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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

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

v.

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

MOTION FOR CERTIFICATION

Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A. (collectively, the Respondent Law Firms), pursuant to Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b), and in accordance with Rule 240, SCACR, hereby move for certification of the above-captioned appeal for review by this Honorable Court. In support thereof, the Respondent Law Firms would respectfully show as follows:

1. Appellants South Carolina Public Interest Foundation and John Crangle (collectively, the Appellants) instituted this action in the Richland County Court of Commons Pleas on September 25, 2020, against the Respondent Attorney General, and several days later, upon learning that the State had paid the law firms the fee to which they were contractually entitled, filed an amended complaint adding claims against the Respondent Law Firms.

2. In their amended complaint, Appellants raised various arguments regarding the payment of attorneys' fees to the Respondent Law Firms pursuant to the Litigation Retention Agreement entered into between the Attorney General and the Respondent Law Firms.[1] Appellants also filed a Motion for Preliminary Injunction.

3. On October 14, 2020, the Honorable Alison Renee Lee denied the Motion for Preliminary Injunction because Appellants lacked standing to advance the claims asserted in the amended complaint and also had not demonstrated that they met the legal standards for the issuance of a preliminary injunction.

4. Following the entry of Judge Lee's October 14, 2020 order, Respondents filed motions to dismiss the amended complaint for lack of standing.

5. Appellants subsequently filed a motion to reconsider Judge Lee's October 14, 2020 order, which Judge Lee denied on December 17, 2020.

6. After conducting a hearing on Respondents' motions to dismiss, the Honorable R. Kirk Griffin issued an order on March 5, 2021, dismissing the amended complaint for lack of standing. Critically, Judge Griffin found that Judge Lee's prior holding that Appellants lacked standing was "dispositive" on the issue of standing.

7. Appellants filed their Notice of Appeal with the Court of Appeals on March 29, 2021, appealing only from Judge Griffin's March 5, 2021 order. Appellants did not identify in or attach to their Notice of Appeal, or otherwise appeal from, Judge Lee's orders.[2]

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[1] Respondent Attorney General and Respondent Law Firms entered into an agreement for the Respondent Law Firms to represent the State of South Carolina in litigation against the Federal Government relating to violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility at the Savannah River Site.

[2] Respondents have filed with the Court of Appeals a Motion to Dismiss this appeal on the grounds that Judge Lee's unappealed finding that Appellants lack standing is the law of the case and, therefore, no justiciable controversy exists.

8. Absent any extensions, Appellants' Initial Brief is currently due to be filed on or before May 12, 2021.

9. Under Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b), this Court may certify cases that involve issues of significant public interest or a legal principle of major importance, or in other cases this Court considers appropriate. Certification of this case is appropriate for the following reasons:

a. This case concerns a high-profile effort by politically and financially-motivated private litigants to stand in the shoes of the State and its constitutional officers to challenge and disavow a contract between the State and a private party after the services to the State have been rendered, payment pursuant to the contract has been made, and the contract fulfilled and fully performed.

b. It presents the opportunity for this Court to further clarify and resolve the limits of the "public importance" exception to standing, a legal principle of major importance, including specifically that:[3]

i. the exception does not extend to claims against private parties, including contract claims against private parties asserted by a stranger to the contract;

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[3] To be clear, there is a clear distinction between the "public interest" standard for purposes of certification and the "public importance" standard for purposes of the exception to general standing requirements. *See, e.g., Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). As set forth in this Motion and accompanying memorandum, this appeal presents issues of public ***interest***, but Appellants' underlying claims are not a matter of "public importance," as the circuit court correctly determined below in rejecting Appellants' argument that they qualified under the public importance exception to standing and dismissing the case for lack of standing.

ii. the concept of "derivative standing" either does not exist or, alternatively, does not permit a citizen to stand in the shoes of the State or to usurp the constitutional and statutory authority of the Attorney General to force the State to breach a contract; and

iii. the exception does not permit a citizen to circumvent the constraints imposed on this Court under Article I, § 8 of the South Carolina Constitution, which mandates that the executive, legislative, and judicial branches shall remain separate and distinct, and seek to have a court violate the separation of powers by asking it to rule on what amounts to a nonjusticiable political question.

c. The circuit court rejected Appellants' arguments, finding the case to be non-justiciable on the grounds that Appellants lack standing to advance these claims. This appeal is therefore limited to these discrete questions of law.

d. Based on the circuit court's dismissal of the case for lack of standing, it did not pass on the merits of Appellants' underlying claims, but to the extent that Appellants attempt to make the merits an issue in this appeal, the underlying allegations advanced by Appellants are that the Litigation Retention Agreement violates the South Carolina Rules of Professional Conduct (Rules), a subject that is within the exclusive province of the Supreme Court. Reaffirmance by this Court of its jurisprudence that the Rules do not create a private right of action for a third party to challenge attorneys' fees is an additional legal principle of major importance.

e. Neither the Appellants nor their counsel were involved in the litigation against the Federal Government in any way, shape or form. Only after the Law Firms' efforts on behalf of the State had achieved an extraordinary and just result, fulfilling the terms of their engagement, did Appellants seek to insert themselves into this matter, publicly casting stones and disparaging the work and result in which they played no part. Yet, while Appellants are critical of the result, their true motivation is revealed to be money, as Appellants seek to take from the Law Firms attorneys' fees owed by contract and redirect those fees, or a portion thereof, to Appellants. This lawsuit, therefore, puts on full display the very worst aspects and tendencies of human nature and their manifestations in the recent trend of predatory practices in this State, warranting an opinion from this Court indicating that these types of frivolous claims and predatory practices will not be tolerated or sanctioned. *Cf.* S.C. Const. art. I, §13 (proscribing a taking of private property for ***private*** use).

f. Expeditious review of these issues is also warranted. The Respondent Law Firms are entitled to finality with respect to the fees that they have lawfully earned. The very existence of this lawsuit is inflicting, and will continue to inflict, substantial damage on the Respondent Law Firms, due to the frivolous cloud that it has cast over the substantial success achieved by them on behalf of the State and the wholly false assertion that Respondent Law Firms have violated the Rules.

g. Given the importance of the issues and amount in controversy, any opinion of the Court of Appeals would likely be presented to this Court on a petition for writ of certiorari, regardless of the outcome, which will further delay a final resolution of this case.

10. This Motion for Certification is not interposed for delay. In fact, the opposite is true. Respondent Law Firms desire that this appeal be heard or otherwise disposed of as soon as possible.

11. Respondent Law Firms submit the attached memorandum in support of this motion as required by Rule 240(c)(2), SCACR, and the attached exhibits as required by Rule 240(c)(3), SCACR.

WHEREFORE, having fully set forth its motion, Respondent Law Firms respectfully request that this Court exercise its discretion to certify the above-captioned appeal for its immediate review; that this Court expedite its consideration of the straightforward legal issues presented, including the consideration and granting of Respondents' Motion to Dismiss; and that Respondent Law Firms be granted such other and further relief as is just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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

MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION

Respondents Willoughby & Hoefer, P.A. (W&H) and Davidson, Wren & DeMasters, P.A. (DW&D, and together with W&H, the Respondent Law Firms), pursuant to Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b), and in accordance with Rule 240, SCACR, hereby submit the within memorandum in support of their Motion for Certification of the above-captioned appeal by this Honorable Court.

INTRODUCTION

After more than four and a half years of advancing the State's interests and litigating against the Federal Government across a number of Federal fora, undertaking such representation on a contingency fee basis requiring them to bear all of the financial risk on behalf of the State, the Respondent Law Firms successfully settled the State's claims against the U.S. Department of Energy (DOE) and the United States of America relating to the mixed oxide fuel fabrication facility

(MOX Facility) at the Savannah River Site (SRS). That settlement secured the largest single upfront monetary recovery ever on behalf of the State—$600 Million—in addition to significant other monetary and non-monetary legally binding contractual commitments from the Federal Government inuring to the State's benefit going forward.

Appellants South Carolina Public Interest Foundation and John Crangle (collectively, the Appellants) were not involved in that litigation in any way, shape, or form. They did not challenge the retention agreements until success was assured and money flowed. Only after the Respondent Law Firms' efforts on behalf of the State succeeded in achieving an extraordinary and just result, fulfilling the terms of their contractual engagement, did Appellants then seek to insert themselves into this matter, publicly casting stones and disparaging the work and result in which they played no part, all for the sole purpose of obtaining a portion of the fees earned by and paid to the Respondent Law Firms based upon a factually meritless and legally baseless contention that a violation of the South Carolina Rules of Professional Conduct (Rules) has occurred.

In the action underlying this appeal, Appellants challenged the amount of attorneys' fees paid to the Respondent Law Firms pursuant to a valid and existing contract with the South Carolina Attorney General and in accordance with the expenditure laws enacted by the South Carolina General Assembly. The circuit court correctly applied the precedent of this Court and dismissed the case because Appellants lacked standing, rejecting Appellants' attempt to conjure some new form of standing for their politically-motivated "money grab." But the expeditious review and finality that only this Court can provide is still needed, and respectfully requested, because of the continuing damage to the Respondent Law Firms caused by the very existence of this lawsuit. Certification of this appeal also is warranted because it presents discrete questions of law of significant public interest and presents the opportunity for this Court to:

1. further clarify and resolve the limits of the "public importance" exception to standing, a legal principle of major importance; and
2. address the recent trend of predatory practices which arise when large settlements are reached in this State.

Therefore, for the reasons set forth in the Motion for Certification and this memorandum, the Respondent Law Firms request that this appeal be certified for immediate consideration and disposition by this Honorable Court.

PROCEDURAL BACKGROUND

Appellants instituted the action underlying this appeal in the Richland County Court of Commons Pleas on September 25, 2020, against the State Attorney General, and several days later, upon learning that the State had paid the Respondent Law Firms the fee to which they were contractually entitled, filed an amended complaint adding claims against the Respondent Law Firms. In their amended complaint, Appellants raised various arguments regarding the payment of attorneys' fees to the Respondent Law Firms pursuant to the Litigation Retention Agreement entered into between the Attorney General and the Respondent Law Firms. Appellants also filed a motion for temporary restraining order and preliminary injunction.

