX Facility after its construction had fallen way behind schedule and gone way over budget.

On May 10, 2018, the Secretary of DOE announced his decision to permanently abandon construction of the ***3** MOX Facility and to pursue a new concept for processing weapons-grade plutonium called "Dilute and Dispose" or "downblending." In the letter announcing this decision, the Secretary purported to comply with the statutory requirements for a "waiver" of the statutory mandate to continue construction of the MOX Facility. DOE made this decision without any analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA), or complying with the analysis requirements of the governing statute.[2]

To remedy these statutory violations, South Carolina brought this action against DOE. The district court granted a preliminary injunction to prevent DOE from terminating construction of the MOX Facility, but the Fourth Circuit reversed. Without reaching the merits, the Fourth Circuit held that South Carolina lacked Article III standing and that its claims are not ripe. The Fourth Circuit characterized South Carolina's standing argument as resting on its fear of being "the permanent repository of weapons-grade plutonium." App. 12a. The Fourth Circuit believed that this fear was "too speculative" to constitute injury in fact or present ripe claims. App. 12a. The Fourth Circuit did not cite *Massachusetts v. EPA* despite its obvious relevance and South Carolina's citation of that decision in its brief.

The Fourth Circuit's decision conflicts with this Court's decision in *Massachusetts v. EPA* and misreads ***4** other decisions of this Court on Article Ill's standing and ripeness requirements. The decision warrants this Court's review because it could hamper South Carolina's ability to enforce statutory provisions that relate to the weapons-grade plutonium at SRS, and other States' ability to enforce statutory rights enacted to protect their interests.

STATEMENT OF THE CASE

South Carolina is home to 10 metric tons of weapons-grade plutonium, which are stored at SRS. If the decision below stands and DOE has its way, South Carolina will be forced to host at least an additional 20 metric tons indefinitely, while DOE tries to turn a new concept for processing it into a reality. DOE's track record in dealing (more accurately, in failing to deal) with the existing 10 metric tons does not inspire confidence that the proposed total of more than 30 metric tons, and their associated dangers, will be going anywhere any time soon. Remarkably, after the district court held that South Carolina was likely to succeed on the merits of its claims in this action, the Fourth Circuit foreclosed the State from even being able to question executive-branch compliance with statutory requirements that Congress specifically and expressly designed to protect South Carolina's interests.

I. Congress enacts statutory protections to prevent South Carolina from becoming the permanent repository of weapons-grade plutonium put there by the federal government.

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In September 2000, the United States and Russia entered an agreement under which each country ***5** would dispose of 34 metric tons of weapons-grade plutonium. App. 35a, 76a. To meet its obligations under this agreement, Congress in 2003 enacted legislation authorizing the construction of the MOX Facility at SRS. App. 39a, 76a-77a. The legislation included a finding that the "agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), § 3181(1), 116 Stat. 2458, 2747 (2002). Another finding stated that DOE planned - quite optimistically in hindsight - for the MOX Facility to begin operating in 2009 and to convert 34 metric tons of weapons-grade plutonium into mixed-oxide fuel "before the end of 2019." *Id.* § 3181(3) & (4).

South Carolina had protested selection of SRS as the site for the MOX Facility. In addition to the concern that weapons-grade plutonium could fall into the wrong hands, South Carolina worried about its citizens' prolonged exposure to multiple tons of this admittedly hazardous material. Indeed, the Nuclear Regulatory Commission (NRC) recognized, when it issued the construction license for the MOX Facility in 2005, that the primary benefit of the Facility's operation would be to reduce the supply of weapons-grade plutonium "available for unauthorized use." App. 62a. The NRC also recognized that "continued storage [of the plutonium] would result in higher annual impacts" of public radiation exposure than implementation of the Project. App. 62a. Besides concerns for its citizens, South Carolina had concerns as the owner of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

***6** Congress addressed some of South Carolina's concerns in the 2003 statute authorizing the MOX Facility. NDAA FY03, § 3182, *subsequently codified* as 50 U.S.C.A. § 2566 (Section 2566). Section 2566 prescribes deadlines for construction of the Facility and for its processing of the plutonium. *E.g., id.* § 2566. The key deadline provided that, as of January 1, 2012, the MOX Facility would be processing no less than one metric ton of weapons-grade plutonium per year. *Id.* 2566(a), (h). The statute also prescribes remedies against DOE for missing these deadlines. *Id.* § 2566(b)(6)(B), (b)(6)(C); *id.* § 2566(c); *id.* § 2461.

Beginning shortly after the enactment of § 2566 and continuing through 2012, DOE shipped significant amounts of defense plutonium to South Carolina for conversion into MOX fuel. Construction began on the MOX Facility on or about August 1, 2007. As the National Academy of Sciences observed, however, "Construction has encountered substantial schedule delays and cost overruns." National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2 (Washington, DC: The National Academies Press, Oct. 2018) [hereafter cited as NAS Interim Report].[3] Although the MOX Facility originally was supposed to begin operating in 2009, today DOE estimates construction will not be completed until at least 2048. App. 5a. The delay caused DOE to violate, among other statutory requirements, a requirement that it remove not less than one metric ton of weapons-grade plutonium by January 1, 2016. In a prior action, South Carolina successfully sued DOE for this statutory ***7** violation. *South Carolina v. United States,* 907 F.3d 742 (4th Cir. 2018).

II. DOE terminates construction of the MOX Facility with no approved alternative for disposition of the defense plutonium at SRS.

Since 2014, DOE has continuously sought termination of the MOX Project and advocated for its proposed "Dilute and Dispose" concept, under which DOE would prepare "dilute" plutonium at SRS for ultimate "disposition" at the Waste Isolation Pilot Plant (WIPP) in New Mexico. Despite DOE's new idea, Congress has continued to mandate that DOE build the MOX Facility. The current mandate is found in two statutory provisions: Section 3121(a) of the NDAA FY18, and Section 309(a) of the Consolidated Appropriations Act, 2018 (CAA FY18). App. 95a-98a.[4]

Recognizing South Carolina's concerns that it be left as an indefinite repository for defense plutonium, Congress specified that DOE can avoid the statutory mandate to construct the MOX Facility only if the Secretary of Energy obtained a waiver of it. The waiver requirements are prescribed in Section 3121(b) of NDAA FY18, and are incorporated by reference in Section 309(b)

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of CAA ***8** FY18. App. 95a-98a. To get a waiver, the Secretary must "submit to the congressional defense committees" (1) a commitment to remove defense plutonium from South Carolina and (2) a certification regarding certain points, including the existence of a viable and feasible alternative option.[5] This waiver requirement was enacted by Congress to ensure a legally viable and feasible disposition pathway existed to remove defense plutonium from South Carolina.

The Secretary of Energy purported to meet the waiver requirement in a letter dated May 10, 2018 ("May 10 Letter"). The May 10 Letter notified Congress of DOE's decision to permanently abandon construction of the MOX Facility and pursue its "Dilute and Dispose" concept for plutonium disposition. App. 107a-109a. In the May 10 Letter, the Secretary stated, "I confirm that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." App. 107a. The Secretary also certified that "an alternative option for carrying out the plutonium disposition program … exists" - namely, the "Dilute and Dispose Approach." App. 108a. But the Secretary did not address the "many barriers" that the National Academy of Sciences has identified and said "must be addressed … before the dilute and dispose conceptual plans can be implemented." NAS Interim Report, *supra,* at 19. In particular, the Secretary did not address any of the legal barriers that exist, despite the waiver provision's requirement that he identify "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose concept. NDAA FY18, § 3121(b)(1)(C).

***9** Based on the decision reported in the May 10 Letter, the Secretary issued a "partial stop work order" on May 14, 2018. App. 50a (quoting ECF No. 19-1 ¶ 10). The partial stop work order "halted any new contracts or new hires at SRS for the MOX Project." App. 44a, 72a. The order "was issued to minimize cos[t] to the government during the 30 day period leading up to an eventual full stop work order and the termination letter expected to be issued on June 11, 2018." App. 50a (quoting ECF No. 19-1 ¶ 10). South Carolina filed this action before the termination letter issued and obtained a preliminary injunction against its issuance.

Today, South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing. South Carolina has no reason to believe that this material is going anywhere anytime soon. To the contrary, as discussed above, DOE has repeatedly missed statutory deadlines for construction and operation of the MOX Facility. In the meantime, South Carolina and its people continue to live with the dangers that are associated with this material and that led to the international agreement with Russia and the Act of Congress directing construction of the MOX Facility in the first place.

III. The Proceedings Below.

A. Federal District Court

On May 25, 2018, the State filed a complaint in the United States District Court for the District of South Carolina challenging DOE's final agency action to terminate the Project. The complaint invoked subjectmatter ***10** jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The State asserted two claims of statutory violations, both resting on the cause of action created by the Administrative Procedure Act (5 U.S.C. §§ 702, 704 & 706): DOE violated (1) NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing its decision to terminate the MOX Facility in favor of the Dilute and Dispose approach; and (2) the statutory provisions requiring DOE to obtain a waiver before terminating construction of the MOX Facility (NDAA FY18, § 3121(b) and CAA FY18, § 309(b)). The State sought declaratory relief and a permanent injunction.

The State also moved for a preliminary injunction to maintain the status quo by enjoining DOE from terminating the Project during the pendency of this lawsuit. The district court granted the preliminary injunction on June 7, 2018. App. 34a-82a.

In its preliminary injunction order, the district court comprehensively addressed and rejected DOE's arguments that South Carolina lacks standing and that the May 10 Letter is not final agency action. App. 44a-54a. The court held that South Carolina has standing to assert its procedural rights under NEPA and the statutory waiver provisions "because the State owns extensive property adjoining, and one road traversing the impacted area." App. 47a. The court further held that the decision of the Secretary

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announced in the May 10 Letter is final agency action reviewable under the APA. The Secretary's "execution of the MOX termination waiver" in the May 10 Letter, if allowed to stand, waives the statutory requirements to continue building the MOX Facility. In addition to this legal effect, the May 10 Letter creates the ***11** "practical reality that the full stop order that is planned for June 11, 2018 will shut down the MOX Facility." App. 50a. Furthermore, the court concluded, "[b]ecause the MOX Project is the only legally authorized disposition method for MOXable plutonium at SRS," the "practical effect" of the decision announced in the May 10 Letter "is that the plutonium will remain at SRS indefinitely." App. 54a.[6]

The court also held that South Carolina is likely to succeed on the merits of both its claims.

In analyzing the State's NEPA claim, the court observed that the relevant statutes, and DOE itself, contemplate that NEPA applies "when rendering decisions and taking action related to the disposition of defense plutonium at SRS." App. 60a. DOE relied, however, on an Environmental Impact Statement (EIS) issued in December 1996 that analyzed the storage of weapons-grade plutonium for a period of up to 50 years - *i.e.,* until 2046. App. 63a, 65a. DOE argued that this EIS sufficed because its use of the new Dilute and Dispose approach would remove all the MOXable plutonium before that 50- ***12** year period ended. App. 63a. The district court rejected that argument on two grounds. First, DOE's past actions with regard to the MOX Facility "have called into question the viability" of DOE's timeline for removal using the Dilute and Dispose approach. App. 65a. Second, and in any event, "pursuing the Dilute and Dispose approach" for the MOXable plutonium "would have a significant impact on the environment." App. 65a. Therefore, the court held, DOE must "produce a supplemental EIS that addresses the conceivability, both practically and legally" of its proposed new approach. App. 65a-66a.

The court also held that the State is likely to succeed on its claim that the Secretary violated the statutory requirements for a waiver of the statutory mandate to continue building the MOX Facility. App. 66a-72a. The court identified three flaws in the May 10 Letter announcing the Secretary's decision to terminate the MOX Project. First, there is no basis for the Secretary's commitment to remove the MOXable plutonium from SRS, since it rests on the unauthorized and unanalyzed Dilute and Dispose approach. App. 68a. Second, the Secretary's cost comparison of the MOX Project and the Dilute and Dispose approach does not meet statutory requirements for accuracy. App. 69a-70a. Third, although the statutory waiver provision requires the Secretary to report to Congress "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose alternative, the May 10 letter provides no such details. App. 70a-71a. The district court, however, held that adoption of the Dilute and Dispose approach would require, among other changes, the amendment of two federal statutes. App. 71a-72a.

***13** DOE appealed the district court order granting the preliminary injunction to the Fourth Circuit under 28 U.S.C. § 1291(a)(1).[7]

B. Court of Appeals

The Fourth Circuit vacated and remanded, holding that "South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review." App. 22a.

The court held that South Carolina lacks Article III standing because it cannot establish injury in fact. App. 10a-19a. The State argued that DOE's failure to comply with NEPA and Section 3121's waiver provision "results in increased radiation exposure to the public, increased risk of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." App. 12a (quoting State's brief on appeal). The court concluded that those alleged injuries were "too speculative" because they rest "on a … 'highly attenuated chain of possibilities.' " App. 13a (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013)).

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The court focused on the time frame "[b]etween now and 2046 - when the analysis in the current [EIS] governing the risks associated with long-term storage of ***14** weapons-grade nuclear material at the Savannah River Site expires." App. 15a. The court did not explain how the EIS's time frame bears on South Carolina's standing. Nonetheless, it assigned 2046 as "the year when South Carolina's alleged injur[ies] will mature." App. 19a. On this view, the court reasoned that the EIS gives DOE "twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina." App. 15a. The court observed that DOE has already identified the Dilute and Dispose method as "one potential alternative," and it might come up with more. App. 15a. The court also observed that DOE is under a statutory deadline to remove, by January 1, 2022, any weapons-grade plutonium that have been slated for processing by the MOX Facility but not yet processed by then. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)). If DOE failed to meet that deadline, the court explained, South Carolina could sue it, just as it had for DOE's past failure to meet statutory deadlines. App. 16a.

"For reasons similar to" the ones that led the court of appeals to hold that South Carolina lacks standing, it also held that "the two claims at issue fail on ripeness grounds." App. 19a. The court recognized that " 'ripeness turns on the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " App. 20a (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). The court apparently found the problem here to be a lack of fitness. *See* App. 20a-21a (paragraph discussing requirements for a case "[t]o be fit for review"). The court said that a case is fit "when the action is final and not dependent on future uncertainties." App. 21a (internal quotation marks omitted). Despite this reference to ***15** "final[ity]," the court of appeals did not discuss, much less express disagreement with, the district court's conclusion that DOE's decision to terminate the MOX Project was final agency action. *Cf.* App. 21a. Instead, the court of appeals seemed to conclude that neither the NEPA claim nor the statutory-waiver-provision claim is ripe because of "uncertainties" about whether South Carolina will indeed become "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a.

REASONS FOR GRANTING THE PETITION

There are four compelling reasons for this Court to grant review of the Fourth Circuit's opinion on a writ of certiorari.

First, the Fourth Circuit's decision conflicts with *Massachusetts v. EPA, Lujan v. Defenders of Wildlife,* and other decisions of this Court addressing the justiciability of suits by States and other plaintiffs seeking to compel a federal agency to comply with express statutory directives. Rule 10(c). Instead, the Fourth Circuit rejected the precedent of this Court in favor of a novel standing and ripeness analysis that narrowly interprets and, thus, unduly restricts the ability of a State to seek enforcement of a statute that involves and pertains to its legitimate interests.

Second, the Fourth Circuit's opinion creates a conflict among the circuits in applying this Court's holdings on standing. By circumscribing the State's ability to invoke the federal judicial power in seeking the enforcement of an existing statutory framework, the Fourth Circuit went far ***16** beyond any other circuit in heightening the level of injury sufficient to form the basis for a "case or controversy." This Court's intervention is necessary to address the conflict among the circuits. Rule 10(a).

Third, this case presents important Constitutional issues regarding the justiciability of claims brought by a State seeking to vindicate its sovereign interests. The State has a legitimate interest in protecting its environment and in enforcing its substantive and procedural rights in its relations with the federal government. The Fourth Circuit's opinion denies the State the ability to even adjudicate its claims, which strikes at the heart of the federalism principle accepted by the State and the United States upon the formation of the union.

Fourth, this case provides an excellent opportunity for this Court to provide the clarification of *Massachusetts v. EPA* that the Fourth Circuit's decision and the conflict among the circuits demonstrate is warranted. This case presents fundamental and well-defined questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA,* including how "special solicitude" relates to a State's possession of a "procedural right" and to the apparent limitations on suits against the federal government by States suing as *parens patriae.*

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I. The decision below squarely conflicts with decisions of this Court.

A. The decision below conflicts with *Massachusetts v. EPA*.

The decision below conflicts in approach and result with this Court's decision in *Massachusetts v. EPA* by ***17** failing to give "special solicitude" to South Carolina when analyzing the State's standing. South Carolina met all the requirements for Article III and statutory standing, and had the court below given South Carolina the "special solicitude" required by *Massachusetts v. EPA,* it would have been compelled to uphold South Carolina's standing in this case.

In *Massachusetts v. EPA,* this Court held that Massachusetts was "entitled to special solicitude in [its] standing analysis" because of (1) the State's possession of a "procedural right" and (2) its "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. The State's "procedural right" was the statutory right to seek judicial review "for agency action unlawfully withheld." *Id.* at 517 (quoting 42 U.S.C. § 7607(b)(1)). The "quasi-sovereign interests" at stake were Massachusetts' "desire to preserve its sovereign territory" from harmful effects assertedly imposed on that State by greenhouse gases (GHGs). *Id.* at 519. The latter interests were reinforced by Massachusetts ownership of "a great deal of the territory alleged to be affected" by GHGs. *Id.* (internal quotation marks omitted).

Both conditions for "special solicitude" exist here. First, South Carolina asserts violations of its procedural rights under NEPA and the statutory provisions requiring DOE to get a waiver before terminating the MOX Facility. NEPA's creation of a procedural right was recognized by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992). And the statutory waiver provisions plainly create procedural rights designed to protect South Carolina's interests. *Cf. Maryland People's Counsel v. FERC,* 760 F.2d 318, 320 (D.C. Cir. 1985) (per Scalia, J.) ***18** (stating that statute authorizing state agencies to seek judicial review of FERC orders showed "special solicitude" for States, removing prudential barriers on States' relying on *parens patriae* standing in litigation against federal government). Second, South Carolina asserts its quasi-sovereign interests in protecting its territory against the environmental harms threatened by the DOE's decision to terminate the MOX Facility. *See* App. 12a (quoting South Carolina's allegations that DOE's May 10 decision "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increase threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium"). Here, as in *Massachusetts v. EPA,* the State's quasi-sovereign interests are reinforced by its ownership of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

Given South Carolina's "procedural right[s] and [its] stake in protecting its quasi-sovereign interests," South Carolina was "entitled to special solicitude" in the Fourth Circuit's standing analysis. *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina plainly identified those rights and interests in its brief for the Fourth Circuit, and cited *Massachusetts v. EPA* in its brief. Br. of Pl.-Appellee at 16-17, *South Carolina v. United States,* 912 F.3d 720 (4th Cir. 2019) (No. 18-1684), ECF No. 31. Yet the Fourth Circuit disregarded those rights and interests, and based its standing analysis - not on *Massachusetts v. EPA* - but instead primarily on *Clapper,* a case involving the standing of private plaintiffs. *Id.* at 406; App. 13a-17a (citing *Clapper*).[8]

***19** The Fourth Circuit's disregard of *Massachusetts v. EPA* led to error. South Carolina's argument for standing closely resembles Massachusetts'. Both States attack agency decisions (to deny a rulemaking petition; to terminate the MOX Project) for failure to follow statutory requirements that, if followed, could have led to a different decision. As things stood, the challenged agency decisions exposed the States to increased risk of harms (additional loss of coastal land; additional radiation and risks of accidents and theft). The risks of harm associated with prolonged storage of weapons-grade plutonium are at least as well established and imminent as those associated with greenhouse gases. *See* App. 39a (district court decision quoting federal officials' acknowledgement of dangers posed by storage of weapons-grade plutonium). Thus, South Carolina's standing in this case follows *a fortiori* from this Court's decision upholding Massachusetts' standing in *Massachusetts v. EPA.*

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***20 B. The decision below conflicts with decisions of this Court on ripeness.**

The Fourth Circuit held that South Carolina's claims are not ripe because they are not "fit" for review. App. 19a-21a. They are not fit for review, the Fourth Circuit concluded, because South Carolina might not "become[] the *permanent* repository" of "weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a (emphasis in original). This conclusion, however, conflicts with decisions of this Court.

South Carolina's claims are fit for review under this Court's precedent. That precedent establishes that a claim is generally fit for review when it challenges agency action that is final, the challenge is purely legal, and the court's ability to resolve the challenge will not benefit from further factual development. *E.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 811 (2003). The court of appeals below did not disturb the district court's holding that DOE's decision to terminate the MOX Facility is "final agency action" within the meaning of the federal APA. App. 48a-54a; 5 U.S.C. § 704. Furthermore, South Carolina's claims that DOE violated NEPA and the statutory waiver requirements are purely legal, as is clear from the district court's analysis of these claims. *See* App. 59a-72a. The court of appeals below did not identify any further factual developments that would facilitate the resolution of South Carolina's NEPA and statutory-waiver claims.

As this Court has held, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes ***21** place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737 (1998). The decision below squarely conflicts with this holding in *Ohio Forestry Ass'n* by finding South Carolina's NEPA claim unripe. *See* App. 19a-21a. Moreover, this Court's holding in *Ohio Forestry Ass'n* also applies to South Carolina's claim that DOE violated the requirements for a waiver of the statutory mandate to continue construction of the MOX Facility: Nothing that happened after the date of the Secretary's May 10 Letter will affect analysis of South Carolina's claim that the DOE violated the requirements for a waiver of that mandate.[9]

Although the Fourth Circuit apparently, erroneously - and in conflict with this Court's precedent - relied on the "fitness" prong of ripeness analysis, its conclusion of unripeness seemed to rest on a supposed lack of hardship. That conclusion, in turn, rested on the Fourth Circuit's belief that only in the year 2046 will "South Carolina's alleged injury mature." App. 19a. The Fourth Circuit cited the year 2046 because it was the end date of the 50-year period analyzed in DOE's 1996 Programmatic EIS (PEIS) on storage of weapons-grade plutonium at SRS. App. 15a, 36a. The 1996 PEIS's 50-year period of analysis arguably *might* bear on the merits of South Carolina's claim that DOE must now prepare a supplemental EIS for its termination of the MOX Project. But it has no bearing on South Carolina's standing or the ripeness of its claims. In concluding otherwise, the Fourth Circuit's ***22** ruling reflects "the familiar confusion between standing and the merits." 13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1, at 98 (3d ed. 2008).

Properly understood, South Carolina's standing and hardship stem from the *existing* 10 metric tons of weapons-grade plutonium stored within its borders, plus the additional 20 metric tons that DOE currently plans to ship to South Carolina. The existing plutonium exposes South Carolina's property and its citizens to ongoing radiation and the risks of nuclear accidents and threats. South Carolina reasonably fears that DOE's decision to terminate the MOX Facility to pursue the unstudied, unauthorized "Dilute and Dispose" concept will indefinitely *prolong* the storage of massive amounts of plutonium in South Carolina, and in turn cause South Carolina to incur additional costs associated with protecting against the radiation and risks. South Carolina's fear is well-founded considering DOE's dismal track record in meeting statutory deadlines for construction of the MOX Facility. *See* App. 5a.

The Fourth Circuit dismissed this fear, reasoning that South Carolina can always sue DOE when DOE fails to meet the *next* statutory deadline. App. 16a. But the likelihood that DOE will violate *additional* statutory requirements in the future surely cannot disable South Carolina from suing DOE for current statutory violations arising from its termination of the Project. To the contrary, the possibility that South Carolina will have to sue DOE again in the future represents just another realistic risk of future harm that supports its standing to bring this suit. *Cf. Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 154-55 (2010) (upholding standing based ***23** partly on costs incurred by plaintiffs to mitigate realistic risks); *Texas v. United States,* 497

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F.3d 491, 497 (5th Cir. 2007) (upholding State's standing based partly on realistic risk that State would have to participate in compelled mediation over tribal gaming).

II. The Fourth Circuit's decision creates a conflict among the circuits concerning the justiciability of State suits against the federal government.

The Fourth Circuit's decision conflicts in approach with decisions in at least three other circuits: the Second, Fifth, and Tenth. Courts of appeals in these circuits rely on *Massachusetts v. EPA* to accord "special solicitude" to States in analyzing the States' standing to sue the federal government. The analysis in those decisions strongly suggest that those courts of appeals would have upheld South Carolina's standing to bring the present suit.

A. Second Circuit

The Second Circuit analyzed *Massachusetts v. EPA* in a decision that upheld the standing of eight States to sue electric power companies that allegedly contributed to global warming. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 109 (2d Cir. 2015), *rev'd on other grounds,* 564 U.S. 410 (2011).[10] As the Second Circuit understood ***24** *Massachusetts v. EPA,* in that case this Court "seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land." *Id.* at 338.

The Second Circuit upheld the States' standing using reasoning that, if applied in the present case, would have led it to uphold South Carolina's standing: The Second Circuit emphasized that the States were suffering present harms from the defendants' conduct - just as South Carolina's property and residents are currently exposed to radiation and other threats from the continued storage of plutonium - and the relief sought could incrementally reduce the harm - as could occur here, if DOE's compliance with its statutory obligations reduces the amount of time that massive amounts of weapons-grade plutonium are stored at SRS. *Id.* at 340-43.

Although *Connecticut* was a suit against private defendants, the Second Circuit relied on it, as well as on *Massachusetts v. EPA,* in a later decision upholding several States' standing to sue a federal agency for statutory violations. *Nat. Res. Def Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 103-04 (2d Cir. 2018) (internal citations omitted).

*25 B. Fifth Circuit

The Fifth Circuit accorded "special solicitude" to a State under circumstances close enough to those of this case to indicate that it would have upheld South Carolina's standing in this case.

Texas and other States sued the United States over the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). *Texas v. United States,* 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016). After the federal district court preliminarily enjoined implementation of DAPA, the United States appealed. *Id.* On appeal, the Fifth Circuit affirmed the preliminary injunction and upheld Texas's standing to bring the suit. *Id.* at 151-62.

The Fifth Circuit said, "[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA.* " *Id.* at 162. The court described "special solicitude" as a "presumption," presumably meaning a presumption that favors standing in close cases. *Id.; see also id.* at 159 (relying partly on "special solicitude" in finding traceability). The court afforded "special solicitude" based on the same two conditions that exist in the present case: The State was asserting procedural rights that required interpretation of federal statutes, and the challenged conduct implicated the State's "quasi-sovereign interests." *Id.* at 152-53.

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Moreover, the Fifth Circuit's reasons for concluding that "quasi-sovereign interests" were at stake equally apply here. Texas challenged DAPA, a federal immigration program. The Fifth Circuit observed that "[w]hen the ***26** states joined the union, they surrendered some of their sovereign prerogatives over immigration." *Id.* at 153. Consequently, the Fifth Circuit explained, States must rely on the federal government to protect their interests in immigration matters, just as they must with respect to their interests in the matters involved in *Massachusetts v. EPA:* namely, interstate and international pollution. *Id.* at 153-54. So too here: Because of the federal government's control over nuclear defense material, South Carolina cannot prevent it from storing that material at SRS as long as federal law allows. South Carolina must rely on the federal government to protect its interests and those of its citizens. This reliance warrants consideration when South Carolina sues to enforce the federal executive-branch's compliance with federal statutory requirements enacted, in part, to protect the State's interests. In short, South Carolina's present lawsuit provides at least as compelling a case for "special solicitude" as did the States' lawsuit in *Texas v. United States.*

C. Tenth Circuit

Like the Fifth Circuit, the Tenth Circuit has relied partly on "special solicitude" to uphold State standing.

Illustrative is *New Mexico v. Dep't of Interior,* 854 F.3d 1207 (10th Cir. 2017). In that case, New Mexico sued the Department of Interior (DOI) claiming that DOI lacked statutory authority for regulations on tribal gaming. *Id.* at 1211. Under the challenged regulations, DOI could allow tribal gaming without the State's input unless the State participated in a process that included mediation. *Id.* at 1213. The Tenth Circuit held that New Mexico had standing to challenge the regulations ***27** on two grounds. First, the regulations caused New Mexico procedural injury by depriving it of its asserted statutory right to have a court determine that the State had bargained in bad faith before tribal gaming could be allowed without the State's input. *Id.* at 1216-17. Second, the regulations "injure[d] New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process - viz., the benefit of being able to offer input, presumably beneficial to its interests, relating to the content of those procedures." *Id.* at 1218. After identifying these two injuries, the Tenth Circuit said, "[T]he Supreme Court's direction that we give states special solicitude in analyzing standing provides further support for each basis establishing New Mexico's standing." *Id.*

In *New Mexico v. Dep't of Interior* and other cases, the Tenth Circuit has, like the Fifth Circuit, apparently treated "special solicitude" as a presumption favoring standing in close cases, or possibly as a "plus factor" applicable in all cases. At the same time, the Tenth Circuit has remarked on " 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to state standing.' " *Id.* at 1219 (quoting *Wyoming v. United States Dep't of Interior,* 674 F.3d 1220, 1238 (10th Cir. 2012); *see also Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions … are hard to reconcile.") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009)); *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("In determining ***28** that New Mexico has standing because of the threat of environmental damage to lands within its boundaries, we consider that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders."); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States,* 528 F.3d 712, 721 (10th Cir. 2008) (attaching "importan[ce]" to "special solicitude" in analyzing State's standing).

III. This case presents important issues of constitutional justiciability for a State seeking to vindicate its rights under federal law.

The proper handling of weapons-grade plutonium is a public policy matter of exceptional importance, implicating not only issues of national defense and national security but also the United States' obligations under an agreement with Russia. *Cf. New York v. United States.* 505 U.S. 144, 149 (1992). South Carolina does not challenge the federal government's broad authority to regulate this matter or to control operations at the SRS as a federal facility. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Hancock v. Train,* 426 U.S. 167 (1976). But being forced by virtue

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of the Supremacy Clause to host SRS, South Carolina seeks only to ensure federal executive-branch compliance with federal law. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607-08 (1982) ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.… [A] State does have an interest … in assuring that the benefits of the federal system are not denied to its general population."). This petition thus poses a question of the justiciability of claims by a State against the federal government.

***29** The importance of this question is reflected in the long line of cases in which this Court has addressed it. In addition to *Massachusetts v. EPA, see, e.g., Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (addressing State's standing to assert claim against the United States under prior decree); *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (addressing scope of statutory waiver of federal government's sovereign immunity from State's suit); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966) (addressing standing of State to challenge constitutionality of federal statute); *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923) (addressing State's standing to challenge constitutionality of federal statute); *Kansas v. United States,* 204 U.S. 331 (1907) (addressing United States' sovereign immunity from suits by States); *Georgia v. Stanton,* 73 U.S. 50 (1867) (addressing justiciability of State's suit to enjoin federal Reconstruction Act).

Although the defense plutonium at issue implicates domestic and international concerns of broad significance, even in these areas, States play an important role. Implementing policies and actions involving defense plutonium necessarily require some degree of state involvement through state regulation of related, collateral matters (such as the issuance of certain environmental permits), the utilization of state infrastructure, and the emissions and impact on state proprietary interests.[11] For ***30** that reason, this case implicates the relationship between the federal government and the States. The Supremacy Clause gives the United States the upper-hand in this relationship. But the federal government's supremacy rests on the rule of law. The federal government's violation of the rule of law generally is objectionable, but for an executive agency to inflict violence upon statutory obligations enacted by the legislature to protect a State without any mechanism of accountability by the state through the judiciary is particularly harmful to our system of government. This Court's review is necessary to ensure a State can remedy that harm, especially when, as here, the harm concerns the State's concrete interests in the proper disposition of the massive amounts of weapons-grade plutonium within its borders.

IV. This case provides an excellent vehicle for clarifying *Massachusetts v. EPA.*

The decision below and the circuit split discussed above show the need for clarification of *Massachusetts v. EPA.* This Court has granted certiorari in two prior cases that offered opportunities to do so that were not subsequently realized. *See United States v. Texas,* 136 S. Ct. 2271; *Connecticut,* 546 U.S. at 420. This case provides an excellent opportunity to provide the needed clarification.

For one thing, the decision below is for all practical and legal purposes final. *Cf., e.g., Trump v. Hawaii,* 138 S. Ct. 2392 (2018) (granting certiorari to review court of appeals decision affirming preliminary injunction on dispositive grounds). Although the Fourth Circuit below addressed an interlocutory appeal from an order granting ***31** a preliminary injunction, its holding that South Carolina lacks standing prevents the case from going forward on the merits. By the same token, this Court's reversal of the decision below will enable South Carolina to pursue legal claims that the district court held, in rulings not disturbed on appeal, are likely to succeed. App. 59a-72a.

For another thing, South Carolina preserved below the arguments that it would advance in this Court. The Fourth Circuit characterized South Carolina as advancing "one theory of injury" (App. 19a n.3) because the State's injuries all arise from the real risk of it becoming the indefinite - and, as a practical matter, the "permanent" - "repository of weapons-grade plutonium." App. 12a (quoting South Carolina's brief for the Fourth Circuit). As the Fourth Circuit's opinion reflects, however, South Carolina argued for standing based on its quasi-sovereign interests and its proprietary interests. App. 9a, 12a. Thus, South Carolina has asserted in the courts below precisely the same claims of injury-in-fact that Massachusetts advanced in *Massachusetts v. EPA,* 549 U.S. at 518-23.[12]

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Finally, this case presents legal claims that crystallize key questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA*. One key question is how "special solicitude" relates to the ***32** State's possession of a "procedural right." That question is cleanly posed here by South Carolina's claim under NEPA, a statute that this Court has recognized creates a procedural right. *See Defenders of Wildlife,* 504 U.S. at 572 n.7. Another key question is how "special solicitude" relates to case law apparently limiting suits against the federal government by States suing as *parens patriae*. *See Massachusetts v. EPA,* 549 U.S. at 539 (Roberts, C.J. dissenting). That question is posed starkly by South Carolina's claim under SRS-specific statutory provisions that are designed partly for the precise purpose of protecting South Carolina's interests and therefore evince "special solicitude" for the State and a corresponding intention to allow South Carolina to sue for enforcement of those provisions. *Cf. Maryland People's Counsel,* 760 F.2d at 320; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 266 (6th ed. 2009). A decision by this Court addressing those questions would go far toward providing the needed clarification of *Massachusetts v. EPA*.

***33 CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan Wilson

Robert D. Cook

T. Parkin Hunter

Attorney General for the State of South Carolina

Post Office Box 11549

Columbia, SC 29211

(803) 734-3970

Randolph R. Lowell

Counsel of Record

Tracey C. Green

John W. Roberts

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, SC 29202

rlowell@willoughbyhoefer.com

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(803) 252-3300

Counsel for Petitioner

June 7, 2019

Footnotes

1 We use "DOE" to refer collectively to the respondents. Among the respondents is the National Nuclear Security Administration (NNSA). NNSA is "established within the Department of Energy [as] a separately organized agency." 50 U.S.C. § 2401(a). The NNSA administers and manages activities related to the MOX Facility. *See id.* §§ 2471(2)(D) & 2481(a).

2 National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18), § 3121(b)(1)(B)(i), 131 Stat. 1283, 1892-93 (2017) (App. 95a); Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016 (BOP-03.07), available at https://directives.nnsa.doe.gov/bop/bop-0003-0007.

3 Available at https://www.nap.edu/read/25272/chapter/1.

4 *See* NDAA FY18, § 3121(a); CAA FY18, § 309(a), 132 Stat. 348, 530 (2018). After the district court issued its preliminary injunction and while this case was pending at the Fourth Circuit, Congress reaffirmed this mandate for fiscal year 2019. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636, 2292 (2018) (requiring continued construction of the MOX Facility unless the waiver requirements prescribed in Section 3121(b) of NDAA FY18 are met).

5 NDAA FY18, § 3121(b)(1); CAA FY18, § 309(b), (c).

6 The district court's reference to "MOXable plutonium" (App. 54a) reflects that, as the court explained, "[t]he plutonium at SRS can be divided into two general categories - the plutonium intended for disposition through the MOX Facility and the plutonium not intended for MOX disposition." App. 63a-64a. For the latter, "non-MOXable" plutonium at SRS, DOE has "assign[ed] Dilute and Dispose as the preferred alternative" in a supplemental Environmental Impact Statement published on April 5, 2016. App. 64a. As the district court further explained, "The ongoing Dilute and Dispose approach is limited in resources and legal authority and is not applicable to the plutonium intended for disposition through the MOX Facility." App. 64a.

7 The district court denied DOE's motion for a stay of the preliminary injunction pending appeal. App. 27a-33a. After briefing and oral argument before the Fourth Circuit, however, that court granted DOE's motion for a stay on October 9, 2018. App. 24a. On October 10, 2018, DOE issued a Project termination notice and began terminating employees at the Project.

8 The Fourth Circuit below erred in relying on *Clapper* not only because *Clapper* involved private plaintiffs but also because the plaintiff in *Clapper* did not assert procedural rights. Lacking procedural rights, the plaintiffs in *Clapper* were subject to a determination in an "injury-in-fact" analysis inapplicable to this case. *Massachusetts v. EPA,* 549 U.S. at 517-18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. at 572 n.7)). Moreover, the plaintiffs - as "US persons" - did not fall into a class to which the FISA provision in *Clapper* was directed, and that provision did not create any legal rights or protections for the plaintiffs. But, here, through NDAA FY18 and CAA FY18, Congress established statutory protections specifically for South Carolina, and South Carolina also falls within the class entitled to bring claims for NEPA violations. Accordingly - "special solicitude" or not - South Carolina met all the requirements for Article III and statutory standing

9 Nor does South Carolina's lawsuit present a programmatic challenge of the sort that, if addressed now, would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n,* 523 U.S. at 733. South Carolina challenges a highly discrete agency action - DOE's decision to terminate the MOX Facility.

