EXHIBIT “A”

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FAIRFIELD	)	Civil Action No. 2017-CP-20-00458
	)	
FAIRFIELD COUNTY,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT**
v.	)	
	)	
SOUTH CAROLINA ELECTRIC & GAS COMPANY,	)	
	)	
Defendant.	)	
	)	

This matter is before the Court on the motion of Defendant South Carolina Electric & Gas Company ("SCE&G")[1] to dismiss the Amended Complaint on several grounds. First, SCE&G contends that Fairfield County's ("Fairfield") claim is a tax matter that can only be heard in the Administrative Law Court following administrative tax proceedings. Second, SCE&G renews its previous motion to dismiss those causes of action that Fairfield has repeated from its original complaint. Third, SCE&G argues that Fairfield's four newly pled causes of action (constructive fraud, bad faith, unjust enrichment, and promissory estoppel) are not viable as pled under South Carolina law.

After considering the motion, related memoranda, the Amended Complaint, the arguments of counsel, and applicable statutory and case law, the Court denies SCE&G's motion to dismiss.

[1] Dominion Energy South Carolina is the current name of Defendant South Carolina Electric & Gas Company.

BACKGROUND

In May 2008, SCE&G announced a multibillion-dollar nuclear expansion project at the VC Summer Plant (the "Project") in Fairfield County, South Carolina. The Project involved the construction of two new nuclear reactors, which were to begin operation in 2016 and 2019. In July 2010, SCE&G and Fairfield entered into a fee-in-lieu of taxes ("FILOT") agreement. Pursuant to the FILOT agreement, Fairfield agreed as consideration to forgo normal taxation on any of SCE&G's property and equipment in exchange for a yearly fee to be paid by SCE&G for thirty years once the reactors were operational.

This current matter involves a business dispute between Fairfield and SCE&G arising from SCE&G's abandonment of the Project, the relationship between the parties arising from the FILOT, and SCE&G's conduct throughout the Project.

ANALYSIS

I. FAIRFIELD'S COMMON LAW CLAIMS ARE PROPERLY MAINTAINED IN CIRCUIT COURT

In its Order denying SCE&G's motion to dismiss the original complaint, this Court determined that Fairfield's claims were "common law causes of action for damages based in contract, quasi-contract, and tort law."[2] As such, the Court ruled: "[a] circuit court is properly vested with jurisdiction to hear and resolve cases involving common law business disputes such as this one."[3] SCE&G's current motion disputes that

[2] Order Denying Defendant's Motion to Dismiss (Except As to One Cause of Action) (Feb. 18, 2019) at 2.

[3] Feb. 18, 2019 Order, at 3.

characterization and argues that Fairfield's claims are actually tax matters that must be heard in the Administrative Law Court. The Court disagrees.

Fairfield is not claiming that SCE&G failed to pay a tax when due. By virtue of the FILOT, Fairfield contracted away the right to tax SCE&G. In return, SCE&G agreed in the FILOT contract to use "reasonable efforts" toward "diligent completion" of the Project. It is SCE&G's alleged failure to use such reasonable efforts, and its related conduct in connection with the Project, that form the basis of Fairfield's common law claims.

Fairfield's Amended Complaint details the SCE&G conduct that allegedly breached the FILOT. Fairfield claims, *inter alia*, that despite assuring Fairfield and others that it would carefully monitor the construction and disclose any Project challenges "in a candid and transparent way," (Amended Complaint ¶ 8), SCE&G sought to conceal information identifying deficiencies in its performance. *Id.* at ¶¶ 16, 17. And despite its promise to use "reasonable efforts" toward "diligent completion," SCE&G allegedly failed from the outset "to monitor and oversee essential aspects of design, cost, and scheduling." *Id*. at ¶ 15.

Fairfield further alleges that, far from using "reasonable efforts," SCE&G quickly lost control of Project costs and scheduling, covering up those deficiencies by publicly announcing revised completion dates in which it internally had "no confidence." *Id*. at ¶¶ 22, 31-34. As a particular example of SCE&G's deceit, Fairfield claims that SCE&G assured it the Project would be completed, less than three months before abandoning it. *Id*. at ¶¶ 40, 41. The Amended Complaint places the cause of Fairfield's losses not on a failure to pay a tax assessment, but on "Defendant's misconduct as detailed herein." *Id*. at ¶ 46.