On October 1, 2020, the Honorable Alison Renee Lee issued an *Ex Parte* Temporary Restraining Order, but scheduled and then conducted a hearing on the motion for preliminary injunction on October 7, 2020. At the close of the hearing, Judge Lee extended the Temporary Restraining Order an additional seven days while she considered the arguments and information advanced by the parties. On October 14, 2020, Judge Lee denied the motion for preliminary injunction and dissolved the extended Temporary Restraining Order because Appellants lacked standing and also had not demonstrated that they met the legal standards for the issuance of a preliminary injunction. *See* Ex. A, Order Denying Plaintiffs' Motion for Preliminary Injunction

Order (October 14 Order). Appellants subsequently filed a motion to reconsider the October 14 Order, which Judge Lee denied on December 17, 2020. *See* Ex. B, Order Denying Plaintiffs' Motion to Alter or Amend (December 17 Order).

On October 20, 2020, W&H and DW&D filed and served motions to dismiss seeking dismissal pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP, on the grounds that Appellants lacked standing and failed to state facts sufficient to constitute a cause of action against the Respondents. The State Attorney General filed his own motion to dismiss on October 27, 2020, seeking dismissal on similar grounds. On January 26, 2021, the Honorable R. Kirk Griffin conducted a hearing on the motions to dismiss. On March 5, 2021, Judge Griffin issued an order dismissing the amended complaint on the basis that Judge Lee's prior findings that Appellants lacked standing were dispositive. *See* Notice of Appeal, Ex. 1, Order Granting Motions to Dismiss (March 5 Order). Judge Griffin also concurred with Judge Lee's analysis and findings. *Id*. Appellants filed their Notice of Appeal with the Court of Appeals on March 29, 2021, appealing only from Judge Griffin's March 5 Order.[1]

FACTUAL BACKGROUND

It is important for this Court to understand at the outset how this lawsuit came to pass. In the action underlying this appeal, Appellants challenged the payment of attorneys' fees to private attorneys as required by contract, fees that were earned through the prosecution of four cases in three separate Federal trial courts, three separate Federal Courts of Appeal, and a petition to the

[1] Appellants did not identify in or attach to their Notice of Appeal, or otherwise appeal from, Judge Lee's orders finding that Appellants lacked standing, and the time to appeal any orders of the lower court expired on April 5, 2021. Respondents have filed with the Court of Appeals a Motion to Dismiss this appeal on the grounds that Judge Lee's unappealed finding that Appellants lack standing is the law of the case and, therefore, no justiciable controversy exists.

United States Supreme Court, culminating in the ultimate settlement of a closed case filed by the State of South Carolina in the Court of Federal Claims.

In March of 2014, after the Congressional delegation and then-Governor Nikki Haley asked the Attorney General to explore any legal avenues the State may have to address the pending injustice to the State through the shuttering of the MOX Facility at SRS, the Respondent Law Firms (or their predecessors) were hired to file an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests with respect to the MOX Facility at SRS. Ex. C, Sept. 16, 2020 Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, p.1. After the filing of a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14, on April 30, DOE capitulated and directed the contractor to continue the MOX Facility construction, a significant win for South Carolina and the many citizens working there. *Id*.

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, the Respondent Law Firms developed a comprehensive strategy focusing on litigation with DOE and briefed the Governor's Office and the Attorney General regarding that proposed and recommended strategy, which included a draft complaint prepared by the Respondent Law Firms. *Id*. This strategy included a multi-front approach that would assert claims for injunctive relief seeking the removal of the weapons-grade plutonium, while simultaneously advancing monetary claims against the Federal Government seeking to apply legal and financial pressure against it in an effort to incentivize continuation of the MOX Facility or removal of the material from the State.

Then-Governor Haley sent another letter to the Attorney General on January 26, 2016, transmitting a formal request that the Attorney General's office once again initiate litigation on

behalf of the State of South Carolina against DOE. *Id*. at 1-2. The Attorney General hired the Respondent Law Firms to represent the State in litigation against the Federal Government related to the MOX Facility at SRS. The litigation retention agreement, as amended (Litigation Retention Agreement), with the Respondent Law Firms was a contingency fee arrangement tailored to the demands of this unique and specialized situation. The Litigation Retention Agreement provided that the Respondent Law Firms would assume 100% of the financial risk involved in the litigation, requiring them to advance all costs and work the hours necessary to execute the complex legal strategy in consideration of the contractual contingency fee, if successful. Exs. D & E, Litigation Retention Agreement. The State bore no risk under this arrangement; if the lawsuit(s) were successful, then the Respondent Law Firms would be paid according to the terms of the contract. If the lawsuit(s) were unsuccessful, the Respondent Law Firms could not seek reimbursement or payment for either their costs or the time worked on behalf of the State.

The Respondent Law Firms filed a complaint on behalf of the State against the Federal Government in Federal District Court in South Carolina seeking the removal of one metric ton of weapons-grade plutonium from South Carolina and payment of the economic and impact assistance monies pursuant to 50 U.S.C.A. § 2566. Ex. C, p.2. After substantial briefing and argument on multiple issues and motions, the District Court issued several orders (1) dismissing the economic and impact assistance payment (monetary) claim for lack of jurisdiction and directing the claim to be made in the United States Court of Federal Claims as the proper forum, and (2) granting the State's injunctive relief claim and ordering the Federal Government to remove one metric ton of weapons-grade plutonium from the State. *Id*. On February 2, 2018, the Federal Government appealed the judgment to the Court of Appeals for the Fourth Circuit. *Id*. After

briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (*i.e*., by December 31, 2019). *Id*.

On November 30, 2018, the State of Nevada filed a lawsuit in the Federal District Court in Nevada against the Federal Government seeking to prevent the relocation of weapons-grade plutonium from South Carolina to Nevada. *Id*. This was a significant issue, as there are less than a handful of sites in the United States capable of storing weapons-grade plutonium and if Nevada was successful, the Federal Government could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from South Carolina and to avoid future removal obligations. It was imperative that South Carolina protect its interest in the removal, and W&H represented the State in intervening in the Nevada case. *Id*. Nevada then sought a preliminary injunction to halt the shipment of the plutonium to Nevada from SRS, and indicated that if the weapons-grade plutonium had left SRS, it could be returned. *Id*. The court held an evidentiary hearing on January 30, 2019, and thereafter denied the motion for a preliminary injunction to stop the defense plutonium shipment, another win for South Carolina. *Id*. Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019. *Id*. After briefing at the Ninth Circuit, the court dismissed the appeal as moot on August 13, 2019.[2] In December 2019, South Carolina's participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE shortly thereafter in 2020. *Id*. at 2-3.

Further, South Carolina learned in mid-2018 that the Federal Government was taking active steps to halt construction of the MOX Facility and planned to terminate the program. *Id*. Once the

[2] Notably, on August 7, 2019, DOE notified the court that the one metric ton of plutonium had been removed from SRS. One-half metric ton was placed in Nevada and the other half was placed in Texas.

construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation and Governor, the strategy was developed for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position regarding the continuation of construction of the MOX Facility and maintenance of the status quo, which would provide the Governor an opportunity to zealously advocate to the Trump Administration for the MOX Facility to remain open. *Id*. W&H again moved expeditiously on behalf of South Carolina, filing a complaint and requesting a preliminary injunction on May 25, 2018, in the Federal District Court in South Carolina. *Id*. On June 7, 2018, the court granted the preliminary injunction and ordered the Federal Government to continue constructing the MOX Facility. *Id*.

The Federal Government then appealed the injunction regarding the continuation of the MOX Facility construction to the Fourth Circuit Court of Appeals. *Id*. During this time, political efforts were made to obtain a solution that, unfortunately, never materialized and, on October 26, 2018, the Fourth Circuit ruled against South Carolina. *Id*. The Federal Government quickly terminated the MOX Facility construction, justifying South Carolina's efforts to try and maintain the status quo, which had achieved temporary success and benefited hundreds of workers in the State.[3]

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover $100 million, and amended the complaint in 2018 seeking an additional $100 million. Ex. C, p.3. These claims were consolidated and briefing ensued. After unsuccessful settlement

[3] It is worth reiterating that none of the foregoing lawsuits seeking injunctive relief had a monetary or damages component, meaning that, although W&H agreed to take on these actions on behalf of the State under the Litigation Retention Agreement, as amended, those actions did not provide an avenue for a corresponding increase in the possibility of damages to the State on which the attorneys' fee is based.

discussions, on August 20, 2019, the Court of Federal Claims ruled against the State, finding the lack of an appropriation by Congress to be fatal to South Carolina's claims for the economic and impact assistance payments. *Id*.

The Respondent Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. *Id*. Beginning in January 2020, additional discussions were held between the respective counsel for DOE and the State, which were more promising and over months developed into a workable framework for possible resolution. While the political representatives of South Carolina were updated on the progress of these discussions, these talks were led by South Carolina's legal counsel, including the Attorney General and W&H. *Id*. Oral argument was held on May 5, 2020, in the Federal Circuit, following which settlement discussions recommenced in earnest. *Id*. Accordingly, the case was stayed pending additional settlement discussions. After several additional productive meetings, settlement discussions culminated in an agreement in principle reached on July 1, 2020, subject to further approvals and consultation with stakeholders including, on South Carolina's side, its political representatives. Governor McMaster, Senator Graham, and Congressman Wilson each indicated approval and acceptance of the agreement in principle. *Id*.at 3-4.

On August 28, 2020, a settlement agreement was executed providing for a payment of $600 million—the largest single recovery ever by the State—from the Federal Government's litigation "Judgment Fund."[4] Ex. F. The settlement further provided the Federal Government with a grace period to comply with an obligation to remove additional weapons-grade plutonium from the State

[4] The Judgment Fund is a permanent, indefinite appropriation of the Federal Government which is available to pay judicially- and administratively-ordered monetary awards against the United States, including amounts owed under compromise agreements negotiated by the DOJ in settlement of claims arising under actual or imminent litigation under appropriate circumstances. 31 C.F.R. § 256.1.

while still maintaining the ability of the State to force removal[5] and receive additional payments[6] should the Federal Government not comply.[7] *Id*. The Federal Government submitted the settlement payment to the State, and the agreement for voluntary dismissal was jointly filed by the State and the Federal Government with the Federal Circuit on September 29, 2020. *See* Ex. G, Agreement to Voluntary Dismissal of Appeal (wherein DOJ agreed and stipulated as a condition of dismissal that "[t]he settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs.").

For the fees in this case, the Litigation Retention Agreement between the Attorney General and the Respondent Law Firms—which was first entered into in 2016 and was later amended to account for the additional litigation matters that were requested of W&H to be brought on behalf of the State—utilizes a decreasing percentage scale based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. Based on the amount of the settlement negotiated with DOE, the attorneys' fees under the agreement, including costs and expenses, are

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[5] The 15-year removal period for the remaining 9.5 metric tons of weapons-grade plutonium–an amount that is now known and was declassified as a result of the litigation–was calculated by multiplying 9.5 times the 19 months it took to remove the one metric ton DOE was ordered to remove.

