Trial Order

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Civil Action No. 2009-CP-04-4482
Anderson County,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**FINAL ORDER AND JUDGMENT**
Joey Preston and the South Carolina Retirement System,	)	
	)	
Defendants.	)	

The Court held a non-jury trial in the above-captioned matter between October 29, 2012 and November 5, 2012. Plaintiff Anderson County ("County" or "Plaintiff") appeared and was represented by Ted Gentry, Troy Tessier, and Tally Parham of Wyche, P.A. Lane Davis of Nelson Mullins Riley & Scarborough, LLP and Candy Kern-Fuller of the Upstate Law Group, LLC appeared on behalf of Defendant Joey Preston ("Preston"). Before trial, and upon request from its counsel, the Court excused the South Carolina Retirement System ("SRS") from appearing at trial since Plaintiff named SRS only as a stakeholder and SRS had no direct interest in the trial's outcome. The County and Preston consented to SRS's request not to appear.

PROCEDURAL BACKGROUND

The instant lawsuit arose out of a severance agreement ("Severance Agreement") executed between the County and Preston on November 18, 2008. On November 13, 2009, the County sued Preston seeking rescission of the Severance Agreement. The County's Complaint alleged eleven (11) causes of action. Plaintiff's claims included: (1) rescission based upon violation of South Carolina Ethics Act and Anderson County Code §2-37(g); (2) rescission based upon violation of public policy; (3) rescission based upon breach of fiduciary duty; (4) rescission based upon fraud; (5) rescission based upon constructive fraud; (6) rescission based upon

negligent misrepresentation; (7) rescission based upon capriciousness, lack of reasonability, and a result of fraud; (8) rescission based upon fundamental and substantial breach of the Severance Agreement; (9) rescission based upon breach of fiduciary duties relating to back-dated documents; (10) imposition of a constructive trust as to funds held by SRS; and (11) rescission based upon unjust enrichment. The County amended its Complaint in March of 2012 to include additional factual allegations but no additional causes of action.

Preston answered the County's Amended Complaint on May 4, 2012. Preston's Answer to the Amended Complaint counterclaimed for damages resulting from Plaintiff's alleged breach of the Severance Agreement.[1] The County thereafter filed a timely Reply. The parties were allowed to submit their closing arguments in writing to the court after the conclusion of the trial. Both sides submitted their closing arguments within the weeks following the trial.

After the trial of this action an opinion was issued by the South Carolina Court of Appeals in the case of *Cunningham v. Anderson County*, Appellate Case No. 2011-194209. The Court Of Appeals filed the opinion on January 16, 2013, which was subsequently withdrawn and refiled February 27, 2013. Since the issues decided in the *Cunningham* case may have had some relevance to the issues before this Court, the parties were asked to submit briefs as to the effect, if any, that this opinion might have on the issues in this case. Both sides filed briefs, which have been made Court's Exhibits, which touched on the issues. In their communications, they asked this Court to consider certain issues from that decision. The Plaintiff argued that *Cunningham* stood for the propositions that: 1) The decision by Council to enter into the Severance Agreement was arbitrary and capricious because Preston's original employment contract would have been unenforceable; 2) That *Cowart* was affirmed and council should have followed

[1] Preston's Answer to the Amended Complaint contained several other counterclaims which were settled before the trial of this case. As such, the Court's decision only addresses Preston's remaining claim for breach of contract.

Attorney Bright's advice to do nothing. The Defendant argued: 1) The Severance Agreement was executed, funded and completed prior to the new council taking office and, therefore, *Cunningham* had no application; 2) Council could not have foreseen the exact outcome of the litigation surrounding the *Cowart* line of cases, and therefore, their action was still "fairly debatable" at the time they took it; 3) The 2008 Council was within its discretion to decide a severance agreement that would be completed within their term without restricting the discretion of the 2009 Council.

The Court considered the issues raised by counsel for the parties as a result of the *Cunningham* case in reaching this decision.

OUTSTANDING EVIDENTIARY ISSUES

The Court took under advisement a number of evidentiary issues raised by both Parties during the trial of this case. Table A, which the Court attaches to this Order and incorporates herein by reference, provides the Court's evidentiary rulings as to the outstanding issues.

FINDINGS OF FACT

It is clear to this Court that what has been referred to by both sides as a "toxic political environment" did exist in Anderson County on the 18th day of November 2008. Who was at fault in bringing about this environment is not as important to the Court's conclusions as is the fact that it existed. This toxic environment dominated the political discourse in Anderson County for some time before the execution of the Severance Agreement in question in this case.

Some of the factors giving rise to this environment included, but were not limited to, the following:

- A council person, Cindy Wilson, came onto Council carrying a personal grudge against the County Administrator as a result of decisions made by the administrator in a

condemnation case involving her or her family's land. (*See, e.g.*, Def. Ex. 17; Def. Ex. 18; Def. Ex. 23; Def. Ex. 24; McAbee Tr. Test. (Day 2); Floyd Tr. Test. (Day 5));[2]

- Repeated accusations and claims, concerning various matters, by Cindy Wilson and others surrounding her concerning the County Administrator. (*See, e.g.*, Def. Ex. 21; Def. Ex. 23; Def. Ex. 24; Def. Ex. 121; Def. Ex. 132; Floyd Tr. Test. (Day 5));
- Candidates and Council members-elect prejudging issues slated to come before them without affording themselves and others the opportunity to gather facts, hold hearings, or be heard. (*See, e.g.*, Brown Tr. Test. (Day 6); Def. Ex. 25; Def. Ex. 26; Def. Ex. 46; Def. Ex. 87; Def. Ex. 89; Def. Ex. 91);
- Council members disregarding the legal "chain of command" established by the Home Rule Act. (*See, e.g.*, Def. Ex. 50, ¶¶27 & 29);
- Council members involving the news media in the decision making processes of Council to the exclusion of other duly elected Council members. (*See, e.g.*, Def. Ex. 71; Def. Ex. 91; Def. Ex. 101; Def. Ex. 102; Def. Ex. 103; Def. Ex. 104; Def. Ex. 105; Floyd Tr. Test (Day 5); Allen Tr. Test. (Depo.), 18:1-19:25);
- Council members and Council-elect involving the news media in "stunts" to gain political advantage over the County Administrator or other Council members. (*See, e.g.*, Def. Ex. 18; Def. Ex. 20; Def. Ex. 50, ¶22; Ex. 71; Ex. 92; Ex. 93; Ex. 97; Ex. 101; Ex. 102; Ex. 103; Ex. 104; Ex. 105);

[2] The Court's citation to the Record in this Order is intended as merely illustrative, not exhaustive. Ample evidence supports the Court's conclusions throughout the decision beyond what is cited. The Parties have also raised a wide array of legal arguments in this case. After careful review and consideration, the Court addresses those it deems material herein. To the extent an argument has not been deemed worthy of discussion by the Court, it should be deemed as having been fully reviewed and rejected by the Court as without legal basis under the facts of the case *sub judice*.

- A County Administrator who appeared to be defensive in how he provided information and responded to inquiries of Council members. (*See, e.g.*, Waldrep Tr. Test. (Day 1); Def. Ex. 34);
- A County Administrator who conducted himself in his personal and professional actions so as to give rise to suspicion and mistrust. (*See, e.g.*, Waldrep Tr. Test. (Day 1));
- Council-elect conducting meetings, before taking office, with individuals who would later constitute a majority of County Council, where the participants planned specific actions to be taken once they had taken their seats. The meeting participants excluded others on Council with whom they would be serving. (*See, e.g.*, Waldrep Tr. Test. (Day 1); Moore Tr. Test. (Depo.), 271: 7-25; Allen Tr. Test. (Depo.), 35:1-41:25; *Compare* Def. Ex. 111 *with* Def. Ex. 140);
- Council members engaging in actions carrying with them an appearance of impropriety. (*See infra.*)
- See Exhibit "A" attached hereto for additional evidence on this point.

The above examples reflect the leadership wasteland existing in Anderson County, on both sides of these issues, at the time County Council approved Preston's Severance Agreement.

As a result of the above cited behavior litigation had begun between Joey Preston, both personally and as the County Administrator, and members of the Council he served. This litigation included Preston bringing suit against the Town of Williamston, Cindy Wilson and others concerning allegations made against Preston surrounding his obtaining a BMW roadster. This case resulted in a settlement and the payment of damages from the defendants, including Cindy Wilson, a council member, to Mr. Preston.

Also, Preston as County Administrator sued Robert Waldrep and Cindy Wilson, alleging the need for injunctive relief and civil damages. That case resulted in the issuance of a

Temporary Restraining Order by Judge Nicholson restraining the two named Council members for violating the Home Rule Act in their dealings with employees of the County and Preston. *See* Compl., *Preston v. Waldrep & C. Wilson*, 2008-CP-04-2776.[3]

Further, C. Wilson brought an action against Preston in his official capacity as County Administrator seeking a Writ of Mandamus to obtain financial records of the County, *Wilson v. Preston*, 378 S.C. 348, 662 S.E. 2d 580, (SC 2008). Her petition was denied by the Circuit Court. This decision was affirmed by the South Carolina Supreme Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court's legal and factual findings as to the claims asserted by the parties are as follows:

I. First Cause of Action: County Council's Actions Violated: S.C. CODE ANN. §§ 8-13-100 *et seq.* ("State Ethics Act"), Anderson County Code §§2-37(g) & 2-288 ("County Code"), and the Common Law.

Anderson County's first claim alleges County Council violated the State Ethics Act, the Anderson County Code, and common law by approving Preston's Severance Agreement. Under this claim, Plaintiff challenges the entire process of passing the Severance Agreement, not just particular votes. (*See* Am. Compl., ¶35 which alleges that, "The Severance Agreement was adopted by Anderson County Council in violation...".)[4] Consistent with the allegations put in issue by Plaintiff, the Court has analyzed all Council members' votes as to the passage of the Severance Agreement. After doing so, the Court finds in favor of Preston for the reasons stated below.

[3] Throughout the trial, the Court heard evidence regarding the lawsuit brought by Preston against Waldrep and C. Wilson. (*See, e.g.*, Def. Ex. 50; *see also* Waldrep Trial Testimony; C. Wilson Testimony (Depo.).) To the extent necessary, the Court also takes judicial notice of the entirety of the allegations from the Complaint in that case, which are a matter of public record. *See* Rule 201(c), SCRE.

