

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Sep 03 2024**

APPEAL FROM RICHLAND COUNTY

S.C. SUPREME COURT

Daniel Coble, Circuit Court Judge

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Appellate Case No. 2024-000065

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

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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 FOUR**

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[SIGNATURE BLOCK ON FOLLOWING PAGE]

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Tel. (803) 734-3680

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September 3, 2024

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**VOLUME FOUR**

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# Exhibit L

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 & Hoefler,  
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 NIKKI G. SETZLER**

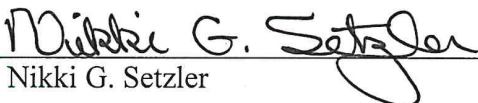
Comes Nikki G. Setzler and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit.
2. I am a member of the South Carolina Senate, representing Senate District 26 since 1976.
3. I am currently the Co-Chairman of the Joint Other Funds Oversight Committee of the South Carolina General Assembly. This Committee is comprised of members of the South Carolina Senate and House of Representatives.
4. The Joint Other Funds Oversight Committee has not considered any application by the Attorney General for authorization to pay \$75 Million for attorneys' fees to outside law firms for representing the State of South Carolina against the United States regarding the storage of weapons grade plutonium at the Savannah River Site, ("\$75 Million attorneys' fee application"), from non-appropriated other funds.

5. After inquiry with the person who staffs the Joint Oversight Committee for the Senate, I am informed and believe there is not any record of the Committee receiving a request to review the \$75 Million attorney fee application.

Further Affiant sayeth naught.

Dated this 5th day of October, 2020.

  
\_\_\_\_\_  
Nikki G. Setzler

Subscribed and sworn to before me  
by Nikki G. Setzler on this  
the 5 day of October 2020.

  
\_\_\_\_\_  
Notary Public, State at Large, South Carolina  
My Commission Expires 12/5/23

**EXHIBIT 4**  
**for Memorandum of Attorney General**

**Emails: from Carpenter 9.25.20; Smith to / from Humphries re service 9.28.20; Smith to Court, 9.28.20; Griffin to Court, 9.30.30**

**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](http://www.carpenterlawfirm.net)



WHEN IT'S WORTH FIGHTING FOR!

## 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@griffin Humphries.com>  
**Sent:** Monday, September 28, 2020 12:01 PM  
**To:** Emory Smith <ESmith@scag.gov>  
**Cc:** james.carpenter@carpenterlawfirm.net; Jim Griffin <jgriffin@griffin Humphries.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  
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## Emory Smith

---

**From:** Emory Smith  
**Sent:** Monday, September 28, 2020 1:48 PM  
**To:** 'McCaslin, Debra Law Clerk (Bruce Norton)'; Jim Griffin; Lee, Alison Renee Law Clerk (Austin Nichols)  
**Cc:** james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries  
**Subject:** RE: SCPIF v. Wilson 2020CP4004603

I don't know whether time would permit Judge Newman to be assigned to hear this case. I do know that Judges do sometime hear cases in counties other than their venue, and that Judge Newman has been assigned some Richland cases that he has hear elsewhere.

However, if you prefer, I am available tomorrow at 3 for either in person or WebEx.

Thank you.

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

---

**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,

**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](mailto:dmccaslinlc@sccourts.org)

---

**From:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**Sent:** Monday, September 28, 2020 1:17 PM  
**To:** McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)>  
**Sent:** Monday, September 28, 2020 11:53 AM  
**To:** Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); Badge Humphries <[bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com)>; Jim Griffin <[jgriffin@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)

---

**From:** Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>  
**Sent:** Monday, September 28, 2020 11:43 AM  
**To:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); [bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com); [jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com); McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto: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](mailto:aleelc@sccourts.org)

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**From:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Sent:** Monday, September 28, 2020 10:13 AM  
**To:** Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); [bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com); [jgriffin@griffinhumphries.com](mailto: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

ELECTRONICALLY FILED - 2020 Oct 06 6:00 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

**Emory Smith**

**From:** Jim Griffin <jgriffin@griffinhumphries.com>  
**Sent:** Wednesday, September 30, 2020 9:27 AM  
**To:** McCaslin, Debra Law Clerk (Bruce Norton); Emory Smith; McCaslin, Debra  
**Cc:** james.carpenter@carpenterlawfirm.net; Badge Humphries; Brad Hutto  
**Subject:** RE: SCPIF v. Wilson 2020CP4004603

Judge McCaslin

I received confirmation this morning from the State Treasurer that the funds were wired to the Willoughby & Hoefler 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  
[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)

---

**From:** Emory Smith <ESmith@scag.gov>  
**Sent:** Tuesday, September 29, 2020 7:00 PM

**To:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>; McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>;  
 McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com)>  
**Subject:** RE: SCPIF v. Wilson 2020CP4004603

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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

---

**From:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**Sent:** Tuesday, September 29, 2020 6:43 PM  
**To:** McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)>  
**Sent:** Tuesday, September 29, 2020 6:13 PM  
**To:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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 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](mailto:dmccaslinlc@sccourts.org)

---

**From:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**Sent:** Tuesday, September 29, 2020 5:48 PM  
**To:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com)>  
**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.

---

**From:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Sent:** Tuesday, September 29, 2020 5:06 PM  
**To:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>; McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

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**From:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**Sent:** Tuesday, September 29, 2020 4:58 PM  
**To:** McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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

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**From:** McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>  
**Sent:** Tuesday, September 29, 2020 4:37 PM  
**To:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com)>; Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**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  
[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)

**From:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Sent:** Tuesday, September 29, 2020 2:12 PM  
**To:** McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; McCaslin, Debra <[dmccaslinj@sccourts.org](mailto:dmccaslinj@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); Badge Humphries <[bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com)>; Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**Subject:** RE: SCPIF v. Wilson 2020CP4004603

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Your Honor:

I have just submitted for e-filing 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](mailto:dmccaslinlc@sccourts.org)>  
**Sent:** Monday, September 28, 2020 1:44 PM  
**To:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>; Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)

---

**From:** Jim Griffin <[jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com)>  
**Sent:** Monday, September 28, 2020 1:17 PM  
**To:** McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto:dmccaslinlc@sccourts.org)>; Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); Badge Humphries <[bhumphries@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)>  
**Sent:** Monday, September 28, 2020 11:53 AM  
**To:** Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>; Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); Badge Humphries <[bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com)>; Jim Griffin <[jgriffin@griffinhumphries.com](mailto: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](mailto:dmccaslinlc@sccourts.org)

---

**From:** Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>  
**Sent:** Monday, September 28, 2020 11:43 AM  
**To:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); [bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com); [jgriffin@griffinhumphries.com](mailto:jgriffin@griffinhumphries.com); McCaslin, Debra Law Clerk (Bruce Norton) <[dmccaslinlc@sccourts.org](mailto: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)  
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---

**From:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>  
**Sent:** Monday, September 28, 2020 10:13 AM  
**To:** Lee, Alison Renee Law Clerk (Austin Nichols) <[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)>  
**Cc:** [james.carpenter@carpenterlawfirm.net](mailto:james.carpenter@carpenterlawfirm.net); [jgriffin@davislaw.com](mailto:jgriffin@davislaw.com); [bhumphries@griffinhumphries.com](mailto:bhumphries@griffinhumphries.com); [jgriffin@griffinhumphries.com](mailto: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

**EXHIBIT 2**  
**to Memorandum of Attorney General in**  
**Support of Motion to Dismiss**  
**2020CP4004603**

*State v. Eli Lilly, 2007-CP-42-1855, Order of the Honorable Roger Couch, (Sept. 22, 2009)*

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG  
STATE OF SOUTH CAROLINA  
*ex rel.* Henry McMaster, in his capacity  
as Attorney General of the State of  
South Carolina,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

Case No. 2007-CP-42-1855

**ORDER**

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RICHLAND COUNTY  
2009 SEP 22 PM 2:00  
MARCO M. URBENS

THIS CAUSE is before the Court upon the Motion of Defendant Eli Lilly and Company (Lilly) to Disqualify Special Counsel filed on August 21, 2009. This matter was fully briefed by the parties, and was argued to the Court on August 31, 2009. After carefully considering all of the parties' written submissions and the oral arguments made by counsel, the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

On July 19, 2006, for the purpose of pursuing litigation relating to the Lilly-manufactured drug Zyprexa, Attorney General McMaster entered into a "Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General" signed by three lawyers as "Special Counsel." The three lawyers were John S. Simmons, John Belton White, Jr., and F. Kenneth Bailey, Jr. According to his Affidavit submitted in this matter, Attorney General McMaster's aim in suing was to recoup state funds and penalties related to Lilly's alleged wrongful conduct in marketing Zyprexa.



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2009 SEP 22 PM 2:00  
HARRIS MICHIGANS

Under the terms of the Special Counsel Appointment, the three signing lawyers agree to share fees (if any),<sup>1</sup> expenses and, subject to the Attorney General's overall control, responsibility for the work to be done. In effect, they agreed to function as de facto joint venturers, working together as a litigation team on behalf of the Attorney General and the State of South Carolina.

Under the Retention Agreement, Special Counsel will not be paid out of any award of State funds. They will be compensated, if at all, only out of a portion of such recovery as they are able to win for the State by their efforts. Meanwhile, under the Retention Agreement's terms, they have undertaken to pay all the costs of this lawsuit out of their own pockets. Thus, as part of their appointment by the Attorney General, Special Counsel have agreed to take on all the economic risk of the litigation, including the risk of a defense verdict, and give up to the State the lion's share (at least 77%) of any net recovery (after litigation costs) generated by the civil suit against Lilly. A copy of the Retention Agreement was produced to Lilly on May 22, 2009.

Since July of 2006 to the present, Special Counsel have pursued the investigation and prosecution of civil litigation against Lilly. The fact of appointment of Special Counsel in this matter has been known to Lilly from the time Special Counsel filed this lawsuit and served with the Summons and Complaint in the Spring of 2007, but an actual copy of the agreement was not given to Lilly until the date stated above.

