STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A., Defendants.	Case Number: 2020-CP-40-04603 AFFIDAVIT OF PETER D. PROTOPAPAS

1. I came to South Carolina to attend law school. Raised in Boston, Massachusetts, I grew up in a large family whose roots span two continents. After college, my strong interests in business and law spurred me on to earn both a Master of Arts and a Juris Doctor. Because of my training, I handle a wide variety of complex business and professional malpractice cases throughout South Carolina. I frequently litigate matters involving business contract disputes, securities and stock losses, and class actions. I also spend a great deal of my practice representing clients who have suffered catastrophic personal injury.
2. I volunteer my time to community activities and served as a Board Member for South Carolina Legal Services, a non-profit organization which assists South Carolinians.
3. I am a member in legal groups such as the South Carolina Bar Association, the John Belton O'Neall Inn of Court, and the South Carolina Association of Justice.
4. I have litigated for and against the reasonableness and appropriateness attorneys' fees in a number of cases.
5. I am a member of the South Carolina Bar and qualified to practice in the United States District

Court for the District of South Carolina and United States Court of Appeals, Fourth Circuit.

6. As an attorney, I have brought and prosecuted complex cases. I have brought and settled class action lawsuits, and I have tried complicated litigation cases, attorney grievances and handled appeals of same. A copy of my resume, which further establishes my credentials, is attached as Exhibit 1.

7. I have been asked by Willoughby & Hoefer, P.A., (Litigation Counsel) to express an opinion as to the validity and reasonableness of the fees awarded and reimbursed to Litigation Counsel pursuant to the litigation retention agreement with the State of South Carolina regarding the litigation related to the State's claims pursuant to 50 U.S.C.A. § 2566 and defense plutonium at the Savannah River Site. A copy of the litigation retention agreement, as amended, is attached as Exhibit 2.

8. I hold the opinions set forth herein to a reasonable degree of professional certainty as an expert in the fields of legal ethics and lawyer compensation. I reserve the right to amend or supplement my opinions or supporting reasons as additional material becomes available.

FEE STRUCTURE

9. The South Carolina Attorney General is authorized by statute to retain and compensate outside counsel by contract to represent the State on a contingency fee basis.

10. South Carolina Code Sections 1-7-85 and -150 enshrine the legislature's approval and endorsement that the Attorney General is authorized to retain outside counsel on behalf of the State and that, "notwithstanding any other provision of law," the payment of these attorneys' fees may be a reimbursement to the Attorney General for the contractual obligation of the State for the representation, with the balance remaining of any recovery being deposited to the general fund. *See Cephalon v. Wilson,* Civil Action No. 2012-CP-40-07317, Order Granting

Def's Mot. for Summ. Judg. (June 6, 2014) ("[T]he Attorney General possesses the authority to associate attorneys ... and to pay those outside attorneys on a contingency fee basis with money received in any settlement...."); Agreement to Voluntary Dismissal of Appeal, *South Carolina v. United States*, dkt.#45, Case No. 19-2324 (Fed. Cir.) (Sept. 29, 2020) ("The settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, *which are reimbursed and awarded from payment of the settlement amount*, and the State shall have no further claim against the United States for such fees and costs.") (emphasis added).

11. The litigation retention agreement effective February 8, 2016 is based on the litigation retention agreement created by former Attorney General Henry McMaster. *See* Exhibit 2 (hereinafter referred to as "AG McMaster Agreement"). The AG McMaster Agreement is a stepdown percentage-of-recovery schedule for attorneys' fees. There is an additional percentage of recovery added for litigating an appeal when the State was successful below. As the litigation progressed, there was a need for representation of the State in two additional litigation matters and those matters – defending the defense plutonium removal upon challenge by the State of Nevada and the termination of the mixed oxide fuel fabrication facility construction project – were subsequently added to the representation through an amendment to the original litigation retention agreement that assigned set percentages for those two cases. Those two matters were for injunctive relief only with no potential monetary recovery.

12. For decades, the South Carolina Attorney General has hired private law firms to pursue recoveries for South Carolina on contingency fee contracts. From tobacco litigation to pharmaceutical litigation, South Carolina Attorneys General have tremendous experience and

knowledge when entering into contingent fee contracts with lawyers. Then Attorney General McMaster drew upon past experiences and developed the AG McMaster Agreement which gives great benefits to the State of South Carolina when employing lawyers on contingency fee contracts.

13. The AG McMaster Agreement utilizes a contingency fee approach where the fees are established based on actual recovery. The AG McMaster Agreement established the application of fee percentages against the recovery similar to a common fund. The costs, including the fees, would be paid from the recovery amount on a percentage-of-the-recovery basis.

14. Application of the AG McMaster Agreement litigation retention agreement fee schedules to the settlement recovery amount of $600,000,000 yields an attorneys' fee payment of slightly more than $75,000,000, or approximately 12.5% of the total recovery. This is inclusive of expenses. A copy of the calculation of the attorneys' fee is attached as Exhibit 3.

15. The South Carolina Supreme Court explained in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), that the principle underlying the common fund methodology for determining attorneys' fees is distinct:

> [T]he equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by fee-shifting, but rather, are taken directly from the common fund or recovery and borne by the prevailing party through fee-spreading.... [W]hen awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.' These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the 'percentage-of-the-recovery' approach.

Layman, 376 S.C. at 452-3, 658 S.E.2d at 330 (internal citations omitted). The South Carolina Supreme Court continued: "[T]he common fund doctrine is based on the equitable

allocation of attorneys' fees among a benefited group, and not the shifting of the attorneys' fee burden to the losing party." *Id.*, 376 S.C. at 453, 658 S.E.2d at 330.

16. Under South Carolina law, a fee award calls for "the court [to] consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). An award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Id.* Consideration of all six factors is necessary but none controls.

ASSIGNMENT AND MATERIAL REVIEWED

17. I have conferred with Litigation Counsel and have conducted independent research. I have reviewed counsel's electronic file in this matter, and this review includes:

    a. Pleadings and exhibits filed in each filed case in each jurisdiction at the trial and appellate court levels;

    b. Motions and memoranda in support and in opposition and exhibits filed in each case in each jurisdiction at the trial and appellate court levels;

    c. Orders and other filings in each case in each jurisdiction at the trial and appellate court levels;

    d. Pleadings, motions, memoranda, and exhibits and orders in the instant case;

    e. The Executive Budget Office approval document for the payment of the attorneys' fees;

    f. Correspondence between counsel in each case in each jurisdiction;

    g. Government documents and reports, including:

i. documents from the U.S. Department of Energy and National Nuclear Security Administration related to defense plutonium policy generally;

ii. documents from the U.S. Department of Energy and National Nuclear Security Administration related to disposition efforts of defense plutonium at the Savannah River Site;

iii. documents from the U.S. Department of Energy and National Nuclear Security Administration related to disposition efforts at other site locations; and

iv. documents from the U.S. Department of Energy and National Nuclear Security Administration related to environmental and public health impacts from defense plutonium.

h. The agreement between the United States and Russia, generally known as the Plutonium Management and Disposition Agreement, executed in 2000, as amended, relating to the disposition of surplus defense plutonium;

i. Draft pleadings for proposed additional litigation to be filed by the State;

j. Settlement Agreement by and between the United States and South Carolina, dated August 28, 2020;

k. Correspondence between Governor McMaster and General Wilson regarding the settlement agreement;

l. Affidavit of C. Bradley Hutto, dated October 5, 2020; and

18. In addition to reviewing the foregoing materials, I consulted with Litigation Counsel concerning the scope and depth of the work they did, and the tenacity and quality of the opposition they faced. I have also conducted research, including review of pertinent authorities

dealing with fee reasonableness issues.

19. I am of the opinion to a reasonable degree of professional certainty that the attorneys' fees, which is inclusive of expenses, are valid, reasonable, and within the range of fees reimbursed or awarded in other cases.

THE NATURE, EXTENT, AND DIFFICULTY OF THE CASE

20. It is a daunting task to take on the federal government in litigation and this matter has been completely litigated and hard fought. Both sides have been represented by excellent lawyers, and the State and its Litigation Counsel faced multiple teams of lawyers from the U.S. Department of Justice (DOJ), which has high-quality lawyers and unlimited resources. Litigating against the federal government in federal court on federal claims is an extremely difficult task under even the best of circumstances.