[6] The rationale for the grace period on payment was that the source of funds for the economic and impact assistance payments changes beginning in 2022 from "available appropriations" to "funds available to the Secretary," which likely meant that any payments to the State would have to be made from the appropriated operating budget for SRS, which would be detrimental to SRS's operations and contrary to the State's desire to improve, rather than impair, missions at SRS.

[7] The additional payments could be up to $1.5 billion if the Federal Government fails to honor its contractual commitment to South Carolina in the settlement agreement.

$75,000,000. These fees represent 12.5% of the upfront settlement amount recovered on behalf of the State by the Respondent Law Firms.[8]

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys' fees owed to the Respondent Law Firms pursuant to the Litigation Retention Agreement. Ex. H, Oct. 1, 2020 Affidavit of Kimberly Buckley, Finance Director for the Office of Attorney General (filed with the circuit court on Oct. 6, 2020). The payment was approved by the Executive Budget Office (EBO) of the Department of Administration and was authorized by the Comptroller General and Treasurer in the normal course. *Id*. The State then made a wire transfer to W&H for $75 million, inclusive of attorneys' fees and costs, owed under the Litigation Retention Agreement and as contemplated by the dismissal filed in the Federal Circuit. *Id*.

STANDARD

This Court may, in its discretion, certify for its review any case pending before the Court of Appeals prior to its determination. Rule 204(b), SCACR; S.C. Code Ann. § 14-8-210(b). Certification of an appeal for review by the Court is "normally appropriate" where a case involves an issue of significant public interest or a legal principle of major importance. *Id.* The Court may also certify a case where it otherwise considers certification to be appropriate. *Id.*

[8] The 12.5% contingency is calculated against the immediate cash settlement payment and does not allocate any of the fees to the additional benefits the Respondent Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove 9.5 additional metric tons or pay the State the additional sum of $1.5 billion.

ARGUMENT

This appeal should be certified because it alternatively involves issues of significant public interest, legal principles of major importance, or otherwise presents issues that are appropriate for immediate certification and review by this Court.

First, this case concerns a high-profile effort by politically and financially-motivated private litigants to stand in the shoes of the State and its constitutional officers to challenge and disavow a contract between the State and a private party after the services to the State have been rendered, payment pursuant to the contract has been made, and the contract fulfilled and fully performed.

Second, this case presents the opportunity for this Court to further clarify and resolve the limits of the "public importance" exception to standing, a legal principle of major importance, including the following questions of law: [9]

- Whether the "public importance" exception extends to claims against private parties, including contract claims against private parties asserted by a non-party to the contract;
- Whether the concept of "derivative standing" exists and permits a citizen to stand in the shoes of the State to force the State to breach an agreement with a private party; and
- Whether the "public importance" exception permits a citizen to circumvent the constraints imposed on this Court under Article I, § 8 of the South Carolina

[9] To be clear, there is a clear distinction between the "public interest" standard for purposes of certification and the "public importance" standard for purposes of the exception to general standing requirements. *See*, *e.g.*, *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). As set forth in this memorandum, this appeal presents issues of public ***interest***, but Appellants' underlying claims are not a matter of "public importance," as the circuit court correctly determined below in rejecting Appellants' argument that they qualified under the public importance exception to standing and dismissing the case for lack of standing.

Constitution, which mandates that the executive, legislative, and judicial branches shall remain separate and distinct, and seek to have a court rule on what amounts to a nonjusticiable political question.

The circuit court rejected Appellants' arguments, finding the case to be non-justiciable because Appellants lack standing to advance their claims and that neither the "public importance" exception nor Appellants' theory of "derivate standing" remedied their clear lack of standing. This appeal is therefore limited to these discrete questions of law.

Third, although the circuit court did not pass on the merits of Appellants' underlying claims because it dismissed the case for lack of standing, to the extent that Appellants attempt to make the merits an issue in this appeal, the underlying allegations advanced by Appellants are that the Litigation Retention Agreement violates the South Carolina Rules of Professional Conduct (Rules), a subject that is within the exclusive province of the Supreme Court. *See In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar*, 422 S.E.2d 123, 124, 309 S.C. 304, 305 (1992) ("The Constitution commits to [the Supreme Court] the duty to regulate the practice of law in South Carolina."); *see also Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124-25, 634 S.E.2d 5, 8-9 (2006) (affirming dismissal for lack of jurisdiction and finding no private action for unauthorized practice of law). Confirmation by this Court that the Rules do not create a private right of action for a third party to challenge attorneys' fees is an additional legal principle of major importance.

Fourth, Appellants had no involvement with the litigation successfully brought by the Respondent Law Firms against the Federal Government on behalf of the State and were not parties to the Litigation Retention Agreement. Appellants also openly acknowledge that their interest in this matter is due, in large part, to the "amount of the fees" paid pursuant to the Litigation Retention

Agreement. *See, e.g.*, October 14 Order at 6 ("Plaintiffs acknowledge that it is because of the amount of the fee the statute requires interpretation."). Nevertheless, Appellants claim that they can stand in the shoes of the State and its constitutional officers to challenge and disavow the Litigation Retention Agreement between the State and the Respondent Law Firms after the services to the State have been rendered and payment pursuant to the contract made. What is worse, as shown by their request for fees paid from some "common fund" which they seek to create by virtue of a putative class action, Appellants disclose their true motive, which is to take a portion of the fees earned by the Respondent Law Firms and put it into their pockets. This case, therefore, presents an opportunity for this Court to address the recent trend of predatory practices in this State, whereby third parties attempt to interject themselves into high-profile (and high-dollar) litigation, after the work of the case has already been performed, speciously claiming they do so for the public good but really just seeking to benefit from the efforts and creativity of others *Cf.* S.C. Const. art. I, §13 (proscribing a taking of private property for ***private*** use).

Finally, expeditious review of these issues is warranted. The Law Respondent Firms are entitled to finality with respect to the fees that they have lawfully earned. The very existence of this lawsuit is inflicting, and will continue to inflict, substantial damage on them, due to the frivolous cloud that it has cast over the substantial success achieved on behalf of the State via a wholly improper importuning of the Rules. And given the issues involved and amount in controversy, any opinion of the Court of Appeals would likely be presented to this Court on a petition for a writ of certiorari regardless of the outcome, which will further delay a final resolution of this case.

CONCLUSION

For the reasons discussed above and set forth in the accompanying motion, the Respondent Law Firms respectfully requests that this Court exercise its discretion under Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b) to certify this appeal for its immediate review; that this Court expedite its consideration of the straightforward legal issues presented, including the consideration and granting of Respondents' Motion to Dismiss; and that the Respondent Law Firms be granted such other and further relief as is just and proper.

Respectfully submitted,

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May 5, 2021
Columbia, South Carolina

EXHIBIT A

ELECTRONICALLY FILED - 2020 Oct 14 5:45 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs,	)	Docket No. 2020-CP-40-04603 **ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
v.	)	
Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	)	

This matter came before the Court on October 7, 2020, on a Motion for Preliminary Injunction (Motion) filed by Plaintiffs South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated (collectively Plaintiffs). James Griffin, Esq. and Badge Humphries, Esq. of Griffin Humphries appeared on behalf of Plaintiffs. J. Todd Rutherford, Esq., John Simmons, Esq., and Gerald Malloy, Esq. appeared on behalf of Defendant Willoughby & Hoefer, P.A. Will Davidson, Esq. and Ken Woodington, Esq. appeared on behalf of Defendant Davidson, Wren & DeMasters, P.A. J. Emory Smith, Esq. of the Office of the Attorney General appeared on behalf of Defendant Alan Wilson.

In the Amended Complaint, Plaintiffs instituted this action against the Attorney General of South Carolina and the law firms of Willoughby & Hoefer, P.A. (W&H) and Davidson, Wren & DeMasters, P.A. (DW&D, and together with W&H, the Law Firms), raising various arguments regarding the payment of attorneys' fees to the Law Firms in the amount of $75 million pursuant

to the Litigation Retention Agreement.[1] Plaintiffs seek a preliminary injunction to freeze the $75 million of settlement proceeds that Plaintiffs allege was unlawfully transferred to Defendant W&H at the direction of Defendant Alan Wilson for the payment of attorneys' fees pending this litigation.

FACTUAL BACKGROUND

It appears from the filings in this matter that, in February 2016, the State of South Carolina, represented by the Law Firms, initiated several lawsuits against the Department of Energy (DOE) related to the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS) and certain weapons grade (defense) plutonium stored at SRS. On August 28, 2020, a Settlement Agreement was executed with the Federal Government providing for a payment of $600 million from the Federal Government's "Judgment Fund." W&H Resp. to Pls.' Mot. for Prelim. Inj. (W&H Resp.), Ex. 1. The settlement provided DOE a grace period to comply with an obligation to remove additional defense plutonium from the State while maintaining the ability of the State to force removal of the plutonium and to receive additional payments should DOE not comply. *Id*. The Federal Government submitted the settlement payment to the State. The State jointly filed with the Federal Circuit Court an agreement for voluntary dismissal dismissing the pending litigation on September 29, 2020. W&H Resp., Ex. 2, Agreement to Voluntary Dismissal of Appeal.

The Litigation Retention Agreement, as amended, provides for the payment of attorney fees based upon a decreasing percentage scale contingent upon the amount of the recovery for two

[1] The Attorney General Alan Wilson and the Law Firms entered into an agreement for the Law Firms to represent the State of South Carolina in litigation relating to violations of 50 U.S.C.A.§ 2566 related to the MOX Facility. *See* Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violation of 50 USCA § 2566 Related to the Mixed Oxide (MOX) Facility.

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cases and flat percentages of recovery for two other cases. The attorneys' fee under the agreement, including costs and expenses, is $75,000,000. This fee represents 12.5% of the cash recovery.

The State Attorney General submitted the request for approval of payment of the attorneys' fees owed pursuant to the Litigation Retention Agreement on September 17, 2020. Attorney General Mem. in Opp'n to First TRO Motion, Ex. 4, Buckley Affidavit. The payment was authorized by the Comptroller General and Treasurer and was approved by the Executive Budget Office (EBO) of the Department of Administration. *Id*. On September 29, 2020, the State made a wire transfer to W&H for $75 million, inclusive of attorneys' fees and costs, owed under the Litigation Retention Agreement and as contemplated by the dismissal filed in the Federal Circuit. *Id*.