When Lilly answered the Complaint on October 1, 2007, Lilly specifically objected to the Attorney General's use of a contingent fee arrangement in hiring Special

<sup>1</sup> If the lawsuit fails, all of the financial loss will fall on Special Counsel, no expenses will be borne by the State. Under Article V, ¶ B of the Retention Agreement, Special Counsel must look to the Attorney General to reimburse them for advance costs out of "the litigation's gross recovery," if any. The Attorney General, in his sole discretion may refuse to reimburse Special Counsel for "improperly documented, unnecessary, or unreasonable costs or expenses." *Id.*

2 

Counsel. Lilly contended the retention of Special Counsel violated Lilly's due process rights and the separation of powers doctrine. Specifically, Lilly pleaded in its answer two affirmative defenses referencing the retention of Special Counsel on a contingent fee basis, to wit:

The filing of this lawsuit by private counsel, retained on a contingent fee arrangement, violates the South Carolina Constitution's separation of the powers of the legislative and executive branches, in that the legislature has not appropriated funds for the payment of private counsel to prosecute this action in place of the Attorney General.

The filing of this lawsuit by private counsel, retained on a contingent fee arrangement, violates the due process requirements of the United States Constitution and the South Carolina Constitution, as well as conflict-of-interest rules applicable to attorneys representing the State, by giving the State's counsel a personal financial interest in the outcome of this action.

Lilly filed a Motion to Disqualify Special Counsel and filed that motion on August 21 2009, with the case at that time being scheduled to go to trial on September 14, 2009. This motion is now before this Court.

**ISSUES BEFORE THE COURT AND CONCLUSIONS OF LAW**

**LILLY'S DUE PROCESS ARGUMENTS**

**I. Does the Retention Agreement violate Lilly's Due Process Rights?**

Lilly contends that the hiring of Special Counsel "violated Lilly's state and federal right to due process because it gave each of these lawyers a direct financial interest in the outcome of this litigation." Lilly Motion at 2. See also *id* at 8-13. Lilly's due process argument flows from Lilly's central premise that all government lawyers must always remain neutral, even in the context of tort litigation against an alleged wrongdoer. The Court is unable to find anything in the relevant Rules of Professional Conduct, statutes, or

controlling case law that supports this argument in the context of tort litigation such as this.

The notion that public officials and their lawyers (whether in-house or outside counsel) must be "neutral" or disinterested in the outcome of civil litigation they bring on behalf of the government is not only unsupported by any authority, it is unsupported in the context applicable here: tort litigation where the government is suing to collect money damages. As the United States Supreme Court explained in a unanimous opinion almost thirty years ago, the Court's "rigid" due process requirements, "designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. . . . Prosecutors need not be entirely neutral and detached. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (citations and internal quotation omitted); *see also Commonwealth v. Gullota*, 716 A.2d 663, 666 (Pa. Super. 1998) (rejecting argument that neutrality principles applied to adjudicative officials apply to prosecutors).

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Indeed, as the Supreme Court held in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002), the Attorney General, as the chief lawyer for the State, may sue even the Governor- ordinarily his client- when the public interest demands it for the protection of the Legislature's right to appropriate funds in accordance with the state Constitution. See also, 7 Am Jur 2d Attorney General section 18 ("...it is the duty of the Attorney General to zealously advocate the public policy positions of his or her clients in pleadings, negotiations, and the courtroom to avoid even the appearance of impropriety by appearing to be in conflict with the desires of his or her client.")

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2009 SEP 22 PM 2:00

MARCO TOLENS

Government lawyers have no heightened duty of neutrality when bringing civil tort lawsuits. Government officials have a duty to carry out the responsibilities of their positions and an obligation to ensure that funds appropriated for that purpose are not misused. In this lawsuit, the State of South Carolina contends that funds intended to pay for care of the elderly and the poor were misdirected by Lilly's allegedly wrongful acts. As a result, the State of South Carolina has brought suit to recover those funds. The Attorney General maintains that he owes an obligation as a public servant to prosecute this case to the best of his ability, and is doing so. Lilly has introduced no evidence demonstrating that the Attorney General has chosen attorneys that are not fully qualified and competent to handle the responsibilities which have been placed upon them in the Retention Agreement.

The lawyers representing the State of South Carolina in civil tort cases, whether in-house or outside counsel, have a duty to represent the State of South Carolina's interests to the fullest, advocating the State of South Carolina's position in the litigation brought to vindicate the State of South Carolina's rights and recover the funds expended because of a private party's alleged wrongdoing. Nothing in South Carolina's Rules of Professional Conduct suggests that the State's retained attorneys should have any other responsibility other than pursue their obligations under the agreement that was made between them. Indeed, Lilly specifically denied that it was making any claim of professional wrong doing against the Special Counsel and agreed that the State's legal counsel have not committed any violation of the Rules of Professional Conduct. This is a significant admission, since SCACR 407 Rule 8.4(e) makes it unethical to "engage in conduct prejudicial to the administration of justice." By agreeing that the State's lawyers

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2020 SEP 22 PM 2:00

MARCO MITCHELL

have behaved ethically as lawyers, Lilly has conceded that no conduct prejudicial to the administration of justice has occurred in this case. This admission casts a long shadow of doubt over Lilly's contentions that it is the victim of constitutional violations and illegality.

In contending the State's counsel owe it an obligation to be "neutral," that is, less than unswervingly zealous in furthering the State's contentions, Lilly ignores the large body of controlling law that governs lawyer conduct in the State of South Carolina. It argues, without support in court rules, statutes, or case law that all government attorneys have a responsibility to act neutrally in all cases. In support of this argument, Lilly relies heavily on the contention that when the State of South Carolina acts in its *parens patriae* capacity, it must act as representative of all citizens, including (presumably) the State of South Carolina's adversaries in civil litigation. This argument is flawed for several reasons.

First, this is a tort action plain and simple. The State of South Carolina is out to recover actual damages it suffered from Lilly's allegedly tortious conduct. It is seeking damages for money it claims that Lilly wrongfully caused to be paid from the State treasury. This tort action is not significantly different than one brought by a private corporation or individual who suffered harm as a result of another person or entity's alleged wrongdoing.

Second, when the State of South Carolina does act in its *parens patriae* role, nothing about its duty to protect the public safety and general welfare requires it to ignore wrongdoing by a particular member of the public. Indeed, courts have held that the *parens patriae* role does not require that a state in a civil case be neutral. As one court

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has noted, a state “acting in its role as *parens patriae*, has the right and the duty to act to protect its weaker members.” *In re Terwilliger*, 304 Pa. Super. 553, 560, 450 A.2d 1376, 1380 (1982). In its *parens patriae* role, the State of South Carolina acts to protect children, charities, and other members of society who need special protection. See, e.g., *Mr. T v. Ms. T*, 378 S.C. 127, 662 S.E.2d 413 (S.C. App. 2008) (“South Carolina, as *parens patriae*, protects and safeguards the welfare of its children.”). In cases where it is fulfilling its *parens patriae* role the State of South Carolina may be adversarial to allegedly abusive or neglectful parents, negligent charitable trustees, or other wrongdoers. This case is no different. The State of South Carolina is adverse to Lilly, and the State of South Carolina’s lawyers (whether in-house or outside counsel) are obligated zealously to represent the interests of their client to vindicate its rights.

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2021 SEP 22 PM 2:00  
MARGARET MICHENS

Finally, Lilly’s due process argument ignores the reality that the State of South Carolina has not ceded its *parens patriae* role to outside counsel. As Article III (D) of the Special Counsel Contract makes clear, the State of South Carolina retains overall control of the present litigation.<sup>2</sup> And there is no question that the Attorney General has

<sup>2</sup> The Retention Agreement in question here is replete with verbiage attesting to it being consistent with sound public policy, with control over this litigation being reposed firmly in the Attorney General’s hands. Thus, the retention agreement states in the first recital clause that the litigation “is in the best interest of South Carolina.” The third recital clause sets forth the premise (unchallenged by Lilly) that Special Counsel “has the skill, experience, expertise, and competence necessary for the meaningful prosecution” of the matter. The Agreement further states in Article II, ¶ A, that due to the “personal nature of the services rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services,” and that “[t]he Attorney General shall have final authority over all aspects of this litigation.” To quote the Agreement,

[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. The Attorney General at his sole discretion has the right to appoint a designated assistant . . . to oversee the litigation, which appointment the Attorney General may modify at will. *Id.* Art. II, ¶ A(1).

The Agreement expressly provides that “[t]he Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation.” Article VI, ¶ A. Special Counsel “may terminate its duties and obligations under the Appointment and this Agreement upon

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authority to hire legal counsel to protect the State's interests. In order to effectuate the broad authority given to the Attorney General under the Constitution, statutes and common law, the General Assembly has empowered the Attorney General to appoint the Assistant Attorneys General. S.C. Code Ann. § 1-7-30. Indeed, the South Carolina Supreme Court has recognized that the Attorney General, as the State's chief legal officer, possesses the authority to appoint and approve private counsel to represent the State. *See Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445 (1943).

Courts have almost universally recognized that Attorneys General possess broad authority to appoint private attorneys as special counsel on a contingent fee basis to assist in the representation of the public interest. Indeed, as was stated in *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000) (en banc),

[t]he statute that allows for the attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorneys fees directly to the State's outside counsel. In 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.

And, in *State of Rhode Island v. Lead Industries Association, Inc.*, 951 A.2d 428, 474-475 (R.I. 2008), the Supreme Court of Rhode Island stated:

[i]t is our view that the Attorney General is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people . . . .

Although we are keenly aware of the gravity of the issue and of the fact that thoughtful and potent policy-based arguments have been made on both sides of the issue, in the end we have concluded that, in principle, there is nothing unconstitutional or illegal or inappropriate in a contractual

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thirty (30) days written notice to the Attorney General." *Id.* However, "[t]ermination on the part of 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." *Id.*

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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 contractual relationships may well, in some circumstances, lead to results that will be beneficial to society results which otherwise not have been attainable. However, due to the special duty of attorneys general to seek justice and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations. In short, it is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee arrangement in order to assist in certain civil litigation, so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into.

The claim to proceeds by attorneys appointed by the Attorney General to represent the State on a contingent fee basis is not a “claim against the State.” *People v. Philip Morris*, 759 N.E.2d 906 (Ill. 2001). *See, also*, ' 1-7-170 (agency may not *engage* on a fee basis an attorney at law except upon the written approval of the Attorney General and a fee must be approved by him”).