10 The Second Circuit's ruling on standing was affirmed by an equally divided Court. "Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*.... Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 420 (2011). The Court reversed the Second Circuit's ruling on the merits, holding that the plaintiffs' federal common-law public nuisance claim was displaced by the Clean Air Act and EPA action authorized under the Act. *Id.* at 420-29.

11 All those elements are indisputably present here. South Carolina has and will continue to provide regulatory oversight on certain aspects of the operations at SRS, such as waste disposal. Much of the supporting infrastructure for SRS is provided by the State of South Carolina or its political subdivisions (such as roads and emergency services). *See generally* Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.*; Atomic Energy Act, 42 U.S.C. §§ 2201 *et seq.*

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12 In the decision below, the Fourth Circuit purports to reserve the question "whether other theories of injury would presently confer standing on South Carolina." App. 19a n.3. There are no "other theories" of standing remaining to the State. Accordingly, DOE has given notice of its intent to move for dismissal of the action for lack of jurisdiction if this Court denies further review. Notice, *South Carolina v. United States,* No. 1:18-cv-01431-JMC (D.S.C. May 1, 2019), ECF No. 45.

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EXHIBIT 11

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2019 WL 4730104 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
September 24, 2019.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Reply Brief for Petitioner

Alan Wilson, Robert D. Cook, T. Parkin Hunter, Attorney General for the, State of South Carolina, Post Office Box 11549, Columbia, South Carolina, 29211-1549, Telephone: (803) 734-3970.

Randolph R. Lowell, Tracey C. Green, John W. Roberts, Wllloughby & Hoefer, P.A., Post Office Box 8416, Columbia, South Carolina, 29202-8416, Telephone: (803) 252-3300, rlowell@willoughbyhoefer.com, for petitioner.

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***1 REPLY BRIEF FOR PETITIONER**

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation - and presents the same issue of the State's Article III standing - as presented in *Massachusetts v. EPA,* 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23-28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA,* it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a-72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA,* and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See, e.g.,* ***2** *United States v. Texas,* 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

ARGUMENT

I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA,* "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA,* Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. Accordingly, the dissent read the ***3** majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539-540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf., e.g.,Horn v. Banks,* 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane,* 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

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Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited - as the United States would have it - to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17-18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring ***4** only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 518-519 ("[I]n its capacity of *quasi*-sovereign … the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA,* those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id.* at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA,* 549 US. at 517-518); and under ***5** statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17-18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4-10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA.*

As shown in our petition (at 23-28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt,* No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

6 II. South Carolina Has Article III Standing under *Massachusetts v. EPA.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21-22. Instead, the United States argues that South Carolina's injuries will not mature until *2048,* because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action … is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats ***7** of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current

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injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf. Massachusetts v. EPA,* 549 U.S. at 522-523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l,* 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the ***8** federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17-18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a-72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a-76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2-3, 19-35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

***9** This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA,* 549 U.S. at 516-526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA,* South Carolina's standing follows a fortiori from this Court's decision in that case.

III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20-23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on ***10** further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "understood petitioner to challenge a decision to make South Carolina 'the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site.' " Pet. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims,* not its assertions of injury. *See id.* at 19a. Where the Fourth

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Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21-22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is ***11** final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government - many of which have reached this Court[3] - and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redisricting Comm'n,* 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government … are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here - the federal government abandoning its statutory obligations and leaving South Carolina to deal with the ***12** consequences. Sen. Graham *Amicus* Br. 3-10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5-10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

***13 CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan Wilson

Robert D. Cook

T. Parkin Hunter

Attorney General for he State of South Carolina

Post Office Box 11549

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Columbia, South Carolina 29211-1549

Telephone: (803) 734-3970

awilson@scag.gov

bcook@scag.gov

phunter@scag.gov

Randolph R. Lowell

Counsel of Record

Tracey C. Green

John W. Roberts

Willoughby & Hoefer, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

Telephone: (803) 252-3300

rlowell@willoughbyhoefer.com

tgreen@willoughbyhoefer.com

jroberts@willoughbyhoefer.com

Counsel for Petitioner

September 24, 2019

Footnotes

1 The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence. Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 530 (2002).

2 In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has

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its way that provision is not long for this world. After all, the federal government has not altered its plans to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

3 *E.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 139 S. Ct. 2779 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

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EXHIBIT 12

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140 S.Ct. 392
Supreme Court of the United States.

SOUTH CAROLINA, Petitioner
v.
UNITED STATES, et al.

No. 18-1531
|
October 15, 2019

Case below, 912 F.3d 720.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 392 (Mem), 205 L.Ed.2d 214

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EXHIBIT 13

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

1:25

INJUNCTION HEARING SEPT. 30 AT 10:00 A.M. BARNWELL COUNTY ET AL. V. ALAN WILSON

VW

Vicky Ware
vmware@williamsattys.com

To: rlowell@willoughbyhoefer.com
tyoung@tomyounglaw.com
Cc: You cbhutto@williamsattys.com
Friday, September 25, 11:10 AM

Please see the email below from Judge Newman with hearing date in the above matter.
Thank you
Vicky

WILLIAMS & WILLIAMS
ATTORNEYS AT LAW

VICKY WARE LEE

Reply to All

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EXHIBIT 14

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: Hearing on Temporary and Preliminary Injunctions
Date: Friday, September 25, 2020 at 4:57:38 PM Eastern Daylight Time
From: James Carpenter <james.carpenter@carpenterlawfirm.net>
To: aleelc@sccourts.org <aleelc@sccourts.org>
CC: Alan Wilson <AWilson@scag.gov>, Jim Griffin <jgriffin@griffindavislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>
Attachments: image001.jpg, 2020-09-25_Motion for TRO Preliminary Injunction.pdf

Dear Judge Lee:

Today the South Carolina Public Interest Foundation and John Crangle filed a Summons and Complaint (Case Number 2020-CP-40-04603) and a Motion for Temporary and Preliminary Injunctions objecting to the Attorney General's anticipated payout of $75 million in attorneys' fees from funds which we believe belong to the State of South Carolina. I attach a copy of the Motion.

The money is expected to arrive in South Carolina by October 1, or shortly thereafter. We are seeking Temporary and Preliminary Injunctions to maintain the status quo during the litigation and prevent the payout of $75 million, which, once paid out, would probably be very difficult to reclaim.

We are flexible on scheduling. We have notified the Attorney General of our filing the case and the motion.

Please telephone me to discuss scheduling a time for a hearing on our Motion for Temporary Injunction.

Respectfully submitted,

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Mobile: (864) 380-4880
www.carpenterlawfirm.net



W_`a Iт'c Wdeb_ Ffg_bfa g Fde!

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EXHIBIT 15

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 4:02:53 PM Eastern Daylight Time
From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>, Emory Smith <ESmith@scag.gov>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, jgriffin@davislaw.com <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, McCaslin, Debra Secretary (Danita O. Martin) <dmccaslinsc@sccourts.org>, Fitzgerald, Roderick <rfitzgerald@sccourts.org>

All,

Below is the link to join the Virtual Courtroom via WebEx for tomorrow's hearing at 3:00 PM. Please join several minutes prior to ensure you are able to properly connect, and contact me If you have any questions

https://scjudicial.webex.com/scjudicial/onstage/g.php?MTID=ec472dac763c1e4f902b0e7479f1f27cd

Best,
Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:56 PM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

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We prefer to go forward tomorrow at 3pm via WebEx.

Thank you.

Jim Griffin

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From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44:11 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>; jgriffin@davislaw.com <jgriffin@davislaw.com>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

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Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 12:06:55 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Badge Humphries <bhumphries@griffinhumphries.com>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Jim Griffin <jgriffin@griffinhumphries.com>, James Griffin <jgriffin@griffindavislaw.com>
Attachments: image002.jpg

I will accept service as of today.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Badge Humphries <bhumphries@griffinhumphries.com>
Sent: Monday, September 28, 2020 12:01 PM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; Jim Griffin <jgriffin@griffinhumphries.com>; James Griffin <jgriffin@griffindavislaw.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

Emory,

Please see attached, and please advise if you are willing and able to accept service on behalf of the Attorney General.

Thanks.

Badge

BADGE HUMPHRIES
ATTORNEY

Griffin Humphries LLC
2113 Middle Street, Ste. 305
Sullivan's Island, SC 29482
o. 843.883.7424 f. 843.883.7462 c. 843.991.7080
BHumphries@griffinhumphries.com
www.griffinhumphries.com

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this e-mail message in error, please notify us immediately at the telephone number listed above to arrange for the return and/or deletion of the original message. Thank you for your cooperation.

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From: Emory Smith <ESmith@scag.gov>
Date: Monday, September 28, 2020 at 10:13 AM
To: "aleelc@sccourts.org" <aleelc@sccourts.org>
Cc: "james.carpenter@carpenterlawfirm.net" <james.carpenter@carpenterlawfirm.net>, "jgriffin@davislaw.com" <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 17

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 3:46:03 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>
CC: James Carpenter <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 3:44 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

OK.

Who should we speak with then?

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 3:03 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

As I said below, I cannot agree to a temporary hold on the monies.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 2:23 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I have spoken with Brad Hutto and we both would like to reach an agreement with your office to prevent disbursement of the money until the cases are determined on the merits.

Thanks

Jim

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 12:04 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I may have misunderstood about the request to hear both matters at the same time, but having both matters heard at the same time before Judge Newman makes sense and would serve judicial economy. I don't know the process for referral of the Richland case to Judge Newman. I don't know if it could come from Judge Lee or a party.

An email just came in that you may have seen that a hearing can be held tomorrow at 3pm before Judge McCaslin. I have not responded, but believe that having Judge Newman would be better b/c he could consider both matters and avoid the possibility of differing orders in the two cases.

I have not been involved in this matter until your suit and the Barnwell suit were brought. I am just the lawyer on these cases, and I am not involved in the handling of funds. I cannot agree to a temporary hold on the monies.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 11:30 AM
To: Emory Smith <ESmith@scag.gov>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I don't know where you heard that we intended to request that our motion for TRO be heard before Judge Newman at the same time. Frankly, we had not give it any thought.

I did speak with Brad today about the possibility of reaching an agreement with you that covers both his case and ours. We are certainly amenable to an agreement that the funds not be dispersed until the cases are heard on the merits.

If we cannot reach an agreement, we are certainly fine with Judge Newman hearing our motion as well, if this is a possibility. But our case is a Richland County case and Brad's case is in Barnwell County.

I think we would need a special assignment from Court administration or the Chief before Judge Newman could hear our Richland County motion.

Jim

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: aleelc@sccourts.org
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
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EXHIBIT 18

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Tuesday, September 29, 2020 at 6:59:35 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 6:43 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please see a revised order. I apologize for the earlier draft. Please use this one.

From: Jim Griffin
Sent: Tuesday, September 29, 2020 6:39 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please find a proposed order from the Plaintiffs' granting a TRO.

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 6:13 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

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Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Crangle was informed that the funds may have been "wired" out of the AG's litigation account but that they have not yet been received by the Treasurer. The Treasure expects to receives the fund tomorrow in the Treasurer's bank account and then will wire to the law firms as requested by the AG.

Also, he was informed that normally payment is made via check and takes approximately 22 days. Here, there has been a request for an expedited wire.

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Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I do not understand. My understanding is that the transfer of funds has occurred.

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
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Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Judge McCaslin

Our client Mr Crangle has just been informed by an official in Treasurers office that the money has not been wired. They received an expedited request for a wire and it is scheduled to be sent either tomorrow or Thursday.

We would therefore request that the Court enter an injunction ASAP to enjoin the Treasurer's office from making the transfer.

We are available if the Court wishes to reconvene the hearing.

Thank you

Jim

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 4:37 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
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Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

In addition to the grounds for and against imposing a constructive trust, Judge McCaslin is requesting both parties submit brief proposed Orders as quickly as possible. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072

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dmccaslinlc@sccourts.org

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Sent: Tuesday, September 29, 2020 2:12 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Your Honor:

I have just submitted for efiling the attached documents. I am sorry that I have not submitted them earlier but had a computer glitch that delayed me a little while. Will look forward to seeing the Court and counsel at the hearing via WebEx at 3 pm.

Respectfully,

Emory Smith
Counsel for Attorney General Wilson

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

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Best,

Bruce H. Norton II
Law Clerk to the
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Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to

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have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

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To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com

Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

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Office of the Attorney General
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803-734-3642 Direct

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EXHIBIT 19

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Wednesday, September 30, 2020 at 9:27:04 AM Eastern Daylight Time
From: Jim Griffin <jgriffin@griffinhumphries.com>
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, Emory Smith <ESmith@scag.gov>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>

Judge McCaslin

I received confirmation this morning from the State Treasurer that the funds were wired to the Willoughby & Hoefer yesterday just hours prior to the hearing.

Mr. Loftis informed two members of the State Senate of the following in writing: “The Treasurers office received a warrant for payment from the Comptrollers Office Monday night. We processed and wired the funds on Tuesday morning to the law firm’s account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires.”

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 9:29 PM
To: Emory Smith <ESmith@scag.gov>; Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Evening,

Please find attached Judge McCaslin’s Order in the above referenced matter which is to remain in effect until a final Order is issued in this matter, no later than 5:00 PM on Friday, October 2, 2020. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
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From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 7:00 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
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For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

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Please find a proposed order from the Plaintiffs' granting a TRO.

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All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
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Eleventh Judicial Circuit
Lexington County Courthouse
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dmccaslinlc@sccourts.org

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Subject: RE: SCPIF v. Wilson 2020CP4004603

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Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I do not understand. My understanding is that the transfer of funds has occurred.

Emory Smith

J. Emory Smith, Jr.
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P.O. Box 11549

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Jim

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Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

In addition to the grounds for and against imposing a constructive trust, Judge McCaslin is requesting both parties submit brief proposed Orders as quickly as possible. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
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Lexington County Courthouse
205 East Main Street, Suite 463
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Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

Your Honor:

I have just submitted for efiling the attached documents. I am sorry that I have not submitted them earlier but had a computer glitch that delayed me a little while. Will look forward to seeing the Court and counsel at the hearing via WebEx at 3 pm.

Respectfully,

Emory Smith
Counsel for Attorney General Wilson

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

Best,

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 4
for Memorandum in Opposition to TRO Motion

Buckley Affidavit

ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA	)	
	)	AFFIDAVIT
COUNTY OF RICHLAND	)	

Kimberly Buckley, being duly sworn, attests to the following:

1. I am the Finance Director for the Office of the Attorney General.
2. The funds for payment were received on September 15, 2020 and deposited in agency's escrow fund on September 17, 2020.
3. On September 16, 2020 at 2:03 p.m. the Finance Department received the invoice from Willoughby and Hoefer for attorneys' fees and a request that the fees be tendered to the firm trust account as soon as such funds are transferred to the Attorney General's Office.
4. The Finance Department received approval to process the payment for attorney fees from Chief Deputy Attorney General on September 17, 2020.
5. The Finance Department submitted the request for increased budget authorization needed to process the payment to the Executive Budget Office (EBO) for approval on September 17, 2020. Copy attached. EBO emailed its approval of the increased budget authorization request to me at 9:21 a.m. on September 25, 2020. See attached.
6. Following receipt of the above approval of the increased budget authorization from EBO, the Finance Department of the Attorney General's Office began processing the payment. The funds for attorney fees ($75m) was transferred from the agency escrow fund to the litigation fund for processing.
7. The payment was entered into the South Carolina Enterprise Information System (SCEIS) by the Fiscal Analyst on the morning of September 25, 2020. At 11:21 a.m. that day, Accounting Supervisor approved the payment.

8. At 1:43 p.m. on the September 25, 2020, I reviewed and approved the payment in the State Carolina Enterprise Information System (SCEIS). After my approval, the payment was automatically routed to the Comptroller General's Office for review and final approval.

9. Attached are screenshots of the System Workflow showing the processing of the attorneys' fee payment to Willoughby and Hoefer through the SCEIS System. See attached.

10. My understanding is that Willoughby & Hoefer contacted the Treasurer's Office on September 28. The Director of Treasury Management at the Treasurer's Office offered a wire transfer option to the firm which would be immediate. To do so, the Attorney General's Office had to change the payment terms within the SCEIS payment document. Director of Treasury Management contacted a fiscal analyst at the Attorney General's Office for her to do so. The Director of Treasury Management sent me a wire request form for the payment. I reviewed what the Treasurer's Office sent over and then sent it back on the 28th. See attached email string from Cash Desk Manager at the Treasurer's Office.

11. The Treasurer's Office confirmed that it wired the funds to the law firm on September 29 at 9:14 a.m. See attached Cash Desk Manager email.

Kimberly Buckley

SWORN TO before me this 1st
day of October, 2020
Tammie Wilson
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3/30/2021

ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

admin
THE SOUTH CAROLINA
DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

This form is used to request an interim increase of Other Funds budget authorization. Approval is subject to the review of the Joint Other Funds Oversight Committee and the approval of the Executive Budget Office. A budget entry in SCEIS should accompany this request.

AGENCY: E200 - Attorney General **DATE:** 9/17/2020

AMOUNT REQUESTED: 75,000,000.00

Please provide responses to the questions below. Attached additional documentation if necessary.

1.	Please provide a description of your request.
	RESPONSE: One-time other funds authorization increase to support the payment of outside counsel fees and litigation cost in the U.S. Department of Energeny v. State of SC settlment agreement. All supporting documentation is attached.
2.	What expenses will be paid with this requested authorization?
	RESPONSE: Cost and fees for civil litigation-USDOE v. State of SC settlement agreement
3.	What funding source will be used to fulfill this request?
	RESPONSE: Other funds received from USDOE settlement agreement
4.	Why is the agency's existing Other Funds authorization level not sufficient to cover this request? Why was this authorization not requested during the previous budget cycle?
	RESPONSE: This is a very sustancial one time litigation settlement requiring payment far beyond the agency's current level of other funds authorization.
5.	Is all or part of the expenditure authorization supported by actual cash received and brought forward from the previous fiscal year?
	RESPONSE: No, all current funds
6.	Is all or part of the expenditure authorization request supported by an increase in projected revenue? If yes, explain in detail.
	RESPONSE: Yes, increase in revenue of other funds due to settlement agreement (600.42m). Agency will be retaining between 10-15m from settlement for cost, fees and fines and all ther funds will be disbursed to outside counsel (75m) and State Litigation Recovery Account (remainder).
7.	Is this request for a recurring initiative or a one-time request? ☐ Recurring ☒ One-time

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admin
THE SOUTH CAROLINA DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

8. If this is a recurring initiative, has additional authority been requested in the budget cycle for the upcoming fiscal year? ☐ Yes ☒ No

9. **Cabinet Agencies:** Has this request been reviewed with the Governor's Office? ☐ Yes ☒ No

AGENCY CERTIFICATION

The agency certifies that the cash identified is sufficient and available. The agency also acknowledges that, if approved, this adjustment is only in effect until the end of the current fiscal year.

9-17-2020

Authorized Agency Representative / Date

JOINT OTHER FUNDS OVERSIGHT COMMITTEE RECOMMENDATION

APPROVE	DISAPPROVE	MEETING DATE
☐	☐	

EXECUTIVE BUDGET OFFICE RECOMMENDATION

APPROVE	DISAPPROVE	SIGNATURE	DATE
☒	☐		
		ANALYST, EXECUTIVE BUDGET OFFICE	
		Brian J. Gaines	9/25/2020
		DIRECTOR, EXECUTIVE BUDGET OFFICE	

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Emory Smith

From: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Sent: Friday, September 25, 2020 9:13 AM
To: Kim Buckley
Subject: RE: [External] FW: MOX

It has been approved. Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account. Will you let me know when this is done?

Lauren Parker Wright
Budget/Research Analyst, Executive Budget Office

The South Carolina
Department of Administration
1205 Pendleton Street, Suite 529, Columbia, SC 29201
(803) 734-7216 | (803) 734-0645 fax

The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.

-----Original Message-----
From: Kim Buckley <KBuckley@scag.gov>
Sent: Thursday, September 24, 2020 5:17 PM
To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Subject: Re: [External] FW: MOX

Thanks, Lauren. I think the Chief Deputy AG may be reaching out to Brian to check on the status. He asked for his contact info. Just to give a heads up. I know these things take time and relayed that to them. They have been asking me daily. Appreciate your help with this!

Kim

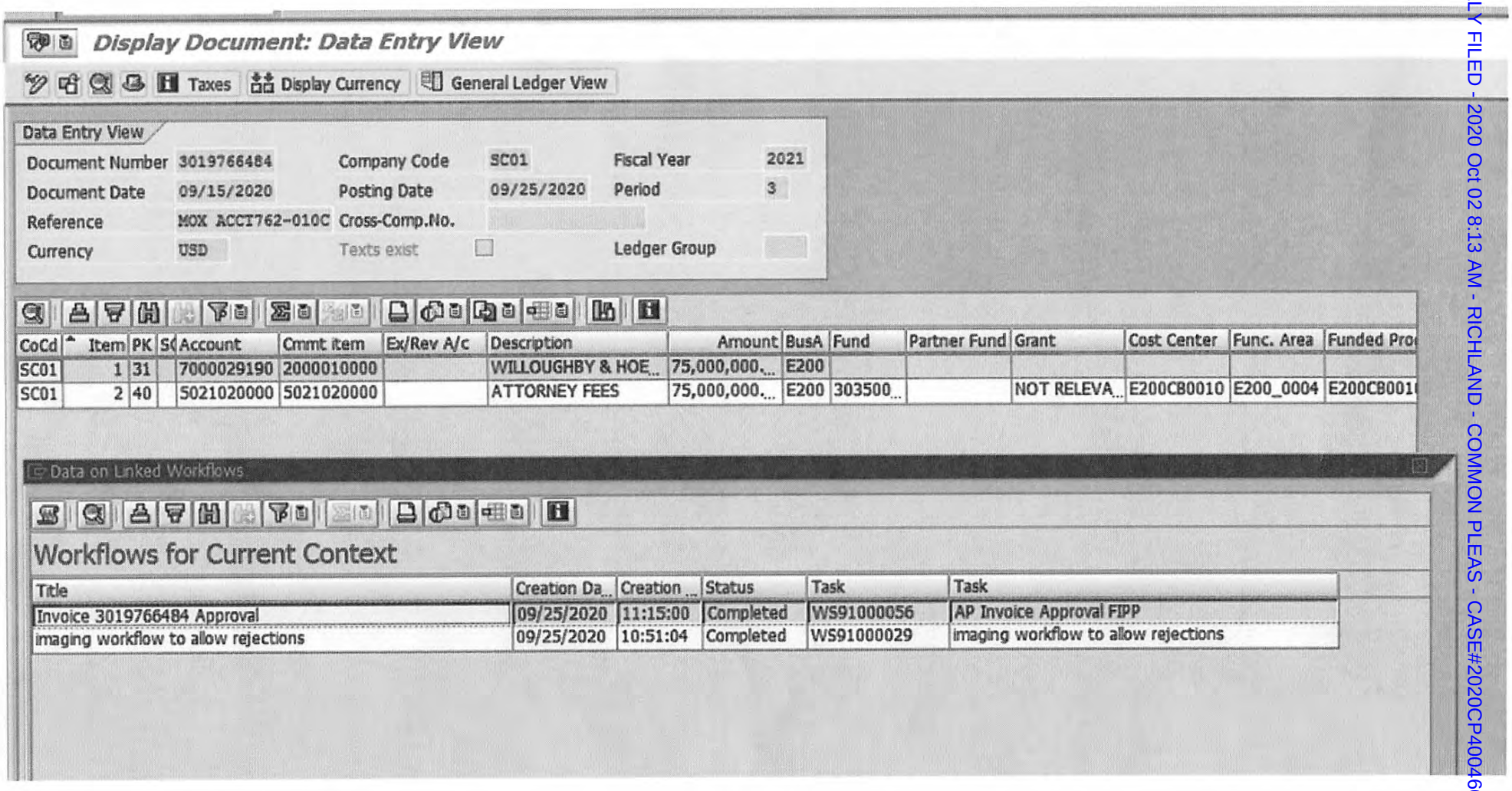
Sent from my iPhone

> On Sep 24, 2020, at 3:32 PM, Parker, Lauren <Lauren.Parker@admin.sc.gov> wrote:
>
> I believe we are waiting on the higher ups- as soon as I hear anything I'll let you know. I have no idea why its taking so long.
>
> Lauren Parker Wright
> Budget/Research Analyst, Executive Budget Office
>
> The South Carolina
> Department of Administration
> 1205 Pendleton Street, Suite 529, Columbia, SC 29201
> (803) 734-7216 | (803) 734-0645 fax
>

> The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.
>
> -----Original Message-----
> From: Kim Buckley <KBuckley@scag.gov>
> Sent: Thursday, September 24, 2020 3:31 PM
> To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
> Subject: [External] FW: MOX
>
> Lauren,
>
> I hope you are doing well. So sorry to bother but has there been any movement on authorization approval?
>
> Best,
>
> Kimberly Buckley
> Finance Director
> SC Attorney General's Office
> 803-734-3771
> kbuckley@scag.gov
>
>

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ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603



Display Document: Data Entry View

Taxes | Display Currency | General Ledger View

Data Entry View

Document Number	3019766484	Company Code	SC01	Fiscal Year	2021
Document Date	09/15/2020	Posting Date	09/25/2020	Period	3
Reference	MOX ACCI762-010C	Cross-Comp.No.			
Currency	USD	Texts exist	☐	Ledger Group	

CoCd	Item	PK	S(	Account	Cmmt item	Ex/Rev A/c	Description	Amount	BusA	Fund	Partner Fund	Grant	Cost Center	Func. Area	Funded Pro
SC01	1	31		7000029190	2000010000		WILLOUGHBY & HOE...	75,000,000....	E200						
SC01	2	40		5021020000	5021020000		ATTORNEY FEES	75,000,000....	E200	303500...		NOT RELEVA...	E200CB0010	E200_0004	E200CB001

Data on Linked Workflows

Workflows for Current Context

Title	Creation Da...	Creation ...	Status	Task	Task
Invoice 3019766484 Approval	09/25/2020	11:15:00	Completed	WS91000056	AP Invoice Approval FIPP
imaging workflow to allow rejections	09/25/2020	10:51:04	Completed	WS91000029	imaging workflow to allow rejections

Step name	Status	Result	Creation date/time	End date/time	Agent
check workflows background method	Completed	No	09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Determine Cost Centers for Invoice 3019766484	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Determine AP Supervisor for 3019766484	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Year End Check	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Agents from Role YWF STO APTM-ALL	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 11:15:00	09/25/2020 - 11:21:32	JOAN POTTS
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 11:21:32	09/25/2020 - 13:43:14	KIMBERLY BUCKLEY
Post an Invoice 3019766484 2021	Completed		09/25/2020 - 13:43:14	09/25/2020 - 13:43:19	Workflow System
Local Check Determination	Completed		09/25/2020 - 13:43:19	09/25/2020 - 13:43:19	Workflow System
Place P Block for WF273	Completed		09/25/2020 - 13:43:19	09/25/2020 - 13:43:49	Workflow System
Determine AP 10K for 3019766484	Completed		09/25/2020 - 13:43:49	09/25/2020 - 13:43:49	Workflow System
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 13:43:49	09/28/2020 - 17:09:15	BRIAN CRONE
STO: E200 Method/Terms = 3 for 3019766484	Completed	Mail sent	09/28/2020 - 17:09:14	09/28/2020 - 17:09:14	Workflow System
Remove P Block for WF273	Completed		09/28/2020 - 17:09:14	09/28/2020 - 17:09:14	Workflow System
3019766484 SC01 2021	Completed		09/28/2020 - 17:09:15	09/28/2020 - 17:09:15	Workflow System

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Emory Smith

From: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Sent: Wednesday, September 30, 2020 9:07 AM
To: Kim Buckley
Cc: Simmons, Melissa
Subject: RE: [External] Fwd: Wire Request-AGO

Kim,

The wire processed successfully on 9/29/20 at 9:14am EST according to our online banking wire information. STO also received a verbal confirmation from the beneficiary. Our best practice is that we do not share the details(documents) of transactions initiated on our wire transfers system. Wire processing and book transfer is a normal part of our daily business practice and we monitor those transactions carefully . If you have any additional question, please let me know and I will be happy to assist.

Thank you,
Michelle

Michelle Blanchfield | Cash Desk Manager
South Carolina Treasurer's Office
1200 Senate Street, Suite 214
Wade Hampton Building
Columbia, SC 29201
803-734-0259 | michelle.blanchfield@sto.sc.gov

From: Kim Buckley <KBuckley@scag.gov>
Sent: Wednesday, September 30, 2020 6:27 AM
To: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: [External] Fwd: Wire Request-AGO

Michelle,

I hope you are doing well. Can you let me know if this wire has been processed and If so the date and time of processing? If there is a document you can send me showing thIs information that would be helpful.

Thank you!

Kim

Sent from my iPhone

Begin forwarded message:

> **From:** Kim Buckley <KBuckley@scag.gov>
> **Date:** September 28, 2020 at 4:37:00 PM EDT
> **To:** "Michelle.Blanchfield@sto.sc.gov" <Michelle.Blanchfield@sto.sc.gov>
> **Cc:** "Simmons, Melissa" <Melissa.Simmons@sto.sc.gov>
> **Subject: Wire Request-AGO**

Michelle,

Please see the request for wire transfer for Willoughby and Hoefer. Please let me know if you need anything additional.

Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

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EXHIBIT 5
for Memorandum in Opposition to TRO Motion

Emails: from Carpenter 9.25.20; Smith to / from Humphries re service 9.28.20

ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Alan Wilson

From: James Carpenter <james.carpenter@carpenterlawfirm.net>
Sent: Friday, September 25, 2020 4:58 PM
To: aleelc@sccourts.org
Cc: Alan Wilson; Jim Griffin; Badge Humphries
Subject: Hearing on Temporary and Preliminary Injunctions
Attachments: 2020-09-25_Motion for TRO Preliminary Injunction.pdf

Dear Judge Lee:

Today the South Carolina Public Interest Foundation and John Crangle filed a Summons and Complaint (Case Number 2020-CP-40-04603) and a Motion for Temporary and Preliminary Injunctions objecting to the Attorney General's anticipated payout of $75 million in attorneys' fees from funds which we believe belong to the State of South Carolina. I attach a copy of the Motion.

The money is expected to arrive in South Carolina by October 1, or shortly thereafter. We are seeking Temporary and Preliminary Injunctions to maintain the status quo during the litigation and prevent the payout of $75 million, which, once paid out, would probably be very difficult to reclaim.

We are flexible on scheduling. We have notified the Attorney General of our filing the case and the motion.

Please telephone me to discuss scheduling a time for a hearing on our Motion for Temporary Injunction.

Respectfully submitted,

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Mobile: (864) 380-4880
www.carpenterlawfirm.net

CARPENTER
WHEN IT'S WORTH FIGHTING FOR!

ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Emory Smith

From: Emory Smith
Sent: Monday, September 28, 2020 12:07 PM
To: 'Badge Humphries'
Cc: james.carpenter@carpenterlawfirm.net; Jim Griffin; James Griffin
Subject: RE: SCPIF v. Wilson 2020CP4004603

I will accept service as of today.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Badge Humphries <bhumphries@griffinhumphries.com>
Sent: Monday, September 28, 2020 12:01 PM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; Jim Griffin <jgriffin@griffinhumphries.com>; James Griffin <jgriffin@griffindavislaw.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

Emory,

Please see attached, and please advise if you are willing and able to accept service on behalf of the Attorney General.

Thanks.

Badge

BADGE HUMPHRIES
ATTORNEY

Griffin Humphries LLC
2113 Middle Street, Ste. 305
Sullivan's Island, SC 29482
o. 843.883.7424 f. 843.883.7462 c. 843.991.7080
BHumphries@griffinhumphries.com
www.griffinhumphries.com

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EXHIBIT 1

ELECTRONICALLY FILED - 2020 Oct 06 7:17 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

DAVIDSON, WREN & DEMASTERS, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Michael B. Wren
David A. DeMasters

1611 Devonshire Drive, Second Floor (29204)
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855

Brandon M. Briggs
Jonathan M. Riddle

Of Counsel
Kenneth P. Woodington

September 16, 2020

W. Jeffrey Young, Esquire
Chief Deputy Attorney General
Office of the Attorney General
jyoung@scag.gov

Dear Judge Young:

Please allow this letter to serve as the final element of the due diligence review and as the request for the release of the attorneys' fees to the trust account of Willoughby & Hoefer, P.A., which will serve as evidence of satisfaction of all contractual commitments by all parties and terminate the engagement related to the litigation for plutonium disposition. *See* Litigation Retention Agreement, effective Feb. 8, 2016, as amended, effective Jan. 1, 2019.

We appreciate the opportunity presented to represent the State in these important matters, and believe some historical context is warranted to bring us to this final point of closure of this engagement.

In March of 2014, these firms (or the predecessors) filed an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests. At that time, the U.S. Department of Energy (DOE) (through the National Nuclear Security Administration) was seeking to place the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS) into "cold standby" status, which would effectively terminate the project. As the Congressional delegation wrote to then-Governor Haley, "[w]e ask that you work with the South Carolina Attorney General to explore any legal avenues the state may have to address this injustice." Ltr. of Congress to Haley, March 6, 2014. After being briefed on a legal strategy to achieve that result, the State retained Davidson, Wren, & DeMasters, P.A., and Willoughby & Hoefer, P.A., law firms to represent it.[1]

The State filed a complaint on March 18, followed by a motion for summary judgment on April 14. Speed was of the essence given other factors at play in Congress. On April 30, 2014, DOE capitulated and directed the contractor to continue the MOX Facility construction.

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, we developed a comprehensive strategy focusing on litigation with DOE and we briefed the Governor's Office and your office on that strategy, which included the draft of a complaint. With political overtures having been rebuffed

[1] We appreciate the confidence your office showed in our collective experience to represent the State on the plutonium disposition issues at SRS. Each firm and its lead counsel on these cases has represented the State in a number of federal court litigation matters against the United States (or its agencies). Each undersigned counsel also has litigated cases regarding nuclear material, environmental issues, and complex civil litigation, generally.

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and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to your office on January 26, 2016, as a "formal request that [the Attorney General's] office initiate litigation on behalf of the State of South Carolina against DOE…." Haley to Wilson, Jan. 26, 2016.

On February 9, 2016, the State filed a complaint against DOE seeking the removal of one metric ton of weapons-grade (defense) plutonium and payment of the economic and impact assistance monies. And the battle was joined. The State pushed hard and fast. After substantial briefing and argument on multiple issues and motions, the federal District Court in South Carolina issued an order on October 31, 2016, dismissing the economic and impact assistance payment claim for lack of jurisdiction, pointing to the Court of Federal Claims as the proper forum.

The removal claim continued in South Carolina and on March 20, 2017, the District Court granted the State's injunctive relief claim and ordered DOE to remove one metric ton of defense plutonium. The court requested additional briefing on the appropriate remedy, and on December 20, 2017, adopted the State's proposal to require removal of the defense plutonium within two years and also required DOE to provide ongoing status reports on its removal progress. On February 2, 2018, DOE appealed the judgment to the Fourth Circuit. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (i.e., by December 31, 2019).

On November 30, 2018, the State of Nevada filed a lawsuit against DOE seeking to prevent the relocation of the one metric ton of defense plutonium to Nevada in the Federal District Court in Nevada. This was a significant issue, as there are less than a handful of sites in the United States capable of storing defense plutonium and if Nevada was successful, DOE could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from SRS. It was imperative that South Carolina protect its interest in the removal.

On January 3, 2019, South Carolina moved to intervene in the Nevada case. The State of Nevada opposed South Carolina's participation in the case but, after expedited briefing, the court granted the State's motion on January 14. Nevada sought a preliminary injunction to halt the shipment of defense plutonium to Nevada from SRS, and indicated that if the defense plutonium had left SRS it should be returned. An evidentiary hearing was held on January 17. On January 30, DOE notified the court and the parties that one-half ton of defense plutonium had been relocated to Nevada. Also on January 30, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. Nevada appealed to the Ninth Circuit on February 4.

During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. It also stated it had 15 witnesses to present. South Carolina was prepared to litigate this matter in a full trial. However, the district court stayed the case pending the appeal. After briefing at the Ninth Circuit, the court dismissed the appeal as moot on August 13, 2019. The stay at the district court was lifted, and additional motions were filed and briefing began anew. In December 2019, South Carolina's

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participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE in 2020.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the Federal District Court in South Carolina ordered its removal, DOE filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS.

During this time, South Carolina learned that DOE was taking active steps to halt construction of the MOX Facility and the Secretary of DOE was finalizing a formal memorandum to terminate the program. Once the construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation, the strategy was for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position and maintain the status quo. South Carolina moved expeditiously, filing a complaint and a request for a preliminary injunction on May 25, 2018 in the federal District Court along with a request for an expedited hearing. On June 7, the court granted the preliminary injunction and ordered DOE to continue constructing the MOX Facility.

DOE appealed to the Fourth Circuit. During this time, efforts were made at obtaining a legislative solution that, unfortunately never materialized and, on October 26, 2018, the Fourth Circuit held that South Carolina lacked standing. DOE quickly terminated the MOX Facility construction, justifying South Carolina's efforts to at least try and maintain the status quo.

