

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

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SC Court of Appeals

NATURE OF EXPERT’S ASSIGNMENT

I have been retained as an expert witness on behalf of Willoughby & Hoefler, P.A. law firm that, along with the Davidson, Wren & DeMasters, P.A., law firm, represented the Attorney General for the State of South Carolina (“AG’s Lawyers”), who have been sued in this case. I have been asked to express an opinion as to the reasonableness of the fees Attorney General Wilson agreed to pay the AG’s Lawyers in this case.

EXPERT QUALIFICATIONS

I am the Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus at the University of South Carolina Law School. Following my graduation from the University of Notre Dame Law School in 1970, I worked at the Jones Day law firm (then known as Jones, Day, Cockley and Reavis). I left Jones Day in 1972 to take a

Fellowship at the University of Pennsylvania Law School's Center for Study of Financial Institutions. My work at Penn Law School involved the study of business-related matters and duties owed by those who participate in business activities, including lawyers and investment professionals. I subsequently received my LL.M. from Penn Law School. In 1973 I joined the faculty of the University of South Carolina Law School. I retired in 2008 and am a Distinguished Professor of Law Emeritus at USC. Besides teaching law at USC for 35 years, I was a Visiting Professor in Residence at the University of Texas Law School in Austin, Texas, and Loyola Law School in Chicago. I have also worked for the Securities and Exchange Commission as a special counsel.

During my 35-year career as a law professor, I specialized in business courses and legal ethics. I taught Securities Regulation and Corporations for over 30 years. I taught White Collar Crime, which has a securities regulation component, for over 10 years. I also taught Legal Accounting, Business Planning and Corporate Finance. I taught legal ethics for many years at USC Law School, at numerous CLE programs, as part of the South Carolina Bar Review, and at several JCLE programs. For 19 years, I wrote a bi-monthly column on legal ethics published in the South Carolina Bar's magazine. Among the topics I have taught about in the field of legal ethics are fee related matters.

Though much of my professional life was devoted to teaching I also have substantial experience practicing law. I have been admitted to practice as a lawyer for nearly 50 years. I am a member of the Bars of the States of South Carolina, Ohio, and Washington. I have been admitted to practice in various federal courts, including the United States District Courts for the Northern District of Ohio, the South Carolina District, and the District of Colorado, the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, and the United States Supreme Court. I

have practiced before each of the foregoing courts and I am at present a member in good standing of each of those courts. I have tried, settled, or testified in a wide variety of cases over the years involving charges of financial misconduct. Such cases include a number of major investment-related cases, including the HomeGold Financial/Carolina Investors fraud, the Al Parish financial fraud, the Three Hebrew Boys criminal case, and cases involving alleged financial misconduct by MeadWestvaco-International Paper, SCANA, KPMG, Deutsche Bank, Horry County State Bank, Sidley Austin Brown & Wood, BB&T, Bankers Trust of New York, BNY Mellon, and Just for Feet, Inc.

I have substantial experience in big case litigation. My work in the area began in the 1970s when, as a young Jones Day attorney, I worked on a design-defect class action involving the Corvair automobile and on Truth and Lending class actions brought against a major credit card company. From that starting point, I have brought and prosecuted complex cases, including class actions. I have also opposed class actions as counsel for defendants. I have tried class actions and handled appeals of same. I have testified in various class actions as an expert witness as to various issues including, many times, the reasonableness of fees and expenses sought.

I have participated in fee matters related to settlements of major lawsuits many times. For example, in the Broin/Ramos flight attendant class action case in Florida, a case in which I was involved as a fee expert, the court approved a fee award of \$46 million for two lawyers from a single firm. The \$300 million settlement in Broin/Ramos was affirmed on appeal. See Ramos v. Philip Morris Cos., Inc., 743 So.2d 24 (Fla. 3d DCA 1999). In another Florida case, I testified in support of the fee petition in case the State of Florida brought against the tobacco companies. In Re: Florida v. Am. Tobacco Co., No. CL-95-1466-AH (Palm Beach Co. Cir. Ct.). An arbitration panel in that case awarded the \$3.4 billion for attorneys' fees to the Plaintiff's legal counsel. That

arbitration panel order stands as the single largest legal fee award in the history of the world. I testified in that case that a fee award of 25% of the financial benefit accruing to the State of Florida should be approved. The arbitration panel in that case awarded more, a fee of 26% of the total financial benefits accruing to the State of Florida. The \$3.4 billion legal fee award granted by the arbitration panel stands and is being paid; there was no appeal from that ruling.

From 1970 to the present I estimate that I have spent over 13,000 hours in dealing with class actions, either as counsel for the class; as counsel for a class action defendant; or as an expert witness in connection with settlement, ethical, or fee issues. A copy of my resume, which further establishes my credentials, is attached as Exhibit 1.

INFORMATION CONSIDERED BY EXPERT

My research in this matter is of the type that is standard for experts in the legal ethics/professional responsibility field. Besides consulting with the AG's Lawyers concerning this case's factual background, I have reviewed various relevant documents including the Amended Complaint with Exhibits (including the Litigation Retention Agreement and the June 2019 amendment thereto); Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction; the Ex Parte Temporary Restraining Order; the Notice of Appeal; the Petition for Supersedeas with Exhibits; statutes and case law relating to the Attorney General's authority to hire counsel; a summary of Settlement Benefits South Carolina has derived from the AG's Lawyers' efforts; a letter from William H. Davidson, II and Randolph R. Lowell to W. Jeffrey Young dated September 16, 2020, providing factual background material concerning work done by the AG's Lawyers in this case. I have also conducted factual and legal research. The opinions I have drawn from the facts available to me are based on my knowledge, background, training, and experience as an expert in duties owed by lawyers, including fiduciary obligations

and fee-related issues. In expressing my opinions, I rely on and apply the standards governing South Carolina lawyers. I hold the opinions I express to a reasonable degree of professional certainty. I reserve the right to amend or supplement my opinions or supporting reasons as additional material becomes available.

FACTUAL OVERVIEW

The fee issue considered herein grows out of the Attorney General's decision to enter into a Settlement Agreement with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). Factual background concerning the underlying dispute and the efforts of the AG's Lawyers to achieve a quality result for their client is set forth in the September 16, 2020, letter from William H. Davidson, II and Randolph R. Lowell to W. Jeffrey Young, a copy of which is attached hereto as Exhibit 2. The factual positions taken in that letter are incorporated by reference.

As explained in Governor McMaster's August 30, 2020, letter to the Attorney General, the settlement was reached "[a]fter years of DOE repeatedly ignoring its obligations and abandoning the MOX project." DOE's dereliction required that the Attorney General become embroiled in "complicated and time-consuming litigation [requiring] the assistance of outside counsel to pursue these complex claims." McMaster August 30, 2020 letter at 1-2. When he wrote that letter, Governor McMaster was certainly well-aware of the long-festering legal problem revolving around the storage of deadly plutonium at SRS. After all, Governor McMaster was South Carolina's Attorney General from 2003-2011, before becoming South Carolina's Lieutenant Governor, and then, in 2017, its Governor.

