THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Debra R. McCaslin, Circuit Court Judge
Alison R. Lee, Circuit Court Judge

Appellate Case No. 2020-001314

Case No. 2020-CP-40-04603

South Carolina Public Interest Foundation and John Crangle,
Individually and on behalf of all others similarly situated, ... Respondents,

v.

Alan Wilson, Attorney General for the State of South Carolina,
Willoughby & Hoefer, P.A., and Davidson, Wren & Demasters, P.A., ... Defendants.

Of whom Willoughby & Hoefer, P.A., and
Davidson, Wren & Demasters, P.A. are ..... Appellants.

REPLY IN SUPPORT OF PETITION FOR SUPERSEDEAS OF APPELLANT WILLOUGHBY & HOEFER, P.A.

Willoughby & Hoefer, P.A. ("Appellant"), pursuant to Rules 240(a) and 241(c), of the South Carolina Appellate Court Rules ("SCACR"), as well as the Court's October 2, 2020 Letter setting out a briefing schedule for this limited appeal, respectfully submits this reply to the return ("Return") of Respondents South Carolina Public Interest Foundation and John Crangle, Individually and on behalf of all others similarly situated (collectively "Respondents"), and in support of Appellant's petition for a writ of supersedeas ("Petition") to dissolve the facially deficient October 1, 2020, *Ex Parte* Temporary Restraining Order ("*Ex Parte* Order"), entered by

the circuit court in this matter below, and with instructions on remand regarding the continued proceedings seeking injunctive relief against Appellant.

INTRODUCTION

The Return is woefully deficient regarding the question before this Court, failing to meaningfully address the many facial deficiencies of the *Ex Parte* Order. In fact, the only arguments advanced by Respondents as to the merits of the Petition begin in the middle of page 23 of the Return, and end two lines onto page 26, consisting of a mere two and a half pages of argument. The remainder of the Return is meaningless as it relates to the relief sought by the Petition.[1]

Indeed, stripped of the hyperbole and irrelevant discussions copied and pasted from Respondents concurrently-filed Petition for Original Jurisdiction to the Supreme Court,[2] Respondents effectively concede—by advancing no material legal argument or supporting case law to support their positions—what they are incapable of defending: the *Ex Parte* Order does not comply with any of the mandatory provisions of Rule 65, of the South Carolina Rules of Civil Procedure ("SCRCP") and is effecting, and will continue to effect, a miscarriage of justice and deprivation of Appellant's due process rights to defend itself in the hearing noticed by the circuit court on Plaintiffs' motion for preliminary injunction.[3] As provided in the Petition, and in direct

[1] Appellant will not attempt to correct each and every factual inaccuracy in the Return, of which there are many. Nor will this Reply directly rebut the many demonstrably false allegations and innuendo of untoward conduct which is replete in the Return. Appellant reiterates that a lack of specific denial is not an admission or acknowledgement of any statement or assertion or argument by Respondents.

[2] Respondents' Petition for Original Jurisdiction filed in the Supreme Court stays neither this Petition nor the underlying action in the circuit court, including the hearing scheduled to occur on Wednesday, October 7. *See* discussion, *infra*.

[3] Respondents' assertion that the circuit court has been divested of jurisdiction to dissolve or modify the *Ex Parte* Order, *see* Return at p.24 n.6, is remarkable for its misapprehension of the law. Rule 205, SCACR, which Respondents cite but do not quote, provides that "the lower court

contravention of Rule 65 and this Court's holdings, *e.g.*, *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 609, 790 S.E.2d 430, 434 (Ct. App. 2016), it is indisputable that the *Ex Parte* Order:

