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Apr 01 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Fairfield County
Donald B. Hocker, Circuit Court Judge

CIVIL ACTION NO. 2017-CP-20-00458

Fairfield County, ...Respondent,

v.

South Carolina Electric & Gas Company, ...Appellant.

Motion to Dismiss Appellant's Notice of Appeal

Appellant South Carolina Electric & Gas Company's (n/k/a Dominion Energy South Carolina, Inc.) requests this Court hear an interlocutory appeal of the denial of several Rule 12(b) motions to dismiss. The trial court properly denied the Defendant's attempt to have the Plaintiff's common law and statutory causes of action assigned to the Administrative Law Court. As shown by Plaintiff's First Amended Complaint, the dispute between Fairfield County and SCE&G is not a tax dispute. Fairfield County and SCE&G entered a contract and Fairfield County's First Amended Complaint asserts that SCE&G breached that contract concerning the V.C. Summer nuclear project as well as committed several tortious and inequitable acts. The Administrative Law Court clearly does not have jurisdiction or the ability to hear and adjudicate such claims.

SCE&G's appeal is untimely and clearly intended to derail the upcoming trial of this case.[1] The motion to dismiss at issue in this appeal, filed more than three years after the initiation of this suit, marks the ***second*** time SCE&G has argued that a tribunal other than the circuit court had exclusive jurisdiction over Fairfield's claims. In 2018, SCE&G unsuccessfully argued that the jurisdiction to hear Plaintiff's claims rested exclusively with the South Carolina Public Service Commission (PSC). Two years later, SCE&G now argues that it is instead the Administrative Law Court that has exclusive jurisdiction over this case. As the trial court has twice recognized, this case involves claims sounding in contract, tort, and equity, which only a circuit can properly hear and decide.

The trial court's order denying SCE&G's subject matter jurisdiction challenge is not immediately appealable. Section 14-3-330 of the South Carolina Code of Laws sets forth which judgments and orders are appealable. The statute provides, in pertinent part:

> The Supreme Court shall have appellate jurisdiction for correction of error of law in law cases, and shall review upon appeal:
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

S.C. Code Ann. § 14-3-330(2). Accordingly, when a final judgment has not been rendered, as in this case, the Court considers whether the interlocutory order presents an exception to the general rule that only final judgments are appealable. Practically, an interlocutory order is not immediately appealable unless the ruling affects a substantial right. *Burkey v. Noce,* 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012); *see also Ex parte Johnson,* 63

[1] The day prior to filing this appeal, the Circuit Court had reset trial to begin September 13, 2021. A March 22, 2021 trial date was lost due to Covid-19.

S.C. 205, 41 S.E. 308 (1901). In this matter, SCE&G cannot point to any substantial right that has been impacted.

Because the denial of a Rule 12(b) motion is interlocutory and does not ultimately decide any issue, appellate courts generally decline to review that issue on appeal pursuant to § 14-3330(2), South Carolina Code of Laws. *See Breland v. Love Chevrolet Olds, Inc.,* 339 S.C. 89, 95, 529 S.E.2d 11, 14 (2000). It is well-settled that the denial of a motion to dismiss for either subject matter jurisdiction or failure to state a claim is not immediately appealable. *See e.g. Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) ("[T]he denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable."); *Huntley v. Young,* 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995); *Woodard v. Westvaco Corp.,* 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled on other grounds by Sabb v. S.C. State Univ.,* 350 S.C. 416, 567 S.E.2d 231 (2002).

While SCE&G did not appeal the prior subject matter challenge in this case, SCE&G did appeal the same motion to dismiss for lack of subject matter jurisdiction that was filed in the ratepayer cases that stemmed from the failed project. **Attachment A**. The Court of Appeals quickly rejected the appeal as untimely. **Attachment B**.

The parties have been engaged in over three years of discovery and pretrial proceedings. Discovery was just about to conclude under the case's scheduling order and a trial date had been set for September 13, 2021. SCE&G did not suddenly discover that the matter it has been litigating for several years was instead a tax matter. SCE&G's argument that the appellate courts must immediately address this issue to avoid a miscarriage of justice is a delay tactic, not something supported by the law or facts.