This affidavit does not consider various legal arguments advanced by Plaintiffs to the effect that the Attorney General lacks the authority to pay legal fees, or that, under the circumstances, payment of the AG's Lawyers' legal fees is forbidden by statute or unconstitutional. For purposes of this affidavit I assume that the Attorney General had authority to enter into the fee agreements with the AG's Lawyers, and that there are no statutory or constitutional impediments preventing the Attorney General from paying the AG's Lawyers the contingent fee they seek for the work they have done.

The focus here is on the claim that payment by the Attorney General of the 12.5% contingent fee¹ to Defendants violates SCACR Rule 407, Rule 1.5, which calls for legal fees to be reasonable. Specifically, this affidavit addresses Plaintiffs' contention that the Attorney General has agreed to pay the AG's Lawyers a fee which is "patently unreasonable," and hence unethical, and hence uncollectable. See Amended Complaint paras. 33-35; Id., Exhibit 3, David Pascoe letter to the Attorney General dated September 10, 2020, at 2-3. In my opinion, for the reasons set forth below, Plaintiffs' claim of a Rule 1.5/unreasonable fee violation is unsupported and unsupportable

RULE 1.5 HAS NOT BEEN VIOLATED

Despite accusing the AG's Lawyers of violating ethical Rule 1.5, neither Plaintiffs nor Solicitor Pascoe quote the rule or provide any evidence showing a violation. Instead, the Plaintiffs' emphasis is on the fee's size, which is large, with the suggestion being that a fee of that magnitude must plainly be unreasonable, particularly since the case was, according to

¹ Defendants' Motion Petition for Supersedeas with Exhibits, October 2, 2020, at 12-13 ("In calculating the attorneys' fee under the agreement, the earned fee, inclusive of costs and expenses, is \$75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.")

Plaintiffs, a relatively simple piece of work that could have been handled by the Attorney General's staff in-house.² I note at the outset that the Plaintiffs' contention that the case was simple, requiring no resort to outside counsel collides with Governor McMaster's admissions in his August 30, 2020, letter to the Attorney General that "I recognize this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims." (Emphasis added.) I now turn my attention to Rule 1.5's specific requirements. The Rule provides:

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved, and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

² See Amended Complaint para 46: "Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated."

When evaluating Rule 1.5's scope and significance, it should be borne in mind that the ethics rules do not create rights of civil recovery. SCACR 407, Scope ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.") Indeed, the Rules' "Scope" paragraph further provides, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."

As a "rule of reason" it is fair to view Rule 1.5, the fee reasonableness rule, in its true context. The Rule's aim is to protect clients from being overreached. The Comment to Rule 1.5(a) makes it clear that the rule "(a) requires that lawyers charge fees that are reasonable under the circumstances." Here, the circumstances involved a documented contract reached between lawyers and a sophisticated client, South Carolina's Attorney General, which the Attorney General believes is valid and binding. Here there is no overreaching, deception, or other abusive behavior on the part of the AG's Lawyers.

Rule 1.5(a)(1)'s Fee Factor Supports the AG's Lawyers

Under Rule 1.5(a)(1), consideration is given to "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." The factors set forth in Rule 1.5(a)(1) support payment of the fee that was agreed to and which the Attorney General intends to pay.

This case presented large, novel challenges. Often law practice involves handling of routine matters. Consequently, lawyers often turn to prior cases for legal blueprints to mirror their pleadings, legal arguments, and discovery requests. Here, there were no legal blueprints. Confronted with landmark issues, the AG's Lawyers became founding architects in seeking

recovery for years of federal dereliction in dealing with deadly plutonium resting inside South Carolina's borders. Through their efforts they advanced novel theories and bore all risks associated with attempting to address unsettled and unknown areas of law. The case was hard. The case was risky. As federal Judge Joseph Anderson has noted, "the riskier the case, the greater the justification for a substantial fee award." Montague v. Dixie National Life Insurance Co.3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011);

The time and labor required was substantial, extending over years and involving thousands of hours of lawyer time. Specialized legal assistance was sought by the Attorney General and supplied by the AG's Lawyers. I reiterate what Governor McMaster wrote the Attorney General on August 30, 2020, "I recognize this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims." When it comes to assessing the novelty and difficulty of the questions involved, I note that in this litigation two of the cases were dismissed by the courts. In my experience, cases that get dismissed tend to be more challenging and riskier than cases that do not.

I find this case posed great risk for the contingent fee lawyers handling it. Successful prosecution of the case called for a great deal of skill on the part of lawyers representing the Attorney General, and the AG's Lawyers were up to the task. As is discussed in more detail below, I have long known the AG's Lawyers' lead counsel, and have tremendous respect both for their uncompromising dedication to doing excellent work, and for the very fine results they have achieved over the years. As one example, see Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016), a case in which I testified for Mr. Willoughby as an expert.

Rule 1.5(a)(2), and (5)'s Fee Factors are Neutral

The Comment to Rule 1.5(a) makes it clear that not all factors will necessarily be relevant in every case. Rule 1.5(a)(2) suggests weighing this factor in assessing fee reasonableness: “the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.” I am unaware of any reason why serving as counsel on behalf of the Attorney General in the SRS litigation did or necessarily would have impinged on the AG’s Lawyers’ ability to take other legal work. I consider Rule 1.5(a)(2) to be a neutral factor, and the same goes for the factors set forth in Rule 1.5(a)(5) (“the time limitations imposed by the client or by the circumstances”).

Rule 1.5(a)(3)’s Fee Factor Supports the AG’s Lawyers

In contrast, Rule 1.5(a)(3) is highly relevant. It calls for evaluation of “(3) the fee customarily charged in the locality for similar legal services.” In my opinion, the SRS case falls in the category of what is known as a “mega-fund” case, meaning that the lawsuit generated a fund “worth many millions” of dollars. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 122 (2d Cir.2005). One study of legal fee reasonableness in mega-fund cases found that “in cases involving common funds ‘from \$500 million to \$1 billion’ in 2006 and 2007, ‘the mean and median awards were both 12.9%’ of the fund.” In re AT & T Mobility Wireless Data Servs. Sales Tax Litig., 792 F.Supp.2d 1028, 1033 (N.D. Ill. 2011), citing Brian T. Fitzpatrick, An Empirical Study Of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 839 (2010). The Fitzpatrick study cited in the AT & T case analyzed “every federal class action settlement from the years 2006 and 2007.” Id. at 839. The average (or “mean”) fee payment in cases involving settlements between \$1 billion and \$6.6 billion was 13.7% of the settlement fund. Id. at 840. The 12.5% mega-fund settlement percentage in this case fits

comfortably within the parameter of the cases analyzed in the Fitzpatrick study. That comfortable fit undermines any argument that the fee in question here is unreasonable/unethical.