Thus, should the State of South Carolina conclude that its purported obligation to act neutrally toward all parties (even the one that caused it harm) requires it to drop this lawsuit, the State of South Carolina through the Attorney General, not any outside law firms, will make that decision. *See also* SCACR 407, Rule 1.2, requiring that clients, not their legal counsel, make decisions as to the resolution of a matter. In short, there is nothing about the State of South Carolina’s *parens patriae* role that requires its attorneys to act completely neutral instead of advocating zealously on behalf of their client.

Lilly’s attempt to hold all government lawyers to the same neutrality standards as judges or neutral arbitrators is misguided and thus unavailing. Lawyers — even government lawyers — have never been treated as neutral parties in litigation. They are advocates. Judges, on the other hand, must be held to the highest standards of neutrality

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and impartiality. See Code of Judicial Conduct Canon 2, requiring judicial independence. Thus, the longstanding jurisprudence invoked by Lilly in its brief (at 8-10), beginning with *Tumey v. Ohio*, 273 U.S. 510 (1927), and carrying through to the recent decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), stands for the proposition that the judicial officer who acts as the decision-maker in an adversarial proceeding must be neutral and impartial. But none of those cases extend the neutrality principle encompassed in the Due Process Clause to the lawyer representing one side of a contested issue, even if those lawyers happen to represent the government. See Motion to Disqualify at 10-11 (citing cases involving personal financial interest of “a judicial officer or administrative fact-finder or decision-maker”).

The few cases Lilly cites not involving judicial or other neutral adjudicators either disprove its arguments or are easily distinguishable from the present situation. The first case, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), involved a federal statute under which civil penalties collected by an agency of the Department of Labor for violations of the law were used to reimburse that agency for its costs of determining violations and assessing penalties. *Id.* at 239. A corporation that was assessed penalties under the statute challenged the statute on due process grounds, arguing that the assistant regional administrator who made the decision to assess the penalties had an improper incentive to find violations and assess penalties in order to increase revenues for the agency. *Id.* at 241-42. The Supreme Court unanimously rejected this argument:

The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and [*Ward v. Village of Monroeville*, 409 U.S. 57 (1972)] have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts

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to a penalty — as he has a statutory right to do — he is entitled to a de novo hearing before an administrative law judge. In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. . . . It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations.

*Id.* at 247-48 (citation and footnote omitted).

The same is true here. As in *Marshall*, the law firm here “performs no judicial or quasi-judicial functions [and] hears no witnesses and rules on no disputed factual or legal questions.” *Id.* at 247.

Strong language from *Marshall* directly forecloses Lilly’s attempt to rely on cases like *Tumey* and *Ward* for its due process argument:

The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a . . . plaintiff-like capacity. . . . The distinction between judicial and nonjudicial officers was explicitly made in *Tumey*, 273 U.S., at 535, where the Court noted that a state legislature “may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people.”

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*Id.* at 248-49 (citation omitted).

The United States Supreme Court thus has approved precisely the situation that Lilly alleges is present here: the attorney for the State of South Carolina has an incentive to zealously advocate for its government client and seek to vindicate the government’s interests against an alleged violator of the law. *Marshall*, a case relied on by Lilly, is directly on point and cuts against Lilly’s due process argument.

Similarly, *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787 (1987), relied on by Lilly at p. 10 of its brief, offers no support for Lilly’s due process argument. In *Young*, the Supreme Court disapproved a federal trial court’s appointment of counsel for an interested party to prosecute a criminal contempt proceeding against its

litigation opponent. *Id.* at 790. Notably, the Court based its holding not on the Due Process Clause, but on its supervisory powers over lower federal courts, *id.* at 802, 808-09, an issue not involved here.

In reaching its conclusion, the Supreme Court emphasized the criminal nature of the proceeding and the special protections afforded the accused criminal contemnor in such situations. Noting that the prosecutor in a criminal contempt proceeding “is appointed solely to pursue the public interest in *vindication of the court’s authority*,” the Court found an inherent conflict between the prosecuting attorneys’ dual roles as advocate for one party in an ongoing civil dispute and criminal prosecutor of the opposing party “for affronts to the Judiciary.” *Id.* at 804-05 (emphasis added).

These principles have no application here. The team of Special Counsel employed by the Attorney General have not been appointed by the State of South Carolina to prosecute a criminal case against Lilly, or a criminal contempt action as the lawyers were appointed to do in *Young*. They have not been appointed to “vindicate the court’s authority.” They have been appointed to seek to recover money in a tort case. The underlying matter here is a civil action for damages, not a criminal contempt proceeding. Special Counsel are not acting to vindicate the court’s authority or punish affronts to the judiciary. They are seeking only to recover damages for the State. Nor have the private law firms, operating as de facto joint venturers, been hired to represent the State of South Carolina in a dispute in which any venture member has a preexisting vested interest, as the prosecuting attorneys did in *Young*. Rather, Special Counsel’s allegedly improper interest arises from the fact that, as in all contingent fee cases, the venture members will be paid only if it wins — and the larger the judgment in favor of its

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client, the greater the possible fee to the firm. *Young* is thus readily distinguishable from this case.

Indeed, the key cases involving lawyer conduct relied on by Lilly involve lawyers acting as criminal prosecutors, a situation different from the one here. The criminal proceeding cases Lilly cites are simply inapposite here, where outside counsel has been hired not to prosecute Lilly criminally, but to bring a civil proceeding for recovery of damages. *See, e.g., Appeal of Nicely*, 130 Pa. 261, 270, 18 A. 737, 738 (1889) (noting the special duty of a criminal prosecutor to act impartially so that justice is done and commenting that, when private counsel aids a criminal prosecutor, he “should be governed by the same rules of propriety”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the U.S. Attorney is the representative of a government whose interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done”); *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (noting that a prosecutor in a criminal case should not be “an architect of a proceeding that does not comport with standards of justice”).

The cases Lilly cites that involve non-criminal prosecutions are inapplicable (because they are decisions of lower federal courts or other state courts) and distinguishable. In *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45 (D.C. Cir. 1992), the court, in *dicta* (after vacating the administrative orders under review), condemned as uncivil the arrogant behavior of lawyers representing a federal agency. The other federal circuit court case relied on by Lilly, *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983), is also distinguishable. The opinion in *Douglas* was written by the same judge that authored *Freeport* and also, as in *Freeport*, resulted in the vacatur of

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the order under review (on mootness grounds). *Id.* at 1277. Once again in *dicta*, the court contended that government lawyers “have special responsibilities to both this court and the public at large.” *Id.* at 1279. As in *Freeport*, the court’s statement was made in the context of rebuking an arrogant, uncivil government lawyer; the court was upset it had not been informed of the settlement of the underlying dispute: “As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation.” *Id.*

In short, Lilly’s due process argument finds no useful support in the well-established case law holding that judges and other decision-makers must be neutral and impartial, or gleaned from a handful of cases noting the special responsibilities of criminal prosecutors. Criminal prosecutors do owe special duties, but this is not a criminal prosecution. These cases do not apply here.

Here, in contrast, Special Counsel is representing a client in a civil case and should be held to the same high standards that all lawyers are held under the South Carolina’s Rules of Professional Conduct. Lilly concedes those duties have all been discharged by the Attorney General and Special Counsel. The fact that the Special Counsel team’s client is the State of South Carolina does not alter this analysis or require the Special Counsel to neglect the contractual and ethical duty to zealously represent its sovereign client and obtain the best recovery possible for that client in the underlying litigation here. The applicable ethics rules and the controlling case law compel this conclusion. Because Lilly’s entire due process argument is based on the faulty premise that civil tort lawyers owe a duty of neutrality when suing for the sovereign, Lilly’s main due process argument fails.

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Lilly also contends that the use of contingent fee representation against it violates its due process rights. This argument is meritless. Even if government lawyers were generally held to a higher standard than private counsel and were required to act neutrally (rather than as advocates for their clients), Lilly's argument would fail. Indeed, given the high standard for finding a Due Process violation in this context (*see, e.g., Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009)), if Lilly is correct that a contingent fee lawyer's financial interest in a government case violates the Due Process Clause, then doubt would be cast on every contingent fee arrangement, even those involving private parties, because of their supposed improper influence on an attorney's incentives and motivations in representing his or her civil client. Yet, contingent fee contracts have been held proper for many years. *See, e.g., Perry v. Atlantic Coast Life Ins. Co.*, 166 S.C. 270, 164 S.E. 753 (1932) recognizing lawyers were "collecting compensation due them in cases where they are employed on a contingent basis." *See also*, SCACR Rule 407, Rule 1.5(d), allowing contingent fees generally, except for domestic cases and criminal cases, neither of which is involved here.

Lilly cites only a single decision adopting its view that contingent fee arrangements by government entities are improper, *People ex rel. Clancy v. Superior Court of Riverside County*, 705 P.2d 347 (Cal. 1985). In *Clancy*, a city attorney retained outside counsel on a contingent fee basis to bring an action to shut down an adult bookstore as a nuisance. *Id.* at 349. The bookstore's owner challenged the contingent fee arrangement, arguing that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." *Id.* at 350. In accepting this argument, the court focused on the well-accepted principle that a prosecuting attorney in

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a criminal case should not have a vested interest in the outcome of that case. *Id.* at 350-52. Relying on a handful of secondary authorities (primarily the same ABA Model Code provision cited by the D.C. Circuit in *Freeport* and *Douglas*), the court also found that in some non-criminal situations, government attorneys must be neutral as well. *Id.* at 352. Ultimately, the court concluded that an action to abate a public nuisance shared sufficient characteristics with criminal prosecutions to require such actions to be brought by attorneys without any interest in the outcome of the case. *Id.* at 352-53.

The California Supreme Court's decision in *Clancy*, which was not grounded in the Due Process Clause (or separation-of-powers concerns), stands alone in terms of case law supporting Lilly's contention that government attorneys in non-criminal actions may not be paid on a contingent basis. In presenting *Clancy* as precedent to be followed, Lilly failed to point out that as *Clancy* is read and applied in California, it "does not bar the public entities from engaging private counsel under a contingent fee arrangement to assist in [public nuisance] litigation, so long as the public entities' in-house counsel retains control over all decision-making." *County of Santa Clara v. Superior Court*, 161 Cal.App.4th 1140, 74 Cal.Rptr.3d 842, 853 (2008). Here, the *Santa Clara* test is met, for Attorney General McMaster has absolute control over the disposition of this case. Article III (D) of the Special Counsel agreement makes this clear:

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.