South Carolina circuit courts have previously heard disputes arising out of FILOT agreements. Two examples include *Horry Cty. Sch. Dist. v. Horry Cty.*, 346 S.C. 621, 552 S.E.2d 737 (2001) and *Richland Cty. Sch. Dist. One v. Richland Cty. Council*, 310 S.C. 106, 425 S.E.2d 747 (1992). In neither *Horry County* nor *Richland County* did the courts feel disabled to decide the civil dispute because a FILOT was involved. In other states, courts of general jurisdiction have regularly heard FILOT[2] agreement disputes. *See e.g.*, *Anderson St. Assocs. v. City of Boston*, 442 Mass. 812, 817 N.E.2d 759 (2004); *Bank of New York v. Williams*, 796 So.2d 69 (La. App. 2001); *Long Island Power Auth. v. Shoreham-Wading River Cent. Sch. Dist.*, 195 A.D.2d 140, 606 N.Y.S.2d 325 (1994),[3] *Lehigh Cty. v. Lerner*, 82 Pa. Cmwlth. 632, 475 A.2d 1357 (1984); *Ctys. of Warren and Washington Indus. Dev. Agency v. Boychuck*, 109 A.D.2d 1024, 47 N.Y.S.2d 139 (1985).

The case *Dema v. Tenet Physician Services Hilton Head, Inc*., 383 S.C. 115, 678 S.E.2d 430 (2009), from the South Carolina Supreme Court explained the difference between matters subject to administrative agency jurisdiction and those subject to circuit court jurisdiction. In *Dema*, patients sued a hospital in tort and for unjust enrichment. *Id*. at 432. The hospital moved to dismiss for lack of subject matter jurisdiction, arguing that DHEC had the exclusive authority to resolve claims regarding violations of the Act. *Id*. The Supreme Court noted that even though Plaintiffs' claim involved an Act governed in many respects by DHEC, the "suit involved civil

[2] While some of the cases refer to "payment in lieu of taxes," or PILOT agreements, instead of a "fee in lieu of taxes," Fairfield uses FILOT here for simplicity.

[3] The *Long Island Power Auth.* case is especially instructive. The issue of responsibility for FILOT payments arose after the power company had mismanaged a nuclear construction project leading to enormous cost overruns. The power company transferred the failed plant to a successor entity who was charged with winding it up. When the county sought FILOT fees from the successor entity, it objected to the amount the county sought. *Id*. at 144-45. The trial court decided when the FILOT payments should begin, and the appellate court affirmed. *Id*. at 149.

claims arising out [of the hospital's] violation of the CON Act." *Id*. at 433. The Court noted that DHEC "does not have subject matter jurisdiction to hear civil claims for damages resulting from those violations." *Id*. In explaining its decision, the Court made a distinction critical here:

> [W]hether a party may maintain an independent civil private cause of action seeking damages as a result of CON Act violations . . . over which the trial court would have subject matter jurisdiction . . . is a distinct issue from whether a healthcare facility violated the CON Act, a case over which DHEC has exclusive subject matter jurisdiction.

Id. at 433, n.5 (emphasis added).

Likewise, the viability of Fairfield's civil causes of action seeking damages as a result of SCE&G's tort and contract breaches is a distinct issue from the RPA regulatory scheme on which SCE&G focuses its attention. As the trial court noted: "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." **Attachment C**. The court cited *Buist v. Huggins*, 367 S.C. 268, 625 S.E.2d 636 (2006), for the proposition that "the RPA does not encompass all property taxpayer claims over money." *Id*. The current case also clearly falls outside the scope of the RPA.

SCE&G cites to no case law that supports its claim that because the parties had entered a FILOT agreement that the circuit court is totally divested of jurisdiction over all disputes. SCE&G cites *BellSouth Telecommunications, LLC v. Cobb County*, 305 Ga. 144, 824 S.E.2d 233 (2019), for the proposition that another state has adopted such a position. However, the *BellSouth* case did not involve a FILOT, or the jurisdiction of the trial court. *Id*. It was a civil action by Georgia counties against telephone companies challenging the companies' failure to collect a 911 telephone tax from their customers. *Id*. at 234. The Georgia Supreme Court held that the counties could not collect this charge -- not because they were in the wrong court -- but because the relevant statutes did not give them any right to collect the tax against the companies. *Id*. at 241.