- Requires the Law Firms to appear at a virtual hearing scheduled for 9:30 a.m. on October 7, 2020 and "***show cause why Plaintiffs' motion for a preliminary injunction should not be granted***," thereby improperly shifting the burden of proof on the Law Firms. (Emphasis supplied);
- Fails to require any security or bond whatsoever, *see* Rule 65(c), SCRCP;
- Was issued *ex parte* with no supporting affidavit alleging specific facts supporting the allegations raised in the *Ex Parte* Motion for Temporary Restraining Order, and where the Amended Complaint was unverified, *see* Rule 65(b), SCRCP;
- Fails to define the injury suffered by Plaintiffs or state why it is irreparable, *id.*;
- Fails to state why the *Ex Parte* Order was granted without notice to Appellant, *id.*;
- Fails to state when the *Ex Parte* Order expires, *id.*;
- Makes no findings regarding the elements of a temporary restraining order, *see* Rule 65(d), SCRCP; and
- Effectively suspended the general and ordinary business of Appellant without notice, *see* Rule 65(e), SCRCP.

Instead of attempting to mount any defense of the *Ex Parte* Order that fails every mandatory requirement and safeguard set forth in Rule 65,[4] Respondents effectively ask this Court to ignore its duties as a reviewing Court, ignore the current and pending miscarriages of justice that are created by the *Ex Parte* Order's deficiencies, and ignore the significant legal disadvantage foisted upon Appellant at the noticed hearing on the underlying motion for preliminary injunction. Appellant respectfully disagrees and requests an order of this Court correcting these errors of law with instructions as to the further proceedings contemplated by the *Ex Parte* Order.

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or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." And Rule 62(c), SCRCP, expressly provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, **the court in its discretion may suspend, modify, restore, or grant an injunction *during the pendency of the appeal* upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party**." (Emphasis supplied).

[4] Which was submitted as a proposed order by Plaintiffs, on information and belief.

ARGUMENT

Respondents' argument to the Court essentially amounts to this: the *Ex Parte* Order is much ado about nothing, as it is set to expire under the Rules and will have no meaningful effect going forward. Respondents assert that this Court should disregard an order that was achieved by Respondents' *ex parte* efforts and communications with the Court, and which fails to comply with any of the mandates of Rule 65, SCRCP, despite the fact that the order severely hamstrings Appellant's ability to meaningfully oppose Respondents' motion for preliminary injunction. Appellant disagrees, and respectfully asks this Court to act on the many clear deficiencies of the *Ex Parte* Order, as set forth in the Petition and herein.

I. The Petition is ripe, as the circuit court appears to be proceeding with its scheduled hearing on Plaintiffs' motion for preliminary injunction on Wednesday, October 7, 2020, notwithstanding Respondents' attempt to seek original jurisdiction of its claims by the Supreme Court.

The Return impermissibly seeks to have this Court defer any action or ruling on the Petition until such time as the Supreme Court decides whether to accept this case in its original jurisdiction, as Respondents have requested. Return at pp.2-3. This request should be rejected. As this Court knows, the filing of a petition seeking the original jurisdiction of the Supreme Court under Rule 245, SCACR, does not stay any related action that is pending, which matters proceed as normal unless and until the Supreme Court decides to grant the petition. The same is true here. The hearing on Respondents' underlying motion for preliminary injunction continues to be set to proceed on Wednesday, October 7, as this Reply is being filed. In fact, Respondents communicated with the circuit court yesterday (Monday, October 5), regarding that matter and hearing, and even presented an affidavit on which they assert that they will rely in the injunction hearing.[5] Thus, by their request

[5] Appellant notes that Respondents filed an affidavit with this Court after their 3 p.m. filing deadline. Although this appears to have been a mistake, as the cover E-mail transmitting the

of this Court to refrain from deciding the Petition, leaving the deficient *Ex Parte* Order (including its improper shift of the burden of proof, as discussed herein) in place for Wednesday's hearing, Respondents are attempting to game the judicial system to Appellant's detriment and in violation of its due process rights. The Court should see this request for what it is, a naked attempt to maintain a defective *ex parte* order and this ill-gotten advantage in the upcoming hearing. The Petition is ripe for this Court's consideration, the issues briefed to this Court have real, practical impacts on the upcoming hearing between the parties and the property of Appellant, and as a matter of principle, an order so deficient on its face should not be allowed to expire on its own, while continuing to inflict real and lasting prejudice to the Law Firms. Appellant respectfully requests this Court to rule on this Petition forthwith.