[4] The Ninth Affirmative Defense in Preston's Answer to the Amended Complaint, which invokes application of the Supreme Court's decision in *Baird v. Charleston County*, 333 S.C. 519 (1999), similarly compels the Court to analyze the votes of all Council members.

All seven members of Anderson County Council attended the November 18th, 2008 meeting of County Council. All voted on various motions concerning the approval of Preston's Severance Agreement. The Council members in attendance included: Larry Greer ("Greer"), Gracie Floyd ("Floyd"), Bill McAbee ("McAbee"), Michael Thompson ("Thompson"), Ron Wilson ("R. Wilson"), Cindy Wilson ("C. Wilson"), and Bob Waldrep ("Waldrep").

In analyzing County Council's actions, the Court finds that the Anderson County's Code is more restrictive than the State Ethics Act concerning conflicts of interests and the reasons for recusal by a council member. Specifically, the State Ethics Act primarily prohibits elected officials from participating in governmental decisions where an official or his family members derive a direct economic benefit. *See, e.g.*, S.C. CODE ANN. § 8-13-700. By contrast, Anderson County Code (hereinafter "ACC") §2-37(g)(4)(e), entitled when "members may not vote," more broadly disallows Council members from participating in decisions where their involvement creates: "a substantial appearance of impropriety." ACC §2-37(g)(4)(e).

With these principles in mind, the Court analyzes County Council's votes in relation to Preston's Severance Agreement, as follows:

Larry Greer & Gracie Floyd

No evidence of record called into question the propriety of the votes cast by Greer or Floyd. No party has suggested any impropriety on the part of Greer and Floyd. As a result, the Court finds both the votes of Greer and Floyd as valid and proper.

Bill McAbee

The County questioned the propriety of McAbee's vote on the Severance Agreement. After considering all evidence of record, however, the Court finds McAbee did not possess a financial interest in Preston's Severance Agreement or the vote approving the same. The Court

likewise finds neither the allegations nor the record evidence concerning McAbee's vote gave rise to a substantial appearance of impropriety.

The Court finds McAbee undertook certain economic development travel, about which the County complains, in an effort to promote economic activities he deemed worthwhile for the County. (*See, e.g.*, McAbee Tr. Test. (Day 2) (discussing benefits of pursuing heavy rail and coal gasification.)) No evidence linked McAbee's travel to Preston's Severance Agreement or the surrounding issues. The evidence established McAbee's economic development travel occurred over an extended period of time and did not relate to Preston's Severance Agreement.

The County also complains of a real estate commission received by McAbee in April of 2008. (*See* Pl. Ex. 60.) The Court rejects the notion that the April of 2008 commission somehow tainted McAbee's Severance Agreement vote. The commission arose out of a real estate contract originating several years before. (*See* Def. Ex. 59.) McAbee received the commission over five months before Preston's employment dispute even arose in September of 2008, before the June of 2008 primaries, and over seven months before the Severance Agreement vote occurred. (*Compare* Pl. Ex. 60 *with* Def. Ex. 59.) Whenever County Council undertook decisions relating to the transaction from which the commission arose, McAbee recused himself. (*See* Def. Ex. 58.)

No evidence of record reflects Preston had anything to do with the commission received by McAbee. No evidence of record establishes any link between the commission and McAbee's vote in favor of the Severance Agreement. No evidence of record reflects that the commission was somehow improper. Accordingly, the Court finds McAbee's vote was valid and proper.

Michael Thompson

Thompson similarly derived no financial benefit from Preston's Severance Agreement. However, the Court does find Thompson's vote ran afoul of ACC §2-37(g)(4)(e)'s substantial

appearance of impropriety prohibition. At the time Thompson cast his vote, he was seeking future employment from Anderson County through Preston. Also, Preston had approved County-funded training for Thompson. To a casual observer of the Severance Agreement vote, the Court finds such facts and circumstances created a substantial appearance of impropriety. Therefore, Thompson should have refrained from voting on Preston's Severance Agreement.

Ronald Wilson

R. Wilson similarly derived no financial benefit from the Severance Agreement vote. But, like Thompson's, the Court finds R. Wilson's vote ran afoul of ACC §2-37(g)(4)(e)'s substantial appearance of impropriety prohibition. In the weeks before the Severance Agreement vote, R. Wilson's adult, emancipated daughter received an extension of her personal services contract ("Services Contract") with Anderson County. To an observer of these transaction, the Court finds such facts and circumstances would have created a substantial appearance of impropriety. Therefore, R. Wilson should have refrained from participating in the vote.

In so holding, the Court acknowledges the County failed to introduce any evidence directly linking the Services Contract's extension to R. Wilson's Severance Agreement vote. R. Wilson received no direct benefit from the Services Contract's extension. And, no evidence establishes R. Wilson knew of the Services Contract's extension when he voted. Indeed, the evidence of record suggests otherwise. (*See, e.g.*, Schaum Tr. Test. (Day 6).)

By operation of ACC §2-37(g)(4)(a), however, a Council member has a disqualifying interest when a direct descendant has a financial interest in the transaction. Thus, while lacking a direct financial interest in the Severance Agreement vote and Services Contract, the Court finds R. Wilson should not have voted on Preston's Severance Agreement since his daughter had recently received a substantial benefit from Administrator Preston. Such vote, in the Court's view, improperly carried a substantial appearance of impropriety.

C. Wilson & Waldrep

The circumstances surrounding the respective votes of C. Wilson and Waldrep mirror each other and, as such, the Court treats them collectively herein. For the reasons set forth below, the Court finds both C. Wilson and Waldrep possessed direct financial interests in the Severance Agreement vote and their respective votes carried a substantial appearance of impropriety. As such, the Court finds neither C. Wilson nor Waldrep should have participated in the Severance Agreement vote. In reaching this conclusion, this Court notes that neither of these parties had an extended period of time in which to analyze their participation in this vote. Further, this Court notes that they both voted against their respective interests. Nevertheless, this Court must analyze their votes on the same standard as the other votes cast in this matter.

At the time of the Severance Agreement's adoption, C. Wilson and Waldrep were named, in their individual capacities, in a lawsuit brought by Preston. The complaint in that case sought costs and attorney's fees as well as injunctive relief. *See* Compl., *Preston v. Waldrep & C. Wilson,* 2008-CP-04-2776.[5] Preston alleged C. Wilson and Waldrep interfered with the execution of his job as County Administrator. *Id.* After the lawsuit commenced and well in advance of the Severance Agreement vote, Preston, by and through his personal attorney, also gave notice to County Council of both his claim for anticipatory breach of contract and tort claims he intended to pursue against two County Council members—C. Wilson and Waldrep. (*See* Pl. Ex. 22.) These are some of the same issues upon which the *Cunningham* case was allowed by the Court of Appeals to go forward toward trial.

[5] Throughout the trial, the Court heard evidence regarding the lawsuit brought by Preston against Waldrep and C. Wilson. (*See, e.g.*, Def. Ex. 50; *see also* Waldrep Trial Testimony; C. Wilson Testimony (Depo.).) To the extent necessary, the Court also takes judicial notice of the entirety of the allegations from the Complaint in that case, which are a matter of public record. *See* Rule 201(c), SCRE.

During trial, testimony from Waldrep and C. Wilson (by deposition) confirmed Preston was asserting tort claims against them personally. (*See* Waldrep. Tr. Test. (Day 1); Tr. Test. C. Wilson (Depo.), 59: 14-18; 75: 1-8; Pl. Ex. 22.)[6] In turn, Paragraph Six of the Severance Agreement states:

> In consideration of the County's agreement to provide Employee [Preston] with the severance payments described in this Agreement, Employee, for himself, his heirs, his legal representatives, and his assigns, hereby covenants irrevocably never to make any claim or demand, or to commence, cause, or permit to be instituted or prosecuted, any suit, charge, proceeding, or action at law or in equity, ~~against the County [or] any of its Council members, employees, managers,~~ officers, board members, or any of its affiliated parts, entities, or subsidiaries, as well as the successors and assigns of those entities and persons, by reason of any claim, demand, or cause of action which Employee may now have, or may hereinafter acquire, relating to his employment, with the County, expressly including, but not limited to, the termination of and/or the conditions of his employment with the County. The parties expressly covenant for themselves, their legal representatives, their heirs, and assigns, that this Agreement may be treated as a complete defense to any legal, equitable, or administrative action that may be brought, instituted, or taken by Employee against the County, related to Employee's employment, and/or the termination of his employment, or the conditions of his employment, and shall forever be a complete bar to the commencement or prosecution of any action, suit, charge, claim, or legal proceeding relating in any way to Employee's employment or termination of employment.[7]

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[6] At trial, the County also argued the release contained in the Severance Agreement conferred identical benefits upon all Council members. According to the County, to the extent the release conferred benefits on all Council members, all votes were improper for the same reason. The Court rejects this analysis. As noted above, Anderson County Code §2-37(g) (4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public." Here, Preston filed a lawsuit against C. Wilson and Waldrep individually, which remained pending at the time of the Severance Agreement vote. Moreover, Preston had supplied notice of an intent to pursue tort claims against two Council members, which C. Wilson and Waldrep acknowledged referred to them. By contrast, at the time of the Severance Agreement vote, Preston had not filed a lawsuit nor given notice of his intent to pursue tort claims against any other member of County Council. Thus, as to C. Wilson and Waldrep, the Severance Agreement conferred personal and financial benefits greater than that of the general Anderson County public, while the release conferred no benefits on the remaining members of Council (against whom no lawsuit was filed or claims asserted) different than those of the public.

[7] By contrast, Preston's Master Employment Agreement required him only to: "execute and deliver to the *County* a release, releasing the County of all further claims that the Administrator may have against the *County*." (Pl. Ex. 1, p. 4, ¶E (Emphasis added).)

(Pl. Ex. 7, p. 2, ¶6.)[8] Since Preston agreed not to pursue any further claims against any County Council member, Waldrep and C. Wilson had a direct economic interest in the outcome of the vote regardless of the vote's outcome. Therefore, due to a potential appearance of substantial impropriety, Waldrep and C. Wilson should not have participated in a vote on Preston's Severance Agreement while Preston maintained a lawsuit against them individually. ACC §2-37(g).

According to Plaintiff, the votes of Waldrep and C. Wilson should nonetheless be counted because they voted against Preston's Severance Agreement. The Court disagrees. Waldrep and C. Wilson had personal and financial interests "greater than that of the general Anderson County public" thereby prohibiting their participation and vote. In such instances, ACC §2-37(g)(4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public."[9] No exception exists based upon how a Council member votes. Accordingly, the Court finds Waldrep and C. Wilson should not have voted on the Severance Agreement or any related issues.