Contrary to Lilly's unsupported speculation, evidence in the record reflects that the State of South Carolina's Attorney General retains control and ultimate decision-making

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authority over this litigation. Indeed, General McMaster's affidavit makes clear he personally has spoken directly with Lilly's counsel about possibly resolving this case.

Lilly's discussion of the interplay between contingent fees and due process also does not deal with persuasive adverse authority such as *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D.1998) ("In view of th[e] long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistants attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute."), and *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (upholding the Rhode Island Attorney General's right to enter into contingent fee agreements with private counsel appointed to bring civil suits). See also *Philip Morris v. Glendening*, 709 A.2d 1233 (Md. 1998) (upholding a contingency fee agreement between private lawyers and the Maryland Attorney General in a civil case). As to the defendant's separation of powers claim, the court agreed with the Attorney General's conclusion that the situation was extraordinary and deemed his decision to hire contingent fee counsel non-reviewable; "[p]rinciples behind constitutional separation of powers place limits on a court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority." *Id.* at 1239 (quoting *Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. 1980)). For another example of a state court rejecting challenges to a contingency fee agreement, see *Kinder v. Nixon*, No. WD 56802, 2000 WL 684860 (Mo. App. W.D. 2000).

In sum, Lilly's contingent fee due process/constitutional violation claim is rejected. At present, only "[a] few state attorneys general's offices, notably California's

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make it a practice not to hire outside counsel on a contingent fee basis.” Donald G. Giffort, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C.L. REV. 913, 964 n.323 (2008). In other words, if the practice of hiring private lawyers in special cases by States’ Attorneys General was actually unconstitutionally improper, one would expect that some authoritative court would have definitively ruled that way by now. Instead, the evidence is to the contrary. See Richard O. Faulk & John S. Gray, *Alchemy in The Courtroom? The Transmutation of Public Nuisance Litigation*, MICH. ST. L. REV. 941, 968 n.140 (2007) (“the majority of state attorneys general [had] contingent fee arrangements in the tobacco litigation, the mayors of over thirty cities signed contingent fee contracts to sue gun manufacturers”).

Lilly’s purported due process constitutional challenge is inconsistent with South Carolina’s Rules of Professional Conduct; and finds no support in the controlling case law of this Court or the United States Supreme Court.

Thus, under the Contract and in fact, the Attorney General is in control of the litigation, both on an ongoing basis and in terms of its ultimate resolution. Special Counsel must follow the Attorney General’s directions and cannot take important action without the Attorney General’s approval. Any claim that the State of South Carolina is not adequately controlling this litigation is contrary to evidence in the record. The hearing in this motion included reliance on an uncontradicted affidavit from the Attorney General testifying to his office’s involvement in this case, plus oral argument from a lawyer on the Attorney General’s staff. Both the Special Counsel Agreement and the actual conduct of this litigation make clear that the Attorney General is in charge of this case; its outside counsel is fulfilling the same role outside counsel for the State of South

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Carolina always fulfills, regardless of how they are paid: assisting the State of South Carolina in vindicating or defending its rights. After due consideration of the parties arguments and the authorities they cite, the Court concludes there is nothing in the Attorney General's Special Counsel Appointment arraignment deprives Lilly of its right to due process.

**LILLY'S SEPARATION OF POWERS ARGUMENTS**

Lilly contends the separation-of-powers doctrine is violated on the ground that payment of fees to Special Counsel is unauthorized under S.C. Ann. § 1-7-150(B). The flaw with this argument is that the statute expressly authorizes payment of "the costs of litigation" out of litigation proceeds, and a "cost of litigation" is precisely what legal fees are. Lilly's separation-of-powers argument rests on case law from a single jurisdiction Louisiana, which is readily distinguishable. The leading Louisiana case is *Meredith v. Ieyoub*, 700 So.2d 478, 482 (La. 1997), followed by *Ieyoub v. W R. Grace & Co.*, 708 So.2d 1227 (La. Ct. App. 3d Cir. 1998). The statute under which those two cases were decided required that "all sums recovered" by suit or settlement "be paid into the state treasury." La. R.S. 30:2205. The Louisiana statute did not recognize the possible need to pay litigation costs; the South Carolina statute, under S.C. Ann. § 1-7-150(B) does. See Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 867 (2009) (listing "legal fees" as one of the "costs of litigation"). Thus, the Louisiana case law relied on by Lilly has no application here.

Another problem not mentioned by Lilly with its *Meredith* separation-of-powers precedent is that the Louisiana cases stand alone—they represent the only defense win on

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the point. Aside from Louisiana cases interpreting the narrow Louisiana statute, courts that have considered the issue uniformly have rejected Lilly's argument:

[N]umerous courts have heard challenges to contingency fee arrangements based on the separation of powers doctrine, but the Supreme Court of Louisiana is the sole court that found it persuasive enough to overturn a contract. The doctrine has failed to gain any significant traction.

Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?* 42 COLUM. J.L. & SOC. PROBS. 587, 612 (2009) (citing as examples, *State v. Hagerty, supra* and *Kinder v. Nixon, supra*. In *Kinder*, the Court stated that "Appellants' fundamental contention is erroneous and the contract is not void.").

As part of its separation-of-powers argument, Lilly contends that, under the Retention Agreement, should the State recover of money from Lilly, the Attorney General would distribute the lawsuit proceeds in an unconstitutional way. This argument is speculative and it is not ripe for adjudication.

SC Code of Laws Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this. There has been no recovery at this time and there is no showing that investigative costs will not exceed or be equal to the 10% of recovery provided for in the contract to be retained by the Attorney General's office. Additionally, it is the Court's finding that the Defense has not shown any evidence amounting to adverse prejudice as to this issue.

The tort case is yet to be tried. A judgment has yet to be entered against Lilly and, depending on the trial's outcome, may never be. Any contention that the Attorney General will act in an unconstitutional way is thus based on events that have yet to occur. Moreover, any provision of the Special Counsel Retention Agreement that would call for

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the Attorney General to commit an illegal act is severable under the terms of Article VII (H) of the agreement. Hence, upon a timely and meritorious challenge, any offensive provision would simply be stricken without causing the entire agreement to fail. Lilly's attack on the Special Counsel Retention Agreement based on its separation of powers argument simply is not ripe at this time. Lilly's contentions are premised on alleged future wrongful acts by the Attorney General are hypothetical, lack substance, do not prove the Agreement's invalidity, and hence are rejected.

**LILLY'S ILLEGALITY ARGUMENTS UNDER SECTION 1342**

Citing S.C. Code § 8-13-1342, Lilly seeks a ruling that, in essence, the State's case must be derailed on the eve of trial because it is being advanced illegally by Special Counsel. The Court has carefully considered Lilly's argument on this novel point, and rejects it for multiple reasons.

**I. The Illegality Contention Has Not Been Affirmatively Pleaded**

First, unlike Lilly's due process and separation of powers arguments, Lilly's illegality contentions have not been affirmatively pleaded in its answer. Illegality contentions by way of a defense or avoidance are required to be affirmatively advanced under SCRCP Rule 8(c). In *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005), the South Carolina Supreme Court emphasized the "importance of the right to one's preferred attorney," noting that an order determining the "right to be represented by an attorney of one's choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case." The Court concludes that a

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legal position premised on alleged illegality calculated to stymie a plaintiff's chosen path to trial represent a form of defense or avoidance that needs to be affirmatively pleaded under Rule 8(c).

Here, the campaign contribution data on which Lilly relies have long been in the public domain. Lilly has known from the start of this case about Special Counsel's appointment. In its answer filed in October of 2007, Lilly raised due process and separation of powers contentions attacking Special Counsel's appointment and the contingent fee arrangement under which Special Counsel was hired.

In view of the great importance attached to a party's right to counsel of one's choosing, and the possibility that, as stated in *Hagood*, losing counsel "could determine . . . or discontinue an action," the Court concludes that an attack seeking to disqualify counsel based on alleged illegality needs to be specifically pleaded under Rule 8(c). Lilly has not done so here. The instant motion was made on the eve of trial and only after the Court denied Lilly's motion for a continuance. Under the circumstances, the motion is not timely. Because it rests on a contention that has not been properly pleaded, and in view of the undue delay in raising the issue, Lilly's motion to disqualify based on section 1342 must be rejected.

It appears that no complaint has been filed with the State Ethics Commission by Lilly or its counsel concerning the post-retention political contributions by two of the Special Counsel lawyers. At the oral argument Lilly's counsel made clear that the only forum in which the question of compliance with section 1342 had been raised was in this case, and specifically in the context of the disqualification motion.



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Further, it should be noted that it appears that all local counsel both for the State and Lilly have made similar contributions to the campaigns of the Attorney General.

**II. Lilly Has Offered No Competent Evidence Of Actual Prejudice**

The Court also rejects Lilly's motion to disqualify due to Lilly's failure to show that Lilly will suffer actual prejudice unless relief is granted. In *State v. Bell*, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), the Court of Appeals analyzed what needs to be shown in order to win a disqualification motion against a solicitor. Bell's contention that the trial court erred in denying his disqualification motion was rejected on the ground that when making a disqualification motion attacking the State, the movant must demonstrate actual prejudice suffered due to the allegedly unethical conduct. The court in *Bell* explained that proof of actual prejudice is required in disqualification motions filed against the State:

In *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), our supreme court addressed the standard for disqualification of a Solicitor's Office where an attorney in that office had been employed by the Public Defender's Office during the pendency of charges against the appellant. There, the court rejected the standard of a presumption of betrayal from mere allegation of successive adverse representation resulting in a per se disqualification. *Id.* at 518, 299 S.E.2d at 688. Instead, the court adopted the requirement of a showing of actual prejudice to the defendant's case. *Id.* at 518-19, 299 S.E.2d at 688. Finding no evidence that any secrets or confidences of Smart were revealed, the court affirmed the denial of Smart's motion for disqualification. *Id.* at 520-521, 299 S.E.2d at 689. Thereafter, in *State v. Chisolm*, 312 S.C. 235, 439 S.E.2d 850 (1994), our supreme court again articulated that an appellant who seeks disqualification of a Solicitor's Office must show actual prejudice. *Id.* at 238, 439 S.E.2d at 852.