It is worth noting that *BellSouth* also undermines SCE&G's claim that all matters related to tax disputes have to begin administratively. *BellSouth* was litigated in the Georgia Superior Court with an eventual appeal to the Georgia Supreme Court. *Id.* at 234. The counties' claims were dismissed on the merits, ***not*** for lack of subject matter jurisdiction. In fact, *BellSouth* discussed a different scenario raised by the counties about recovering against "agents who sell hunting and fishing licenses on behalf of the state" pursuant to an agreement (similar to the FILOT at issue) if they fail to perform. *Id*. at 242, n.16. The court noted that, "such arrangements may give rise to a breach of contract action or other means of recourse that could not be characterized as a tax collection action." *Id*. Likewise, here SCE&G agreed with Fairfield to use "reasonable efforts" to complete the Project -- an agreement it failed to perform. Under *BellSouth*, a "breach of contract action or other means of recourse" is certainly a proper avenue to remedy this failure.

SCE&G's reliance on *In re ExxonMobil Corp.*, 153 S.W.3d 605 (Tex. Ct. App. 2004) is also misplaced. In *ExxonMobil Corp.*, the taxing authorities sued a large number of oil companies alleging that the companies had fraudulently undervalued their property for *ad valorem* tax purposes. 153 S.W.3d at 608. The Texas Court of Appeals found that clear procedures existed in the tax code for the tax appraiser to use when confronted with fraudulent conduct in undervaluing real property for *ad valorem* tax purposes. *Id*. at 613-14. Thus, the taxing entities who were seeking to correct property appraisals in a lawsuit already had a clear remedy in the administrative procedure. *Id.,* at 615 ("the Tax Code provided the taxing units a remedy for the infection of the appraisal process by fraud.").

The *ExxonMobil* case did not involve a FILOT or any other agreement between the parties involved in the litigation. In *ExxonMobil*, the tax collecting authorities were merely pursuing property owners for undervaluing their real estate. *Id*. at 608. Unlike the *ExxonMobil*

situation, the RPA does not provide an alternate procedure for Fairfield County to pursue its common law, statutory, and equitable claims. This case does not involve SCE&G attempting to undervalue real property to avoid *ad valorem* taxes. Additionally, the Texas Court of Appeals found extraordinary relief was necessary in part because there were 36 similar suits filed by the taxing authority and thus a quick answer was needed. *Id.* at 619. In this case, no other entities are involved, and that SCE&G waited over 3 years to make this motion clearly disproves any similar urgency.

Conclusion

Fairfield County hopes to hold its September trial date and respectfully requests that the Court swiftly reject this blatant delay tactic. When SCE&G filed its motion to dismiss, the parties had a date certain for trial of March 22, 2021. COVID-19 protocols required that date to be rescheduled. On March 25, 2021, the trial court set a new date certain of September 13, 2021. On the very next day, SCE&G filed its motions and current appeal. On March 30, 2021, the trial court wrote the parties informing them "[c]oncerning what to do with the three weeks set aside in September, Judge Hocker will sit on this for the time being but not for a long period of time." *See* **Attachment D.**

Three years ago, SCE&G argued that the South Carolina Public Service Commission was the ***only*** body with jurisdiction to hear Fairfield's claims as well as those claims of the ratepayers. When the trial court disagreed, SCE&G appealed the ratepayer claims and it took the Court of Appeals only two days to reject it as interlocutory. Now, years later, SCE&G has filed this appeal along with extraordinary emergency writs to the South Carolina Supreme Court arguing that it is in fact the Administrative Law Court that really has exclusive jurisdiction over

Fairfield's claims. Fairfield County would ask the Court to again swiftly deal with this clearly interlocutory appeal and remit the case to the trial court so trial may proceed.

Respectfully submitted,

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Dated: March 31, 2021

86059

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

RECEIVED
MAR 05 2018
SC Court of Appeals

C.A. No.: 2017-CP-40-04833

LeBrian Cleckley, on behalf of himself and all others similarly situated,....................Respondent,

v.

South Carolina Electric & Gas Company and the State of South Carolina,................. Defendants.

Of whom:

South Carolina Electric & Gas Company is ....Appellant.