Having found the votes of Thompson, R. Wilson, C. Wilson, and Waldrep as improperly cast, the Court next analyzes what impact flows from such findings. In that regard, the Court finds the Supreme Court's holding in *Baird v. Charleston County*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controlling. Adopting the majority view, the *Baird* Court held:

> In general, the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. *See* W.J. Dunn, *What*

[8] Having found Preston's Severance Agreement as a valid contract, as discussed below, the Court also finds Paragraph 6 of the Severance Agreement establishes Preston's seventh affirmative defense of release.

[9] In addition, and as noted *supra*, personal financial interest also includes matters where a Council member's "participation in the matter at hand would create a substantial appearance of impropriety." ACC §2-37(g).

Constitutes Requisite Majority of Members of Municipal Council Voting on Issue, 43 A.L.R.2d 698, 748 (1955). Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77-78 (citing W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955) ("[T]he Council action will be upheld if the majority was not dependent on the votes of disqualified members and rejected if there would be no majority without such votes.")[10]

[10] Numerous decisions around the country accord with the *Baird* Court's analysis. *See Marshal v. Ellwood*, 189 Pa. 348, 354, 41 A. 994, 995 (1899) ("It would be an astonishing proposition to submit that an ordinance...which was passed by a considerable majority of perfectly qualified votes, should be declared illegal because it had received the supporting vote of one member who was disqualified."); *Anderson v. City of Parsons*, 209 Kan. 337, 342, 496 P.2d 1333, 1337 (1972) ("It is also the rule that where the required majority exists without the vote of the disqualified member, his presence and vote will not invalidate the result"); *Hodge v. Princeton*, 227 Ky. 481, 13 S.W.2d 491 (1929) (considering the disqualification of one of four votes); *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N.W. 953 (1916) (reducing number of votes to fifteen due to failure of nine members to participate); *Commonwealth ex rel. Whitehouse v. Raudenbush*, 249 Pa. 86, 94 A. 555 (1915) (disqualifying vote of interested council member); *Alamo Heights v. Gerety*, 264 S.W.2d 778 (Tex. Civ. App. 1954); *Sup'rs of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879); *Woodward v. City of Wakefield*, 236 Mich. 417, 210 N.W. 322 (1926); *Saks & Co. v. Beverly Hills*, 107 Cal. App. 2d 260, 237 P.2d 32 (1951) (five votes, three disqualified, left one to one vote) (overruled on other grounds as to meaning of the term "trial *de novo*" at issue in *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 776, 537 P.2d 375, 379 (1975)); *State ex rel. Oakey v. Fowler*, 66 Conn. 294, 32 A. 162, 163 (1895) ("If his own vote was necessary to give a majority of the board of selectmen, we should feel compelled to hold his election to be void."); *Fort Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N.E. 215, 217 (1892) ("sufficient number of councilmen voted for the resolution granting the land to the railroad company to pass it without counting the vote of Edgerton"); *Tuscan v. Smith*, 130 Me. 36, 153 A. 289, 292 (1931) ("The vote was unanimous and he was but one of three."); *Beale v. Santa Barbara*, 32 Cal. App. 235, 162 P. 657 (1916); *Murach v. Planning & Zoning Commission of City of New London*, 196 Conn. 192, 203, 491 A.2d 1058, 1065 (1985) ("Where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result."); *Klindt v. Pembina County Water Resource Bd.*, 2005 N.D. 106, 697 N.W.2d 339, 350 (2005) (question is whether vote was "determinative"); *Eways v. Reading Parking Authority*, 385 Pa. 592, 124 A.2d 92 (1956); *Board of Com'rs of Richmond County v. Thompson*, 216 Ga. 348, 349, 116 S.E.2d 737, 738 (1960) (reducing vote count by two).

Relying upon authority from other jurisdictions, Anderson County argues only one tainted vote sufficed to rescind the Severance Agreement.[11] However, the Court relies upon the *Baird* decision in concluding the "one tainted vote rule" does not control in South Carolina.[12] Moreover, *Baird* does not indicate that South Carolina's courts would consider the political position or relative strength of those advocating for one side or another in determining which votes to allow.

No South Carolina authority supports the County's premise wherein it argues that South Carolina's courts should weigh the potential sway of participating individual officials when reviewing the validity of governmental votes. To the contrary, here, all elected officials owed the same legal duties to their constituents. The Court treats each public official equally and finds their respective votes warrant equal weight and independence.[13]

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[11] Had it not elected to follow the *Baird* holding, the Court may very well have had to consider what impact other tainted votes of Waldrep and C. Wilson had on the County's ability to bring the instant lawsuit and the Court's jurisdiction to hear Plaintiff's claims. For example, votes approving the investigation of the Severance Agreement and to commence and maintain the instant lawsuit could prove void if, as Plaintiff urges, one tainted vote (such as those cast by C. Wilson and Waldrep) invalidated Council action. (*See, e.g.*, Def. Ex. 138; Anderson County Meeting Minutes, Nov. 12, 2009 (publicly available at: http://www.andersoncountysc.org/web/Council_Minutes01.asp.) In light of the Court's decision, however, the Court finds further factual development and legal analysis, in this regard, proves unnecessary to the current analysis.

[12] Consistent with the balance of this decision, the Court notes the superiority of the analytical framework established by the *Baird* Court. Under Plaintiff's urged approach, the validity and finality of an otherwise valid action of a legislative body could be rendered uncertain by virtue of a judicial challenge arising out of an alleged appearance of impropriety, regardless of whether the challenged vote proved outcome determinative. The Court rejects such approach as inconsistent with the holding of *Baird* and the other authority discussed herein. *See, e.g., Eways v. Reading Parking Authority*, 385 Pa. 592, 604, 124 A.2d 92, 98 (1956) ("However, it is equally true that where a Resolution or Ordinance is passed or adopted by a sufficient number of legal votes, it will not be invalidated by improper illegal votes if the contract or subject matter in question was lawful and there is no fraud or statutory restriction. To hold otherwise would injure the public interest or stifle government.").

[13] The County characterizes County Council's approval of the Severance Agreement as "judicial" in nature. The Court rejects the County's distinction in this regard. The "appointment and removal of a public officer is a governmental function..." *Piedmont Pub. Serv. Dist. v. Cowart*,

The Court, therefore, rejects Plaintiff's premise that because Thompson (as Chairman of Council) and R. Wilson (as Chairman of the Personnel Committee) supported the Severance Agreement, their influence somehow overwhelmed the independent judgment of County Council's remaining elected officials. Indeed, even if such inquiry proved appropriate, the evidence of record establishes otherwise. As discussed *infra*, each of the Council members whose votes the Court has found as properly cast in favor of the Severance Agreement, articulated independent and lucid grounds supporting their respective votes. (*See* Greer Tr. Test. (Day 4); McAbee Tr. Test. (Day 2); Floyd Tr. Test. (Day 5).)

The Court's reasoning, in this regard, also accords with South Carolina precedent. South Carolina law disfavors substituting judicial determinations for the decision-making of officials elected to make such judgments. In so finding, the Court references the decisions of *Segars-Andrews v. Judicial Merit Selection Commission et al.* and *Bear Enterprises v. The County of Greenville et al.*, wherein South Carolina's appellate courts have afforded great deference to legislative bodies and their decision-making, both legislatively and judicially. *Segars-Andrews*, 387 S.C. 109, 130, 691 S.E. 2d 453, 469 (2010) (declining judicial intervention into political determinations conferred to a legislative body due to Separation of Powers constraints); *Bear Enterprises*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) ("If the propriety of the Council's decision is even "fairly debatable," we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed."); *see also* S.C. CODE ANN. § 4-9-620

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324 S.C. 239, 241 (1996). Indeed, it is a statutory power conferred upon County bodies to exercise within their legislative discretion. S.C. CODE ANN. § 4-9-620. In addition, the County also characterizes the Severance Agreement as conferring solely an "individual benefit." The Court likewise rejects this characterization. The evidence at trial confirmed those Council members who appropriately voted in favor of the Severance Agreement did so in hopes of promoting the public good. Some of the rationales included *inter alia*: a desire to avoid a significant downside risk to the County, to avoid further political infighting that had proved deleterious to the County, to help the County Council move forward with County business, which had been stymied, and to help ensure the County could hire competent County Administrators later.

(conferring upon County Council the discretion to hire and remove County Administrators in Council-Administrator form of government).[14]

The Court next examines how many votes were necessary to approve the Severance Agreement. Pursuant to ACC § 2-37(g)(3), approval of the Severance Agreement required a simple majority of those members present and voting. ACC § 2-37(g)(3) ("[A] majority vote of those members present and voting shall decide all questions, motions, and other votes."). Upon applying the *Baird* holding and ACC § 2-37(g)(3) to the facts at bar, the Court finds a majority of votes of those present and properly voting approved Preston's Severance Agreement.

Specifically, the Court finds the votes approving Preston's Severance Agreement included the following:

- Motion to Amend the Agenda: Passed 5-2, with Thompson and R. Wilson voting Aye; with Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 23, ll. 28-30.)
    - Motion to Amend Proposed Amendment to Agenda: Failed 2-5, with Waldrep and C. Wilson voting Aye; Thompson and R. Wilson voting Nay; Removing Improper Votes, Failed 0-3. (Pl. Ex. 5, p. 23, ll. 22-26.)
- Motion to Adopt the Severance Agreement: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 27, ll. 36-39.)
    - Question called for: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 27, ll. 28-32.)

[14] *See also Griggs v. Hodge*, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956) ("As a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate governmental agency."); *Schroeder v. O'Neill*, 179 S.C. 310, 184 S.E.2d (1936) ("The Court will not interfere with discretionary powers of a municipal body, except in cases of fraud or clear abuse of power, or where unreasonable or capricious"); *Plunkett v. Aiken*, 159 S.C. 97, 108-09, 156 S.E. 245 (1931) ("The exercise of that discretion so long as it is not unreasonable or capricious, is a matter of policy with which the Courts are not concerned. There was not sufficient evidence to show any exercise of arbitrary power or caprice upon the part of the City Council, and we cannot sustain the decree of the Circuit Judge on this additional ground, as urged by the respondents.").

- Motion to Approve Transfer of Funds to Fund the Agreement: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and R. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 30, ll. 41-45.)