In Spartanburg Regional Health Services District, Inc. v. Hillenbrand Indus., Inc. 7:03-cv-02141, 2006 WL 8446464 *4, Order Filed August 15, 2006, ECF No. 377, at 10, Judge Henry Floyd found that “In ‘mega-fund’ antitrust cases (more than \$100 million), a majority of circuit courts award between twenty and thirty percent of the fund, with an average of 25.03 percent in recently reported mega-fund antitrust cases.” Judge Floyd awarded a fee equal to 25% of the settlement value of \$117,157,800. Id. *5. In another mega-fund case, In re Enron Corp. Securities, Derivative & “ERISA” Litig., 586 F.Supp.2d 732, 740, 828 (S.D.Tex.2008) the Federal Court approved a settlement with a fee award equal to 9.52% of the \$7.2 billion settlement fund. The Enron fee percentage was roughly 25% lower than the 12.5% fee in this case, but the fund was 12 times the size of the SRS settlement sum. The fee in Enron was more than 11 times the size of the fee here.

It is true that fees for like work are “to be calculated according to the prevailing market rates in the relevant community.” Blum v. Stensen, 465 U.S. 886, 895, 104 S. Ct. 1541, 1547 (1984). In my opinion, the fee sought here is unquestionably appropriate based on the fee percentage in relation to the cash amassed in the common fund. The South Carolina Supreme Court recognized in Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998), the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-third to one-half of the gross recovery. Global Protection, 332 S.C. at 161, 503 S.E.2d at 489. I personally have participated in exceedingly difficult cases where contingent fees of as much as 50% were collected. In Miller v. Botwin, 258 Kan. 108, 899 P.2d 1004 (1995) the court allowed a 50% contingent fee for amounts the attorney saved the client in property

taxes. Closer to home, Judge Bryan Harwell observed in Dewitt v. Darlington Co., 2013 WL 6408371 (D.S.C. 2013), quoting from Bredbermer v. Liberty Travel, Inc., 2011 WL 1344745 (D.N.J. Apr.8, 2011): “[C]ases from district courts throughout the country in common fund cases [reflect that] attorney's fee awards ‘generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund.’”

This is a mega-fund case. The Court should use the prevailing fee rates charged in mega-fund cases by lawyers of “comparable skill, experience, and reputation.” Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210-11 (9th Cir. 1986). With complex mega-fund cases of this sort, the community is nationwide in scope. In contingent fee cases, fees in the local community ordinarily tend to range from 30-40%. This is not an ordinary case. It is a mega-fund case. The case is extraordinary and so is the result.

I also take into account results in other cases in which I testified, including Judge Johnson’s fee award order in Lackey v. Green Tree Financial Corp., Civil Action No. 96-CP-06-073 (July 24, 2000), and Judge Ervin’s fee award order in Bazzle v. Green Tree Financial Corp., Civil Action No. 97-CP-18-258 (July 24, 2000). In both of those hard-fought attorney preference cases, fees equal to one-third of the common fund were awarded. In Fairey v. Exxon Corp., Civil Action No. 94-CP-38-118 (C.P. Orangeburg County), a fee award of 40% of the \$30 million common fund accumulated was approved by the Circuit Court. I was involved in the Fairey case on settlement-related issues and filed an affidavit in support of the settlement and the (successful) fee petition. This case was riskier, far more complex, and more bitterly contested than Lackey, Bazzle or Fairey. I consider the fee reasonable in light of all relevant facts, including the delay in payment, the impressive amount of work involved, the excellent result, and the fact that counsel had to litigate strenuously and at length in multiple forums to carry the day.

Also relevant are some other less demanding and less complex cases with which I am personally familiar. The fee award approved by the Colleton County Circuit Court in Carter v. Wal-Mart Stores, Inc., Civil Action No. 06-15-839 was 1/3 of the \$49 million common fund, a percentage less than that granted in the similar Wal-Mart employee pay cases of Lerma v. Wal-Mart Stores, Case No. CJ-2001-1395 (Cleveland County, Oklahoma, March 16, 2009, Order) (granting fee amounting to 40% of the \$42,500,000 common fund); Hale v. Wal-Mart Stores, 01-cv-218710, 16th Judicial Circuit Court, Jackson County, Missouri (May 28, 2009, Order) (granting an award of 38.3% of the \$90,000,000 common fund). In another Wal-Mart class action, Ouellette v. Wal-Mart Stores, Inc., File No. 67-01-CA-326 (Washington County, Florida, Circuit Court), in an Order dated August 21, 2009, the Court, applied Florida law which required a lodestar/multiplier analysis. Wal-Mart had agreed to pay up to \$148,000,000. The amount of fees sought was \$49,333,333, which was one-third of the common fund. Though the court was required to use the lodestar-multiplier approach, it nonetheless approved the fee sought, using a lodestar multiplier of 4.68, though noting that a “multiplier of 5 would be appropriate.” Id. at p. 8, ¶ 30. I am familiar with these facts since I was a witness in the Ouellette case and testified at the fee hearing in Chipley, Florida.

Most recently, on July 21, 2020, Acting Circuit Court Judge Jean Hoefler Toal approved a 15% fee award in a case where the common fund settlement amount was \$520 million. Cook v. South Carolina Public Service Authority, Greenville County Circuit Court, Case No. 2019-CP-23-06675, Order filed July 21, 2020. In approving the Cook settlement, Justice Toal, observed that:

Class Counsel’s fee request is well-below previously approved percentage-of-the-recovery fees in common fund cases in South Carolina. For example, in Condon, the Supreme Court of South Carolina upheld the circuit court’s award of a 28% attorneys’ fee assessed from the common fund. 354 S.C. at 644, 583 S.E.2d at 435. In Spartanburg

Regional Health Services District,, Inc. v. Hillenbrand Industries, Inc., the Honorable Henry F. Floyd awarded a 25% fee of roughly \$117 million on a total settlement of \$486.6 million, comprised of \$337.5 million paid in cash and an agreement by defendants to change future pricing for an additional benefit of \$131.1 million. C.A. No 7:03-2141-HFF, 2006 WL 8446464, at *5, n.3 (D.S.C. Aug. 15, 2006). Id. at 23-24.

In Cook, Justice Toal explicitly called attention to the relevance of cases from other jurisdictions in evaluating fee awards in mega-fund cases:

Because of the limited number of class actions and fee awards in South Carolina, our courts have turned to other jurisdictions for guidance. Condon, 354 S.C. at 644, 583 S.E.2d at 435 (relying on similar cases in addressing the reasonableness of fees). Accordingly, in their Fee Petition, Class Counsel have included a recitation of class action cases where courts have upheld attorneys' fee awards of more than the 15% requested here. Id. at 24-25.

Each case stands on its own facts. Here, the fee sought by the AG's Lawyers is fair when compared to those involving large recoveries and mega-fund results. Likewise, based on my knowledge, training, background and experience, the fees sought by the AG's Lawyers are clearly reasonable when viewed from a national perspective.