NOTICE OF APPEAL

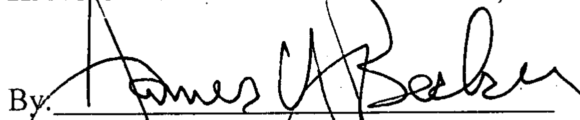
South Carolina Electric & Gas Company ("SCE&G") appeals the Order in this matter filed on March 1, 2018, denying SCE&G's motion to strike the jury demand set forth in the Complaint in this case (which Complaint seeks solely equitable relief) and ruling on the merits of and effectively striking certain of SCE&G's affirmative defenses. SCE&G received written notice of the entry of the Order on March 1, 2018. A copy of the Order is attached to this Notice as Exhibit A.

Pursuant to Rule 214, SCACR, SCE&G further asks that this appeal be consolidated with its appeals in the related cases of *Chris Kolbe, et al, v. Santee Cooper, et al.* (Case No. 2017-CP-08-02009, Berkeley County Court of Common Pleas); *Edwinda Goodman, et al., v. SCANA*

Corporation and SCE&G (Case No. 2017-CP-20-00300, Fairfield County Court of Common Pleas); *Jessica S. Cook v. Santee Cooper et al.* (Case No. 2017-CP-25-00348, Hampton County Court of Common Pleas); and *Richard Lightsey v. SCE&G* (Case No. 2017-CP-25-00335, Hampton County Court of Common Pleas) as the appeals arise from the same order which was entered in each of these related cases, all of which are subject to the South Carolina Supreme Court's Order No. 2017-10-31-01.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

C.A. No.: 2017-CP-40-04833

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SC Court of Appeals

LeBrian Cleckley, on behalf of himself and all others similarly situated,.................. Respondents,

v.

South Carolina Electric & Gas Company and the State of South Carolina,................. Defendants.

Of whom:

South Carolina Electric & Gas Company is ....Appellant.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the addresses shown below.

1. *Notice of Appeal*

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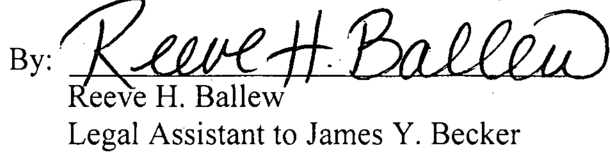
HAYNSWORTH SINKLER BOYD, P.A.

By: 
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March 5, 2018

The Honorable Jeanette W. McBride
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Re: *LeBrian Cleckley, et al. v. South Carolina Electric and Gas Company and the State of South Carolina*
C. A. No. 2017-CP-40-04833

Dear Ms. McBride:

Enclosed for filing are two copies of the Notice of Appeal in regards to the above referenced matter. Please clock in both copies and return one to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter.

Sincerely yours,

James Y. Becker

JYB/jmb
Enclosures

RECEIVED
MAR 05 2018
SC Court of Appeals

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Jessica Fickling, Esq.
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The Honorable Jenny Abbott Kitchings

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March 5, 2018

RECEIVED
MAR 05 2018
SC Court of Appeals

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *LeBrian Cleckley, et al. v. South Carolina Electric and Gas Company and the State of South Carolina*
C. A. No. 2017-CP-40-04833

Dear Ms. Kitchings:

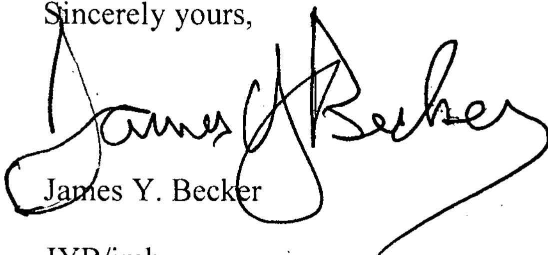
Enclosed please find the original and one (1) copy of the following for filing in regards to the above referenced matter:

(1) Notice of Appeal including a copy of the Order appealed from marked as Exhibit A;
(2) Proof of Service;
(3) a firm check in the amount of $100.00 for the filing fee; and
(4) a copy of letter filing Notice of Appeal with the lower court.

Please return a clocked copy to me via our courier.

The transcript will be ordered within the timeframe allowed by the South Carolina Rules of Appellate Procedure.