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover $100 million. On January 8, 2018, the State filed its second complaint seeking to recover another $100 million. These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions. The Department of Justice and the State agreed that the outcome of the case would govern all six years of payments under 50 U.S.C. § 2566(d)(1), essentially rendering this matter a $600 million case. These efforts were not successful and, in June 2019, South Carolina informed the court that DOJ had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. It did—ruling against the State on August 20, 2019 and finding that no appropriation by Congress was available for the payments.

South Carolina appealed that decision to the Federal Circuit. After briefing and oral argument on May 5, the case was stayed pending additional settlement discussions.

Beginning in January 2020, promising discussions were held between counsel for DOE and the State met on several occasions to work on a framework for a resolution. After several productive meetings and the Federal Circuit oral argument, settlement discussions progressed further, culminating in a meeting on July 1 in Washington, DC, with the Secretary of DOE. An agreement in principle was reached that day, subject to further approvals and consultation with

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stakeholders. The President and U.S. Attorney General ultimately concurred, as did and South Carolina's federal and state legislative leaders.

On August 28, 2020, a settlement agreement was executed providing for a 100% recovery of the economic and impact assistance payments and provide DOE with a grace period to comply with a contractual obligation to remove 9.5 metric tons of defense plutonium while still maintaining the ability to force removal and receive payment should DOE not comply with its contractual obligations.

As you know, the August 31, 2020, settlement agreement reflects that each party bears its own attorneys' fees and costs. In these circumstances, the "common fund" approach is often utilized to calculate the attorneys' fee award.[2] *Layman v. State*, 376 S.C. 434, 451-53, 658 S.E.2d 320, 329-30 (2008). "[W]hen awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.' These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the 'percentage-of-the-recovery' approach." *Id.* Here, that percentage is calculated by applying the contractual agreed-upon fee percentages to the recovery amount.

For the fees in this case, the litigation retention agreement entered into in 2016—a contract binding on the State of South Carolina—utilizes a decreasing percentage based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. In calculating the attorneys' fee under the agreement, the earned fee, *inclusive* of costs and expenses, is $75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.[3]

Regarding our specific engagement in 2016, we note that the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by a circuit court. *See* S.C. Code Ann. §§ 1-7-85, 170;[4] *Cephalon v. Wilson*, Civil Action No. 2012-CP-40-07317, Order Granting Def's Mot. for Summ. Judg. (June 6, 2014) ("As the Supreme Court recognized in the case of *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28, 28 S.E.2d 445, 447-48

[2] Because the State and its citizens are the beneficiaries of the recovery of over half a billion dollars, the "common fund" approach should be applied.

[3] We note this percentage is less than the fee percentages of most standard contingency fee agreements as well as the attorneys' fee percentages in the two recent settlements involving the V.C. Summer nuclear plant litigation.

[4] South Carolina Code Section 1-7-85 states: "Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement … in representing the State … in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees … or costs of litigation awarded by court order or settlement, travel expenditures, depositions, printing, transcripts, and personnel costs…."

Further, Part I.B of the Budget also contains the following proviso: "59.8. (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled 'Litigation Recovery Account.' The funds deposited in this account must be expended only as prescribed by law." Payment of the attorneys' fees complies with the legal contractual obligation resulting from the settlement.

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(1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State."). As the circuit court further found, "the Attorney General possesses the authority to associate attorneys … and to pay those outside attorneys on a contingency fee basis with money received in any settlement…." *Id.*; *see also South Carolina v. Eli Lilly*, 2007-CP-42-1855, Order Denying Mot. To Disqualify (Sept. 22, 2009); *see also Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300, No. 05-CP-40-2785 (Ct. Common Pleas, Fifth Judicial Circuit) (Sept. 18, 2006) ("Attorney General Henry McMaster stated that the public should understand his use of outside attorneys under this [contingency] fee arrangement 'is consistent with the highest standards of practicing law and bringing litigation.'" *The State*, August 10, 2006; Ex. 4 to Harpootlian Depo.").

The fee is eminently reasonable. As detailed above, the work performed included litigation of four cases in three separate trial courts, three separate courts of appeal, and the United States Supreme Court. Litigating against the federal government in federal court on a federal project involving federal dollars is a daunting task. It involved thousands of hours of work,[5] tens of thousands of pages of document review, interaction with multiple state and Federal agencies, consideration of national security issues (which also meant being denied access to certain information), and coordinating the litigation of multiple cases in different courts simultaneously.[6] It also involved coordination and communication with multiple Congressional offices and staff—including offices and staff outside of South Carolina—and the White House.

The litigation risk assumed by counsel was significant. For three of these cases, injunctive relief was the only relief available. However, these cases were critical to the overall strategy to address the defense plutonium issue in the State. But with only one available claim for monetary relief, we were all presented with a unique situation. The chosen path—and the most logical path—was to combine all the defense plutonium litigation matters under a single contract and for the injunctive relief cases to assign a small percentage of additional recovery IF any payments were recovered.[7] There was a clear risk that the State could be successful in the injunctive relief litigation and fail to recover any monies, leaving its counsel with having brought about a successful result in litigation for the State and receiving no payment. The litigation

[5] "Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour." George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 660 (1956). South Carolina agrees. "Attorney General of South Carolina [Henry McMaster] recognizes in these types of cases, attorneys' fees are based on a percentage of recovery, regardless of hours or how hours are kept. R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo." *Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300 (emphasis in original).

[6] DOE had four separate legal teams defending these cases.

[7] Notably, if these four cases were litigated under three separate, independent litigation retention agreements using the standard stepped fee schedule, and drawing from the single monetary recovery case, the attorneys' fee calculation could have been as much as $103,750,000, or 17% of the total recovery. While adjustments may have been made to those separate agreements if they had been undertaken, there is no question that combining all four matters within a single litigation retention agreement and modifying the fee schedule accordingly resulted in a fee that was less than would have been calculated under separate, stand-alone agreements.

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retention agreement appropriately reflected the risk incurred by counsel. *See Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees ("The State itself, through Attorney General Henry McMaster, recognizes the appropriateness of percentage recoveries for lawyers who take a chance for the State. R. Harpootlian Depo., p. 40; Ex. 3 to Depo.").

The litigation result was extraordinary. The success of the removal litigation and the threat of additional litigation immediately and in 2022 was a significant factor in bringing DOE to the table to negotiate a resolution. This litigation removed one metric ton of defense plutonium from the State and a payment to the State's General Fund of over half a billion dollars—the largest single settlement in the State's history. It also secured a contractual commitment to remove 9.5 metric tons[8] of weapons-grade plutonium by 2037 and for the payment of additional money to the State—which could number over a billion dollars should DOE fail to remove additional defense plutonium from SRS.[9] These are benefits that accrue to the State and for which no additional payment to counsel is required.

Therefore, we respectfully request that the attorneys' fee of $75,000,000 be tendered to the trust account of Willoughby & Hoefer, P.A., for further distribution as soon as such funds are transferred to the Attorney General.[10]

Thank you for the opportunity to be of service.

Sincerely,



William H. Davidson, II
Davidson, Wren, & DeMasters, P.A.



Randolph R. Lowell
Willoughby & Hoefer, P.A.

[8] In fact, the State now knows the exact amount of defense plutonium subject to 50 U.S.C. § 2566, as that number was declassified as part of this litigation.

[9] However, while maintaining the hammer of enforcement to incentivize the removal of the defense plutonium, the settlement does not interfere with the programs for removal. If South Carolina continued to engage in litigation from 2022 forward, then success on the economic and impact assistance payments could have been detrimental to SRS, as those payments would have to be made from the operations budget of DOE instead of payable from the judgment fund. This means a reduction in available funds for DOE could adversely impact SRS—a undesirable result from a South Carolina economic and public policy perspective.

[10] Regarding the four cases, Willoughby & Hoefer, PA served as lead counsel in all four cases, with Davidson, Wren, and DeMasters, PA, serving as counsel in two cases. The division of fees and expenses for the shared cases is 92.5%/7.5%. This division is reflective of the proportion of services provided by each firm in the cases involving joint representation.

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EXHIBIT 3

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	
Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,	)	
Defendants.	)	

AFFIDAVIT OF LEONIDAS E. STAVRINAKIS

PERSONALLY APPEARED BEFORE ME **Leonidas E. Stavrinakis**, who deposes and says as follows:

1. I am over 18 years of age, and I am qualified and competent to make this affidavit.

2. I make this affidavit based upon my personal knowledge, except as to those matters stated upon information and belief and, as to those matters, I believe them to be true.

3. I am a member of the South Carolina House of Representatives, representing District 119.

4. I serve on the Ways and Means Committee of the South Carolina House of Representatives. I also serve on the Joint Other Funds Oversight Committee.

5. On May 18, 2020, Act No. 135 was signed into law and became effective and remains in effect through today.

6. On information and belief, from May 18, 2020 through the present, and until such time as the General Assembly takes further action, under Act No. 135, Section 7, the Executive

Budget Office has full and complete authority to approve agency requests for other fund authorization adjustments without any action or review by the Joint Other Funds Oversight Committee. During this time period, any authority of the Joint Other Funds Oversight Committee has been delegated to the Executive Budget Office.

Leonidas E. Stavrinakis

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 6th DAY OF
OCTOBER 2020.

Notary Public for the State of South Carolina
My commission expires 3/1/2022
[SEAL]

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EXHIBIT 4

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated,	)	Case No. 2020-CP-40-04603
	)	
Plaintiffs,	)	
	)	
v.	)	**AFFIDAVIT OF JOHN FREEMAN**
	)	
Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

NATURE OF EXPERT'S ASSIGNMENT

I have been retained as an expert witness on behalf of Willoughby & Hoefer, P.A. law firm that, along with the Davidson, Wren & DeMasters, P.A., law firm, represented the Attorney General for the State of South Carolina ("AG's Lawyers"), who have been sued in this case. I have been asked to express an opinion as to the reasonableness of the fees Attorney General Wilson agreed to pay the AG's Lawyers in this case.

EXPERT QUALIFICATIONS

I am the Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus at the University of South Carolina Law School. Following my graduation from the University of Notre Dame Law School in 1970, I worked at the Jones Day law firm (then known as Jones, Day, Cockley and Reavis). I left Jones Day in 1972 to take a

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Fellowship at the University of Pennsylvania Law School's Center for Study of Financial Institutions. My work at Penn Law School involved the study of business-related matters and duties owed by those who participate in business activities, including lawyers and investment professionals. I subsequently received my LL.M. from Penn Law School. In 1973 I joined the faculty of the University of South Carolina Law School. I retired in 2008 and am a Distinguished Professor of Law Emeritus at USC. Besides teaching law at USC for 35 years, I was a Visiting Professor in Residence at the University of Texas Law School in Austin, Texas, and Loyola Law School in Chicago. I have also worked for the Securities and Exchange Commission as a special counsel.

During my 35-year career as a law professor, I specialized in business courses and legal ethics. I taught Securities Regulation and Corporations for over 30 years. I taught White Collar Crime, which has a securities regulation component, for over 10 years. I also taught Legal Accounting, Business Planning and Corporate Finance. I taught legal ethics for many years at USC Law School, at numerous CLE programs, as part of the South Carolina Bar Review, and at several JCLE programs. For 19 years, I wrote a bi-monthly column on legal ethics published in the South Carolina Bar' s magazine. Among the topics I have taught about in the field of legal ethics are fee related matters.

Though much of my professional life was devoted to teaching I also have substantial experience practicing law. I have been admitted to practice as a lawyer for nearly 50 years. I am a member of the Bars of the States of South Carolina, Ohio, and Washington. I have been admitted to practice in various federal courts, including the United States District Courts for the Northern District of Ohio, the South Carolina District, and the District of Colorado, the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, and the United States Supreme Court. I

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have practiced before each of the foregoing courts and I am at present a member in good standing of each of those courts. I have tried, settled, or testified in a wide variety of cases over the years involving charges of financial misconduct. Such cases include a number of major investment-related cases, including the HomeGold Financial/Carolina Investors fraud, the Al Parish financial fraud, the Three Hebrew Boys criminal case, and cases involving alleged financial misconduct by MeadWestvaco-International Paper, SCANA, KPMG, Deutsche Bank, Horry County State Bank, Sidley Austin Brown & Wood, BB&T, Bankers Trust of New York, BNY Mellon, and Just for Feet, Inc.

I have substantial experience in big case litigation. My work in the area began in the 1970s when, as a young Jones Day attorney, I worked on a design-defect class action involving the Corvair automobile and on Truth and Lending class actions brought against a major credit card company. From that starting point, I have brought and prosecuted complex cases, including class actions. I have also opposed class actions as counsel for defendants. I have tried class actions and handled appeals of same. I have testified in various class actions as an expert witness as to various issues including, many times, the reasonableness of fees and expenses sought.

I have participated in fee matters related to settlements of major lawsuits many times. For example, in the Broin/Ramos flight attendant class action case in Florida, a case in which I was involved as a fee expert, the court approved a fee award of $46 million for two lawyers from a single firm. The $300 million settlement in Broin/Ramos was affirmed on appeal. See Ramos v. Philip Morris Cos., Inc., 743 So.2d 24 (Fla. 3d DCA 1999). In another Florida case, I testified in support of the fee petition in case the State of Florida brought against the tobacco companies. In Re: Florida v. Am. Tobacco Co., No. CL-95-1466-AH (Palm Beach Co. Cir. Ct.). An arbitration panel in that case awarded the $3.4 billion for attorneys' fees to the Plaintiff's legal counsel. That

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arbitration panel order stands as the single largest legal fee award in the history of the world. I testified in that case that a fee award of 25% of the financial benefit accruing to the State of Florida should be approved. The arbitration panel in that case awarded more, a fee of 26% of the total financial benefits accruing to the State of Florida. The $3.4 billion legal fee award granted by the arbitration panel stands and is being paid; there was no appeal from that ruling.

From 1970 to the present I estimate that I have spent over 13,000 hours in dealing with class actions, either as counsel for the class; as counsel for a class action defendant; or as an expert witness in connection with settlement, ethical, or fee issues. A copy of my resume, which further establishes my credentials, is attached as Exhibit 1.

INFORMATION CONSIDERED BY EXPERT

My research in this matter is of the type that is standard for experts in the legal ethics/professional responsibility field. Besides consulting with the AG's Lawyers concerning this case's factual background, I have reviewed various relevant documents including the Amended Complaint with Exhibits (including the Litigation Retention Agreement and the June 2019 amendment thereto); Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction; the Ex Parte Temporary Restraining Order; the Notice of Appeal; the Petition for Supersedeas with Exhibits; statutes and case law relating to the Attorney General's authority to hire counsel; a summary of Settlement Benefits South Carolina has derived from the AG's Lawyers' efforts; a letter from William H. Davidson, II and Randolph R. Lowell to W. Jeffrey Young dated September 16, 2020, providing factual background material concerning work done by the AG's Lawyers in this case. I have also conducted factual and legal research. The opinions I have drawn from the facts available to me are based on my knowledge, background, training, and experience as an expert in duties owed by lawyers, including fiduciary obligations

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and fee-related issues. In expressing my opinions, I rely on and apply the standards governing South Carolina lawyers. I hold the opinions I express to a reasonable degree of professional certainty. I reserve the right to amend or supplement my opinions or supporting reasons as additional material becomes available.

FACTUAL OVERVIEW

The fee issue considered herein grows out of the Attorney General's decision to enter into a Settlement Agreement with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). Factual background concerning the underlying dispute and the efforts of the AG's Lawyers to achieve a quality result for their client is set forth in the September 16, 2020, letter from William H. Davidson, II and Randolph R. Lowell to W. Jeffrey Young, a copy of which is attached hereto as Exhibit 2. The factual positions taken in that letter are incorporated by reference.

As explained in Governor McMaster's August 30, 2020, letter to the Attorney General, the settlement was reached "[a]fter years of DOE repeatedly ignoring its obligations and abandoning the MOX project." DOE's dereliction required that the Attorney General become embroiled in "complicated and time-consuming litigation [requiring] the assistance of outside counsel to pursue these complex claims." McMaster August 30, 2020 letter at 1-2. When he wrote that letter, Governor McMaster was certainly well-aware of the long-festering legal problem revolving around the storage of deadly plutonium at SRS. After all, Governor McMaster was South Carolina's Attorney General from 2003-2011, before becoming South Carolina's Lieutenant Governor, and then, in 2017, its Governor.

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This affidavit does not consider various legal arguments advanced by Plaintiffs to the effect that the Attorney General lacks the authority to pay legal fees, or that, under the circumstances, payment of the AG's Lawyers' legal fees is forbidden by statute or unconstitutional. For purposes of this affidavit I assume that the Attorney General had authority to enter into the fee agreements with the AG's Lawyers, and that there are no statutory or constitutional impediments preventing the Attorney General from paying the AG's Lawyers the contingent fee they seek for the work they have done.

The focus here is on the claim that payment by the Attorney General of the 12.5% contingent fee[1] to Defendants violates SCACR Rule 407, Rule 1.5, which calls for legal fees to be reasonable. Specifically, this affidavit addresses Plaintiffs' contention that the Attorney General has agreed to pay the AG's Lawyers a fee which is "patently unreasonable," and hence unethical, and hence uncollectable. See Amended Complaint paras. 33-35; Id., Exhibit 3, David Pascoe letter to the Attorney General dated September 10, 2020, at 2-3. In my opinion, for the reasons set forth below, Plaintiffs' claim of a Rule 1.5/unreasonable fee violation is unsupported and unsupportable

RULE 1.5 HAS NOT BEEN VIOLATED

Despite accusing the AG's Lawyers of violating ethical Rule 1.5, neither Plaintiffs nor Solicitor Pascoe quote the rule or provide any evidence showing a violation. Instead, the Plaintiffs' emphasis is on the fee's size, which is large, with the suggestion being that a fee of that magnitude must plainly be unreasonable, particularly since the case was, according to

[1] Defendants' Motion Petition for Supersedeas with Exhibits, October 2, 2020, at 12-13 ("In calculating the attorneys' fee under the agreement, the earned fee, inclusive of costs and expenses, is $75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.")

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Plaintiffs, a relatively simple piece of work that could have been handled by the Attorney General's staff in-house.[2] I note at the outset that the Plaintiffs' contention that the case was simple, requiring no resort to outside counsel collides with Governor McMaster's admissions in his August 30, 2020, letter to the Attorney General that "I recognize this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims." (Emphasis added.) I now turn my attention to Rule 1.5's specific requirements. The Rule provides:

RULE 1.5: FEES

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . . The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) the fee customarily charged in the locality for similar legal services;
> >
> > (4) the amount involved, and the results obtained;
> >
> > (5) the time limitations imposed by the client or by the circumstances;
> >
> > (6) the nature and length of the professional relationship with the client;
> >
> > (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> >
> > (8) whether the fee is fixed or contingent.

[2] See Amended Complaint para 46: "Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated."

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When evaluating Rule 1.5's scope and significance, it should be borne in mind that the ethics rules do not create rights of civil recovery. SCACR 407, Scope ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.") Indeed, the Rules' "Scope" paragraph further provides, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."

As a "rule of reason" it is fair to view Rule 1.5, the fee reasonableness rule, in its true context. The Rule's aim is to protect clients from being overreached. The Comment to Rule 1.5(a) makes it clear that the rule "(a) requires that lawyers charge fees that are reasonable under the circumstances." Here, the circumstances involved a documented contract reached between lawyers and a sophisticated client, South Carolina's Attorney General, which the Attorney General believes is valid and binding. Here there is no overreaching, deception, or other abusive behavior on the part of the AG's Lawyers.

Rule 1.5(a)(1)'s Fee Factor Supports the AG's Lawyers

Under Rule 1.5(a)(1), consideration is given to "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." The factors set forth in Rule 1.5(a)(1) support payment of the fee that was agreed to and which the Attorney General intends to pay.

This case presented large, novel challenges. Often law practice involves handling of routine matters. Consequently, lawyers often turn to prior cases for legal blueprints to mirror their pleadings, legal arguments, and discovery requests. Here, there were no legal blueprints. Confronted with landmark issues, the AG's Lawyers became founding architects in seeking

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recovery for years of federal dereliction in dealing with deadly plutonium resting inside South Carolina's borders. Through their efforts they advanced novel theories and bore all risks associated with attempting to address unsettled and unknown areas of law. The case was hard. The case was risky. As federal Judge Joseph Anderson has noted, "the riskier the case, the greater the justification for a substantial fee award." Montague v. Dixie National Life Insurance Co.3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011);

The time and labor required was substantial, extending over years and involving thousands of hours of lawyer time. Specialized legal assistance was sought by the Attorney General and supplied by the AG's Lawyers. I reiterate what Governor McMaster wrote the Attorney General on August 30, 2020, "I recognize this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims." When it comes to assessing the novelty and difficulty of the questions involved, I note that in this litigation two of the cases were dismissed by the courts. In my experience, cases that get dismissed tend to be more challenging and riskier than cases that do not.

I find this case posed great risk for the contingent fee lawyers handling it. Successful prosecution of the case called for a great deal of skill on the part of lawyers representing the Attorney General, and the AG's Lawyers were up to the task. As is discussed in more detail below, I have long known the AG's Lawyers' lead counsel, and have tremendous respect both for their uncompromising dedication to doing excellent work, and for the very fine results they have achieved over the years. As one example, see Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016), a case in which I testified for Mr. Willoughby as an expert.

Rule 1.5(a)(2), and (5)'s Fee Factors are Neutral

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The Comment to Rule 1.5(a) makes it clear that not all factors will necessarily be relevant in every case. Rule 1.5(a)(2) suggests weighing this factor in assessing fee reasonableness: "the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer." I am unaware of any reason why serving as counsel on behalf of the Attorney General in the SRS litigation did or necessarily would have impinged on the AG's Lawyers' ability to take other legal work. I consider Rule 1.5(a)(2) to be a neutral factor, and the same goes for the factors set forth in Rule 1.5(a)(5) ("the time limitations imposed by the client or by the circumstances").

Rule 1.5(a)(3)'s Fee Factor Supports the AG's Lawyers

In contrast, Rule 1.5(a)(3) is highly relevant. It calls for evaluation of "(3) the fee customarily charged in the locality for similar legal services." In my opinion, the SRS case falls in the category of what is known as a "mega-fund" case, meaning that the lawsuit generated a fund "worth many millions" of dollars. Wal–Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 122 (2d Cir.2005). One study of legal fee reasonableness in mega-fund cases found that "in cases involving common funds 'from $500 million to $1 billion' in 2006 and 2007, 'the mean and median awards were both 12.9%' of the fund." In re AT & T Mobility Wireless Data Servs. Sales Tax Litig., 792 F.Supp.2d 1028, 1033 (N.D. Ill. 2011), citing Brian T. Fitzpatrick, An Empirical Study Of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 839 (2010). The Fitzpatrick study cited in the AT & T case analyzed "every federal class action settlement from the years 2006 and 2007." Id. at 839. The average (or "mean") fee payment in cases involving settlements between $1 billion and $6.6 billion was 13.7% of the settlement fund. Id. at 840. The 12.5% mega-fund settlement percentage in this case fits

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comfortably within the parameter of the cases analyzed in the Fitzpatrick study. That comfortable fit undermines any argument that the fee in question here is unreasonable/unethical.

In Spartanburg Regional Health Services District, Inc. v. Hillenbrand Indus., Inc. 7:03-cv-02141, 2006 WL 8446464 *4, Order Filed August 15, 2006, ECF No. 377, at 10, Judge Henry Floyd found that "In 'mega-fund' antitrust cases (more than $100 million), a majority of circuit courts award between twenty and thirty percent of the fund, with an average of 25.03 percent in recently reported mega-fund antitrust cases." Judge Floyd awarded a fee equal to 25% of the settlement value of $117,157,800. Id. *5. In another mega-fund case, In re Enron Corp. Securities, Derivative & "ERISA" Litig., 586 F.Supp.2d 732, 740, 828 (S.D.Tex.2008) the Federal Court approved a settlement with a fee award equal to 9.52% of the $7.2 billion settlement fund. The Enron fee percentage was roughly 25% lower than the 12.5% fee in this case, but the fund was 12 times the size of the SRS settlement sum. The fee in Enron was more than 11 times the size of the fee here.

It is true that fees for like work are "to be calculated according to the prevailing market rates in the relevant community." Blum v. Stensen, 465 U.S. 886, 895, 104 S. Ct. 1541, 1547 (1984). In my opinion, the fee sought here is unquestionably appropriate based on the fee percentage in relation to the cash amassed in the common fund. The South Carolina Supreme Court recognized in Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998), the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-third to one-half of the gross recovery. Global Protection, 332 S.C. at 161, 503 S.E.2d at 489. I personally have participated in exceedingly difficult cases where contingent fees of as much as 50% were collected. In Miller v. Botwin, 258 Kan. 108, 899 P.2d 1004 (1995) the court allowed a 50% contingent fee for amounts the attorney saved the client in property

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taxes. Closer to home, Judge Bryan Harwell observed in Dewitt v. Darlington Co., 2013 WL 6408371 (D.S.C. 2013), quoting from Bredbermer v. Liberty Travel, Inc., 2011 WL 1344745 (D.N.J. Apr.8, 2011): "[C]ases from district courts throughout the country in common fund cases [reflect that] attorney's fee awards 'generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund.'"

This is a mega-fund case. The Court should use the prevailing fee rates charged in mega-fund cases by lawyers of "comparable skill, experience, and reputation." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210-11 (9th Cir. 1986). With complex mega-fund cases of this sort, the community is nationwide in scope. In contingent fee cases, fees in the local community ordinarily tend to range from 30-40%. This is not an ordinary case. It is a mega-fund case. The case is extraordinary and so is the result.

I also take into account results in other cases in which I testified, including Judge Johnson's fee award order in Lackey v. Green Tree Financial Corp., Civil Action No. 96-CP-06-073 (July 24, 2000), and Judge Ervin's fee award order in Bazzle v. Green Tree Financial Corp., Civil Action No. 97-CP-18-258 (July 24, 2000). In both of those hard-fought attorney preference cases, fees equal to one-third of the common fund were awarded. In Fairey v. Exxon Corp., Civil Action No. 94-CP-38-118 (C.P. Orangeburg County), a fee award of 40% of the $30 million common fund accumulated was approved by the Circuit Court. I was involved in the Fairey case on settlement-related issues and filed an affidavit in support of the settlement and the (successful) fee petition. This case was riskier, far more complex, and more bitterly contested than Lackey, Bazzle or Fairey. I consider the fee reasonable in light of all relevant facts, including the delay in payment, the impressive amount of work involved, the excellent result, and the fact that counsel had to litigate strenuously and at length in multiple forums to carry the day.

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Also relevant are some other less demanding and less complex cases with which I am personally familiar. The fee award approved by the Colleton County Circuit Court in Carter v. Wal-Mart Stores, Inc., Civil Action No. 06-15-839 was 1/3 of the $49 million common fund, a percentage less that that granted in the similar Wal-Mart employee pay cases of Lerma v. Wal-Mart Stores, Case No. CJ-2001-1395 (Cleveland County, Oklahoma, March 16, 2009, Order) (granting fee amounting to 40% of the $42,500,000 common fund); Hale v. Wal-Mart Stores, 01-cv-218710, 16th Judicial Circuit Court, Jackson County, Missouri (May 28, 2009, Order) (granting an award of 38.3% of the $90,000,000 common fund). In another Wal-Mart class action, Ouellette v. Wal-Mart Stores, Inc., File No. 67-01-CA-326 (Washington County, Florida, Circuit Court), in an Order dated August 21, 2009, the Court, applied Florida law which required a lodestar/multiplier analysis. Wal-Mart had agreed to pay up to $148,000,000. The amount of fees sought was $49,333,333, which was one-third of the common fund. Though the court was required to use the lodestar-multiplier approach, it nonetheless approved the fee sought, using a lodestar multiplier of 4.68, though noting that a "multiplier of 5 would be appropriate." Id. at p. 8, ¶ 30. I am familiar with these facts since I was a witness in the Ouellette case and testified at the fee hearing in Chipley, Florida.

Most recently, on July 21, 2020, Acting Circuit Court Judge Jean Hoefer Toal approved a 15% fee award in a case where the common fund settlement amount was $520 million. Cook v. South Carolina Public Service Authority, Greenville County Circuit Court, Case No. 2019-CP-23-06675, Order filed July 21, 2020. In approving the Cook settlement, Justice Toal, observed that:

> Class Counsel's fee request is well-below previously approved percentage-of-the-recovery fees in common fund cases in South Carolina. For example, in Condon, the Supreme Court of South Carolina upheld the circuit court's award of a 28% attorneys' fee assessed from the common fund. 354 S.C. at 644, 583 S.E.2d at 435. In Spartanburg

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> Regional Health Services District,, Inc. v. Hillenbrand Industries, Inc., the Honorable Henry F. Floyd awarded a 25% fee of roughly $117 million on a total settlement of $486.6 million, comprised of $337.5 million paid in cash and an agreement by defendants to change future pricing for an additional benefit of $131.1 million. C.A. No 7:03-2141-HFF, 2006 WL 8446464, at *5, n.3 (D.S.C. Aug. 15, 2006). Id. at 23-24.

In Cook, Justice Toal explicitly called attention to the relevance of cases from other jurisdictions in evaluating fee awards in mega-fund cases:

> Because of the limited number of class actions and fee awards in South Carolina, our courts have turned to other jurisdictions for guidance. Condon, 354 S.C. at 644, 583 S.E.2d at 435 (relying on similar cases in addressing the reasonableness of fees). Accordingly, in their Fee Petition, Class Counsel have included a recitation of class action cases where courts have upheld attorneys' fee awards of more than the 15% requested here. Id. at 24-25.

Each case stands on its own facts. Here, the fee sought by the AG's Lawyers is fair when compared to those involving large recoveries and mega-fund results. Likewise, based on my knowledge, training, background and experience, the fees sought by the AG's Lawyers are clearly reasonable when viewed from a national perspective.

Rule 1.5(a)(4)'s Fee Factor Supports the AG's Lawyers

Rule 1.5(a)(4), calls for evaluating "the amount involved, and the results obtained." The amount involved, a settlement of $600 million, is what marks this case as a "mega-fund" settlement. The United States Supreme Court has deemed the "results obtained" in litigation to be a key factor in assessing the reasonableness of a fee. See Hensley v. Eckerhardt, 461 U.S. 424, 434 (1983). See also Littlejohn v. State, 2002 WL 34454074, *5 (S .C. Cir. 2002) aff'd sub nom Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003) ("Ultimately when a 'common fund ' is generated . . . the result is everything.").

Next to the $1.7 billion, 20-year payout to the State by the cigarette companies, the result achieved in this lawsuit stands as the largest cash recovery in South Carolina litigation history. This outcome—a $600 million settlement fund—is extremely impressive. This excellent result

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was achieved only after a protracted and risky litigation struggle against the most powerful litigation opponent in this country, namely the United States of America. That the underlying case was risky is testified to by Plaintiffs' chronology offered at paras. 36-44 of their Amended Complaint:

> 36. The lawyers brought suit to collect a statutory payment for economic impact and assistance of $100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.
>
> 37. The DOE never contested that it failed to comply with federal law.
>
> 38. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.
>
> 39. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 Million assistance payment for failing to comply with the statute.
>
> 40. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.
>
> 41. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.
>
> 42. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id*., Ex. 5.
>
> 43. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.
>
> 44. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

Each case turns on its own facts. I reject the notion that the AG's Lawyers were faced with a case so simple that retention of excellent outside counsel was not needed. This case presented stark legal issues for the courts to rule upon, and those issues were neither simple nor skewed in the AG's Lawyers' favor. These lawyers prevailed not because they had an easy case,

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but because they fought so hard to get the maximum value out of a hard one. The AG's Lawyers succeeded because their case was prepared with all the care needed for them to do a first-rate job. This case has been marked from the start by careful, determined, highly professional preparation. Obviously, the AG's Lawyers have achieved an exceptionally good result. This victory is a tribute to aggressive, heady, creative lawyering by the AG's Lawyers. They have performed admirably for their most deserving clients. I reiterate that I consider the 12.5% contingent fee payout based on a settlement fund of $600 million dollars in cash to be fair and reasonable.

Rule 1.5(a)(6)'s Fee Factor Supports the AG's Lawyers

Rule 1.5(a)(6) calls for consideration of "the nature and length of the professional relationship with the client." In attacking the AG's Lawyers' fee, Plaintiffs have relied on this passage from Solicitor Pascoe's letter to Alan Wilson dated September 10, 2020, at 4:

> [T]his deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.

I respect Solicitor Pascoe. However, I beg to differ with Solicitor Pascoe in this instance. To begin with, I respectfully disagree with Solicitor Pascoe's characterization of the AG's Lawyers' fees as unconscionable. For all the reasons cited in this affidavit, in my opinion the legal fee in question was ethical and proper. I am confident it was the product of arm's-length bargaining between the parties and, as I have explained above, in mega-fund cases involving similar recoveries, the average fee was a greater percentage of the settlement fund than the one in this case.

Mr. Pascoe's letter refers to indirectly to Mr. Ben Mustian Mr. Mustian does not work at the Willoughby firm; he left the firm more than a year ago. To my knowledge, neither he nor his

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wife have had any involvement in the settlement of the underlying case or in the fee it has generated. I have never heard of an instance where the political or employment affiliation of a former law firm lawyer's wife was considered material in determining the reasonableness of law firm's legal fee.

A Post and Courier article was cited by Mr. Pascoe in his letter. See https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

I note in passing that the article cited by Mr. Pascoe mentions that attorney Mitchell Willoughby, "has long been recognized as one of the state's leading attorneys for administrative and regulatory law." The Charleston newspaper's observation accords with my experience that Mr. Willoughby is a highly accomplished lawyer known for diligence and achieving laudable results for his clients.

In my opinion, it is a positive, not a negative factor that Mr. Willoughby's firm has previously worked on a contingent fee basis for the Attorney General and earned a significant fee for work yielding an exceptionally good result. My experience is that lawyers who accomplish good results for their clients tend to get rehired by those clients. Finally, I note that the above-quoted passage from Mr. Pascoe's letter offers no details whatsoever about the other Defendant law firm of Davidson, Wren & DeMasters, P.A.

Rule 1.5(a)(7)'s Fee Factor Supports the AG's Lawyers

In evaluating legal fees, it is customary to consider, as indicated by Rule 1.5(a)(7), "the experience, reputation, and ability of the lawyer or lawyers performing the services." In this case, the facts line up strongly in the AG's Lawyers' favor.

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Mitchell Willoughby is a founding member of the Willoughby & Hoefer law firm. He graduated from the University of South Carolina Law School, where he served as Student Bar Association President. He has practiced law in South Carolina since his bar admission in 1975. After beginning his legal career with South Carolina's Public Service Commission, he entered private practice in 1977. Mr. Willoughby has assisted clients in matters involving litigation of complex business. One such case is the Maybank lawsuit mentioned above. Mr. Willoughby has earned an AV peer rating from Martindale-Hubbell. Martindale-Hubbell's AV certification mark is a significant rating accomplishment. It is a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence, both in terms of legal ability and adherence to ethical standards. Mr. Willoughby has been recognized as of South Carolina's "Best Lawyers" for years, including 2015 and 2018 when he was selected "Lawyer of the Year" in the field of Administrative/Regulatory Law. His drive and leadership skills have propelled him to the top ranks of South Carolina's business lawyers. Those same abilities served him well in his 36-year military career, during which he served on active duty in the Army for three years, followed by service in South Carolina's National Guard from which he retired at the rank of Brigadier General.

The lead environmental lawyer from the Willoughby Hoefer law firm on the SRS project is Randolph R. Lowell. Mr. Lowell holds a law degree from the University of South Carolina Law School, and an LL.M. in Environmental Law from The George Washington University Law School. Mr. Lowell's legal talent has been recognized in various ways. In 2012-13 he was selected as a Rising Star by the South Carolina Super Lawyers publication. He has been annually listed in the South Carolina Super Lawyers publication since 2017. Mr. Lowell has been recognized as of South Carolina's "Best Lawyers" in the Environmental Litigation area

since 2015 and he was most recently selected "Lawyer of the Year" in the field of Environmental Litigation. Like Mr. Willoughby, Mr. Lowell has earned an AV peer rating from Martindale-Hubbell.

John Roberts of the Willoughby Hoefer law firm likewise provided important litigation support for the Attorney General's efforts. Mr. Roberts was admitted to practice in 2010 after graduating Magna Cum Laude from the Charleston School of Law. He then earned an LL.M. in Taxation from the University of Florida Levin College of Law. Since joining the Willoughby Hoefer firm he has played lead roles in the successful handling of large cases for firm clients. In the SRS litigation, Mr. Roberts was Mr. Lowell's chief assisting lawyer throughout the litigation.

Also aiding in Willoughby Hoefer's efforts on behalf of the Attorney General was Chad Johnston, a Willoughby Hoefer shareholder. Like Mr. Willoughby, Mr. Johnston is well known to me based on my involvement as an expert in law firm cases. Mr. Johnston joined the firm after clerking with Justice Kay Hearn for three years, two when she served as Chief Judge of the Court of Appeals, and then during Justice Hearn's first year on the Supreme Court. Like Mr. Willoughby, I can testify that Mr. Johnston is one of the smartest, most resourceful, most professional lawyers I have ever worked with. He was most recently recognized as one of the Best Lawyers in America in the field of Environmental Litigation. In the SRS litigation, Mr. Johnston worked principally on matters related to questions arising under the National Environmental Policy Act.