21. The complexity of these cases is breathtaking. Litigation Counsel were litigating issues that impacted federalism, international affairs, nuclear waste policy, and national security and contained political elements. Litigation Counsel, on behalf of the State, was simultaneously litigating claims in different jurisdictions against different teams of lawyers from the U.S. Department of Justice. The strategy to litigate multiple claims in multiple courts requires a significant degree of thought and strategic expertise. Most cases that are the subject of affidavits to defend a case are for a single case with a single outcome. Here, there are multiple cases with multiple outcomes, and the defendant was the United States government—the most challenging and difficult of all defendants.

22. The United States and the Department of Justice fought everything, engaging in what can only be categorized as trench warfare, with every inch of ground contested. *Cf. Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *2 (W.D.N.C. Jan. 10, 2007) ("Additional skill

is required when the opponent . . . is a sophisticated corporation with sophisticated counsel."). Litigation Counsel's strategy to combat the inexhaustible and indefatigable federal government was to strike hard and strike fast and frame the issues as legal issues. Which they did with skill, to avoid the bottomless pit of endless discovery that the United States sought to use for delay and wear down the State and its resolve in the district court cases. And yet even with that excellent strategy, these matters have been heavily litigated and contested in four trial-level federal court matters and four appeals in three different federal appellate courts.

23. With the fee structure placing all the risk of recovery on Litigation Counsel, including the extraordinary and unusual risk allocation to Litigation Counsel that it could prevail in litigation and not be paid, this undertaking was a risky gamble for Litigation Counsel and high risk deserves a high reward.

24. The briefing by both sides has been excellent. Litigation Counsel's briefs were superb. So were those from the other side. The DOJ left no stone unturned in their zealous efforts to defend the United States. Their tenacious defense efforts increased the difficulty level of an already daunting task. Thus, in my opinion, Litigation Counsel has consistently fought hard and well against a very powerful, sophisticated, and well-represented adversary.

THE TIME NECESSARILY DEVOTED TO THE CASE

25. These cases have consumed thousands of hours of time in prosecuting South Carolina's claims in multiple jurisdictions at multiple levels. It is evident from the filings in the multiple cases and the documents acquired from the United States that required review that a significant amount of time was consumed with understanding the nuances and context of the policy and legal issues.

26. As a percentage-of-recovery case, actual time spent is not a significant factor to be considered.

As one legal scholar has noted: "Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour." George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 660 (1956). And South Carolina's plaintiff attorney Richard Harpootlian relied upon then-Attorney General Henry McMaster in supporting a percentage-based fee award: "Attorney General of South Carolina [Henry McMaster] recognizes in these types of cases, attorneys' fees are based on a percentage of recovery, regardless of hours or how hours are kept. R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo." *Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300 (emphasis in original). See Exhibit 4 to Affidavit of Peter D. Protopapas.

27. Accordingly, time necessarily devoted to the case, while the least important of the factors under these circumstances, favors a conclusion that a 12.5% effective rate is earned, reasonable, and appropriate.

THE PROFESSIONAL STANDING OF COUNSEL

28. I am familiar with the lead law firm in the four cases, Willoughby & Hoefer, P.A., and the lead Litigation Counsel, Randolph R. Lowell.

29. Willoughby & Hoefer, P.A., enjoys a reputation of being one of the best law firms in the State and particularly adept at handling complex civil litigation matters and achieving extraordinary results. And achieving those results against very talented and very capable opposing counsel. Mitch Willoughby and John Hoefer, the founding shareholders, are both personally known to me to be two of the best lawyers in the State. The firm is talented from top to bottom and its superior reputation is recognized by its Martindale-Hubbell rating and its Best Law Firm

recognition.

30. I am also personally familiar with lead Litigation Counsel for the State of South Carolina in this matter, Randolph R. Lowell of Willoughby & Hoefer, P.A. He holds a Master's of Law in Environmental Law from The George Washington University, a Master of National Security Studies degree from the American Military University, a Master of Public Administration degree from the University of South Carolina, a Juris Doctor degree from the University of South Carolina, and Bachelor of Arts' degree from the College of Charleston. From a professional standpoint, he is rated AV Preeminent by his peers by Martindale-Hubbell and has been named a *Best Lawyers* and *SuperLawyer* in South Carolina for years, and has twice been awarded the *Best Lawyers* Environmental Litigator of the Year.

Mr. Lowell is admitted to practice in state and federal courts in South Carolina and the District of Columbia, as well being admitted to practice before the U.S. Court of Federal Claims, U.S. Court of International Trade, U.S. Supreme Court, and ten U.S. Courts of Appeal. He has been appointed by the President of the United States to serve on the National Infrastructure Advisory Council and elected by the South Carolina General Assembly to serve on the College of Charleston Board of Trustees.

He has authored a number of articles and book chapters, and co-authored the *South Carolina Administrative Practice and Procedures* treatise and *South Carolina Equity* book. He and his work have been cited as authority in various state and federal courts.

Mr. Lowell has also previously represented and currently represents the State of South Carolina in high-profile, high-stakes litigation. Mr. Lowell represented the State of South Carolina (through its agencies) in challenging the harbor deepening in the Savannah River in state and federal court against the federal government and represents the State of South Carolina

(including its agencies) in current litigation to protect the water levels at the New Savannah Bluff Lock and Dam near Augusta, Georgia, in federal court against the federal government. Mr. Lowell has also represented various state agencies in state and federal court litigation, including the Department of Transportation, Department of Commerce, State Ports Authority, and State Housing Finance and Development Authority. He is well respected in the legal community. Based on his background, experience, and reputation, there was no better lawyer in the State that could have been chosen to lead the prosecution of these actions and advocate for the State's interests in these cases and regarding these issues.

31. Opposing counsel was the venerable United States Department of Justice, who offered no quarter and had unlimited resources. Obtaining these results in the face of such strong, talented, and well-heeled opposing counsel weighs in favor of the agreed-upon fee.

32. I conclude based on thorough study that the factor established by South Carolina precedent, "the professional standing of counsel" strongly favors a generous fee.

CONTINGENCY OF COMPENSATION

33. This was a contingent fee case from its inception, with four cases ultimately litigated under a single litigation retention agreement with only one possible source of funding. In other words, Litigation Counsel could prevail in three out of four cases and receive no compensation. This carried a significant risk to Litigation Counsel. It also was a risk allocation properly reflected in the litigation retention agreement.

34. As stated by Judge Matthew Perry in *Smith v. Sec. of HHS*, No. 79-1781-O, 1983 WL 44252, at *1 (D.S.C. Dec. 22, 1983): "The contingency of compensation, whether it stems from an employment contract or results from the claimant's indigency, is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and

any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyers' risk of receiving nothing for his services."

35. The justification for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008).

36. "[C]ases from district courts throughout the country in common fund cases [reflect that] attorney's fee awards 'generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund.'" *Dewitt v. Darlington Co.,* 2013 WL 6408371, at *8 (D.S.C. Dec. 6, 2013) (quoting *Bredbermer v. Liberty Travel, Inc.*, 2011 WL 1344745 (D.N.J. Apr. 8, 2011)).

37. According to one study, in cases involving common funds "from $500 million to $1 billion," "the mean and median awards were both 12.9%" of the fund. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F.Supp.2d 1028, 1033 (N.D. Ill. 2011) (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 839 (2010)).

38. Given that the 12.5% effective rate from the common fund recovery also compensates for the injunctive relief for the removal of one metric ton of plutonium, defending that removal in litigation initiated by another state, and obtaining a preliminary injunction to stop the termination of the construction of the MOX facility, it is not just fair compensation but is on the low end of the scale, as most of the other cases on which a comparison is being based was for work and recovery in a single case.

39. I conclude that the fourth fee factor strongly favors a generous fee.

BENEFICIAL RESULTS OBTAINED

40. The United States Supreme Court has stated, "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (internal quotes omitted); *Hensley v. Eckerhardt*, 461 U.S. 424, 434 (1983) (the "results obtained" in litigation to be a key factor in assessing the reasonableness of a fee). The South Carolina Supreme Court has similarly held: "Ultimately when a 'common fund' is generated for the benefit of the class, the result is everything." *Littlejohn v. State*, 2002 WL 34454074, *5 (S.C. Cir. 2002), *aff'd sub nom Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003); *see also Layman v. State*, 376 S.C. 434, 453, 658 S.E.2d 320, 330 (2008).

41. To my knowledge, the $600,000,000 immediate payment is the largest single payment recovery for the State of South Carolina in the State's history.

42. The State also successfully forced the United States to remove one metric ton of defense plutonium from the State of South Carolina. While I have not attempted to assign a value to this benefit, it is indisputably significant.