Rule 1.5(a)(4)'s Fee Factor Supports the AG's Lawyers

Rule 1.5(a)(4), calls for evaluating "the amount involved, and the results obtained." The amount involved, a settlement of \$600 million, is what marks this case as a "mega-fund" settlement. The United States Supreme Court has deemed the "results obtained" in litigation to be a key factor in assessing the reasonableness of a fee. See Hensley v. Eckerhardt, 461 U.S. 424, 434 (1983). See also Littlejohn v. State, 2002 WL 34454074, *5 (S .C. Cir. 2002) aff'd sub nom Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003) ("Ultimately when a 'common fund' is generated . . . the result is everything.").

Next to the \$1.7 billion, 20-year payout to the State by the cigarette companies, the result achieved in this lawsuit stands as the largest cash recovery in South Carolina litigation history. This outcome—a \$600 million settlement fund—is extremely impressive. This excellent result

was achieved only after a protracted and risky litigation struggle against the most powerful litigation opponent in this country, namely the United States of America. That the underlying case was risky is testified to by Plaintiffs' chronology offered at paras. 36-44 of their Amended

Complaint:

36. The lawyers brought suit to collect a statutory payment for economic impact and assistance of \$100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.
37. The DOE never contested that it failed to comply with federal law.
38. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.
39. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 Million assistance payment for failing to comply with the statute.
40. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.
41. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.
42. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.
43. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.
44. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

Each case turns on its own facts. I reject the notion that the AG's Lawyers were faced with a case so simple that retention of excellent outside counsel was not needed. This case presented stark legal issues for the courts to rule upon, and those issues were neither simple nor skewed in the AG's Lawyers' favor. These lawyers prevailed not because they had an easy case,

but because they fought so hard to get the maximum value out of a hard one. The AG's Lawyers succeeded because their case was prepared with all the care needed for them to do a first-rate job. This case has been marked from the start by careful, determined, highly professional preparation. Obviously, the AG's Lawyers have achieved an exceptionally good result. This victory is a tribute to aggressive, heady, creative lawyering by the AG's Lawyers. They have performed admirably for their most deserving clients. I reiterate that I consider the 12.5% contingent fee payout based on a settlement fund of \$600 million dollars in cash to be fair and reasonable.

Rule 1.5(a)(6)'s Fee Factor Supports the AG's Lawyers

Rule 1.5(a)(6) calls for consideration of "the nature and length of the professional relationship with the client." In attacking the AG's Lawyers' fee, Plaintiffs have relied on this passage from Solicitor Pascoe's letter to Alan Wilson dated September 10, 2020, at 4:

[T]his deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately \$7 Million for representing the State in a prior contingency fee matter.

I respect Solicitor Pascoe. However, I beg to differ with Solicitor Pascoe in this instance. To begin with, I respectfully disagree with Solicitor Pascoe's characterization of the AG's Lawyers' fees as unconscionable. For all the reasons cited in this affidavit, in my opinion the legal fee in question was ethical and proper. I am confident it was the product of arm's-length bargaining between the parties and, as I have explained above, in mega-fund cases involving similar recoveries, the average fee was a greater percentage of the settlement fund than the one in this case.

Mr. Pascoe's letter refers to indirectly to Mr. Ben Mustian. Mr. Mustian does not work at the Willoughby firm; he left the firm more than a year ago. To my knowledge, neither he nor his

wife have had any involvement in the settlement of the underlying case or in the fee it has generated. I have never heard of an instance where the political or employment affiliation of a former law firm lawyer's wife was considered material in determining the reasonableness of law firm's legal fee.

A Post and Courier article was cited by Mr. Pascoe in his letter. See https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

I note in passing that the article cited by Mr. Pascoe mentions that attorney Mitchell Willoughby, "has long been recognized as one of the state's leading attorneys for administrative and regulatory law." The Charleston newspaper's observation accords with my experience that Mr. Willoughby is a highly accomplished lawyer known for diligence and achieving laudable results for his clients.

In my opinion, it is a positive, not a negative factor that Mr. Willoughby's firm has previously worked on a contingent fee basis for the Attorney General and earned a significant fee for work yielding an exceptionally good result. My experience is that lawyers who accomplish good results for their clients tend to get rehired by those clients. Finally, I note that the above-quoted passage from Mr. Pascoe's letter offers no details whatsoever about the other Defendant law firm of Davidson, Wren & DeMasters, P.A.

Rule 1.5(a)(7)'s Fee Factor Supports the AG's Lawyers

In evaluating legal fees, it is customary to consider, as indicated by Rule 1.5(a)(7), "the experience, reputation, and ability of the lawyer or lawyers performing the services." In this case, the facts line up strongly in the AG's Lawyers' favor.

Mitchell Willoughby is a founding member of the Willoughby & Hoefler law firm. He graduated from the University of South Carolina Law School, where he served as Student Bar Association President. He has practiced law in South Carolina since his bar admission in 1975. After beginning his legal career with South Carolina's Public Service Commission, he entered private practice in 1977. Mr. Willoughby has assisted clients in matters involving litigation of complex business. One such case is the Maybank lawsuit mentioned above. Mr. Willoughby has earned an AV peer rating from Martindale-Hubbell. Martindale-Hubbell's AV certification mark is a significant rating accomplishment. It is a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence, both in terms of legal ability and adherence to ethical standards. Mr. Willoughby has been recognized as one of South Carolina's "Best Lawyers" for years, including 2015 and 2018 when he was selected "Lawyer of the Year" in the field of Administrative/Regulatory Law. His drive and leadership skills have propelled him to the top ranks of South Carolina's business lawyers. Those same abilities served him well in his 36-year military career, during which he served on active duty in the Army for three years, followed by service in South Carolina's National Guard from which he retired at the rank of Brigadier General.

The lead environmental lawyer from the Willoughby Hoefler law firm on the SRS project is Randolph R. Lowell. Mr. Lowell holds a law degree from the University of South Carolina Law School, and an LL.M. in Environmental Law from The George Washington University Law School. Mr. Lowell's legal talent has been recognized in various ways. In 2012-13 he was selected as a Rising Star by the South Carolina Super Lawyers publication. He has been annually listed in the South Carolina Super Lawyers publication since 2017. Mr. Lowell has been recognized as one of South Carolina's "Best Lawyers" in the Environmental Litigation area

since 2015 and he was most recently selected “Lawyer of the Year” in the field of Environmental Litigation. Like Mr. Willoughby, Mr. Lowell has earned an AV peer rating from Martindale-Hubbell.

John Roberts of the Willoughby Hoefler law firm likewise provided important litigation support for the Attorney General’s efforts. Mr. Roberts was admitted to practice in 2010 after graduating Magna Cum Laude from the Charleston School of Law. He then earned an LL.M. in Taxation from the University of Florida Levin College of Law. Since joining the Willoughby Hoefler firm he has played lead roles in the successful handling of large cases for firm clients. In the SRS litigation, Mr. Roberts was Mr. Lowell’s chief assisting lawyer throughout the litigation.