Sincerely yours,



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The Honorable Alan Wilson
The Honorable Tonnya K. Kohn, South Carolina Court Administration

The South Carolina Court of Appeals

LeBrian Cleckley, Respondent,

v.

South Carolina Electric & Gas Company, and the State of South Carolina, Defendants,

And

Richard Lightsey, Respondent,

v.

South Carolina Electric & Gas Company, Defendant,

And

Jessica S. Cook, Respondent,

v.

South Carolina Public Service Authority (also known as Santee Cooper), et al, Defendants,

And

Chris Kolbe and Ruth Ann Keffer, on behalf of themselves and all others similarly situated, Respondents,

v.

South Carolina Public Service Authority, et al., Defendants,

And

Edwinda Goodman, et al., Respondents,

v.

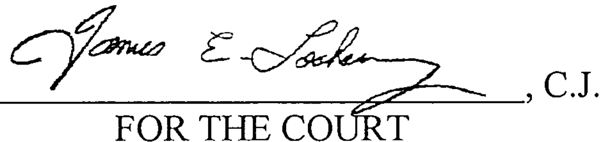
SCANA Corporation, et al., Defendants,

Of which South Carolina Electric & Gas Company and SCANA Corporation are the Appellants.

Appellate Case No. 2018-000384

ORDER

This appeal arises out of multiple orders from different counties[1] denying the appellants' motions to dismiss. These appeals are hereby consolidated pursuant to Rule 214 of the South Carolina Appellate Court Rules (SCACR). Because the denial of a motion to dismiss is not immediately appealable, this appeal is dismissed. *See Levi v. Northern Anderson Cnty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (2014) ("The denial of a motion to dismiss [] under Rule 12(b)(6), SCRCP . . . [is] not immediately appealable."); *Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) ("[T]he denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable."); *Breland v. Chevrolet Olds, Inc.*, 339 S.C. 89, 94-95, 529 S.E.2d 11, 14 (2000) (declining to consider an interlocutory appeal from a claim of improper venue until after trial). The remittitur will be sent pursuant to Rule 221(b), SCACR.


, C.J.

FOR THE COURT

Columbia, South Carolina

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[1] The appellants filed notices of appeal from the following counties and lower court case numbers: Berkeley (2017-CP-08-02099); Richland (2017-CP-40-04833); Hampton (2017-CP-25-00335 and 2017-CP-25-00348); and Fairfield (2017-CP-20-00300).

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ELECTRONICALLY FILED - 2021 Feb 25 10:21 AM - FAIRFIELD - COMMON PLEAS - CASE#2017CP2000458

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

ELECTRONICALLY FILED - 2021 Feb 25 10:21 AM - FAIRFIELD - COMMON PLEAS - CASE#2017CP2000458

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.

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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.

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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. <u>FILOT Disputes Are Regularly Heard By Trial Courts</u>

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 <u>Fairfield Seeks</u>

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.

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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

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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.

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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

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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

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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

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only where the project will "benefit the general public welfare." S.C. Ann. Code § 12-44-40(I)(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).

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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.

____
Donald B. Hocker
Circuit Court Judge

Laurens, South Carolina
Dated: February __, 2021

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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

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Dan Haltiwanger

From: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Sent: Wednesday, March 31, 2021 1:56 PM
To: Steve Pugh; Jack McKenzie; Chally, Jon; Dan Haltiwanger; thargrove@rpwb.com; Terry Richardson; ewestbrook@rpwb.com; jevans@rpwb.com; bthomas@rpwb.com; Robert McKenzie; Ben Carlton; islj@jtbpa.com; Charity McQueen; IS Leevy Johnson; George Johnson; Tony Rebollo
Cc: Hocker, Donald B. Secretary (Regan A. Snow)
Subject: RE: Fairfield Co. v. SCE&G - Pending Matters

All:

Judge Hocker is in receipt of the recent emails from Jack McKenzie and Steve Pugh. Unless both sides agree, all matters are stayed pending outcome of the appeal. Judge Hocker does not believe that an Order is necessary formally to stay the case, however, if the Defense feels more comfortable with one then he will be glad to sign it. Concerning what to do with the three weeks set aside in September, Judge Hocker will sit on this for the time being but not for a long period of time. Finally, the Court would appreciate being kept informed as to the status of the appeal.