Likewise, Fairfield does not claim that SCE&G missed a FILOT payment when due. Rather, Fairfield alleges that SCE&G totally breached the FILOT by its conduct, including abandoning the Project so there is no property on which the FILOT could operate. Amended Complaint ¶¶ 41-44. It is this failure of contractual performance and related conduct that give rise to Fairfield's common law damage claims, as well as its equitable claim for SCE&G's unjust enrichment. The Court notes that SCE&G similarly described the source of Fairfield's claims in its previous motion to dismiss:

> Plaintiff's main issue, case, or controversy – from which all of its causes of action are derived – concerns SCE&G's abandonment of the Project and the result that the Project may never be completed.[4]

The Court agrees that the focus of the case as pled by Fairfield is SCE&G's conduct, including the Project's management and abandonment.

II. THE COURT HAS SUBJECT MATTER JURISDICTION

A. Fairfield's Case Is Not Appropriate For The Administrative Law Court

SCE&G argues that this is a tax case which should go first to administrative tax authorities and then to the Administrative Law Court. For the reasons stated herein, the Court finds that this argument is not supported by case law or the relevant statutes.

1. FILOT Disputes Are Regularly Heard By Trial Courts

In the Order denying SCE&G's previous motion to dismiss, this Court noted: "[l]egal actions with counties arising from FILOT agreements have routinely been litigated in South Carolina Circuit Courts."[5] FILOT agreements are contracts, albeit statutorily

[4] Defendant's First Supplemental Memorandum in Support of Motion to Dismiss (Dec. 3, 2018), at 3-4.

[5] Feb. 18, 2019 Order, at 3.

authorized contracts. As such, disputes over alleged breaches of their terms involving claims for money are within the jurisdiction of circuit courts. *See e.g.*, *Horry Cty. Sch. Dist. v. Horry Cty.*, 346 S.C. 621, 552 S.E.2d 737 (2001) (dispute over a FILOT fee division); *Richland Cty. Sch. Dist. One v. Richland Cty. Council*, 310 S.C. 106, 425 S.E.2d 747 (1992) (same). Trial courts in other jurisdictions also regularly address FILOT disputes. *See e.g.*, *Anderson St. Assocs. v. City of Boston*, 442 Mass. 812, 817 N.E.2d 759 (2004) (requiring property developers to make FILOT payments pursuant to their agreement); *Ctys. of Warren and Washington Indus. Dev. Agency v. Boychuck*, 109 A.D.2d 1024, 487 N.Y.S.2d 139 (1985) (requiring developers to make payments pursuant to the FILOT even though project had not been completed); *Bank of New York v. Williams*, 796 So.2d 69 (La. App. 2001) (finding no basis for a bankruptcy trustee to assume the bankrupt's contractual obligation to make fee-in-lieu payments). SCE&G has cited no case where a breach of contract, fraud, or unjust enrichment claim involving a FILOT was relegated to an administrative forum.

2. Neither Administrative Tax Agencies, Nor The Administrative Law Court Could Grant The Relief Fairfield Seeks

SCE&G relies heavily on the Revenue Procedures Act ("RPA") which provides that it is the exclusive remedy for cases "involving the illegal or wrongful collection of taxes, or attempt to collect taxes." S.C. Code Ann. § 12-60-80(A). But tax collection is not at issue here. Fairfield gave up its right to collect taxes from SCE&G in return for SCE&G's contractual promise to use reasonable efforts toward diligent completion of the Project. SCE&G's alleged breach of this contractual undertaking and accompanying conduct throughout the Project give rise to Fairfield's claims.

Nothing in the RPA gives administrative agencies or the Administrative Law Court the authority to hear common law disputes as presented here. The RPA concerns itself with "Appeals, Protests, and Refunds" in property tax matters, giving the taxpayer the right to object to "one or more of the following: the fair market value, the special use value, the assessment ratio, and the property tax assessment." S.C. Code Ann. § 12-60-2510(A)(3). None of the detailed RPA procedures applies to a controversy where the focus of the claim is on a party's allegedly malicious conduct causing common law damages.