William H. Davidson, II, the Davidson, Wren & DeMasters, P.A. firm's lead partner, has more than forty years' experience, often litigating on behalf of governmental entities. He has deep and wide litigation experience. For example, he served as counsel in more than 70 reported

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South Carolina Supreme Court cases. Like Mr. Willoughby, Mr. Davidson has earned an AV peer rating from Martindale-Hubbell.

Kenneth Woodington of Mr. Davidson's firm, likewise, is a senior member of the South Carolina Bar, having graduated from Duke Law School in 1973. Mr. Woodington has long experience in the environmental law area. From 1983 to the present, he has served as counsel in nearly every South Carolina case with the United States Department of Energy relating to nuclear material, including this one. Like other lawyers mentioned above, Mr. Woodington has earned an AV peer rating from Martindale-Hubbell.

In summary, all the AG's Lawyers who worked on the SRS case have excellent "experience, reputation, and ability" and their professional records to date prove it.

Rule 1.5(a)(8)'s Fee Factor Supports the AG's Lawyers

Rule 1.5(a)'s eighth and final factor focuses on the contingency of counsel's compensation, asking "whether the fee is fixed or contingent." In this case, the AG's Lawyer's compensation stemmed from contingency agreements covering both fees and costs. As such, the AG's Lawyers have received no compensation for their work from 2016 onward. Nor have they been compensated for litigation costs. Given these facts, this factor weighs in favor of the AG's Lawyers' entitlement to the fee they negotiated with the Attorney General.

SUMMARY

Plaintiffs contend that the fee the Attorney General agreed to pay the AG's Lawyers is unethical, and hence unenforceable. Amended Complaint paras. 34-35. To date, Plaintiffs have not put forward compelling evidence for their position. Much less have Plaintiffs put forward sufficient proof to meet the "clear and convincing" standard of proof applicable to ethics

prosecutions. As shown above, there is a reason for Plaintiffs' failure of proof—supporting evidence does not exist. Plaintiffs cannot point to any competent, credible evidence that the AG's Lawyers have acted unethically by violating Rule 1.5 or any other legal ethics rule.[3]

Besides having taught legal ethics to law students, lawyers, and judges for more than three decades, I have long experience in the sphere of ethics enforcement. This experience has involved numerous instances where I worked as a lawyer or testifying witness in ethics prosecutions in South Carolina. I hold the opinion to a reasonable degree of professional certainty that any ethics proceeding filed against the AG's Lawyers would be dismissed with no finding of misconduct. I say bluntly and with confidence that Rule 1.5(a) does not provide a justification for nullifying the AG's Lawyers' rights under their fee agreement with the Attorney General.

Further affiant sayeth not.

John P. Freeman

John P. Freeman

SWORN TO AND SUBSCRIBED BEFORE ME
this 5th day of October, 2020.

NANCY K. FREEMAN
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
FEB. 07, 2021

Nancy K. Freeman
Notary Public for the State of Washington
My Commission Expires: February 7, 2021

[3] Putting aside the ethical demands of Rule 1.5(a), I note for the record that in percentage-of-the-recovery cases South Carolina courts apply a six-factor test in assessing fee reasonableness. See Jackson v. Speed, 354 S.C. 634, 638, 583 S.E.2d 430, 432 (2003). That test largely mirrors the Rule 1.5(a) standards. For the record I state my opinion the AG's Lawyers' 12.5% contingent fee is reasonable under the Jackson v. Speed factors.

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Exhibit 1

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RESUME
John P. Freeman
Professor of Law Emeritus

Address and phone numbers:

200 West Highland Drive
Unit 107
Seattle, Washington 98119
(803) 361-6934
jfreemanusc@gmail.com

Education history:

LL.M., 1976, University of Pennsylvania Law School; J.D., 1970, University of Notre Dame Law School; B.B.A., 1967, University of Notre Dame (Accounting)

Employment history:

1970-72, Attorney, Jones, Day Law Firm, Cleveland, Ohio

1972-73, Fellow, University of Pennsylvania Law School Center for the Study of Financial Institutions

1973-75, Assistant Professor of Law, University of South Carolina

1974 and 1975 (Summers), Special Counsel, Division of Investment Management, SEC, Washington, D.C.

1975-78, Associate Professor of Law, University of South Carolina; Visiting Associate Professor of Law at Loyola Law School (Chicago) Spring 1977

1978-2008, Professor of Law, University of South Carolina; Visiting Professor of Law at University of Texas Law School, summer 1978

Present:

Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus

EXHIBIT 1

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Honors and Awards: Undergraduate:	Member Beta Alpha Psi (Honorary Accounting Fraternity)
Law School:	Executive Editor, Notre Dame Lawyer; Distinguished Military Graduate
Professional:	At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977, 1984 Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving) John Belton O'Neall Inn of Court McDonald/Rhodes Award 2010
Admitted to Practice:	Ohio; South Carolina; Washington
Teaching History **Courses Taught**:	Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1999-2008, Regular Legal Ethics Column for the South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

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Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).

Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations? South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

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Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

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Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

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Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1-124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

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Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371-439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732-983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122-40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2004-16: Special Relationships and Legal Ethics, Oct. 14, 2016, S.C. Bar, Columbia, S.C.; Who's My Client? Understanding the Relationship Between In-House Attorneys, Members and Lobbyists, SC House of Representatives In-House CLE, Oct. 13, 2016, Columbia, S.C.; Incivility, Attempted Shaming and Other Ethics No-Nos, South Carolina Public Defender Ass'n, Sept. 28, 2016, Myrtle Beach, SC; Pascoe v. Wilson and other Ethics Lessons, Lexington County Bar Ass'n, August 4, 2016; Ethical Issues for South Carolina Environmental Practitioners, June 3, 2016, Columbia SC; Hot Ethics Issues for Environmental/Regulatory Practitioners, Jan. 22, 2016, S.C. Bar, Charleston, S.C.; S.C. Bar, Business Lawyer Horror Stories II, Oct. 3, 2014; Greenwood, S.C., S.C. Ass'n of Criminal Defense Lawyers, "Whose Theme and Theory is it Anyway?" July 11, 2014; Ft. Worth, Texas, Advice on Duties Owed by Members of the Board of Trustees, May 16, 2014; Charleston Bar Ass'n, 20 Ethics Tips for a Happier Professional Life, Feb. 7, 2014;2004-13: Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar March 22, 2013; SC Bar, Ethical Issues in Working with Vets and Their Families, Feb. 12, 2012; Expert Witness Participant, SC Bar-ABOTA, Masters in Trial Program, Feb. 1, 2013; SC Bar, Ethical Issues in Handling VA Appeals, Jan. 12, 2013; SC Bar, Ethical Issues in a Non-Adversarial System, Dec. 11, 2012; Richland County Bar Ass'n Ethics CLE, Nov. 9, 2012;University of South Carolina Law School, Alumni Reunion Ethics CLE, Nov. 3, 2012; General Assembly Legal Staff, Ethics for Government Lawyers, Oct. 3, 2012; Setzler Scott Law Firm (In-house CLE), West Columbia, SC, Ethics CLE, Feb. 14, 2012; Charleston Law School, Panel, Symposium on Lawyer and Judicial Fitness, Feb. 10, 2012; Charleston County Bar Ass'n, Ethics CLE, Feb. 3, 2012; SC Bar, Panel on Lawyer Confidentiality, Jan. 19, 2012; Nov. 15, 2011, SC Workers Comp. Comm., Legal Ethics; Richardson Patrick-Sponsored CLE, Charleston, SC, April 29, 2011; North American Securities Administrators Ass'n, Ethics in Securities Litigation, Charleston, Jan. 24, 2011; Richland County Legal Ethics Update, Nov. 5, 2010; S.C. Law Review Symposium, Judicial Recusal, Oct. 21, 2010; League of Women Voters, Lecture on Judicial Selection, Oct. 8, 2010, Charleston, S.C.; KershawHealth Board of Directors, Advice on Your Duties as Board Members, July 15, 2010, Camden, SC; American Ass'n of Matrimonial Lawyers, Ethics in Marital Cases, March 19, 2010 (Aruba), John Belton O'Neall Inn of Court, Ethics Lessons Taught by Lawyers, Nov. 17, 2009; South Carolina Defense Trial Lawyer's Ass'n, Judicial Selection in South Carolina, Nov. 7, 2009; Richland County Bar Ass'n, Legal Ethics, Nov. 6, 2009; South Carolina Legislature

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S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service
Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976).
Faculty Senate (1996-98)

University Committees
Promotion and Tenure
Faculty Welfare

Annuities and Insurance
Budget Committee

Law School Committees
Faculty Selection
Academic Standing
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee
Chairman, Supreme Court Commission on CLE and Specialization(1980-83)
President, Leaphart Elementary School PTO (1983)
Chairman, Irmo Middle School School Improvement Council (1985)
Member, Irmo Middle School School Improvement Council (1985-89),
President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member Executive Board (1988-93)
Member, Irmo High School-School Improvement Council (1988-93)
Founder and Past-president, University of Notre Dame Club of South Carolina
Lexington District Five and South Carolina State School Volunteer of the Year 1993

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Exhibit 2

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DAVIDSON, WREN & DEMASTERS, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Michael B. Wren
David A. DeMasters

1611 Devonshire Drive, Second Floor (29204)
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855

Brandon M. Briggs
Jonathan M. Riddle

Of Counsel
Kenneth P. Woodington

September 16, 2020

W. Jeffrey Young, Esquire
Chief Deputy Attorney General
Office of the Attorney General
jyoung@scag.gov

Dear Judge Young:

Please allow this letter to serve as the final element of the due diligence review and as the request for the release of the attorneys' fees to the trust account of Willoughby & Hoefer, P.A., which will serve as evidence of satisfaction of all contractual commitments by all parties and terminate the engagement related to the litigation for plutonium disposition. *See* Litigation Retention Agreement, effective Feb. 8, 2016, as amended, effective Jan. 1, 2019.

We appreciate the opportunity presented to represent the State in these important matters, and believe some historical context is warranted to bring us to this final point of closure of this engagement.

In March of 2014, these firms (or the predecessors) filed an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests. At that time, the U.S. Department of Energy (DOE) (through the National Nuclear Security Administration) was seeking to place the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS) into "cold standby" status, which would effectively terminate the project. As the Congressional delegation wrote to then-Governor Haley, "[w]e ask that you work with the South Carolina Attorney General to explore any legal avenues the state may have to address this injustice." Ltr. of Congress to Haley, March 6, 2014. After being briefed on a legal strategy to achieve that result, the State retained Davidson, Wren, & DeMasters, P.A., and Willoughby & Hoefer, P.A., law firms to represent it.[1]

The State filed a complaint on March 18, followed by a motion for summary judgment on April 14. Speed was of the essence given other factors at play in Congress. On April 30, 2014, DOE capitulated and directed the contractor to continue the MOX Facility construction.

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, we developed a comprehensive strategy focusing on litigation with DOE and we briefed the Governor's Office and your office on that strategy, which included the draft of a complaint. With political overtures having been rebuffed

[1] We appreciate the confidence your office showed in our collective experience to represent the State on the plutonium disposition issues at SRS. Each firm and its lead counsel on these cases has represented the State in a number of federal court litigation matters against the United States (or its agencies). Each undersigned counsel also has litigated cases regarding nuclear material, environmental issues, and complex civil litigation, generally.

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and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to your office on January 26, 2016, as a "formal request that [the Attorney General's] office initiate litigation on behalf of the State of South Carolina against DOE…." Haley to Wilson, Jan. 26, 2016.

On February 9, 2016, the State filed a complaint against DOE seeking the removal of one metric ton of weapons-grade (defense) plutonium and payment of the economic and impact assistance monies. And the battle was joined. The State pushed hard and fast. After substantial briefing and argument on multiple issues and motions, the federal District Court in South Carolina issued an order on October 31, 2016, dismissing the economic and impact assistance payment claim for lack of jurisdiction, pointing to the Court of Federal Claims as the proper forum.

The removal claim continued in South Carolina and on March 20, 2017, the District Court granted the State's injunctive relief claim and ordered DOE to remove one metric ton of defense plutonium. The court requested additional briefing on the appropriate remedy, and on December 20, 2017, adopted the State's proposal to require removal of the defense plutonium within two years and also required DOE to provide ongoing status reports on its removal progress. On February 2, 2018, DOE appealed the judgment to the Fourth Circuit. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (i.e., by December 31, 2019).

On November 30, 2018, the State of Nevada filed a lawsuit against DOE seeking to prevent the relocation of the one metric ton of defense plutonium to Nevada in the Federal District Court in Nevada. This was a significant issue, as there are less than a handful of sites in the United States capable of storing defense plutonium and if Nevada was successful, DOE could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from SRS. It was imperative that South Carolina protect its interest in the removal.

On January 3, 2019, South Carolina moved to intervene in the Nevada case. The State of Nevada opposed South Carolina's participation in the case but, after expedited briefing, the court granted the State's motion on January 14. Nevada sought a preliminary injunction to halt the shipment of defense plutonium to Nevada from SRS, and indicated that if the defense plutonium had left SRS it should be returned. An evidentiary hearing was held on January 17. On January 30, DOE notified the court and the parties that one-half ton of defense plutonium had been relocated to Nevada. Also on January 30, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. Nevada appealed to the Ninth Circuit on February 4.

During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. It also stated it had 15 witnesses to present. South Carolina was prepared to litigate this matter in a full trial. However, the district court stayed the case pending the appeal. After briefing at the Ninth Circuit, the court dismissed the appeal as moot on August 13, 2019. The stay at the district court was lifted, and additional motions were filed and briefing began anew. In December 2019, South Carolina's

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participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE in 2020.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the Federal District Court in South Carolina ordered its removal, DOE filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS.

During this time, South Carolina learned that DOE was taking active steps to halt construction of the MOX Facility and the Secretary of DOE was finalizing a formal memorandum to terminate the program. Once the construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation, the strategy was for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position and maintain the status quo. South Carolina moved expeditiously, filing a complaint and a request for a preliminary injunction on May 25, 2018 in the federal District Court along with a request for an expedited hearing. On June 7, the court granted the preliminary injunction and ordered DOE to continue constructing the MOX Facility.

DOE appealed to the Fourth Circuit. During this time, efforts were made at obtaining a legislative solution that, unfortunately never materialized and, on October 26, 2018, the Fourth Circuit held that South Carolina lacked standing. DOE quickly terminated the MOX Facility construction, justifying South Carolina's efforts to at least try and maintain the status quo.

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover $100 million. On January 8, 2018, the State filed its second complaint seeking to recover another $100 million. These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions. The Department of Justice and the State agreed that the outcome of the case would govern all six years of payments under 50 U.S.C. § 2566(d)(1), essentially rendering this matter a $600 million case. These efforts were not successful and, in June 2019, South Carolina informed the court that DOJ had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. It did—ruling against the State on August 20, 2019 and finding that no appropriation by Congress was available for the payments.

South Carolina appealed that decision to the Federal Circuit. After briefing and oral argument on May 5, the case was stayed pending additional settlement discussions.

Beginning in January 2020, promising discussions were held between counsel for DOE and the State met on several occasions to work on a framework for a resolution. After several productive meetings and the Federal Circuit oral argument, settlement discussions progressed further, culminating in a meeting on July 1 in Washington, DC, with the Secretary of DOE. An agreement in principle was reached that day, subject to further approvals and consultation with

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stakeholders. The President and U.S. Attorney General ultimately concurred, as did and South Carolina's federal and state legislative leaders.

On August 28, 2020, a settlement agreement was executed providing for a 100% recovery of the economic and impact assistance payments and provide DOE with a grace period to comply with a contractual obligation to remove 9.5 metric tons of defense plutonium while still maintaining the ability to force removal and receive payment should DOE not comply with its contractual obligations.

As you know, the August 31, 2020, settlement agreement reflects that each party bears its own attorneys' fees and costs. In these circumstances, the "common fund" approach is often utilized to calculate the attorneys' fee award.[2] *Layman v. State*, 376 S.C. 434, 451-53, 658 S.E.2d 320, 329-30 (2008). "[W]hen awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.' These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the 'percentage-of-the-recovery' approach." *Id.* Here, that percentage is calculated by applying the contractual agreed-upon fee percentages to the recovery amount.

For the fees in this case, the litigation retention agreement entered into in 2016—a contract binding on the State of South Carolina—utilizes a decreasing percentage based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. In calculating the attorneys' fee under the agreement, the earned fee, *inclusive* of costs and expenses, is $75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.[3]

Regarding our specific engagement in 2016, we note that the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by a circuit court. *See* S.C. Code Ann. §§ 1-7-85, 170;[4] *Cephalon v. Wilson*, Civil Action No. 2012-CP-40-07317, Order Granting Def's Mot. for Summ. Judg. (June 6, 2014) ("As the Supreme Court recognized in the case of *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28, 28 S.E.2d 445, 447-48

[2] Because the State and its citizens are the beneficiaries of the recovery of over half a billion dollars, the "common fund" approach should be applied.

[3] We note this percentage is less than the fee percentages of most standard contingency fee agreements as well as the attorneys' fee percentages in the two recent settlements involving the V.C. Summer nuclear plant litigation.

[4] South Carolina Code Section 1-7-85 states: "Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement … in representing the State … in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees … or costs of litigation awarded by court order or settlement, travel expenditures, depositions, printing, transcripts, and personnel costs…."

Further, Part I.B of the Budget also contains the following proviso: "59.8. (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled 'Litigation Recovery Account.' The funds deposited in this account must be expended only as prescribed by law." Payment of the attorneys' fees complies with the legal contractual obligation resulting from the settlement.

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(1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State."). As the circuit court further found, "the Attorney General possesses the authority to associate attorneys … and to pay those outside attorneys on a contingency fee basis with money received in any settlement…." *Id.*; *see also South Carolina v. Eli Lilly*, 2007-CP-42-1855, Order Denying Mot. To Disqualify (Sept. 22, 2009); *see also Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300, No. 05-CP-40-2785 (Ct. Common Pleas, Fifth Judicial Circuit) (Sept. 18, 2006) ("Attorney General Henry McMaster stated that the public should understand his use of outside attorneys under this [contingency] fee arrangement 'is consistent with the highest standards of practicing law and bringing litigation.'" *The State*, August 10, 2006; Ex. 4 to Harpootlian Depo.").

The fee is eminently reasonable. As detailed above, the work performed included litigation of four cases in three separate trial courts, three separate courts of appeal, and the United States Supreme Court. Litigating against the federal government in federal court on a federal project involving federal dollars is a daunting task. It involved thousands of hours of work,[5] tens of thousands of pages of document review, interaction with multiple state and Federal agencies, consideration of national security issues (which also meant being denied access to certain information), and coordinating the litigation of multiple cases in different courts simultaneously.[6] It also involved coordination and communication with multiple Congressional offices and staff—including offices and staff outside of South Carolina—and the White House.

The litigation risk assumed by counsel was significant. For three of these cases, injunctive relief was the only relief available. However, these cases were critical to the overall strategy to address the defense plutonium issue in the State. But with only one available claim for monetary relief, we were all presented with a unique situation. The chosen path—and the most logical path—was to combine all the defense plutonium litigation matters under a single contract and for the injunctive relief cases to assign a small percentage of additional recovery IF any payments were recovered.[7] There was a clear risk that the State could be successful in the injunctive relief litigation and fail to recover any monies, leaving its counsel with having brought about a successful result in litigation for the State and receiving no payment. The litigation

[5] "Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour." George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 660 (1956). South Carolina agrees. "Attorney General of South Carolina [Henry McMaster] recognizes in these types of cases, attorneys' fees are based on a percentage of recovery, regardless of hours or how hours are kept. R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo." *Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300 (emphasis in original).

[6] DOE had four separate legal teams defending these cases.

[7] Notably, if these four cases were litigated under three separate, independent litigation retention agreements using the standard stepped fee schedule, and drawing from the single monetary recovery case, the attorneys' fee calculation could have been as much as $103,750,000, or 17% of the total recovery. While adjustments may have been made to those separate agreements if they had been undertaken, there is no question that combining all four matters within a single litigation retention agreement and modifying the fee schedule accordingly resulted in a fee that was less than would have been calculated under separate, stand-alone agreements.

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retention agreement appropriately reflected the risk incurred by counsel. *See Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees ("The State itself, through Attorney General Henry McMaster, recognizes the appropriateness of percentage recoveries for lawyers who take a chance for the State. R. Harpootlian Depo., p. 40; Ex. 3 to Depo.").

The litigation result was extraordinary. The success of the removal litigation and the threat of additional litigation immediately and in 2022 was a significant factor in bringing DOE to the table to negotiate a resolution. This litigation removed one metric ton of defense plutonium from the State and a payment to the State's General Fund of over half a billion dollars—the largest single settlement in the State's history. It also secured a contractual commitment to remove 9.5 metric tons[8] of weapons-grade plutonium by 2037 and for the payment of additional money to the State—which could number over a billion dollars should DOE fail to remove additional defense plutonium from SRS.[9] These are benefits that accrue to the State and for which no additional payment to counsel is required.

Therefore, we respectfully request that the attorneys' fee of $75,000,000 be tendered to the trust account of Willoughby & Hoefer, P.A., for further distribution as soon as such funds are transferred to the Attorney General.[10]

Thank you for the opportunity to be of service.

Sincerely,



William H. Davidson, II
Davidson, Wren, & DeMasters, P.A.



Randolph R. Lowell
Willoughby & Hoefer, P.A.

[8] In fact, the State now knows the exact amount of defense plutonium subject to 50 U.S.C. § 2566, as that number was declassified as part of this litigation.

[9] However, while maintaining the hammer of enforcement to incentivize the removal of the defense plutonium, the settlement does not interfere with the programs for removal. If South Carolina continued to engage in litigation from 2022 forward, then success on the economic and impact assistance payments could have been detrimental to SRS, as those payments would have to be made from the operations budget of DOE instead of payable from the judgment fund. This means a reduction in available funds for DOE could adversely impact SRS—a undesirable result from a South Carolina economic and public policy perspective.

[10] Regarding the four cases, Willoughby & Hoefer, PA served as lead counsel in all four cases, with Davidson, Wren, and DeMasters, PA, serving as counsel in two cases. The division of fees and expenses for the shared cases is 92.5%/7.5%. This division is reflective of the proportion of services provided by each firm in the cases involving joint representation.

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EXHIBIT 5

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STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF MICHAEL J. VIRZI
COUNTY OF RICHLAND)

The undersigned affiant Michael J. Virzi, having been duly sworn, deposes and says as follows:

1. My name is Michael J. Virzi, and I am attorney in good standing and licensed to practice law in the State of South Carolina. My practice has focused exclusively on matters of legal ethics, malpractice, and lawyer discipline for more than 17 years, including three years as an Assistant Disciplinary Counsel to the South Carolina Supreme Court, and I have taught Professional Responsibility at the University of South Carolina School of law for the past eight years. I have served on the South Carolina Bar's Ethics Advisory Committee since 2003, including three years as Chair, on the Bar's Professional Responsibility Committee since 2011, including two years as Chair, and on the Board of Directors for the South Carolina Association for Justice as Ethics Chair for the three years. I am a member of the South Carolina Association of Ethics Counsel, the Association of Professional Responsibility Lawyers, and the ABA Center for Professional Responsibility, and I have been interviewed by and quoted in The ABA Journal, The State, The Post and Courier, The Greenville News, The Augusta Chronicle, and S.C. Lawyers Weekly. I have given more than 100 presentations on the topics of lawyer ethics as a law school guest lecturer and as a CLE presenter, including 12 years as a faculty member for the South Carolina Bar and Supreme Court's semi-annual Legal Ethics and Practice Program. I have been qualified to give expert testimony on matters of lawyer ethics and malpractice in federal state courts in South Carolina and have provided expert opinions on matters involving lawyer ethics and malpractice on more than 100 occasions either in court, in deposition, or by affidavit.

MJV

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2. I have been asked to give my professional opinion on whether the fees received by the law firm of Willoughby & Hoefer, P.A. on behalf of itself and of the law firm of Davidson, Wren, & DeMasters, P.A., for their work for the State of South Carolina violates Rule 1.5 of the Rules of Professional Conduct as alleged by the South Carolina Public Interest Foundation and John Crangle. In formulating the opinions in this affidavit, I have reviewed the pleadings filed by Crangle and the Foundation; the Attorney General's Memorandum in Opposition; Judge Lee's Order; Willoughby & Hoefer's Petition for Supersedeas; the August 28, 2020, Settlement Agreement between the State of South Carolina and the United States; the Litigation Retention Agreement between the Attorney General and the Willoughby and Davidson law firms and the June 2019 Amendment thereto; the October 5, 2020, Affidavit of C. Bradley Hutto; and correspondence between the Governor, the Attorney General, and counsel regarding the Settlement Agreement and attorneys fees paid pursuant to the Litigation Retention Agreement.

3. Based on my experience and understanding of the Rules of Professional Conduct and my review of the above-referenced documents, it is my professional opinion that neither the percentages agreed to in the Retention Agreement, originally or as amended in June 2019, nor the amount ultimately received by Willoughby & Hoefer in any way violate Rule 1.5 of the Rules of Professional Conduct.

4. Contingency fees based on a percentage of recovery in litigation are universally permitted except in specific categories of litigation not applicable here, and percentage fees between 25% and 40% are routine in civil litigation and widely regarded as both reasonable under Rule 1.5 and otherwise ethically permissible, regardless of the resulting effective hourly rate. Even in common fund cases, where contingent fees tend to be based on lower percentages than in

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individual litigation, fees well in excess of the 12.5% received in this case are common and widely approved as reasonable by trial courts and appellate courts alike.

5. The primary reasons percentage contingent fees are permitted regardless of the effective hourly rate they represent include the risk taken by counsel of investing substantial time and expense in cases in which they may recover nothing, often not even their out-of-pocket expenses, and the access to competent counsel that such contingent fees provide to individuals and entities that may not have the ability to hire counsel at an hourly rate. Contingent fees allow the client (in this case the State of South Carolina) to take no financial risk in hiring counsel for potentially complex and lengthy litigation; that risk is instead assumed entirely by counsel, as it was in this case.

6. In the relevant litigation underlying Crangle's and the Foundation's claims, the risk to the Willoughby and Davidson firms was even more elevated than usual because they were representing the State in four separate actions only one of which involved the possibility of monetary recovery. The other three actions were entirely injunctive, and the State and its counsel faced the realistic possibility that it might prevail in the injunctive matters but lose the damages case. In that scenario, counsel's efforts on behalf of the State of South Carolina would have forced the Department of Energy to both remove plutonium from the state and resume the MOX facility project at the Savannah River Site but with no fees whatsoever owed to the lawyers who obtained those results. That is the risk the Willoughby and Davidson firms initially undertook on behalf of the State, and that risk would justify as reasonable an even higher contingent fee percentage than the 12.5% they ultimately received.

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7. Crangle's and the Foundation's focus on the amount of the fee ($75,000,000.00) in relation to hours spent is misplaced and inconsistent with the reasonableness analysis required by Rule 1.5. The "time and labor required" in representation is a small part of the reasonableness analysis under Rule 1.5, which also includes the novelty and difficulty of the issues, the requisite skill, fees customarily charged for similar services, the amounts involved, the results obtained, time limitations imposed, the lawyers' experience, reputation and ability, and "whether the fee is fixed or contingent," among others. Applied to the Willoughby and Davidson firms' work, these factors indicate that a higher percentage than 12.5 would have been reasonable. The Nevada litigation appears to have required quick action by counsel in a distant venue, the issues throughout the four cases were complex and changing, lasting several years and through multiple appeals. The amounts involved initially appeared to be in the one-to-two-hundred-million-dollar range, and the results obtained were three times that, plus substantial non-monetary relief with enforcement provisions. The 12.5% fee was a reasonable cost of obtaining not only a $525,000,000.00 net benefit to the State but the additional benefit of immediate removal of a metric ton of weapons-grade plutonium and temporary resumption of DOE's Mixed-oxide fuel facility project. The degree of success—monetary or injunctive—is widely regarded as the most critical of all the reasonableness factors. The success in this case was exemplary and characterized by the Attorney General as "a grand slam home run for the State of South Carolina."

8. The initial litigation by the State involved a single Complaint for removal and damages, and the Retention Agreement provided for percentage contingent fees based on the damages recovered plus the reasonable value of injunctive relief, but pursuing the State's various monetary and non-monetary interests in the litigation later required four separate actions in

different forums, including appeals. The Amendment to the Retention Agreement predetermined the value of two of the three non-monetary relief lawsuits the Willoughby and Davidson firms were was pursuing for the State (defending the State of Nevada's efforts to return the plutonium to South Carolina, and pursuing resumption of DOE's MOX facility project, but not the plutonium removal action) by assigning low percentage contingency fees to two of those three non-monetary suits in place of the Attorney General's discretion to assign that value at a later date, with the percentages both increasing with levels of appellate review and decreasing for higher recovery amounts consistent with the original version of the agreement. Ultimately, the Retention Agreement entitled the Willoughby and Davidson firms to more than 12.5% of the recovery in the damages case for the work they performed in three of four related cases they successfully litigated to highly beneficial monetary and non-monetary results for the State, including two appeals. The firms then voluntarily reduced those fees to 12.5% inclusive of their costs.

9. Significantly, the Willoughby and Davidson firms ultimately took no fee at all in one of the injunction cases in which they were highly successful. No additional percentage fee was provided in the Amendment to the Retention Agreement for the lawsuit seeking removal of weapons-grade plutonium from the state, despite the success of that suit in securing removal of a metric ton of plutonium. No additional fees were sought for those efforts despite that the original Retention Agreement would have allowed the Attorney General to assign a value to that result, entitling the Willoughby and Davidson firms to additional fees.

10. Crangle's and the Foundation's suggestion that the $600,000,000.00 recovery was low (relative to the potential for $100,000,000.00 per year "economic and impact assistance payments" through 2037) also appears misguided within an evaluation of the lawyers' success on

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the merits for purposes of a reasonableness analysis. The $600,000,000.00 represents $100,000,000.00 per year from 2016 through 2021, for which time such payments would come from appropriations, whereas any such payments after 2021 would have come from the Secretary of Energy's available funds. The latter, but not the former, includes the operating budget for the Savannah River Site; thus pursuing monetary recovery beyond 2021 appears likely to have adversely affected the SRS budget and was not in the State's best interests. The $600,000,000.00 appears to be the maximum possible monetary recovery without risk of offsetting harm to the State.

11. In short, not only is the 12.5% contingency fee reasonable and permitted by Rule 1.5 of the Rules of Professional Conduct, several measures of additional fees (a higher contractual percentage, an additional fee for the value of the plutonium removal, and not reducing the fee after its calculation) would also have been reasonable, permitted by Rule 1.5, and consistent with prior court-approved common-fund fee awards in this state, had such additional fees been sought and paid.

12. The opinions in this affidavit are given to a reasonable degree of certainty and are specifically based on the documents listed above. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented.

Further affiant sayeth naught.

[signature page to follow]

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Michael J. Virzi

State of South Carolina
County of Richland

Sworn and subscribed before me
This 5th day of October, 2020

Natasha Brenchar
Notary Public

My Commission Expires : 10/18/26

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EXHIBIT 6

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A., Defendants.	Case Number: 2020-CP-40-04603 AFFIDAVIT OF PETER D. PROTOPAPAS

1. I came to South Carolina to attend law school. Raised in Boston, Massachusetts, I grew up in a large family whose roots span two continents. After college, my strong interests in business and law spurred me on to earn both a Master of Arts and a Juris Doctor. Because of my training, I handle a wide variety of complex business and professional malpractice cases throughout South Carolina. I frequently litigate matters involving business contract disputes, securities and stock losses, and class actions. I also spend a great deal of my practice representing clients who have suffered catastrophic personal injury.
2. I volunteer my time to community activities and served as a Board Member for South Carolina Legal Services, a non-profit organization which assists South Carolinians.
3. I am a member in legal groups such as the South Carolina Bar Association, the John Belton O'Neall Inn of Court, and the South Carolina Association of Justice.
4. I have litigated for and against the reasonableness and appropriateness attorneys' fees in a number of cases.
5. I am a member of the South Carolina Bar and qualified to practice in the United States District

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Court for the District of South Carolina and United States Court of Appeals, Fourth Circuit.

6. As an attorney, I have brought and prosecuted complex cases. I have brought and settled class action lawsuits, and I have tried complicated litigation cases, attorney grievances and handled appeals of same. A copy of my resume, which further establishes my credentials, is attached as Exhibit 1.

7. I have been asked by Willoughby & Hoefer, P.A., (Litigation Counsel) to express an opinion as to the validity and reasonableness of the fees awarded and reimbursed to Litigation Counsel pursuant to the litigation retention agreement with the State of South Carolina regarding the litigation related to the State's claims pursuant to 50 U.S.C.A. § 2566 and defense plutonium at the Savannah River Site. A copy of the litigation retention agreement, as amended, is attached as Exhibit 2.

8. I hold the opinions set forth herein to a reasonable degree of professional certainty as an expert in the fields of legal ethics and lawyer compensation. I reserve the right to amend or supplement my opinions or supporting reasons as additional material becomes available.

FEE STRUCTURE

9. The South Carolina Attorney General is authorized by statute to retain and compensate outside counsel by contract to represent the State on a contingency fee basis.

10. South Carolina Code Sections 1-7-85 and -150 enshrine the legislature's approval and endorsement that the Attorney General is authorized to retain outside counsel on behalf of the State and that, "notwithstanding any other provision of law," the payment of these attorneys' fees may be a reimbursement to the Attorney General for the contractual obligation of the State for the representation, with the balance remaining of any recovery being deposited to the general fund. *See Cephalon v. Wilson*, Civil Action No. 2012-CP-40-07317, Order Granting

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Def's Mot. for Summ. Judg. (June 6, 2014) ("[T]he Attorney General possesses the authority to associate attorneys … and to pay those outside attorneys on a contingency fee basis with money received in any settlement…."); Agreement to Voluntary Dismissal of Appeal, *South Carolina v. United States*, dkt.#45, Case No. 19-2324 (Fed. Cir.) (Sept. 29, 2020) ("The settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, *which are reimbursed and awarded from payment of the settlement amount*, and the State shall have no further claim against the United States for such fees and costs.") (emphasis added).

11. The litigation retention agreement effective February 8, 2016 is based on the litigation retention agreement created by former Attorney General Henry McMaster. *See* Exhibit 2 (hereinafter referred to as "AG McMaster Agreement"). The AG McMaster Agreement is a stepdown percentage-of-recovery schedule for attorneys' fees. There is an additional percentage of recovery added for litigating an appeal when the State was successful below. As the litigation progressed, there was a need for representation of the State in two additional litigation matters and those matters – defending the defense plutonium removal upon challenge by the State of Nevada and the termination of the mixed oxide fuel fabrication facility construction project – were subsequently added to the representation through an amendment to the original litigation retention agreement that assigned set percentages for those two cases. Those two matters were for injunctive relief only with no potential monetary recovery.

12. For decades, the South Carolina Attorney General has hired private law firms to pursue recoveries for South Carolina on contingency fee contracts. From tobacco litigation to pharmaceutical litigation, South Carolina Attorneys General have tremendous experience and

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knowledge when entering into contingent fee contracts with lawyers. Then Attorney General McMaster drew upon past experiences and developed the AG McMaster Agreement which gives great benefits to the State of South Carolina when employing lawyers on contingency fee contracts.

13. The AG McMaster Agreement utilizes a contingency fee approach where the fees are established based on actual recovery. The AG McMaster Agreement established the application of fee percentages against the recovery similar to a common fund. The costs, including the fees, would be paid from the recovery amount on a percentage-of-the-recovery basis.

14. Application of the AG McMaster Agreement litigation retention agreement fee schedules to the settlement recovery amount of $600,000,000 yields an attorneys' fee payment of slightly more than $75,000,000, or approximately 12.5% of the total recovery. This is inclusive of expenses. A copy of the calculation of the attorneys' fee is attached as Exhibit 3.

15. The South Carolina Supreme Court explained in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), that the principle underlying the common fund methodology for determining attorneys' fees is distinct:

> [T]he equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by fee-shifting, but rather, are taken directly from the common fund or recovery and borne by the prevailing party through fee-spreading.... [W]hen awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.' These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the 'percentage-of-the-recovery' approach.

Layman, 376 S.C. at 452-3, 658 S.E.2d at 330 (internal citations omitted). The South Carolina Supreme Court continued: "[T]he common fund doctrine is based on the equitable

allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party." *Id.*, 376 S.C. at 453, 658 S.E.2d at 330.

16. Under South Carolina law, a fee award calls for "the court [to] consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). An award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Id.* Consideration of all six factors is necessary but none controls.

ASSIGNMENT AND MATERIAL REVIEWED

17. I have conferred with Litigation Counsel and have conducted independent research. I have reviewed counsel's electronic file in this matter, and this review includes:

    a. Pleadings and exhibits filed in each filed case in each jurisdiction at the trial and appellate court levels;

    b. Motions and memoranda in support and in opposition and exhibits filed in each case in each jurisdiction at the trial and appellate court levels;

    c. Orders and other filings in each case in each jurisdiction at the trial and appellate court levels;

    d. Pleadings, motions, memoranda, and exhibits and orders in the instant case;

    e. The Executive Budget Office approval document for the payment of the attorneys' fees;

    f. Correspondence between counsel in each case in each jurisdiction;

    g. Government documents and reports, including:

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i. documents from the U.S. Department of Energy and National Nuclear Security Administration related to defense plutonium policy generally;

ii. documents from the U.S. Department of Energy and National Nuclear Security Administration related to disposition efforts of defense plutonium at the Savannah River Site;

iii. documents from the U.S. Department of Energy and National Nuclear Security Administration related to disposition efforts at other site locations; and

iv. documents from the U.S. Department of Energy and National Nuclear Security Administration related to environmental and public health impacts from defense plutonium.

h. The agreement between the United States and Russia, generally known as the Plutonium Management and Disposition Agreement, executed in 2000, as amended, relating to the disposition of surplus defense plutonium;

i. Draft pleadings for proposed additional litigation to be filed by the State;

j. Settlement Agreement by and between the United States and South Carolina, dated August 28, 2020;

k. Correspondence between Governor McMaster and General Wilson regarding the settlement agreement;

l. Affidavit of C. Bradley Hutto, dated October 5, 2020; and

18. In addition to reviewing the foregoing materials, I consulted with Litigation Counsel concerning the scope and depth of the work they did, and the tenacity and quality of the opposition they faced. I have also conducted research, including review of pertinent authorities

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dealing with fee reasonableness issues.