43. The State also now has a contractual obligation and recognition from the United States that it will remove 9.5 metric tons of defense plutonium by 2037.

44. As Senator Lindsey Graham commented on August 31: "Without the litigation, you wouldn't have anything today.... [T]his is the best possible outcome South Carolina could hope for...."

45. The beneficial results obtained by Litigation Counsel's creativity and legal strategy in prosecuting these cases was superlative. It is even more impressive given that this result was achieved against ferocious opposition with unlimited resources.

46. Recognizing litigation result as the single most important factor, the 12.5% effective fee is more than justified by the monetary recovery of $600,000,000 standing alone. In conjunction with

the injunctive relief and contractual agreement for additional removal and/or future payments, the 12.5% is more than reasonable.

47. In my opinion, this factor—the most important—weighs heavily in support of the reasonableness of a 12.5% effective rate for attorneys' fees in this case.

CUSTOMARY LEGAL FEES FOR SIMILAR SERVICES

48. Courts have long considered fee applications in common fund cases. Newberg on Class Actions conducted a study and found: "[R]ecent empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20–30%, with the average award hovering around 25% . . . Usually, 50% of the fund is the upper limit on a reasonable fee award from any common fund, in order to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented." § 15:83.Applying the percentage method—Reasonableness of percentage—Empirical data on percentages awarded, 5 Newberg on Class Actions § 15:83 (5th ed.).

49. Courts have also considered fees in cases with similar large returns. Just recently, in *Cook, et al. v. South Carolina Public Service Authority, et al.*, C/A 2019-CP-23-06675 (Order 7/31/20 Greenville Court of Common Pleas), Chief Justice (Ret.) Toal approved a 15% attorney fee award on a $520 million settlement. Similarly, in *Lightsey v. SCE&G,* C/A 2017-CP-2500335 (Order 6/11/19 Hampton County Court of Common Pleas), the Court awarded $51 million on $115 million in cash and property valued between $60-85 million or 25.5% of present settlement benefit. The Court noted: "The requested fee computed as a percentage of the cash and transferred property value will likely fall between 35.5%-29.1% depending on the ultimate sales prices of the transferred property. Regardless of whether the final fee percentage is at the high or low end of that range, the fee will fall within the customary South Carolina complex

case contingency fee of 33.3%-50%. The 25.5%-29.1% fee range is also well within the traditionally accepted common fund fee range in complex class actions of 19-45%.[1] Id. internal citations omitted. In *Spartanburg Regional Health Services District, Inc. v. Hillenbrand Industries*, the Honorable Henry F. Floyd awarded 25% fee of roughly $117 million on a total settlement of 486.6 million, comprised of $337.5 million paid in cash and an agreement by defendants to change future pricing for an additional benefit of $131.1 million. C.A. No 7:03-2141-HHF, 2006 WL 8446464, at 5, n. 3 (D.S.C. Aug. 15, 2006). Here, the fees sought are far less.

50. The Court should use the prevailing market rate in the community for similar services of lawyers "of reasonably comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986). The South Carolina Supreme Court found in *Global Protection Corp. v. Halbersberg* that the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-third to one-half of the gross recovery. *Global Protection,* 332 S.C. at 161, 503 S.E.2d at 489. Judge Harwell observed in *Dewitt v. Darlington Co.,* 2013 WL 6408371 (D.S.C. 2013) that, "Attorneys fees awarded generally range anywhere from nineteen percent (19%) to forty-five (45%) of the settlement fund.

51. With complex class action cases of this sort, it is proper to review nationwide in scope. In Michigan, the Michigan Attorney General has hired lawyers under fee agreements more favorable to the attorneys prosecuting the action than AG McMaster Agreement. See Exhibit 5, State of Michigan Department of Attorney General PFAS Environmental Tort Litigation contract.

[1] Like in many cases, *Lightsey* contained a noncash common fund benefit that was valued at $2 billion of rate relief. Here the non cash benefit includes, in part, the removal of 1 metric ton of plutonium.

52. It is therefore my opinion that the South Carolina Supreme Court customary fee award factor strongly supports a very substantial fee award.

CONCLUSION

53. This case required, and the Plaintiff's lawyers delivered, an experienced team who worked tenaciously and unsparingly to affect the State's goals. The result achieved against this well-funded and formidable Defendant could not have occurred but for the exceptional strategic planning and execution that very few lawyers could have achieved.

54. Outstanding lawyering which resulted in the single largest single payment to the State of South Carolina deserves to be recognized and rewarded.

55. All six factors enunciated by our courts when applied to the facts of this case supports the fee award requested. As a result, to reasonable degree of certainty in my field, the requested fee is reasonable and appropriate.

Further Affiant sayeth not.

Peter D. Protopapas

SWORN TO AND SUBSCRIBED BY ME
This 5th Day of October, 2020

Notary Public for the State of South Carolina
My Commission Expires: 3/31/2020

EXHIBIT 1

PETER D. PROTOPAPAS, ESQUIRE

Rikard & Protopapas – 1329 Blanding Street, Columbia, SC 29201 – 803.978.6111 –
PDP@RPLEGALGROUP.COM

EDUCATION

2000 Juris Doctorate, University of South Carolina
With Honors, Member of the Order of the Wig and Robe, Order of the Coif and Member of the ABA Real Property Journal

1994 MA, University of Florida

1992 BA, University of Massachusetts

PROFFESSIONAL EXPERIENCE

2010 – Present Partner, Rikard & Protopapas, LLC

2000 – 2010 Associate and later, Partner at Lewis & Babcock, LLP

Represented clients in a wide variety of complex business and professional malpractice cases throughout South Carolina. Law practice focusing on civil litigation in the areas of business dispute, personal injury loss, and complicated professional loss. Advised clients and/or worked with individuals appointed to liquidate assets of defunct or bankrupt entitles. Examples of such work include Carolina Investors, HomeGold, Compass Academy, Global Holdings, and FIP investment.

LICENSURE / MEMBERSHIPS

- Qualified to Practice in the United States District Court for the District of South Carolina and the United States Court of Appeals, Fourth Circuit
- South Carolina Bar Association, Member
- Richland County Bar Association, Member
- John Belton O'Neall Inn of Court, Member
- South Carolina Association of Justice, Member
- American Association of Justice, Member
- Super Lawyers, Member

VOLUNTEERING / HONORS & RECOGNITIONS / SPEAKING ENGAGEMENTS

- Former Board Member for South Carolina Legal Services, a non profit organizations assisting South Carolinians.
- Coach of Mock Trial for Longleaf Middle School, Richland School District 2
- Intricately involved in numerous reported and unreported decisions on legal ethics and business law.
- Frequent ethics speaker for SC Association of Justice and the SC Bar Association

EXHIBIT 2

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

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

RECITALS

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

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

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

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

ARTICLE I. TERM

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

ARTICLE II. SERVICES

A. Scope of Appointment

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

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

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

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

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

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

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

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

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

B. Non-Delegation of Work

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

C. Employment Status

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

ARTICLE III. CASE MANAGEMENT

A. Status Reports

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

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

B. Notices and Correspondence

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

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

Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com

Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

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

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

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

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

D. Settlement

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

E. Appeals

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

F. Public Records

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

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

G. Settlement or Judgment Proceeds

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

ARTICLE IV. COMPENSATION

A. Contingent Status

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

B. Fee Schedule and Division

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

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

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

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

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

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

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

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

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

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

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

C. Early Settlement

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

D. Non-Monetary Relief

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

E. Compensation upon Termination

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

F. No Other Payment Source

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

G. Court Approval of Fees and Costs

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

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

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

B. Expert Expenses

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

C. Other Expenses

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

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

2. There is no reimbursement for meals.

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

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

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

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

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

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

D. Hourly Fee

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

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

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

E. Form and Timing of Submission

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

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

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

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

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

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

ARTICLE VI. TERMINATION

A. Termination by the Parties

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

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

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

B. Jurisdiction and Choice of Law

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

C. Code of Professional Responsibility

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

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

D. Insurance

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

E. Conflict of Interest

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

F. Equal Opportunity

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

G. Right to Contact

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

H. Entire Agreement/Integration

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

I. Severability of Terms and Conditions

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

J. Amendment or Modification

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

K. Headings

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

L. Counterparts

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

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

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

SPECIAL COUNSEL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Legal Services

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

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

B. Notices and Correspondence

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

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

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Signatures on following page.]