II. The *Ex Parte* Order alters the burden of proof required of Plaintiffs' to seek a temporary injunction at the scheduled October 7, 2020, hearing, imposing on Appellant the legally impermissible burden to "show cause why Plaintiffs' motion for a preliminary injunction should not be granted."

As set forth in the Petition, of the many facial deficiencies of the *Ex Parte* Order, the issue that causes a real exigency and need for immediate relief is the *Ex Parte* Order's holding that unilaterally alters the burden of proof required of Plaintiffs to achieve a temporary injunction during the noticed hearing on October 7, 2020. Specifically, the order provides that the Law Firms must appear and "show cause why Plaintiffs' motion for a preliminary injunction should not be granted." Incredibly, Respondents dispute the fact that the foregoing plain language of the order requires Appellant to meet a burden of proof that does not comply with black letter law and is

affidavit states "[p]lease find attached an affidavit we intend to present to Judge Lee at the hearing scheduled for Wednesday at 9:30 a.m.," Appellant notes that the contents of the affidavit are irrelevant to the legal question presented by the Petition. However, the Court should know that the representation contained in the affidavit also have no relevance to the issues pending before Judge Lee, as they are based on a misunderstanding of the applicable law.

unsupported by any legal authority or justification. Respondents assert that "Appellant reads too much into the lower court's notice" and that "Respondents … readily accept the burden of establishing that a preliminary injunction should be entered in the litigation." Respondents' suggestion that the order does not mean what it says, even though an order granting a restraining order must be precise in its terms, is telling. In the face of the express language of the order, which self-evidently shifts the required burden of proof required, Respondents' assertion is a clear concession that the *Ex Parte* Order is contrary to the law and legally indefensible. But acceptance of the actual burden required of a movant seeking a preliminary injunction does not cure the harm to the Law Firms, as the shift in burden mandated by the *Ex Parte* Order imposes an improper duty on the Law Firms heading into Wednesday's hearing that must be eliminated so there can be no confusion at the hearing.

Accordingly, dissolution of the *Ex Parte* Order on this basis is warranted.

III. The *Ex Parte* Order fails to require any security or bond in contravention of Rule 65(c), SCRCP.

Rule 65(c) provides that "no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." It is indisputable that the *Ex Parte* Order does not comply with the mandatory language of Rule 65(c) to require Respondents to secure a bond or other security or surety. This is true despite the fact that the order enjoins the use by the Law Firms of $75 Million in earned attorney fees, even though Respondents admit in their complaint that fees are due.

The Return does not dispute the fact that the order is silent as to a bond. Or that Rule 65(c) and the case law interpreting it have stated unequivocally that a bond is mandatory. Instead,

Respondents assert that, because they are seeking to bring a third-party beneficiary claim on behalf of the State, they should fall under the exception to Rule 65(c)'s mandatory requirement as "the State or of an officer or agency thereof." This argument, advanced without any authority, is devoid of merit. *See*, *e.g.*, *Town of McBee v. Alligator Rural Water & Sewer Company, Inc., et al.*, 2019 WL 2613742, Op. No. 2019-UP-176 (S.C. Ct. App. filed June 26, 2019) (finding that the circuit court erred in failing to require *Alligator*, a non-for-profit corporation, to post a security for its injunction and remanding to the circuit court to set a bond in accordance with the mandatory requirements of Rule 65(c)).[6]

First, the Return admits, as it must, that there is no legal support for the proposition it advances, instead arguing that *Ex Parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), a nearly 80-year-old case involving a claim for recoupment on behalf of a local government, clearly distinguishable on its facts, should be extended to recognize—for the first time—the right of a private litigant to assert a derivative suit on behalf of the State. Return at p.16 ("It is a ***logical extension*** of this precedent that Respondents have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity.") (emphasis supplied). This concept of a derivative suit on behalf of the State of South Carolina, which has never been recognized and which Respondents assert would require an extension of precedent to achieve, is the sole basis advanced by Respondents to avoid their mandatory requirement under Rule 65 to post a bond equal to the amount in controversy in this