Thank you,

Madison Hoffman
Law Clerk to
Honorable Donald B. Hocker
P.O. Box 972
100 Hillcrest Square
Laurens, S.C. 29360
dhockerlc@sccourts.org

From: Steve Pugh <SPugh@RichardsonPlowden.com>
Sent: Tuesday, March 30, 2021 9:19 PM
To: Jack McKenzie <JackM@mmrml.com>; Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>; Chally, Jon <JChally@KSLAW.com>; Dan Haltiwanger <dan@richardsonthomas.com>; thargrove@rpwb.com; Terry Richardson <terry@richardsonthomas.com>; ewestbrook@rpwb.com; jevans@rpwb.com; bthomas@rpwb.com; Robert McKenzie <mckenzie@mmrml.com>; Ben Carlton <BCarlton@RichardsonPlowden.com>; islj@jtbpa.com; Charity McQueen <CMcQueen@RichardsonPlowden.com>; IS Leevy Johnson <ISLJ@jtbpa.com>; George Johnson <george@jtbpa.com>; Tony Rebollo <TRebollo@RichardsonPlowden.com>
Cc: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Subject: RE: Fairfield Co. v. SCE&G - Pending Matters

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Judge Hocker,

I hope all remains well with you, your family, and your staff.

Please let this email serve as Defendant's response to the recent correspondence from Plaintiff's counsel and the Court regarding the appeals that have been filed, the currently scheduled trial date, and the interplay between the two. Given the underlying basis for Defendant's appeals and the position of Plaintiff's counsel, relayed earlier today, we believe that the underlying case should be stayed pending final resolution of those appeals. Should the Court be so willing, Defendant would appreciate the Court entering an Order confirming this stay pending final resolution of those appeals, which counsel for Defendant would be happy to prepare for your consideration.

During this stay, Defendant takes the position that the stay should be given its full effect—all motions, briefing, hearings, discovery, etc. before this Court should be stayed; however, the parties are presently scheduled to mediate this case (for a second time) on April 19-20, 2021 and we intend for that mediation to proceed.

Defendant disagrees with Plaintiff's counsel's reference to an inapplicable ratepayer case and a ruling from the Court of Appeals several years ago on an appeal concerning completely different arguments and subject matter. In addition to being off-base, that reference ignores other appeals in other matters initiated after the abandonment of the VCS Unit 2 & 3 nuclear project, which have not been promptly dismissed, remain pending, and/or have been successful. To be clear, just because the Court of Appeals dismissed one appeal in one unrelated matter, in a shortened time frame, does not provide the parties any insight as to what action the Court of Appeals may take in this instance or the likelihood thereof.

We think it more likely that the Court of Appeals will require full briefing on the issues, and, of course, we are optimistic that we will prevail. Even if we do not prevail, however, the time required for the Court of Appeals to evaluate this issue may significantly impact whether a trial in this case could be held in September. There are a host of factors—such as the extent and timing of current and/or forthcoming motions (including the Motion to Transfer Venue Defendant would file), and additional briefing, hearings, discovery, etc.—that could render the September 13, 2021 trial date unworkable.

Nevertheless, Defendant is not opposed to the Court reserving the September 13, 2021 trial date until April 30, 2021 and revisiting the trial scheduling issue after that date. We would obviously defer to the Court as to whether any delay associated with this appeal impacts the Court's docket enough to release the September 13, 2021 trial date at this point.

We appreciate your assistance and consideration. Please let me know if you need anything further from the Defendant at this time.

Respectfully submitted,

Steve Pugh

Statement of Operations: Richardson Plowden & Robinson, P.A. is monitoring the Covid-19 outbreak and conducting its operations with respect to government mandates. We have executed policies and procedures to ensure the safety of our firm and clients. With remote access securely implemented, we are able to serve our clients with the same level of attention as we are under normal circumstances.