*Bell*, 374 S.C. 141-42, 646 S.E.2d 891 (emphasis added).

Even assuming the validity of Lilly's illegality charge, it is clear that no actual prejudice whatever has been shown here. At the motion hearing, Lilly contended that it was suffering "actual prejudice" at the hands of Special Counsel due to their alleged

failure to comply with Lilly's discovery needs. No competent evidence was offered on this point, and the charge is at odds with Lilly's repeated admission during the hearing that Lilly was not asserting any violation of Special Counsel's professional obligations as lawyers. This is a significant concession by Lilly.

The Court notes that SCACR 407, Rule 3.4(d) makes it unethical for counsel "in pretrial procedure . . . [to] fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Lilly's concession that Special Counsel have acted ethically as lawyers in this matter disposes of its purported actual prejudice contention. In sum, the Court finds that in a disqualification motion under these circumstances, proof of actual prejudice must be shown by the movant. No showing of actual prejudice has been made here. Lilly's failure to prove that it would suffer actual prejudice but for disqualification of opposing counsel is an additional reason why Lilly's motion to disqualify based on section 1342 is overruled.

**III. Lilly's Motion Cannot Not Reach Special Counsel Bailey**

Lilly's illegality argument made under section 1342 does not rest on the contention that the Appointment of Special Counsel violated the statute when the Retention Agreement was entered into. Lilly appears to concede the Agreement did not violate section 1342 at the time of Special Counsel's appointment. Lilly also concedes that one of the three Special Counsel, F. Kenneth Bailey, Jr., never made any post-appointment contribution reached by section 1342. Thus, the statute can provide no justification for his disqualification at all.

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**IV. Section 1342 Does Not Require Disqualification of Special Counsel**

As for the two Special Counsel who did make post-appointment contributions to Attorney General McMaster, the Court finds, for the reasons set forth below, that their contributions are not made illegal by the statute and that, further, even if the contributions were covered by the statute, they still would not suffice to justify disqualification on the facts of this case.

It is well understood in South Carolina that a basic rule of statutory interpretation requires that, where possible, statutes receive a construction which will render them valid. *Last v. MSI Construction Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991); *Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888 (1991) (statutes are presumed to be constitutional and will be construed so as to render them valid). “[A] statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object . . . .” *Crescent Mfg. Co. v. South Carolina Tax Comm'n*, 129 S.C. 480, 493-94, 124 S.E. 761, 765 (1924); *Poinsett Constr. Co. v. Fischer*, 301 S.C. 343, 391 S.E.2d 875 (Ct. App. 1990). Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation. *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977).

Applied here, this rule of statutory construction requires that this Court refrain from construing § 8-13-1342 as Lilly seeks to have it interpreted, namely as an ethical prohibition covering the practice of law and lawyer-client contractual dealings usable by adverse parties to drive a wedge between the Attorney General and his Special Counsel, appointed to represent the State in litigation.

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*Handwritten signature*  
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**V. Control Over the Ethics of Lawyer-Client Dealings Rests with the Court**

A major reason Lilly's illegality arguments fails is because neither the General Assembly nor the State Ethics Commission controls the subject of legal ethics in South Carolina. That function belongs to the Supreme Court. Lilly has repeatedly informed this Court that no Court-created ethics rule has been violated here.

At page 5 of its Motion to Disqualify, Lilly explains that the Campaign Reform Act "gave the State Ethics Commission . . . responsibilities over . . . ethical rules of conduct," with section 8-13-1342 prohibiting persons awarded contracts with the State from contributing to campaigns of officials in a position to act on those contracts." *Id.* Insofar as the statute regulates relationships outside the practice of law, it is unexceptionable. Insofar as the statute purports to impose unique and unfair obligations restraints on Special Counsel hired by the State, it raises grave constitutional questions which should be avoided by this Court.

The General Assembly possesses no constitutional role in defining, regulating or punishing otherwise proper and ethical dealings between lawyers and their clients. Pursuant to Article 1, Section 5 of South Carolina's Constitution, the South Carolina Supreme Court possesses the ultimate responsibility for ruling on attorneys' ethical matters. *See In re Okpalaeké*, 374 S.C. 186, 193, 648 S.E.2d 593, 597 (2007), *citing In re Rushton*, 286 S.C. 543, 544, 335 S.E.2d 238, 238 (1985).

An express provision in the Rules of the Supreme Court Rule makes it clear that attorneys' ethics are determined by ethical rules established by the Court, not the General Assembly. See SCACR 407, Rule of Professional Conduct Preamble, ¶ 11, which declares: "To the extent that lawyers meet the obligations of their professional calling,

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the occasion for government regulation is obviated.” Lilly has conceded that plaintiff’s lawyers here have met the obligations of their professional calling; nowhere does Lilly charge them with a violation of any provision of the Rules of Professional Conduct. Reading section 1342 to create unethical behavior in the attorney-client setting is improper.

When it comes to setting rules of behavior for Special Counsel appointed by the Attorney General, the General Assembly’s regulatory power is limited. Thus, in *Williams v. Bordon’s Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980), the Supreme Court struck down a statute aimed at guaranteeing continuances for lawyer-legislators while the South Carolina General Assembly was in session. The Court relied on separation of powers principles in holding the statute invalid, unequivocally rejecting the notion that the General Assembly has the right to assume control over the rendition of legal services. *Williams v. Bordon’s Inc.*, 274 S.C. 275, 278, 262 S.E.2d 881, 883-84 (1980). Likewise, the authority to regulate the relationship and the dealings between Special Counsel and Special Counsel’s client, the State *ex rel.* the Attorney General, fall within the inherent power of the Supreme Court to control all aspects of the practice of law in South Carolina. *See also, Gmerek v. State Ethics Commission*, 751 A.2d 1241 (Pa. 2000) (Lobbying Disclosure Act, though it applied to nonlawyers as well as lawyers, is unconstitutional in regulating the professional activities which are regulated solely by the judicial branch).

Because of the Supreme Court’s special role in policing attorney-client relationships, and because such a specially regulated relationship is involved in the Attorney General-Special Counsel setting, the Court concludes the Legislature did not

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intend to include such relationships within section 8-13-1342's sweep. The Court concludes that the proper way to avoid adjudicating the unconstitutionality of section 1342 is to construe it to be pre-empted by legal ethics rules to the extent it would apply to lawyers.

Pertinent case law supports this policy choice. In the words our Supreme Court used in *Hagood v. Summerville*, 362 S.C. 191, 196, 607 S.E. 2d 707, 710 (2005), "the attorney-client relationship . . . demands a confidential, trusting relationship that often develops over time." The Supreme Court's ethical rules have been written to "require attorneys to maintain the highest professional and ethical standards in their dealings with clients." *Matter of Conway*, 305 S.C. 388, 393, 409 S.E.2d 357, 360 (1991). The attorney-client relationship has long been viewed as sacrosanct. As was stated in *Martin v. Camp*, 219 N.Y. 170, 173, 114 N.E. 46 (1916),

[n]otwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies injects into the contract certain special and unique features.

As was stated in *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 57 (Mo. 1982), the relation between a lawyer and his client is a delicate and exacting one, highly personal. (quoting *Craig v. Jo B Gardner*, 586 S.W.2d 316 (Mo. banc 1979) (quoting 7 AM.JUR.2D *Attorneys at Law* ' 92 at 105 (1963)). The Court concludes section 1342 has not application in the attorney-client setting.

**VI. Section 1342 Yields an Unfair and Inequitable Result if Applied as Lilly Requests**

Besides pre-emption of the regulation of attorneys by virtue of the separation-of-powers doctrine and Court Rule, another problem with section 1342, is the unfair result

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the statute would yield, if Lilly's section 1342 argument prevails. According to Lilly the statute criminalizes campaign contributions made to a government official by lawyers he hires, but the statute turns a blind eye to campaign contributions made to the same official by lawyers for the other side. The lawyer who signed Lilly's motion to disqualify, and the political action committee for the local law firm representing Lilly have both made significant campaign contributions to the Attorney General within the last year, i.e., while this case is pending. The corrupting potential flowing from adverse lawyers' contributions is certainly no different from that flowing from payments by counsel hired by the government official in question.

It simply is bizarre to say that the lawyers an official is working with cannot show their support for the official (and exercise their First Amendment rights) by making a contribution to him or her, but the lawyers on the other side (who may be seeking from the official a favorable deal for their client) can make contributions calculated to further their client's agenda. The facts before this Court show this is not merely a hypothetical problem.

A statute which prohibits a government official's litigation allies from contributing to him, but permits his litigation adversaries to do so is inordinately unfair. It is obvious that section 1342 was written without contemplating the practicalities of the litigation setting or the special role played by the Supreme Court in policing attorney-client relationships. This is another persuasive reason the statute should not be construed as applicable here. To the extent it discriminates against campaign contributors aligned in litigation with a government official, but allows contributions by the official's

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adversaries, it is illogical and unfairly deprives the official's retained counsel of equal treatment, that is, equal protection under the law.

**VII. An Ethics Commission Opinion Supports Reading § 1342 Narrowly**

The Court notes in passing that even the State Ethics Commission tends to read section 1342 narrowly. Ethics Opinion SEC A092-019 (Dec. 18, 1991), analyzes Section 1342 and concludes:

The Commission does not believe that the General Assembly intended to restrict campaign contributions to the extent that employees of companies that contract with the State would be prohibited from making a campaign contribution. Accordingly, the Attorney General's campaign may accept campaign contributions from lawyers and employees that receive contracts to provide legal services under the Attorney General's Associate Counsel Program.