19. I am of the opinion to a reasonable degree of professional certainty that the attorneys' fees, which is inclusive of expenses, are valid, reasonable, and within the range of fees reimbursed or awarded in other cases.

THE NATURE, EXTENT, AND DIFFICULTY OF THE CASE

20. It is a daunting task to take on the federal government in litigation and this matter has been completely litigated and hard fought. Both sides have been represented by excellent lawyers, and the State and its Litigation Counsel faced multiple teams of lawyers from the U.S. Department of Justice (DOJ), which has high-quality lawyers and unlimited resources. Litigating against the federal government in federal court on federal claims is an extremely difficult task under even the best of circumstances.

21. The complexity of these cases is breathtaking. Litigation Counsel were litigating issues that impacted federalism, international affairs, nuclear waste policy, and national security and contained political elements. Litigation Counsel, on behalf of the State, was simultaneously litigating claims in different jurisdictions against different teams of lawyers from the U.S. Department of Justice. The strategy to litigate multiple claims in multiple courts requires a significant degree of thought and strategic expertise. Most cases that are the subject of affidavits to defend a case are for a single case with a single outcome. Here, there are multiple cases with multiple outcomes, and the defendant was the United States government—the most challenging and difficult of all defendants.

22. The United States and the Department of Justice fought everything, engaging in what can only be categorized as trench warfare, with every inch of ground contested. *Cf. Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *2 (W.D.N.C. Jan. 10, 2007) ("Additional skill

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is required when the opponent . . . is a sophisticated corporation with sophisticated counsel."). Litigation Counsel's strategy to combat the inexhaustible and indefatigable federal government was to strike hard and strike fast and frame the issues as legal issues. Which they did with skill, to avoid the bottomless pit of endless discovery that the United States sought to use for delay and wear down the State and its resolve in the district court cases. And yet even with that excellent strategy, these matters have been heavily litigated and contested in four trial-level federal court matters and four appeals in three different federal appellate courts.

23. With the fee structure placing all the risk of recovery on Litigation Counsel, including the extraordinary and unusual risk allocation to Litigation Counsel that it could prevail in litigation and not be paid, this undertaking was a risky gamble for Litigation Counsel and high risk deserves a high reward.

24. The briefing by both sides has been excellent. Litigation Counsel's briefs were superb. So were those from the other side. The DOJ left no stone unturned in their zealous efforts to defend the United States. Their tenacious defense efforts increased the difficulty level of an already daunting task. Thus, in my opinion, Litigation Counsel has consistently fought hard and well against a very powerful, sophisticated, and well-represented adversary.

THE TIME NECESSARILY DEVOTED TO THE CASE

25. These cases have consumed thousands of hours of time in prosecuting South Carolina's claims in multiple jurisdictions at multiple levels. It is evident from the filings in the multiple cases and the documents acquired from the United States that required review that a significant amount of time was consumed with understanding the nuances and context of the policy and legal issues.

26. As a percentage-of-recovery case, actual time spent is not a significant factor to be considered.

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As one legal scholar has noted: "Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour." George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 660 (1956). And South Carolina's plaintiff attorney Richard Harpootlian relied upon then-Attorney General Henry McMaster in supporting a percentage-based fee award: "Attorney General of South Carolina [Henry McMaster] recognizes in these types of cases, attorneys' fees are based on a percentage of recovery, regardless of hours or how hours are kept. R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo." *Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300 (emphasis in original). See Exhibit 4 to Affidavit of Peter D. Protopapas.

27. Accordingly, time necessarily devoted to the case, while the least important of the factors under these circumstances, favors a conclusion that a 12.5% effective rate is earned, reasonable, and appropriate.

THE PROFESSIONAL STANDING OF COUNSEL

28. I am familiar with the lead law firm in the four cases, Willoughby & Hoefer, P.A., and the lead Litigation Counsel, Randolph R. Lowell.

29. Willoughby & Hoefer, P.A., enjoys a reputation of being one of the best law firms in the State and particularly adept at handling complex civil litigation matters and achieving extraordinary results. And achieving those results against very talented and very capable opposing counsel. Mitch Willoughby and John Hoefer, the founding shareholders, are both personally known to me to be two of the best lawyers in the State. The firm is talented from top to bottom and its superior reputation is recognized by its Martindale-Hubbell rating and its Best Law Firm

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recognition.

30. I am also personally familiar with lead Litigation Counsel for the State of South Carolina in this matter, Randolph R. Lowell of Willoughby & Hoefer, P.A. He holds a Master's of Law in Environmental Law from The George Washington University, a Master of National Security Studies degree from the American Military University, a Master of Public Administration degree from the University of South Carolina, a Juris Doctor degree from the University of South Carolina, and Bachelor of Arts' degree from the College of Charleston. From a professional standpoint, he is rated AV Preeminent by his peers by Martindale-Hubbell and has been named a *Best Lawyers* and *SuperLawyer* in South Carolina for years, and has twice been awarded the *Best Lawyers* Environmental Litigator of the Year.

Mr. Lowell is admitted to practice in state and federal courts in South Carolina and the District of Columbia, as well being admitted to practice before the U.S. Court of Federal Claims, U.S. Court of International Trade, U.S. Supreme Court, and ten U.S. Courts of Appeal. He has been appointed by the President of the United States to serve on the National Infrastructure Advisory Council and elected by the South Carolina General Assembly to serve on the College of Charleston Board of Trustees.

He has authored a number of articles and book chapters, and co-authored the *South Carolina Administrative Practice and Procedures* treatise and *South Carolina Equity* book. He and his work have been cited as authority in various state and federal courts.

Mr. Lowell has also previously represented and currently represents the State of South Carolina in high-profile, high-stakes litigation. Mr. Lowell represented the State of South Carolina (through its agencies) in challenging the harbor deepening in the Savannah River in state and federal court against the federal government and represents the State of South Carolina

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(including its agencies) in current litigation to protect the water levels at the New Savannah Bluff Lock and Dam near Augusta, Georgia, in federal court against the federal government. Mr. Lowell has also represented various state agencies in state and federal court litigation, including the Department of Transportation, Department of Commerce, State Ports Authority, and State Housing Finance and Development Authority. He is well respected in the legal community. Based on his background, experience, and reputation, there was no better lawyer in the State that could have been chosen to lead the prosecution of these actions and advocate for the State's interests in these cases and regarding these issues.

31. Opposing counsel was the venerable United States Department of Justice, who offered no quarter and had unlimited resources. Obtaining these results in the face of such strong, talented, and well-heeled opposing counsel weighs in favor of the agreed-upon fee.

32. I conclude based on thorough study that the factor established by South Carolina precedent, "the professional standing of counsel" strongly favors a generous fee.

CONTINGENCY OF COMPENSATION

33. This was a contingent fee case from its inception, with four cases ultimately litigated under a single litigation retention agreement with only one possible source of funding. In other words, Litigation Counsel could prevail in three out of four cases and receive no compensation. This carried a significant risk to Litigation Counsel. It also was a risk allocation properly reflected in the litigation retention agreement.

34. As stated by Judge Matthew Perry in *Smith v. Sec. of HHS*, No. 79-1781-O, 1983 WL 44252, at *1 (D.S.C. Dec. 22, 1983): "The contingency of compensation, whether it stems from an employment contract or results from the claimant's indigency, is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and

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any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyers' risk of receiving nothing for his services."

35. The justification for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008).

36. "[C]ases from district courts throughout the country in common fund cases [reflect that] attorney's fee awards 'generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund.'" *Dewitt v. Darlington Co.,* 2013 WL 6408371, at *8 (D.S.C. Dec. 6, 2013) (quoting *Bredbermer v. Liberty Travel, Inc.*, 2011 WL 1344745 (D.N.J. Apr. 8, 2011)).

37. According to one study, in cases involving common funds "from $500 million to $1 billion," "the mean and median awards were both 12.9%" of the fund. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F.Supp.2d 1028, 1033 (N.D. Ill. 2011) (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 839 (2010)).

38. Given that the 12.5% effective rate from the common fund recovery also compensates for the injunctive relief for the removal of one metric ton of plutonium, defending that removal in litigation initiated by another state, and obtaining a preliminary injunction to stop the termination of the construction of the MOX facility, it is not just fair compensation but is on the low end of the scale, as most of the other cases on which a comparison is being based was for work and recovery in a single case.

39. I conclude that the fourth fee factor strongly favors a generous fee.

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BENEFICIAL RESULTS OBTAINED

40. The United States Supreme Court has stated, "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (internal quotes omitted); *Hensley v. Eckerhardt*, 461 U.S. 424, 434 (1983) (the "results obtained" in litigation to be a key factor in assessing the reasonableness of a fee). The South Carolina Supreme Court has similarly held: "Ultimately when a 'common fund' is generated for the benefit of the class, the result is everything." *Littlejohn v. State*, 2002 WL 34454074, *5 (S.C. Cir. 2002), *aff'd sub nom Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003); *see also Layman v. State*, 376 S.C. 434, 453, 658 S.E.2d 320, 330 (2008).

41. To my knowledge, the $600,000,000 immediate payment is the largest single payment recovery for the State of South Carolina in the State's history.

42. The State also successfully forced the United States to remove one metric ton of defense plutonium from the State of South Carolina. While I have not attempted to assign a value to this benefit, it is indisputably significant.

43. The State also now has a contractual obligation and recognition from the United States that it will remove 9.5 metric tons of defense plutonium by 2037.

44. As Senator Lindsey Graham commented on August 31: "Without the litigation, you wouldn't have anything today.... [T]his is the best possible outcome South Carolina could hope for...."

45. The beneficial results obtained by Litigation Counsel's creativity and legal strategy in prosecuting these cases was superlative. It is even more impressive given that this result was achieved against ferocious opposition with unlimited resources.

46. Recognizing litigation result as the single most important factor, the 12.5% effective fee is more than justified by the monetary recovery of $600,000,000 standing alone. In conjunction with

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the injunctive relief and contractual agreement for additional removal and/or future payments, the 12.5% is more than reasonable.

47. In my opinion, this factor—the most important—weighs heavily in support of the reasonableness of a 12.5% effective rate for attorneys' fees in this case.

CUSTOMARY LEGAL FEES FOR SIMILAR SERVICES

48. Courts have long considered fee applications in common fund cases. Newberg on Class Actions conducted a study and found: "[R]ecent empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20–30%, with the average award hovering around 25% . . . Usually, 50% of the fund is the upper limit on a reasonable fee award from any common fund, in order to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented." § 15:83.Applying the percentage method—Reasonableness of percentage—Empirical data on percentages awarded, 5 Newberg on Class Actions § 15:83 (5th ed.).

49. Courts have also considered fees in cases with similar large returns. Just recently, in *Cook, et al. v. South Carolina Public Service Authority, et al.*, C/A 2019-CP-23-06675 (Order 7/31/20 Greenville Court of Common Pleas), Chief Justice (Ret.) Toal approved a 15% attorney fee award on a $520 million settlement. Similarly, in *Lightsey v. SCE&G,* C/A 2017-CP-2500335 (Order 6/11/19 Hampton County Court of Common Pleas), the Court awarded $51 million on $115 million in cash and property valued between $60-85 million or 25.5% of present settlement benefit. The Court noted: "The requested fee computed as a percentage of the cash and transferred property value will likely fall between 35.5%-29.1% depending on the ultimate sales prices of the transferred property. Regardless of whether the final fee percentage is at the high or low end of that range, the fee will fall within the customary South Carolina complex

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case contingency fee of 33.3%-50%. The 25.5%-29.1% fee range is also well within the traditionally accepted common fund fee range in complex class actions of 19-45%.[1] Id. internal citations omitted. In *Spartanburg Regional Health Services District, Inc. v. Hillenbrand Industries*, the Honorable Henry F. Floyd awarded 25% fee of roughly $117 million on a total settlement of 486.6 million, comprised of $337.5 million paid in cash and an agreement by defendants to change future pricing for an additional benefit of $131.1 million. C.A. No 7:03-2141-HHF, 2006 WL 8446464, at 5, n. 3 (D.S.C. Aug. 15, 2006). Here, the fees sought are far less.

50. The Court should use the prevailing market rate in the community for similar services of lawyers "of reasonably comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986). The South Carolina Supreme Court found in *Global Protection Corp. v. Halbersberg* that the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-third to one-half of the gross recovery. *Global Protection,* 332 S.C. at 161, 503 S.E.2d at 489. Judge Harwell observed in *Dewitt v. Darlington Co.,* 2013 WL 6408371 (D.S.C. 2013) that, "Attorneys fees awarded generally range anywhere from nineteen percent (19%) to forty-five (45%) of the settlement fund.

51. With complex class action cases of this sort, it is proper to review nationwide in scope. In Michigan, the Michigan Attorney General has hired lawyers under fee agreements more favorable to the attorneys prosecuting the action than AG McMaster Agreement. See Exhibit 5, State of Michigan Department of Attorney General PFAS Environmental Tort Litigation contract.

[1] Like in many cases, *Lightsey* contained a noncash common fund benefit that was valued at $2 billion of rate relief. Here the non cash benefit includes, in part, the removal of 1 metric ton of plutonium.

52. It is therefore my opinion that the South Carolina Supreme Court customary fee award factor strongly supports a very substantial fee award.

CONCLUSION

53. This case required, and the Plaintiff's lawyers delivered, an experienced team who worked tenaciously and unsparingly to affect the State's goals. The result achieved against this well-funded and formidable Defendant could not have occurred but for the exceptional strategic planning and execution that very few lawyers could have achieved.

54. Outstanding lawyering which resulted in the single largest single payment to the State of South Carolina deserves to be recognized and rewarded.

55. All six factors enunciated by our courts when applied to the facts of this case supports the fee award requested. As a result, to reasonable degree of certainty in my field, the requested fee is reasonable and appropriate.

Further Affiant sayeth not.

Peter D. Protopapas

SWORN TO AND SUBSCRIBED BY ME
This 7th Day of October, 2020

Notary Public for the State of South Carolina
My Commission Expires: 3/31/2020

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EXHIBIT 1

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PETER D. PROTOPAPAS, ESQUIRE

Rikard & Protopapas – 1329 Blanding Street, Columbia, SC 29201 – 803.978.6111 –
PDP@RPLEGALGROUP.COM

EDUCATION

2000 Juris Doctorate, University of South Carolina
With Honors, Member of the Order of the Wig and Robe, Order of the Coif and Member of the ABA Real Property Journal

1994 MA, University of Florida

1992 BA, University of Massachusetts

PROFFESSIONAL EXPERIENCE

2010 – Present Partner, Rikard & Protopapas, LLC

2000 – 2010 Associate and later, Partner at Lewis & Babcock, LLP

Represented clients in a wide variety of complex business and professional malpractice cases throughout South Carolina. Law practice focusing on civil litigation in the areas of business dispute, personal injury loss, and complicated professional loss. Advised clients and/or worked with individuals appointed to liquidate assets of defunct or bankrupt entitles. Examples of such work include Carolina Investors, HomeGold, Compass Academy, Global Holdings, and FIP investment.

LICENSURE / MEMBERSHIPS

- Qualified to Practice in the United States District Court for the District of South Carolina and the United States Court of Appeals, Fourth Circuit
- South Carolina Bar Association, Member
- Richland County Bar Association, Member
- John Belton O'Neall Inn of Court, Member
- South Carolina Association of Justice, Member
- American Association of Justice, Member
- Super Lawyers, Member

VOLUNTEERING / HONORS & RECOGNITIONS / SPEAKING ENGAGEMENTS

- Former Board Member for South Carolina Legal Services, a non profit organizations assisting South Carolinians.
- Coach of Mock Trial for Longleaf Middle School, Richland School District 2
- Intricately involved in numerous reported and unreported decisions on legal ethics and business law.
- Frequent ethics speaker for SC Association of Justice and the SC Bar Association

EXHIBIT 2

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com

Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

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Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

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destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

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4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

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required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

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litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. **Article III.B is deleted in its entirety and replaced with the following:**

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov
Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov
Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov
Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name:	Kenneth P. Woodington
	Davidson, Wren & Plyler, P.A.
Address:	1611 Devonshire Drive, Second Floor
	Columbia, SC 29204
Phone:	803-806-8222
Email:	kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

Date: 6/13/19

SPECIAL COUNSEL

Davidson, Wren & Plyler, P.A.
By: William H. Davidson, II
Its: Shareholder

Date: 6/2/19

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EXHIBIT 3

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Litigation Retention Agreement

	Removal Claim*	Payment Claim*	Termination Claim	Nevada Claim	
Article IV.B.4.i (Removal and Payment Claims)	$29,250,000		X	X	
Article IV.B.5 (Appeal of Removal and Payment Claims)	$8,000,000		X	X	
Article IV.B.4.ii (Termination Claim)	X	X	$21,000,000	X	
Article IV.B.4.iii (Nevada Claim)	X	X	X	$18,000,000	
Totals:	**$ 37,250,000.00**	**$ -**	**$ 21,000,000.00**	**$ 18,000,000.00**	**$ 76,250,000.00**
				(Credit)	$ (1,250,000.00)
				Total Due:	**$ 75,000,000.00**

* The Removal Claim District Court litigation payment is copayable with the Payment Claim Court of Federal Claims litigation.

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$600,000,000 Recovery

Amount of the remaining net recovery	Contingent percentage		
First $0 to $25,000,000.00	21%	$	5,250,000.00
$25,000,000 to $50,000,000	18%	$	4,500,000.00
$50,000,000 to $75,000,000	15%	$	3,750,000.00
$75,000,000 to $100,000,000	13%	$	3,250,000.00
$100,000,000 to $125,000,000	11%	$	2,750,000.00
$125,000,000 to $150,000,000	9%	$	2,250,000.00
$150,000,000 to $250,000,000	4%	$	4,000,000.00
Greater than $250,000,000.00	1%	$	3,500,000.00
		$	29,250,000.00

Appeal (Removal of Pu) $600,000,000

Amount of the remaining net recovery	Contingent percentage		
First $0 to $25,000,000.00	3%	$	750,000.00
$25,000,000 to $50,000,000	3%	$	750,000.00
$50,000,000 to $75,000,000	3%	$	750,000.00
$75,000,000 to $100,000,000	2%	$	500,000.00
$100,000,000 to $125,000,000	2%	$	500,000.00
$125,000,000 to $150,000,000	1%	$	250,000.00
$150,000,000 to $250,000,000	1%	$	1,000,000.00
Greater than $250,000,000.00	1%	$	3,500,000.00
		$	8,000,000.00

Nevada		MOX Facility Termination	$600,000,000
District - 2%	$12,000,000.00	District - 2%	$12,000,000.00
Appeal - 1%	$6,000,000.00	Appeal - 1%	$6,000,000.00
Sup Ct - 0.5%	$0.00	Sup Ct - 0.5%	$3,000,000.00
	$18,000,000.00		$21,000,000.00

EXHIBIT 4

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2006 WL 5453177 (S.C.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of South Carolina.
Fifth Judicial Circuit
Richland County

Nancy S. LAYMAN, David M. Fitzgerald, Vicki K. Zelenko, Wyman M. Looney, Nancy Ahrens, James Haynes and Janice Franklin, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA and The South Carolina Retirement System, Defendants.

No. 05-CP-40-2785.

September 18, 2006.

Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Petition for Attorneys' Fees Pursuant to § 15-77-300

Lewis & Babcock, L.L.P., A. Camden Lewis, Keith M. Babcock, Ariail E. King, By: A. Camden Lewis, 1513 Hampton Street, Post Office Box 11208, Columbia, South Carolina 29211, (803) 771-8000, Richard A. Harpootlian, P.A., Richard A. Harpootlian, Post Office Box 1090, Columbia, South Carolina 29202, (803) 252-4848, Attorneys for the Plaintiffs.

Plaintiffs, Nancy S. Layman, David M. Fitzgerald, Vicki K. Zelenko, and Wyman M. Looney,[1] hereby submit this Memorandum of law in reply to Defendants' Memorandum in Opposition to the Petition for Attorney's Fees Pursuant to §15-77-300.

INTRODUCTION

Defendants the State of South Carolina and the South Carolina Retirement System (hereinafter collectively "The State") have made revealing admissions as well as extreme and absurd statements in their opposition to an award of attorneys' fees. For example:

• Amazingly, The State *never* looked at the legality of Act No. 153 before the passage of the Act. Boykin Depo. p. 44-45; Gray Culbreath Depo. p. 37. Plaintiff David Fitzgerald spoke via telephone to the Retirement System's legal counsel: "I have talked with Steve Van Camp, legal counsel at SCRS. He told me that SCRS was not asked for a legal opinion regarding breaking the TERI contract and none was rendered." E-mail to Senator Ronnie Cromer, Exhibit 8 to Fitzgerald deposition.[2]

• Even though The State was forced to return $37 million to old TERI participants and will not collect $87 million in the future, The State claims to be the prevailing party. The State reasons that it was upon their legal theory that they lost, and therefore they won.[3]

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• The State also claims that even though the Supreme Court's ruling required fees to be based in part on "the benefit obtained for all of the old TERI participants,"[4] the $124 million total benefit to old TERI participants does not have "to be a part of that formula." Boykin Depo. p. 167.[5] Even more outrageously, The State also claims that Plaintiffs are seeking $50 million in attorneys' fees (Exhibit 25 to Boykin Depo.). This is simply a scare tactic by the State.[6] In fact, Plaintiffs have not requested such a sum.

• The State has admitted that it *did not have* to follow Act No. 153. Peggy Boykin, head of the Retirement System, admitted that there was a "collaboration" after this Court's June 14, 2005 grant of injunctive relief as to Act No. 153, and, when asked who made the decision to continue to enforce the Act, stated: "I would have been the one to sign off on that decision." Boykin Depo., p. 127. In other words, Ms. Boykin could have also decided *not* to enforce the Act.[7]

• When asked questions about Act No. 153 and the State's actions, Peggy Boykin had a lack of memory on at least 68 occasions. For example, consider the following discussion regarding the Senate Finance Subcommittee's inquiry as to the name of the state that supposedly required retiree contributions to a retirement fund:

Q: And you told the subcommittee you would get the name of the state to them. Did you get the name of the state to them?

A: I don't recall.

Q: If there would, would you have sent it by some kind of note or letter?

A: I don't recall.

Q: Do you know if the state was Oregon?

A: I don't recall.

Boykin Depo., p. 52. When confronted with a memo reflecting the fact that Senator Setzler asked a legal question about retiree contributions to which Ms. Boykin indicated she would have the legal experts respond, Ms. Boykin again exhibited this same lack of memory:

Q: Well, you said you would have legal experts respond. Did you have them respond?

A: I don't recall whether Senator Setzler spoke to the attorneys or not.

Q: Did you ever ask the attorneys to talk to Senator Setzler.

A: I don't recall.

Q: Would you have done it in writing?

A: I don't recall having done so.

Q: Who are the legal experts you were talking about?

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A: You know, I don't recall....

Boykin Depo. pp. 76-77.

These are just a few examples of the extreme and absurd arguments the State makes. The State's illogical positions should be disregarded.

I. Under the statute and the Supreme Court's order, Plaintiffs are entitled to recover for "work performed, expenses incurred, and the benefit obtained for all of the old TERI participants."

At least since 1948, South Carolina has recognized the theory that attorneys' fees can be granted in certain situations in cases involving government. *Shilitto v. City of Spartanburg*, 51 S.E.2d 95 (SC 1948). Shillitto was a taxpayer seeking to recover the money collected under an unconstitutional statute. That court granted attorneys' fees, recognizing that the principle of attorneys' fees was not "solely confined in its application to what is usually termed a 'common fund'." *Shillito* at 100. The court rejected the notion that the common fund principle did "not extend to a case...involving public funds." *Id.* The court stated:
Citizens should be encouraged to bring suits like this, and when they have succeeded in [recovering] into the county treasury money for the benefit of the people that would otherwise be lost, it is no more than right and just they should have these fees.

Shillito at 101. Here, the named Plaintiffs, as in *Shillito*, brought a lawsuit for money illegally collected, and they succeeded in recovering those funds for the benefit of thousands of other old TERI participants. As such, they should be granted attorneys' fees.

Likewise, the benefits (monetary or non-monetary), obtained for a certain group or for the general public, can support an award of attorneys' fees. When fees are awarded under the common fund doctrine, it simply refers to the *source* of the award-- not the amount or the reason for such an amount.[8] However, the principles in awarding fees from the common fund source or the statutory source are much the same. A statute, such as the one involved here, merely shifts payment of the fees from the common fund to The State under much the same principles. In awarding fees, courts mainly look to the benefits obtained, regardless of the source of those fees. In *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 166 (1939), the United States Supreme Court noted "[t]hat the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class does not seem to be a differentiating factor..." in the court's power to award fees and costs.

Other states have awarded fees when a benefit has been conferred on a particular group regardless of the source of funds. In Alabama, the court permitted an award of fees to be paid by the defendant state when the plaintiffs conferred a benefit on the public. *Brown v. State*, 565 So.2d 585 (Ala. 1990)("This litigation clearly resulted in a benefit to the general public. It is unquestionable that plaintiffs' attorneys rendered a public service by bringing an end to an improper practice."). In that case, the Alabama Supreme Court stated: "The fact that this litigation, by virtue of our rationale and holding, has not produced a monetary recovery does not preclude an award of attorney fees." *Brown* at 591 -592.

Here, because a benefit was conferred on the old TERI participants, the Supreme Court properly recognized that the benefit must be considered in awarding attorneys' fees. Contrary to The State's assumption, Plaintiffs are not seeking to recover fees from a common fund source. Plaintiffs seek fees under § 15-77-300 with The State as the source, based on the directive of the Supreme Court.

The State also claims that because the Supreme Court denied Plaintiffs' request for attorneys' fees under the common fund, the Supreme Court has foreclosed the possibility of attorneys' fees based on the benefit to old TERI participants. This position is wrong for two reasons: 1) the Supreme Court denied the common fund petition because it found that attorneys' fees "should not come from the retirement contributions made by the old TERI participants" (i.e., the source of the attorneys' fees should

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not be the retirees' money);[9] and 2), the Supreme Court explicitly required the *benefit* to old TERI participants be a factor. The State simply ignores the clear language and rulings of the Supreme Court.

II. Fees can be assessed against the Retirement System.

A. The Retirement System is more than a stakeholder; it is a willing participant.

The State claims that the statute only applies to acts of a government agency and that the Plaintiffs have waived any claim against the Retirement System by stating that the Retirement System was only a stakeholder.[10] The State concludes that if the Retirement System is only a stakeholder, the Retirement System's conduct cannot be the basis of Plaintiffs' claims.

The State has misled the Court as to the nature of Plaintiffs' statements concerning the Retirement System as a stakeholder. The only time Plaintiffs used the word "stakeholder" was at the June 28, 2005 hearing before this Court, *prior* to Act No. 153's effective date of July 1, 2006. At that time, the Retirement System had not yet enforced the illegal Act or collected any funds.

Similarly, at the time of the 2005 hearing, Plaintiffs were operating under the understanding that they were not members of the Retirement System. This was a reasonable assumption, as the Plaintiffs, in order to enter the TERI program, completed forms entitled "Election of *Non-Membership*." (emphasis added). If old TERI participants were non-members, the Retirement System would only have been tangentially involved.

Since that time, the Retirement System has maintained that old TERI participants are members and that the Retirement System could elect to collect or not to collect the contributions. Despite the "Election of Non-Membership" forms, the Retirement System now calls the TERI participants "retired members." Tammy Davis Depo., July 18, 2006, p. 7.[11] Moreover, Plaintiffs now know that the Retirement System made decisions to enforce the Act and collect contributions from the old TERI participants.[12] The Retirement System never even conducted an investigation into the legality of requiring old TERI participants to make contributions, despite requests for such a legal analysis.[13] The Retirement System ignored the plain meaning of the old TERI statute and the contract which the statute created. In fact, the Retirement System never acknowledged a difference between the old TERI participants and the new TERI participants, and never considered applying the Act only to new TERI participants.[14] Then, *after* the June 28, 2005 hearing, the Retirement System *did* enforce Act No. 153 and *did* withhold a percentage of the old TERI participants' paychecks. As such, the Retirement System was an active participant violating the rights of its own members.[15]

Furthermore, the Retirement System has actually earned interest as a result of withholding funds from old TERI participants. On or around August 26, 2005, the Supreme Court certified a class of old TERI participants and ordered that all funds withheld from the old TERI participants be escrowed during this litigation, at an interest rate of 4 percent. However, the Retirement System itself earned 7.25 percent in interest. Tammy Davis Depo., July 18, 2006, p. 13-14. Thus, while the individual refunds were computed at 4 percent,[16] the Retirement System earned at least 3.25 percent more on the money The State illegally withheld. As an active participant in helping create Act No. 153, in enforcing the Act, and in profiting from the Act, the Retirement System cannot be shielded from liability for attorneys' fees under S.C. Code § 15-77-300.

B. Section 15-77-300's use of the term "agency" does not preclude fees against the State.

The State argues that attorneys' fees cannot be assessed against the State because the statute only provides for fees to be assessed against an "agency." Neither Section 15-77-300, nor the case law interpreting it, precludes an award against the State. In fact, the statute specifically provides that party contesting "state action" may recover attorneys' fees:

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In any civil action brought by the State, any political subdivision of the State or any party who is contesting **state action**, unless the prevailing party is **the State** or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency.

S.C. Code § 15-77-300 (emphasis added). The term "agency" as used by the statute merely refers to the conduit through which the State must act.[17] The State can only act through its agencies; the agencies are the divisions of the State that enforce and implement the laws passed by the General Assembly. Section 15-77-300 recognizes that an agency's acts are the same as the State's acts by allowing a party who contests "state action" to recover fees. Moreover, the law recognizes that the fees can be paid from the State's general fund. S.C. Code § 15-77-330 (Attorneys' fees can be paid "from the state's or political subdivision's general fund[.]").

III. Plaintiffs have met all of the prerequisites of S.C. Code § 15-77-300.[18]

A. Plaintiffs are the prevailing party.

The State devotes a substantial portion of its Memorandum attempting to convince this Court that the State is the prevailing party, even though it has paid $37 million in refunds and it lost $87 million in future revenue. Interestingly, The State concedes that Plaintiffs Layman, Fitzgerald, Zelenko and Looney are prevailing parties for the purposes of § 15-77-300.[19] However, The State claims that other old TERI participants cannot be considered prevailing parties because the Supreme Court decertified the class. What The State refuses to recognize is that on May 4, 2006, the Supreme Court ruled *in favor* of the class and ordered full refunds with interest.[20] It was only after the class fully and completely prevailed that the Supreme Court decertified the class so as to allow the immediate mailing of refund checks.[21] The Supreme Court's Order made *no* substantive changes to its Opinion, and, in fact, ordered that the refunds be issued within 30 days or else be subject to 11.25 percent interest. Clearly *all* old TERI participants prevailed under the Supreme Court's May 4, 2006 Opinion, since *all* of them got *all* of their money back, and they are not required to make future payments.[22]

B. The evidence clearly indicates that The State acted without substantial justification.

1. The State ignored the potential legal problems with Act No. 153.

The State had multiple reasons to doubt the legal validity of Act No. 153 and conduct the necessary investigation into it. Without such, The State acted without substantial justification. The State admitted that they questioned the Act with regard to certain tax issues and got a legal opinion. Exhibit 5 to Boykin Depo. Since The State obtained a legal opinion on the tax implication, it could have easily asked for other legal aspects of the Act to be evaluated. Instead, it did nothing, ignoring all requests for legal analysis.

At a meeting of the Senate Finance Subcommittee on South Carolina Retirement Systems on January 27, 2005, Senator Nikki Setzler asked Peggy Boykin, the head of the Retirement System to have the lawyers determine if one group of retirees could legally be required to make contributions, while another group was not required to make the same contributions. Exhibit 3 to Boykin Depo. In reply, Ms. Boykin said that "she would have the legal experts respond." Exhibit 3 to Boykin Depo. Yet, no expert review was undertaken and no legal opinion obtained.[23] Instead, The State relied on a "white paper" issued by the Society of Actuaries *three years earlier*, which indicated that one other state was requiring these contributions from retirees who were in a deferred retirement plan similar to the TERI plan. Boykin Depo. p. 55. At that same meeting, Ms. Boykin indicated that she would get the name of the state to the Subcommittee. Boykin Depo. p. 51. In her deposition, Ms. Boykin could not recall whether she ever did so. Boykin Depo. p. 52. No other assessment was made, and no investigation conducted as to whether a legal challenge had been made in that State. Cursory research would have found the case of *Strunk v. Public Employees Retirement*

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Board, 108 P.3d 1058 (Or. 2005), where, in March 2005, the Oregon Supreme Court, *en banc,* recognized that promises made to state employees to retire could not be rescinded.

Furthermore, contrary to The State's assertion, the State did have actual notice that Act No. 153's validity or legality was being questioned *prior* to the Act's passage. Notice occurred in the January 27, 2005 meeting of the Senate Finance Subcommittee where The State agreed to have legal experts review the matter, but failed to actually perform the review. Additionally, between May 26 and June 14, 2005, Plaintiff David Fitzgerald wrote various Representatives and Senators, including Annette Young, Chip Huggins, Nathan Ballantine, Greg Ryberg, Nikki Setzler, Thomas Alexander and Ronnie Cromer concerning Act No. 153.[24] Exhibits 4-10 to Fitzgerald Depo. Mr. Fitzgerald expressed his concern that The State was changing the rules for old TERI participants, after they had entered into "an irrevocable agreement" and after they had "accepted the terms outlined at TERI election[.]" In an email to Senator Cromer, Mr. Fitzgerald wrote: "I have talked with Steve Van Camp, legal counsel at SCRS. He told me that SCRS was not asked for legal opinion regarding breaking the TERI contract and none was rendered." Exhibit 8 to Fitzgerald deposition; Depo. of David Fitzgerald, P. 11. In his response, Senator Cromer stated:

I made a point of addressing it with the members of the Finance Committee as to the legality of "breaking a contract" and was only told that the IRS had been contacted and said it was "okay."

Exhibit 8 to Fitzgerald Depo.

It would have been very easy to ask the lawyers not only about the IRS implications but also about the legal effect as to the existing TERI participants.[25] Mr. Fitzgerald even emailed Governor Sanford on June 7, 2005, stating his belief that the provisions of the Act "constitute[d] a breach of contract between employee and the State." Exhibit 11 to Fitzgerald deposition. Mr. Fitzgerald asked the Governor to request a legal opinion. As with so much of Mr. Fitzgerald's correspondence, this email request went unanswered.

From Mr. Fitzgerald's inquiries alone, the Retirement System, at least 7 members of the General Assembly, and the Governor of The State knew that the legality of Act No. 153 was questionable. Did The State do what any reasonable person would do and request a legal opinion?[26] No, because The State was intent on passing the Act so it could begin taking the money from old TERI participants. Nevertheless, The State claims it acted with substantial justification because it had no reason to believe Act No. 153 was invalid. In actuality, The State simply acted with reckless disregard and ignored the multiple and apparent problems with Act No. 153.[27] The State's actions in deliberate indifference to the potential legal issues cannot constitute substantial justification.

The State acted without substantial justification by failing to examine the language of the then existing statute. If The State had made such and examination, it would have easily determined the existence of the contract and the illegality of the contributions. The Supreme Court held that "the language in the old TERI statute demonstrates, *in unambiguous terms*, the intent of the legislature to bind itself" and that the State "was in *clear breach* of the contract it created." *Layman v. State*, 368 S.C. 631, 639, 630 S.E.2d 265, 269 (2006)(emphasis added). Where statutory language is clear and unambiguous, there can be no substantial justification in attempting to rewrite it as The State has done here. The statutory contract and its breach were so obvious that the Supreme Court did not even have to consider the other causes of action set forth by Plaintiffs, nor did it have to receive any evidence, such as the individual contracts signed by old TERI participants. A cursory inquiry into the existence of statutory language would have alerted The State to the problem.

Furthermore, The State could have decided not to enforce Act No. 153, especially in light of this Court's July 14, 2005 ruling and grant of injunctive relief. Instead, The State continued to enforce the Act with regard to all old TERI participants (with the exception that the named Plaintiffs' funds were escrowed). The State admitted that it had to sign off on the continued enforcement of the Act, after meeting with various officials:
Q. Okay, so you got this information in this collaboration. And who makes the decision? Somebody has to make the decision.

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A. I would have been the one to sign off on that decision.

* * *

Q. So you signed off on you go ahead and enforce the act.

A. That's correct.

Boykin Depo. p. 127. In other words, The State, after this Court ruled that the TERI Plaintiffs' contracts were being violated, could have stopped enforcing the law; nevertheless, it forged ahead, continuing to breach the contracts of all old TERI participants. Positions taken during the litigation can be a predicate for fees. *Thompson v. Sullivan*, 980 F.2d 280 (4th Cir. 1992).