On September 29, 2020, virtual hearings on Plaintiffs' first Motion for Temporary Restraining Order against only the Attorney General were held before Judge Debra McCaslin. Thereafter, Judge McCaslin issued an Order Granting Temporary Injunction Pendente Lite (the First TRO) enjoining the Attorney General from "ordering, approving, or facilitating the distribution of any portion of the disputed funds until this Court issues a ruling on Plaintiff's motion."[2] The First TRO also enjoined the State Treasurer from "disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court." When the First TRO was entered, the wire transfer to W&H paying the fees contractually owed of $75 million had already been completed.

Plaintiff filed an Amended Summons and Complaint the next day, September 30, 2020, adding the Law Firms as defendants. Plaintiffs also filed the instant Motion *ex parte*. On

[2] The First TRO was electronically signed on September 29, 2020, and electronically filed on September 30, 2020. It was subsequently dissolved by Judge McCaslin.

September 30, 2020, this Court issued an *Ex Parte* Temporary Restraining Order, electronically filed on October 1, 2020 (the Second TRO). The Second TRO enjoined the Law Firms, members of Law Firms, and "anyone acting in concert with these Defendants" from "transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina on September 29, 2020." The Second TRO also set a hearing on the Motion for Preliminary Injunction for October 7, 2020. Thereafter, the parties were served with the Amended Summons and Complaint and the Second TRO.

Plaintiffs bring this action on behalf of the taxpayers of this State and assert standing under the public importance exception. At the close of the hearing, the Court issued a Form 4 extending the restraining order until Wednesday, October 14, 2020.

PLAINTIFFS LACK PUBLIC IMPORTANCE STANDING

A plaintiff must have standing to maintain a claim. "Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) "constitutional standing"; and (3) the public importance exception." *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013) (citing *ATC South, Inc. v. Charleston Cnty*., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). Plaintiffs do not assert they have statutory standing or constitutional standing, they assert standing through the "public importance" exception.

"Public importance" standing allows citizens in some limited instances to seek judicial resolution of an issue "of such public importance as to require its resolution for future guidance." *Davis v. Richland County Council,* 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). However, the Supreme Court has recognized that courts "must be cautious with this exception, lest it swallow the rule." *Jowers v. S.C. Dep't Health & Envtl. Control*, 423 S.C. 343, 360, 815 S.E.2d 446, 455 (2018) (quoting *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646,

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744 S.E.2d 521, 524 (2013)). Indeed, "standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). The key for finding that public importance standing is warranted is a need for future guidance. As the Supreme Court has stated:

> For a court to relax general standing rules, the matter of importance must, ***in the context of the case***, be inextricably connected to the public need for court resolution for future guidance.

ATC, 380 S.C. at 199, 669 S.E.2d at 341(emphasis added).

Plaintiffs contend the meaning of § 1-7-150 of the South Carolina Code of Laws is a matter upon which future guidance is needed. S.C. Code Ann. § 1-7-150(B) states, "All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State…." Plaintiffs assert S.C. Code Ann. § 1-7-150 requires all attorney's fees to be approved by court order or be approved in the settlement, and because the Attorney General regularly employs outside counsel there is a need for future guidance on this matter. Plaintiffs also assert that without approval of the fees by court order or in the settlement, all proceeds from the settlement should have been deposited into the General Fund.

Plaintiffs challenge the one-time payment of the attorneys' fees here based upon this particular settlement and pursuant to this Litigation Retention Agreement. Any judicial ruling on this matter would be entirely limited to the Litigation Retention Agreement and payment for services performed pursuant to this single contract. *Cf. City of Charleston v. Masi*, 362 S.C. 505, 509, 609 S.E.2d 301, 304 (2005) (denying public importance standing with respect to right to vote in certain municipal elections because "the pertinent issue does not present a recurring dilemma

such that this issue should be addressed to clarify the law"). Plaintiffs acknowledge that it is because of the amount of the fee the statute requires interpretation.

Plaintiffs do not challenge the Attorney General's authority to enter into retention agreements with outside counsel. The subject of this action is not the Attorney General's authority to enter into contracts for outside litigation counsel to represent the State. S.C. Code Ann. § 1-7-170 grants the Attorney General the authority to enter into an agreement or to hire private counsel on a contingency basis. Additionally, S.C. Code Ann. § 1-7-85 expressly states that "the Attorney General may obtain reimbursement for its costs in representing the State in … civil and administrative proceedings. These costs may include, but are not limited to, attorney fees…." This Court finds that payment of attorneys' fees is expressly authorized under § 1-7-85 and, pursuant to a valid and binding contract for services rendered in civil proceedings brought on behalf of the State, the fees constitute a cost which the Attorney General is authorized to pay.

S.C. Code Ann. § 1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. Plaintiffs concede the language is clear and unambiguous. The statute does not require court approval for the payment of the fee, and the appropriate State Officers followed applicable law in disbursing the funds to meet the State's contractual obligations. Thus, the Court finds that this is not a situation requiring future guidance. Public importance standing is inappropriate here because there is no ruling the Court might make that would assist other courts resolving future arguments regarding outside litigation.

Furthermore, future guidance is not needed on this matter because Proviso 59.8 of the State's current budget precludes the Attorney General from transferring ***any*** funds to the General Fund and instead directs him to deposit any funds that "otherwise" would go to the General Fund in a separate account:

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> (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled "Litigation Recovery Account." The funds deposited in this account must be expended only as prescribed by law.

2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). This proviso continues in effect. 2020 S.C. Acts 135, § 1(A)(2) (extending the effective dates of 2019 Act 91, Part 1.B. "until the effective date for appropriations made in a general appropriations act for Fiscal Year 2020-2021"); *see also* 2019 S.C. Acts 91 ("All acts or parts of acts inconsistent with any of the provisions of … Part 1B of this act are suspended for Fiscal Year 2019-20."); *see Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 374, 718 S.E.2d 432, 436 (2011) (holding that a budget proviso that conflicts with a permanent statute suspends the statute for the period during which the proviso is effective).

Because Proviso 59.8 suspended the requirements of § 1-7-150(B) with respect to funds that "otherwise" would go to the General Fund, even if Plaintiffs were correct that the entire settlement, including the money for attorneys' fees, should be deposited in the General Fund under § 1-7-150(B), the Proviso would prevent such action in this case. The argument articulated by Plaintiffs is therefore inapplicable.

The payment of the contractual attorneys' fees also constituted a "disposition required by law" and an "expend[iture] … prescribed by law" because the EBO approved the payment of the contract fees as expressly authorized by the General Assembly. 2020 S.C. Acts 135, § 7 ("The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments."). Moreover, as Plaintiffs acknowledge, the Treasurer's Office processed the payment for the attorneys' fees pursuant to a warrant from the Comptroller General. *See* Mot., pp. 4-5 & Am. Compl., Ex. 19.

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Plaintiffs claim that additional approval by the Joint Other Funds Oversight Committee was required and allege "the EBO Director apparently by-passed the approval process." Pls.' Suppl. Mem., p. 11. However, the Attorney General as the Chief Legal Officer of the State is specifically charged with administering § 1-7-150. The EBO is responsible for overseeing the expenditure of funds in this State. Both approved and authorized the payment of the attorneys' fees. The payment also was authorized by the Comptroller General and the Treasurer. Pursuant to the current continuing resolution passed by the General Assembly, the General Assembly expressly provided the EBO with complete authority to approve requests like the Attorney General's payment request ***without*** seeking any additional approvals. 2020 S.C. Acts 135, §7; W&H Resp., Ex. 3, Stavrinakis Aff. ¶ 6 ("[T]he Executive Budget Office has full and complete authority to approve agency requests for other fund authorization adjustments without any action or review by the Joint Other Funds Oversight Committee…. [A]ny authority of the Joint Other Funds Oversight Committee has been delegated to the [EBO]."). The EBO Director therefore did not by-pass the requisite approval process. Thus, the agencies charged with administrating § 1-7-150 necessarily have determined that payment of the fees was authorized pursuant to the statute. *See Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control*, 766 S.E.2d 707, 718, 411 S.C. 16, 34 (2014) ("[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration."). Plaintiffs' contention that further approvals were required is incorrect.

Therefore, without a showing that future guidance needed on this issue, Plaintiffs lack standing under the public importance exception.

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PLAINTIFFS LACK DERIVATIVE STANDING

Plaintiffs also assert they have derivative standing to pursue claims for the recovery of State funds asserted under *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939). *Ex parte Hart* allowed a citizen of a county to assert a plain claim on behalf of that county. Plaintiffs argue derivative standing should be extended to the State even though it is a sovereign entity and there is no "plain" claim. Pls.' Suppl. Mem., p. 16.

This Court finds that *Hart* is inapplicable here. *Hart* allowed a county resident to assert a "plain" claim on behalf of a county. *See Hart*, 190 S.C. at 477, 2 S.E.2d at 53. However, *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry v. McLeod,* 328 S.C. 435, 447, 492 S.E.2d 794, 800 (Ct. App. 1997) (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."); *Hart*, 190 S.C. at 477, 2 S.E.2d at 53 (municipality); *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").

The Attorney General's authority to represent State interests is rooted in the Constitution, statutes, and the common law. Our courts have repeatedly emphasized that the Attorney General of South Carolina is the State's chief legal officer with broad authority to direct and control the State's legal affairs. The Supreme Court noted in *Cooley, et al. v. South Carolina Tax Commission*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943), "[t]he office of Attorney General is created by the

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Constitution." According to the Court, the various statutes relating to the Office demonstrate the "wide scope of authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." 28 S.E.2d at 451. The Court, in *Cooley*, recognizing the creation of the Office of Attorney General by the state Constitution, as well as the broad powers of the Office, concluded the Attorney General had the authority to settle that case.

Also, in *State ex rel. Condon v. Hodges*, 349 SC. 232, 562 S.E.2d 623 (2002), our Supreme Court addressed the question of the Attorney General's statutory and inherent common law authority as the State's chief legal officer. In *Condon*, the Court confronted the issue of the Attorney General's power to enforce the Constitution and laws of the State in the context of the improper or illegal expenditure of public funds. There, the Court stated:

> [T]he General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must
>
> > appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes when required by the Governor or either branch of the General Assembly.
>
> . . . The General Assembly has also provided that the Attorney General, upon written request of a state officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986) [footnote omitted]. The Attorney General also must 'give his opinion upon questions of law submitted to him by either branch' of the General Assembly or by the Governor. S.C. Code Ann § 1-7-90 (1986).... Further,
>
> > '[a]s the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority*, as public interests may from time to time require, and may institute, conduct, and maintain all such suits and *proceedings* as *he deems necessary for the enforcement of the laws of the State,* the *preservation of order,* and the *protection* of *public rights.*'

> *State ex rel. Daniel v. Broad River Power Co.,* 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), *aff'd* 282 U.S. 187, 51 S.Ct. 94, 75 L.Ed. 287 (1930) (citation omitted and italics added by *Daniel* Court). *Cf. State v. Beach Co*., 271 S.C. 425, 248 S.E.2d 115 (1978) (while Attorney General has broad statutory authority, and arguably common law authority, to institute actions involving welfare of State, that authority is not unlimited).