A controversy may touch on a tax matter, but unless it is encompassed within the RPA mandates, it can properly be heard in circuit court. In *Buist v. Huggins*, 367 S.C. 268, 625 S.E.2d 636 (2006), the Supreme Court held that the RPA does not encompass all property taxpayer claims over money. *Id*. at 274-75, 639. There, property owners sought a refund of the "bidder interest" they paid to redeem their properties at tax sales. *Id*. at 271, 637. The Supreme Court found the RPA inapplicable, since the taxpayers were not challenging their property tax assessment. *Id*. at 274, 639. Rather, they were seeking a refund of interest they had paid, and "jurisdiction over such disputes remains in the circuit court." *Id*. at 275, 639. Likewise, Fairfield is not proceeding on an unpaid tax assessment. No such assessment could be made because SCE&G abandoned the Project and all the property on site. Its action and related Project mismanagement form the basis of Fairfield's claim – a claim not encompassed by the RPA.

The distinctions between a tax collection dispute and this case are many. Property taxes are involuntarily imposed on an entity on a "no fault basis," due to an entity's status as owner of property. Fairfield's damage claims arise from a voluntary undertaking by

SCE&G under fault-based theories for its allegedly harmful conduct. Taxes are typically billed annually based on a tax assessor's determination of the value of existing property. Fairfield's total damages from the alleged contract breach will be determined in a single action based by a jury's determination after evaluating lay and expert evidence. *See Worley v. Greenwood Mfg. Co.*, 223 S.C. 249, 251, 75 S.E.2d 298, 298 (1953) (A party cannot split a cause of action); *Plum Creek Dev. Co., Inc. v. City of Conway*, 328 S.C. 347, 491 S.E.2d 692 (Ct. App. 1997) (Dismissing subsequent suit because Plaintiff was required to pursue all damage claims in first suit).

And unlike taxes, which are assessed precisely, damage awards are often imprecise. While damage awards cannot be left to speculation, "[w]here it is reasonably certain that damage has resulted, mere uncertainty as to the exact amount will not preclude the right of recovery." *Johnston v. Brown*, 290 S.C. 141, 145, 348 S.E.2d 391, 393 (Ct. App. 1986), *rev'd on other grounds,* 292 S.C. 478, 357 S.E.2d 450 (1987). In making its liability and damage determinations, the jury will be examining multiple issues related to SCE&G's conduct. None of these conduct-based factors would be relevant in a tax collection case before the Administrative Law Court.

While SCE&G points to language in the Amended Complaint and discovery responses mentioning lost tax or fee revenue, that language is in reference to Fairfield's damages, not the basis for its claims. The nature of a cause of action is determined by what duties are allegedly violated. Here, Fairfield alleges the duties violated include SCE&G acting in disregard of its contract obligations, acting in bad faith, and acting fraudulently. These are common law violations, not tax concepts. For these reasons, the Court finds that it is the appropriate forum to entertain Fairfield's claims.

3. Fairfield Is Not Required To Exhaust Administrative Remedies

It is well-settled that, "[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006). The Administrative Law Court has recognized that it has no authority to grant common law money damages. See *Kennedy v. S.C. Dept. of Corrections*, 2006 WL 868143 at *1, n.1 (S.C. Admin. Law. Judge Div. Feb. 22, 2006) (refusing to entertain prisoner action for damages, holding "[t]he trial courts under the Judiciary have subject matter jurisdiction over tort claims.").

The South Carolina Supreme Court has confirmed this important limitation on administrative proceedings. In *Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 707 S.E.2d 397 (2011), the Supreme Court held it was "legal error" for the circuit court to require parents of an expelled student to pursue an administrative remedy in seeking damages for the expulsion. The Court found that because the parents were alleging a conduct-based claim (negligence) and seeking damages, the claim was unsuited to the administrative forum, and should be heard in circuit court. *Id*. at 550, n.1, 398, n.1. Fairfield's common law claims similarly seek damages for SCE&G's conduct, a remedy neither the tax authorities, nor the Administrative Law Court could grant.