2. During the litigation, The State resorted to scare tactics about the retirement systems.

The scare tactics employed by The State provide further evidence of its lack of substantial justification. In looking at substantial justification, courts have found that an "egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's 'position' in the entire case as unreasonable[.]" *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993). The State attempts to rewrite history by claiming that it did not resort to scare tactics. Having been rebuked by the Supreme Court for its use of a misleading actuarial report and making a misrepresentation, The State now claims that they simply submitted the report to provide "case background" and did not try to use actuarial unsoundness to support its defense. Yet the Supreme Court, which addressed this issue in both its May 4, 2006 Opinion and its June 1, 2006 Order, stated "contrary to *the State's suggestion*, our holding will not place the actuarial soundness of the retirement system in ruins." *Layman v. State*, 368 S.C. 631, 641, 630 S.E.2d 265, 270 (2006)(emphasis added). The Court also noted that an affidavit "relied upon heavily by the State" was inaccurate in that it included future TERI participants (who are not a part of this case). *Id.* The Supreme Court concluded that The State's "contention that the number of old TERI participants is growing at a rapid pace [was] a complete misrepresentation." *Id.*

The State complained about the Supreme Court's criticism in its Motion for Reconsideration. However, in ruling on that motion, the Supreme Court stated:

At page 26 of their brief respondents state, "Act 153 was adopted in the face of increasing liabilities in the Retirement System." The sentence is accompanied by a reference to pages 754 and 755 of the record. Those pages in the record contain a portion of the Milliman study describing the increase in the number of participants corresponding to the increase in the liabilities of the retirement system. The numbers are reflected in chart form, depicting the liabilities increasing significantly, almost off the charts. We did not intend to impugn the character of counsel, but we did find fault in the analysis used with respect to the entire Milliman report. Respondent's reliance on the report was inaccurate because by the time respondents prepared the briefs for presentation before this Court, we had previously certified the plaintiff class to include only those retirees enrolled prior to July 1, 2005. The Milliman report included both current and future TERI participants.

Layman v. State, Order of June 1, 2006, p. 2-3. It is not surprising that The State is now trying to distance themselves from their scare tactic (the claim of actuarial unsoundness). However, the Supreme Court clearly recognized that The State did resort to such scare tactics during the litigation by relying on inaccurate and misleading documents. These scare tactics and misleading positions taken by The State completely taint The State's position and render it unjustified.

3. The fact that The State followed the statute does not create substantial justification.

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The State claims that it was following a statute and even though that statute was illegal, they were justified. In other words, The State absurdly claims that it can enforce any act, no matter how apparent the illegality, without repercussions.[28] The State's expert on substantial justification claimed the state would be substantially justified in enforcing a discriminatory statute against women and African-Americans.[29] There is no support for The State's position. The statute and case law provide that if a party successfully challenges a state action (here the application of Act 153 to old TERI participants) and the State lacked substantial justification, then the party is entitled to attorneys' fees.

4. The prospective use of Act No. 153 does not affect the lack of substantial justification.

The fact that Act No. 153 is still "on the books" and effective for TERI participants after July 1, 2005, has no bearing as to The State's lack of substantial justification in applying Act No. 153 to the old TERI participants. Plaintiffs have never argued that Act No. 153 was improper as to TERI participants enrolled *after* the Act's effective date of July 1, 2005. Indeed, at the June 28, 2005 hearing before this Court, Plaintiffs made that point clear:

I want the Court to understand, we are not interested or are we here on behalf of future TERI retirees.

Transcript of Hearing, p. 8 (Record, p. 72). In fact, the State's argument on this point shows its continued ignorance of the difference between the old and new TERI participants and highlights the fact that the State never considered applying Act No. 153 to new TERI participants only.[30]

C. There are no special circumstances which would preclude an award of fees.

The State argues that an award of attorneys' fees would require the distribution of funds from a qualified pension trust, which would violate both the State Constitution and IRS regulations. The State either ignores or fails to understand an award can be paid from "*the state's or political subdivision's general fund if the agency has no available funds[.]*" (emphasis added) S. C. Code § 15-77-330 (1976). Obviously, the Retirement System has funds to pay its own attorneys and other expenses. There has been no evidence provided that payment of court-ordered attorneys' fees would violate IRS regulations. More importantly, the Supreme Court has already addressed this issue and determined that no special circumstances prevented the shifting of attorneys' fees to The State when it ruled that "attorney's fees in this matter should not come from the retirement contributions made by the old TERI participants." *Layman*, June 1, 2005 Order, p. 6.

IV. The Supreme Court specifically set forth the factors for the award.

In spite of the Supreme Court's June 1, 2006 Order setting forth the basis for fees, The State falls back to a familiar position -- ignoring clear and unambiguous language. The Supreme Court, recognizing that § 15-77-300 did not prescribe or limit fees, set forth the appropriate considerations in determining a fee award in this case --"the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants." *Layman*, Order of June 1, 2006, p. 7. The State may not like the Supreme Court's directive, but it cannot ignore it. The source for attorneys' fees is The State. The Supreme Court-ordered benefit considerations in setting the amount of attorneys' fees is no different than any other fee awards, regardless of their source. The State wants to confuse source with amount. When the source is a common fund, the common fund benefit is a primary consideration. Similarly, when the source is shifted to The State, as here, the benefit to the retirees is a primary consideration.[31] In other words, the amount of the benefit, which weighs heavily in common fund source considerations, is also crucial here, as the Supreme Court recognized when it stated that fees should be based on "the results obtained for all old TERI participants." Thus, the percentages used to establish attorneys' fees in all cases that analyze the benefits to determine such fees provide guidance.

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A one-third fee is a common benchmark in benefit consideration cases, although the percentage may be higher in some cases. Eisenberg, Theodore and Geoffrey P. Miller. *"Attorneys Fees in Class Action Settlements: An Empirical Study," I Journal of Empirical Legal Studies* (2004). Courts in such cases have routinely awarded attorneys' fees of 25 percent to 40 percent of the award recovered for the clients.[32] South Carolina has approved a percentage awards as appropriate attorneys' fees in amounts of 28-33 percent. *See, e.g., Condon v. State of South Carolina,* 354 S.C. 634, 583 S.E.2d 430 (2003) (Supreme Court approved lower court's award of 28% of $7.5 million, noting that the "fees customarily charged in similar cases" factor was particularly persuasive). In fact, a percentage award has been approved in a in a similar action against the State. In *Bass v. State of South Carolina*, 307 S.C. 13, 414 S.E.2d 110 (1992), federal retirees sued for the return of state taxes collected on federal pensions. A settlement was reached in which approximately $89 million was refunded to the federal retirees -- the largest class action settlement ever against the State. See, *Record on Appeal, Condon v. State, supra*. The attorneys were awarded fees of $17,355,000 or 19.5 percent.[33] The Attorney General of South Carolina recognizes in these types of cases, attorneys' fees are based on a percentage of recovery, *regardless of hours or how hours are kept*. R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo.

Attorney General Henry McMaster stated that the public should understand his use of outside attorneys under this fee arrangement "is consistent with the highest standards of practicing law and bringing litigation." *The State*, August 10, 2006; Ex. 4 to Harpootlian Depo.

CONCLUSION

Plaintiffs have met all of the prerequisites of S.C. Code § 15-77-300 and are entitled to recover attorneys' fees based on "the actual amount of work performed, expenses incurred, and the benefit obtained for all the old TERI participants."

Columbia, South Carolina

September 18, 2006

Footnotes

1 Plaintiffs Nancy Ahrens, James Haynes and Janice Franklin, who were added as plaintiffs after the initial complaint was filed, are Working Retirees, not "old TERI" participants (i.e., those who enrolled prior to July 1, 2005), and have not joined in the Petition for Costs as their case was remanded for evidentiary inquiry.

2 The only legal issue ever considered was whether contributions from old TERI participants would violate IRS provisions governing tax-qualified pension plans (See, Exhibit 5 to Boykin Depo.), despite Fitzgerald's numerous requests to review the Act's legality.

3 Plaintiffs were the ones who actually raised the distinction between old TERI participants and those that joined after July I, 2005. The State did not recognize the difference prior to this litigation.

4 *Layman v. State*, June 1, 2006 Order of the Supreme Court.

5 The State provides another example of this double talk by claiming that only fees, and not costs, can be recovered, when the Supreme Court clearly stated that any award should include "expenses incurred." Depo. of Elizabeth Crum, p. 31; *Layman v. State*, June 1, 2006 Order of the Supreme Court.

6 The State itself, through Attorney General Henry McMaster, recognizes the appropriateness of percentage recoveries for lawyers who take a chance for the State. R. Harpootlian Depo., p. 40; Ex. 3 to Depo.

7 When cornered with an equally obvious situation, the Ms. Boykin claimed she would not know how to respond:
FNQ: We're sitting here today, Ms. Boykin, and I'm asking you what you would do if there was a law passed that says men pay--working retirees pay six percent and woman pay ten percent and you're telling me you don't know what you would do?...
* * *
FNA: I don't know exactly what I would do.
Boykin Depo. p. 74-75.

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8 The Supreme Court has made it clear that the source of the fees should not be the old TERI participants: "we find attorney's fees in this matter should not come from the retirement contributions made by the old TERI participants, or the interest accumulated thereon." *Layman v. State*, June 1, 2006 Order of the Supreme Court, p. 6.

9 *Layman*, June 1, 2006 Order.

10 It appears that there is a conflict between the two defendants, with the Retirement System attempting to "pass the buck" to the State. The South Carolina Supreme Court has already rejected this maneuver. The State made this argument in its Return to Petition for Costs to Include S.C. Code § 15-77-300 Attorneys' Fees filed in the Supreme Court on May 25, 2006. On June 1, 2006, the Supreme Court issued an order remanding the issue of attorneys' fees, stating that this Court should determine if "fees to be taxed as court costs against the State of South Carolina **and** the South Carolina Retirement System [.]" *Layman v. State,* June 1, 2006 Order, p. 6-7. In fact, throughout this litigation, the Supreme Court has never distinguished between or separated the two defendants.

11 When questioned about the fact that the old TERI participants signed forms of "non-membership," Ms. Davis admitted it was "an inappropriate choice of wording." Tammy Davis Depo., July 18, 2006.

12 Q: So you signed off on ["]you go ahead and enforce the act["].
FNA: That's correct.
Boykin, Depo., p. 127. (internal quotations added)

13 Mr. Fitzgerald spoke to legal counsel for the Retirement System regarding "the breaking of the contract" with TERI participants and need for a legal opinion. Fitzgerald Depo. p. 11.

14 When asked whether it ever came up that the Retirement System should distinguish between the people who entered TERI after July 1, 2005 and prior to July 1, 2005, Ms. Boykin stated that "it never came up" and that she "did not bring it up." Boykin Depo., p. 111-112.

15 The Retirement System claims it has no obligation to treat its members fairly and its only duty is "to administer the pension plan in accordance with the statutes. And that's--that's our job." Boykin Depo. p. 121.

16 The interest was actually computed at 3.667 percent. Tammy Davis Depo, August 9, 2006, p. 10.

17 As noted previously, this is just another attempt by the two defendants to claim "not me" and blame the other defendant, which appears to create a conflict between the two.

18 Contrary to The State's claim, the statute does not have to be strictly construed; none of the case law interpreting this section has so held. However, even if the statute is strictly construed, the result would be the same -- Plaintiffs are entitled to attorneys' fees.

19 The State wrongly argues that because the named Plaintiffs have not paid any attorneys' fees, they cannot recover any fees under § 15-77-300. There is no requirement in the statute or the case law that requires first be paid and then be reimbursed. The statute simply allows a party to "recover" attorneys' fees. In this context, recover means "to obtain by judgment in a court of law, or by legal proceedings." Random House Dictionary (Unabridged Ed.). The State is reading a requirement that does not exist into the statute. The language of S.C. Code § 15-77-300 does not state that a party may be "reimbursed" for any monies expended in litigation, but rather allows a prevailing party to recover attorneys' fees.

20 The Supreme Court held:
Based on the above reasoning, we hold that the State breached its contract with Petitioners who were enrolled as old TERI participants by forcing those old TERI participants to make retirement system contributions. Accordingly, all retirement system contributions withheld from old TERI participants enrolled prior to July 1, 2005 shall be returned with interest to such TERI participants and no further contributions from TERI participants enrolled prior to July 1, 2005 shall be required.
Layman v. State, 368 S.C. 631, 639, 630 S.E.2d 265, 269 (2006).

21 It must be noted that the ruling of the Supreme Court indicates that one of the reasons the class was decertified was simply to eliminate certain cumbersome class procedures: "Respondents also point out that if the class is not decertified, class notice will be required. We are persuaded by this argument." *Layman v. State*, June 1, 2006 Order, p. 4. The Supreme Court did not find that the class had been improperly certified, but instead agreed so that the State could simply mail refund checks with no further court involvement and no more delays.

22 Contrary to The State's assertion, it has not prevailed as to the Working Retirees. The Supreme Court did not dismiss the claims of the Working Retirees, but remanded the claims for a determination as to whether "any actions of the State with regard to individual old working retirees constituted a breach of contract." *Layman v. State* at 643, 630 S.E.2d at 271-272. When claims are remanded for further proceedings, a party cannot claim they have prevailed until the issue on remand have been adjudicated. *See, e.g.* 32 AmJur *Federal Courts* § 324 ("[A] prevailing party is one who ultimately succeeds on the merits of the administrative decision appealed to the District Court. It is not enough to have won a remand to the administrative level for further proceedings."). Furthermore, the State's claim that because the Supreme Court found no statutory contract with regard to the Working Retirees, the State has "saved the State of South Carolina millions of dollars in retirement contributions from the members of the working retiree class" is supposition and exaggeration. Defendants' Memorandum, p. 14. As noted, the claims of the Working Retirees are ongoing. An interim favorable ruling "on the way to ultimate defeat" does not confer prevailing party status. 32 AmJur *Federal Courts* § 324.

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23 Because, The State did not look at the legality of Act No. 153, they cannot now claim that the then-existing case law provided them with substantial justification. The State has already admitted that no legal analysis was ever performed, so they could not have been relying on *Alston v. City of Camden*, or any other cases. Depo. of Gray Culbreath, p. 36. The State admitted that it never recognized the problem with the retroactive change until after this lawsuit was filed. Boykin Depo. p. 137.

24 The majority of Mr. Fitzgerald's correspondence went unanswered. Mr. Fitzgerald also testified that he emailed every member of the Senate Finance Committee and the House Ways and Means Committee, with the exception of Herb Kirsch, who did not have an email address. Depo. of David Fitzgerald, p. 10.

25 The State has admitted that it never considered applying the Act to only future TERI participants or the effect on old TERI participants. Boykin Depo. p. 111; p. 133 "I don't recall there being a discussion of a difference between the two." This is an astounding admission that The State did not recognize a retroactive change and the obvious difference between old and ne TERI participants. Plaintiffs and the Supreme Court saw this distinction as a primary concern.

26 The South Carolina Attorney General issues opinions on the legality of acts or practices in response to any official request. The State easily could have sought such an opinion as to Act No, 153, but it did not.

27 The State could have sought a declaratory judgment as it does for many state actions so that dire consequences, like the ones present here, can be avoided. *See, e.g., State ex rel. McLeod v. Riley*, 276 S.C. 323, 278 S.E.2d 612 (1981)(actions were brought under Declaratory Judgments Act to determine constitutionality of certain bond authorizations); *South Carolina Public Service Authority v. Citizens and Southern Nat. Bank of South Carolina,* 300 S.C. 142, 386 S.E.2d 775, 777 (1989)(Agency sought declaration that a change to fiscal year did not violate any right of any bondholder or the Authority or violate any terms or covenants of any of the outstanding bond indentures).

28 The State ignores the fact that it could, and does in many cases, request a declaratory judgment before proceeding, so as to avoid dire consequences. *See, State ex rel McLeod v. Riley*, 276 S.C. 323, 278 S.E.2d 612 (1981).

29 Q: The State passes a statute that says that women and African-Americans will get less--have their retirement--they will make the 6.25% [contribution] and they are the only people that have to. Okay?
FNA: Okay.
* * *
FNQ: Okay. Should the State enforce that on July 1 when the law is supposed to go into effect or should they not?
FNA: Well, in that case, I don't think the agency has the ability to tell the General Assembly or the State, "You know what, forget it. We are not going to enforce it."...
Culbreath Depo. p. 24-25.

30 Boykin Depo. p. 133: "I don't recall there being a discussion of a difference between the two." *See also*, Boykin Depo. p. 111:
FNQ: And it wasn't broken down as to leaving the old, that is the prior to July 2005, alone, it just includes them all?
FNA: That's right.

31 As discussed previously, the benefit to over 15,000 old TERI participants was the $37 million refunds and the $87 million in future contributions that will not be required. The old TERI participants, many of whom entered the TERI plan after careful financial planning, were dependent upon the receipt of their full pay, without the withholding of illegal contributions. These retirees would not have been able to pay an attorney to bring this lawsuit. Fitzgerald Depo. p.24; Depo. Exhibits 4-10.

32 *In re Rite Aid Corp. Sec.*, 146 F.Supp.2d 706 (E.D. Pa. 20001)(25% of $193 million); *In re Aetna, Inc. Sec. Litig.*, 2001 WL 20928 (E.d Pa. 2001) (29.5% of $83 million); *In re Merry-Go-Round Enterprise, Inc.*, 244 B.R. 327 (40% of $187 million); *MCI Non-Subscriber Tel. Rates* MDL Docket No. 1275 (S.D. Ill) (29% of $88 million); *In Re Ross Cosmetics Security Litigation*, 92-1706 (D.S.C. Dec. 15, 1993)(33% of settlement of $9.5 million); *Georgallas v. Martin Colorfi, Inc.* 95-0648 (D.S.C. September 10, 1997) (30% of $2,000,000).

33 The fees in that case were not assessed against the State as its conduct there was not as egregious as in this case.

End of Document

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EXHIBIT 5

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FEE AGREEMENT

State of Michigan
Department of Attorney General

PFAS Environmental Tort Litigation

1. This is a contingent fee case. The Fields Team, comprised of Fields PLLC; Keating, Muething & Klekamp PLL; and DiCello Levitt Gutzler LLC, has been selected to enter into a SAAG Contract to provide legal services through the appointment of specified individuals as Special Assistant Attorneys General (SAAGs). The Fields Team shall receive no compensation from the State of Michigan for any services rendered unless the State of Michigan recovers civil penalties, compensatory or punitive damages, and/or attorneys' fees in connection with the litigation described in the Contract to which this Fee Agreement is attached. If the State obtains such a recovery, the Fields Team will be compensated for its services as follows:

a. Those costs necessary for conducting the litigation described in the SAAG Contract shall initially be advanced by the Fields Team and shall be deducted from the litigation's gross or total recovery, if any, before any further distribution is made;

b. Of the monies remaining from any recovery after deducting costs, the Fields Team shall receive a contingent fee according to the following graduated scale:

Amount of recovery	Attorneys' Fee
$0 - $100,000,000	20% of recovery
$100,000,000.01 - $200,000,000	17.5% of recovery
$200,000,000.01 - $300,000,000	15% of recovery
$300,000,000.01 - $400,000,000	12.5% of recovery
$400,000,000.01 - $500,000,000	10% of recovery
Over $500,000,000.01	10% of recovery

c. In the event that the Fields Team enters into a contingency fee contract with any other State for the purpose of pursuing manufacturers of per- and polyfluoroalkyl substances (PFAS) for costs and damages related to the presence of PFAS in the environment, the State of Michigan reserves the right to amend subsection 1(b) of the Fee Agreement to include the contingency fee formula or scale from that contract with another State for litigation against manufacturers of PFAS.

2. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the SAAGs in accordance with the provisions of Par. 5.11 of the Contract to which this Fee Agreement is attached.

3. The Fields Team shall advance all necessary costs necessary for conducting the litigation, including, but not limited to, expert witness fees and costs, deposition costs, and costs of document review and production. The Fields Team's agreement to advance all litigation costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending, has been taken into consideration in establishing the fee schedule above.

4. The Fields Team shall be reimbursed for its reasonable costs solely from the recovery of funds obtained from the defendant(s) in the litigation under the terms of the SAAG Contract, as approved by the Attorney General. Reimbursement for meals, lodging and travel expenses shall be in accordance with the State of Michigan travel and other expense requirements, which can be found at http://www.michigan.gov/dmb/0,1607, 7-150-9141_13132---,00.html. Expenses exceeding State rates will not be reimbursed. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by the Fields Team for at least one full year following this Agreement's termination. All costs must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in her sole discretion may decline to reimburse the Fields Team for improperly documented, unnecessary, or unreasonable costs.

5. The State will not pay for attorney or paralegal time spent performing clerical tasks, such as filing, indexing, or page numbering.

Dated: September 20th, 2019

Joseph M. Callow, Jr., Esq.
Keating, Muething & Klekamp PLL

Dated: September ___, 2019

Richard M. Fields, Esq.
Fields PLLC

Dated: September ___, 2019

Amy E. Keller, Esq.
DiCello Levitt Gutzler LLC

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Dated: September ___, 2019

Joseph M. Callow, Jr., Esq.
Keating, Muething & Klekamp PLL

Dated: September ___, 2019

Richard M. Fields, Esq.
Fields PLLC

Dated: September 20, 2019

Amy E. Keller, Esq.
DiCello Levitt Gutzler LLC

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Dated: September 20, 2019

Adam J. Levitt, Esq.
DiCello Levitt Gutzler LLC

Dated: September ___, 2019

Gregory M. Utter, Esq.
Keating, Muething & Klekamp PLL

Dated: September ___, 2019

Dana Nessel, Attorney General
or her Designee Michigan Department of
Attorney General

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Dated: September ___, 2019

Adam J. Levitt, Esq.
DiCello Levitt Gutzler LLC

Dated: September 20, 2019

Gregory M. Utter, Esq.
Keating, Muething & Klekamp PLL

Dated: September ___, 2019

Dana Nessel, Attorney General
or her Designee Michigan Department of
Attorney General

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Dated: September 27, 2019

Adam J. Levitt, Esq.
DiCello Levitt Gutzler LLC

Dated: September 27, 2019

Dana Nessel, Attorney General
or her Designee
Michigan Department of Attorney
General

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EXHIBIT 7

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	)	**AFFIDAVIT OF C. BRADLEY HUTTO**

PERSONALLY APPEARED BEFORE ME **C. Bradley Hutto**, who deposes and says as follows:

1. I am over 18 years of age, and I am qualified and competent to make this affidavit.

2. I make this affidavit based upon my personal knowledge.

3. On September 21, 2020, on behalf of Allendale and Barnwell Counties and the Southern Carolina Regional Development Alliance I filed a lawsuit in Barnwell County against Attorney General Alan Wilson and Aiken County regarding the August 28, 2020 settlement agreement by and between the United States and the State of South Carolina for the failure of the United States Department of Energy to fully construct a MOX Fabrication Facility and the storage of defense plutonium at the Savannah River Site (Barnwell Lawsuit). That case has been assigned case number 2020-CP-06-00294.

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4. A motion for a temporary injunction was filed by the plaintiffs in the Barnwell Lawsuit to prevent the transfer of the settlement proceeds to the General Fund. That motion was granted by the Honorable Clifton Newman on Wednesday, September 30, 2020 preventing the transfer of the settlement proceeds to the General Fund until such time as the matter can be heard on the merits of the declaratory judgment action. The temporary injunction was issued orally from the bench and is to be followed by a written order.

5. After the Attorney General was served with the Summons and Complaint and Motion for Temporary Restraining Order, I spoke with Randolph R. Lowell of Willoughby & Hoefer, P.A. We had at least two conversations. The first being on Tuesday, September 22, 2020, and the second on Saturday, September 27, 2020. At the time of the initial conversation, I was speaking to Mr. Lowell as the attorney for the Attorney General. Ultimately, he did not appear in the case and the Attorney General was represented by Emory Smith. I did not learn of Mr. Smith's representation of the Attorney General until Friday, September 26, 2020. In both conversations with Attorney Lowell, I was pursuing the potential settlement of the Temporary Injunction Motion and also discussed a global settlement of the merits claim.

6. Prior to filing the suit, I was aware that there were concerns about the issue of attorneys' fees because I had read a letter to Attorney General Wilson from Solicitor David Pascoe. I acknowledged to Attorney Lowell in our conversations that my clients appreciated the hard work and persistence of him and his firm in pursuing this settlement which my clients believe was designed to benefit the Plaintiffs in the Barnwell case as well as the County of Aiken.

7. After I filed the lawsuit in Barnwell County and after my initial conversation with Attorney Lowell, I learned of the filing of the Richland County lawsuit on September 26th.

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8. In the initial conversation that I had with Attorney Lowell, he asked whether the issue of attorneys' fees was being questioned in the Barnwell case. I advised him that I was aware of the concerns raised in the Pascoe letter, but it was not the issue that I was raising in the Barnwell case. I conveyed to Mr. Lowell that the Barnwell Lawsuit was not seeking to challenge the issue of attorneys' fees. I offered to resolve the issue regarding the temporary injunction by acknowledging that I waived any challenge to the transfer of attorneys' fees from the settlement, if the Attorney General would agree to an order barring co-mingling and disbursement of the remaining funds to the general fund pending a hearing on the merits. (This is ultimately what Judge Newman ordered following the Temporary Hearing on September 30, 2020). After Mr. Smith's appearance on behalf of the Attorney General, I renewed this offer to him. By that time, I had learned of the existence of the Richland County case challenging the attorneys' fees. As stated above the issue of the reasonableness of the attorneys' fees was never an issue that had been pled in the Barnwell case or that I intended to raise in the Barnwell case.

9. It had always been my understanding that there was a plan to transfer the settlement funds no later than October 1, 2020. This is the reason why I had requested that the temporary hearing be held prior to October 1st. My motion for a temporary injunction sought to restrain the Attorney General from "depositing settlement funds into the General Fund…"

10. I learned of the transfer the attorneys' fees when it was made public in the course of the Richland County case on September 29th.

11. The Barnwell lawsuit did not contain pleadings seeking to halt, prevent, impede, or otherwise impact the processing or payment of attorneys' fees. As stated above, the Plaintiffs of the Barnwell case understood that attorneys' fees had been earned and would be paid from the

$600 million dollar settlement. While I knew of the concerns raised about the amount of the attorneys' fees, my clients made an intentional decision not to pursue that issue in the Barnwell case and that was communicated to attorney Lowell in our conversation on September 22nd and reiterated to him in our conversation on September 27th.

C. Bradley Hutto

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5th DAY OF
OCTOBER 2020.

Notary Public for the State of South Carolina
My commission expires: 5-24-2027
[SEAL]

VICKI WARE LEE NOTARY PUBLIC My Comm. Exp. 05/24/2027 SOUTH CAROLINA

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EXHIBIT 8

efile GRAPHIC print - DO NOT PROCESS | As Filed Data - | DLN: 93491205003019

Form **990-PF**
Department of the Treasury
Internal Revenue Service

Return of Private Foundation

or Section 4947(a)(1) Trust Treated as Private Foundation

▶ **Do not enter social security numbers on this form as it may be made public.**
▶ **Go to *www.irs.gov/Form990PF* for instructions and the latest information.**

OMB No 1545-0052

2018

Open to Public Inspection

For calendar year 2018, or tax year beginning 01-01-2018 , and ending 12-31-2018

Name of foundation
SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

A Employer identification number
20-2475247

Number and street (or P O box number if mail is not delivered to street address)
PO BOX 1195

Room/suite

B Telephone number (see instructions)
(864) 757-2334

City or town, state or province, country, and ZIP or foreign postal code
SIMPSONVILLE, SC 29681

C If exemption application is pending, check here ▶ ☐

G Check all that apply ☐ Initial return ☐ Initial return of a former public charity ☐ Final return ☐ Amended return ☐ Address change ☐ Name change

D 1. Foreign organizations, check here ▶ ☐
2 Foreign organizations meeting the 85% test, check here and attach computation ▶ ☐

H Check type of organization ☑ Section 501(c)(3) exempt private foundation ☐ Section 4947(a)(1) nonexempt charitable trust ☐ Other taxable private foundation

E If private foundation status was terminated under section 507(b)(1)(A), check here ▶ ☐

I Fair market value of all assets at end of year (from Part II, col (c), *line 16)* ▶$ 91,960

J Accounting method ☑ Cash ☐ Accrual ☐ Other (specify) _____
(Part I, column (d) must be on cash basis)

F If the foundation is in a 60-month termination under section 507(b)(1)(B), check here ▶ ☐

Part I **Analysis of Revenue and Expenses** *(The total of amounts in columns (b), (c), and (d) may not necessarily equal the amounts in column (a) (see instructions))*

			(a) Revenue and expenses per books	(b) Net investment income	(c) Adjusted net income	(d) Disbursements for charitable purposes (cash basis only)
Revenue	1	Contributions, gifts, grants, etc , received (attach schedule)	32,610			
	2	Check ▶ ☐ if the foundation is **not** required to attach Sch B				
	3	Interest on savings and temporary cash investments	3,507	3,507	3,507	
	4	Dividends and interest from securities				
	5a	Gross rents				
	b	Net rental income or (loss) -3,081				
	6a	Net gain or (loss) from sale of assets not on line 10	129,373			
	b	Gross sales price for all assets on line 6a 129,373				
	7	Capital gain net income (from Part IV, line 2)		129,373		
	8	Net short-term capital gain				
	9	Income modifications				
	10a	Gross sales less returns and allowances				
	b	Less Cost of goods sold				
	c	Gross profit or (loss) (attach schedule)				
	11	Other income (attach schedule)	525,001		525,001	
	12	**Total.** Add lines 1 through 11	690,491	132,880	528,508	
Operating and Administrative Expenses	13	Compensation of officers, directors, trustees, etc				
	14	Other employee salaries and wages				
	15	Pension plans, employee benefits				
	16a	Legal fees (attach schedule)	283,211			283,211
	b	Accounting fees (attach schedule)	2,700			2,700
	c	Other professional fees (attach schedule)				
	17	Interest				
	18	Taxes (attach schedule) (see instructions)	521		521	
	19	Depreciation (attach schedule) and depletion				
	20	Occupancy				
	21	Travel, conferences, and meetings				
	22	Printing and publications				
	23	Other expenses (attach schedule)	3,092	3,081	3,081	11
	24	**Total operating and administrative expenses.** Add lines 13 through 23	289,524	3,081	3,602	285,922
	25	Contributions, gifts, grants paid	0			0
	26	**Total expenses and disbursements.** Add lines 24 and 25	289,524	3,081	3,602	285,922
	27	Subtract line 26 from line 12				
	a	**Excess of revenue over expenses and disbursements**	400,967			
	b	**Net investment income** (if negative, enter -0-)		129,799		
	c	**Adjusted net income** (if negative, enter -0-)			524,906	

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Part II	Balance Sheets	Attached schedules and amounts in the description column should be for end-of-year amounts only (See instructions)	Beginning of year (a) Book Value	End of year (b) Book Value	End of year (c) Fair Market Value
Assets	1	Cash—non-interest-bearing	35,109	91,961	91,960
	2	Savings and temporary cash investments			
	3	Accounts receivable ▶			
		Less allowance for doubtful accounts ▶			
	4	Pledges receivable ▶			
		Less allowance for doubtful accounts ▶			
	5	Grants receivable			
	6	Receivables due from officers, directors, trustees, and other disqualified persons (attach schedule) (see instructions)			
	7	Other notes and loans receivable (attach schedule) ▶			
		Less allowance for doubtful accounts ▶			
	8	Inventories for sale or use			
	9	Prepaid expenses and deferred charges			
	10a	Investments—U S and state government obligations (attach schedule)			
	b	Investments—corporate stock (attach schedule)			
	c	Investments—corporate bonds (attach schedule)			
	11	Investments—land, buildings, and equipment basis ▶			
		Less accumulated depreciation (attach schedule) ▶			
	12	Investments—mortgage loans			
	13	Investments—other (attach schedule)	25,465		
	14	Land, buildings, and equipment basis ▶			
		Less accumulated depreciation (attach schedule) ▶			
	15	Other assets (describe ▶)			
	16	**Total assets** (to be completed by all filers—see the instructions Also, see page 1, item I)	60,574	91,961	91,960
Liabilities	17	Accounts payable and accrued expenses			
	18	Grants payable			
	19	Deferred revenue			
	20	Loans from officers, directors, trustees, and other disqualified persons	465,100	101,400	
	21	Mortgages and other notes payable (attach schedule)			
	22	Other liabilities (describe ▶)			
	23	**Total liabilities**(add lines 17 through 22)	465,100	101,400	
Net Assets or Fund Balances		**Foundations that follow SFAS 117, check here ▶ ☐ and complete lines 24 through 26 and lines 30 and 31.**			
	24	Unrestricted			
	25	Temporarily restricted			
	26	Permanently restricted			
		Foundations that do not follow SFAS 117, check here ▶ ☑ and complete lines 27 through 31.			
	27	Capital stock, trust principal, or current funds			
	28	Paid-in or capital surplus, or land, bldg , and equipment fund			
	29	Retained earnings, accumulated income, endowment, or other funds	-404,526	-9,439	
	30	**Total net assets or fund balances** (see instructions)	-404,526	-9,439	
	31	**Total liabilities and net assets/fund balances** (see instructions)	60,574	91,961	

Part III Analysis of Changes in Net Assets or Fund Balances

1	Total net assets or fund balances at beginning of year—Part II, column (a), line 30 (must agree with end-of-year figure reported on prior year's return)	1	-404,526
2	Enter amount from Part I, line 27a	2	400,967
3	Other increases not included in line 2 (itemize) ▶	3	
4	Add lines 1, 2, and 3	4	-3,559
5	Decreases not included in line 2 (itemize) ▶	5	5,880
6	Total net assets or fund balances at end of year (line 4 minus line 5)—Part II, column (b), line 30	6	-9,439

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Part IV Capital Gains and Losses for Tax on Investment Income

	(a) List and describe the kind(s) of property sold (e g , real estate, 2-story brick warehouse, or common stock, 200 shs MLC Co)	(b) How acquired P—Purchase D—Donation	(c) Date acquired (mo , day, yr)	(d) Date sold (mo , day, yr)
1 a	NET LONG TERM GAIN FROM K-1	P		
b	ARCADIA PAYMENT	P		
c				
d				
e				

	(e) Gross sales price	(f) Depreciation allowed (or allowable)	(g) Cost or other basis plus expense of sale	(h) Gain or (loss) (e) plus (f) minus (g)
a	97,113			97,113
b	32,260			32,260
c				
d				
e				

Complete only for assets showing gain in column (h) and owned by the foundation on 12/31/69

	(i) F M V as of 12/31/69	(j) Adjusted basis as of 12/31/69	(k) Excess of col (i) over col (j), if any	(l) Gains (Col (h) gain minus col (k), but not less than -0-) or Losses (from col (h))
a				97,113
b				32,260
c				
d				
e				

2	Capital gain net income or (net capital loss) { If gain, also enter in Part I, line 7 / If (loss), enter -0- in Part I, line 7 }	2	129,373
3	Net short-term capital gain or (loss) as defined in sections 1222(5) and (6) If gain, also enter in Part I, line 8, column (c) (see instructions) If (loss), enter -0- in Part I, line 8	3	

Part V Qualification Under Section 4940(e) for Reduced Tax on Net Investment Income

(For optional use by domestic private foundations subject to the section 4940(a) tax on net investment income)

If section 4940(d)(2) applies, leave this part blank

Was the foundation liable for the section 4942 tax on the distributable amount of any year in the base period? ☐ Yes ☑ No
If "Yes," the foundation does not qualify under section 4940(e) Do not complete this part

1 Enter the appropriate amount in each column for each year, see instructions before making any entries

(a) Base period years Calendar year (or tax year beginning in)	(b) Adjusted qualifying distributions	(c) Net value of noncharitable-use assets	(d) Distribution ratio (col (b) divided by col (c))
2017	201,987	209,191	0 965563
2016	152,739	844,601	0 180842
2015	135,203	1,463,372	0 092391
2014	139,779	1,453,770	0 096149
2013	163,107	399,670	0 408104

2	**Total** of line 1, column (d)	2	1 743049
3	Average distribution ratio for the 5-year base period—divide the total on line 2 by 5 0, or by the number of years the foundation has been in existence if less than 5 years	3	0 348610
4	Enter the net value of noncharitable-use assets for 2018 from Part X, line 5	4	140,351
5	Multiply line 4 by line 3	5	48,928
6	Enter 1% of net investment income (1% of Part I, line 27b)	6	1,298
7	Add lines 5 and 6	7	50,226
8	Enter qualifying distributions from Part XII, line 4	8	285,922

If line 8 is equal to or greater than line 7, check the box in Part VI, line 1b, and complete that part using a 1% tax rate See the Part VI instructions

Part VI **Excise Tax Based on Investment Income (Section 4940(a), 4940(b), 4940(e), or 4948—see instructions)**