State ex rel. Condon v. Hodges, 349 S.C. at 239, 240. In *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Court explained that the Attorney General, by bringing this action in the name of the State, speaks for all its citizens, and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

Moreover, in *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), the Court reiterated that "[t]his Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State." *State v. Southern* Ry. Co., 82 S.C. 12, 62 S.E. 1116 (1908) (the Court expresses it does not believe it was the Legislature's intent to deny the Attorney General "the power and responsibility of conducting the litigation according to his judgment.").

Accordingly, Plaintiffs have no authority to represent State interests in this proceeding. The Attorney General is the State's chief legal officer, and he properly exercised his authority to contract with the W&H law firm to represent the State in its action against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated in *Cephalon v. Wilson*, Civil Action No. 2012-CP-400737 (June 6, 2014), "[t]he Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions … and to pay those outside attorneys on a contingency fee basis with money received in any settlement or

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judgement obtained in the case." Order at 9 (Exhibit 3 to Attorney General's Memorandum).

Judge Roger Couch, in *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009), also concluded § 1-7-150 "expressly authorizes payment of 'the costs of litigation' out of litigation proceeds and a 'cost of litigation' is certainly what legal fees are." Order at p. 19. He added, "Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this." Order at 20. Similarly, in *Cephalon, supra,* Judge Cooper concluded that "the costs of litigation include attorneys' fees, [§1-7-150(B)] expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund." Order at p. 18.

Contrary to Plaintiffs' second assertion, these fees were also "awarded by settlement." The settlement provides that each party bears its own fees thereby allowing the payment to be made from the settlement proceeds. This understanding is ratified by the parties to the settlement in documents presented to the U.S. Court of Appeals for the Federal Circuit. The "Agreement To Voluntary Dismissal of Appeal" filed with the Federal Court and executed by all parties to the litigation incorporates the settlement into the dismissal. It specifically states that the settlement agreement is "inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount and the State shall have no further claim against the United States for such fees and costs . . . ."

The Attorney General had the authority to pay the attorney's fees from settlement proceeds without depositing the money into a particular account. Therefore, Plaintiffs no authority to act for the State as to this matter.

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PLAINTIFFS FAILED THEIR BURDEN FOR A PRELIMINARY INJUNCTION

Even if this Court has improperly determined that Plaintiffs do not have standing to pursue this claim, Plaintiffs have failed to meet their burden for a preliminary injunction.[3] "A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc*., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). "Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law." *Id.*

Plaintiffs ultimately seek to prevent the Law Firms from spending the money paid to them pursuant to the agreement. Plaintiffs' claims can be remedied by money damages if they were to succeed, especially since no unique property was transferred to the Law Firms. "The applicable rule, reaffirmed in almost every case dealing with the matter, is that in the absence of some positive provision of the law to the contrary, an injunction will not be granted in cases where there is a choice between the ordinary processes of law and the extraordinary remedy by injunction, and where the remedy at law is sufficient to furnish the injured party the full relief to which he is entitled in the circumstances." (Emphasis added). *Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co*., 272 S.C. 127, 129, 249 S.E.2d 744, 745 (1978). Plaintiffs also have not shown a

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[3] This Court does not address each and every claim raised by Plaintiffs, but briefly addresses only those elements that demonstrate Plaintiffs have not met their burden.

likelihood of success on their claim that the Attorney General lacked the authority to pay fees to W&H from the settlement proceeds. As noted above, S.C. Code Ann. §1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. The statute does not require court approval for the payment of the fee, and the appropriate State Officers followed applicable law in disbursing the funds to meet the State's contractual obligations.

CONCLUSION

After hearing the issues and arguments of counsel and considering the materials submitted, this Court finds Plaintiffs lack standing and have failed to meet their burden for a Preliminary Injunction in this matter. Plaintiffs' Motion for Preliminary Injunction is **DENIED.** Accordingly, this Court dissolves the Temporary Restraining Order.

AND IT IS SO ORDERED.

[Electronic Signature to Follow]

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Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al

Case Number: 2020CP4004603

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

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EXHIBIT B

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	)	Case No. 2020-CP-40-04603 **ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND**

This matter came before the Court on October 23, 2020, by Plaintiffs South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated (collectively Plaintiffs), Motion Pursuant to Rules 52(b) and 59(a), SCRCP, to Alter or Amend Order. Plaintiffs previously moved for a preliminary injunction to freeze the $75 million of settlement proceeds that Plaintiffs allege was unlawfully transferred to Defendant Willoughby & Hoefer P.A. and Davidson, Wren & DeMasters, P.A. law firms. Plaintiffs raised various arguments regarding the disbursement of the attorneys' fees. This Court issued an order on October 14, 2020, denying Plaintiffs' Motion for Preliminary Injunction and dissolved the Court's previous Temporary Restraining Order issued October 1, 2020. Plaintiffs now bring this Motion asserting this court failed to consider several arguments presented by Plaintiffs.

The Order denying preliminary injunction appropriately considered all the arguments. Plaintiffs argue this Court failed to appropriately consider *Adams v. McMaster,* 2020 WL 5939936, Op. No. 2020-001069 (Slip. Op. Oct. 7, 2020). This Court properly considered the legal issue relating to standing. However, the facts in Adams are distinguished from those in this case. Here, there is no need for future guidance on this matter.

This Court appropriately applied and considered the language of S.C. Code Ann. § 1-7-150(B) and S.C. Code Ann. § 1-7-85. For clarification on Proviso 59.8, the Court does not rely on Proviso 59.8 as the prevailing reason for its decision, nor does it consider the Proviso to be an

exception to the statute. The Court simply relies on the Proviso to demonstrate that the money from the settlement would not go to the General Fund as Plaintiffs indicate the statute requires. Additionally, the Court references the EBO's approval of the disbursements to show the Attorney General followed appropriate procedure for disbursement of funds and the disbursement was processed through several departments.

Furthermore, this Court reiterates the language of the Litigation Retention Agreement gave the Attorney General the discretion to seek Court approval. The Litigation Retention Agreement states, "When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction." *See* Plaintiff Exhibit 7 – Litigation Retention Agreement. This agreement provides the Attorney General with discretion in determining when and if the Court needs to approve the agreement. The Attorney General had a duty to fulfill his contractual obligations. Plaintiffs have no standing to challenge the terms of the Litigation Retention Agreement between the Attorney General and the law firms involved.

Lastly, this Court properly ruled Plaintiffs lack standing in this matter. Plaintiffs' standing and request for preliminary injunction are separate issues. The matter before the Court was to determine if a preliminary injunction was appropriate. The question of standing had to be determined. While this Court found Plaintiffs lack standing and the inquiry could have ended at that point, for judicial economy this Court also determined that a preliminary injunction could not be granted because Plaintiffs could not establish all of the criteria for its issuance.

CONCLUSION

Based on the evidence in the record and the arguments of counsel, this Court is unable to discover any material fact or principle of law that was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Pursuant to SCRCP Rule 59(f), oral argument is not necessary.

Therefore, Defendant's Motion to Alter or Amend is **DENIED**.

AND IT IS SO ORDERED.

[Electronic Signature to Follow]

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Richland Common Pleas

Case Caption:	South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number:	2020CP4004603
Type:	Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

Electronically signed on 2020-12-17 10:08:14

EXHIBIT C

DAVIDSON, WREN & DEMASTERS, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
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Brandon M. Briggs
Jonathan M. Riddle

Of Counsel
Kenneth P. Woodington

September 16, 2020

W. Jeffrey Young, Esquire
Chief Deputy Attorney General
Office of the Attorney General
jyoung@scag.gov

Dear Judge Young:

Please allow this letter to serve as the final element of the due diligence review and as the request for the release of the attorneys' fees to the trust account of Willoughby & Hoefer, P.A., which will serve as evidence of satisfaction of all contractual commitments by all parties and terminate the engagement related to the litigation for plutonium disposition. *See* Litigation Retention Agreement, effective Feb. 8, 2016, as amended, effective Jan. 1, 2019.

We appreciate the opportunity presented to represent the State in these important matters, and believe some historical context is warranted to bring us to this final point of closure of this engagement.

In March of 2014, these firms (or the predecessors) filed an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests. At that time, the U.S. Department of Energy (DOE) (through the National Nuclear Security Administration) was seeking to place the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS) into "cold standby" status, which would effectively terminate the project. As the Congressional delegation wrote to then-Governor Haley, "[w]e ask that you work with the South Carolina Attorney General to explore any legal avenues the state may have to address this injustice." Ltr. of Congress to Haley, March 6, 2014. After being briefed on a legal strategy to achieve that result, the State retained Davidson, Wren, & DeMasters, P.A., and Willoughby & Hoefer, P.A., law firms to represent it.[1]

The State filed a complaint on March 18, followed by a motion for summary judgment on April 14. Speed was of the essence given other factors at play in Congress. On April 30, 2014, DOE capitulated and directed the contractor to continue the MOX Facility construction.

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, we developed a comprehensive strategy focusing on litigation with DOE and we briefed the Governor's Office and your office on that strategy, which included the draft of a complaint. With political overtures having been rebuffed

[1] We appreciate the confidence your office showed in our collective experience to represent the State on the plutonium disposition issues at SRS. Each firm and its lead counsel on these cases has represented the State in a number of federal court litigation matters against the United States (or its agencies). Each undersigned counsel also has litigated cases regarding nuclear material, environmental issues, and complex civil litigation, generally.

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and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to your office on January 26, 2016, as a "formal request that [the Attorney General's] office initiate litigation on behalf of the State of South Carolina against DOE…." Haley to Wilson, Jan. 26, 2016.

On February 9, 2016, the State filed a complaint against DOE seeking the removal of one metric ton of weapons-grade (defense) plutonium and payment of the economic and impact assistance monies. And the battle was joined. The State pushed hard and fast. After substantial briefing and argument on multiple issues and motions, the federal District Court in South Carolina issued an order on October 31, 2016, dismissing the economic and impact assistance payment claim for lack of jurisdiction, pointing to the Court of Federal Claims as the proper forum.

