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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

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.

**RECORD ON APPEAL
VOLUME ONE**

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October 25, 2021

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The Supreme Court of South Carolina

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

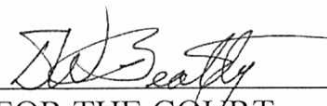
v.

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

Appellate Case No. 2021-000472

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, the appeal in
Appellate Case No. 2021-000343 is hereby certified for review by the Supreme
Court of South Carolina.



FOR THE COURT C.J.

Columbia, South Carolina
July 06, 2021

cc: William H. Davidson, II, Esquire
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John S. Simmons, Esquire
James Todd Rutherford, Esquire
Gerald Malloy, Esquire
The Honorable Jenny Abbott Kitchings

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

This matter is before the Court on the motions of Defendants Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A. (collectively, the “Defendants”) each for an order dismissing Plaintiffs’ Amended Complaint. For the reasons set forth below, this Court **GRANTS** the motions and **DISMISSES** the Amended Complaint with prejudice.

Procedural History

In the Amended Complaint, Plaintiffs instituted this action against Alan Wilson, 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 entered into between the Attorney

General and the Law Firms.¹ Plaintiffs 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 Plaintiffs lacked standing and also had not demonstrated that they met the legal standards for the issuance of a preliminary injunction. *See Order Denying Plaintiffs' Motion for Preliminary Injunction Order* ("PI Order"). Plaintiffs subsequently filed a motion to reconsider the PI Order, which Judge Lee denied on December 17, 2020. *See Order Denying Plaintiffs' Motion to Alter or Amend* ("Reconsideration 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), SCRPC, on the grounds that Plaintiffs lack standing and have failed to state facts sufficient to constitute a cause of action against the Defendants. The Attorney General filed his own Motion to Dismiss on October 27, 2020, seeking dismissal on similar grounds. On January 20, 2021, Defendants filed memoranda in support of their Motions to Dismiss and Plaintiffs filed a memorandum in opposition. On January 26, 2021, this Court conducted a hearing via WebEx on the Motions to Dismiss. James Mixon Griffin,

¹ The Attorney General 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 Mixed Oxide ("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 MOX Facility.

Esquire, and Badge Humphries, Esquire, appeared on behalf of Plaintiffs. J. Todd Rutherford, Esquire, John S. Simmons, Esquire, and Gerald Malloy, Esquire, appeared on behalf of W&H. William H. Davidson, II, Esquire, and Kenneth P. Woodington, Esquire, appeared on behalf of DW&D. J. Emory Smith, Esquire, appeared on behalf of Attorney General Wilson.

Factual Background

It appears from the Amended Complaint and its incorporated affidavit and attachments that, in February 2016, the State of South Carolina, represented by the Law Firms, initiated what ultimately became several lawsuits against the Department of Energy (“DOE”) and/or the United States related to the MOX Facility at the Savannah River Site (“SRS”) and certain weapons grade (defense) plutonium stored at SRS. After several years of litigation before several different federal district and appellate courts, 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.” 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, both of which are contractually enforceable by the State. The Federal Government submitted the settlement payment to the State on September 15, 2020. Thereafter, the State and Federal Government jointly filed with the U.S. Court of Appeals for the Federal Circuit an agreement for voluntary dismissal dismissing the pending litigation on September 29, 2020. Agreement to Voluntary Dismissal of Appeal, *State of South Carolina v. United States*, No. 19-2324 (Fed. Cir. Sept. 29, 2020).

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

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 upfront settlement amount recovered on behalf of the State by the Law Firms.²

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys' fees owed pursuant to the Litigation Retention Agreement on September 17, 2020. The payment was authorized by the Comptroller General and Treasurer and was approved by the Executive Budget Office ("EBO") of the Department of Administration in the normal course. On the morning of 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.

Discussion

For the reasons set forth herein and in the PI Order, this Court finds that the Motions to Dismiss should be granted and the Amended Complaint dismissed with prejudice. In the PI Order, Judge Lee specifically found that Plaintiffs do not have standing to pursue any of their claims against the Defendants. PI Order at 4-12; *see also* Reconsideration Order at 1-2.

Initially, Judge Lee's findings are dispositive.³ "It is settled [law] that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge."

² 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 Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove nine additional metric tons or pay the State the additional sum of \$1.5 billion.