1a	Exempt operating foundations described in section 4940(d)(2), check here ▶ ☐ and enter "N/A" on line 1. Date of ruling or determination letter _____ **(attach copy of letter if necessary–see instructions)**			
b	Domestic foundations that meet the section 4940(e) requirements in Part V, check here ▶ ☑ and enter 1% of Part I, line 27b		1	298
c	All other domestic foundations enter 2% of line 27b Exempt foreign organizations enter 4% of Part I, line 12, col (b)			
2	Tax under section 511 (domestic section 4947(a)(1) trusts and taxable foundations only Others enter -0-)		2	
3	Add lines 1 and 2		3	298
4	Subtitle A (income) tax (domestic section 4947(a)(1) trusts and taxable foundations only Others enter -0-)		4	
5	**Tax based on investment income.** Subtract line 4 from line 3 If zero or less, enter -0-		5	298
6	Credits/Payments			
a	2018 estimated tax payments and 2017 overpayment credited to 2018	6a 1,040		
b	Exempt foreign organizations—tax withheld at source	6b		
c	Tax paid with application for extension of time to file (Form 8868)	6c 258		
d	Backup withholding erroneously withheld	6d		
7	Total credits and payments Add lines 6a through 6d		7	298
8	Enter any **penalty** for underpayment of estimated tax Check here ☐ if Form 2220 is attached		8	
9	**Tax due.** If the total of lines 5 and 8 is more than line 7, enter **amount owed** ▶		9	
10	**Overpayment.** If line 7 is more than the total of lines 5 and 8, enter the **amount overpaid** ▶		10	
11	Enter the amount of line 10 to be **Credited to 2019 estimated tax** ▶ **Refunded** ▶		11	

Part VII-A **Statements Regarding Activities**

			Yes	No
1a	During the tax year, did the foundation attempt to influence any national, state, or local legislation or did it participate or intervene in any political campaign?	1a		No
b	Did it spend more than $100 during the year (either directly or indirectly) for political purposes? (see Instructions for definition)	1b		No
	*If the answer is "Yes" to **1a** or **1b**, attach a detailed description of the activities and copies of any materials published or distributed by the foundation in connection with the activities*			
c	Did the foundation file **Form 1120-POL** for this year?	1c		No
d	Enter the amount (if any) of tax on political expenditures (section 4955) imposed during the year **(1)** On the foundation ▶ $ _____ **(2)** On foundation managers ▶ $ _____			
e	Enter the reimbursement (if any) paid by the foundation during the year for political expenditure tax imposed on foundation managers ▶ $ _____			
2	Has the foundation engaged in any activities that have not previously been reported to the IRS? *If "Yes," attach a detailed description of the activities*	2		No
3	Has the foundation made any changes, not previously reported to the IRS, in its governing instrument, articles of incorporation, or bylaws, or other similar instruments? *If "Yes," attach a conformed copy of the changes*	3		No
4a	Did the foundation have unrelated business gross income of $1,000 or more during the year?	4a		No
b	If "Yes," has it filed a tax return on **Form 990-T** for this year?	4b		
5	Was there a liquidation, termination, dissolution, or substantial contraction during the year? *If "Yes," attach the statement required by General Instruction T*	5		No
6	Are the requirements of section 508(e) (relating to sections 4941 through 4945) satisfied either • By language in the governing instrument, or • By state legislation that effectively amends the governing instrument so that no mandatory directions that conflict with the state law remain in the governing instrument?	6	Yes	
7	Did the foundation have at least $5,000 in assets at any time during the year? *If "Yes," complete Part II, col (c), and Part XV*	7	Yes	
8a	Enter the states to which the foundation reports or with which it is registered (see instructions) ▶ SC			
b	If the answer is "Yes" to line 7, has the foundation furnished a copy of Form 990-PF to the Attorney General (or designate) of each state as required by General Instruction G? *If "No," attach explanation* .	8b		
9	Is the foundation claiming status as a private operating foundation within the meaning of section 4942(j)(3) or 4942(j)(5) for calendar year 2018 or the taxable year beginning in 2018? See the instructions for Part XIV If "Yes," complete Part XIV	9	Yes	
10	Did any persons become substantial contributors during the tax year? *If "Yes," attach a schedule listing their names and addresses*	10		No

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Part VII-A Statements Regarding Activities (continued)

11	At any time during the year, did the foundation, directly or indirectly, own a controlled entity within the meaning of section 512(b)(13)? If "Yes," attach schedule See instructions.	11		No
12	Did the foundation make a distribution to a donor advised fund over which the foundation or a disqualified person had advisory privileges? If "Yes," attach statement See instructions	12		No
13	Did the foundation comply with the public inspection requirements for its annual returns and exemption application?	13	Yes	

Website address ▶ WWW SCPIF ORG

14 The books are in care of ▶ THE FOUNDATION Telephone no ▶ (864) 757-2334

Located at ▶ PO BOX 1195 SIMPSONVILLE SC ZIP+4 ▶ 29681

15 Section 4947(a)(1) nonexempt charitable trusts filing Form 990-PF in lieu of **Form 1041** —check here ▶ ☐ and enter the amount of tax-exempt interest received or accrued during the year ▶ 15

16	At any time during calendar year 2018, did the foundation have an interest in or a signature or other authority over a bank, securities, or other financial account in a foreign country? See the instructions for exceptions and filing requirements for FinCEN Form 114 If "Yes", enter the name of the foreign country ▶	16	Yes	No

Part VII-B Statements Regarding Activities for Which Form 4720 May Be Required

	File Form 4720 if any item is checked in the "Yes" column, unless an exception applies.		Yes	No
1a	During the year did the foundation (either directly or indirectly)			
	(1) Engage in the sale or exchange, or leasing of property with a disqualified person? ☐ Yes ☑ No			
	(2) Borrow money from, lend money to, or otherwise extend credit to (or accept it from) a disqualified person? ☑ Yes ☐ No			
	(3) Furnish goods, services, or facilities to (or accept them from) a disqualified person? ☐ Yes ☑ No			
	(4) Pay compensation to, or pay or reimburse the expenses of, a disqualified person? ☐ Yes ☑ No			
	(5) Transfer any income or assets to a disqualified person (or make any of either available for the benefit or use of a disqualified person)? ☐ Yes ☑ No			
	(6) Agree to pay money or property to a government official? (**Exception.** Check "No" if the foundation agreed to make a grant to or to employ the official for a period after termination of government service, if terminating within 90 days). ☐ Yes ☑ No			
b	If any answer is "Yes" to 1a(1)–(6), did **any** of the acts fail to qualify under the exceptions described in Regulations section 53 4941(d)-3 or in a current notice regarding disaster assistance? See instructions	1b	Yes	
	Organizations relying on a current notice regarding disaster assistance check here ▶ ☐			
c	Did the foundation engage in a prior year in any of the acts described in 1a, other than excepted acts, that were not corrected before the first day of the tax year beginning in 2018?	1c	Yes	
2	Taxes on failure to distribute income (section 4942) (does not apply for years the foundation was a private operating foundation defined in section 4942(j)(3) or 4942(j)(5))			
a	At the end of tax year 2018, did the foundation have any undistributed income (lines 6d and 6e, Part XIII) for tax year(s) beginning before 2018? ☐ Yes ☑ No			
	If "Yes," list the years ▶ 20____ , 20____ , 20____ , 20____			
b	Are there any years listed in 2a for which the foundation is **not** applying the provisions of section 4942(a)(2) (relating to incorrect valuation of assets) to the year's undistributed income? (If applying section 4942(a)(2) to **all** years listed, answer "No" and attach statement—see instructions)	2b		
c	If the provisions of section 4942(a)(2) are being applied to **any** of the years listed in 2a, list the years here ▶ 20____ , 20____ , 20____ , 20____			
3a	Did the foundation hold more than a 2% direct or indirect interest in any business enterprise at any time during the year? ☐ Yes ☑ No			
b	If "Yes," did it have excess business holdings in 2018 as a result of **(1)** any purchase by the foundation or disqualified persons after May 26, 1969, **(2)** the lapse of the 5-year period (or longer period approved by the Commissioner under section 4943(c)(7)) to dispose of holdings acquired by gift or bequest, or **(3)** the lapse of the 10-, 15-, or 20-year first phase holding period? *(Use Schedule C, Form 4720, to determine if the foundation had excess business holdings in 2018).*	3b		
4a	Did the foundation invest during the year any amount in a manner that would jeopardize its charitable purposes?	4a		No
b	Did the foundation make any investment in a prior year (but after December 31, 1969) that could jeopardize its charitable purpose that had not been removed from jeopardy before the first day of the tax year beginning in 2018?	4b		No

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Part VII-B **Statements Regarding Activities for Which Form 4720 May Be Required** *(continued)*

				Yes	No
5a	During the year did the foundation pay or incur any amount to				
	(1) Carry on propaganda, or otherwise attempt to influence legislation (section 4945(e))?	☐ Yes	☑ No		
	(2) Influence the outcome of any specific public election (see section 4955), or to carry on, directly or indirectly, any voter registration drive?	☐ Yes	☑ No		
	(3) Provide a grant to an individual for travel, study, or other similar purposes?	☐ Yes	☑ No		
	(4) Provide a grant to an organization other than a charitable, etc , organization described in section 4945(d)(4)(A)? See instructions	☐ Yes	☑ No		
	(5) Provide for any purpose other than religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals?	☐ Yes	☑ No		
b	If any answer is "Yes" to 5a(1)–(5), did **any** of the transactions fail to qualify under the exceptions described in Regulations section 53 4945 or in a current notice regarding disaster assistance? See instructions			5b	
	Organizations relying on a current notice regarding disaster assistance check here ▶	☐			
c	If the answer is "Yes" to question 5a(4), does the foundation claim exemption from the tax because it maintained expenditure responsibility for the grant?	☐ Yes	☐ No		
	If "Yes," attach the statement required by Regulations section 53 4945–5(d)				
6a	Did the foundation, during the year, receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	☐ Yes	☑ No		
b	Did the foundation, during the year, pay premiums, directly or indirectly, on a personal benefit contract?			6b	No
	If "Yes" to 6b, file Form 8870				
7a	At any time during the tax year, was the foundation a party to a prohibited tax shelter transaction?	☐ Yes	☑ No		
b	If yes, did the foundation receive any proceeds or have any net income attributable to the transaction?			7b	
8	Is the foundation subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment during the year?	☐ Yes	☑ No		

Part VIII **Information About Officers, Directors, Trustees, Foundation Managers, Highly Paid Employees, and Contractors**

1 List all officers, directors, trustees, foundation managers and their compensation. See instructions

(a) Name and address	**(b)** Title, and average hours per week devoted to position	**(c)** Compensation **(If not paid, enter -0-)**	**(d)** Contributions to employee benefit plans and deferred compensation	**(e)** Expense account, other allowances
See Additional Data Table				

2 Compensation of five highest-paid employees (other than those included on line 1—see instructions). If none, enter "NONE."

(a) Name and address of each employee paid more than $50,000	**(b)** Title, and average hours per week devoted to position	**(c)** Compensation	**(d)** Contributions to employee benefit plans and deferred compensation	**(e)** Expense account, other allowances
NONE				

Total number of other employees paid over $50,000 ▶

Part VIII **Information About Officers, Directors, Trustees, Foundation Managers, Highly Paid Employees, and Contractors *(continued)***

3 Five highest-paid independent contractors for professional services (see instructions). If none, enter "NONE".

(a) Name and address of each person paid more than $50,000	(b) Type of service	(c) Compensation
THE CARPENTER LAW FIRM 819 E NORTH STREET GREENVILLE, SC 29616	LEGAL SERVICES	275,046

Total number of others receiving over $50,000 for professional services. ▶

Part IX-A **Summary of Direct Charitable Activities**

List the foundation's four largest direct charitable activities during the tax year Include relevant statistical information such as the number of organizations and other beneficiaries served, conferences convened, research papers produced, etc	Expenses
1 THE FOUNDATION CONDUCTS EDUCATIONAL AND OTHER ACTIVITIES AIMED AT PRESERVING AND ENHANCING GOOD GOVERNMENT IN SOUTH CAROLINA, ENSURES THAT THE PUBLIC AGENCIES AND BODIES WITHIN SOUTH CAROLINA ACT IN COMPLIANCE WITH THE CONSTITUTIONAL AND STATUTORY LAW APPLICABLE TO THEM, AND ENSURES THAT THE EXPENDITURES OF PUBLIC FUNDS IS ALL CASES CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW AND TO DO ALL OTHER THINGS CONSISTENT WITH THE FOREGOING SUBJECT TO THE FOUNDATION'S STATUS AS AN EXEMPT ORGANIZATION PURSUANT TO SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE	285,922
2	
3	
4	

Part IX-B **Summary of Program-Related Investments** (see instructions)

Describe the two largest program-related investments made by the foundation during the tax year on lines 1 and 2	Amount
1 N/A	
2	
All other program-related investments See instructions **3**	
Total. Add lines 1 through 3 ▶	

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Part X Minimum Investment Return (All domestic foundations must complete this part Foreign foundations,see instructions)

1	Fair market value of assets not used (or held for use) directly in carrying out charitable, etc , purposes		
a	Average monthly fair market value of securities	1a	0
b	Average of monthly cash balances	1b	63,508
c	Fair market value of all other assets (see instructions)	1c	78,980
d	**Total** (add lines 1a, b, and c)	1d	142,488
e	Reduction claimed for blockage or other factors reported on lines 1a and 1c (attach detailed explanation) 1e		
2	Acquisition indebtedness applicable to line 1 assets	2	
3	Subtract line 2 from line 1d	3	142,488
4	Cash deemed held for charitable activities Enter 1 1/2% of line 3 (for greater amount, see instructions)	4	2,137
5	**Net value of noncharitable-use assets.** Subtract line 4 from line 3 Enter here and on Part V, line 4	5	140,351
6	**Minimum investment return.** Enter 5% of line 5	6	7,018

Part XI Distributable Amount (see instructions) (Section 4942(j)(3) and (j)(5) private operating foundations and certain foreign organizations check here ▶ ☑ and do not complete this part)

1	Minimum investment return from Part X, line 6	1	
2a	Tax on investment income for 2018 from Part VI, line 5 2a		
b	Income tax for 2018 (This does not include the tax from Part VI) 2b		
c	Add lines 2a and 2b	2c	
3	Distributable amount before adjustments Subtract line 2c from line 1	3	
4	Recoveries of amounts treated as qualifying distributions	4	
5	Add lines 3 and 4	5	
6	Deduction from distributable amount (see instructions)	6	
7	**Distributable amount** as adjusted Subtract line 6 from line 5 Enter here and on Part XIII, line 1	7	

Part XII Qualifying Distributions (see instructions)

1	Amounts paid (including administrative expenses) to accomplish charitable, etc , purposes		
a	Expenses, contributions, gifts, etc —total from Part I, column (d), line 26	1a	285,922
b	Program-related investments—total from Part IX-B	1b	
2	Amounts paid to acquire assets used (or held for use) directly in carrying out charitable, etc , purposes	2	
3	Amounts set aside for specific charitable projects that satisfy the		
a	Suitability test (prior IRS approval required)	3a	
b	Cash distribution test (attach the required schedule)	3b	
4	**Qualifying distributions.** Add lines 1a through 3b Enter here and on Part V, line 8, and Part XIII, line 4	4	285,922
5	Foundations that qualify under section 4940(e) for the reduced rate of tax on net investment income Enter 1% of Part I, line 27b See instructions	5	1,298
6	**Adjusted qualifying distributions.** Subtract line 5 from line 4	6	284,624

Note: The amount on line 6 will be used in Part V, column (b), in subsequent years when calculating whether the foundation qualifies for the section 4940(e) reduction of tax in those years

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Part XIII Undistributed Income (see instructions)

	(a) Corpus	(b) Years prior to 2017	(c) 2017	(d) 2018
1 Distributable amount for 2018 from Part XI, line 7				
2 Undistributed income, if any, as of the end of 2018				
a Enter amount for 2017 only.				
b Total for prior years 20___, 20___, 20___				
3 Excess distributions carryover, if any, to 2018				
a From 2013.				
b From 2014.				
c From 2015.				
d From 2016.				
e From 2017.				
f **Total** of lines 3a through e.				
4 Qualifying distributions for 2018 from Part XII, line 4 ▶ $ 285,922				
a Applied to 2017, but not more than line 2a				
b Applied to undistributed income of prior years (Election required—see instructions).				
c Treated as distributions out of corpus (Election required—see instructions).				
d Applied to 2018 distributable amount.				
e Remaining amount distributed out of corpus	285,922			
5 Excess distributions carryover applied to 2018				
(If an amount appears in column (d), the same amount must be shown in column (a))				
6 **Enter the net total of each column as indicated below:**				
a Corpus Add lines 3f, 4c, and 4e Subtract line 5	285,922			
b Prior years' undistributed income Subtract line 4b from line 2b				
c Enter the amount of prior years' undistributed income for which a notice of deficiency has been issued, or on which the section 4942(a) tax has been previously assessed.				
d Subtract line 6c from line 6b Taxable amount —see instructions				
e Undistributed income for 2017 Subtract line 4a from line 2a Taxable amount—see instructions				
f Undistributed income for 2018 Subtract lines 4d and 5 from line 1 This amount must be distributed in 2019				
7 Amounts treated as distributions out of corpus to satisfy requirements imposed by section 170(b)(1)(F) or 4942(g)(3) (Election may be required - see instructions)				
8 Excess distributions carryover from 2013 not applied on line 5 or line 7 (see instructions) . . .				
9 **Excess distributions carryover to 2019.** Subtract lines 7 and 8 from line 6a				
10 Analysis of line 9				
a Excess from 2014. . . .				
b Excess from 2015. . . .				
c Excess from 2016. . . .				
d Excess from 2017. . . .				
e Excess from 2018. . . .				

Part XIV **Private Operating Foundations** (see instructions and Part VII-A, question 9)

1a If the foundation has received a ruling or determination letter that it is a private operating foundation, and the ruling is effective for 2018, enter the date of the ruling. . . . . ▶ 2006-03-16

b Check box to indicate whether the organization is a private operating foundation described in section ☑ 4942(j)(3) or ☐ 4942(j)(5)

	Tax year	Prior 3 years			(e) Total
	(a) 2018	(b) 2017	(c) 2016	(d) 2015	
2a Enter the lesser of the adjusted net income from Part I or the minimum investment return from Part X for each year listed	7,018	6,693	7,920	5,207	26,838
b 85% of line 2a	5,965	5,689	6,732	4,426	22,812
c Qualifying distributions from Part XII, line 4 for each year listed	285,922	202,481	152,739	135,203	776,345
d Amounts included in line 2c not used directly for active conduct of exempt activities			4,101	2,647	6,748
e Qualifying distributions made directly for active conduct of exempt activities Subtract line 2d from line 2c	285,922	202,481	148,638	132,556	769,597
3 Complete 3a, b, or c for the alternative test relied upon					
a "Assets" alternative test—enter					
(1) Value of all assets					
(2) Value of assets qualifying under section 4942(j)(3)(B)(i)					
b "Endowment" alternative test— enter 2/3 of minimum investment return shown in Part X, line 6 for each year listed	4,679	6,973	28,153	48,779	88,584
c "Support" alternative test—enter					
(1) Total support other than gross investment income (interest, dividends, rents, payments on securities loans (section 512(a)(5)), or royalties)					
(2) Support from general public and 5 or more exempt organizations as provided in section 4942(j)(3)(B)(iii)					
(3) Largest amount of support from an exempt organization					
(4) Gross investment income					

Part XV **Supplementary Information (Complete this part only if the foundation had $5,000 or more in assets at any time during the year—see instructions.)**

1 Information Regarding Foundation Managers:

a List any managers of the foundation who have contributed more than 2% of the total contributions received by the foundation before the close of any tax year (but only if they have contributed more than $5,000) (See section 507(d)(2))

WILLIAM LOWNDES III

b List any managers of the foundation who own 10% or more of the stock of a corporation (or an equally large portion of the ownership of a partnership or other entity) of which the foundation has a 10% or greater interest

2 Information Regarding Contribution, Grant, Gift, Loan, Scholarship, etc., Programs:

Check here ▶ ☑ if the foundation only makes contributions to preselected charitable organizations and does not accept unsolicited requests for funds If the foundation makes gifts, grants, etc to individuals or organizations under other conditions, complete items 2a, b, c, and d See instructions

a The name, address, and telephone number or email address of the person to whom applications should be addressed

b The form in which applications should be submitted and information and materials they should include

c Any submission deadlines

d Any restrictions or limitations on awards, such as by geographical areas, charitable fields, kinds of institutions, or other factors

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Part XV Supplementary Information (continued)

3 Grants and Contributions Paid During the Year or Approved for Future Payment

Recipient Name and address (home or business)	If recipient is an individual, show any relationship to any foundation manager or substantial contributor	Foundation status of recipient	Purpose of grant or contribution	Amount
a *Paid during the year*				
Total . . . . . ▶ **3a**				
b *Approved for future payment*				
Total . . . . . ▶ **3b**				

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Part XVI-A Analysis of Income-Producing Activities

Enter gross amounts unless otherwise indicated	Unrelated business income		Excluded by section 512, 513, or 514		(e) Related or exempt function income (See instructions)
	(a) Business code	(b) Amount	(c) Exclusion code	(d) Amount	
1 Program service revenue					
a					
b					
c					
d					
e					
f					
g Fees and contracts from government agencies					
2 Membership dues and assessments. . . .					
3 Interest on savings and temporary cash investments			14	3,507	
4 Dividends and interest from securities. . . .					
5 Net rental income or (loss) from real estate					
a Debt-financed property.					
b Not debt-financed property.			16	-3,081	
6 Net rental income or (loss) from personal property					
7 Other investment income.					
8 Gain or (loss) from sales of assets other than inventory			18	129,373	
9 Net income or (loss) from special events					
10 Gross profit or (loss) from sales of inventory					
11 Other revenue					
a ATTORNEY FEE REIMBURSEMENTS					525,001
b					
c					
d					
e					
12 Subtotal Add columns (b), (d), and (e). .				129,799	525,001
13 **Total.** Add line 12, columns (b), (d), and (e).				13	654,800

(See worksheet in line 13 instructions to verify calculations)

Part XVI-B Relationship of Activities to the Accomplishment of Exempt Purposes

Line No. ▼	Explain below how each activity for which income is reported in column (e) of Part XVI-A contributed importantly to the accomplishment of the foundation's exempt purposes (other than by providing funds for such purposes) (See instructions)
3	INTEREST AND DIVIDENDS THAT ARE RECEIVED AS INVESTMENT
3	INCOME ARE EXEMPT UNDER IRC 512
5B	RENT INCOME FROM NON DEBT FINANCED REAL ESTATE
5B	IS EXEMPT UNDER IRC 512
8	TAXPAYER SOLD INVESTMENTS OF VARIOUS PROPERTY SUCH GAIN
8	IS EXEMPT UNDER IRC 512
11B	TAXPAYER IS ENTITLED TO FEE REIMBURSEMENTS
11B	FOR COSTS OF SUITS FOR PUBLIC DISCLOSURE

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Part XVII **Information Regarding Transfers To and Transactions and Relationships With Noncharitable Exempt Organizations**

		Yes	No
1	Did the organization directly or indirectly engage in any of the following with any other organization described in section 501 (c) (other than section 501(c)(3) organizations) or in section 527, relating to political organizations?		
a	Transfers from the reporting foundation to a noncharitable exempt organization of		
	(1) Cash	1a(1)	No
	(2) Other assets	1a(2)	No
b	Other transactions		
	(1) Sales of assets to a noncharitable exempt organization	1b(1)	No
	(2) Purchases of assets from a noncharitable exempt organization	1b(2)	No
	(3) Rental of facilities, equipment, or other assets	1b(3)	No
	(4) Reimbursement arrangements	1b(4)	No
	(5) Loans or loan guarantees	1b(5)	No
	(6) Performance of services or membership or fundraising solicitations	1b(6)	No
c	Sharing of facilities, equipment, mailing lists, other assets, or paid employees	1c	No

d If the answer to any of the above is "Yes," complete the following schedule Column **(b)** should always show the fair market value of the goods, other assets, or services given by the reporting foundation If the foundation received less than fair market value in any transaction or sharing arrangement, show in column **(d)** the value of the goods, other assets, or services received

(a) Line No	**(b)** Amount involved	**(c)** Name of noncharitable exempt organization	**(d)** Description of transfers, transactions, and sharing arrangements

2a Is the foundation directly or indirectly affiliated with, or related to, one or more tax-exempt organizations described in section 501(c) (other than section 501(c)(3)) or in section 527? ☐ Yes ☑ No

b If "Yes," complete the following schedule

(a) Name of organization	**(b)** Type of organization	**(c)** Description of relationship

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge

******	2019-07-02	******
Signature of officer or trustee	Date	Title

May the IRS discuss this return with the preparer shown below (see instr)? ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's Signature	Date	Check if self-employed ▶ ☐	PTIN
PETER C TIFFANY		2019-07-02		P00037053

Firm's name ▶ BRADSHAW GORDON & CLINKSCALES LLC — Firm's EIN ▶57-1060705

Firm's address ▶ 630 E WASHINGTON ST STE B GREENVILLE, SC 296012963 — Phone no (864) 233-0590

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Form 990PF Part VIII Line 1 - List all officers, directors, trustees, foundation managers and their compensation

(a) Name and address	Title, and average hours per week **(b)** devoted to position	**(c)** Compensation **(If not paid, enter -0-)**	**(d)** Contributions to employee benefit plans and deferred compensation	Expense account, **(e)** other allowances
LAIRD MINOR PO BOX 25999 GREENVILLE, SC 29616	PRESIDENT/TR 000 00	0	0	0
GREGORY ENGLISH ESQ PO BOX 25999 GREENVILLE, SC 29616	SECRETARY/TR 000 00	0	0	0
STACY M SHEA PO BOX 25999 GREENVILLE, SC 29616	DIRECTOR 000 00	0	0	0
DR EVAN K DUKE PO BOX 25999 GREENVILLE, SC 29616	DIRECTOR 000 00	0	0	0
ROBERT K TAYLOR III PO BOX 25999 GREENVILLE, SC 29616	DIRECTOR 000 00	0	0	0

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TY 2018 Accounting Fees Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Category	Amount	Net Investment Income	Adjusted Net Income	Disbursements for Charitable Purposes
INDIRECT ACCOUNTING FEES	2,700			2,700

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TY 2018 Explanation of Non-Filing with Attorney General Statement

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Statement:

SC ATTORNEY GENERAL AT THIS TIME DOES NOT REQUIRE OR WANT FORMS 990-PF FILED WITH ITS OFFICE

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TY 2018 Investments - Other Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Investments Other Schedule 2

Category/ Item	Listed at Cost or FMV	Book Value	End of Year Fair Market Value
INVESTMENT IN CONNECTOR HOLDINGS	AT COST		

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TY 2018 Legal Fees Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Category	Amount	Net Investment Income	Adjusted Net Income	Disbursements for Charitable Purposes
INDIRECT LEGAL FEES	283,211			283,211

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TY 2018 Loans from Officers Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Item No.	1
Lender's Name	LOAN FROM SLOAN
Lender's Title	
Original Amount of Loan	30000
Balance Due	11400
Date of Note	
Maturity Date	
Repayment Terms	ON DEMAND
Interest Rate	
Security Provided by Borrower	UNSECURED
Purpose of Loan	FINANCE OPERATIONS OF FOUNDATION
Description of Lender Consideration	NONE
Consideration FMV	

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Item No.	2
Lender's Name	2-14-18 PROMISSORY NOTE FROM SLOAN
Lender's Title	
Original Amount of Loan	30000
Balance Due	30000
Date of Note	2018-02
Maturity Date	2019-02
Repayment Terms	
Interest Rate	
Security Provided by Borrower	UNSECURED
Purpose of Loan	FINANCE OPERATIONS OF FOUNDATION
Description of Lender Consideration	NONE
Consideration FMV	

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Item No.	3
Lender's Name	2-14-18 PROMISSORY NOTE FROM SLOAN
Lender's Title	
Original Amount of Loan	60000
Balance Due	60000
Date of Note	2018-05
Maturity Date	2019-05
Repayment Terms	
Interest Rate	
Security Provided by Borrower	UNSECURED
Purpose of Loan	FINANCE OPERATIONS OF FOUNDATION
Description of Lender Consideration	NONE
Consideration FMV	

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TY 2018 Other Decreases Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Description	Amount
OTHER BASIS ADJUSTMENTS	5,800

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TY 2018 Other Expenses Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Other Expenses Schedule

Description	Revenue and Expenses per Books	Net Investment Income	Adjusted Net Income	Disbursements for Charitable Purposes
FROM PASSTHROUGH K-1				
OTHER EXPENSES	3,081	3,081	3,081	
EXPENSES				
BANK CHARGES	11			11

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TY 2018 Other Income Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Other Income Schedule

Description	Revenue And Expenses Per Books	Net Investment Income	Adjusted Net Income
ATTORNEY FEE REIMBURSEMENTS	525,001		525,001

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TY 2018 Taxes Schedule

Name: SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

EIN: 20-2475247

Category	Amount	Net Investment Income	Adjusted Net Income	Disbursements for Charitable Purposes
EXCISES TAX	521		521	

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Schedule B (Form 990, 990-EZ, or 990-PF)
Department of the Treasury
Internal Revenue Service

Schedule of Contributors

▶ Attach to Form 990, 990-EZ, or 990-PF
▶ Go to *www.irs.gov/Form990* for the latest information

OMB No 1545-0047

2018

Name of the organization
SOUTH CAROLINA PUBLIC INTEREST FOUNDATION

Employer identification number
20-2475247

Organization type (check one)

Filers of:	Section:
Form 990 or 990-EZ	☐ 501(c)( ) (enter number) organization
	☐ 4947(a)(1) nonexempt charitable trust **not** treated as a private foundation
	☐ 527 political organization
Form 990-PF	☑ 501(c)(3) exempt private foundation
	☐ 4947(a)(1) nonexempt charitable trust treated as a private foundation
	☐ 501(c)(3) taxable private foundation

Check if your organization is covered by the **General Rule** or a **Special Rule.**
Note. Only a section 501(c)(7), (8), or (10) organization can check boxes for both the General Rule and a Special Rule See instructions

General Rule

☑ For an organization filing Form 990, 990-EZ, or 990-PF that received, during the year, contributions totaling $5,000 or more (in money or other property) from any one contributor Complete Parts I and II See instructions for determining a contributor's total contributions

Special Rules

☐ For an organization described in section 501(c)(3) filing Form 990 or 990-EZ that met the 33 1/3% support test of the regulations under sections 509(a)(1) and 170(b)(1)(A)(vi), that checked Schedule A (Form 990 or 990-EZ), Part II, line 13, 16a, or 16b, and that received from any one contributor, during the year, total contributions of the greater of **(1)** $5,000 or **(2)** 2% of the amount on (i) Form 990, Part VIII, line 1h, or (ii) Form 990-EZ, line 1 Complete Parts I and II

☐ For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, total contributions of more than $1,000 *exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals Complete Parts I, II, and III

☐ For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, contributions *exclusively* for religious, charitable, etc , purposes, but no such contributions totaled more than $1,000 If this box is checked, enter here the total contributions that were received during the year for an *exclusively* religious, charitable, etc , purpose Don't complete any of the parts unless the **General Rule** applies to this organization because it received *nonexclusively* religious, charitable, etc , contributions totaling $5,000 or more during the year . . . . . ▶ $ _____

Caution. An organization that isn't covered by the General Rule and/or the Special Rules doesn't file Schedule B (Form 990, 990-EZ, or 990-PF), but it **must** answer "No" on Part IV, line 2, of its Form 990, or check the box on line H of its Form 990-EZ or on its Form 990PF, Part I, line 2, to certify that it doesn't meet the filing requirements of Schedule B (Form 990, 990-EZ, or 990-PF)

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Name of organization	Employer identification number
SOUTH CAROLINA PUBLIC INTEREST FOUNDATION	20-2475247

Part I **Contributors** (See instructions) Use duplicate copies of Part I if additional space is needed

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
1	JOE TAYLOR 146 STATE STREET WEST COLUMBIA, SC 29169	$ 32,489	☑ Person ☐ Payroll ☐ Noncash (Complete Part II for noncash contributions)
-		$	☐ Person ☐ Payroll ☐ Noncash (Complete Part II for noncash contributions)
-		$	☐ Person ☐ Payroll ☐ Noncash (Complete Part II for noncash contributions)
-		$	☐ Person ☐ Payroll ☐ Noncash (Complete Part II for noncash contributions)
-		$	☐ Person ☐ Payroll ☐ Noncash (Complete Part II for noncash contributions)
-		$	☐ Person ☐ Payroll ☐ Noncash (Complete Part II for noncash contributions)

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Name of organization	Employer identification number
SOUTH CAROLINA PUBLIC INTEREST FOUNDATION	20-2475247

Part II Noncash Property

(See instructions) Use duplicate copies of Part II if additional space is needed

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (See instructions)	(d) Date received
		$	
(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (See instructions)	(d) Date received
		$	
(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (See instructions)	(d) Date received
		$	
(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (See instructions)	(d) Date received
		$	
(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (See instructions)	(d) Date received
		$	
(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (See instructions)	(d) Date received
		$	

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Name of organization	Employer identification number
SOUTH CAROLINA PUBLIC INTEREST FOUNDATION	20-2475247

Part III ***Exclusively*** **religious, charitable, etc., contributions to organizations described in section 501(c)(7), (8), or (10) that total more than $1,000 for the year from any one contributor. Complete columns (a) through (e) and the following line entry. For organizations completing Part III, enter the total of *exclusively* religious, charitable, etc., contributions of $1,000 or less for the year. (Enter this information once. See instructions.) ▶ $** _____

Use duplicate copies of Part III if additional space is needed

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP 4	Relationship of transferor to transferee

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EXHIBIT 9

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ALAN WILSON
ATTORNEY GENERAL

September 1, 2020

The Honorable Henry McMaster
Governor
State House
1100 Gervais Street
Columbia, South Carolina 29201

Dear Governor McMaster:

I received your correspondence dated August 30, 2020, regarding the historic Settlement Agreement reached between the State of South Carolina and the United States Department of Energy (DOE). This is a settlement that the Trump Administration, members of our Federal delegation and our office believes is not only equally beneficial to all parties involved, but represents a grand slam home run for the State of South Carolina.

In your letter, you raise two concerns. First, you were concerned that this Settlement Agreement does not provide sufficient assurances that DOE will remove the plutonium from our state in a timely manner. I will refer to this as the "15-year grace period." Second, you take issue with the amount of attorneys' fees awarded to outside counsel. I will address both concerns but, before I do, I feel compelled to share my perspective on the timing of your letter that I received via email two hours before the press conference.

Your letter stated that you did not receive a copy of the Settlement Agreement until late last week after I had already signed it. You also wrote that after reading the Settlement Agreement and reviewing answers to questions provided by our outside counsel you were compelled to raise these concerns with me. I appreciate your candor but feel it is important to provide another point of view.

As you know, the state's negotiations with DOE on the terms of the Settlement Agreement began to come together in early July. Since that time, you and your staff have been briefed several times on its substantive terms. This includes a full briefing I provided to both you and Senator Lindsey Graham in the presence of one of our attorneys on August 12.

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

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On Friday, August 28, I informed you that United States Department of Justice had signed off on the Settlement Agreement within one hour of Attorney General Barr informing me that the deal was complete. I then asked if you wanted me to set up a meeting with the Secretary of Energy when he arrived in town to discuss this historic agreement and you declined to meet with us. It was not until the night before the announcement that you called to voice your concerns with me about the Settlement Agreement.

I respect that you have criticisms of the Settlement Agreement. However, at no time between early July when I first notified you about the progress of the settlement negotiations and Sunday, August 30, the night before our announcement, did you or your office provide my office with any alternative solutions to a litigation resolution. You were adamant about the removal of plutonium but offered no solution on how to do it.

I will now address your concern about the 15-year grace period for plutonium removal under the Settlement Agreement. Our office was working hard to find a workable solution to ending what was turning into a long and expensive legal battle with the United States Government. We were successful in litigating the removal of 1-metric ton of plutonium from SRS as well as preventing that plutonium from coming back to South Carolina from Nevada. However, the Court of Federal Claims ruled against the state, which we appealed, and a second adverse ruling at the appellate level would have resulted in hundreds of millions of dollars lost to the state.

When I met with DOE Secretary Dan Brouillette he expressed to me a strong desire to find a workable solution that would allow DOE to focus solely on plutonium removal and disposal without having to fight South Carolina in court for the next decade. I was looking for a workable solution that would end years of litigation, bring over half a billion dollars to the state, and strengthen South Carolina's legal position if a future Administration's DOE failed to meet its obligations under the Agreement. I accomplished all three.

You also state in your letter that you are "not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner." You then state in the very next paragraph that "President Trump and his Administration have demonstrated their commitment to removing the surplus plutonium." It is nonsensical to assert in one paragraph that you do not trust that the federal government will remove the plutonium in a timely manner and in the next paragraph assert that you do trust that the federal government will remove the plutonium.

Regardless of which contradictory statement you truly believe, South Carolina ultimately wins under this Settlement Agreement. If DOE does not remove plutonium in a timely manner then the state receives billions of dollars and retains the right sue on the removal provision. If DOE does remove plutonium in a timely manner it is because I have provided them with the proper motivation by preserving the right for payments and legal action for removal.

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I will now address your concerns regarding the attorneys' fees. First, I agree that the fees are high but that is a byproduct of receiving the largest settlement in our state's history. Second, the amount of the attorneys' fees is based on a similar fee schedule in a model contract you used while serving as Attorney General. Third, the contract was signed in 2016 long before we believed the settlement was going to be this high (meaning recovery of 100% of the monies owed). Fourth, you state in your letter that you cannot "endorse the payment of $75 million in attorney's fees under the circumstances." As the state's chief legal officer, I cannot endorse breaking a legally binding contract entered in good faith four years ago. Fifth, if I were to back out of this Settlement Agreement as you suggest, the attorneys' fees only go higher as more litigation ensues. Sixth, the attorneys will receive no additional fees should the state recover billions of dollars more from DOE's failure to comply with the Agreement. Finally, I expect to be criticized for this agreement, but leaders have to be willing to make tough decisions regardless of the political consequences.