Special Counsel points out that under the Retention Agreement by which they were appointed, any fees received by the Special Counsel will be paid to them as joint venturers. There is some merit in this analysis, for if the suit succeeds, the Retention Agreement makes it clear Special Counsel will share the profits, if any, flowing from their work as co-venturers. The Retention Agreement evidences a joint undertaking by Special Counsel, subject to the Attorney General's overall control, of a single project (the Lilly lawsuit) for profit, a commitment to share profits as well as losses, a contribution of skills and property by the co-venturers, and a community interest and control over the subject matter of the enterprise. It appears that as a result of the Retention Agreement, Special Counsel did in fact form a joint venture to prosecute this case on behalf of the State in this case. *See Berger v. Mead*, 127 Mich. App. 209, 338 N.W.2d 919, 922 (1983). Under the Campaign Reform Act relied on by Lilly, joint ventures are covered persons. See S.C. St. Ann. 8-13-1300 (25) defining person to include a "joint venture."

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The above-quoted 1991 Opinion rendered by the State Ethics Commission expresses the belief that the General Assembly did not intend “to restrict campaign contributions to the extent that employees of companies that contract with the State would be prohibited from making a campaign contribution.” Opinion SEC A092-019 (Dec. 18, 1991), *supra*. Here, it is possible to view the “company” the Attorney General appointed as a de facto joint venture formed by Special Counsel for purposes of undertaking the Lilly case. This is significant, because the joint venture itself has never contributed anything to Attorney General McMaster; two of the joint venture’s members, two of the members’ firms, and employees of two members’ firms have, but such contributions are plainly permitted under the Ethics Commission’s ruling that “the Attorney General’s campaign may accept campaign contributions from lawyers and employees that receive contracts to provide legal services.”

Moreover, as noted above, it would be anomalous in the extreme to construe a statute to criminalize unsolicited campaign contributions by lawyers toiling on behalf of the State against a litigant like Lilly, while permitting Lilly’s lawyers to make campaign contributions to the lawyer leading the attack against them and their client.

**VIII. Appointment and Use of Special Counsel Is Properly Within the Attorney General’s Powers and Unaffected by § 1342**

The Attorney General is a constitutional officer, and is charged with the duties of the State’s chief legal officer, possessing broad constitutional, statutory and common law authority to represent the State, to enforce the laws of South Carolina, and to protect “public rights.” *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002). See also § 1-7-10 *et seq.*, including § 1-7-30 [Attorney General appoints assistants]; § 1-7-85 [Office of Attorney General may obtain reimbursement for attorneys

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fees or investigative costs or costs of litigation awarded by court order or settlement]; § 1-7-170 [a “department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him . . . .”] It is the Attorney General who is responsible “for vindicating wrongs against the collective citizens of the State.” *Condon v. Hodges*, *supra*.

As the chief law officer of South Carolina, the Attorney General is authorized not only to appoint assistant attorneys general to carry out these duties, see § 1-7-30, *supra*, but to employ special counsel from the private sector “to represent and protect the interests of the state.” *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 448 (1943). It is generally acknowledged that “[a] determination by the attorney general of the extraordinariness of a case calling for outside counsel is a decision within his/her discretionary authority ... and it has been stated there is no limit on the attorney general’s ability to appoint a special prosecutor.” 7 Am.Jur.2d, *Attorney General*, § 14.

In view of the great latitude given to decisions by the Attorney General in prosecuting and staffing cases, it is appropriate to read section 1342 narrowly. Section 1342 is best read to not reach the dealings between Special Counsel and the Attorney General relates to the unique role of the Attorney General as chief prosecutor of the State and as the state’s chief legal officer. The Supreme Court has consistently recognized that certain constraints normally imposed by ethical requirements are inapplicable to the Attorney General’s representation of the public interest. For example, in *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 223 S.E.2d 853 (1976), the Court held that representation by the Attorney General of a public officer in a criminal case did not

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ethically conflict with the Attorney General's role in prosecution of that case. As the Court noted,

[w]e find no mandated conflict of interest in the role occupied by the Attorney General under the Constitution [as chief prosecutor] and the statute [requesting the Attorney General to defend public officers]. The Attorney General is not required to sit at both the prosecution and defense table in the prosecution of a public official, in the sense that he or all of his staff equally participate in the prosecution or defense .... [The Attorney General has] ample latitude to designate an individual or individuals who could independently represent the public official, if the Attorney General found that he could not do so because of a conflict with his duties as chief prosecuting officer.

223 S.E. 2d at 855. See also, *Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977) (Attorney General's representation of municipal officials in criminal prosecution did not result in inherently conflicting or unethical duties upon Attorney General, including requirement that prosecuting officer not accept fees in civil action based upon same facts); *State ex rel. McLeod v. McInnis*, 266 S.C. 415, 223 S.E.2d 853 (1976) (Attorney General represented adverse parties in case brought to declare JARC statutes unconstitutional). Clearly, as the State's top lawyer, the Attorney General must shoulder special duties and responsibilities imposed by statute in order properly to represent the State in court and to oversee the State's litigation. With these provisions in mind, the Court does not believe that § 8-13-1342 is applicable to the situation here, a situation which involves the Attorney General's retention of private counsel in complex litigation to represent the State on a contingency fee basis.

Examination of the precise language of § 8-13-1342 demonstrates the great difficulty in applying this statute in this instance. Section 8-13-1342 is expressly applicable to an award of a "contract with the state . . . ." However, as has been noted,

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outside counsel's rights to the proceeds of the contingent fee for performance of his or her work is not a "claim against the state," but one against the fund paid by the defendants (if any). *People v. Philip Morris*, 759 N.E.2d 906 (2001). Moreover, courts have held that such proceeds are not state funds or "public funds" since they never are deposited in the State Treasury. *Conant v. Robins, et al.* 603 N.W.2d 143 (Minn. 1999).

Further, § 1-7-170 expressly authorizes the Attorney General to approve any engagement "on a fee basis [of any] attorney at law" to represent an agency or department of state government and to approve the fee of that private attorney or attorneys. This statute, which for many years appeared each year as a Proviso in the Appropriations Act, was codified by the General Assembly as § 1-7-170 in 2008, long after § 8-13-1342 was enacted in 1991 as part of the State Ethics Act. The Court notes that Section 1-7-170 gives virtually unlimited discretion to the Attorney General to approve private counsel and the fee arrangement for such counsel's services. Such would, of course, include a contingency fee arrangement with the Attorney General's own designated attorneys to act as special counsel on his behalf.

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On the other hand, § 8-13-1342 imposes clear constraints upon the award of contracts with the State by requiring that no campaign contributions may be given to any person awarding a contract with the State. Under ordinary rules of statutory construction, § 1-7-170, a specific statute enacted later in time to the more general § 8-13-1342, would be deemed controlling. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000).

The Court also finds the Supreme Court's decision in *S.C. Coastal Council v. State Ethics Commission*, 306 S.C. 41, 410 S.E.2d 245 (1995) to be persuasive. In *Coastal Council*, the Ethics Commission had concluded that the Coastal Council was

governed by a provision in the Ethics Act forbidding any person from serving as a member of a body regulating business with which that person is associated. However, the Court concluded that such provision was inapplicable to the Coastal Council. In the Court's view, the separate body of statutory law governing the Coastal Council was controlling. According to the Supreme Court, "[a]fter reviewing the Act, which defines Coastal Council's regulatory duties, and after examining Coastal Council's regulations, we conclude that Coastal Council regulates the preservation and utilization of coastal resources." 410 S.E.2d at 247.

Likewise, the various statutes and common law relating to the powers and duties of the Attorney General bestow upon him broad discretion to appoint or engage attorneys to assist him in the representation of the State and to determine the fees for such representation rather than to award a contract with the State in the ordinary course of state business. Further, special ethics rules specifically tailored to policing the propriety of attorney-client dealings exist under the Rules of Professional Conduct and apply to the relationship between the Attorney General and the Special Counsel he appointed. Thus, based upon the same type of reasoning as in *Coastal Council*, the Court finds that § 8-13-1342 is inapplicable to the situation where the Attorney General appoints private counsel on a contingency fee basis to assist him in the representation of the State in this matter.

Finally, as an additional reason in support of the Court's finding that section 1342 offers no grounds for Lilly's disqualification motion, the Court notes that the special confidential fiduciary relationship embraced by the Retention Agreement falls outside the type of standard type of commercial contract award at which section 1342 is targeted. Unlike a normal state contract with a supplier or goods or a service-provider, here no

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payment has been made or will be made out of State funds to Special Counsel. They will be paid, if at all, purely out of any fund they are able to generate for the State's benefit. The fiduciary and adversary pressures involved in this case make the setting very different from that encountered in the standard commercial context. Without denying that there is a financial aspect to the dealings between Special Counsel and the Attorney General, the Court concludes that the appointment of Special Counsel by the Attorney General reflects a relationship different in kind and degree from the contract-award setting envisioned by section 1342. See, *Kinder v. Nixon*, 2000 WL 684860 (Mo. App. W.D. 2000) (The Attorney General has the authority to appoint special assistants unless the Legislature has expressly forbidden the exercise of that power.”).

Stated differently, there are numerous huge differences between retainer agreements between Special Counsel and the Attorney General and commercial contracts between a municipality and its vendors. Supreme Court rules thoroughly regulate the former relationship not the latter. Intense, well understood fiduciary obligations permeate the former; the latter concerns mostly business as usual. Most importantly, the special attorney-client relation that arises when the Attorney General appoints a law firm or group of lawyers in whom he has absolute confidence is far different in scope and content from those generated when contracts are awarded to commercial entities by the State through other processes such as the State Procurement Code.

No provision of law expressly forbids the giving of a campaign contribution by a joint venture member to the Attorney General by whom he was appointed, unless there is a *quid pro quo* or some other unique circumstance. No such charge has been made here.

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**IX. A Balancing of Equities Supports Denial of the Motion to Disqualify**

As noted above, Lilly has not presented competent evidence of any adverse prejudice it has suffered due to the behavior of Special Counsel. There has been no “meaningful showing that the trial process here will be tainted in any way” due to Special Counsel’s participation. *See Reilly v. Computer Assoc. Long-Term Disability Plan*, 423 F. Supp.2d 5, 10 (E.D. N.Y. 2006). It is appropriate to weigh the foreseeable lack of taint against the hardship that disqualification in this very hard-fought and difficult case would place on plaintiff on the eve of trial. *Id.* Weighing the parties’ relative hardship is appropriate here. *See In re Bohack Corp.*, 607 F.2d 258, 263 (2d Cir.1979) (stating in the bankruptcy context that “[t]he delay and additional expense created by substitution of counsel is a factor to which we have attached considerable significance in these cases.”). A weighing of the parties’ relative hardship provides further justification for denial of the motion to disqualify based on Lilly’s § 1342 illegality claim. *See also*, SCACR 407, Rule 3.7(a)(3) (listing “substantial hardship on the client” as a factor to be evaluated in determining whether a lawyer-witness must be disqualified).