    - Motion to Table Motion to Transfer Funds: Failed 2-5, with Thompson and R. Wilson voting Nay; Waldrep and C. Wilson voting Aye; Removing Improper Votes, Failed 0-3. (Pl. Ex. 5, p. 30, ll. 15-20.)

    - Question Called For on Motion to Transfer Funds: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 30, ll. 30-38.)

- ~~Motion to Reconsider the Transfer of Funds Motion: Passed 6-0-1, with Thompson, R.~~ Wilson and Waldrep voting Aye; C. Wilson Abstaining; Removing Improper Votes, Passed 3-0-1. (Pl. Ex. 5, p. 32, ll. 3-5.)

- Second Vote on Motion to Transfer Funds: Passed 5-2, with Thompson, R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 33, ll. 7-8.)

    - Question Called For: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 32, ll. 43-46.)

- Motion to Reconsider Approval of the Severance Agreement: Passed 4-0-3, with Thompson voting Aye; R. Wilson, C. Wilson and Waldrep abstaining; Removing Improper Votes, Passed 3-0-3. (Pl. Ex. 5, p. 33, ll. 30-43.)

    - Question Called For: Passed 4-3, Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 2-1. (Pl. Ex. 5, p. 33, ll. 34-39.)[15]

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[15] Of all the votes leading up to the approval of the Severance Agreement, only the parliamentary vote to call for the question on the motion to reconsider was close. The Court finds, however, that even if Waldrep and C. Wilson could have voted, no change in outcome would have manifested. First, under Robert's Rules of Order Article 1, §7, debate would have eventually expired regardless of the outcome on the subject vote to call for the question. Consistent with their votes throughout, the trial testimony from voting Council members reflected that additional debate on the Motion to Reconsider would not have changed their ultimate vote. (*See, e.g.*, McAbee Tr. Test.; Greer Tr. Test; Floyd Tr. Test.) The County has not introduced any evidence to the contrary. Second, had such members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement. As noted above, this did not occur, as the Second Vote on the Severance Agreement passed with a vote of 5-1-1. Third, adverse parliamentary rulings can be appealed under the Anderson County Code. *See* ACC § 2-37(g). Here, no appeal occurred. (*See* Pl. Ex. 5.) Finally, South Carolina Courts do not review the parliamentary processes of legislative bodies. *See State v. Lewis*, 181 S.C. 10, 186 S.E. 625, 631 (1936) ("That is merely a

- Second Vote on Severance Agreement: Passed 5-1-1, with Thompson and R. Wilson voting Aye; C. Wilson voting Nay; Waldrep Abstaining; Adjusted Vote, Passed 3-0-1.

(*See* Pl. Ex. 5.)

Therefore, under Plaintiff's first cause of action, Preston's Severance Agreement does not warrant rescission. After discounting the improper votes, the Court finds a majority of members present and voting duly passed Preston's Severance Agreement.

II. Second Cause of Action: Public Policy Voids County Council's Actions; and Seventh Cause of Action: County Council's Actions Were Arbitrary and Capricious.

Plaintiff's second and seventh causes of action respectively alleged County Council's vote approving the Severance Agreement warrants rescission because such vote contravened public policy and constituted arbitrary and capricious decision-making. (*See* Am. Compl., ¶¶37-39 & 71-74.) As the second and seventh causes of action present interrelated issues, the Court addresses them together, and for the reasons set out below, rejects both claims as unsupported by fact or law. Accordingly, the Court finds in favor of Preston as to the second and seventh causes of action.

As to the second cause of action, the Court finds that public policy renders neither the Severance Agreement nor the vote adopting the same as void as against public policy. While paragraphs 37 through 39 of the Amended Complaint never specify how the Severance Agreement's approval violated public policy, the Court finds greater harm would exist by virtue of South Carolina's courts disturbing the decision of a legislative body. As noted *supra*, in furtherance of strong public policy in this state, South Carolina courts accord deference to the discretionary decision-making conferred upon legislative bodies by statute. *Segars-Andrews*,

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matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself."); *Smith v. Jennings*, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903) (Same); *see also* MASON'S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975) ("[C]ourts will not disturb a ruling on a parliamentary question made by a legislative . . . body having authority necessary to make rules for its government . . . .").

387 S.C. at 130, 691 S.E. 2d at 469; *Bear Enters.*, 319 S.C. at 140, 459 S.E. 2d at 886; *see also* S.C. CODE ANN. § 4-9-20; *supra*, n. 8. The Court, therefore, finds in favor of Preston as to the second cause of action.

As to the seventh cause of action, the Court finds County Council's vote in favor of Preston's Severance Agreement did not constitute arbitrary decision-making. In reaching this conclusion, the Court relies upon the decision of *Bear Enterprises v. County of Greenville.* Quite simply, *Bear* stands for the proposition that: "[i]t is not the prerogative of the courts to pass upon the wisdom of County Council's decision . . . " *Bear Enters.*, 319 S.C. at 140, 459 S.E.2d at 885. "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster Cnty.*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). Importantly, "The decision of the legislative body is presumptively valid and the [opposing party] has the burden of proving otherwise." *Bear Enters.*, 319 S.C. at 141, 459 S.E.2d at 885 (citing *Lenardis v. City of Greenville*, 316 S.C. 471, 471, 450 S.E.2d 597, 597 (Ct. App. 1994)).

Anderson County was required, but did not, prove the arbitrariness of County Council's action "by clear and convincing evidence." *Bear Enters.*, 319 S.C. at 141, 459 S.E.2d at 886 (citing *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991)). "If the propriety of the Council's decision is even 'fairly debatable,' [the court] cannot inject [its] judgment into a review of [the Council's] decision, but must leave that decision undisturbed." *Id.* at 140, 459 S.E.2d at 885 (citing *Lenardis*, 316 S.C. at 472, 450 S.E.2d at 598) (holding the county's decision in refusing to rezone an area was not arbitrary or capricious). Applying these standards to the case at bar, the Court finds County Council's vote approving the Severance Agreement did not constitute arbitrary and capricious action.

According to Plaintiff, the financial value of the Severance Agreement rendered County Council's vote approving the same arbitrary and capricious. Specifically, Anderson County compares severance amounts owed under the strict terms of Preston's Master Employment Agreement with the financial value of the Severance Agreement. Because the latter exceeds the former, Plaintiff concludes the Severance Agreement was arbitrary and capricious. The Court disagrees.[16]

The evidence at trial established Anderson County Council's approval of the Severance Agreement proved neither arbitrary nor capricious. In light of the information available to County Council when it approved the Severance Agreement, and in light of events occurring since, the Court finds Anderson County Council's approval of the Severance Package fell within the advice of counsel and has proven a reasonable choice. (*See* Bright Tr. Test. (Day 1) (Conceding advice to Personnel Committee included several potential options including settling with Preston; conceding he informed Personnel Committee of potential downside of litigation); *see also* Def. Ex. 28, p. 4, ¶F.)[17]

The reasonability of County Council's decision-making proves especially true in light of the steps the Council-elect had leaked to the public as their intended course of action upon taking office. Based on what the members of County Council knew at the time, such actions could very

[16] As an initial matter, it is worth noting that Preston's claims, as articulated in correspondence from his attorney dated October 23, 2008, included potential tort claims and exceeded severance claims arising strictly from the four corners of his Master Employment Agreement. (*See* Pl. Ex. 22; *see also* Bright Tr. Test. (Day 1).) Moreover, the release contained in the Severance Agreement exceeds the scope of the release contemplated by Preston's Master Employment Agreement. (*Compare* Pl. Ex. 1, p. 4, ¶E *with* Pl. Ex. 7, p. 2, ¶6.) Preston's Master Employment Agreement also contained an indemnity provision, which survived the Agreement, but was terminated under the Severance Agreement. (*Compare* Pl. Ex. 1, p. 8, §14 *with* Pl. Ex. 7, p. 2, ¶6.) Thus, contrary to Plaintiff's suggestions, County Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious.

[17] Importantly, the County's employment lawyer alluded to subsequent events before County Council acted upon the Severance Agreement.

well have violated Preston's legal and contractual rights. Both Preston's Master Employment Contract and South Carolina statute provided for a hearing before dismissal or suspension without cause. (*See, e.g.*, Pl. Ex. 1, p. 7, ¶13; S.C. CODE ANN. § 4-9-620.)

By November of 2008, the evidence at trial demonstrated that the issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. It is clear to this Court that the matter had been prejudged by the majority of Council-elect. To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer. The County's employment lawyer estimated potential exposure, including attorney's fees and costs, of up to two million ($2,000,000.00) dollars. (*See* McBee Tr. Test. (Day 2); Greer Tr. Test. (Day 4); *see also* Floyd Tr. Test. (Day 5); Bright Tr. Test. (Day 1).) Also, it is noted that the *Cunningham* case has been allowed to go forward toward trial on issues relating to his wrongful discharge. These are some of the same issues that may have been asserted by Preston had the plan developed by the councilmen and councilmen-elect in the time leading up to this vote been allowed to proceed as had been planned.

Each of the Council members who the Court has found properly voted for the Severance Agreement provided independent and lucid reasons supporting their votes.[18] Certainly their

[18] (*See, e.g.*, Greer Tr. Test. (Day 4) (testifying that he voted in favor of the Severance Agreement because *inter alia*: he hoped it would end political infighting that he observed as having impaired the County's ability to conduct business; he sought to avoid the potential downside risk of two million ($2,000,000,00) dollars, as articulated by the County's employment counsel; he sought to avoid risk to economic development caused by political infighting; and he deemed it important to treat the County Administrator fairly so as not to impair County's ability to find another Administrator); Floyd Tr. Test. (Day 5) (testifying that she voted in favor of the Severance Agreement because, *inter alia*: she believed the County faced over two million ($2,000,000.00) dollars in liability if it lost to Preston; she hoped the Severance Agreement would end the political infighting she had observed as interfering with County Council's ability to complete business; she believed the Severance Agreement was the honest and fair thing to do; she believed it was important for the County to treat Preston honestly and fairly; and by voting in favor of the Severance Agreement, an outcome deleterious to the County could be avoided.);

decisions were unpopular with segments of the community and with Council-elect. However, Courts should not weigh the decisions of legislative bodies based upon the popularity of their decisions. Courts must instead judge whether a reasonable basis existed for making the decision in question. Reasonable decisions made by legislative bodies can often be unpopular when they are made. That fact does not make the decisions in question arbitrary, capricious or illegal.