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

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

Date: 6/13/19

SPECIAL COUNSEL

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

Date: 6/7/19

EXHIBIT 3

Litigation Retention Agreement

	Removal Claim*	Payment Claim*	Termination Claim	Nevada Claim	
Article IV.B.4.i (Removal and Payment Claims)	$29,250,000		X	X	
Article IV.B.5 (Appeal of Removal and Payment Claims)	$8,000,000		X	X	
Article IV.B.4.ii (Termination Claim)	X	X	$21,000,000	X	
Article IV.B.4.iii (Nevada Claim)	X	X	X	$18,000,000	
Totals:	**$ 37,250,000.00**	**$ -**	**$ 21,000,000.00**	**$ 18,000,000.00**	**$ 76,250,000.00**
				(Credit)	$ (1,250,000.00)
				Total Due:	**$ 75,000,000.00**

* The Removal Claim District Court litigation payment is copayable with the Payment Claim Court of Federal Claims litigation.

Amount of the remaining net recovery	Contingent percentage	$600,000,000 Recovery	
First $0 to $25,000,000.00	21%	$	5,250,000.00
$25,000,000 to $50,000,000	18%	$	4,500,000.00
$50,000,000 to $75,000,000	15%	$	3,750,000.00
$75,000,000 to $100,000,000	13%	$	3,250,000.00
$100,000,000 to $125,000,000	11%	$	2,750,000.00
$125,000,000 to $150,000,000	9%	$	2,250,000.00
$150,000,000 to $250,000,000	4%	$	4,000,000.00
Greater than $250,000,000.00	1%	$	3,500,000.00
		$	29,250,000.00

Appeal (Removal of Pu)		$600,000,000	
Amount of the remaining net recovery	Contingent percentage		
First $0 to $25,000,000.00	3%	$	750,000.00
$25,000,000 to $50,000,000	3%	$	750,000.00
$50,000,000 to $75,000,000	3%	$	750,000.00
$75,000,000 to $100,000,000	2%	$	500,000.00
$100,000,000 to $125,000,000	2%	$	500,000.00
$125,000,000 to $150,000,000	1%	$	250,000.00
$150,000,000 to $250,000,000	1%	$	1,000,000.00
Greater than $250,000,000.00	1%	$	3,500,000.00
		$	8,000,000.00

Nevada		MOX Facility Termination	$600,000,000
District - 2%	$12,000,000.00	District - 2%	$12,000,000.00
Appeal - 1%	$6,000,000.00	Appeal - 1%	$6,000,000.00
Sup Ct - 0.5%	$0.00	Sup Ct - 0.5%	$3,000,000.00
	$18,000,000.00		$21,000,000.00

EXHIBIT 4

2006 WL 5453177 (S.C.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of South Carolina.
Fifth Judicial Circuit
Richland County

Nancy S. LAYMAN, David M. Fitzgerald, Vicki K. Zelenko, Wyman M. Looney, Nancy Ahrens, James Haynes and Janice Franklin, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA and The South Carolina Retirement System, Defendants.

No. 05-CP-40-2785.

September 18, 2006.

Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Petition for Attorneys' Fees Pursuant to § 15-77-300

Lewis & Babcock, L.L.P., A. Camden Lewis, Keith M. Babcock, Ariail E. King, By: A. Camden Lewis, 1513 Hampton Street, Post Office Box 11208, Columbia, South Carolina 29211, (803) 771-8000, Richard A. Harpootlian, P.A., Richard A. Harpootlian, Post Office Box 1090, Columbia, South Carolina 29202, (803) 252-4848, Attorneys for the Plaintiffs.

Plaintiffs, Nancy S. Layman, David M. Fitzgerald, Vicki K. Zelenko, and Wyman M. Looney,[1] hereby submit this Memorandum of law in reply to Defendants' Memorandum in Opposition to the Petition for Attorney's Fees Pursuant to §15-77-300.

INTRODUCTION

Defendants the State of South Carolina and the South Carolina Retirement System (hereinafter collectively "The State") have made revealing admissions as well as extreme and absurd statements in their opposition to an award of attorneys' fees. For example:

• Amazingly, The State *never* looked at the legality of Act No. 153 before the passage of the Act. Boykin Depo. p. 44-45; Gray Culbreath Depo. p. 37. Plaintiff David Fitzgerald spoke via telephone to the Retirement System's legal counsel: "I have talked with Steve Van Camp, legal counsel at SCRS. He told me that SCRS was not asked for a legal opinion regarding breaking the TERI contract and none was rendered." E-mail to Senator Ronnie Cromer, Exhibit 8 to Fitzgerald deposition.[2]

• Even though The State was forced to return $37 million to old TERI participants and will not collect $87 million in the future, The State claims to be the prevailing party. The State reasons that it was upon their legal theory that they lost, and therefore they won.[3]

• The State also claims that even though the Supreme Court's ruling required fees to be based in part on "the benefit obtained for all of the old TERI participants,"[4] the $124 million total benefit to old TERI participants does not have "to be a part of that formula." Boykin Depo. p. 167.[5] Even more outrageously, The State also claims that Plaintiffs are seeking $50 million in attorneys' fees (Exhibit 25 to Boykin Depo.). This is simply a scare tactic by the State.[6] In fact, Plaintiffs have not requested such a sum.

• The State has admitted that it *did not have* to follow Act No. 153. Peggy Boykin, head of the Retirement System, admitted that there was a "collaboration" after this Court's June 14, 2005 grant of injunctive relief as to Act No. 153, and, when asked who made the decision to continue to enforce the Act, stated: "I would have been the one to sign off on that decision." Boykin Depo., p. 127. In other words, Ms. Boykin could have also decided *not* to enforce the Act.[7]

• When asked questions about Act No. 153 and the State's actions, Peggy Boykin had a lack of memory on at least 68 occasions. For example, consider the following discussion regarding the Senate Finance Subcommittee's inquiry as to the name of the state that supposedly required retiree contributions to a retirement fund:

Q: And you told the subcommittee you would get the name of the state to them. Did you get the name of the state to them?

A: I don't recall.

Q: If there would, would you have sent it by some kind of note or letter?

A: I don't recall.

Q: Do you know if the state was Oregon?

A: I don't recall.

Boykin Depo., p. 52. When confronted with a memo reflecting the fact that Senator Setzler asked a legal question about retiree contributions to which Ms. Boykin indicated she would have the legal experts respond, Ms. Boykin again exhibited this same lack of memory:

Q: Well, you said you would have legal experts respond. Did you have them respond?

A: I don't recall whether Senator Setzler spoke to the attorneys or not.

Q: Did you ever ask the attorneys to talk to Senator Setzler.

A: I don't recall.

Q: Would you have done it in writing?

A: I don't recall having done so.

Q: Who are the legal experts you were talking about?

A: You know, I don't recall....

Boykin Depo. pp. 76-77.

These are just a few examples of the extreme and absurd arguments the State makes. The State's illogical positions should be disregarded.

I. Under the statute and the Supreme Court's order, Plaintiffs are entitled to recover for "work performed, expenses incurred, and the benefit obtained for all of the old TERI participants."

At least since 1948, South Carolina has recognized the theory that attorneys' fees can be granted in certain situations in cases involving government. *Shilitto v. City of Spartanburg*, 51 S.E.2d 95 (SC 1948). Shillitto was a taxpayer seeking to recover the money collected under an unconstitutional statute. That court granted attorneys' fees, recognizing that the principle of attorneys' fees was not "solely confined in its application to what is usually termed a 'common fund'." *Shillito* at 100. The court rejected the notion that the common fund principle did "not extend to a case...involving public funds." *Id.* The court stated:
Citizens should be encouraged to bring suits like this, and when they have succeeded in [recovering] into the county treasury money for the benefit of the people that would otherwise be lost, it is no more than right and just they should have these fees.

Shillito at 101. Here, the named Plaintiffs, as in *Shillito*, brought a lawsuit for money illegally collected, and they succeeded in recovering those funds for the benefit of thousands of other old TERI participants. As such, they should be granted attorneys' fees.

Likewise, the benefits (monetary or non-monetary), obtained for a certain group or for the general public, can support an award of attorneys' fees. When fees are awarded under the common fund doctrine, it simply refers to the *source* of the award-- not the amount or the reason for such an amount.[8] However, the principles in awarding fees from the common fund source or the statutory source are much the same. A statute, such as the one involved here, merely shifts payment of the fees from the common fund to The State under much the same principles. In awarding fees, courts mainly look to the benefits obtained, regardless of the source of those fees. In *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 166 (1939), the United States Supreme Court noted "[t]hat the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class does not seem to be a differentiating factor..." in the court's power to award fees and costs.