The fact that the FILOT is a statutorily authorized contract does not change the analysis. In *Dema v. Tenet Physician Services–Hilton Head, Inc.*, 383 S.C. 115, 678 S.E.2d 430 (2009), the Supreme Court ruled that civil claims for damages, even if they arise out of conduct in an otherwise regulated setting, are within the subject matter jurisdiction of the circuit court. Fairfield's civil causes of action seeking damages for

SCE&G's allegedly tortious conduct and contractual breaches are properly matters of circuit court jurisdiction. Fairfield's equitable claim of unjust enrichment focuses on SCE&G's gain from the contractual relationship, which is even further afield from a tax claim. There is no basis to refer that claim to an administrative tax body which has no authority to determine the amount of SCE&G's alleged unjust enrichment.

III. FAIRFIELD HAS MET ITS PLEADING OBLIGATIONS

A. Original Causes Of Action

SCE&G has renewed its motion to dismiss on the causes of action for which its previous motion to dismiss was denied. For the reasons set forth in that February 18, 2019 Order, the Court denies the renewed motion.

B. Four New Causes Of Action

Fairfield has pled four new causes of action in its Amended Complaint – unjust enrichment, bad faith, constructive fraud, and promissory estoppel. These claims are evaluated by the standard the Court stated in its February 18, 2019 Order (at 7):

> A 12(b)(6) motion should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved on its behalf, the complaint states any valid claim for relief.

1. Unjust Enrichment

SCE&G contends that Fairfield cannot pursue an unjust enrichment claim if Fairfield is also pursuing a claim for breach of an express contract. However, modern pleading rules expressly allow alternative pleading. SCRCP 8(a) provides: "[r]elief in the alternative or of several different types may be demanded." Further, "[a] party may also state as many separate causes of actions or defenses as he has regardless of

consistency and whether based on legal or on equitable grounds or on both." SCRCP 8(e)(2).

While breach of contract (Amended Complaint ¶¶ 47-51) and unjust enrichment (Amended Complaint ¶¶ 90-93) are alternative claims, they are not inconsistent. Fairfield alleges that SCE&G's conduct: (1) breached SCE&G's contractual obligation to use "reasonable efforts" to complete the Project; and (2) resulted in SCE&G receiving unjustified financial benefit. Unjust enrichment looks at what the defendant has gained, while breach of contract evaluates what the plaintiff has lost. *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). There is nothing inconsistent about these remedies which look at two results from the same conduct.

Under South Carolina's liberal pleading rules, all claims supported by the evidence can proceed to trial, with the plaintiff having the right to elect between remedies to avoid a double recovery. *Williams v. Reidman*, 339 S.C. 251, 275, 529 S.E.2d 28, 40 (Ct. App. 2000); *see also Brooks v. GAF Materials Corp.,* 41 F.Supp.3d 474, 485 (D.S.C. 2014) (Denying motion for summary judgment on unjust enrichment claim where contractual remedies existed, and noting a party is not required to make an election of remedies until after the verdict).

Fairfield further argues that under the emerging doctrine of "opportunistic breach of contract," Restatement (Third) of Restitution § 39, it may recover in unjust enrichment for SCE&G's deliberate breach of contract. The Restatement doctrine has application in situations where, "damages will not permit the [injured party] to acquire a full equivalent to the promised performance in a substitute transaction." Restatement (Third) of Restitution § 39(2). At this stage of the pleadings, with discovery ongoing, the Court will

not deny Fairfield the opportunity to plead and prove entitlement to recovery under this emerging doctrine, a doctrine which the United States Supreme Court has recently embraced. *See Kansas v. Nebraska*, 574 U.S. 445, 135 S.Ct. 1042 (2015).