[6] Appellant and its counsel are conscious of Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. The appellate opinions in *Alligator* are not cited as binding precedent but rather as an indisputable fact that this Court has rejected an assertion that a not-for-profit corporation can find cover in the limited exception to Rule 65(c)'s security requirement. Appellant submits that this Court may take judicial notice of these facts and its files in *Alligator* pursuant to *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).

case. *See* Return at 25-26. However, this reliance on a novel theory of law to achieve a derivative exemption of the mandatory requirements of Rule 65 runs expressly afoul of this Court's precedent in *Spartanburg Buddhist Center*, where it found the "provisions of Rule 65" are "mandatory" and require more than "a 'nominal security bond … does not satisfy Rule 65(c) ***because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper***.'" 417 S.C. at 609, 790 S.E.2d at 434 (emphasis supplied; citations omitted). Respondents seek to avoid the posting of security on precisely this basis, presuming that a novel theory of law is correct (when it is not), rather than fulfilling the purpose of the security in the first instance, which is to protect the Law Firms from loss and damage in the event the injunction is ultimately deemed improper. *Id.*

Respondents' incorrect position that they can step into the shoes of the State and challenge a contract that the duly-elected Attorney General entered into and duly honored, as he must, is plainly evident from a review of *Ex parte Hart* and its progeny. "[A] private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action." *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801-02 (Ct. App. 1997) (also rejecting claim to proceed as class action "because there is no claim of injury or damage not common to the public"). Respondents have alleged no injury or damage not common to the public and, thus, cannot proceed with their putative derivative class action. *See Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012) (holding that a "taxpayer lacks constitutional standing when he suffers in some ***indefinite*** way in common with people ***generally***.") (emphasis supplied and internal quotation marks omitted). In fact, by purporting to represent a class consisting of the public, generally, Respondent Crangle necessarily admits that his injury is common to the public. *Cf.* Rule 23(a)(2), SCRCP.

Second, *Hart* and its progeny apply only to counties, municipalities, and local government entities. *E.g.*, *Berry*, 328 S.C. at 447, 492 S.E.2d at 800 (municipality) ("[T]his power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear that the governmental entity has unjustifiably refused to assert the claim.") (emphasis added); *see also Newman v. Richland County Historic Preservation Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997) (county, city, and county historic preservation commission); *Johnston v. City of Myrtle Beach*, 285 S.C. 453, 454, 330 S.E.2d at 321, 322 (Ct. App. 1985) (municipality) ("Generally, a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action"). Here, however, Respondents seek to extend *Hart* to allow a derivative suit on behalf of the State—a sovereign entity. In short, they seek to usurp the Attorney General as the State's Chief Legal Officer, a position to which they were not elected and to which they have no legal standing to challenge the Attorney General's right to contract and pay for the services of outside counsel. There is no precedent authorizing them to do so.

Third, Respondents cannot challenge executive branch action absent some discrete injury not common to the general public. This they do not have. *Berry* is instructive in this regard because it rejected an effort to bring a legal malpractice claim on behalf of a municipality. This Court held that the town residents had no standing to sue either on behalf of New Ellenton or as a class of New Ellenton citizens. *Id*., 328 S.C. at 446-47, 492 S.E.2d at 800. However, the Court noted that the "authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity." *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Consequently, absent the express type of cause of action described in *Hart*, which does not exist here, citizens do not have the right to bring a claim on behalf of a government.

At bottom, Respondents seek to have this Court decide a political question. *S.C. Public Interest Found. v. Judicial Merit Selection Com'n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) ("The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government.") ((citing *U.S. v. Munoz–Flores,* 495 U.S. 385, 393–94 (1990)). However, "the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial." *Id*. (citing *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Brd.,* 333 U.S. 103, 111 (1948)).