While I appreciate your caution, I do not see how South Carolina reasonably could have walked away from this opportunity. To paraphrase President Reagan, we have done our absolute best to trust and verify. I have no regrets.

To be clear, I appreciate the effort you demonstrated early on in this legal battle. Showing a unified front was important to our success as it demonstrated to the federal government our resolve as state leaders. Make no mistake that it was the past, present, and threat of future litigation that brought them to the negotiation table and yielded our state over half a billion dollars and a firm contractually binding commitment on removal.

Sincerely,

Alan Wilson

Alan Wilson

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No. 2020-CP-40-04603 **Expert Affidavit of Nathan M. Crystal In Support of Defendant, Willoughby & Hoefer, PA's, Response to Plaintiffs' Claim of Unreasonable Attorney Fees**

The undersigned, Nathan M. Crystal, provides the following expert affidavit under oath:

1. My qualifications to give expert testimony include the following: I am Class of 1969 Professor of Professional Responsibility and Contract Law Emeritus at the University of South Carolina School of Law and Adjunct Professor of Professional Responsibility at NYU School of Law. I have taught professional responsibility and related subjects for almost 40 years. I am the author or coauthor of three books on Professional Responsibility and Legal Ethics, along with numerous articles in this field. One of my books is THE ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (2020 ed. forthcoming), a comprehensive treatment of professional ethics in this state. I write a bimonthly column on legal ethics for the *South Carolina Lawyer* entitled "Ethics Watch." I was a member of the South Carolina Bar's Ethics Advisory Committee for more than 15 years and have authored a number of opinions that were adopted by the Committee on issues of legal ethics. I was appointed by the President of the South Carolina Bar as chair of the committee from 2002-2003. I also represented the South

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Carolina Bar in its petition to the Supreme Court in 1990 to adopt the South Carolina Rules of Professional Conduct ("SCRPC"). I have delivered more than 100 speeches, presentations, and continuing legal education programs to law firms, bar organizations, and other groups, both in South Carolina and nationally. I served as a member of the New York City Bar Ethics Advisory Committee. I have appeared as an expert witness by way of testimony, deposition, or affidavit in hundreds of cases involving questions of professional responsibility and legal ethics, including issues of reasonableness of legal fees generally and specifically with regard to major litigation matters. I have served as an ethics consultant to and expert witness for lawyers and law firms in South Carolina and nationally for more than 40 years. I am one of the founding members of Crystal & Giannoni-Crystal, LLC - a law firm with offices in Charleston, New York City, Washington, DC, and Savannah – whose core practice is ethics and professional responsibility (together with international law). In 2014 I was recognized by the *South Carolina Lawyers Weekly* for one of its "Leadership in Law" awards. I have been selected by my peers for inclusion in *The Best Lawyers in America*© since 2015 in the fields of Ethics and Professional Responsibility Law; since 2018 I have also been chosen as the "Lawyer of the Year" in Charleston, South Carolina in these fields. My complete CV is attached.

I. Materials Reviewed

2. In preparing this opinion I have reviewed the following materials:

Plaintiffs' Amended Summons and Complaints with attached Exhibits 1-19 (totaling more than 180 pages);

Plaintiffs' Motion for TRO and Temporary Injunction;

Ex Parte TRO;

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Petition for Supersedeas by Willoughby & Hoefer, PA with attachments totaling over 400 pages;

These filings include among other significant documents the Litigation Retention Agreement and the Amended Litigation Retention Agreement between Attorney General Alan Wilson and the law firm of Willoughby & Hoefer, P.A.("W&H") (along with certain other designated law firms);

The Settlement Agreement between the State of South Carolina and the United States dated August 28, 2020.

I have also obtained additional information from W&H related to my analysis of the reasonableness of the fees received by W&H.

3. In preparing this opinion I have considered the South Carolina Rules of Professional Conduct ("SCRPC"), South Carolina statutes, case law in South Carolina and generally, and legal literature. These are the types of materials customarily relied on by experts in legal ethics and professional responsibility. I reserve the right to modify, amend, and/or supplement this opinion. I hold the opinions set forth in this affidavit to a reasonable degree of professional certainty.

II. Factual Basis of Opinions

The factual basis of my opinions is set forth below as part of each opinion.

III. Summary of Opinions

4. I have been asked to render an opinion on the reasonableness of fees paid to the Law Firm of Special Counsel[1] in the amount of $75 million for the MOX Litigation, which

[1] The MOX Litigation involved four cases. W&H served as lead counsel in all four cases, with Davidson, Wren, and DeMasters, PA, serving as counsel in two cases. The division of fees and expenses for the shared cases is

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resulted in a monetary settlement and payment to the State of South Carolina in the amount of $600 (including attorney fees), nonmonetary relief requiring DOE to remove 9.5 metric tons of plutonium currently stored at the Savannah River Site ("SRS"), and possible future monetary relief of over $1.5 billion if the DOE fails to comply with its removal obligations under the Settlement Agreement. A copy of the Settlement Agreement is attached as Exhibit A.

5. In my opinion these fees are reasonable for two reasons: First, a contract freely entered into between the State's duly elected highest legal official, the Attorney General, and Special Counsel pursuant to standard terms that the Attorney General uses for other special counsel contracts is enforceable absent some defense to an ordinary commercial contract, such as fraud. Second, in fee shifting cases, usually involving statutes providing for recovery of attorney fees, courts must determine a reasonable attorney fee applying a number of factors. However, this case is analogous to a fee spreading ("common fund") case, rather than fee shifting case, because the recovery was for the benefit of the citizens of South Carolina. Under a common fund analysis, the fees paid to Special Counsel amounting to 12.5% of the immediate monetary settlement with the United States disregarding the value of any nonmonetary and future monetary benefits to the State are reasonable. The percentage is much lower if a reasonable value is assigned to the nonmonetary provisions of the settlement.

I. <u>A contract freely entered into between the State's duly elected highest legal official, the Attorney General, and Special Counsel pursuant to standard terms that the Attorney General uses for other special counsel contracts is enforceable absent some defense to an ordinary commercial contract, such as fraud.</u>

92.5%/7.5%. I am informed that this division is reflective of the proportion of services provided by each firm in the cases involving joint representation.

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6. Lawyers and clients are generally free to contract for the fee the client is to pay. See Restatement (Third) of the Law Governing Lawyers §§18 and 38. That is particularly true when the client is a sophisticated party. In this case the client, the Attorney General of South Carolina, is a constitutional officer (See S.C. Constitution Art. VI, section 7) who serves as the State's top legal official with responsibility for a wide range of legal matters. The Attorney General is not only a sophisticated client but is a lawyer himself with a staff of lawyers working for him.

7. The Attorney General has established a Special Counsel Program. The Attorney General provides the public policy justification for this program on its website:

> The Attorney General often retains private counsel for matters that require specialized expertise or involve an extensive commitment of financial resources and personnel. By retaining private counsel, the Attorney General is able to pursue effective enforcement of state statutes in large, important cases that the Attorney General's Office itself would otherwise be unable to pursue.

Both of these factors – expertise and extensive commitment of financial resources and personnel – were present when the Attorney General hired Special Counsel in 2016 to represent the State against the DOE and the United States.

8. Special Counsel have extensive experience in handling complex civil cases, but what sets them apart from other firms with regard to this litigation is that they had experience in litigation against the DOE with regard to the Savannah River Site. In 2014, DOE (through the National Nuclear Security Administration) was seeking to place the MOX Facility into "cold standby" status, which would have effectively terminated the MOX project. At the time, then-Governor Haley, asked the Attorney General to explore any legal avenues the State may have to address the situation and avoid the loss of hundreds of jobs to the State. After being briefed on a legal strategy to achieve that result, the State retained Special Counsel to represent it. Speed was

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important because the matter involved political as well as legal issues. Special Counsel filed a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14. On April 30, 2014, DOE reversed its decision and directed the contractor to continue the MOX Facility construction maintaining the status quo and avoiding a loss of a significant number of jobs.

9. Litigation against the DOE (and subsequently directly against the United States in the Federal Court of Claims and against the State of Nevada in federal district court and before the 9th Circuit) requires substantial financial and personnel commitments, which Special Counsel were willing to undertake. With regard to legal fees, Special Counsel took on the MOX Litigation on a contingent fee basis. There was a significant risk of no recovery in which Special Counsel would not have received any compensation or of a nonmonetary recovery in which Special Counsel's fees would have been capped at less than $500,000. (See Amended MOX Litigation Retention Agreement par. 11.) With regard to expenses, Special Counsel were obligated to advance all expenses repayment of which would be made only from recovered funds. (See MOX Litigation Retention Agreement Art. V.)

> Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

10. The Attorney General's office is fully transparent with regard to its contingent fee contracts, which are posted on its website. This posting included the original and amended MOX Litigation Agreements. (See http://www.scag.gov/litigation-retention-agreements.) The terms of the Litigation Agreements between the Attorney General and Special Counsel with

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regard to the MOX Litigation – including the percentages for legal fees -- are substantially identical to the terms and rates of agreements with other counsel. Thus, it is fair to conclude that the fees being paid to Special Counsel in this case reflect market rates.[2]

11. Plaintiffs rely on *Gertzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006) to support their claim that the fees paid to Special Counsel were unreasonable. (Plaintiffs' Complaint ¶35.) However, *Gertzen* involved a claim by a party to the engagement with the lawyer, the client's mother who signed the agreement and paid her son's legal fees, that the fees were unreasonable. In this case the client, the Attorney General, established the fee schedule and fully approves of the payment of the fees. If SCPIF has standing to claim that the fees paid to Special Counsel were unreasonable, a third party, not a party to the contract, has the power to override the decision of the client who is a party to the contract about the reasonableness of the fees. Moreover, the client/party in this case is not an ordinary client but a lawyer who is a constitutional officer duly elected as the State's top legal official. In addition, the Rules of Professional Conduct state in the Scope section that the Rules are not a basis of civil liability. Therefore, to the extent that the Plaintiffs rely on SCRPC 1.5 as the basis of their claim, they are using the rules as a basis of civil liability, contrary to the intention of the rules:

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. . . . The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Scope ¶7.

[2] In its filings Plaintiffs object to the reasonableness of additional fees paid by the Attorney General under the Amended Retention Agreement. (Plaintiffs' complaint ¶¶51-59). However, the nature of the services and the rates paid to Special Counsel under the Amended Retention Agreement are the same as the types of services and rates that the Attorney General has agreed to with other special counsel. (See http://www.scag.gov/litigation-retention-agreements.)

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12. If Plaintiffs are dissatisfied with the fee structure established by the Attorney General, they have options available to them other than the judicial process. They can write to the Attorney General giving the reasons why they think the AG's fee schedule is unreasonable and suggesting modifications. In addition, they may vote against the reelection of the current Attorney General should he run again, but they do not have the right to assume the powers of the Attorney General to manage the legal affairs of the State.

13. Plaintiffs complain that the difficulty of the litigation and the results obtained do not justify the fees paid to Special Counsel. (Plaintiffs' Complaint ¶¶36-47.) In particular, Plaintiffs allege that the Settlement was a "political resolution brokered by elected leaders, including Governor McMaster and Senator Graham." (Plaintiffs' Complaint ¶46). The only evidence that Plaintiffs submit to support this claim is a letter from Governor McMaster. In the letter Governor McMaster focuses on the issue of plutonium removal without making any mention of the $600 million recovery to the State. He does not claim that the matter was resolved politically. Instead, he refers to the zealous advocacy of his office and coordination with the congressional delegation that in "no small part" contributed to the Government's attention to plutonium removal. Further, he recognizes that the Attorney General needed to retain Special Counsel and that the matter was complex and time consuming. In addition, the hiring of Special Counsel in 2014 resulted because political efforts to deal with plutonium at the SRS had failed, and Governor Haley wrote to the Attorney General requesting that he explore legal avenues to protect the State's interest. Moreover, even if there was political contribution to the Settlement, the litigation efforts of Special Counsel created the climate conducive for settlement. Finally, regardless of the causes of the settlement, the Retention Agreement applies

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to all settlements, including this one. The agreement does not have a "politically brokered" exception or any other exception.

14. Plaintiffs argue that the Litigation Retention Agreement provides that "[w]hen possible" fees and costs shall be approved by a court of competent jurisdiction. (Plaintiffs' Complaint ¶¶47-47.) The fees and costs awarded under the Agreement and the amended Agreement came from various proceedings. No one court would have had jurisdiction to determine those fees and costs. The final proceeding before the Federal Court of Claims was dismissed by settlement, as the case was pending on appeal in the Court of Appeals for the Federal Circuit. The "Agreement to Voluntary Dismissal of Appeal" jointly filed among the Department of Justice, the Attorney General of South Carolina, and Special Counsel makes clear that the settlement amount includes the attorneys' fees "which are reimbursed and awarded from payment of the settlement amount." For a matter that the Attorney General pursued through the services of Special Counsel under his Litigation Retention Agreement and thereafter agreed to settle, no further approval of the fees is required other than for the Attorney General to determine the appropriate calculation of the fees due pursuant to the contract and based upon the results achieved.

15. Plaintiffs complain that the Amended Litigation Agreement provides unreasonable compensation for collateral litigation and appellate work. (Plaintiffs' Complaint ¶¶51-60.) However, a comparison of the Amended Agreement between the Attorney General and Special Counsel with the Litigation Agreements in other cases shows that the collateral litigation fee provision in this case were equal to or less than the collateral agreements in other cases. In other words, they were at market rates. Moreover, the reasonableness of the fees for

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these services is a matter of contract for the Attorney General to decide, not for judicial determination.

16. Plaintiffs also contend that the citizens of South Carolina have standing as third party beneficiaries of the agreement between General Wilson and Special Counsel to claim that the fees paid to Special Counsel are unreasonable. (Plaintiffs' Complaint ¶61.) However, to qualify as a third party beneficiary a person must show that the parties to the agreement intended to confer a "direct" benefit on the citizens of South Carolina. All contracts are subject to the "reasonableness" principle of interpretation. Under this principle, the more reasonable interpretation of an agreement should be chosen over an unreasonable or less reasonable interpretation. See, e.g., *Mishoe v. Gen. Motors Acceptance Corp*., 234 S.C. 182, 189, 107 S.E.2d 43, 47 (1958). In this case it would be unreasonable to conclude that the United States and the Attorney General of South Carolina by entering into the Settlement Agreement intended to confer on all the citizens of South Carolina the right to sue either of them for violation of the terms of the agreement. There is no evidence either in the language of either the Settlement Agreement or the Litigation Retention Agreements or otherwise to show that the parties to those agreements intended to bestow a direct benefit on the citizens of the State. In the absence of such evidence the citizens of South Carolina are properly treated as incidental rather than third party beneficiaries of the Litigation Retention Agreements. See *Helms Realty, Inc. v. Gibson-Wall Co*., 363 S.C. 334, 340,611 S.E.2d 485, 488 (2005).

17. Litigation Retention Agreements between the Attorney General and Special Counsel are valid contracts between sophisticated parties on standard terms published by the Attorney General. Special Counsel took substantial risks in entering into these contracts. After the fact, attorney fees of $75 million may sound like a lot of money, but that can sometimes be

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the case with successful contingent fee contracts. Public Interest groups do not complain about the many contingent fee contracts in which there is no recovery or in which the recovery is not even close to the value of the time devoted by counsel. For the reasons set forth above, in my opinion these contracts should be enforced as written.

II. In fee shifting cases, usually involving statutes providing for recovery of attorney fees, courts must determine a reasonable attorney fee applying a number of factors. However, this case is analogous to a fee spreading ("common fund") case, rather than fee shifting case, because the recovery was for the benefit of the citizens of South Carolina. Under a common fund analysis, the fees paid to Special Counsel amounting to 12.5% of the immediate monetary settlement with the United States disregarding the value of any nonmonetary and future monetary benefits to the State are reasonable. The percentage is even lower if a reasonable value is assigned to the nonmonetary provisions of the settlement.

18. Under the "American Rule" regarding recovery of attorney fees, which is recognized in South Carolina, parties to a lawsuit generally bear the responsibility for paying their own attorney fees. See *Layman v. State of South Carolina,* 376 S.C. 434, 658 S.E.2d 320 (2008). The American Rule is subject to a number of exceptions, the two most frequently applied are the "contract" and the "statutory" exceptions. Under these exceptions a prevailing party may recover reasonable attorney fees from the opposing party if the contract or statute that is the basis of the claim so provides. Such cases are often referred to as "fee shifting" matters because the prevailing party is able to shift the liability for its fees, subject to the requirement of reasonableness, to the other party.

19. For many year courts have also recognized an equitable exception to the American Rule, the "common benefit fund" or "common fund" exception. South Carolina recognizes this exception. The State Supreme Court described the exception as follows:

> Another exception to the American Rule recognized by this Court is the award of attorneys' fees pursuant to the common fund doctrine. The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorneys' fees to a party who, at his own expense, successfully maintains a suit for the creation,

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> recovery, preservation, or increase of a common fund or common property. *Petition of Crum Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941). Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved. *Id.* The justification for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* at 531-32, 14 S.E.2d at 23. *Layman v. State of South Carolina*, 376 S.C. at 452, 658 S.E.2d at 330.

20. A fundamental difference exists between fee shifting cases and common fund cases. In fee shifting cases the determination of attorney fees involves several steps. The court must apply the language of the statute under which fees are sought. The statute may authorize but not require an award of attorney fees and expenses. See *S.C. DOT v. Revels*, 411 S.C. 1, 766 S.E.2d 700 (2014). If the court decides to award fees or if the statute requires an award of fees, then the court must determine a reasonable fee. Any fee contract between the party seeking recovery of fees and its counsel is relevant but not determinative because the issue is one of fee shifting not payment of fees by client to lawyer. *Id.* Courts have wide discretion in determining reasonableness in fee shifting cases. The court may make a reasonableness determination using the common law factors established by the South Carolina Supreme Court for fee shifting cases. In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the Court identified six factors for reasonableness of fees: (1) the nature, extent and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results; and (6) customary legal fees for similar services. Absent statutory or judicial guidance a court may make a "lodestar" computation multiplying the number of hours devoted by attorneys and staff to the matter by the hourly rates for each provider. (This step has a reasonableness component because the court must determine a reasonable hourly rate for each provider and must review the time devoted by a provider to the matter for reasonableness). The

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court could then adjust the lodestar computation based on the reasonableness factors, typically upward by a multiplier. *Layman v. State of South Carolina*, supra is a good example of the application of the fee shifting approach using a lodestar computation with a multiplier. In that case the court adjusted the lodestar computation by a multiplier of 1.25.

21. By contrast in common fund cases, attorney fees are typically decided based on a percentage of the common fund. In *Layman* the court stated:

> When awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's "success." These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the "percentage-of-the-recovery" approach. See, e.g., *Edmonds v. United States*, 658 F. Supp. 1126, 1144 (D.S.C. 1987) (expressing a preference for a percentage-of-the-recovery method when awarding attorneys' fees from a common fund). *Layman v. State of South Carolina*, 376 S.C. at 452, 658 S.E.2d at 330.

22. In my opinion this matter is analogous[3] to a "common fund" matter where attorney fees are determined under the "percentage-of-the-recovery" method. I have several reasons for this opinion. First, this is not a fee shifting matter because there is no statute or contract that provides for recovery of attorney fees. Second, the efforts of Special Counsel led to the creation of a fund of $600 million. Special Counsel also obtained nonmonetary benefits for the State as well. Third, the fund is for the common benefit of a large number of people, the entire State of South Carolina. I understand that there is litigation pending seeking to direct the funds received from the settlement with the United States to local communities most directly affected by the Savannah River Site rather than into the State's general fund. In either case the

[3] I use the word "analogous" because in my opinion the proper analysis in this case is whether the Litigation Retention Agreements between the Attorney General and Special Counsel are enforceable contracts. In my opinion they are for the reasons set forth in Part I. However, if a court decides that a reasonableness inquiry is called for, in my opinion this case is much closer to a common fund case, where the issue is the proper percentage to apply to determine legal fees than to a fee shifting case where the inquiry focuses on the common law factors of reasonableness set forth in *Jackson v. Speed.*

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funds will be for the common benefit of the citizens of the State generally or the citizens of the affected local communities. Fourth, the Plaintiffs themselves seem to recognize this case as similar to a common fund case because they allege that fee agreements were "on behalf of the Citizens of South Carolina." (Plaintiffs' Complaint ¶61.) The Settlement Agreement is consistent with treatment of this matter as a common fund case because it does not provide for fee shifting.

23. If this matter is treated as analogous to a common fund matter it becomes necessary to determine the appropriate percentage to be used. In my opinion the appropriate percentages to be used are the ones agreed to by the parties. I have several reasons for this conclusion.

24. First, the rates in the Litigation Retention Agreement in this case were set by the Attorney General, the chief legal officer of the State. These are the same rates that he sets for other special counsel retention agreements as published on the Attorney General's Website. They therefore represent market rates resulting from arms' length negotiation between the AG and Special Counsel. It may be that these rates are nonnegotiable, but if they are non-negotiable no firm has to accept them. If the AG was unable to attract special counsel at published rates it would have to adjust those rates.

25. Second, the AG's standard contingent fee agreement for special counsel requires special counsel to assume all risks in the matter. The Litigation Retention Agreements in this case had an identical "all risk" provision. No fees are due unless there is a recovery; there is no compensation for nonmonetary recovery; special counsel must advance all expenses which are only payable out of the recovery. The agreements provide that the rates set by the AG reflect the risks that special counsel are taking. If the rates agreed by the AG and special counsel are

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subject to judicial review or some other form of collateral attack, it creates an additional unbargained for risk that likely would result in the market rates having to be increased to attract competent counsel.

26. Third, the rates charged in this case are reasonable in light of published empirical studies of common benefit fund cases. The most significant, comprehensive empirical study of common benefit cases is Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. of Empirical Leg. Stud. 248 (2010). Eisenberg and Miller found the two most important factors correlated with the fee percentage were size of the settlement and degree of risk. *Id.* at 250. Their study found that the median percentage is the largest settlement cases, greater than $175 million, was 12.0%. *Id.* at 265 (Table 7). They also found that "[s]tandards applied to attorney fees uniformly indicate that greater risk warrants an increased fee. *Id.* at n. 25. The percentage fee paid to Special Counsel under the Litigation Retention Agreements was 12.5%. Further, as discussed above, these engagements were high risk warranting a percentage greater than 12.0%. In addition, the computation of fees to Special Counsel is based only on the immediate payment of $600 million. Special Counsel obtained other benefits for the State that have significant value but are not factored into the fee award. These include: The value of the removal of 1 metric ton of plutonium; the value of the United States' commitment to remove an additional 9.5 metric tons by 2037; and the value of $1.5 billion in penalties if the Government fails to comply with its removal obligations. Considering these benefits, the total value of the settlement is $2.125 billion. The attorney fees represent only 3.5% of the total benefit achieved, which is well below rates that could be justified as reasonable under a common fund analysis.

27. Based on the above analysis, in my opinion the payments made to Special Counsel representing 12.5% of the immediate case benefits obtained for the State in the Settlement Agreement are reasonable.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt. I make this certification pursuant to South Carolina Supreme Court Order 2020-04-22-01, Appellate Case No. 2020-000447, April 22, 2020.

Further the affiant sayeth not.

Nathan M. Crystal
Crystal & Giannoni-Crystal, LLC
6 Marbel Ln
Charleston, SC 29403
nmcrystal@cgcfirm.com

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Exhibit D

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HOMEPAGE

Should 2 law firms get $75M of SC's $600M plutonium settlement? This lawsuit says no

BY JOHN MONK
SEPTEMBER 28, 2020 05:00 AM



Attorney General Alan Wilson explained why South Carolina will pay $75 million to two law firms that worked on the $500-plus million plutonium settlement. BY JOHN MONK

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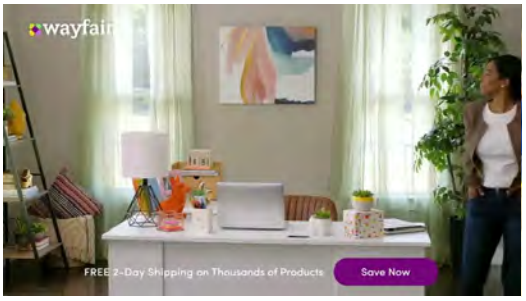
COLUMBIA, SC

A lawsuit filed by a government watchdog group and a Columbia lawyer challenges S.C. Attorney General Alan Wilson's proposed $75 million in legal fees to two Columbia law firms for work they did to help obtain a $600 million settlement payment to the State of South Carolina.

John Crangle, a lawyer and longtime observer of state government ethics, and the S.C. Public Interest Foundation allege that the two firms didn't do anywhere near enough work to justify a $75 million fee for their work in a long-running case against the U.S. Department of Energy.

The lawsuit also alleges the $600 million settlement was not a legal settlement — it was a political deal arranged by politicians, and therefore the law firms: Willoughby & Hoefer and Davidson Wren & DeMasters, both of Columbia.

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Along with the lawsuit, attorneys Jim Carpenter, Jim Griffin and Badge Humphries requested an injunction seeking to halt any payment of money to the lawyers until the courts make a final decision on the matter.

"Our only response is this lawsuit has no merit," said Robert Kittle, a spokesman for Wilson's office.

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A judge has not been appointed to hear the case, which was filed Friday in the Richland County Court of Common Pleas, also known as state civil court.

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The case involved a 20-year dispute with the Department of Energy over tons of deadly plutonium that wound up in Barnwell County at the Savannah River Site as a result of a failed deal between South Carolina and the federal government to build a plant that would convert the deadly plutonium into a substance that could be used for peaceful nuclear purposes. Plutonium is used for building nuclear bombs.

The lawsuit said that under the settlement agreement, all $600 million in federal money must be deposited into the General Fund and "only the Legislature controls its appropriation." Moreover, the "settlement agreement does not allocate any portion of the $600 million to attorneys' fees," the lawsuit said.

The award of $75 million in legal fees is not only "patently unreasonable," but the private attorneys Wilson hired for the case didn't do anywhere near enough work to justify such a fee, the lawsuit said.

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Wilson's lawyers "engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the Department of Energy is required to pay South Carolina penalties from money that has "been appropriated by Congress," the lawsuit said.

"Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated," the lawsuit said. (The money is to come from a special U.S. Department of Justice pool of fines. Attorney General William Barr signed off on the payment.)

The lawsuit said the settlement had no need for Wilson's lawyers — the "agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham."

Moreover, the lawsuit said, under a fee agreement that the lawyers made with Wilson, the maximum amount they might be entitled to is $50.2 million, not $75 million. The agreement contains a sliding scale percentage provision, in which the lawyers working on the case get increasingly smaller percentages of any settlement amount as the amount awarded in the settlement increases.

As an example of the alleged questionable nature of Wilson's agreement with the lawyers, the lawsuit alleges that one of Wilson's law firms, Willoughby & Hoefer, is to get half a percent of $600 million, or $3 million just for writing a 46-page petition and reply — meaning that Wilson "intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

The lawsuit asks that before any money is given out to private lawyers from the $600 million settlement, that a judge approve the amount. The money is supposed to be paid to South Carolina by early October, Wilson has said.

The lawsuit filed Friday is the latest public challenge to Wilson's $600 million settlement.

Earlier this week, western counties in South Carolina sued Wilson, saying the $600 million South Carolina stands to get for settling the plutonium dispute should go to those counties, especially Barnwell and Allendale, because they suffer the "stigma" of having the plutonium in their area. Those counties allege they have also lost prospective businesses because few want to come to a place with such a potential threat to the environment.

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And Gov. McMaster, after learning of the deal, wrote a letter to Wilson objecting to the $75 million fee as too high. McMaster also objected to the terms of the settlement, saying Wilson's deal potentially allowed the federal government to leave plutonium at the Savannah River Site for years longer than necessary.

First Circuit Solicitor David Pascoe also wrote Wilson, objecting to the use of these settlement proceeds for attorneys' fees on the grounds that state law requires the entire amount be deposited into the state's general fund.

On Aug. 31, when Wilson announced the $600 million settlement, he said he knew some people might object to the $75 million fee to two law firms, but they had done excellent work without which the settlement would not have been made and were worth it.



A controversial plan would send plutonium to the Savannah River Site from around the world for keeping indefinitely. SAVANNAH RIVER SITE *FILE*

JOHN MONK 803-771-8344

John Monk has covered courts, crime, politics, public corruption, the environment and other issues in the Carolinas for more than 40 years. A U.S. Army veteran who covered the 1989 American invasion of Panama, Monk is a former Washington correspondent for The Charlotte Observer. He has covered numerous death penalty trials, including those of the Charleston church killer, Dylann Roof, serial killer Pee Wee Gaskins and child killer Tim Jones. Monk's hobbies include hiking, books, languages, music and a lot of other things.

COMMENTS

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BY JON GAMBRELL AND ADAM SCHRECK *ASSOCIATED PRESS*
SEPTEMBER 29, 2020 10:20 AM

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Exhibit E

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Subject: FW: [External] Fwd: Wire Request-AGO
Date: Thursday, October 1, 2020 at 2:22:34 PM Eastern Daylight Time
From: Jim Griffin <jgriffin@griffinhumphries.com>
To: Badge Humphries <bhumphries@griffinhumphries.com>
Attachments: image003.jpg, image002.jpg, image001.jpg

From: Jeff Young <JYoung@scag.gov>
Sent: Wednesday, September 30, 2020 10:27 AM
To: Jim Griffin <jgriffin@griffinhumphries.com>
Subject: Fwd: [External] Fwd: Wire Request-AGO

Jim, This is a copy of the message sent to Judge McCaslin

Sent from my iPhone

Begin forwarded message:

> **From:** Jeff Young <JYoung@scag.gov>
> **Date:** September 30, 2020 at 10:05:00 AM EDT
> **To:** dmccaslinsc@sccourt.org
> **Subject: FW: [External] Fwd: Wire Request-AGO**
>
> Judge McCaslin,
>
> Attached is the statement from the Treasurer's office confirming that the $75,000,000 was wired to the lawyers at 9:14 EST yesterday 9/29/2020. The process started on 9/17/2020.
>
> Respectfully,
>
> W. Jeffrey Young
>
> **W. Jeffrey Young**
> Chief Deputy Attorney General
> Office: (803) 734-6680
> jyoung@scag.gov
> Rembert C. Dennis Building
> 1000 Assembly Street
> Columbia, SC 29201
>
> ---
>
> **From:** Kim Buckley <KBuckley@scag.gov>
> **Sent:** Wednesday, September 30, 2020 9:08 AM
> **To:** Emory Smith <ESmith@scag.gov>; Jeff Young <JYoung@scag.gov>; Alan Wilson <agwilson@scag.gov>; Bob Cook <RCook@scag.gov>
> **Subject:** FW: [External] Fwd: Wire Request-AGO

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Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

From: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Sent: Wednesday, September 30, 2020 9:07 AM
To: Kim Buckley <KBuckley@scag.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: RE: [External] Fwd: Wire Request-AGO

Kim,

The wire processed successfully on 9/29/20 at 9:14am EST according to our online banking wire information. STO also received a verbal confirmation from the beneficiary. Our best practice is that we do not share the details(documents) of transactions initiated on our wire transfers system. Wire processing and book transfer is a normal part of our daily business practice and we monitor those transactions carefully . If you have any additional question, please let me know and I will be happy to assist.

Thank you,
Michelle

Michelle Blanchfield| Cash Desk Manager
South Carolina Treasurer's Office
1200 Senate Street, Suite 214
Wade Hampton Building
Columbia, SC 29201
803-734-0259 | michelle.blanchfield@sto.sc.gov

From: Kim Buckley <KBuckley@scag.gov>
Sent: Wednesday, September 30, 2020 6:27 AM
To: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: [External] Fwd: Wire Request-AGO

Michelle,

I hope you are doing well. Can you let me know if this wire has been processed and If so the date and time of processing? If there is a document you can send me showing thIs information that would be helpful.

Thank you!

Kim

Sent from my iPhone

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Begin forwarded message:

From: Kim Buckley <KBuckley@scag.gov>
Date: September 28, 2020 at 4:37:00 PM EDT
To: "Michelle.Blanchfield@sto.sc.gov" <Michelle.Blanchfield@sto.sc.gov>
Cc: "Simmons, Melissa" <Melissa.Simmons@sto.sc.gov>
Subject: Wire Request-AGO

Michelle,

Please see the request for wire transfer for Willoughby and Hoefer. Please let me know if you need anything additional.

Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

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Exhibit K

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	
	)	
EX PARTE: Barnwell County, Allendale County, And the Southern Carolina Regional Development Alliance,	)	C/A No. 2020CP0600294
Petitioners,	)	
IN RE: Barnwell County, Allendale County, and Southern Carolina Regional Development Alliance,	)	**MEMORANDUM OF ATTORNEY GENERAL IN OPPOSITION TO MOTION FOR A TRO OR TEMPORARY INJUNCTION**
v.	)	
Alan Wilson, in his official capacity As Attorney General for State of South Carolina and Aiken County,	)	
Defendants.	)	

Without waiving any other defenses that may exist to this suit, the Attorney General, as named herein, opposes this Motion for injunctive relief for the reasons set forth below.

BACKGROUND

The motion asks that this Court "restrain[] the Defendants from depositing settlement funds into the General Fund of the State until it can be determined who is the beneficial owner of the settlement funds, or alternatively issue its declaratory ruling that the settlement funds are federal funds and must be used for their intended purpose." The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due to the storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State of South Carolina is the only Plaintiff in

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that case and the agreement provides for the payment of the $600 million in settlement money to the State of South Carolina. Ex. 1, p. 2, ¶5a. The statute under which settlement was reached provides for payment of funds to the State of South Carolina and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but the General Assembly is the proper body to determine how the funds at issue in this action should be allocated, rather than him or this Court.

A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION SHOULD BE DENIED

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. . . . For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. . . ." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (2004). Plaintiffs fail to meet these standards.

A

Plaintiffs Have No Likelihood of Success

1

They have no standing and present no justiciable controversy

> Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

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Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statute confers standing on these Plaintiffs. Constitutional standing and public interest standing also fail.

> The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., supra, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008). "Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

Plaintiffs cannot succeed because have not sustained a direct injury or the immediate danger that a direct injury will be sustained so as to establish standing. As noted, they are not parties to the Federal suit nor are they parties to the settlement agreement. The General Assembly will control the disbursement of funds as discussed, *infra.*

> For these same reasons, public interest standing is lacking. The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

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ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. Public interest standing is lacking here because no need exists for "future guidance" in that the General Assembly will determine the allocation of funds.

Standing fails for the above reasons. Accordingly, Plaintiffs have also not alleged a case or controversy. *ACT S, supra*.

2

Plaintiffs have no likelihood of success because these funds are controlled by the General Assembly

The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).[1]

> The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition

[1] As stated in *Condon*:

> The General Assembly cannot delegate this legislative power [to transfer appropriated funds] even if it so desired. *See Gilstrap v. South Carolina Budget and Control Bd., supra* (General Assembly may not delegate its power to make laws); State ex rel. McLeod v. McInnis, supra (General Assembly's attempt to delegate to Joint Appropriations Review Committee power to control expenditure of state and federal funds was found to violate separation of powers because committee was permitted to control expenditures by administration rather than by legislation); *Bauer v. South Carolina State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978) (non-delegation doctrine is based on the constitutional requirement that branches of government be forever separate and distinct from each other).

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> against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11–11–160 (Supp.2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2–65–20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90–91, 678 S.E.2d 412, 416–17 (2009). The courts "may not, by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass upon the legislative domain." *Gregory v. Rollins***,** 230 S.C. 269, 275, 95 S.E.2d 487, 491 (1956). "The General Assembly has . . . the right to specify the conditions under which the appropriated monies shall be spent." *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633, 637, 278 S.C. 307, 313–14 (1982). The appropriation of public funds, as a legislative function, presents a political question, a function of the separation of powers doctrine which the courts do not address. *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 376–77, 718 S.E.2d 432, 438 (2011). ("Petitioners' argument that the funds appropriated for conducting a 2012 Presidential Preference Primary are insufficient presents a nonjusticiable political question; " *Segars–Andrews v. Judicial Merit Selection Comm'n,* 387 S.C. 109, 121, 691 S.E.2d 453, 460 (2010)("The nonjusticiability of a political question is primarily a function of the separation of powers.").

For the above reasons this Court lacks the authority to stop the monies from being deposited into the General Funds and thereby prevent the General Assembly from appropriating them as determined by that body. This matter presents a political question and invokes the separation of powers doctrine to prevent this Court from issuing an injunction. Plaintiffs, therefore, have no likelihood of success.

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Irreparable Harm

Plaintiffs have alleged that they will suffer irreparable harm if the Attorney General pays the funds into the general fund before this court declares who the intended beneficiaries of settlement are, but Plaintiffs have no justiciable interest in the settlement because the suit was brought in the name of the State, and the monies are payable to the State. Whether Plaintiffs receive any monies from the settlement is entirely up to the legislature. Therefore, they suffer no harm from the transfer of funds to the General Fund, where it is supposed to go. They can direct their concerns to the legislature for that body's consideration in the appropriations process.

CONCLUSION

Plaintiffs must show both a likelihood of success and irreparable harm. They have shown neither. Because they fail to meet those requirements, they are not entitled to a TRO or a temporary injunction, and adequacy of a remedy need not be addressed. Their remedy is to go the legislature to seek the funds that they want.

Respectfully submitted,

s/ J. Emory Smith, Jr.
S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

[Signature block continues next page]

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)
esmith@scag.gov

September 29, 2020

Attorneys for the Attorney General

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