2. Bad Faith

SCE&G contends that Fairfield's bad faith claim should be dismissed on the same basis as the Court previously dismissed Fairfield's contractual claim for breach of the implied covenant of good faith and fair dealing. In the Amended Complaint, however, Fairfield has pled a different claim for the tort of bad faith. This doctrine has heretofore been recognized only in the insurance context, but that does not mean that the doctrine can never be applied in another context. In *Williams v. Reidman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000), the court refused to apply the doctrine in the employment context, finding that relationship decidedly different from the insurance relationship. The court noted that: "[t]o date, a tort cause of action for breach of implied covenant of good faith and fair dealing appears only in the insurance arena under a claim for a bad faith refusal to pay benefits." *Id*. at 267, 36. By noting that the doctrine had been applied in only one area "to date," the court left open the possibility that it could be applied elsewhere.

Fairfield points to a recent decision of the South Carolina Supreme Court identifying several factors that favor recognizing an independent bad faith tort claim arising out of a contract breach: (1) a contract affecting the public interest; (2) a "special relationship" between the parties; and (3) a captive party in the relationship. *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 169-71, 829 S.E.2d 707, 713-14 (2019). Fairfield argues that a FILOT contract is one that affects the public interest because a FILOT is permitted

only where the project will "benefit the general public welfare." S.C. Ann. Code § 12-44-40(l)(1)(a) (1976); *see also* Amended Complaint ¶ 87.

Fairfield has also pled a special relationship between the parties. Amended Complaint ¶ 87. Fairfield argues that the FILOT created a special relationship akin to a public-private partnership. Through this special arrangement, Fairfield invested in the Project for the public interest, while agreeing to take much less from SCE&G that it would have been entitled to if it had adhered to a property tax regime.

Fairfield additionally asserts that it, like an insured, was a captive party in the relationship once the FILOT was signed. Just as an insured places special trust in its insurer to deal fairly with it, Fairfield placed special trust in SCE&G to use its "reasonable efforts" toward "diligent completion." An insured cannot seek an alternative in the marketplace once it enters into an insurance contract. *Williams v. Reidman*, 339 S.C. 251, 272, 529 S.E.2d 28, 39 (Ct. App. 2000). Fairfield claims that it was similarly wedded to SCE&G. It had no alternative in the marketplace, as no other utility company was building a nuclear plant in the county.

Finally, Fairfield has alleged numerous instances of bad faith throughout the Project. Amended Complaint ¶¶ 15-41. At this stage of the proceedings, the question for the Court is "whether in the light most favorable to plaintiff, and with every doubt resolved on its behalf, the complaint states any valid claim for relief." *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). For the purposes of the current motion to dismiss, and with discovery ongoing, the Court finds that Fairfield has adequately pled a claim for bad faith. *See Tyler v. Mack Stores*, 275 S.C. 456, 272 S.E.2d 633 (1980) (novel claims should not be dismissed when factual development may aid decision).

3. Constructive Fraud

SCE&G contends that Fairfield's claim for constructive fraud should be dismissed for the same reasons that Fairfield's fraud claim should have been dismissed. This Court denied SCE&G's motion to dismiss the fraud claim in its February 18, 2019 Order. Constructive fraud requires all elements of fraud, except that plaintiff need not prove intent. *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993). Constructive fraud is actionable, "irrespective of the moral guilt of a fraud feasor . . . because of its tendency to deceive others, to violate public or private confidence, or to injure public interest." *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 288, 328 S.E.2d 916, 918 (Ct. App. 1985).

For the reasons set forth in this Court's Order refusing to dismiss the fraud claim, the Court finds that the constructive fraud claim is properly pled.

4. Promissory Estoppel

SCE&G asserts that a promissory estoppel claim cannot be maintained if there is a valid, written contract between the parties. In response, Fairfield points out that SCE&G has not yet admitted that the FILOT was a valid, written contract between the parties. For the purpose of the motion to dismiss, the Court finds that the promissory estoppel claim is adequately pled. Once SCE&G answers the Amended Complaint, the viability of the promissory estoppel claim, as well as the other claims, can be revisited at the summary judgment stage.

THEREFORE, DEFENDANT'S MOTION TO DISMISS IS DENIED.

SO ORDERED.

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Donald B. Hocker
Circuit Court Judge

Laurens, South Carolina
Dated: February __, 2021

Fairfield Common Pleas

Case Caption: Fairfield County VS South Carolina Electric & Gas Company

Case Number: 2017CP2000458

Type: Order/Dismissal

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167