Also aiding in Willoughby Hoefler’s efforts on behalf of the Attorney General was Chad Johnston, a Willoughby Hoefler shareholder. Like Mr. Willoughby, Mr. Johnston is well known to me based on my involvement as an expert in law firm cases. Mr. Johnston joined the firm after clerking with Justice Kay Hearn for three years, two when she served as Chief Judge of the Court of Appeals, and then during Justice Hearn’s first year on the Supreme Court. Like Mr. Willoughby, I can testify that Mr. Johnston is one of the smartest, most resourceful, most professional lawyers I have ever worked with. He was most recently recognized as one of the Best Lawyers in America in the field of Environmental Litigation. In the SRS litigation, Mr. Johnston worked principally on matters related to questions arising under the National Environmental Policy Act.

William H. Davidson, II, the Davidson, Wren & DeMasters, P.A. firm’s lead partner, has more than forty years’ experience, often litigating on behalf of governmental entities. He has deep and wide litigation experience. For example, he served as counsel in more than 70 reported

South Carolina Supreme Court cases. Like Mr. Willoughby, Mr. Davidson has earned an AV peer rating from Martindale-Hubbell.

Kenneth Woodington of Mr. Davidson's firm, likewise, is a senior member of the South Carolina Bar, having graduated from Duke Law School in 1973. Mr. Woodington has long experience in the environmental law area. From 1983 to the present, he has served as counsel in nearly every South Carolina case with the United States Department of Energy relating to nuclear material, including this one. Like other lawyers mentioned above, Mr. Woodington has earned an AV peer rating from Martindale-Hubbell.

In summary, all the AG's Lawyers who worked on the SRS case have excellent "experience, reputation, and ability" and their professional records to date prove it.

Rule 1.5(a)(8)'s Fee Factor Supports the AG's Lawyers

Rule 1.5(a)'s eighth and final factor focuses on the contingency of counsel's compensation, asking "whether the fee is fixed or contingent." In this case, the AG's Lawyer's compensation stemmed from contingency agreements covering both fees and costs. As such, the AG's Lawyers have received no compensation for their work from 2016 onward. Nor have they been compensated for litigation costs. Given these facts, this factor weighs in favor of the AG's Lawyers' entitlement to the fee they negotiated with the Attorney General.


SUMMARY

Plaintiffs contend that the fee the Attorney General agreed to pay the AG's Lawyers is unethical, and hence unenforceable. Amended Complaint paras. 34-35. To date, Plaintiffs have not put forward compelling evidence for their position. Much less have Plaintiffs put forward sufficient proof to meet the "clear and convincing" standard of proof applicable to ethics

prosecutions. As shown above, there is a reason for Plaintiffs’ failure of proof—supporting evidence does not exist. Plaintiffs cannot point to any competent, credible evidence that the AG’s Lawyers have acted unethically by violating Rule 1.5 or any other legal ethics rule.³

Besides having taught legal ethics to law students, lawyers, and judges for more than three decades, I have long experience in the sphere of ethics enforcement. This experience has involved numerous instances where I worked as a lawyer or testifying witness in ethics prosecutions in South Carolina. I hold the opinion to a reasonable degree of professional certainty that any ethics proceeding filed against the AG’s Lawyers would be dismissed with no finding of misconduct. I say bluntly and with confidence that Rule 1.5(a) does not provide a justification for nullifying the AG’s Lawyers’ rights under their fee agreement with the Attorney General.

Further affiant sayeth not.


John P. Freeman

SWORN TO AND SUBSCRIBED BEFORE ME
this 5th day of October, 2020


Nancy K. Freeman
Notary Public for the State of Washington
My Commission Expires February 7, 2021



³ Putting aside the ethical demands of Rule 1.5(a), I note for the record that in percentage-of-the-recovery cases South Carolina courts apply a six-factor test in assessing fee reasonableness. See Jackson v. Speed, 354 S.C. 634, 638, 583 S.E.2d 430, 432 (2003). That test largely mirrors the Rule 1.5(a) standards. For the record I state my opinion the AG’s Lawyers’ 12.5% contingent fee is reasonable under the Jackson v. Speed factors.

Exhibit 1

RESUME
John P. Freeman
Professor of Law Emeritus

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Unit 107
Seattle, Washington 98119
(803) 361-6934
jfremanusc@gmail.com

Education history:

LL.M., 1976, University of Pennsylvania
Law School; J.D., 1970, University of Notre
Dame Law School; B.B.A., 1967, University
of Notre Dame (Accounting)

Employment history:

1970-72, Attorney, Jones, Day Law
Firm, Cleveland, Ohio

1972-73, Fellow, University of Pennsylvania
Law School Center for the Study of
Financial Institutions

1973-75, Assistant Professor of Law,
University of South Carolina

1974 and 1975 (Summers), Special Counsel,
Division of Investment Management, SEC,
Washington, D.C.

1975-78, Associate Professor of Law,
University of South Carolina; Visiting
Associate Professor of Law at Loyola Law
School (Chicago) Spring 1977

1978-2008, Professor of Law, University of
South Carolina; Visiting Professor of Law at
University of Texas Law School, summer
1978

Present:

Distinguished Professor Emeritus and John
T. Campbell Chair in Business and
Professional Ethics Emeritus

Honors and Awards: Undergraduate:

Member Beta Alpha Psi (Honorary Accounting Fraternity)

Law School:

Executive Editor, Notre Dame Lawyer;
Distinguished Military Graduate

Professional:

At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977, 1984

Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving) John Belton O'Neall Inn of Court McDonald/Rhodes Award 2010

Admitted to Practice:

Ohio; South Carolina; Washington

**Teaching History
Courses Taught:**

Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1999-2008, Regular Legal Ethics Column for the South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).

Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations? South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

Article, Treble Damage Statutes Can Increase Trust Recoveries, 4 Probate Practice Reporter, June 1992, at 1.

Article (with Nathan Crystal), Scienter in Professional Liability Cases, 42 S.C.L. Rev. 783 (1991).

Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

Article, When Are Lawyers' Gifts to Judges Improper? Carolina Lawyer (November-December 1990).

Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

Article, Understanding the Joint Client Exception to the Attorney-Client Privilege, Carolina Lawyer (July-August 1989).

Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1-124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371-439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732-983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122-40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2004-16: Special Relationships and Legal Ethics, Oct. 14, 2016, S.C. Bar, Columbia, S.C.; Who's My Client? Understanding the Relationship Between In-House Attorneys, Members and Lobbyists, SC House of Representatives In-House CLE, Oct. 13, 2016, Columbia, S.C.; Incivility, Attempted Shaming and Other Ethics No-Nos, South Carolina Public Defender Ass'n, Sept. 28, 2016, Myrtle Beach, SC; Pascoe v. Wilson and other Ethics Lessons, Lexington County Bar Ass'n, August 4, 2016; Ethical Issues for South Carolina Environmental Practitioners, June 3, 2016, Columbia SC; Hot Ethics Issues for Environmental/Regulatory Practitioners, Jan. 22, 2016, S.C. Bar, Charleston, S.C.; S.C. Bar, Business Lawyer Horror Stories II, Oct. 3, 2014; Greenwood, S.C., S.C. Ass'n of Criminal Defense Lawyers, "Whose Theme and Theory is it Anyway?" July 11, 2014; Ft. Worth, Texas, Advice on Duties Owed by Members of the Board of Trustees, May 16, 2014; Charleston Bar Ass'n, 20 Ethics Tips for a Happier Professional Life, Feb. 7, 2014; 2004-13: Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar March 22, 2013; SC Bar, Ethical Issues in Working with Vets and Their Families, Feb. 12, 2012; Expert Witness Participant, SC Bar-ABOTA, Masters in Trial Program, Feb. 1, 2013; SC Bar, Ethical Issues in Handling VA Appeals, Jan. 12, 2013; SC Bar, Ethical Issues in a Non-Adversarial System, Dec. 11, 2012; Richland County Bar Ass'n Ethics CLE, Nov. 9, 2012; University of South Carolina Law School, Alumni Reunion Ethics CLE, Nov. 3, 2012; General Assembly Legal Staff, Ethics for Government Lawyers, Oct. 3, 2012; Setzler Scott Law Firm (In-house CLE), West Columbia, SC, Ethics CLE, Feb. 14, 2012; Charleston Law School, Panel, Symposium on Lawyer and Judicial Fitness, Feb. 10, 2012; Charleston County Bar Ass'n, Ethics CLE, Feb. 3, 2012; SC Bar, Panel on Lawyer Confidentiality, Jan. 19, 2012; Nov. 15, 2011, SC Workers Comp. Comm., Legal Ethics; Richardson Patrick-Sponsored CLE, Charleston, SC, April 29, 2011; North American Securities Administrators Ass'n, Ethics in Securities Litigation, Charleston, Jan. 24, 2011; Richland County Legal Ethics Update, Nov. 5, 2010; S.C. Law Review Symposium, Judicial Recusal, Oct. 21, 2010; League of Women Voters, Lecture on Judicial Selection, Oct. 8, 2010, Charleston, S.C.; Kershaw Health Board of Directors, Advice on Your Duties as Board Members, July 15, 2010, Camden, SC; American Ass'n of Matrimonial Lawyers, Ethics in Marital Cases, March 19, 2010 (Aruba), John Belton O'Neill Inn of Court, Ethics Lessons Taught by Lawyers, Nov. 17, 2009; South Carolina Defense Trial Lawyer's Ass'n, Judicial Selection in South Carolina, Nov. 7, 2009; Richland County Bar Ass'n, Legal Ethics, Nov. 6, 2009; South Carolina Legislature

Employees, Legal Ethics Update, Oct. 21, 2009; Budget & Control Board, Ethics Lecture to SC State Employees, Oct. 2, 2009; South Carolina Bar, Family Law Ethics Update, Sept. 18, 2009; Motley Rice Law Firm, Legal Ethics Update, Sept. 11, 2009; South Carolina Judicial Selection Commission, Judicial Ethics, July 31, 2009; John Belton O'Neall Inn of Court, Ethics of Advertising Firms, Jan. 20, 2009; S.C. Bar, Ethics Presentation "Business Lawyer Horror Stories, Nov. 21, 2008; Participant, Mutual Fund Industry Regulation Roundtable, Chicago-Kent Law School, Nov. 7, 2008; SC Legislature, Ethical Duties of Legislative Employees, Oct. 2, 2008; SC Bar, Dealing with Ethical Duties When Dealing with Pro Se Parties, Oct. 10, 2008; Richardson Patrick Local Counsel CLE, Litigation Ethics, May 2, 2008 (Charleston, SC); Inst. of Public Utilities, 39th Ann. Reg. Policy Conf., Panel on Equity and Responsibility in the Public Utilities Sector (Charleston, SC), Dec. 3, 2007; S.C. Attorney General's Office; Litigation Ethics, Nov. 9, 2007; Richland County Bar, Ethics Update, Nov. 2, 2007; SC Bar, Litigation Ethics, Oct. 26, 2007; S.C. Children's Law Center, Ethical Problems in the Child Abuse Area, Oct. 19, 2007; National Ass'n of Medicaid Fraud Control Units, Ethics and the Government Lawyer (Savannah, Ga.), Oct. 1, 2007; SCACPA Litigation Conf., Litigation Ethics (Kiawah Island, SC), Sept. 21, 2007; S.C. Circuit Court Judges, May 17, 2007, Practice Tips in Civil Litigation; Energy & Mineral Law Foundation, May 15, 2007, Panel Member, Legal Ethics, 2 hr.; S.C. Government Investigators, Ethical Duties of Investigators, Feb. 23, 2007; S.C. Bar, Employment Law Section, Ethics Update, Jan. 26, 2007; S.C. Association of Counties, Ethics Update, Dec. 8, 2006; Lexington County Bar Ass'n, Ethics Update, Dec. 6, 2006; Richland County Bar, Ethics Update, Nov. 3, 2006; S.C. State Government Lawyers, Ethics Update, Nov. 3, 2006; S.C. Judicial Merit Selection Commission, Overview of Judicial Ethics, Sept. 14, 2006 (½ hr.); Federal Bar Ass'n, SC Bar, Ethics and Professionalism, Sept. 8, 2006; Commercial Law League of America, Avoiding Grievances and Malpractice Worries in Your Practice, July 6, 2006, Asheville, N.C. (2 hours); National Structured Settlement Trade Ass'n, Ethics in Litigation, Westin Rio Mar, Puerto Rico, May 9, 2006; S.C. Chamber of Commerce, Legal Ethics for the Employment Lawyer, Hilton Head, S.C., May 6, 2006; American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTLA, Making Money Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004;

S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service
Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976).
Faculty Senate (1996-98)

University Committees
Promotion and Tenure
Faculty Welfare

Annuities and Insurance
Budget Committee

Law School Committees
Faculty Selection
Academic Standing
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee
Chairman, Supreme Court Commission on CLE and Specialization(1980-83)
President, Leaphart Elementary School PTO (1983)
Chairman, Irmo Middle School School Improvement Council (1985)
Member, Irmo Middle School School Improvement Council (1985-89),
President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member
Executive Board (1988-93)
Member, Irmo High School-School Improvement Council (1988-93)
Founder and Past-president, University of Notre Dame Club of South Carolina
Lexington District Five and South Carolina State School Volunteer of the Year 1993

Exhibit 2

DAVIDSON, WREN & DEMASTERS, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Michael B. Wren
David A. DeMasters

1611 Devonshire Drive, Second Floor (29204)
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Brandon M. Briggs
Jonathan M. Riddle

Of Counsel
Kenneth P. Woodington

September 16, 2020

W. Jeffrey Young, Esquire
Chief Deputy Attorney General
Office of the Attorney General
jyoung@scag.gov

Dear Judge Young:

Please allow this letter to serve as the final element of the due diligence review and as the request for the release of the attorneys' fees to the trust account of Willoughby & Hoefler, P.A., which will serve as evidence of satisfaction of all contractual commitments by all parties and terminate the engagement related to the litigation for plutonium disposition. *See* Litigation Retention Agreement, effective Feb. 8, 2016, as amended, effective Jan. 1, 2019.

