STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF MICHAEL J. VIRZI
COUNTY OF RICHLAND)

The undersigned affiant Michael J. Virzi, having been duly sworn, deposes and says as follows:

1. My name is Michael J. Virzi, and I am attorney in good standing and licensed to practice law in the State of South Carolina. My practice has focused exclusively on matters of legal ethics, malpractice, and lawyer discipline for more than 17 years, including three years as an Assistant Disciplinary Counsel to the South Carolina Supreme Court, and I have taught Professional Responsibility at the University of South Carolina School of law for the past eight years. I have served on the South Carolina Bar's Ethics Advisory Committee since 2003, including three years as Chair, on the Bar's Professional Responsibility Committee since 2011, including two years as Chair, and on the Board of Directors for the South Carolina Association for Justice as Ethics Chair for the three years. I am a member of the South Carolina Association of Ethics Counsel, the Association of Professional Responsibility Lawyers, and the ABA Center for Professional Responsibility, and I have been interviewed by and quoted in The ABA Journal, The State, The Post and Courier, The Greenville News, The Augusta Chronicle, and S.C. Lawyers Weekly. I have given more than 100 presentations on the topics of lawyer ethics as a law school guest lecturer and as a CLE presenter, including 12 years as a faculty member for the South Carolina Bar and Supreme Court's semi-annual Legal Ethics and Practice Program. I have been qualified to give expert testimony on matters of lawyer ethics and malpractice in federal state courts in South Carolina and have provided expert opinions on matters involving lawyer ethics and malpractice on more than 100 occasions either in court, in deposition, or by affidavit.

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2. I have been asked to give my professional opinion on whether the fees received by the law firm of Willoughby & Hoefer, P.A. on behalf of itself and of the law firm of Davidson, Wren, & DeMasters, P.A., for their work for the State of South Carolina violates Rule 1.5 of the Rules of Professional Conduct as alleged by the South Carolina Public Interest Foundation and John Crangle. In formulating the opinions in this affidavit, I have reviewed the pleadings filed by Crangle and the Foundation; the Attorney General's Memorandum in Opposition; Judge Lee's Order; Willoughby & Hoefer's Petition for Supersedeas; the August 28, 2020, Settlement Agreement between the State of South Carolina and the United States; the Litigation Retention Agreement between the Attorney General and the Willoughby and Davidson law firms and the June 2019 Amendment thereto; the October 5, 2020, Affidavit of C. Bradley Hutto; and correspondence between the Governor, the Attorney General, and counsel regarding the Settlement Agreement and attorneys fees paid pursuant to the Litigation Retention Agreement.

3. Based on my experience and understanding of the Rules of Professional Conduct and my review of the above-referenced documents, it is my professional opinion that neither the percentages agreed to in the Retention Agreement, originally or as amended in June 2019, nor the amount ultimately received by Willoughby & Hoefer in any way violate Rule 1.5 of the Rules of Professional Conduct.

4. Contingency fees based on a percentage of recovery in litigation are universally permitted except in specific categories of litigation not applicable here, and percentage fees between 25% and 40% are routine in civil litigation and widely regarded as both reasonable under Rule 1.5 and otherwise ethically permissible, regardless of the resulting effective hourly rate. Even in common fund cases, where contingent fees tend to be based on lower percentages than in

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individual litigation, fees well in excess of the 12.5% received in this case are common and widely approved as reasonable by trial courts and appellate courts alike.

5. The primary reasons percentage contingent fees are permitted regardless of the effective hourly rate they represent include the risk taken by counsel of investing substantial time and expense in cases in which they may recover nothing, often not even their out-of-pocket expenses, and the access to competent counsel that such contingent fees provide to individuals and entities that may not have the ability to hire counsel at an hourly rate. Contingent fees allow the client (in this case the State of South Carolina) to take no financial risk in hiring counsel for potentially complex and lengthy litigation; that risk is instead assumed entirely by counsel, as it was in this case.

6. In the relevant litigation underlying Crangle's and the Foundation's claims, the risk to the Willoughby and Davidson firms was even more elevated than usual because they were representing the State in four separate actions only one of which involved the possibility of monetary recovery. The other three actions were entirely injunctive, and the State and its counsel faced the realistic possibility that it might prevail in the injunctive matters but lose the damages case. In that scenario, counsel's efforts on behalf of the State of South Carolina would have forced the Department of Energy to both remove plutonium from the state and resume the MOX facility project at the Savannah River Site but with no fees whatsoever owed to the lawyers who obtained those results. That is the risk the Willoughby and Davidson firms initially undertook on behalf of the State, and that risk would justify as reasonable an even higher contingent fee percentage than the 12.5% they ultimately received.