In sum, given the above and the mandatory language of Rule 65(c), a significant security is both mandated (*see Spartanburg Buddhist*, *supra*) and warranted. Respondents have intentionally interfered in a private attorney fee agreement between the Attorney General and the Law Firms without any legal justification for doing so. For all of the foregoing reasons, while the failure to require Respondents to post a bond or security as a condition of the entry of the *Ex Parte* Order is reversible error and cause for dissolution of the TRO standing alone, Appellant respectfully requests the Court provide instructions on remand that a bond or security be posted in an amount not less than the amount at issue in this lawsuit, including the opportunity costs which Appellant has been unable to realize as a result of the TRO.

IV. The *Ex Parte* Order did not comply with *any* of the requirements of Rule 65(b), SCRCP for the issuance of an *ex parte* temporary restraining order.

As set forth in the Petition, the *Ex Parte* Order is facially deficient in that it fails to comply with ***any*** of the mandatory requirements set forth in Rule 65(b), SCRCP, that serve as absolute requirements for a Court to issue a temporary restraining order against a party without notice. The

Return does not even bother to argue that the *Ex Parte* Order complies with many of these requirements, a concession that warrants dissolution of the order standing alone.[7]

a. Plaintiffs' motion for *ex parte* temporary restraining order was not supported by an affidavit and neither the Original nor Amended Complaint were verified.

It is undisputed that Plaintiffs did not supply an affidavit alleging specific facts in support of their Motion. Nor is the Amended Complaint verified. In the Return, Respondents concede that their motion was unsupported by an affidavit. Return at 25. However, Respondents attempt to qualify their concession by pointing to affidavit of their counsel filed with their Amended Complaint. *See* Petition Ex. 2 (Am. Compl. Ex. A, Griffin Affidavit). The Griffin Affidavit does not comply with Rule 65(b) and is unavailing to Respondents' retorts, as it merely certifies 12 exhibits attached to the affidavit as "true and correct copies." Wholly absent from the Griffin Affidavit, however, is ***any assertion*** of "specific facts … that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." The Return's suggestion that the Griffin Affidavit complies with Rule 65(b)'s requirements in this respect is incorrect. The Griffin Affidavit contains no assertions of fact, much less specific facts demonstrating to the reviewing court that Respondents stood to suffer an immediate and irreparable injury, loss or damage. And as discussed herein and in the Petition, Respondents' counsel made no attempt to contact Appellant—a law firm accessible my multiple means, not the least of which are their members' Supreme Court-approved AIS E-mail addresses. Respondents' assertions to the contrary are demonstrably incorrect.

[7] As set forth in the Petition, each of the identified deficiencies are plain from the face of the *Ex Parte* Order and require no real or further analysis of the points. The Return has no meaningful analysis or contrary argument arguments on these points; therefore, the facial deficiencies of the order warrant dissolution under the mandatory and express requirements of Rule 65.

The *Ex Parte* Order was issued in contravention of the affidavit or verified complaint requirement set forth in the plain language of Rule 65(b), and nothing in the Return refutes this unassailable point.

b. The *Ex Parte* Order does not define the injury that it finds Plaintiffs have suffered or why the failure to grant a TRO would cause irreparable harm to that undefined injury.

As described in the Petition, the *Ex Parte* Order is facially deficient for this additional reason in that it does not define Plaintiffs' interest in the earned attorney fee of Appellant. Nor does it state any particularized injury suffered by Respondents, much less one that would be irreparably harmed in the absence of an *ex parte* TRO. The Return does not address the argument advanced by Appellant in the Petition on this point at all. Accordingly, under Rule 240(e), SCACR, Respondents have conceded that relief on this point is appropriate and the Petition should be granted on this basis alone. *See* Rule 240(e) ("Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.").[8] Thus, dissolution of the *Ex Parte* Order is warranted for this additional reason.

c. The *Ex Parte* Order fails to state why it was granted without notice to Appellant.