As was stated in the *Bear Enterprises* case, if the decision made by County Council was "fairly debatable" the decision should remain undisturbed. 319 S.C. at 140, 459 S.E.2d at 885. Here, this Court has determined the decision to approve the Severance Agreement was "fairly debatable." It is noteworthy that, upon taking office, Council-elect did take actions to initiate this litigation on similar issues facing the 2008 Council in the litigation averted by the Severance Agreement. The resulting costs to Anderson County for this litigation and the underlying investigation have exceeded the County employment attorney's 2008 estimate of two million ($2,000,000.00) dollars. (*See, e.g.,* Allen Tr. Test (Depo.), 20:25-21:1-8 (Testifying "investigation in this lawsuit" was already nearing two million dollars ($2,000,000.00) in January of 2012).) Therefore, the Court finds that Anderson County Council's decision to enter into Preston's Severance Agreement was neither arbitrary nor capricious.[19]

McAbee Tr. Test. (Day 2) (testifying that he voted in favor of the Severance Agreement because *inter alia*: he wanted to avoid the downside risk of in excess of two million ($2,000,000.00) dollars, if the County lost the dispute with Preston, as articulated by the County's employment lawyer; he hoped the Severance Agreement could put behind the contentious period of County Council, which had already lasted several years and impaired County Council's ability to move forward.).)

[19] The County has raised subsequent precedent to the Court regarding the potential unenforceability of Preston's Master Employment Agreement. Such precedent, however, does not change the Court's decision. At the time of the Severance Agreement's approval, no such precedent existed. Legislative bodies do not have to foresee what an appellate court may decide five (5) years later. The question before the Court is whether, based upon the information then available, County Council's decision-making was fairly debatable. The Court finds that it was. If the issue was so clear, the County's employment attorney would not have identified a potential downside risk of up to two million ($2,000,000.00) dollars.

III. Third Cause of Action: Preston Breached His Fiduciary Duty to Anderson County.

Plaintiff's third cause of action seeks rescission of the Severance Agreement due to Preston's alleged breach of fiduciary duty resulting from violations of the State Ethics Act and Anderson County Code. (*See* Am. Compl., ¶¶40-46.) As an initial matter, the Court finds no evidence supporting Plaintiff's contention that Preston breached a fiduciary duty by violating the State Ethics Act or Anderson County Code.[20] (*See infra* (discussing County Council members as those individuals who owed disclosure duties, to the extent applicable). As found above, the Court has discounted the favorable votes of Thompson and R. Wilson as contrary to the Anderson County Code inasmuch as such votes carried a substantial "appearance of impropriety" and that they personally had a greater stake in the outcome than a member of the general public in Anderson County *See supra.* After doing so, the Court finds in favor of Preston in relation to the County's third cause of action.

The analysis applied by the Court follows the Supreme Court's holding in *Baird*, 333 S.C. at 519, 511 S.E.2d at 69. In *Baird*, the State Ethics Commission advised the tainted voter not to vote on a Bond Ordinance. When the tainted voter ignored the State Ethics Commission and nonetheless voted, the remedy, as determined by the *Baird* Court, was to invalidate the tainted vote "in determining the necessary majority for valid action." *Id.* at 535, 511 S.E.2d at 77. The remedy was not to overturn the entire vote. *Id.* The Court finds the instant remedy should be no greater than in *Baird.*

Pursuant to the Supreme Court's holding in *Baird*, then, this Court should discount the tainted votes and then determine whether County Council would have still adopted the Severance Agreement. *Id.*, 511 S.E.2d at 78 (The court has jurisdiction to undo legislative action if the

[20] As to the specific nuclei of allegations (*i.e.*, Thompson, McAbee, and Wilson), the Court has set out additional analysis below, which similarly applies to Plaintiff's third cause of action. The Court incorporates by reference analysis later in this opinion to the extent it applies to the County's third cause of action.

requisite number of votes "would not [have] exist[ed] but for the improper vote[s]."") Unlike *Baird*, however, when the Court discounts the tainted votes in this case, the result of the vote remains unchanged.[21] Accordingly, Anderson County Council still approved Preston's Severance Agreement. Further, this would be true even if the votes of Waldrep and C. Wilson remained undisturbed for the reasons set forth above. Therefore, the Court finds in favor of Preston as to Plaintiff's third cause of action.

IV. Fourth Cause of Action: Preston Committed Fraud; Fifth Cause of Action: Preston Committed Constructive Fraud; Sixth Cause of Action: Preston Committed Negligent Misrepresentation.

As to the fourth, fifth, and sixth causes of action, Plaintiff respectively alleges Preston committed fraud, constructive fraud, and negligent misrepresentation warranting the Severance Agreement's rescission. (*See* Am. Compl., ¶¶40-70.) The Court finds Anderson County failed to prove the necessary elements of such claims. *See Kahn Construction Co. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 271 S.E.2d 414 (1980) (reciting nine elements of fraud required to be proven by clear, cogent, and convincing evidence); *Woods v. State*, 314, S.C. 501, 431 S.E.2d 260 (Ct. App. 1993) (reciting nine elements of constructive fraud); *Baptist Foundation for Christian Education v. Baptist College*, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984) (noting clear, cogent, and convincing proof for constructive fraud); *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847, 852 (Ct. App. 1997) (reciting six elements required for negligent misrepresentation claim); *Smothers v. Richland Memorial Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct. App. 1987). Accordingly, the Court finds in favor of Preston as to the fourth, fifth, and sixth causes of action.

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[21] The Court similarly finds no evidence of record establishes any of the remaining votes of County Council would have changed had such Council members known the information about which Plaintiff complains. Indeed, the evidence of record demonstrates none of the remaining proper votes would have voted differently. Moreover, as noted above, Anderson County failed to prove any connection linking the Thompson Allegations and R. Wilson Allegations to the Severance Agreement. The Court instead discounted Thompson's vote and R. Wilson's vote due to the appearance of impropriety.

The County predicates its fourth, fifth, and sixth claims on the McAbee, Thompson, and R. Wilson allegations. As noted *supra*, the Court finds no evidence supports any impropriety as to the McAbee allegations. As to Thompson and R. Wilson, the County failed to introduce any evidence linking the alleged improprieties to Preston's Severance Agreement. Moreover, to the extent duties of disclosure existed, the impacted *elected officials* possessed positive legal duties to disclose any issues implicating ethical matters. But, in any event, Plaintiff failed to prove such disclosures were material to the outcome, as Plaintiff has not shown such disclosures, even if made, would have changed the votes of McAbee, Greer, and Floyd. Indeed, the evidence of record supports an opposite conclusion.

Moreover, by November 18, 2008, the Court finds Preston did not possess a duty to disclose information about his employment claims to County Council. It is clear to this Court that by October and November of 2008, Preston and County Council had assumed positions adverse to each other. By that time, Preston had already sued two Council members individually, asserting claims for injunctive relief, payment of costs, and attorney's fees. (*See, e.g.*, Def. Ex. 50.) Preston had further employed personal counsel to advance a claim of anticipatory breach of his employment contract by Council and the Council-elect. (*See, e.g.*, Pl. Ex. 23.) Preston had likewise given notice of tort claims he intended to bring against individual Council members and Council-elect. (*Id.*) The County and the individual Council members each had retained their own attorneys to protect their interests. It is clear to this Court, that at that time, the Parties were in adversarial positions to each other concerning the continued employment of Joey Preston.

In effect, in October and November of 2008, Preston was a claimant against certain Council members and Council itself. Because of their adversarial positions, open and known to both parties, any responsibility Preston may have had to keep County Council fully informed of his position in this matter had been necessarily greatly diminished or negated. Under these

circumstances, Preston did not owe a duty, and this Court has found scant authority to support such a fiduciary duty to one's employer in such a litigious situation as existed in Anderson County at that time. Accordingly, the Court finds Preston did not owe County Council a duty to furnish information adverse to his claim: when both parties had employed attorneys, when both parties were preparing for litigation, and when the involved Council members themselves had positive legal duties to disclose the ethics issues cited by Plaintiff. Further, this Court has invalidated any tainted votes and the result of the voting remains unchanged.

The County also complains that Preston failed to correct information supplied by Thompson to a local newspaper. According to Plaintiff, in June of 2008, Thompson publicly denied in a newspaper interview that he sought employment with the County. (*See* Am. Compl., ¶¶ 16, 44, 48.)[22] The Court rejects Plaintiff's claims as unsupported. However, even assuming Preston somehow owed a duty to correct misstatements of sitting Council members (his employers) to the media, Plaintiff failed to prove that Preston had anything to do with Thompson's statement to the media, or that Preston even knew about Thompson's statement when the Severance Agreement vote occurred. Moreover, no evidence established County Council's members knew and relied upon Thompson's statement. Similarly, no evidence demonstrated that had such information been known, it would have materially affected the outcome of the Severance Agreement vote. Based upon the totality of evidence presented during six (6) days of trial, the Court finds it would not have changed the outcome.

As to the Schaum issues, the Court finds the Services Contract was a public file and Preston had no duty to inform Council of public information. *See, e.g.*, S.C. CODE ANN. § 30-4-40(a)(5)(A). It had been widely known that Schaum had a Services Contract with the County

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[22] The County also cites Preston's failure to correct Thompson's alleged misstatement in support of its third cause of action. The same analysis would apply to that cause of action. That is to say, assuming a duty existed to correct Thompson's statement, the County failed to prove Preston even knew of the same.

long before Preston asserted any claims against the County. Schaum's relationship with R. Wilson was likewise known. No evidence proved the Services Contract's renewal was in any way material or related to County Council's decision to approve Preston's Severance Agreement. The evidence further failed to prove County Council would not have approved the Severance Agreement, regardless. Indeed, the Court finds the evidence of record proves otherwise.

Therefore, the Court finds no fraud, constructive fraud, or negligent misrepresentation arose by virtue of Preston's remaining quiet during the Severance Agreement vote. The Court similarly finds the Severance Agreement was not the product of fraud nor was it an abuse of power. Accordingly, the Court finds in favor of Preston in relation to Plaintiff's fourth, fifth, and sixth causes of action.

V. Eighth Cause of Action: Preston Breached the Severance Agreement by Back-dating Documents & Ninth Cause of Action: Breach of Fiduciary Duties by Back- dating Documents.

Plaintiff bottoms its eighth and ninth causes of action on allegations relating to former Anderson County Economic Development Director, Heather Jones. (Am. Compl, ¶¶ 75-80.) According to Plaintiff, Preston participated in back-dating memoranda relating to Jones' employment with the County. (*See* Am. Compl., ¶¶ 11(a), (b), & (c).) After reviewing the evidence of record, the Court finds Preston did not breach the Severance Agreement by executing back-dated memoranda and had he done so the breach would not have justified the relief sought.