**X. Administrative Remedies Have Not Been Exhausted**

Lilly has invoked the Ethics Act and cited an opinion by the State Ethics Commission interpreting section 1342 in its brief. Conspicuously absent from the record is any sign that Lilly has presented its ethics charges based on section 1342 to the attention of the Ethics Commission for its consideration. This Court is disinclined to mete out severe punishment to lawyers and their client based on a novel application of a statute that even the Ethics Commission seems to agree needs to be narrowly construed.

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In any event, to repeat, there has been no showing that there has been any prejudice to the Defendant and the court finds that the Special Counsel Retention Agreement contract does not constitute a denial of equal protection or due process in this case. If the Defendant wishes to complain about the behavior of Special Counsel in light of section 1342, it has access to the same Commission established to investigate and rule on such matters as any other citizen.

Alternatively, if Lilly wishes to test the legality of Special Counsel's service, the Court believes that subject should be more properly addressed in a declaratory judgment action, which has not been filed at this point, not through a motion to disqualify counsel filed at this late hour in this case. The Court's consideration of the matter on the eve of trial is particularly inappropriate since it is not an issue which has been presented to the court by pleading as required under Rule 8(c)..

**SUMMARY**

For all of the foregoing reasons, Lilly's Motion to Disqualify is hereby DENIED.  
AND IT IS SO ORDERED.

  
Roger L. Couch  
Circuit Court Judge

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Spartanburg, South Carolina

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# Exhibit E

**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

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**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](mailto:JYoung@scag.gov)>  
**Date:** September 30, 2020 at 10:05:00 AM EDT  
**To:** [dmccaslinsc@sccourt.org](mailto: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](mailto:jyoung@scag.gov)  
Rembert C. Dennis Building  
1000 Assembly Street  
Columbia, SC 29201

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**From:** Kim Buckley <[KBuckley@scag.gov](mailto:KBuckley@scag.gov)>  
**Sent:** Wednesday, September 30, 2020 9:08 AM  
**To:** Emory Smith <[ESmith@scag.gov](mailto:ESmith@scag.gov)>; Jeff Young <[JYoung@scag.gov](mailto:JYoung@scag.gov)>; Alan Wilson <[agwilson@scag.gov](mailto:agwilson@scag.gov)>; Bob Cook <[RCook@scag.gov](mailto:RCook@scag.gov)>  
**Subject:** FW: [External] Fwd: Wire Request-AGO

Best,

Kimberly Buckley  
Finance Director  
SC Attorney General's Office  
803-734-3771  
[kbuckley@scag.gov](mailto:kbuckley@scag.gov)

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**From:** Blanchfield, Michelle <[Michelle.Blanchfield@sto.sc.gov](mailto:Michelle.Blanchfield@sto.sc.gov)>  
**Sent:** Wednesday, September 30, 2020 9:07 AM  
**To:** Kim Buckley <[KBuckley@scag.gov](mailto:KBuckley@scag.gov)>  
**Cc:** Simmons, Melissa <[Melissa.Simmons@sto.sc.gov](mailto: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](mailto:michelle.blanchfield@sto.sc.gov)

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**From:** Kim Buckley <[KBuckley@scag.gov](mailto:KBuckley@scag.gov)>  
**Sent:** Wednesday, September 30, 2020 6:27 AM  
**To:** Blanchfield, Michelle <[Michelle.Blanchfield@sto.sc.gov](mailto:Michelle.Blanchfield@sto.sc.gov)>  
**Cc:** Simmons, Melissa <[Melissa.Simmons@sto.sc.gov](mailto: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 thls information that would be helpful.

Thank you!

Kim

Sent from my iPhone

Begin forwarded message:

**From:** Kim Buckley <[KBuckley@scag.gov](mailto:KBuckley@scag.gov)>  
**Date:** September 28, 2020 at 4:37:00 PM EDT  
**To:** "[Michelle.Blanchfield@sto.sc.gov](mailto:Michelle.Blanchfield@sto.sc.gov)" <[Michelle.Blanchfield@sto.sc.gov](mailto:Michelle.Blanchfield@sto.sc.gov)>  
**Cc:** "Simmons, Melissa" <[Melissa.Simmons@sto.sc.gov](mailto: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](mailto:kbuckley@scag.gov)

# Exhibit K

**Jim Griffin**

**From:** Lee, Alison Renee <ALeeJ@sccourts.org>  
**Sent:** Wednesday, October 28, 2020 1:33 PM  
**To:** Todd Rutherford  
**Cc:** Emory Smith (ESmith@scag.gov); William H. Davidson II; kwoodington@dml-law.com; Jim Griffin; Badge Humphries; james.carpenter@carpenterlawfirm.net; Gerald Malloy; John Simmons; Lee, Alison Renee Law Clerk (Austin Nichols); Strom, Pete  
**Subject:** RE: SCPIF and John Crangle v. Alan Wilson, et al. Docket No. 2020CP4004603

Good afternoon,

I am not considering any motions to intervene or motions to dismiss. Please file any memoranda you want considered on those motions. The orders were not solicited by me and will not be considered at this time as they are premature. At this point only the motion to reconsider filed October 23, 2020 is under consideration.

Thank you.

*Alison Renee Lee*

Circuit Court Judge  
 1701 Main Street, Suite 324  
 Post Office Box 192  
 Columbia, SC 29202  
 (803) 576-1765

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**From:** Todd Rutherford <todd@rutherford.law>  
**Sent:** Wednesday, October 28, 2020 1:04 PM  
**To:** Lee, Alison Renee <ALeeJ@sccourts.org>  
**Cc:** Emory Smith (ESmith@scag.gov) <ESmith@scag.gov>; William H. Davidson II <wdavidson@dml-law.com>; kwoodington@dml-law.com; Jim Griffin <jgriffin@griffinhumphries.com>; Badge Humphries <bhumphries@griffinhumphries.com>; james.carpenter@carpenterlawfirm.net; Gerald Malloy <gmalloy@bellsouth.net>; John Simmons <jsimmons@simmonsfirm.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Strom, Pete <petestrom@stromlaw.com>  
**Subject:** SCPIF and John Crangle v. Alan Wilson, et al. Docket No. 2020CP4004603

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Judge Lee,

Attached for your consideration is a proposed order that grants the pending Motion to Dismiss filed on behalf of my client, Willoughby & Hoefer, P.A., and a virtually identical Motion to Dismiss filed by the law firm of Davidson, Wren & DeMasters, P.A. in this matter. This proposed order was filed with the Court's e-filing system earlier today. For your ease of reference, I have also attached copies of the motions to dismiss that were filed by the law firms last week.

If the Court needs any further information from us, please let us know.

Thank you in advance for your consideration of this most important matter.

J. Todd Rutherford, Esq.  
RUTHERFORD LAW FIRM  
2113 Park Street (29201)  
Post Office Box 1452  
Columbia, SC 29202  
Phone: (803) 256-3003  
Facsimile: (803) 256-9698

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ELECTRONICALLY FILED - 2021 Jan 20 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

Appellate Case No. 2021-000343

RECEIVED

May 17 2021

S.C. SUPREME COURT

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

Appellants,

v.

Alan Wilson, Attorney General and The State of South Carolina,  
Willoughby & Hoefler, P.A., and Davidson, Wren & DeMasters, P.A.

Respondents.

---

**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 Appellants in this matter.

2. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in Appellants' Memorandum in Support of Motion to Certify Case for Review filed concurrently herewith.

- |           |                                                                                                      |
|-----------|------------------------------------------------------------------------------------------------------|
| Exhibit 1 | Settlement Agreement, <i>South Carolina v. United States</i> , 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 Complaint, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Sept. 25, 2020
- Exhibit 5 Motion for Temporary Restraining Order and Preliminary Injunction, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Sept. 25, 2020
- Exhibit 6 James Carpenter email to Judge Lee and counsel re Hearing on Temp. and Prelim. Inj., Sept. 25, 2020
- Exhibit 7 Bruce Norton email thread with counsel re SCPIF v. Wilson 2020CP4004603, Sept. 28, 2020
- Exhibit 8 Jeff Young email exchange with Kim Buckley and Randy Lowell, Sept. 28, 2020
- Exhibit 9 Emory Smith email exchange with Jim Griffin re SCPIF v. Wilson 2020CP4004603, Sept. 28, 2020
- Exhibit 10 Emory Smith email exchange with Bruce Norton and counsel for parties re SCPIF v. Wilson 2020CP4004603, Sept. 29, 2020
- Exhibit 11 Memorandum of Attorney General in Opposition to Motion to TRO or Temporary Injunction, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Sept. 29, 2020
- Exhibit 12 Jim Griffin email thread with B. Norton and counsel for the parties re SCPIF v. Wilson 2020CP4004603, Sept. 28-30, 2020
- Exhibit 13 Order Granting Temporary Injunction Pendente Lite, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Sept. 29, 2020, signed Sept. 29, 2020 and entered Sept. 30, 2020
- Exhibit 14 Amended Complaint, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Sept. 30, 2020
- Exhibit 15 Motion for Temporary Restraining Order and Preliminary Injunction, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Sept. 30, 2020
- Exhibit 16 Ex Parte Temporary Restraining Order, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Oct. 1, 2020
- Exhibit 17 Order Denying Motion for Preliminary Injunction, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Oct. 14, 2020
- Exhibit 18 Order Denying Motion to Alter or Amend, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Dec. 17, 2020

- Exhibit 19 Order Granting Motions to Dismiss, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Mar. 5, 2021
- Exhibit 20 Notice of Appeal, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Mar. 29, 2021
- Exhibit 21 Affidavit of Kimberly Buckley, Oct. 1, 2020
- Exhibit 22 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 23 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
- Exhibit 24 Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
- Exhibit 25 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 26 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 27 *South Carolina v. United States*, 912 F.3d 720 (2019)
- Exhibit 28 Petition for Writ of Certiorari, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
- Exhibit 29 Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
- Exhibit 30 *South Carolina v. United States*, 140 S. Ct. 392 (2019)
- Exhibit 31 Memorandum of Attorney General in Opposition to Mot. to TRO or Temporary Injunction, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020)
- Exhibit 32 South Carolina Department of Administration Form BD-100 Request for Other Funds Authorization, Sept. 17, 2020
- Exhibit 33 Affidavit of Nikki G. Setzler, *South Carolina Public Interest Foundation v. Wilson*, Case No. 2020-CP-40-04603, Oct. 5, 2020
- Exhibit 34 Judge Lee email to Counsel, Oct. 28, 2020



# EXHIBIT 8

**From:** [Jeff Young](#)  
**To:** [Kim Buckley](#); [Randy Lowell](#)  
**Subject:** RE: Willoughby Hoefer PA Trust Account Wiring Instructions (002).pdf  
**Date:** Monday, September 28, 2020 3:43:27 PM

---

Just got back from CG office. RE said all was well and it would go to the Treasurer today.