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From: Jack McKenzie <JackM@mmrml.com>
Sent: Tuesday, March 30, 2021 12:36 PM
To: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>; Chally, Jon <JChally@KSLAW.com>; Dan Haltiwanger <dan@richardsonthomas.com>; thargrove@rpwb.com; Terry Richardson <terry@richardsonthomas.com>; ewestbrook@rpwb.com; jevans@rpwb.com; bthomas@rpwb.com; Robert McKenzie <mckenzie@mmrml.com>; Steve Pugh <SPugh@RichardsonPlowden.com>; Ben Carlton <BCarlton@RichardsonPlowden.com>; islj@jtbpa.com; Charity McQueen <CMcQueen@RichardsonPlowden.com>
Cc: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Subject: RE: Fairfield Co. v. SCE&G - Pending Matters

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Dear Judge Hocker:

The Plaintiff would humbly request that the Court keep the September 13, 2021 trial date at least and until April 30, 2021.

A bit of history is necessary here to understand our request. In the SCANA ratepayer cases, which stemmed from the same VC Summer failure, SCANA made a motion to dismiss arguing that the circuit court lacked subject matter jurisdiction because the Plaintiffs' causes of action, however framed, were all under the exclusive jurisdiction of the South Carolina Public Service Commission. The Circuit Court denied the motion and SCANA appealed. Within two (2) days of receiving SCANA's Notice of Appeal, before the Plaintiff's could even reply, the Court of Appeals dismissed SCANA's petition and remanded to the Circuit Court. While we

understand that the Defendant is taking the position that the issues are different here, we think they are the same and believe that there is a likelihood that this appeal may go away sooner rather than later.

If the Plaintiff is correct, then we move forward and we have not lost the trial date. If we are incorrect and the appeal moves forward then the Court can hopefully reschedule those three weeks, which would still be a little over four (4) months out.

We look forward to your reply.

Thanks,

Jack McKenzie
(803) 223-6160

From: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Sent: Tuesday, March 30, 2021 10:31 AM
To: Jack McKenzie <JackM@mmrml.com>; Chally, Jon <JChally@KSLAW.com>; Dan Haltiwanger <dan@richardsonthomas.com>; thargrove@rpwb.com; Terry Richardson <terry@richardsonthomas.com>; ewestbrook@rpwb.com; jevans@rpwb.com; bthomas@rpwb.com; Robert McKenzie <mckenzie@mmrml.com>; spugh@richardsonplowden.com; bcarlton@richardsonplowden.com; islj@jtbpa.com; CMcQueen@richardsonplowden.com
Cc: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Subject: RE: Fairfield Co. v. SCE&G - Pending Matters

All:

In light of the appeal filed by SCE&G and assuming that the Court of Appeals would not reach this case prior to September 13th, it would be the position of the Court to cancel the three weeks set for trial in September in Fairfield County. Judge Hocker does not want to have a block of three weeks open again as it would be much easier to fill the holes now as opposed to waiting closer to September. Before Judge Hocker does anything he welcomes any comments. He is aware from Jack McKenzie's email of today wherein the Plaintiff would like to keep the three weeks in September.

Best,

Madison Hoffman
Law Clerk to
Honorable Donald B. Hocker
P.O. Box 972
100 Hillcrest Square
Laurens, S.C. 29360
dhockerlc@sccourts.org

From: Jack McKenzie <JackM@mmrml.com>
Sent: Tuesday, March 30, 2021 9:02 AM

To: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>; Chally, Jon <JChally@KSLAW.com>; Dan Haltiwanger <dan@richardsonthomas.com>; thargrove@rpwb.com; Terry Richardson <terry@richardsonthomas.com>; ewestbrook@rpwb.com; jevans@rpwb.com; bthomas@rpwb.com; Robert McKenzie <mckenzie@mmrml.com>; spugh@richardsonplowden.com; bcarlton@richardsonplowden.com; islj@jtbpa.com; CMcQueen@richardsonplowden.com
Cc: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Subject: RE: Fairfield Co. v. SCE&G - Pending Matters

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Hocker:

We apologize for not responding earlier to your request for us to confirm the motions pending before the Court. We agree that those are the correct motions. We are not aware of any other motions pending.

I cannot tell if you were copied or not, but SCE&G has appealed your order denying its motion for judgment on the pleadings. I am sending you those documents. In light of this information, it is our understanding that pending matters are stayed. The Plaintiff is fine to move forward with motions and the like, but our understanding is that the Defendant would have to consent to them in order for us to move forward.