Other states have awarded fees when a benefit has been conferred on a particular group regardless of the source of funds. In Alabama, the court permitted an award of fees to be paid by the defendant state when the plaintiffs conferred a benefit on the public. *Brown v. State*, 565 So.2d 585 (Ala. 1990)("This litigation clearly resulted in a benefit to the general public. It is unquestionable that plaintiffs' attorneys rendered a public service by bringing an end to an improper practice."). In that case, the Alabama Supreme Court stated: "The fact that this litigation, by virtue of our rationale and holding, has not produced a monetary recovery does not preclude an award of attorney fees." *Brown* at 591 -592.

Here, because a benefit was conferred on the old TERI participants, the Supreme Court properly recognized that the benefit must be considered in awarding attorneys' fees. Contrary to The State's assumption, Plaintiffs are not seeking to recover fees from a common fund source. Plaintiffs seek fees under § 15-77-300 with The State as the source, based on the directive of the Supreme Court.

The State also claims that because the Supreme Court denied Plaintiffs' request for attorneys' fees under the common fund, the Supreme Court has foreclosed the possibility of attorneys' fees based on the benefit to old TERI participants. This position is wrong for two reasons: 1) the Supreme Court denied the common fund petition because it found that attorneys' fees "should not come from the retirement contributions made by the old TERI participants" (i.e., the source of the attorneys' fees should

not be the retirees' money);[9] and 2), the Supreme Court explicitly required the *benefit* to old TERI participants be a factor. The State simply ignores the clear language and rulings of the Supreme Court.

II. Fees can be assessed against the Retirement System.

A. The Retirement System is more than a stakeholder; it is a willing participant.

The State claims that the statute only applies to acts of a government agency and that the Plaintiffs have waived any claim against the Retirement System by stating that the Retirement System was only a stakeholder.[10] The State concludes that if the Retirement System is only a stakeholder, the Retirement System's conduct cannot be the basis of Plaintiffs' claims.

The State has misled the Court as to the nature of Plaintiffs' statements concerning the Retirement System as a stakeholder. The only time Plaintiffs used the word "stakeholder" was at the June 28, 2005 hearing before this Court, *prior* to Act No. 153's effective date of July 1, 2006. At that time, the Retirement System had not yet enforced the illegal Act or collected any funds.

Similarly, at the time of the 2005 hearing, Plaintiffs were operating under the understanding that they were not members of the Retirement System. This was a reasonable assumption, as the Plaintiffs, in order to enter the TERI program, completed forms entitled "Election of *Non-Membership*." (emphasis added). If old TERI participants were non-members, the Retirement System would only have been tangentially involved.

Since that time, the Retirement System has maintained that old TERI participants are members and that the Retirement System could elect to collect or not to collect the contributions. Despite the "Election of Non-Membership" forms, the Retirement System now calls the TERI participants "retired members." Tammy Davis Depo., July 18, 2006, p. 7.[11] Moreover, Plaintiffs now know that the Retirement System made decisions to enforce the Act and collect contributions from the old TERI participants.[12] The Retirement System never even conducted an investigation into the legality of requiring old TERI participants to make contributions, despite requests for such a legal analysis.[13] The Retirement System ignored the plain meaning of the old TERI statute and the contract which the statute created. In fact, the Retirement System never acknowledged a difference between the old TERI participants and the new TERI participants, and never considered applying the Act only to new TERI participants.[14] Then, *after* the June 28, 2005 hearing, the Retirement System *did* enforce Act No. 153 and *did* withhold a percentage of the old TERI participants' paychecks. As such, the Retirement System was an active participant violating the rights of its own members.[15]

Furthermore, the Retirement System has actually earned interest as a result of withholding funds from old TERI participants. On or around August 26, 2005, the Supreme Court certified a class of old TERI participants and ordered that all funds withheld from the old TERI participants be escrowed during this litigation, at an interest rate of 4 percent. However, the Retirement System itself earned 7.25 percent in interest. Tammy Davis Depo., July 18, 2006, p. 13-14. Thus, while the individual refunds were computed at 4 percent,[16] the Retirement System earned at least 3.25 percent more on the money The State illegally withheld. As an active participant in helping create Act No. 153, in enforcing the Act, and in profiting from the Act, the Retirement System cannot be shielded from liability for attorneys' fees under S.C. Code § 15-77-300.

B. Section 15-77-300's use of the term "agency" does not preclude fees against the State.

The State argues that attorneys' fees cannot be assessed against the State because the statute only provides for fees to be assessed against an "agency." Neither Section 15-77-300, nor the case law interpreting it, precludes an award against the State. In fact, the statute specifically provides that party contesting "state action" may recover attorneys' fees:

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

S.C. Code § 15-77-300 (emphasis added). The term "agency" as used by the statute merely refers to the conduit through which the State must act.[17] The State can only act through its agencies; the agencies are the divisions of the State that enforce and implement the laws passed by the General Assembly. Section 15-77-300 recognizes that an agency's acts are the same as the State's acts by allowing a party who contests "state action" to recover fees. Moreover, the law recognizes that the fees can be paid from the State's general fund. S.C. Code § 15-77-330 (Attorneys' fees can be paid "from the state's or political subdivision's general fund[.]").

III. Plaintiffs have met all of the prerequisites of S.C. Code § 15-77-300.[18]

A. Plaintiffs are the prevailing party.

The State devotes a substantial portion of its Memorandum attempting to convince this Court that the State is the prevailing party, even though it has paid $37 million in refunds and it lost $87 million in future revenue. Interestingly, The State concedes that Plaintiffs Layman, Fitzgerald, Zelenko and Looney are prevailing parties for the purposes of § 15-77-300.[19] However, The State claims that other old TERI participants cannot be considered prevailing parties because the Supreme Court decertified the class. What The State refuses to recognize is that on May 4, 2006, the Supreme Court ruled *in favor* of the class and ordered full refunds with interest.[20] It was only after the class fully and completely prevailed that the Supreme Court decertified the class so as to allow the immediate mailing of refund checks.[21] The Supreme Court's Order made *no* substantive changes to its Opinion, and, in fact, ordered that the refunds be issued within 30 days or else be subject to 11.25 percent interest. Clearly *all* old TERI participants prevailed under the Supreme Court's May 4, 2006 Opinion, since *all* of them got *all* of their money back, and they are not required to make future payments.[22]

B. The evidence clearly indicates that The State acted without substantial justification.

1. The State ignored the potential legal problems with Act No. 153.

The State had multiple reasons to doubt the legal validity of Act No. 153 and conduct the necessary investigation into it. Without such, The State acted without substantial justification. The State admitted that they questioned the Act with regard to certain tax issues and got a legal opinion. Exhibit 5 to Boykin Depo. Since The State obtained a legal opinion on the tax implication, it could have easily asked for other legal aspects of the Act to be evaluated. Instead, it did nothing, ignoring all requests for legal analysis.

At a meeting of the Senate Finance Subcommittee on South Carolina Retirement Systems on January 27, 2005, Senator Nikki Setzler asked Peggy Boykin, the head of the Retirement System to have the lawyers determine if one group of retirees could legally be required to make contributions, while another group was not required to make the same contributions. Exhibit 3 to Boykin Depo. In reply, Ms. Boykin said that "she would have the legal experts respond." Exhibit 3 to Boykin Depo. Yet, no expert review was undertaken and no legal opinion obtained.[23] Instead, The State relied on a "white paper" issued by the Society of Actuaries *three years earlier*, which indicated that one other state was requiring these contributions from retirees who were in a deferred retirement plan similar to the TERI plan. Boykin Depo. p. 55. At that same meeting, Ms. Boykin indicated that she would get the name of the state to the Subcommittee. Boykin Depo. p. 51. In her deposition, Ms. Boykin could not recall whether she ever did so. Boykin Depo. p. 52. No other assessment was made, and no investigation conducted as to whether a legal challenge had been made in that State. Cursory research would have found the case of *Strunk v. Public Employees Retirement*

Board, 108 P.3d 1058 (Or. 2005), where, in March 2005, the Oregon Supreme Court, *en banc,* recognized that promises made to state employees to retire could not be rescinded.