The removal claim continued in South Carolina and on March 20, 2017, the District Court granted the State's injunctive relief claim and ordered DOE to remove one metric ton of defense plutonium. The court requested additional briefing on the appropriate remedy, and on December 20, 2017, adopted the State's proposal to require removal of the defense plutonium within two years and also required DOE to provide ongoing status reports on its removal progress. On February 2, 2018, DOE appealed the judgment to the Fourth Circuit. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (i.e., by December 31, 2019).

On November 30, 2018, the State of Nevada filed a lawsuit against DOE seeking to prevent the relocation of the one metric ton of defense plutonium to Nevada in the Federal District Court in Nevada. This was a significant issue, as there are less than a handful of sites in the United States capable of storing defense plutonium and if Nevada was successful, DOE could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from SRS. It was imperative that South Carolina protect its interest in the removal.

On January 3, 2019, South Carolina moved to intervene in the Nevada case. The State of Nevada opposed South Carolina's participation in the case but, after expedited briefing, the court granted the State's motion on January 14. Nevada sought a preliminary injunction to halt the shipment of defense plutonium to Nevada from SRS, and indicated that if the defense plutonium had left SRS it should be returned. An evidentiary hearing was held on January 17. On January 30, DOE notified the court and the parties that one-half ton of defense plutonium had been relocated to Nevada. Also on January 30, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. Nevada appealed to the Ninth Circuit on February 4.

During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. It also stated it had 15 witnesses to present. South Carolina was prepared to litigate this matter in a full trial. However, the district court stayed the case pending the appeal. After briefing at the Ninth Circuit, the court dismissed the appeal as moot on August 13, 2019. The stay at the district court was lifted, and additional motions were filed and briefing began anew. In December 2019, South Carolina's

participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE in 2020.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the Federal District Court in South Carolina ordered its removal, DOE filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS.

During this time, South Carolina learned that DOE was taking active steps to halt construction of the MOX Facility and the Secretary of DOE was finalizing a formal memorandum to terminate the program. Once the construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation, the strategy was for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position and maintain the status quo. South Carolina moved expeditiously, filing a complaint and a request for a preliminary injunction on May 25, 2018 in the federal District Court along with a request for an expedited hearing. On June 7, the court granted the preliminary injunction and ordered DOE to continue constructing the MOX Facility.

DOE appealed to the Fourth Circuit. During this time, efforts were made at obtaining a legislative solution that, unfortunately never materialized and, on October 26, 2018, the Fourth Circuit held that South Carolina lacked standing. DOE quickly terminated the MOX Facility construction, justifying South Carolina's efforts to at least try and maintain the status quo.

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover $100 million. On January 8, 2018, the State filed its second complaint seeking to recover another $100 million. These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions. The Department of Justice and the State agreed that the outcome of the case would govern all six years of payments under 50 U.S.C. § 2566(d)(1), essentially rendering this matter a $600 million case. These efforts were not successful and, in June 2019, South Carolina informed the court that DOJ had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. It did—ruling against the State on August 20, 2019 and finding that no appropriation by Congress was available for the payments.

South Carolina appealed that decision to the Federal Circuit. After briefing and oral argument on May 5, the case was stayed pending additional settlement discussions.

Beginning in January 2020, promising discussions were held between counsel for DOE and the State met on several occasions to work on a framework for a resolution. After several productive meetings and the Federal Circuit oral argument, settlement discussions progressed further, culminating in a meeting on July 1 in Washington, DC, with the Secretary of DOE. An agreement in principle was reached that day, subject to further approvals and consultation with

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stakeholders. The President and U.S. Attorney General ultimately concurred, as did and South Carolina's federal and state legislative leaders.

On August 28, 2020, a settlement agreement was executed providing for a 100% recovery of the economic and impact assistance payments and provide DOE with a grace period to comply with a contractual obligation to remove 9.5 metric tons of defense plutonium while still maintaining the ability to force removal and receive payment should DOE not comply with its contractual obligations.

As you know, the August 31, 2020, settlement agreement reflects that each party bears its own attorneys' fees and costs. In these circumstances, the "common fund" approach is often utilized to calculate the attorneys' fee award.[2] *Layman v. State*, 376 S.C. 434, 451-53, 658 S.E.2d 320, 329-30 (2008). "[W]hen awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.' These courts consequently base an award of attorneys' fees on a percentage of the common fund created, known as the 'percentage-of-the-recovery' approach." *Id.* Here, that percentage is calculated by applying the contractual agreed-upon fee percentages to the recovery amount.

For the fees in this case, the litigation retention agreement entered into in 2016—a contract binding on the State of South Carolina—utilizes a decreasing percentage based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. In calculating the attorneys' fee under the agreement, the earned fee, *inclusive* of costs and expenses, is $75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.[3]

Regarding our specific engagement in 2016, we note that the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by a circuit court. *See* S.C. Code Ann. §§ 1-7-85, 170;[4] *Cephalon v. Wilson*, Civil Action No. 2012-CP-40-07317, Order Granting Def's Mot. for Summ. Judg. (June 6, 2014) ("As the Supreme Court recognized in the case of *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28, 28 S.E.2d 445, 447-48

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[2] Because the State and its citizens are the beneficiaries of the recovery of over half a billion dollars, the "common fund" approach should be applied.

[3] We note this percentage is less than the fee percentages of most standard contingency fee agreements as well as the attorneys' fee percentages in the two recent settlements involving the V.C. Summer nuclear plant litigation.

[4] South Carolina Code Section 1-7-85 states: "Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement … in representing the State … in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees … or costs of litigation awarded by court order or settlement, travel expenditures, depositions, printing, transcripts, and personnel costs…."

Further, Part I.B of the Budget also contains the following proviso: "59.8. (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled 'Litigation Recovery Account.' The funds deposited in this account must be expended only as prescribed by law." Payment of the attorneys' fees complies with the legal contractual obligation resulting from the settlement.

(1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State."). As the circuit court further found, "the Attorney General possesses the authority to associate attorneys … and to pay those outside attorneys on a contingency fee basis with money received in any settlement…." *Id.*; *see also South Carolina v. Eli Lilly*, 2007-CP-42-1855, Order Denying Mot. To Disqualify (Sept. 22, 2009); *see also Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees Pursuant to § 15-77-300, No. 05-CP-40-2785 (Ct. Common Pleas, Fifth Judicial Circuit) (Sept. 18, 2006) ("Attorney General Henry McMaster stated that the public should understand his use of outside attorneys under this [contingency] fee arrangement 'is consistent with the highest standards of practicing law and bringing litigation.'" *The State*, August 10, 2006; Ex. 4 to Harpootlian Depo.").

The fee is eminently reasonable. As detailed above, the work performed included litigation of four cases in three separate trial courts, three separate courts of appeal, and the United States Supreme Court. Litigating against the federal government in federal court on a federal project involving federal dollars is a daunting task. It involved thousands of hours of work,[5] tens of thousands of pages of document review, interaction with multiple state and Federal agencies, consideration of national security issues (which also meant being denied access to certain information), and coordinating the litigation of multiple cases in different courts simultaneously.[6] It also involved coordination and communication with multiple Congressional offices and staff—including offices and staff outside of South Carolina—and the White House.

The litigation risk assumed by counsel was significant. For three of these cases, injunctive relief was the only relief available. However, these cases were critical to the overall strategy to address the defense plutonium issue in the State. But with only one available claim for monetary relief, we were all presented with a unique situation. The chosen path—and the most logical path—was to combine all the defense plutonium litigation matters under a single contract and for the injunctive relief cases to assign a small percentage of additional recovery IF any payments were recovered.[7] There was a clear risk that the State could be successful in the injunctive relief litigation and fail to recover any monies, leaving its counsel with having brought about a successful result in litigation for the State and receiving no payment. The litigation

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

[6] DOE had four separate legal teams defending these cases.

[7] Notably, if these four cases were litigated under three separate, independent litigation retention agreements using the standard stepped fee schedule, and drawing from the single monetary recovery case, the attorneys' fee calculation could have been as much as $103,750,000, or 17% of the total recovery. While adjustments may have been made to those separate agreements if they had been undertaken, there is no question that combining all four matters within a single litigation retention agreement and modifying the fee schedule accordingly resulted in a fee that was less than would have been calculated under separate, stand-alone agreements.

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retention agreement appropriately reflected the risk incurred by counsel. *See Layman v. State*, Plaintiffs' Reply to Def's' Mem. in Opp. to Plaintiffs' Pet'n for Attorneys' Fees ("The State itself, through Attorney General Henry McMaster, recognizes the appropriateness of percentage recoveries for lawyers who take a chance for the State. R. Harpootlian Depo., p. 40; Ex. 3 to Depo.").

The litigation result was extraordinary. The success of the removal litigation and the threat of additional litigation immediately and in 2022 was a significant factor in bringing DOE to the table to negotiate a resolution. This litigation removed one metric ton of defense plutonium from the State and a payment to the State's General Fund of over half a billion dollars—the largest single settlement in the State's history. It also secured a contractual commitment to remove 9.5 metric tons[8] of weapons-grade plutonium by 2037 and for the payment of additional money to the State—which could number over a billion dollars should DOE fail to remove additional defense plutonium from SRS.[9] These are benefits that accrue to the State and for which no additional payment to counsel is required.

Therefore, we respectfully request that the attorneys' fee of $75,000,000 be tendered to the trust account of Willoughby & Hoefer, P.A., for further distribution as soon as such funds are transferred to the Attorney General.[10]

Thank you for the opportunity to be of service.

Sincerely,

William H. Davidson, II
Davidson, Wren, & DeMasters, P.A.

Randolph R. Lowell
Willoughby & Hoefer, P.A.

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[8] In fact, the State now knows the exact amount of defense plutonium subject to 50 U.S.C. § 2566, as that number was declassified as part of this litigation.

[9] However, while maintaining the hammer of enforcement to incentivize the removal of the defense plutonium, the settlement does not interfere with the programs for removal. If South Carolina continued to engage in litigation from 2022 forward, then success on the economic and impact assistance payments could have been detrimental to SRS, as those payments would have to be made from the operations budget of DOE instead of payable from the judgment fund. This means a reduction in available funds for DOE could adversely impact SRS—a undesirable result from a South Carolina economic and public policy perspective.

[10] Regarding the four cases, Willoughby & Hoefer, PA served as lead counsel in all four cases, with Davidson, Wren, and DeMasters, PA, serving as counsel in two cases. The division of fees and expenses for the shared cases is 92.5%/7.5%. This division is reflective of the proportion of services provided by each firm in the cases involving joint representation.