With the above said, it is the Plaintiff's hope that this matter is resolved quickly by the appellate courts. The date certain of September 13, 2021, suits the Plaintiff and we would ask that the Court set trial for that date so that we don't lose it.

Thanks,

Jack McKenzie
(803) 223-6160

From: Hocker, Donald B. Law Clerk (Madison Hoffman) <dhockerlc@sccourts.org>
Sent: Monday, March 29, 2021 12:59 PM
To: Jack McKenzie <JackM@mmrml.com>; Chally, Jon <JChally@KSLAW.com>; Dan Haltiwanger <dan@richardsonthomas.com>; thargrove@rpwb.com; Terry Richardson <terry@richardsonthomas.com>; ewestbrook@rpwb.com; jevans@rpwb.com; bthomas@rpwb.com; Robert McKenzie <mckenzie@mmrml.com>; spugh@richardsonplowden.com; bcarlton@richardsonplowden.com; islj@jtbpa.com; CMcQueen@richardsonplowden.com
Cc: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Subject: RE: Fairfield Co. v. SCE&G - Pending Matters

Good afternoon,

Based upon what Mr. Richardson submitted last week, #8 will need to be added to the list of outstanding matters

8. Plaintiff's Motion to Submit Expanded Interrogatories with Objections by the Defense.

Since I have not heard from either side concerning my March 24th email, Judge Hocker is assuming that the list is accurate with the above addition. Also, the Court still believes that an informal conference needs to be held so scheduling of these outstanding matters can be addressed.

Thank you,

Madison Hoffman
Law Clerk to
Honorable Donald B. Hocker
P.O. Box 972
100 Hillcrest Square
Laurens, S.C. 29360
dhockerlc@sccourts.org

From: Hocker, Donald B. Law Clerk (Madison Hoffman)
Sent: Wednesday, March 24, 2021 10:41 AM
To: 'Jack McKenzie' <JackM@mmrml.com>; 'Chally, Jon' <JChally@KSLAW.com>; 'Dan Haltiwanger' <dan@richardsonthomas.com>; 'thargrove@rpwb.com' <thargrove@rpwb.com>; 'Terry Richardson' <terry@richardsonthomas.com>; 'ewestbrook@rpwb.com' <ewestbrook@rpwb.com>; 'jevans@rpwb.com' <jevans@rpwb.com>; 'bthomas@rpwb.com' <bthomas@rpwb.com>; 'Robert McKenzie' <mckenzie@mmrml.com>; 'spugh@richardsonplowden.com' <spugh@richardsonplowden.com>; 'bcarlton@richardsonplowden.com' <bcarlton@richardsonplowden.com>; 'islj@jtbpa.com' <islj@jtbpa.com>; 'CMcQueen@richardsonplowden.com' <CMcQueen@richardsonplowden.com>
Cc: Hocker, Donald B. Secretary (Regan A. Snow) <dhockersc@sccourts.org>
Subject: Fairfield Co. v. SCE&G - Pending Matters

Good morning,

Judge Hocker has made a review and he believes that the following are the outstanding matters at this time:

1. Privilege Log and further review by Dean Wilcox;
2. Defendant's Subpoena to Parker Poe Law Firm (Plaintiff's Bond counsel). We have not seen a Motion to Quash as yet;
3. Plaintiff's concern that discovery period will expire approximately five weeks from 3/17/21. Of course JH will extend if necessary;
4. Plaintiff's 30(b)(6) Third Amended Notice for deposition;
5. Defendant's Motion for Protective Order;
6. Defendant's Potential Motion to Change Venue
7. Deposition of Steven Byrne

If there is anything else outstanding, please advise. The Court realizes that there will be additional issues raised as we get closer to trial.

It appears that nothing was firmly decided about this week concerning a hearing either in person via virtual courtroom. However, Judge Hocker is open to an informal conference this week to discuss scheduling. It appears that probably the major issue that needs to be work on very soon is the Privilege Log and any further work to be done by Dean Wilcox.

Thank you all for your continued hard work in this case.

Madison Hoffman
Law Clerk to
Honorable Donald B. Hocker
P.O. Box 972
100 Hillcrest Square
Laurens, S.C. 29360
dhockerlc@sccourts.org

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