**W. Jeffrey Young**  
Chief Deputy Attorney General  
Office: (803) 734-6680  
[jyoung@scag.gov](mailto:jyoung@scag.gov)  
Rembert C. Dennis Building  
1000 Assembly Street  
Columbia, SC 29201

---

**From:** Kim Buckley <[KBuckley@scag.gov](mailto:KBuckley@scag.gov)>  
**Sent:** Monday, September 28, 2020 3:33 PM  
**To:** Randy Lowell <[rlowell@willoughbyhoefer.com](mailto:rlowell@willoughbyhoefer.com)>  
**Cc:** Jeff Young <[JYoung@scag.gov](mailto:JYoung@scag.gov)>  
**Subject:** Re: Willoughby Hoefer PA Trust Account Wiring Instructions (002).pdf

Thank you, Randy.

Kim

Sent from my iPhone

On Sep 28, 2020, at 3:30 PM, Randy Lowell <[rlowell@willoughbyhoefer.com](mailto:rlowell@willoughbyhoefer.com)> wrote:

Here is the wire transfer info that the Treasurer is going to ask you for.

<image001.jpg> Randolph R. Lowell  
**WILLOUGHBY & HOEFER, P.A.**  
133 River Landing Drive, Suite 200  
Charleston, SC 29492  
(o) 843.619.4426  
(f) 843.619.4430  
[rlowell@willoughbyhoefer.com](mailto:rlowell@willoughbyhoefer.com)

---

**From:** Randy Lowell  
**Sent:** Monday, September 28, 2020 3:29 PM

# EXHIBIT 34

**Jim Griffin**

**From:** Lee, Alison Renee <ALeeJ@sccourts.org>  
**Sent:** Wednesday, October 28, 2020 1:33 PM  
**To:** Todd Rutherford  
**Cc:** Emory Smith (ESmith@scag.gov); William H. Davidson II; kwoodington@dml-law.com; Jim Griffin; Badge Humphries; james.carpenter@carpenterlawfirm.net; Gerald Malloy; John Simmons; Lee, Alison Renee Law Clerk (Austin Nichols); Strom, Pete  
**Subject:** RE: SCPIF and John Crangle v. Alan Wilson, et al. Docket No. 2020CP4004603

Good afternoon,

I am not considering any motions to intervene or motions to dismiss. Please file any memoranda you want considered on those motions. The orders were not solicited by me and will not be considered at this time as they are premature. At this point only the motion to reconsider filed October 23, 2020 is under consideration.

Thank you.

*Alison Renee Lee*

Circuit Court Judge  
 1701 Main Street, Suite 324  
 Post Office Box 192  
 Columbia, SC 29202  
 (803) 576-1765

---

**From:** Todd Rutherford <todd@rutherford.law>  
**Sent:** Wednesday, October 28, 2020 1:04 PM  
**To:** Lee, Alison Renee <ALeeJ@sccourts.org>  
**Cc:** Emory Smith (ESmith@scag.gov) <ESmith@scag.gov>; William H. Davidson II <wdavidson@dml-law.com>; kwoodington@dml-law.com; Jim Griffin <jgriffin@griffinhumphries.com>; Badge Humphries <bhumphries@griffinhumphries.com>; james.carpenter@carpenterlawfirm.net; Gerald Malloy <gmalloy@bellsouth.net>; John Simmons <jsimmons@simmonsfirm.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Strom, Pete <petestrom@stromlaw.com>  
**Subject:** SCPIF and John Crangle v. Alan Wilson, et al. Docket No. 2020CP4004603

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Judge Lee,

Attached for your consideration is a proposed order that grants the pending Motion to Dismiss filed on behalf of my client, Willoughby & Hoefer, P.A., and a virtually identical Motion to Dismiss filed by the law firm of Davidson, Wren & DeMasters, P.A. in this matter. This proposed order was filed with the Court's e-filing system earlier today. For your ease of reference, I have also attached copies of the motions to dismiss that were filed by the law firms last week.

If the Court needs any further information from us, please let us know.

Thank you in advance for your consideration of this most important matter.

J. Todd Rutherford, Esq.  
RUTHERFORD LAW FIRM  
2113 Park Street (29201)  
Post Office Box 1452  
Columbia, SC 29202  
Phone: (803) 256-3003  
Facsimile: (803) 256-9698

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ELECTRONICALLY FILED - 2021 Jan 20 4:51 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

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-40-04063

---

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 & Hofer, P.A., and Davidson, Wren & DeMasters, P.A., Respondents.

---

**CERTIFICATE OF COUNSEL**

---

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 25, 2021

s/ James M. Griffin

---

James M. Griffin (SC Bar # 9995)  
Badge Humphries (SC Bar #72904)  
Margaret N. Fox (SC Bar # 76228)  
GRIFFIN HUMPHRIES LLC  
4408 Forest Drive, Suite 300  
Columbia, South Carolina 29206  
803-744-0800

James G. Carpenter (SC Bar #1136)  
THE CARPENTER LAW FIRM  
819 East North Street  
Greenville, South Carolina 29601  
864-235-1269

Attorneys for Appellants

# Exhibit B

Affidavit of James M. Griffin

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 & Hofer,  
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  
PURSUANT TO RULE 56(f) SCRPC**

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

1. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.
2. I am submitting this Affidavit in opposition to the Defendants' motion for summary judgment pursuant to Rule 56(f), SCRPC.
3. On September 14, 2022, the South Carolina Supreme Court filed an opinion reversing the Circuit Court's order dismissing Plaintiffs' Amended Complaint concluding that Plaintiffs have public importance standing to pursue the claims alleged.
4. The Supreme Court remanded this case "for the circuit court to consider the merits of [Plaintiffs'] claims."
5. Plaintiffs have alleged the following claims in the Amended Complaint:
  - a. Declaratory Judgment that:
    - i. Section 1-7-150 SC Code requires the Attorney General to deposit all of the \$600 million in settlement proceeds from the DOE settlement into the State's General Fund;

- ii. The General Assembly has exclusive authority to appropriate moneys from the General Fund and that the Attorney General has no such authority;
  - iii. The Attorney General's payment of \$75 million of public funds violates the South Carolina Constitution, Art. I, §8, the Separation of Powers Clause; and
  - iv. In the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable.
- b. Imposition of a Construction Trust over the \$75 Million transferred to Willoughby & Hoefler and/or Davidson, Wren & DeMasters;
  - c. Return of the \$75 Million to the State by Willoughby & Hoefler and Davidson, Wren & DeMasters; and
  - d. Injunctive Relief requiring that the funds not be further disbursed until this dispute is resolved on its merits.

6. On November 18, 2022, Plaintiffs served interrogatories and requests for documents upon Defendants Willoughby & Hoefler PA and Davidson, Wren & DeMasters PA. A true and accurate copy of these discovery requests are attached hereto as Exhibit A.

7. On December 16, 2022, Defendants Willoughby & Hoefler PA and Davidson, Wren & DeMasters PA each filed motions for a protective order and to stay discovery.

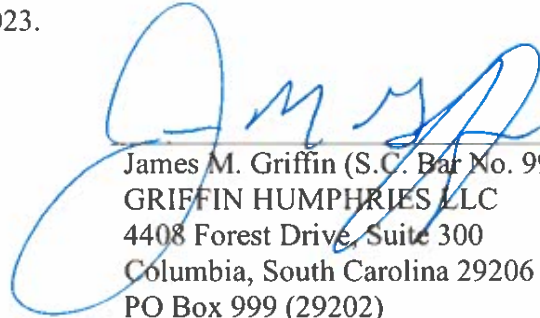
8. Defendants have not responded to any Plaintiffs' discovery requests since filing the motions on December 16, 2022.

9. Plaintiffs have been denied any opportunity to conduct discovery on the claims alleged in the Amended Complaint.

10. Plaintiffs therefore request that Defendants' motions for summary judgment be denied without prejudice or continued until Plaintiffs have a reasonable opportunity to conduct discovery.

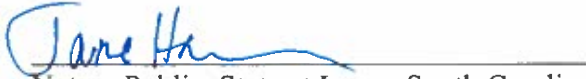
Further Affiant sayeth naught.

Dated this 2nd day of August 2023.



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

Subscribed and sworn to before me  
by James M. Griffin on this  
the 2nd day of August 2023.



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

THE STATE OF SOUTH CAROLINA  
In the 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 & Hoefler, P.A., and Davidson, Wren & DeMasters, P.A.,

Respondents.

---

**CERTIFICATE OF COUNSEL**

---

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 3, 2024

s/ James M. Griffin

---

James M. Griffin (SC Bar # 9995)  
Badge Humphries (SC Bar #72904)  
Margaret N. Fox (SC Bar # 76228)  
GRIFFIN HUMPHRIES LLC  
4408 Forest Drive, Suite 300  
Columbia, South Carolina 29206  
803-744-0800

James G. Carpenter (SC Bar #1136)  
THE CARPENTER LAW FIRM  
819 East North Street  
Greenville, South Carolina 29601  
864-235-1269

Attorneys for Appellants