³ Plaintiffs contend that Judge Lee's findings are not binding in this case, citing to Rule 54(b), SCRCR, in purported support. However, Rule 54(b) is inapplicable as it applies only to instances in which a court "adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties." Here, Judge Lee determined that Plaintiffs lacked standing for **all** of their claims and had **no** rights to assert such claims against the Defendants.

State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (1985) (citing cases); see *Graham v. Town of Loris*, 248 S.E.2d 594, 597, 272 S.C. 442, 449 (1978) (“The Court of Common Pleas is a unity. . . . There is no appeal from one Circuit Judge to another.”) (quoting *Steele v. C., C. & A. Railroad Co.*, 14 S.C. 324 (1880)). Therefore, even if this Court had identified any reason to modify Judge Lee’s orders, which, as explained below, it has not, Judge Lee’s findings are dispositive and require dismissal.

Nonetheless and in the alternative, this Court has thoroughly reviewed the PI Order and Reconsideration Order and concurs with and adopts Judge Lee’s well-reasoned analysis and findings. Plaintiffs lack standing to maintain their claims against Defendants, and therefore, the Motions to Dismiss must be granted.

Conclusion

For the reasons set forth above and in Judge Lee’s PI Order and Reconsideration Order, it is **ORDERED, ADJUDGED, AND DECREED** that the Motions to Dismiss of Defendants are **GRANTED** and this case is **DISMISSED**, with prejudice.

AND IT IS SO ORDERED.

The Honorable R. Kirk Griffin
Court of Common Pleas

February __, 2021
Columbia, South Carolina



Richland Common Pleas

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

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2021-03-05 14:39:06 page 6 of 6



State of South Carolina
The Circuit Court of the Third Judicial Circuit

R. Kirk Griffin
Judge

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February 12, 2021

TO: JAMES G. CARPENTER, ESQUIRE
JAMES M. GRIFFIN, ESQUIRE
BADGE HUMPHRIES, ESQUIRE
WILLIAM H. DAVIDSON, ESQUIRE
GERALD MALLOY, ESQUIRE
JAMES T. RUTHERFORD, ESQUIRE
JOHN S. SIMMONS, ESQUIRE
J. EMORY SMITH JR., ESQUIRE
JOSEPH P. STROM, ESQUIRE
KENNETH P. WOODINGTON, ESQUIRE

FROM: R. KIRK GRIFFIN

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 AND DEMASTERS, P.A.
2020-CP-40-04603

This matter was held via WebEx on January 26, 2021 with all parties represented by counsel. After reviewing the issues under advisement and all items submitted by the parties, **I respectfully grant the Defendants' Motions to Dismiss.**

The Court finds that Circuit Court Judge Alison Renee Lee's order dated October 14, 2020 is dispositive as to the issue of standing. As the Plaintiffs lack standing to maintain a claim, the Defendants' Motions to Dismiss must be granted. Because the standing issue is dispositive of the matters before the Court, the Court declines to rule on the remaining grounds for dismissal raised in the Defendants' memoranda.

Defense Counsel please draft a single proposed order within 30 days. Please include a detailed procedural history and factual background. Upon completion, please forward the proposed order to Plaintiffs' counsel. Upon review, please submit the order via efilings, and I will sign if appropriate.

If you have any questions, please feel free to contact my office.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest	)	
Foundation and John Crangle,	)	Case No. 2020-CP-40-04603
individually and on behalf of all	)	
others similarly situated,	)	
	)	ORDER DENYING PLAINTIFFS'
Plaintiffs,	)	MOTION TO ALTER OR AMEND
	)	
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 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]



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 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest	)	
Foundation and John Crangle,	)	Docket No. 2020-CP-40-04603
individually and on behalf of all	)	
others similarly situated,	)	
	)	ORDER DENYING PLAINTIFFS'
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.

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,

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:

(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.

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 administering § 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.

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

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

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.