No evidence of record demonstrates that any document executed by Preston changed the County's existing employment or contractual obligations to Jones. The documents in question memorialized agreements that had been previously made and acted upon by all parties. (*See, e.g.*, Jones Tr. Test. (Depo.), (relating to SUV allegations: 125: 9-19; 127: 20-25; 128: 1-13; 128: 24-25; 129: 1-5; 129: 18-25; 130: 1-4 Def. Ex. 66; Def. Ex. 138); (relating to Educational Reimbursements: 122: 5-20; 123: 10-12; 123: 17-25; 124: 14-25).) Moreover, the County failed

to prove that Preston executed any memoranda on or after December 1, 2008, as alleged.[23] (*See* Am. Compl., ¶¶ 11(a), (b), & (c).) Accordingly, the Court finds none of the alleged actions relating to Jones breached the Severance Agreement, nor did the execution of Jones' employment memoranda harm the County in any way.

For a breach of contract to warrant rescission, the breaches must prove so substantial and fundamental as to defeat the contract's purpose. *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) ("The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract."); *Smith v. First Provident Corp.*, 245 S.C. 509, 512, 141 S.E.2d 646, 647 (1965); *Davis v. Cordell*, 237 S.C. 88, 99, 115 S.E.2d 654, 655 (1960); *Martin v. Carolina Water Serv., Inc.*, 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984).

Even if Preston somehow breached the Severance Agreement, which is rejected as unsupported, the Court finds that any such breaches would not rise to the level of justifying a rescission of the contract. *Brazell v. Windson*, 384 S.C. 512, 517, 682 S.E.2d 824, 826 (2009) (citing *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989); 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 68:21 (4th ed. 1999 & Supp. 2012) (Instructing that the breach must be "of a most substantial character and pervade[ ] almost the entire contract" such that the breach would "defeat its purpose in nearly every respect."). Accordingly, the Court finds in favor of Preston as to the eighth and ninth causes of action.

VI. Tenth Cause of Action: Seeking a Constructive Trust for Funds Held by SCRS.

[23] The Court notes that the evidence demonstrated Jones had use of a County vehicle from December of 2006 until her departure in 2009, which was standard and necessary for her job. Jones never submitted any educational reimbursements. As to the travel memorandum, Preston never executed the memorandum and Jones never took the contemplated trip. (*See* Jones Tr. Test. (Depo.), 117: 22-23.) Thus, none of the Jones' allegations impacted the County whatsoever.

In its tenth cause of action, Anderson County seeks the imposition of a constructive trust over funds "in possession of" SCRS. (Am. Compl., ¶¶81-84.) Given the remaining findings of the Court, as set forth in this decision, Plaintiff's cause of action for constructive trust no longer remains viable. Accordingly, the Court finds in favor of Preston as to the tenth cause of action.

VII. Eleventh Cause of Action: Unjust Enrichment.

Plaintiff's eleventh cause of action purports to seek rescission based upon the remedy of unjust enrichment. No evidence supports a finding of unjust enrichment in this case. Preston and the County each retained attorneys who negotiated the terms of the Severance Agreement. As noted above, County Council approved the Severance Agreement by a majority of Council members present and voting.

The Court finds the County's unjust enrichment claim is misplaced. Unjust enrichment does not provide grounds for the rescission of a contract. Unjust enrichment does not provide an equitable remedy when a valid contract exists. And, unjust enrichment does not create a vehicle to recoup a contract benefit—after the fact—if a party no longer views the exchange of consideration as desirable. In any event, the Court finds the evidence of record fails to establish Preston's retention of the benefits conferred by the Severance Agreement constitutes a condition under which it would be unjust for him to retain the same. Accordingly, the Court finds in favor of Preston as to the County's eleventh cause of action.

VIII. Further Grounds Supporting Judgment in Favor of Preston.

The Court declines to rescind Preston's Severance Agreement for two additional reasons. They include:

A. Rescission Proves Unavailable In This Case Because the Court Cannot Return the Parties to Their *Status Quo* Before the Severance Agreement's Formation.

In order to invoke its equitable powers to rescind a contract, and in the absence of fraud, the Court must be able to return the parties to their *status quo* before the contract's formation.[24] *See King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984) ("In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract.") (citing *Rice and Santos, Inc. v. Jones*, 279 S.C. 201, 305 S.E.2d 74 (1983); *Hester v. New Amsterdam Casualty Co.*, 268 F. Supp. 623 (D.S.C. 1967)).[25] Indeed, controlling South Carolina precedent holds the ability to return the parties "to the status quo prior to the contract" as a "fundamental prerequisite for rescission." *Rice and Santos, Inc. v. Jones*, 279 S.C. at 204. "This includes the requirement that [Anderson County,] the party seeking rescission[,] must restore [Preston,] the opposite party[,] the benefits received" from Preston. *Id.* Applying such principles to the case *sub judice* renders rescission unavailable as an equitable remedy.

Here, returning the parties to the *status quo* prior to the Severance Agreement's adoption proves fundamentally impossible. The Court cannot return Preston to his position of County Administrator; someone else now holds the position and the parties' relationship has deteriorated such that Preston's restoration to his prior position is impossible. Preston's employment contract has now lapsed and, thus, no longer remains in force and effect. (*See* Pl. Ex. 1, Preston Master Employment Agreement, § 2.) Nor can the Court reinstate the elected Anderson County Council present in November of 2008. Furthermore, the South Carolina Retirement System has used and invested portions of the severance proceeds, while Preston has substantially depleted the

[24] The Court notes an exception to this rule is fraud. However, consistent with the Court's Order, Plaintiff has failed to prove fraud, constructive fraud, or even negligent misrepresentation in this case. Accordingly, the exception does not apply.

[25] *See also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004) ("Rescission, as a remedy, returns the parties to the status quo *ante*.") (citing *Gov't Emps. Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970)).

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remaining funds. (*See, e.g.*, Pl. Ex. 90; Pl. Ex. 91; Preston's Tr. Test.; *see also* Preston Depo.) Accordingly, the Court finds rescission proves unavailable as a viable remedy in this case.

B. The Doctrine of Unclean Hands And The Availability of Adequate Remedies at Law Bar Plaintiff from Invoking the Court's Equitable Jurisdiction.

Invoked by Preston as a fifth affirmative defense, the doctrine of unclean hands likewise bars Anderson County from seeking the equitable remedy of rescission in this case. "An action to rescind a contract is in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) (citing *Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960)). In turn, "The doctrine of unclean hands precludes a plaintiff from recovering in equity if [it] acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Straight v. Goss*, 383 S.C. 180, 206, 678 S.E.2d 443, 457 (Ct. App. 2009) (quoting *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998)). Here, the Court finds Anderson County has unclean hands and, therefore, it cannot invoke the Court's equitable powers.

It is axiomatic: "'[h]e who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). It is well understood that unclean hands will preclude rescission of a contract. *See Fattorusso v. Urbanowicz*, 774 N.Y.S.2d 658, 662 (Sup. Ct. 2004) (holding that where the plaintiff came to court with unclean hands and was not entitled to rescind the purchase of a racehorse); *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App. 1990) (holding that where a plaintiff was found negligent or guilty of wrongful conduct, the plaintiff was precluded from the remedy of rescission).

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The requirement that a party seeking the aid of equity, such as rescission, must do so with clean hands is often referred to by the equitable maxim: '[h]e who seeks equity must do equity.'" *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011) (quoting *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994)). "This principle applies to one who affirmatively seeks equitable relief." *Id.* "In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity." *Id.* Consequently, the Court finds the County lacks clean hands and cannot invoke equitable relief. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (declining to grant a plaintiff's request for specific performance where the plaintiff misled the defendants); *Shumaker v. Shumaker*, 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959) ("Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties."); *Anderson v. Purvis*, 211 S.C. 255, 266, 44 S.E.2d 611, 616 (1947) (discussing the maxim that he who seeks equity should do equity).

The record proves replete with evidence of the County's unclean hands. An illustrative, but non-exhaustive list of actions by sitting councilmen whose legal fees for actions surrounding the following were later paid by the county, includes the following:

- Waldrep and C. Wilson cast votes against Preston's Severance Agreement when this court has found they should have recused themselves under the Anderson County Code. (*See supra.*)

- A series of meetings occurred at sitting Council member Bob Waldrep's office ("Waldrep Meetings") starting in July of 2008 and extending through January of 2009 wherein two sitting Council members (Waldrep and C. Wilson) met with three Council-elects (Allen, Moore, and Dunn) to plot the course of Anderson County Council in 2009, including adverse employment actions against Joey Preston. The Court has little doubt the group attending the Waldrep Meetings had prejudged the issue of Preston's employment and had decided to pursue his dismissal. (Waldrep Tr. Test.; Allen Tr. Test. (Depo.), 49:1-52:25; Moore Tr. Test. (Depo.), 100:23-106:17.)

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- Allen, Moore, and Waldrep all testified that specific County employees were discussed during the Waldrep Meetings. Waldrep conceded on the witness stand that the group of employees discussed during the Waldrep meetings have subsequently left County employment. Allen, Moore, and Waldrep conceded Preston was discussed during the Waldrep Meetings. (*See, e.g.*, Allen Tr. Test. (Depo.), 49:14-55:21; Moore Tr. Test. (Depo.), 100:23-106:17; Waldrep Tr. Test. (Day 1).)

- While outwardly denied by the attendees of the Waldrep meetings, a series of E-mails from Council-elect, Eddie Moore, reflect the true intent of the group with regard to Joey Preston. (*See* Def. Ex. 46, 8/14/08 E-mail (Preston "is desperate and just wants to freeze everything so we can't run him off."); Def. Ex. 87, 08/04/08 Moore E-mail to Trammel ("Hopefully we can get [Preston] run out of Anderson County soon..."); Def. Ex. 89, 08/13/06, Stan Welch (reporter) E-mail to Moore ([I]f you can get the witchhunters to understand what should be done, you are the man!"); Def. Ex. 91, 10/20/08 E-mail from Moore to reporter Welch and WAIM Radio ("Well, I told radio hog Saturday that they had been trying to get rid of Joey for 10 years and we did by just winning a primary"); *see also* Def. Ex. 20, Bright Notes 10/13/08 ("[H]e's heard her say 'let's fire him.'")