Furthermore, contrary to The State's assertion, the State did have actual notice that Act No. 153's validity or legality was being questioned *prior* to the Act's passage. Notice occurred in the January 27, 2005 meeting of the Senate Finance Subcommittee where The State agreed to have legal experts review the matter, but failed to actually perform the review. Additionally, between May 26 and June 14, 2005, Plaintiff David Fitzgerald wrote various Representatives and Senators, including Annette Young, Chip Huggins, Nathan Ballantine, Greg Ryberg, Nikki Setzler, Thomas Alexander and Ronnie Cromer concerning Act No. 153.[24] Exhibits 4-10 to Fitzgerald Depo. Mr. Fitzgerald expressed his concern that The State was changing the rules for old TERI participants, after they had entered into "an irrevocable agreement" and after they had "accepted the terms outlined at TERI election[.]" In an email to Senator Cromer, Mr. Fitzgerald wrote: "I have talked with Steve Van Camp, legal counsel at SCRS. He told me that SCRS was not asked for legal opinion regarding breaking the TERI contract and none was rendered." Exhibit 8 to Fitzgerald deposition; Depo. of David Fitzgerald, P. 11. In his response, Senator Cromer stated:

I made a point of addressing it with the members of the Finance Committee as to the legality of "breaking a contract" and was only told that the IRS had been contacted and said it was "okay."

Exhibit 8 to Fitzgerald Depo.

It would have been very easy to ask the lawyers not only about the IRS implications but also about the legal effect as to the existing TERI participants.[25] Mr. Fitzgerald even emailed Governor Sanford on June 7, 2005, stating his belief that the provisions of the Act "constitute[d] a breach of contract between employee and the State." Exhibit 11 to Fitzgerald deposition. Mr. Fitzgerald asked the Governor to request a legal opinion. As with so much of Mr. Fitzgerald's correspondence, this email request went unanswered.

From Mr. Fitzgerald's inquiries alone, the Retirement System, at least 7 members of the General Assembly, and the Governor of The State knew that the legality of Act No. 153 was questionable. Did The State do what any reasonable person would do and request a legal opinion?[26] No, because The State was intent on passing the Act so it could begin taking the money from old TERI participants. Nevertheless, The State claims it acted with substantial justification because it had no reason to believe Act No. 153 was invalid. In actuality, The State simply acted with reckless disregard and ignored the multiple and apparent problems with Act No. 153.[27] The State's actions in deliberate indifference to the potential legal issues cannot constitute substantial justification.

The State acted without substantial justification by failing to examine the language of the then existing statute. If The State had made such and examination, it would have easily determined the existence of the contract and the illegality of the contributions. The Supreme Court held that "the language in the old TERI statute demonstrates, *in unambiguous terms*, the intent of the legislature to bind itself" and that the State "was in *clear breach* of the contract it created." *Layman v. State*, 368 S.C. 631, 639, 630 S.E.2d 265, 269 (2006)(emphasis added). Where statutory language is clear and unambiguous, there can be no substantial justification in attempting to rewrite it as The State has done here. The statutory contract and its breach were so obvious that the Supreme Court did not even have to consider the other causes of action set forth by Plaintiffs, nor did it have to receive any evidence, such as the individual contracts signed by old TERI participants. A cursory inquiry into the existence of statutory language would have alerted The State to the problem.

Furthermore, The State could have decided not to enforce Act No. 153, especially in light of this Court's July 14, 2005 ruling and grant of injunctive relief. Instead, The State continued to enforce the Act with regard to all old TERI participants (with the exception that the named Plaintiffs' funds were escrowed). The State admitted that it had to sign off on the continued enforcement of the Act, after meeting with various officials:
Q. Okay, so you got this information in this collaboration. And who makes the decision? Somebody has to make the decision.

A. I would have been the one to sign off on that decision.

* * *

Q. So you signed off on you go ahead and enforce the act.

A. That's correct.

Boykin Depo. p. 127. In other words, The State, after this Court ruled that the TERI Plaintiffs' contracts were being violated, could have stopped enforcing the law; nevertheless, it forged ahead, continuing to breach the contracts of all old TERI participants. Positions taken during the litigation can be a predicate for fees. *Thompson v. Sullivan*, 980 F.2d 280 (4th Cir. 1992).

2. During the litigation, The State resorted to scare tactics about the retirement systems.

The scare tactics employed by The State provide further evidence of its lack of substantial justification. In looking at substantial justification, courts have found that an "egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's 'position' in the entire case as unreasonable[.]" *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993). The State attempts to rewrite history by claiming that it did not resort to scare tactics. Having been rebuked by the Supreme Court for its use of a misleading actuarial report and making a misrepresentation, The State now claims that they simply submitted the report to provide "case background" and did not try to use actuarial unsoundness to support its defense. Yet the Supreme Court, which addressed this issue in both its May 4, 2006 Opinion and its June 1, 2006 Order, stated "contrary to *the State's suggestion*, our holding will not place the actuarial soundness of the retirement system in ruins." *Layman v. State*, 368 S.C. 631, 641, 630 S.E.2d 265, 270 (2006)(emphasis added). The Court also noted that an affidavit "relied upon heavily by the State" was inaccurate in that it included future TERI participants (who are not a part of this case). *Id.* The Supreme Court concluded that The State's "contention that the number of old TERI participants is growing at a rapid pace [was] a complete misrepresentation." *Id.*

The State complained about the Supreme Court's criticism in its Motion for Reconsideration. However, in ruling on that motion, the Supreme Court stated:
At page 26 of their brief respondents state, "Act 153 was adopted in the face of increasing liabilities in the Retirement System." The sentence is accompanied by a reference to pages 754 and 755 of the record. Those pages in the record contain a portion of the Milliman study describing the increase in the number of participants corresponding to the increase in the liabilities of the retirement system. The numbers are reflected in chart form, depicting the liabilities increasing significantly, almost off the charts. We did not intend to impugn the character of counsel, but we did find fault in the analysis used with respect to the entire Milliman report. Respondent's reliance on the report was inaccurate because by the time respondents prepared the briefs for presentation before this Court, we had previously certified the plaintiff class to include only those retirees enrolled prior to July 1, 2005. The Milliman report included both current and future TERI participants.

Layman v. State, Order of June 1, 2006, p. 2-3. It is not surprising that The State is now trying to distance themselves from their scare tactic (the claim of actuarial unsoundness). However, the Supreme Court clearly recognized that The State did resort to such scare tactics during the litigation by relying on inaccurate and misleading documents. These scare tactics and misleading positions taken by The State completely taint The State's position and render it unjustified.

3. The fact that The State followed the statute does not create substantial justification.

The State claims that it was following a statute and even though that statute was illegal, they were justified. In other words, The State absurdly claims that it can enforce any act, no matter how apparent the illegality, without repercussions.[28] The State's expert on substantial justification claimed the state would be substantially justified in enforcing a discriminatory statute against women and African-Americans.[29] There is no support for The State's position. The statute and case law provide that if a party successfully challenges a state action (here the application of Act 153 to old TERI participants) and the State lacked substantial justification, then the party is entitled to attorneys' fees.

4. The prospective use of Act No. 153 does not affect the lack of substantial justification.

The fact that Act No. 153 is still "on the books" and effective for TERI participants after July 1, 2005, has no bearing as to The State's lack of substantial justification in applying Act No. 153 to the old TERI participants. Plaintiffs have never argued that Act No. 153 was improper as to TERI participants enrolled *after* the Act's effective date of July 1, 2005. Indeed, at the June 28, 2005 hearing before this Court, Plaintiffs made that point clear:

I want the Court to understand, we are not interested or are we here on behalf of future TERI retirees.

Transcript of Hearing, p. 8 (Record, p. 72). In fact, the State's argument on this point shows its continued ignorance of the difference between the old and new TERI participants and highlights the fact that the State never considered applying Act No. 153 to new TERI participants only.[30]

C. There are no special circumstances which would preclude an award of fees.

The State argues that an award of attorneys' fees would require the distribution of funds from a qualified pension trust, which would violate both the State Constitution and IRS regulations. The State either ignores or fails to understand an award can be paid from "*the state's or political subdivision's general fund if the agency has no available funds[.]*" (emphasis added) S. C. Code § 15-77-330 (1976). Obviously, the Retirement System has funds to pay its own attorneys and other expenses. There has been no evidence provided that payment of court-ordered attorneys' fees would violate IRS regulations. More importantly, the Supreme Court has already addressed this issue and determined that no special circumstances prevented the shifting of attorneys' fees to The State when it ruled that "attorney's fees in this matter should not come from the retirement contributions made by the old TERI participants." *Layman*, June 1, 2005 Order, p. 6.