Once again, it is undisputed that no notice was provided to Appellant regarding the *ex parte* motion for temporary restraining order or a hearing thereon and the *Ex Parte* Order does not state

[8] In any event, and as set forth in the Petition at pp.19-24, Respondents are incapable of demonstrating an injury on these facts, as they lack standing to assert this challenge against a private litigant to the earned attorney fee on behalf of the State. Respondents are not parties to the contract between the Law Firms and the State Attorney General, were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys' fees. At its core, this lawsuit is a challenge to the attorneys' fees paid pursuant to contract with the Attorney General to the Law Firms. However, the U.S. Supreme Court has stated definitively that "[a]n '***interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim***.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (emphasis supplied) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)).

a reason why notice was not capable of being provided to Appellant. The Return does not contest this fact or otherwise argue that notice was attempted or provided to Appellant, thus this deficiency of the *Ex Parte* Order is conceded by Respondents. *See* Rule 240(e), SCACR.[9]

Having failed to provide notice or any explanation or justification for the failure to do so, dissolution of the *Ex Parte* Order for this additional reason is warranted.

d. The *Ex Parte* Order fails to state when the order expires.

The *Ex Parte* Order is facially deficient for this additional reason in that it does not provide or fix any term for the duration and expiration of the order. Incredibly, the Return disputes this fact, arguing that the fact that the *Ex Parte* Order noticed a hearing on Respondents' underlying motion for preliminary injunction, that somehow provides the express terms and duration for the order. *See* Return at p.25 ("Obviously, this complies with Rule 65."). While all TROs expire within 10 days under Rule 65, the issuing court is nevertheless required by the plain language of the Rule to set or fix such term and expiration expressly. Notwithstanding Respondents assertion, it is indisputable that the *Ex Parte* Order does not expressly set an expiration, it does not comply with Rule 65(b), and the setting of an unrelated motion for preliminary injunction does not satisfy the Rule's express requirement. Thus, dissolution of the *Ex Parte* Order for this additional reason is warranted.

[9] Nor do Respondents attempt to justify their failure to attempt to contact or otherwise provide notice to the Law Firms regarding the *ex parte* relief that they sought. *See McClurg v. Deaton*, 380 S.C. 563, 583, 671 S.E.2d 87, 98 (Ct. App. 2008) (Hearn, C.J., concurring in part, describing the actions of the plaintiff's attorney in failing to give notice of the lawsuit to opposing counsel "as bad faith and 'smack[ing] of chicanery and unfair advantage' which could not be tolerated.'" (quoting *McGee v. Reynolds*, 618 N.E.2d 40, 42 (Ind. Ct .App. 1993))), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011).

V. The *Ex Parte* Order fails to make any findings regarding the elements of a temporary injunction in contravention of Rule 65(d), SCRCP.

As set forth in the Petition, the *Ex Parte* Order is once again facially deficient under the Rule, as it does not contain any specific terms setting forth the reasons for its issuance. Once again, the Return does not contest this fact or otherwise argue that the *Ex Parte* Order complies with this mandatory requirement of Rule 65. Consequently, Respondents have conceded this additional deficiency of the *Ex Parte* Order. *See* Rule 240(e), SCACR. And, in any event, the lack of any specific findings in the *Ex Parte* Order does not comply with the strictures of Rule 65(d) and does not afford Appellant its due process. Thus, dissolution of the *Ex Parte* Order for this additional reason is warranted.

VI. The *Ex Parte* Order suspends the general and ordinary business of Appellant without notice in contravention of Rule 65(e), SCRCP.

As set forth in the Petition, there is no question that this order was issued *ex parte* without notice to Appellant. And here again, the Return does not contest this fact or otherwise argue that the *Ex Parte* Order complies with this mandatory requirement of Rule 65. Consequently, Respondents have conceded this additional deficiency of the *Ex Parte* Order. *See* Rule 240(e), SCACR. For the reasons set forth in the Petition, the *Ex Parte* Order's overbreadth in this regard is stark, purporting "to prevent transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina" of not only Appellant, but also expressly purports to enjoin conduct of non-parties to this litigation, including "members of their respective firms and anyone acting in concert with these Defendants." The practical and real effect of the *Ex Parte* Order, amounting to a miscarriage of justice, is that it has effectively suspended the general and ordinary business of Appellant. *Contra Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601–02, 553 S.E.2d 110, 121 (2001) (holding that it was error for the

trial court to issue an *ex parte* order enjoining a partnership from accessing funds in its account and making lawful disbursements absent a hearing, stating that where "the factual basis for the TRO was not fully developed … a hearing on the matter was imperative."). Because this was accomplished without notice to the Law Firms in contravention of Rule 65(e), dissolution of the *Ex* Parte Order is warranted for this additional and final reason.