- In early fall of 2008, Joey Preston sued Bob Waldrep and Cindy Wilson individually for interfering with his duties as County Administrator. (*See* Ex. 50, 12/29/08, Order Granting Preliminary Injunction.) At the time, both Waldrep and C. Wilson were sitting County Council members. Among a host of other findings, the court determined: "The County Administrator's duty to supervise his employees is being intentionally and purposefully thwarted by [Waldrep and C. Wilson]." (Ex. 50, ¶27.) The Court also found: "The actions of [Waldrep and C. Wilson] have interfered with the County Administrator's ability to do his job." (Ex. 50, ¶29.) Finding Preston was likely to win on the merits of his suit, the Court issued a preliminary injunction against Waldrep and C. Wilson. (Ex. 50.) According to Waldrep, the County later paid his attorney's fees ratifying his actions as within his official scope of duties, despite being found by the Court as contrary to South Carolina law. Cindy Wilson confirmed this was consistent with her recollection but, unlike Waldrep, did not seek reimbursement of her personal attorney's fees from public funds. (Tr. Test. C. Wilson (Depo.), 68: 2-15.) Thus, Plaintiff has accepted Waldrep's actions, which violated Home Rule and interfered with Preston's duties, as official conduct attributable to Plaintiff. Such conduct occurred in the months just prior to the Severance Agreement's approval.

- On November 17, 2008, Council members Bob Waldrep and Cindy Wilson and Council-elect Tommy Dunn, Eddie Moore, and Tom Allen sent a letter to Preston directing him to freeze County hiring effective immediately. (*See* Ex. 71, 11/17/08 Letter.) At that time, Dunn, Moore, and Allen had not been sworn-in, nevertheless, the correspondence was sent on Anderson County letterhead and copied to: "All Media Outlets." (*Id.*) No action on this subject had been taken by the sitting County Council.

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- Eddie Moore testified that the group met at Bob Waldrep's office on the Sunday directly prior to the January 6, 2009 meeting. That meeting would have occurred on January 4, 2009. During the meeting the group discussed agenda items and probably looked at "some of the resolutions." (Moore Tr. Test. (Depo.), 271: 7-25.)

- Gracie Floyd testified that Cindy Wilson used FOIA information requests as a club to harass Preston, over and over again. Indeed, Defense Exhibit 34, which is an opinion from the Supreme Court of South Carolina confirms this tactic. As of 2005, Wilson had already requested over 59,000 pages of documents from Preston. (Ex. 34, p. 5, 2008 Opinion of *Wilson v. Preston*.) Thereafter, the evidence at trial indicated C. Wilson's information requests were unending.

- See Exhibit "A" for additional matters which were not considered by this Court in reaching these conclusions since they were done by persons who were not yet county officials when they took these actions, and therefore, their actions should not be attributed to the county on this issue. However, these do matters do serve as a basis for the atmosphere that surrounded the actors in this case and as a basis for Preston's claim of anticipatory breach of contract as mentioned earlier.

Accordingly, when taken in its totality, the evidence of record firmly establishes that the County, by and through certain of its sitting Council members acting with members of the Council-elect, engaged in a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as County Administrator.

The Court finds such behavior prejudiced Preston in the execution of his duties, prompting his assertion of the anticipatory breach claim and tort claims in the first instance. The above described conduct is at the very least conduct that this Court finds to be ethically questionable, if not illegal. Accordingly, the Court finds the County lacks clean hands in this case and cannot invoke the Court's equitable powers to rescind the Severance Agreement, even if it could otherwise supply a basis for doing so, which it cannot. *See Straight*, 383 S.C. at 206, 678 S.E.2d at 457.

The County has stated in this action it wished to question the legality of the Severance Agreement. If that was the County's intention, that goal could have been accomplished by the bringing of a declaratory judgment action questioning the legality of the actions of the former

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council, without suing Mr. Preston directly for rescission. In the current case, allegations are advanced in direct violation of Paragraph Eight of the Severance Agreement since they are based on matters that are "relating to Mr. Preston's employment with the county or his actions as an employee on behalf of the County, expressly, including but not limited to, all action taken by Mr. Preston within the scope and course of his employment as County Administrator." This Court finds that an adequate remedy at law does exist. Generally, in South Carolina "equitable relief is unnecessary when an adequate remedy ... is available at law. *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 251 (1939); *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) ("[E]quitable relief is generally available where there is no adequate remedy at law...."); *Carolina Park Associates, LLC v. Marino*, 2012 WL 4711857 (S.C. 2012)

IX. Preston's Counterclaim for the Breach of Paragraph Eight of the Severance Agreement.

The Court finds Anderson County breached the unambiguous terms of Paragraph Eight of the Severance Agreement by bringing this action. Paragraph Eight states as follows:

> The County agrees and hereby covenants irrevocably never to make any claim or demand, or to commence, cause or permit to be instituted or prosecuted, any claim, charge, proceeding or action at law or in equity against Mr. Preston, his heirs, legal representatives, or assigns, by reason of any claim, demand or cause of action which the County may now have, or may hereinafter acquire, relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the County, expressly including, but not limited to, all actions taken by Mr. Preston within the scope and course of his employment as County Administrator. (Pl. Ex. 7, p. 3, ¶8.)[26]

[26] Similarly, Paragraph Six of the Severance Agreement states in material part:

> The parties expressly covenant for themselves, their legal representatives, their heirs, and assigns, that this Agreement may be treated as a complete defense to any legal, equitable, or administrative action that may be brought, instituted, or taken by Employee against the County, related to Employee's employment, and/or the termination of his employment, or the conditions of his employment, and shall forever be a complete bar to the prosecution of any action, suit, charge, claim, or legal proceeding relating in any way to Employee's employment or termination of employment.

(Pl. Ex. 7, p. 2, ¶6.)

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Having found Preston's Severance Agreement valid and enforceable by virtue of its adoption by the remaining untainted votes of County Council, and hearing no argument that the agreement was not legally entered into other that the issues raised in the Complaint, the Court finds Plaintiff's initiation and prosecution of the instant action breached Paragraph Eight of the Severance Agreement.

According to the County, the instant lawsuit merely attacks the Severance Agreement, not Preston's actions while County Administrator. The Court rejects this argument. It is clear the County based the instant lawsuit upon actions taken by Preston while performing his job as Administrator. (*See, e.g.,* Am. Compl., ¶¶12, 13, & 17 (Preston's attempted hiring of Thompson); *Id.* at ¶¶25-28 (renewing Services Contract with R. Wilson's daughter); *Id.* at ¶¶30-33 (challenging Preston's processing of McAbee's travel reimbursements); *Id.* at ¶¶11(a)-(c) (Preston's back-dating of memos regarding Jones' employment).) In fact, several of Plaintiff's causes of action attempt, albeit unsuccessfully, to invoke Preston's employment as a predicate to stating a claim. (*See* Am. Compl., Fifth Cause of Action (Constructive Fraud); Sixth Cause of Action (Negligent Misrepresentation); Seventh Cause of Action (Breach of Fiduciary Duty); Ninth Cause of Action (Breach of Fiduciary Duty other grounds).

Had the County wanted the courts to determine the validity of the Severance Agreement itself and make it the focus of the litigation, it could have done so by instituting a declaratory judgment action focusing solely on the contract and its validity.[27] Instead, the County brought

[27] The County also attempts to draw the distinction that the Severance Agreement is beyond the covenant not to sue, which should not be construed as what it characterizes as an "incontestability clause." The Court rejects this analysis. The covenant not to sue is clear and unambiguous. (*See* Pl. Ex. 8, p. 2, ¶6.) The covenant not to sue does not, as the County suggests, contain an exception to challenge the actions taken by Preston while County Administrator, so long as those challenges are raised in contesting the Severance Agreement's validity. (*Id.*) Thus, the Court finds the County breached the covenant not to sue when it

this action against Preston and the Retirement System as named defendants seeking rescission of the Severance Agreement and the return of all monies and costs.

Accordingly, the Court finds the County's filing of the instant lawsuit constitutes a breach of the Severance Agreement's covenant not to sue provisions as contained in Paragraph Eight of that Agreement. Numerous Courts examining the issue have ruled that obvious breaches of covenants not to sue support the award of damages in the amount of attorney's fees incurred as a result of the breach. *See S&D Mech. Contractors, Inc. v. Enting Water Conditioning Systems, Inc.*, 71 Ohio App.3d 228, 241, 593 N.E.2d 354, 363 (Ohio Ct. App. 1991); *Anchor Motor Freight, Inc. v. Int'l Bd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 377*, 700 F.2d 1067, 1072 (6th Cir. 1983); *Prospect Energy Corp. v. Dallas Gas Partners, LP*, 761 F. Supp. 2d 579, 592 (S.D. Tex. 2011). *See, e.g., Lubrizol Corp. v. Exxon Corp.*, 957 F.2d 1302, 1306 (5th Cir. 1992) (holding that where an action is brought in obvious breach of covenant not to sue, court has wide discretion to impose liability for litigation expenses, including attorney's fees); *McKissick v. Gemstar–TV Guide Int'l, Inc.*, Ca. No. 04-262, 2006 WL 211950, at *2 (N.D. Okla. Jan. 27, 2006) (granting summary judgment in favor of defendant where plaintiff's suit was "in violation of a broad and unambiguous covenant not to sue"), *aff'd in part, vacated in part on other grounds, and remanded*, 618 F.3d 1177 (10th Cir. 2010); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1027 (W.D.N.Y. 1990) (holding party is entitled to attorney's fees for "suits brought in obvious breach or otherwise in bad faith" where plaintiffs' allegations arose directly from events surrounding the settlement agreement and were in obvious breach of the covenant); *Quill Co., Inc. v. A.T. Cross Co.*, 477 A.2d 939, 943 (R.I. 1984) ("In the absence of contrary evidence, sufficient effect is given the usual covenant not to sue if, in addition to its service as a defense, it

challenged the Severance Agreement's validity based upon conduct allegedly occurring during Preston's tenure as Administrator. To hold otherwise would render the provision meaningless.

is read as imposing liability only for suits brought in *obvious breach or otherwise in bad faith*") (emphasis added).

A similar result was reached in a recent South Carolina Court of Appeals decision filed on October 24, 2012. In *Benedict College v. National Credit Systems, Inc. v. Ford*, 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012), the South Carolina Court of Appeals analyzed whether attorney's fees and costs could be pursued as special damages in a civil conspiracy claim where certain parties conspired to alter previously existing contract rights. The *Benedict* Court allowed the claim for special damages in the form of attorney's fees and costs arising out of the pending action.