IV. The Supreme Court specifically set forth the factors for the award.

In spite of the Supreme Court's June 1, 2006 Order setting forth the basis for fees, The State falls back to a familiar position -- ignoring clear and unambiguous language. The Supreme Court, recognizing that § 15-77-300 did not prescribe or limit fees, set forth the appropriate considerations in determining a fee award in this case --"the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants." *Layman*, Order of June 1, 2006, p. 7. The State may not like the Supreme Court's directive, but it cannot ignore it. The source for attorneys' fees is The State. The Supreme Court-ordered benefit considerations in setting the amount of attorneys' fees is no different than any other fee awards, regardless of their source. The State wants to confuse source with amount. When the source is a common fund, the common fund benefit is a primary consideration. Similarly, when the source is shifted to The State, as here, the benefit to the retirees is a primary consideration.[31] In other words, the amount of the benefit, which weighs heavily in common fund source considerations, is also crucial here, as the Supreme Court recognized when it stated that fees should be based on "the results obtained for all old TERI participants." Thus, the percentages used to establish attorneys' fees in all cases that analyze the benefits to determine such fees provide guidance.

A one-third fee is a common benchmark in benefit consideration cases, although the percentage may be higher in some cases. Eisenberg, Theodore and Geoffrey P. Miller. *"Attorneys Fees in Class Action Settlements: An Empirical Study," I Journal of Empirical Legal Studies* (2004). Courts in such cases have routinely awarded attorneys' fees of 25 percent to 40 percent of the award recovered for the clients.[32] South Carolina has approved a percentage awards as appropriate attorneys' fees in amounts of 28-33 percent. *See, e.g., Condon v. State of South Carolina,* 354 S.C. 634, 583 S.E.2d 430 (2003) (Supreme Court approved lower court's award of 28% of $7.5 million, noting that the "fees customarily charged in similar cases" factor was particularly persuasive). In fact, a percentage award has been approved in a in a similar action against the State. In *Bass v. State of South Carolina*, 307 S.C. 13, 414 S.E.2d 110 (1992), federal retirees sued for the return of state taxes collected on federal pensions. A settlement was reached in which approximately $89 million was refunded to the federal retirees -- the largest class action settlement ever against the State. See, *Record on Appeal, Condon v. State, supra.* The attorneys were awarded fees of $17,355,000 or 19.5 percent.[33] The Attorney General of South Carolina recognizes in these types of cases, attorneys' fees are based on a percentage of recovery, *regardless of hours or how hours are kept.* R. Harpootlian, p. 40; Exhibit 3 to Harpootlian Depo.

Attorney General Henry McMaster stated that the public should understand his use of outside attorneys under this fee arrangement "is consistent with the highest standards of practicing law and bringing litigation." *The State*, August 10, 2006; Ex. 4 to Harpootlian Depo.

CONCLUSION

Plaintiffs have met all of the prerequisites of S.C. Code § 15-77-300 and are entitled to recover attorneys' fees based on "the actual amount of work performed, expenses incurred, and the benefit obtained for all the old TERI participants."

Columbia, South Carolina

September 18, 2006

Footnotes

1 Plaintiffs Nancy Ahrens, James Haynes and Janice Franklin, who were added as plaintiffs after the initial complaint was filed, are Working Retirees, not "old TERI" participants (i.e., those who enrolled prior to July 1, 2005), and have not joined in the Petition for Costs as their case was remanded for evidentiary inquiry.

2 The only legal issue ever considered was whether contributions from old TERI participants would violate IRS provisions governing tax-qualified pension plans (See, Exhibit 5 to Boykin Depo.), despite Fitzgerald's numerous requests to review the Act's legality.

3 Plaintiffs were the ones who actually raised the distinction between old TERI participants and those that joined after July 1, 2005. The State did not recognize the difference prior to this litigation.

4 *Layman v. State*, June 1, 2006 Order of the Supreme Court.

5 The State provides another example of this double talk by claiming that only fees, and not costs, can be recovered, when the Supreme Court clearly stated that any award should include "expenses incurred." Depo. of Elizabeth Crum, p. 31; *Layman v. State*, June 1, 2006 Order of the Supreme Court.

6 The State itself, through Attorney General Henry McMaster, recognizes the appropriateness of percentage recoveries for lawyers who take a chance for the State. R. Harpootlian Depo., p. 40; Ex. 3 to Depo.

7 When cornered with an equally obvious situation, the Ms. Boykin claimed she would not know how to respond:
FNQ: We're sitting here today, Ms. Boykin, and I'm asking you what you would do if there was a law passed that says men pay--working retirees pay six percent and woman pay ten percent and you're telling me you don't know what you would do?...
* * *
FNA: I don't know exactly what I would do.
Boykin Depo. p. 74-75.

8 The Supreme Court has made it clear that the source of the fees should not be the old TERI participants: "we find attorney's fees in this matter should not come from the retirement contributions made by the old TERI participants, or the interest accumulated thereon." *Layman v. State*, June 1, 2006 Order of the Supreme Court, p. 6.

9 *Layman*, June 1, 2006 Order.

10 It appears that there is a conflict between the two defendants, with the Retirement System attempting to "pass the buck" to the State. The South Carolina Supreme Court has already rejected this maneuver. The State made this argument in its Return to Petition for Costs to Include S.C. Code § 15-77-300 Attorneys' Fees filed in the Supreme Court on May 25, 2006. On June 1, 2006, the Supreme Court issued an order remanding the issue of attorneys' fees, stating that this Court should determine if "fees to be taxed as court costs against the State of South Carolina **and** the South Carolina Retirement System [.]" *Layman v. State,* June 1, 2006 Order, p. 6-7. In fact, throughout this litigation, the Supreme Court has never distinguished between or separated the two defendants.

11 When questioned about the fact that the old TERI participants signed forms of "non-membership," Ms. Davis admitted it was "an inappropriate choice of wording." Tammy Davis Depo., July 18, 2006.

12 Q: So you signed off on ["]you go ahead and enforce the act["].
FNA: That's correct.
Boykin, Depo., p. 127. (internal quotations added)

13 Mr. Fitzgerald spoke to legal counsel for the Retirement System regarding "the breaking of the contract" with TERI participants and need for a legal opinion. Fitzgerald Depo. p. 11.

14 When asked whether it ever came up that the Retirement System should distinguish between the people who entered TERI after July 1, 2005 and prior to July 1, 2005, Ms. Boykin stated that "it never came up" and that she "did not bring it up." Boykin Depo., p. 111-112.

15 The Retirement System claims it has no obligation to treat its members fairly and its only duty is "to administer the pension plan in accordance with the statutes. And that's--that's our job." Boykin Depo. p. 121.

16 The interest was actually computed at 3.667 percent. Tammy Davis Depo, August 9, 2006, p. 10.

17 As noted previously, this is just another attempt by the two defendants to claim "not me" and blame the other defendant, which appears to create a conflict between the two.

18 Contrary to The State's claim, the statute does not have to be strictly construed; none of the case law interpreting this section has so held. However, even if the statute is strictly construed, the result would be the same -- Plaintiffs are entitled to attorneys' fees.

19 The State wrongly argues that because the named Plaintiffs have not paid any attorneys' fees, they cannot recover any fees under § 15-77-300. There is no requirement in the statute or the case law that requires first be paid and then be reimbursed. The statute simply allows a party to "recover" attorneys' fees. In this context, recover means "to obtain by judgment in a court of law, or by legal proceedings." Random House Dictionary (Unabridged Ed.). The State is reading a requirement that does not exist into the statute. The language of S.C. Code § 15-77-300 does not state that a party may be "reimbursed" for any monies expended in litigation, but rather allows a prevailing party to recover attorneys' fees.

20 The Supreme Court held:
Based on the above reasoning, we hold that the State breached its contract with Petitioners who were enrolled as old TERI participants by forcing those old TERI participants to make retirement system contributions. Accordingly, all retirement system contributions withheld from old TERI participants enrolled prior to July 1, 2005 shall be returned with interest to such TERI participants and no further contributions from TERI participants enrolled prior to July 1, 2005 shall be required.
Layman v. State, 368 S.C. 631, 639, 630 S.E.2d 265, 269 (2006).

21 It must be noted that the ruling of the Supreme Court indicates that one of the reasons the class was decertified was simply to eliminate certain cumbersome class procedures: "Respondents also point out that if the class is not decertified, class notice will be required. We are persuaded by this argument." *Layman v. State*, June 1, 2006 Order, p. 4. The Supreme Court did not find that the class had been improperly certified, but instead agreed so that the State could simply mail refund checks with no further court involvement and no more delays.