EXHIBIT D

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

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

RECITALS

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

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

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

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

ARTICLE I. TERM

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

ARTICLE II. SERVICES

A. Scope of Appointment

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

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

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

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

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

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

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

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

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

B. Non-Delegation of Work

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

C. Employment Status

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

ARTICLE III. CASE MANAGEMENT

A. Status Reports

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

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

B. Notices and Correspondence

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

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

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

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

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

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

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

C. Communication

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

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

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

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

D. Settlement

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

E. Appeals

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

F. Public Records

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

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

G. Settlement or Judgment Proceeds

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

ARTICLE IV. COMPENSATION

A. Contingent Status

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

B. Fee Schedule and Division

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

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

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

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

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

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

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

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

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

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

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

C. Early Settlement

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

D. Non-Monetary Relief

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

E. Compensation upon Termination

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

F. No Other Payment Source

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

G. Court Approval of Fees and Costs

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

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

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

B. Expert Expenses

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

C. Other Expenses

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

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

2. There is no reimbursement for meals.

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

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

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

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

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

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

D. Hourly Fee

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

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

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

E. Form and Timing of Submission

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

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

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

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

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

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

ARTICLE VI. TERMINATION

A. Termination by the Parties

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

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

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

B. Jurisdiction and Choice of Law

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

C. Code of Professional Responsibility

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

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

D. Insurance

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

E. Conflict of Interest

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

F. Equal Opportunity

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

G. Right to Contact

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

H. Entire Agreement/Integration

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

I. Severability of Terms and Conditions

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

J. Amendment or Modification

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

K. Headings

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

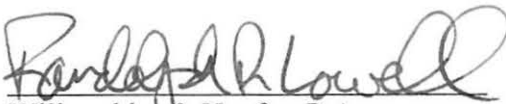
L. Counterparts

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

ATTORNEY GENERAL OF SOUTH CAROLINA

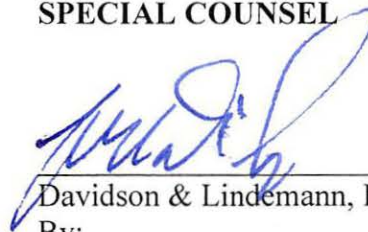
Alan Wilson

SPECIAL COUNSEL



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

SPECIAL COUNSEL



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

EXHIBIT E

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Legal Services

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

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

B. Notices and Correspondence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Signatures on following page.]

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

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

Date: 6/13/19

SPECIAL COUNSEL

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

Date: 6/7/19

EXHIBIT F

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

AGREED TO:

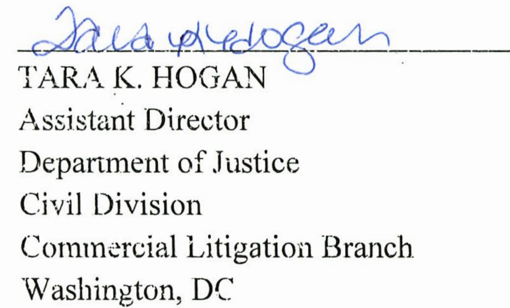
UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

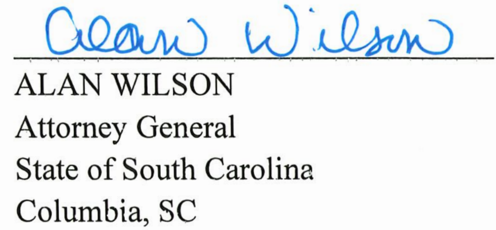
ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section



TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA



ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

EXHIBIT G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE OF SOUTH CAROLINA,	)	
	)	
Appellant,	)	
	)	
v.	)	19-2324
	)	
THE UNITED STATES,	)	
	)	
Appellee.	)	

AGREEMENT TO VOLUNTARY DISMISSAL OF APPEAL

Pursuant to Rule 42 of the Federal Rules of Appellate Procedure, appellant, the State of South Carolina, and appellee, the United States, stipulate and agree that this appeal should be dismissed with prejudice, with each side to bear its own costs.

This dismissal is made as part of an agreement to resolve and settle a number of disputes, including the issue presented on appeal. The settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs. Such payment has been made, and with this requirement now being satisfied, the parties request dismissal of this appeal with prejudice.

Respectfully submitted,

Of Counsel:

Alan Wilson
South Carolina Attorney General
Robert D. Cook
Solicitor General
ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA
Post Office Box 11549
Columbia, South Carolina 29211-1549
awilson@scag.gov
bcook@scag.gov
Telephone: (803) 734-3970
Facsimile: (803) 734-3524

Attorney of Record:

/s/Randolph R. Lowell
Randolph R. Lowell
John W. Roberts
WILLOUGHBY & HOEFER, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
rlowell@willoughbyhoefer.com
jroberts@willoughbyhoefer.com
Telephone: (843) 619-4426
Facsimile: (843) 619-4430

September 29, 2020

Attorneys for Appellant

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Tara K. Hogan
TARA K. HOGAN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-2228
Tara.Hogan@usdoj.gov

September 29, 2020

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Randolph R. Lowell
Randolph R. Lowell
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 155 words, according to the count of Microsoft Word.

/s/Randolph R. Lowell
Randolph R. Lowell

EXHIBIT H

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF RICHLAND)

Kimberly Buckley, being duly sworn, attests to the following:

1. I am the Finance Director for the Office of the Attorney General.
2. The funds for payment were received on September 15, 2020 and deposited in agency's escrow fund on September 17, 2020.
3. On September 16, 2020 at 2:03 p.m. the Finance Department received the invoice from Willoughby and Hoefer for attorneys' fees and a request that the fees be tendered to the firm trust account as soon as such funds are transferred to the Attorney General's Office.
4. The Finance Department received approval to process the payment for attorney fees from Chief Deputy Attorney General on September 17, 2020.
5. The Finance Department submitted the request for increased budget authorization needed to process the payment to the Executive Budget Office (EBO) for approval on September 17, 2020. Copy attached. EBO emailed its approval of the increased budget authorization request to me at 9:21 a.m. on September 25, 2020. See attached.
6. Following receipt of the above approval of the increased budget authorization from EBO, the Finance Department of the Attorney General's Office began processing the payment. The funds for attorney fees ($75m) was transferred from the agency escrow fund to the litigation fund for processing.
7. The payment was entered into the South Carolina Enterprise Information System (SCEIS) by the Fiscal Analyst on the morning of September 25, 2020. At 11:21 a.m. that day, Accounting Supervisor approved the payment.

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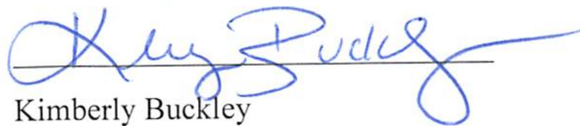
8. At 1:43 p.m. on the September 25, 2020, I reviewed and approved the payment in the State Carolina Enterprise Information System (SCEIS). After my approval, the payment was automatically routed to the Comptroller General's Office for review and final approval.
9. Attached are screenshots of the System Workflow showing the processing of the attorneys' fee payment to Willoughby and Hoefer through the SCEIS System. See attached.
10. My understanding is that Willoughby & Hoefer contacted the Treasurer's Office on September 28. The Director of Treasury Management at the Treasurer's Office offered a wire transfer option to the firm which would be immediate. To do so, the Attorney General's Office had to change the payment terms within the SCEIS payment document. Director of Treasury Management contacted a fiscal analyst at the Attorney General's Office for her to do so. The Director of Treasury Management sent me a wire request form for the payment. I reviewed what the Treasurer's Office sent over and then sent it back on the 28th. See attached email string from Cash Desk Manager at the Treasurer's Office.
11. The Treasurer's Office confirmed that it wired the funds to the law firm on September 29 at 9:14 a.m. See attached Cash Desk Manager email.



Kimberly Buckley

SWORN TO before me this 1st
day of October, 2020
Tammie Wilson

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3/30/2021

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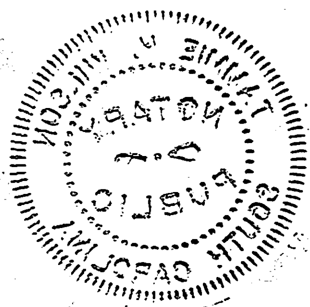

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admin
THE SOUTH CAROLINA
DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

This form is used to request an interim increase of Other Funds budget authorization. Approval is subject to the review of the Joint Other Funds Oversight Committee and the approval of the Executive Budget Office. A budget entry in SCEIS should accompany this request.

AGENCY: E200 - Attorney General **DATE:** 9/17/2020

AMOUNT REQUESTED: 75,000,000.00

Please provide responses to the questions below. Attached additional documentation if necessary.

1. Please provide a description of your request.

   RESPONSE: One-time other funds authorization increase to support the payment of outside counsel fees and litigation cost in the U.S. Department of Energeny v. State of SC settlment agreement. All supporting documentation is attached.

2. What expenses will be paid with this requested authorization?

   RESPONSE: Cost and fees for civil litigation-USDOE v. State of SC settlement agreement

3. What funding source will be used to fulfill this request?

   RESPONSE: Other funds received from USDOE settlement agreement

4. Why is the agency's existing Other Funds authorization level not sufficient to cover this request? Why was this authorization not requested during the previous budget cycle?

   RESPONSE: This is a very sustancial one time litigation settlement requiring payment far beyond the agency's current level of other funds authorization.

5. Is all or part of the expenditure authorization supported by actual cash received and brought forward from the previous fiscal year?

   RESPONSE: No, all current funds

6. Is all or part of the expenditure authorization request supported by an increase in projected revenue? If yes, explain in detail.

   RESPONSE: Yes, increase in revenue of other funds due to settlement agreement (600.42m). Agency will be retaining between 10-15m from settlement for cost, fees and fines and all ther funds will be disbursed to outside counsel (75m) and State Litigation Recovery Account (remainder).

7. Is this request for a recurring initiative or a one-time request? ☐ Recurring ☒ One-time

admin
THE SOUTH CAROLINA
DEPARTMENT *of* ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

8. If this is a recurring initiative, has additional authority been requested in the budget cycle for the upcoming fiscal year? ☐ Yes ☒ No

9. **Cabinet Agencies:** Has this request been reviewed with the Governor's Office? ☐ Yes ☒ No

AGENCY CERTIFICATION

The agency certifies that the cash identified is sufficient and available. The agency also acknowledges that, if approved, this adjustment is only in effect until the end of the current fiscal year.

