

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY

G. Edward Welmaker, Circuit Court Judge

Charles B. Simmons, Jr., Master-in-Equity

SC Court of Appeals

Case No. 2010-CP-23-6767

Arthur M. Field, Respondent-Appellant,

v.

Henry McMaster, Attorney General, Appellant-Respondent.

REPLY BRIEF OF APPELLANT-RESPONDENT

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TABLE OF CONTENTS

Table of Authorities	ii
Statement.....	1
Argument	1
Conclusion	6

TABLE OF AUTHORITIES

Cases

<i>Rein v. U.S. Patent & Trademark Office</i> , 553 F.3d 353 (4th Cir. 2009).	3
<i>Spreeuw v. Barke</i> , 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009).	2
<i>Vaughn v. Rosen</i> , 484 F.2d 820 (D.C. Cir. 1973).	3
<i>Wiedemann v. Town of Hilton Head Island</i> , 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001).	1

Statutes and Rules of Court

S.C. Code Ann. § 30-4-40(a)(7).	4
S.C. Code Ann. § 35-1-607(b)(1).	4, 5
Rule 210(c), SCACR.	2

STATEMENT

In this Reply Brief, the Attorney General responds to several claims asserted by Plaintiff Field in his Respondent's Brief, erroneously designated by him as his "Reply Brief." That brief by Field, which will be referenced herein as his Respondent's Brief, consists almost entirely of the same arguments made by him in his Appellant's Brief, often stated in the same words. However, a few points are made in the Respondent's Brief that had not been made previously. Those are briefly addressed herein.

ARGUMENT

1. On p. 3 of the Respondent's Brief, Plaintiff incorrectly describes the standard of review of the lower court's factual determinations. As pointed out in the Attorney General's Appellant's Brief, this Court has held that any factual issues that might be involved in a FOIA case are subject to de novo review by this Court. *See, e.g., Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The Attorney General does not necessarily agree that this case actually presents factual issues, but if such issues are present, they may be decided de novo by this Court.

2. Plaintiff makes a number of contentions that are unsupported by anything in the record. For instance, he repeatedly claims that several attorneys for the Securities Division had contacted him and advised that "they were not acting as

lawyers, but as regulators and were not in breach of any ethical restrictions.” Respondent’s Br. at 11, 11 n.3, and 17. This is an allegation that could have been asserted by Field in an affidavit at the circuit court level, but no such affidavit was presented. In the absence of record evidence, this claim cannot be considered. *See, e.g., Spreeuw v. Barke*, 385 S.C. 45, 68, 682 S.E.2d 843, 854 (Ct. App. 2009) (evidence which does not appear in the record cannot be considered on appeal); *see also*, SCACR Rule 210(c)(record cannot include material not presented to the lower court).

Another instance of statements that have no support in the record is found on p. 19 of the Respondent’s Brief. There it is stated that “The Securities Division closed down CIF and injures [sic] Field and the citizens of South Carolina,” and that four years later, the Division “is still persecuting Field, his family and friends. . . .” Again, if these claim had been relevant or true, both of which the Attorney General denies, it is the kind of information that Field could have supplied to the court below via affidavit or other evidence. He did not do so, however. As a result, this Court should give no consideration to such unsupported and inflammatory statements as those quoted above (and others like them).

3. Plaintiff Field asserts on p. 6 of his Respondent’s Brief that the Attorney General has acted in “bad faith” with respect to Field and CIF. The basis for this assertion is the claim that the Attorney General allegedly declined to disclose any

documents at all. The Attorney General has previously addressed this point, which was also found in an Order of Judge Simmons, but would reiterate that the Attorney General did in fact disclose several thousand pages of public documents, while declining to disclose other thousands of pages of nonpublic or exempt documents. The fact that Plaintiff claims not to have found much of interest in the public documents does not translate into a requirement that he must therefore also be supplied with nonpublic or exempt documents as well. Yet this seems to be part of the rationale for Field's contention, and apparently was also one basis on which the court below based the parts of its order that erroneously ordered the disclosure of some documents. The Attorney General would therefore again note that the group of documents reviewed by Judge Simmons consisted only of the documents contended to be nonpublic or exempt, the public documents having already been previously disclosed much earlier.

4. On p. 13 of the Respondent's Brief, Field claims that "the Securities Division failed to satisfy the U.S. Supreme Court mandated requirements of a Vaughn index when it provided the court below with the Log." As previously noted, however, a "*Vaughn* index," (*Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)), is produced as a "substitute for *in camera* review. . . ." *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 366 (4th Cir. 2009)(emphasis added). Here, the court below had before it all of the documents as well as the privilege log. It therefore

had more than ample information on which to conduct its review. Indeed, also as previously noted, the lower court erroneously revealed much more of the index to Plaintiff than necessary to inform him of the general nature of the contents of each document.

5. On p. 13 of his Respondent's Brief, Plaintiff asserts that the "placement of the Securities Division under the aegis of the Attorney General" does not "provide instant privilege." As with most of Plaintiff's arguments, this contention is not addressed to anything actually argued by the Attorney General. There has never been a contention that all Securities Division documents are entitled to "instant privilege," as is shown by the release of several thousand public documents. The Attorney General instead contends that the documents in the investigative file of the Securities Division are not subject to disclosure because they consist of either materials received in investigation, which are made nonpublic by § 35-1-607(b)(1), or consist of attorney correspondence and/or work product, which is exempt under § 30-4-40(a)(7).

6. Plaintiff continues to ignore § 35-1-607(b)(1), which provides that documents received in a Securities Division investigation are not public documents. Thus, Plaintiff argues, for instance, on p. 2, n. 5, of his Respondent's Brief that documents containing correspondence from two individuals described by him as "former members of CIF's parent company in New Jersey" were not

attorney-client documents or work product documents. Leaving aside the issue of whether those documents could constitute work product in the absence of § 35-1-607(b)(1), they are clearly nonpublic documents under that statute, having been obtained in the course of a securities investigation.

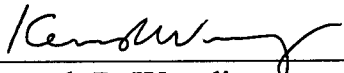
On p. 6, n. 7, Plaintiff not only ignores § 35-1-607(b)(1), but tries to deny that it even exists, claiming that there is no “exemption” for “materials obtained in an investigation.” However, § 35-1-607(b) deems such materials to be “not public records.” As the Attorney General has previously noted (Respondent’s Br. of Attorney General at 9-10), this statute is more than an exemption: it completely precludes the application of FOIA, which covers only public records. Many of Plaintiff’s arguments should therefore be disregarded, because they fail to take into account this key statute on which the Attorney General has relied.

CONCLUSION

For the foregoing reasons, the Appellant-Respondent Attorney General respectfully submits that the portions of the Orders below that would require the disclosure of information should be reversed.

Respectfully submitted,

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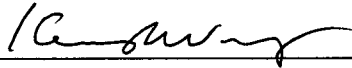
Columbia, South Carolina

April 2, 2013

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Henry McMaster, Attorney General, certifies that the Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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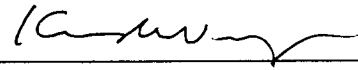
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April 2, 2013

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Henry McMaster, Attorney General, certifies that the Reply Brief of Appellant-Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent, does hereby certify that service of the **Reply Brief of Appellant-Respondent** was made upon the *pro se* Respondent-Appellant Field by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 2nd day of April 2013:

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