CONCLUSION

For any or all of the reasons discussed herein and in the Petition, Appellant respectfully requests an Order of this Court superseding and dissolving the *Ex Parte* Order entered by the circuit court, with the following specific instructions as to the conduct of the noticed hearing on Plaintiffs' underlying motion for preliminary injunction, to include that:

i. The burden of satisfying the legal standard required for the entry of any injunction shall rest solely with the moving party, and the non-moving party is not required "to show cause" why an injunction should not be granted;

ii. Any order granting Plaintiffs' temporary injunction shall require the posting of a security or surety, as required by Rule 65(c), SCRCP, in an amount not less than the amount at issue in this lawsuit and enjoined;

iii. Any order granting an injunction shall set forth the reasons for its issuance under the appropriate standards set forth in the opinions of the Appellate Courts of this state, shall be specific in its terms, shall describe in reasonable detail the act or acts sought to be restrained and the basis therefore, as all required by Rule 65(c), SCRCP; and

iv. To include such just and other reasonable relief as ordered by the Court.

Respectfully submitted,

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Columbia, South Carolina
October 6, 2020

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PROOF OF SERVICE

This is to certify that the undersigned counsel, an attorney with the law firm Simmons Law Firm, LLC, has caused to be served this day one (1) copy of Appellant Willoughby & Hoefer, P.A.'s Reply in Support of Petition for Supersedeas via electronic mail at the email addresses as stated in the Attorney Information System and as set forth below:

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A copy of the email serving counsel as stated above is attached hereto.

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October 6, 2020
Columbia, South Carolina

John Simmons

From: John Simmons
Sent: Tuesday, October 6, 2020 11:36 AM
To: Jim Griffin; james.carpenter@carpenterlawfirm.net; William H. Davidson (wdavidson@dml-law.com); kwoodington@dml-law.com; esmith@scag.gov; Badge Humphries
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Subject: Appellate Case No. 2020-001314
Attachments: 2020-10-06 Filing Ltr re Reply ISO Pet for Supersedeas.pdf; 2020-10-06 Reply ISO Pet for Supersedeas.pdf

Counsel,

As permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, I am herewith serving via E-mail Appellant Willoughby & Hoefer, P.A.'s Reply in Support of its Petition for Supersedeas in the above-captioned appeal. Shortly, I will be filing these documents with the Court of Appeals electronically as permitted by part (c)(6) of the Order, and will attach this E-mail to the certificate of service of same.

Please advise if you have any difficulty opening an attachment.

John Simmons
Simmons Law Firm, LLC

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SIMMONS
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Reply to:
JOHN S. SIMMONS
jsimmons@simmonslawfirm.com

October 6, 2020

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *South Carolina Public Interest Foundation and John Crangle, Individually and on behalf of all others similarly situated, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,* Appellate Case No. 2020-001314

Dear Ms. Kitchings:

Attached for electronic filing in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rules 240 and 241 of the South Carolina Appellate Court Rules, please find the Reply in Support of Petition for Supersedeas of Appellant Willoughby & Hoefer, P.A. As permitted by Order 2020-05-29-02, part (d), no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving all counsel of record via email as permitted by Order 2020-05-29-02, part (g)(3), and attached is a proof of service to that effect.

Thank you. If you have any questions, please call.

Sincerely,

SIMMONS LAW FIRM, LLC

s/John S. Simmons

John S. Simmons

Attachments

cc: James M. Griffin, Esquire
Badge Humphries, Esquire
James G. Carpenter, Esquire
William H. Davidson, II, Esquire
Kenneth P. Woodington, Esquire
J. Emory Smith, Jr., Esquire