[signature] 9-17-2020

Authorized Agency Representative / Date

JOINT OTHER FUNDS OVERSIGHT COMMITTEE RECOMMENDATION

APPROVE	DISAPPROVE	MEETING DATE
☐	☐	________________

EXECUTIVE BUDGET OFFICE RECOMMENDATION

APPROVE	DISAPPROVE	SIGNATURE	DATE
☒	☐	________________ ANALYST, EXECUTIVE BUDGET OFFICE	________
		[signature] DIRECTOR, EXECUTIVE BUDGET OFFICE	9/25/2020

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Emory Smith

From: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Sent: Friday, September 25, 2020 9:13 AM
To: Kim Buckley
Subject: RE: [External] FW: MOX

It has been approved. Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account. Will you let me know when this is done?

Lauren Parker Wright
Budget/Research Analyst, Executive Budget Office

The South Carolina
Department of Administration
1205 Pendleton Street, Suite 529, Columbia, SC 29201
(803) 734-7216 | (803) 734-0645 fax

The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.

-----Original Message-----
From: Kim Buckley <KBuckley@scag.gov>
Sent: Thursday, September 24, 2020 5:17 PM
To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Subject: Re: [External] FW: MOX

Thanks, Lauren. I think the Chief Deputy AG may be reaching out to Brian to check on the status. He asked for his contact info. Just to give a heads up. I know these things take time and relayed that to them. They have been asking me daily. Appreciate your help with this!

Kim

Sent from my iPhone

> On Sep 24, 2020, at 3:32 PM, Parker, Lauren <Lauren.Parker@admin.sc.gov> wrote:
>
> I believe we are waiting on the higher ups- as soon as I hear anything I'll let you know. I have no idea why its taking so long.
>
> Lauren Parker Wright
> Budget/Research Analyst, Executive Budget Office
>
> The South Carolina
> Department of Administration
> 1205 Pendleton Street, Suite 529, Columbia, SC 29201
> (803) 734-7216 | (803) 734-0645 fax
>

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> The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.
>
> -----Original Message-----
> From: Kim Buckley <KBuckley@scag.gov>
> Sent: Thursday, September 24, 2020 3:31 PM
> To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
> Subject: [External] FW: MOX
>
> Lauren,
>
> I hope you are doing well. So sorry to bother but has there been any movement on authorization approval?
>
> Best,
>
> Kimberly Buckley
> Finance Director
> SC Attorney General's Office
> 803-734-3771
> kbuckley@scag.gov
>
>

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Display Document: Data Entry View

Taxes | Display Currency | General Ledger View

Data Entry View

Document Number	3019766484	Company Code	SC01	Fiscal Year	2021
Document Date	09/15/2020	Posting Date	09/25/2020	Period	3
Reference	MOX ACCT762-010C	Cross-Comp.No.			
Currency	USD	Texts exist		Ledger Group	

CoCd	Item	PK	S	Account	Cmmt item	Ex/Rev A/c	Description	Amount	BusA	Fund	Partner Fund	Grant	Cost Center	Func. Area	Funded Pro
SC01	1	31		7000029190	2000010000		WILLOUGHBY & HOE...	75,000,000...	E200						
SC01	2	40		5021020000	5021020000		ATTORNEY FEES	75,000,000...	E200	303500...		NOT RELEVA...	E200CB0010	E200_0004	E200CB001

Data on Linked Workflows

Workflows for Current Context

Title	Creation Da...	Creation ...	Status	Task	Task
Invoice 3019766484 Approval	09/25/2020	11:15:00	Completed	WS91000056	AP Invoice Approval FIPP
imaging workflow to allow rejections	09/25/2020	10:51:04	Completed	WS91000029	imaging workflow to allow rejections

ELECTRONICALLY FILED - 2020 Oct 06 6:00 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Step name	Status	Result	Creation date/time	End date/time	Agent
check workflows background method	Completed	No	09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Determine Cost Centers for Invoice 3019766484	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Determine AP Supervisor for 3019766484	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Year End Check	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Agents from Role YWF STO APTM-ALL	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 11:15:00	09/25/2020 - 11:21:32	JOAN POTTS
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 11:21:32	09/25/2020 - 13:43:14	KIMBERLY BUCKLEY
Post an Invoice 3019766484 2021	Completed		09/25/2020 - 13:43:14	09/25/2020 - 13:43:19	Workflow System
Local Check Determination	Completed		09/25/2020 - 13:43:19	09/25/2020 - 13:43:19	Workflow System
Place P Block for WF273	Completed		09/25/2020 - 13:43:19	09/25/2020 - 13:43:49	Workflow System
Determine AP 10K for 3019766484	Completed		09/25/2020 - 13:43:49	09/25/2020 - 13:43:49	Workflow System
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 13:43:49	09/28/2020 - 17:09:15	BRIAN CRONE
STO: E200 Method/Terms = 3 for 3019766484	Completed	Mail sent	09/28/2020 - 17:09:14	09/28/2020 - 17:09:14	Workflow System
Remove P Block for WF273	Completed		09/28/2020 - 17:09:14	09/28/2020 - 17:09:14	Workflow System
3019766484 SC01 2021	Completed		09/28/2020 - 17:09:15	09/28/2020 - 17:09:15	Workflow System

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ELECTRONICALLY FILED - 2020 Oct 06 6:00 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Emory Smith

From:	Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Sent:	Wednesday, September 30, 2020 9:07 AM
To:	Kim Buckley
Cc:	Simmons, Melissa
Subject:	RE: [External] Fwd: Wire Request-AGO

Kim,

The wire processed successfully on 9/29/20 at 9:14am EST according to our online banking wire information. STO also received a verbal confirmation from the beneficiary. Our best practice is that we do not share the details(documents) of transactions initiated on our wire transfers system. Wire processing and book transfer is a normal part of our daily business practice and we monitor those transactions carefully . If you have any additional question, please let me know and I will be happy to assist.

Thank you,
Michelle

Michelle Blanchfield | Cash Desk Manager
South Carolina Treasurer's Office
1200 Senate Street, Suite 214
Wade Hampton Building
Columbia, SC 29201
803-734-0259 | michelle.blanchfield@sto.sc.gov

From: Kim Buckley <KBuckley@scag.gov>
Sent: Wednesday, September 30, 2020 6:27 AM
To: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: [External] Fwd: Wire Request-AGO

Michelle,

I hope you are doing well. Can you let me know if this wire has been processed and If so the date and time of processing? If there is a document you can send me showing this information that would be helpful.

Thank you!

Kim

Sent from my iPhone

Begin forwarded message:

> **From:** Kim Buckley <KBuckley@scag.gov>
> **Date:** September 28, 2020 at 4:37:00 PM EDT
> **To:** "Michelle.Blanchfield@sto.sc.gov" <Michelle.Blanchfield@sto.sc.gov>
> **Cc:** "Simmons, Melissa" <Melissa.Simmons@sto.sc.gov>
> **Subject: Wire Request-AGO**

Michelle,

Please see the request for wire transfer for Willoughby and Hoefer. Please let me know if you need anything additional.

Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

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RECEIVED
May 05 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

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

v.

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

PROOF OF SERVICE

This is to certify that the undersigned counsel, an attorney with The Rutherford Law Firm, LLC, has caused to be served this day one (1) copy of Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A.'s Motion for Certification and one (1) copy of Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A.'s Memorandum in Support of Motion for Certification via electronic mail at the email addresses as stated in the Attorney Information System and as set forth below:

J. Emory Smith, Jr., Esquire
Alan M. Wilson, Esquire
Robert D. Cook, Esquire
Office of the Attorney General
esmith@scag.gov
awilson@scag.gov
bcook@scag.gov

William H. Davidson, II, Esquire
Kenneth P. Woodington, Esquire
Davidson, Wren & DeMasters, P.A.
wdavidson@dml-law.com
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James M. Griffin, Esquire
Badge Humphries, Esquire
Margaret N. Fox, Esquire
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James G. Carpenter, Esquire
The Carpenter Law Firm, PC
james.carpenter@carpenterlawfirm.net

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

s/J. Todd Rutherford
J. Todd Rutherford, S.C. Bar No. 12097

May 5, 2020
Columbia, South Carolina

Todd Rutherford

From:	Todd Rutherford
Sent:	Wednesday, May 5, 2021 4:53 PM
To:	'esmith@scag.gov'; 'awilson@scag.gov'; 'bcook@scag.gov'; 'jgriffin@griffindavislaw.com'; 'jgriffin@griffinhumphries.com'; 'bhumphries@griffinhumphries.com'; 'mfox@griffindavislaw.com'; 'james.carpenter@carpenterlawfirm.net'
Cc:	'wdavidson@dml-law.com'; 'kwoodington@dml-law.com'; 'gmalloy@bellsouth.net'; 'jsimmons@simmonslaw.com'
Subject:	SC Public Interest Foundation et al v Wilson et al; Appellate Case No. 2021-000343
Attachments:	2021-05-05 Filing Ltr re Mot for Certification Memo in Support.pdf; 2021-05-05 WH and DWD Motion to Certify.pdf; 2021-05-05 WH and DWD Memo ISO Motion to Certify (w Exs).pdf

Counsel:

As permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, I am herewith serving via email Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A.'s Motion for Certification and Memorandum in Support of Motion for Certification (with Exhibits A-H) in the above-captioned case. Shortly, I will be filing these documents with the Supreme Court electronically as permitted by part c(6) of the Order, and will attach this email to the proof of service of same.

THE RUTHERFORD LAW FIRM, LLC
J. TODD RUTHERFORD
ATTORNEY AT LAW

2113 PARK STREET
P.O. BOX 1452
COLUMBIA, SC 29202

TELEPHONE: (803) 256-3003
FACSIMILE: (803) 256-9698

May 5, 2021

RECEIVED
May 05 2021
SC Court of Appeals

VIA ELECTRONIC FILING
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais 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. 2021-000343

Dear Mr. Shearouse:

Attached for electronic filing in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rules 204(b) and 240 of the South Carolina Appellate Court Rules, please find Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A.'s Motion for Certification and Memorandum in Support in the above-captioned matter. 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 parties via email as permitted by Order 2020-05-29-02, part (g)(3), and attached is a proof of service to that effect.

A check in the amount of $50.00 for the filing fee associated with this motion is being forwarded to your attention via U.S. Mail.

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

Sincerely,

THE RUTHERFORD LAW FIRM, LLC

s/J. Todd Rutherford

J. Todd Rutherford

Attachments

cc: The Honorable Jenny Abbott Kitchings
James M. Griffin, Esquire
Badge Humphries, Esquire
Margaret N. Fox, Esquire
James G. Carpenter, Esquire
William H. Davidson, II, Esquire

Kenneth P. Woodington, Esquire
J. Emory Smith, Jr., Esquire
Alan M. Wilson, Esquire
Robert D. Cook, Esquire
(*all via email*)