7. Crangle's and the Foundation's focus on the amount of the fee ($75,000,000.00) in relation to hours spent is misplaced and inconsistent with the reasonableness analysis required by Rule 1.5. The "time and labor required" in representation is a small part of the reasonableness analysis under Rule 1.5, which also includes the novelty and difficulty of the issues, the requisite skill, fees customarily charged for similar services, the amounts involved, the results obtained, time limitations imposed, the lawyers' experience, reputation and ability, and "whether the fee is fixed or contingent," among others. Applied to the Willoughby and Davidson firms' work, these factors indicate that a higher percentage than 12.5 would have been reasonable. The Nevada litigation appears to have required quick action by counsel in a distant venue, the issues throughout the four cases were complex and changing, lasting several years and through multiple appeals. The amounts involved initially appeared to be in the one-to-two-hundred-million-dollar range, and the results obtained were three times that, plus substantial non-monetary relief with enforcement provisions. The 12.5% fee was a reasonable cost of obtaining not only a $525,000,000.00 net benefit to the State but the additional benefit of immediate removal of a metric ton of weapons-grade plutonium and temporary resumption of DOE's Mixed-oxide fuel facility project. The degree of success—monetary or injunctive—is widely regarded as the most critical of all the reasonableness factors. The success in this case was exemplary and characterized by the Attorney General as "a grand slam home run for the State of South Carolina."

8. The initial litigation by the State involved a single Complaint for removal and damages, and the Retention Agreement provided for percentage contingent fees based on the damages recovered plus the reasonable value of injunctive relief, but pursuing the State's various monetary and non-monetary interests in the litigation later required four separate actions in

different forums, including appeals. The Amendment to the Retention Agreement predetermined the value of two of the three non-monetary relief lawsuits the Willoughby and Davidson firms were was pursuing for the State (defending the State of Nevada's efforts to return the plutonium to South Carolina, and pursuing resumption of DOE's MOX facility project, but not the plutonium removal action) by assigning low percentage contingency fees to two of those three non-monetary suits in place of the Attorney General's discretion to assign that value at a later date, with the percentages both increasing with levels of appellate review and decreasing for higher recovery amounts consistent with the original version of the agreement. Ultimately, the Retention Agreement entitled the Willoughby and Davidson firms to more than 12.5% of the recovery in the damages case for the work they performed in three of four related cases they successfully litigated to highly beneficial monetary and non-monetary results for the State, including two appeals. The firms then voluntarily reduced those fees to 12.5% inclusive of their costs.

9. Significantly, the Willoughby and Davidson firms ultimately took no fee at all in one of the injunction cases in which they were highly successful. No additional percentage fee was provided in the Amendment to the Retention Agreement for the lawsuit seeking removal of weapons-grade plutonium from the state, despite the success of that suit in securing removal of a metric ton of plutonium. No additional fees were sought for those efforts despite that the original Retention Agreement would have allowed the Attorney General to assign a value to that result, entitling the Willoughby and Davidson firms to additional fees.

10. Crangle's and the Foundation's suggestion that the $600,000,000.00 recovery was low (relative to the potential for $100,000,000.00 per year "economic and impact assistance payments" through 2037) also appears misguided within an evaluation of the lawyers' success on

the merits for purposes of a reasonableness analysis. The $600,000,000.00 represents $100,000,000.00 per year from 2016 through 2021, for which time such payments would come from appropriations, whereas any such payments after 2021 would have come from the Secretary of Energy's available funds. The latter, but not the former, includes the operating budget for the Savannah River Site; thus pursuing monetary recovery beyond 2021 appears likely to have adversely affected the SRS budget and was not in the State's best interests. The $600,000,000.00 appears to be the maximum possible monetary recovery without risk of offsetting harm to the State.

11. In short, not only is the 12.5% contingency fee reasonable and permitted by Rule 1.5 of the Rules of Professional Conduct, several measures of additional fees (a higher contractual percentage, an additional fee for the value of the plutonium removal, and not reducing the fee after its calculation) would also have been reasonable, permitted by Rule 1.5, and consistent with prior court-approved common-fund fee awards in this state, had such additional fees been sought and paid.

12. The opinions in this affidavit are given to a reasonable degree of certainty and are specifically based on the documents listed above. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented.

Further affiant sayeth naught.

[signature page to follow]

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Michael J. Virzi

State of South Carolina
County of Richland

Sworn and subscribed before me
This 5th day of October, 2020

Natasha Brenchar
Notary Public

My Commission Expires : 10/18/26