The *Benedict* decision supports the general proposition underlying the decisions cited above, namely, that attorney's fees and costs can form an element of recoverable damages—if—as in this case, they flow from the complained of wrong. Here, Plaintiff plainly violated a clear and unambiguous covenant not to sue and the damages incurred by Preston proximately flowing from the same are the fees and costs of this action.

The above cited cases represent a common law approach to the awarding of attorney's fees. It appears that there is no case law from South Carolina directly on point which establishes a common law right to attorney's fees involving breach of a covenant not to sue. This especially true for cases in which the State or one of its political subdivisions is a moving party. However, the Court does find that the legislature has provided a statutory right to collect attorney's fees in cases which are initiated by governmental entities, as was done in this case. This statute sets forth the basis for the award of attorney's fees and also sets the prerequisites which must be followed by the Courts in making such an award. The statutory authority for the awarding of attorney's fees is S.C. Code 15-77-300 which provides:

§ 15-77-300. Allowance of fees

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

(B) Attorney's fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate. Factors to be applied in determining a reasonable rate include:

(1) the nature, extent, and difficulty of the case;

(2) the time devoted;

(3) the professional standing of counsel;

(4) the beneficial results obtained; and

(5) the customary legal fees for similar services.

The judge must make specific written findings regarding each factor listed above in making the award of attorney's fees. However, in no event shall a prevailing party be allowed to shift attorney's fees pursuant to this section that exceed the fees the party has contracted to pay counsel personally for work on the litigation.

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

This Court finds that this statute is in derogation of the common law on the award of damages against a sovereign body. "If the statute is in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent." *Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338 (2012)(quoting *Doe v. Marion*, 361 S.C. 463, 473 (Ct. App. 2004). This Court finds that S.C. Code § 15-77-310 provides the method that should be followed by a claimant seeking attorney's fees in this case. Section 15-77-310 states "The party shall petition for the attorney's fees within thirty days following final disposition of the case. The petition must be supported by an affidavit setting forth the basis for the request."

Accordingly, the Court finds that the issue concerning an award of attorney's fees in this matter should be held in abeyance pending the final disposition of this case and the filing of the petition as required by law.

CONCLUSION

The Court finds the witnesses supporting the Severance Agreement, specifically Gracie Floyd, Larry Greer, and Bill McAbee, to be the more credible witnesses in the trial. Other testimony at trial was evasive and not credible concerning issues surrounding the meetings held at councilman Bob Waldrep's office. This Court further finds testimony concerning the emails between those parties that did not support the approval of the severance package untrustworthy (See exhibit A and Finding of Facts). Therefore, as to all causes of action asserted by Plaintiff, the Court finds in favor of Defendant Preston and enters judgment consistent with this decision. As to Preston's counterclaim, the Court finds in favor of Defendant Preston and holds the question of attorney's fees in abeyance until the final disposition of this case and any petition filed according to statute.

IT IS SO ORDERED.

The Honorable Roger L. Couch
Circuit Court Judge

May 3, 2013

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TABLE A

EXHIBIT NUMBERS	DESCRIPTION	COURT'S RULING
Pl. Ex. 33	3/21/06 Council Mtg. Transcript	Admitted.
Pl. Ex. 92	Jones screen print and memo to Preston Re/ Germany Trip	Admitted.
Pl. Ex. 93	Jones screen print and memo to Preston Re/ ed. reimb. 11/26/08 and 10/16/06	Admitted.
Def. Ex. 121	Agt. Donohue SLED Memo. Interviewed C. Wilson, Morgan & Poliakoff Re/ lawsuit against Big Creek Landfill.	Admitted.
Def. Ex. 122	Statement by Cole to SLED. Re/	Excluded. Irrelevant &
	Conversation with C. Wilson, Polk Re/ allegations Preston used public money to buy people drinks	Hearsay.
Def. Ex. 123	12/3/05 Preston Statement, Re/ Felton Meeting with C. Wilson.	Excluded: Hearsay.
Def. Ex. 125	10/6/05 letter to Preston. Re: Extramarital affairs in Anderson and Lt. Briggs	Excluded: Hearsay.
Def. Ex. 126	Kelly Nichols letter to County Council Re/ Cindy Wilson slandering her	Excluded: Nichols denied its truth and testified Cunningham & Preston authored.
Def. Ex. 132	2/15/2005 Preston v. Wilson *et al.* Judg. Re/ Award to Preston for $ 3,500.00	Admitted: Public Record & Preston Statement.
Def. Ex. 134	3/27/06 SLED memo by special agent Kindley Re/ Threats received by C. Wilson	Excluded: Relevance & Hearsay.
Def. Ex. 139	Allen email to Dunn from 12/24/08	Admitted.
Kelly Nichols' Testimony concerning her affair with Joey Preston		Excluded as Irrelevant; Information was not available to Council when the vote occurred and did not enter into the decision-making process. The Court further finds that Preston was not untruthful to County Council on this subject, so testimony would be impeachment on a collateral matter and thus inadmissible.

- Brooks Brown testified Tom Allen, current County Council Chairman, told him in July of 2008 (at the Waldrep campaign victory party) that the incoming Council knew how to get rid of "his boy"—the new Council intended to give Preston a command he could not obey and fire him for insubordination. (*See also* Def. Ex. 26, Bright Notes 11/04/08 ("[M]eeting held—they would give him something to do that he could not perform and that he would be fired for insubordination.")) Brown further testified that when Allen learned Brown had divulged his comments to Preston, Allen threatened him with an investigation. Notably, at the time of such threat, Allen served as the Chairman of Anderson County's investigative subcommittee and C. Wilson also served on the subcommittee. (Allen Tr. Test. (Depo.), 47: 3-25.)

- Council-elect Moore sent correspondence to Preston about a paper shred day for the public on November 13, 2008 at 9:24 AM requesting that Preston "hold off on doing any shredding of any kind of documents from Anderson County at the present time" and "that no financial records be part of this action." (Ex. 92, 11/13/08 Moore E-mail to Preston). However, Exhibit 93 reflects that Moore already knew no County documents would be shredded as of 6:58 AM the same morning. (Ex. 93, 11/13/08 Moore E-mail to King.) Moore blind-copied both Council-elect Tom Allen and Council member Bob Waldrep on the earlier E-mail to Gail King with Anderson County, which stated: "Thanks for the quick response. We new council members just want to make sure no county documents are destroyed at all before our auditors examine them." (*Id.*) As reflected in Preston's response in Exhibit 92, WAIM Radio had been misreporting that county documents were being shredded. Exhibit 92, which blind-copies Allen, Waldrep, the County Council Clerk, and WAIM Radio, reflects a further response from Moore: "Thanks for your quick response...I have always been a no nonsense guy." (Ex. 92, 11/13/08 Moore E-mail to Preston). Then, Moore again writes to Rick Driver at WAIM Radio, who had been misreporting county documents were being shredded when they were not, as had been clarified by Preston, and states; "Rick, keep Preston's response confidential..." (Ex. 94, 11/13/08 Moore E-mail to Rick Driver at WAIM Radio.) So, in essence, Moore sent an E-mail simply to harass Preston and then instructed WAIM Radio to keep Preston's response confidential so the public would remain misled about county documents being shredded.

- On November 25, 2008, before taking office, and before the County ever conducted any investigation, Council-elect Moore wrote to the Attorney General requesting an investigation of Preston's buyout. (Ex. 101, 11/25/08 Moore E-mail to Attorney General.) Moore copied Tom Allen and Council member Bob

Waldrep. Moore blind-copied the County Council clerk, Rick Freemantle, reporter Stan Welch, and WAIM Radio. On 12/01/08, Williamston Journal reporter, Stan Welch, wrote to Moore asking if he could run the story for publication. (Ex. 102, 12/01/08 Welch E-mail to Moore.) On 12/01/08, Eddie Moore forwarded the Attorney General's response to his correspondence to Tom Allen and Bob Waldrep. Moore again blind-copied WAIM Radio, Rick Freemantle, Jenna Trammell, and reporter Stan Welch. Later on 12/01/08, Moore wrote to Stan Welch stating: "Ask Rusty about it. I have to tread gingerly on this until next week. I don't want to play our hand just quite yet. But if Rusty thinks we need to go public we can." (Ex. 104, 12/01/08 E-mail from Moore to reporter Stan Welch.) During his deposition, Moore confirmed the "Rusty" referred to is current County Administrator, Rusty Burns. (Moore Tr. Test. (Depo.), 257: 18-20.) On 12/01/08, reporter Stan Welch wrote to Moore, "I spoke with Rusty. We agree there is nothing to be lost be running with this story..." (Ex. 105, 12/01/08 Welch E-mail to Moore). So, before the County ever spent the first dime on its multi-million dollar investigation, Moore had already begun manipulating the media by leaking "news" about an Attorney General investigation into Preston.

- Allen, under oath, adamantly denied drafting an E-mail on December 24, 2008, attaching a draft agenda of fourteen (14) items, which mirrored exactly what the newly constituted County Council did in its first meeting on January 6, 2009. (*Compare* Def. Ex. 111, 12/24/08 E-mail with attached agenda *with* Def. Ex. 138, 1/6/09 Council Meeting Minutes *with* Allen Tr. Test. (Dep.), 109-114; 119-141 (Testifying E-mail is "100 forgery" and then going through every item on "forged" agenda and locating them on Meeting Minutes).) Importantly, Allen's E-mail was produced from the work E-mail account of Eddie Moore by the Fluor Corporation; from its server, pursuant to a subpoena; and was first produced, by Court Order, to counsel for Eddie Moore, before production to Preston. By contrast, Eddie Moore was questioned about the same E-mail. Moore testified he in no way fabricated or manipulated Allen's E-mail stating: "If it come from Fluor Daniel, that the way it come." (Moore Tr. Test. (Depo.), 267: 2-6.) The documents confirm the resolve of the group attending the Waldrep Meetings to implement a detailed course of action, which at one time included Preston's suspension and dismissal, once they were seated.

- Council-elect Moore repeatedly leaked information to WAIM Radio to cause baseless problems for Preston as County Administrator. (*See, e.g.*, Ex. 97, 9/23/08 Moore E-mail to WAIM Radio; Ex. 101, 11/25/08 E-mail blind-copying WAIM Radio; Ex. 103, 12/01/08 Moore E-mail blind-copying WAIM Radio.)