22 Contrary to The State's assertion, it has not prevailed as to the Working Retirees. The Supreme Court did not dismiss the claims of the Working Retirees, but remanded the claims for a determination as to whether "any actions of the State with regard to individual old working retirees constituted a breach of contract." *Layman v. State* at 643, 630 S.E.2d at 271-272. When claims are remanded for further proceedings, a party cannot claim they have prevailed until the issue on remand have been adjudicated. *See, e.g.* 32 AmJur *Federal Courts* § 324 ("[A] prevailing party is one who ultimately succeeds on the merits of the administrative decision appealed to the District Court. It is not enough to have won a remand to the administrative level for further proceedings."). Furthermore, the State's claim that because the Supreme Court found no statutory contract with regard to the Working Retirees, the State has "saved the State of South Carolina millions of dollars in retirement contributions from the members of the working retiree class" is supposition and exaggeration. Defendants' Memorandum, p. 14. As noted, the claims of the Working Retirees are ongoing. An interim favorable ruling "on the way to ultimate defeat" does not confer prevailing party status. 32 AmJur *Federal Courts* § 324.

23 Because, The State did not look at the legality of Act No. 153, they cannot now claim that the then-existing case law provided them with substantial justification. The State has already admitted that no legal analysis was ever performed, so they could not have been relying on *Alston v. City of Camden*, or any other cases. Depo. of Gray Culbreath, p. 36. The State admitted that it never recognized the problem with the retroactive change until after this lawsuit was filed. Boykin Depo. p. 137.

24 The majority of Mr. Fitzgerald's correspondence went unanswered. Mr. Fitzgerald also testified that he emailed every member of the Senate Finance Committee and the House Ways and Means Committee, with the exception of Herb Kirsch, who did not have an email address. Depo. of David Fitzgerald, p. 10.

25 The State has admitted that it never considered applying the Act to only future TERI participants or the effect on old TERI participants. Boykin Depo. p. 111; p. 133 "I don't recall there being a discussion of a difference between the two." This is an astounding admission that The State did not recognize a retroactive change and the obvious difference between old and ne TERI participants. Plaintiffs and the Supreme Court saw this distinction as a primary concern.

26 The South Carolina Attorney General issues opinions on the legality of acts or practices in response to any official request. The State easily could have sought such an opinion as to Act No, 153, but it did not.

27 The State could have sought a declaratory judgment as it does for many state actions so that dire consequences, like the ones present here, can be avoided. *See, e.g., State ex rel. McLeod v. Riley*, 276 S.C. 323, 278 S.E.2d 612 (1981)(actions were brought under Declaratory Judgments Act to determine constitutionality of certain bond authorizations); *South Carolina Public Service Authority v. Citizens and Southern Nat. Bank of South Carolina,* 300 S.C. 142, 386 S.E.2d 775, 777 (1989)(Agency sought declaration that a change to fiscal year did not violate any right of any bondholder or the Authority or violate any terms or covenants of any of the outstanding bond indentures).

28 The State ignores the fact that it could, and does in many cases, request a declaratory judgment before proceeding, so as to avoid dire consequences. *See, State ex rel McLeod v. Riley*, 276 S.C. 323, 278 S.E.2d 612 (1981).

29 Q: The State passes a statute that says that women and African-Americans will get less--have their retirement--they will make the 6.25% [contribution] and they are the only people that have to. Okay?
FNA: Okay.
* * *
FNQ: Okay. Should the State enforce that on July 1 when the law is supposed to go into effect or should they not?
FNA: Well, in that case, I don't think the agency has the ability to tell the General Assembly or the State, "You know what, forget it. We are not going to enforce it."...
Culbreath Depo. p. 24-25.

30 Boykin Depo. p. 133: "I don't recall there being a discussion of a difference between the two." *See also*, Boykin Depo. p. 111:
FNQ: And it wasn't broken down as to leaving the old, that is the prior to July 2005, alone, it just includes them all?
FNA: That's right.

31 As discussed previously, the benefit to over 15,000 old TERI participants was the $37 million refunds and the $87 million in future contributions that will not be required. The old TERI participants, many of whom entered the TERI plan after careful financial planning, were dependent upon the receipt of their full pay, without the withholding of illegal contributions. These retirees would not have been able to pay an attorney to bring this lawsuit. Fitzgerald Depo. p.24; Depo. Exhibits 4-10.

32 *In re Rite Aid Corp. Sec.*, 146 F.Supp.2d 706 (E.D. Pa. 20001)(25% of $193 million); *In re Aetna, Inc. Sec. Litig.*, 2001 WL 20928 (E.d Pa. 2001) (29.5% of $83 million); *In re Merry-Go-Round Enterprise, Inc.*, 244 B.R. 327 (40% of $187 million); *MCI Non-Subscriber Tel. Rates* MDL Docket No. 1275 (S.D. Ill) (29% of $88 million); *In Re Ross Cosmetics Security Litigation*, 92-1706 (D.S.C. Dec. 15, 1993)(33% of settlement of $9.5 million); *Georgallas v. Martin Colorfi, Inc.* 95-0648 (D.S.C. September 10, 1997) (30% of $2,000,000).

33 The fees in that case were not assessed against the State as its conduct there was not as egregious as in this case.

End of Document

EXHIBIT 5

FEE AGREEMENT

State of Michigan
Department of Attorney General

PFAS Environmental Tort Litigation

1. This is a contingent fee case. The Fields Team, comprised of Fields PLLC; Keating, Muething & Klekamp PLL; and DiCello Levitt Gutzler LLC, has been selected to enter into a SAAG Contract to provide legal services through the appointment of specified individuals as Special Assistant Attorneys General (SAAGs). The Fields Team shall receive no compensation from the State of Michigan for any services rendered unless the State of Michigan recovers civil penalties, compensatory or punitive damages, and/or attorneys' fees in connection with the litigation described in the Contract to which this Fee Agreement is attached. If the State obtains such a recovery, the Fields Team will be compensated for its services as follows:

a. Those costs necessary for conducting the litigation described in the SAAG Contract shall initially be advanced by the Fields Team and shall be deducted from the litigation's gross or total recovery, if any, before any further distribution is made;

b. Of the monies remaining from any recovery after deducting costs, the Fields Team shall receive a contingent fee according to the following graduated scale:

Amount of recovery	Attorneys' Fee
$0 - $100,000,000	20% of recovery
$100,000,000.01 - $200,000,000	17.5% of recovery
$200,000,000.01 - $300,000,000	15% of recovery
$300,000,000.01 - $400,000,000	12.5% of recovery
$400,000,000.01 - $500,000,000	10% of recovery
Over $500,000,000.01	10% of recovery

c. In the event that the Fields Team enters into a contingency fee contract with any other State for the purpose of pursuing manufacturers of per- and polyfluoroalkyl substances (PFAS) for costs and damages related to the presence of PFAS in the environment, the State of Michigan reserves the right to amend subsection 1(b) of the Fee Agreement to include the contingency fee formula or scale from that contract with another State for litigation against manufacturers of PFAS.

2. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the SAAGs in accordance with the provisions of Par. 5.11 of the Contract to which this Fee Agreement is attached.

3. The Fields Team shall advance all necessary costs necessary for conducting the litigation, including, but not limited to, expert witness fees and costs, deposition costs, and costs of document review and production. The Fields Team's agreement to advance all litigation costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending, has been taken into consideration in establishing the fee schedule above.

4. The Fields Team shall be reimbursed for its reasonable costs solely from the recovery of funds obtained from the defendant(s) in the litigation under the terms of the SAAG Contract, as approved by the Attorney General. Reimbursement for meals, lodging and travel expenses shall be in accordance with the State of Michigan travel and other expense requirements, which can be found at http://www.michigan.gov/dmb/0,1607, 7-150-9141_13132---,00.html. Expenses exceeding State rates will not be reimbursed. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by the Fields Team for at least one full year following this Agreement's termination. All costs must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in her sole discretion may decline to reimburse the Fields Team for improperly documented, unnecessary, or unreasonable costs.

5. The State will not pay for attorney or paralegal time spent performing clerical tasks, such as filing, indexing, or page numbering.

Dated: September 20th, 2019

Joseph M. Callow, Jr., Esq.
Keating, Muething & Klekamp PLL

Dated: September ___, 2019

Richard M. Fields, Esq.
Fields PLLC

Dated: September ___, 2019

Amy E. Keller, Esq.
DiCello Levitt Gutzler LLC

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Dana Nessel, Attorney General
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