We appreciate the opportunity presented to represent the State in these important matters, and believe some historical context is warranted to bring us to this final point of closure of this engagement.

In March of 2014, these firms (or the predecessors) filed an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests. At that time, the U.S. Department of Energy (DOE) (through the National Nuclear Security Administration) was seeking to place the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS) into "cold standby" status, which would effectively terminate the project. As the Congressional delegation wrote to then-Governor Haley, "[w]e ask that you work with the South Carolina Attorney General to explore any legal avenues the state may have to address this injustice." Ltr. of Congress to Haley, March 6, 2014. After being briefed on a legal strategy to achieve that result, the State retained Davidson, Wren, & DeMasters, P.A., and Willoughby & Hoefler, P.A., law firms to represent it.¹

The State filed a complaint on March 18, followed by a motion for summary judgment on April 14. Speed was of the essence given other factors at play in Congress. On April 30, 2014, DOE capitulated and directed the contractor to continue the MOX Facility construction.

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, we developed a comprehensive strategy focusing on litigation with DOE and we briefed the Governor's Office and your office on that strategy, which included the draft of a complaint. With political overtures having been rebuffed

¹ We appreciate the confidence your office showed in our collective experience to represent the State on the plutonium disposition issues at SRS. Each firm and its lead counsel on these cases has represented the State in a number of federal court litigation matters against the United States (or its agencies). Each undersigned counsel also has litigated cases regarding nuclear material, environmental issues, and complex civil litigation, generally.

and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to your office on January 26, 2016, as a “formal request that [the Attorney General’s] office initiate litigation on behalf of the State of South Carolina against DOE....” Haley to Wilson, Jan. 26, 2016.

On February 9, 2016, the State filed a complaint against DOE seeking the removal of one metric ton of weapons-grade (defense) plutonium and payment of the economic and impact assistance monies. And the battle was joined. The State pushed hard and fast. After substantial briefing and argument on multiple issues and motions, the federal District Court in South Carolina issued an order on October 31, 2016, dismissing the economic and impact assistance payment claim for lack of jurisdiction, pointing to the Court of Federal Claims as the proper forum.

The removal claim continued in South Carolina and on March 20, 2017, the District Court granted the State’s injunctive relief claim and ordered DOE to remove one metric ton of defense plutonium. The court requested additional briefing on the appropriate remedy, and on December 20, 2017, adopted the State’s proposal to require removal of the defense plutonium within two years and also required DOE to provide ongoing status reports on its removal progress. On February 2, 2018, DOE appealed the judgment to the Fourth Circuit. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (i.e., by December 31, 2019).

On November 30, 2018, the State of Nevada filed a lawsuit against DOE seeking to prevent the relocation of the one metric ton of defense plutonium to Nevada in the Federal District Court in Nevada. This was a significant issue, as there are less than a handful of sites in the United States capable of storing defense plutonium and if Nevada was successful, DOE could attempt to use that as the basis for an “impossibility” defense or other tactic to delay the removal of the one metric ton from SRS. It was imperative that South Carolina protect its interest in the removal.

On January 3, 2019, South Carolina moved to intervene in the Nevada case. The State of Nevada opposed South Carolina’s participation in the case but, after expedited briefing, the court granted the State’s motion on January 14. Nevada sought a preliminary injunction to halt the shipment of defense plutonium to Nevada from SRS, and indicated that if the defense plutonium had left SRS it should be returned. An evidentiary hearing was held on January 17. On January 30, DOE notified the court and the parties that one-half ton of defense plutonium had been relocated to Nevada. Also on January 30, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. Nevada appealed to the Ninth Circuit on February 4.

During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. It also stated it had 15 witnesses to present. South Carolina was prepared to litigate this matter in a full trial. However, the district court stayed the case pending the appeal. After briefing at the Ninth Circuit, the court dismissed the appeal as moot on August 13, 2019. The stay at the district court was lifted, and additional motions were filed and briefing began anew. In December 2019, South Carolina’s

participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE in 2020.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the Federal District Court in South Carolina ordered its removal, DOE filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS.

During this time, South Carolina learned that DOE was taking active steps to halt construction of the MOX Facility and the Secretary of DOE was finalizing a formal memorandum to terminate the program. Once the construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation, the strategy was for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position and maintain the status quo. South Carolina moved expeditiously, filing a complaint and a request for a preliminary injunction on May 25, 2018 in the federal District Court along with a request for an expedited hearing. On June 7, the court granted the preliminary injunction and ordered DOE to continue constructing the MOX Facility.

DOE appealed to the Fourth Circuit. During this time, efforts were made at obtaining a legislative solution that, unfortunately never materialized and, on October 26, 2018, the Fourth Circuit held that South Carolina lacked standing. DOE quickly terminated the MOX Facility construction, justifying South Carolina's efforts to at least try and maintain the status quo.

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover \$100 million. On January 8, 2018, the State filed its second complaint seeking to recover another \$100 million. These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions. The Department of Justice and the State agreed that the outcome of the case would govern all six years of payments under 50 U.S.C. § 2566(d)(1), essentially rendering this matter a \$600 million case. These efforts were not successful and, in June 2019, South Carolina informed the court that DOJ had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. It did—ruling against the State on August 20, 2019 and finding that no appropriation by Congress was available for the payments.

South Carolina appealed that decision to the Federal Circuit. After briefing and oral argument on May 5, the case was stayed pending additional settlement discussions.

Beginning in January 2020, promising discussions were held between counsel for DOE and the State met on several occasions to work on a framework for a resolution. After several productive meetings and the Federal Circuit oral argument, settlement discussions progressed further, culminating in a meeting on July 1 in Washington, DC, with the Secretary of DOE. An agreement in principle was reached that day, subject to further approvals and consultation with

stakeholders. The President and U.S. Attorney General ultimately concurred, as did and South Carolina's federal and state legislative leaders.

On August 28, 2020, a settlement agreement was executed providing for a 100% recovery of the economic and impact assistance payments and provide DOE with a grace period to comply with a contractual obligation to remove 9.5 metric tons of defense plutonium while still maintaining the ability to force removal and receive payment should DOE not comply with its contractual obligations.

As you know, the August 31, 2020, settlement agreement reflects that each party bears its own attorneys' fees and costs. In these circumstances, the "common fund" approach is often utilized to calculate the attorneys' fee award.² *Layman v. State*, 376 S.C. 434, 451-53, 658 S.E.2d 320, 329-30 (2008). "[W]hen awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.' These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the 'percentage-of-the-recovery' approach." *Id.* Here, that percentage is calculated by applying the contractual agreed-upon fee percentages to the recovery amount.

For the fees in this case, the litigation retention agreement entered into in 2016—a contract binding on the State of South Carolina—utilizes a decreasing percentage based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. In calculating the attorneys' fee under the agreement, the earned fee, *inclusive* of costs and expenses, is \$75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.³

Regarding our specific engagement in 2016, we note that the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by a circuit court. *See* S.C. Code Ann. §§ 1-7-85, 170;⁴ *Cephalon v. Wilson*, Civil Action No. 2012-CP-40-07317, Order Granting Def's Mot. for Summ. Judg. (June 6, 2014) ("As the Supreme Court recognized in the case of *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28, 28 S.E.2d 445, 447-48

² Because the State and its citizens are the beneficiaries of the recovery of over half a billion dollars, the "common fund" approach should be applied.

³ We note this percentage is less than the fee percentages of most standard contingency fee agreements as well as the attorneys' fee percentages in the two recent settlements involving the V.C. Summer nuclear plant litigation.

⁴ South Carolina Code Section 1-7-85 states: "Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement ... in representing the State ... in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees ... or costs of litigation awarded by court order or settlement, travel expenditures, depositions, printing, transcripts, and personnel costs...."

Further, Part I.B of the Budget also contains the following proviso: "59.8. (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled 'Litigation Recovery Account.' The funds deposited in this account must be expended only as prescribed by law." Payment of the attorneys' fees complies with the legal contractual obligation resulting from the settlement.

(1943), the Attorney General possesses the authority as the State’s chief legal officer to appoint and approve private counsel to represent the State.”). As the circuit court further found, “the Attorney General possesses the authority to associate attorneys ... and to pay those outside attorneys on a contingency fee basis with money received in any settlement....” *Id.*; see also *South Carolina v. Eli Lilly*, 2007-CP-42-1855, Order Denying Mot. To Disqualify (Sept. 22, 2009); see also *Layman v. State*, Plaintiffs’ Reply to Def’s’ Mem. in Opp. to Plaintiffs’ Pet’n for Attorneys’ Fees Pursuant to § 15-77-300, No. 05-CP-40-2785 (Ct. Common Pleas, Fifth Judicial Circuit) (Sept. 18, 2006) (“Attorney General Henry McMaster stated that the public should understand his use of outside attorneys under this [contingency] fee arrangement ‘is consistent with the highest standards of practicing law and bringing litigation.’” *The State*, August 10, 2006; Ex. 4 to Harpootlian Depo.”).

The fee is eminently reasonable. As detailed above, the work performed included litigation of four cases in three separate trial courts, three separate courts of appeal, and the United States Supreme Court. Litigating against the federal government in federal court on a federal project involving federal dollars is a daunting task. It involved thousands of hours of work,⁵ tens of thousands of pages of document review, interaction with multiple state and Federal agencies, consideration of national security issues (which also meant being denied access to certain information), and coordinating the litigation of multiple cases in different courts simultaneously.⁶ It also involved coordination and communication with multiple Congressional offices and staff—including offices and staff outside of South Carolina—and the White House.

The litigation risk assumed by counsel was significant. For three of these cases, injunctive relief was the only relief available. However, these cases were critical to the overall strategy to address the defense plutonium issue in the State. But with only one available claim for monetary relief, we were all presented with a unique situation. The chosen path—and the most logical path—was to combine all the defense plutonium litigation matters under a single contract and for the injunctive relief cases to assign a small percentage of additional recovery IF any payments were recovered.⁷ There was a clear risk that the State could be successful in the injunctive relief litigation and fail to recover any monies, leaving its counsel with having brought about a successful result in litigation for the State and receiving no payment. The litigation

⁵ “Where success is a condition precedent to compensation, ‘hours of time expended’ is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour.” George D. Hornstein, *Legal Therapeutics: The “Salvage” Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 660 (1956). South Carolina agrees. “Attorney General of South Carolina [Henry McMaster] recognizes in these types of cases, attorneys’ fees are based on a percentage of recovery, regardless of hours or how hours are kept. R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo.” *Layman v. State*, Plaintiffs’ Reply to Def’s’ Mem. in Opp. to Plaintiffs’ Pet’n for Attorneys’ Fees Pursuant to § 15-77-300 (emphasis in original).

⁶ DOE had four separate legal teams defending these cases.

⁷ Notably, if these four cases were litigated under three separate, independent litigation retention agreements using the standard stepped fee schedule, and drawing from the single monetary recovery case, the attorneys’ fee calculation could have been as much as \$103,750,000, or 17% of the total recovery. While adjustments may have been made to those separate agreements if they had been undertaken, there is no question that combining all four matters within a single litigation retention agreement and modifying the fee schedule accordingly resulted in a fee that was less than would have been calculated under separate, stand-alone agreements.

retention agreement appropriately reflected the risk incurred by counsel. *See Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees ("The State itself, through Attorney General Henry McMaster, recognizes the appropriateness of percentage recoveries for lawyers who take a chance for the State. R. Harpootlian Depo., p. 40; Ex. 3 to Depo.").

The litigation result was extraordinary. The success of the removal litigation and the threat of additional litigation immediately and in 2022 was a significant factor in bringing DOE to the table to negotiate a resolution. This litigation removed one metric ton of defense plutonium from the State and a payment to the State's General Fund of over half a billion dollars—the largest single settlement in the State's history. It also secured a contractual commitment to remove 9.5 metric tons⁸ of weapons-grade plutonium by 2037 and for the payment of additional money to the State—which could number over a billion dollars should DOE fail to remove additional defense plutonium from SRS.⁹ These are benefits that accrue to the State and for which no additional payment to counsel is required.

Therefore, we respectfully request that the attorneys' fee of \$75,000,000 be tendered to the trust account of Willoughby & Hoefler, P.A., for further distribution as soon as such funds are transferred to the Attorney General.¹⁰

Thank you for the opportunity to be of service.

Sincerely,



William H. Davidson, II
Davidson, Wren, & DeMasters, P.A.



Randolph R. Lowell
Willoughby & Hoefler, P.A.

⁸ In fact, the State now knows the exact amount of defense plutonium subject to 50 U.S.C. § 2566, as that number was declassified as part of this litigation.

⁹ However, while maintaining the hammer of enforcement to incentivize the removal of the defense plutonium, the settlement does not interfere with the programs for removal. If South Carolina continued to engage in litigation from 2022 forward, then success on the economic and impact assistance payments could have been detrimental to SRS, as those payments would have to be made from the operations budget of DOE instead of payable from the judgment fund. This means a reduction in available funds for DOE could adversely impact SRS—a undesirable result from a South Carolina economic and public policy perspective.

¹⁰ Regarding the four cases, Willoughby & Hoefler, PA served as lead counsel in all four cases, with Davidson, Wren, and DeMasters, PA, serving as counsel in two cases. The division of fees and expenses for the shared cases is 92.5%/7.5%. This division is reflective of the proportion of services provided by each firm in the cases involving joint representation.