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

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]



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 2020-10-14 17:33:59 page 15 of 15

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4004603

South Carolina Public Interest Foundation et al
PLAINTIFF(S)

Alan Wilson et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Temporary Restraining Order issued on September 30, 2020, is hereby extended to and through October 14, 2020. Such order will remain effective until that date, pending an order on the Preliminary Injunction.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/08/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number: 2020CP4004603
Type: Order/Electronic Form 4

IT IS SO ORDERED!

s/ Alison Renee Lee, Chief Administrative Judge
for 2020

Electronically signed on 2020-10-08 15:25:33 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4004603

South Carolina Public Interest Foundation et al
PLAINTIFF(S)

Alan Wilson et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

On September 29, 2020, a hearing was held on Plaintiffs' Motion for a Preliminary Injunction, which this Court took under advisement.

Subsequent to that hearing, this Court issued a Temporary Order enjoining the Defendant or the State Treasurer from releasing the disputed funds until this Court ruled on the Plaintiffs' motion.

On September 30, 2020, this Court learned that the \$75 million in attorney's fees had already been transferred prior to the hearing on September 29, 2020. Plaintiffs have since amended their pleadings and obtained a Temporary Restraining Order against the now Defendant law firms from the Honorable Alison Renee Lee, which enjoins the Defendant law firms from transferring, spending, pledging or otherwise encumbering the disputed funds until a hearing is held on October 7, 2020.

Therefore the Plaintiffs' motion before this Court is now MOOT, and therefore DENIED. The Order of this court issued September 29, 2020 is hereby VACATED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/01/2020 .

Willoughby & Hoefer Pa
Davidson Wren & Demasters Pa

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number: 2020CP4004603
Type: Order/Electronic Form 4

So Ordered

Debra R. McCaslin

Electronically signed on 2020-10-01 16:06:44 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

Alan Wilson, Attorney General for the State
of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

2020-CP-40-04603

**ORDER GRANTING TEMPORARY
INJUNCTION PENDENTE LITE**

This matter comes before the Court on Plaintiffs South Carolina Public Interest Foundation and John Crangle's, et.al., Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65, SCRCF. The motion was heard by way of a virtual hearing on September 29, 2020. Appearing on behalf of Plaintiffs were James Griffin and Badge Humphries, and on behalf of Defendant Alan Wilson, as Attorney General for the State of South Carolina ("the Defendant"), was Deputy Solicitor General Emory Smith. At the conclusion of the hearing, this Court took Plaintiff's Motion under advisement.

Plaintiffs seek a Preliminary Injunction against the Defendant in order to prevent the disbursement of \$75 million ("the disputed funds") which is to be paid to private law firms hired by the Defendant for services rendered in obtaining a \$600 million settlement which the Defendant has entered into with the United States Department of Energy (the "DOE"). On August 31, 2020, the Defendant announced the settlement which resolved a lawsuit against the DOE regarding the disposition of weapons grade plutonium stored at

the Savannah River Site. As a result of this settlement, the Defendant has agreed to pay two private law firms, Willoughby & Hoefer, P.A and Davidson, Wren & DeMasters, P.A. (“the law firms”) the disputed funds directly out of the proceeds of the settlement sum of \$600 million. Plaintiffs dispute the Defendant’s authority to directly disburse these funds and seek a preliminary injunction preventing the disbursement of said funds until this litigation is resolved on the merits.

At the hearing on Plaintiffs’ motion, the Defendant informed the Court that the funds had already been distributed to the law firms prior to the hearing, and thus Plaintiff’s motion was moot. Immediately after the conclusion of the hearing, Plaintiffs informed the Court that the disputed funds had been distributed from the Defendant to the State Treasurer, but had in fact not yet been distributed to the law firms, and that the State Treasurer was planning to do so imminently. Defendant disputed this assertion and asserts the funds had been received by the law firms today.

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). Out of an abundance of caution, this Court finds it necessary, in order to preserve the status quo and to prevent irreparable harm to the Plaintiffs, to issue a temporary injunction until this Court issues a full ruling on Plaintiffs’ Motion. This Court’s ruling on Plaintiff’s motion will be issued prior to Friday, October 2, 2020 at 5:00 PM, and thus this Order shall remain in effect no later than such time.

IT IS THEREFORE ORDERED,

The Defendant is hereby enjoined from ordering, approving, or facilitating the distribution of any portion of the disputed funds until this Court issues a ruling on Plaintiff’s motion. It is further ordered that the Office of the State Treasurer is hereby

enjoined from disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court. This Order is to remain in effect until Friday, October 2, 2020 at 5:00 PM.

IT SO ORDERED.

Debra R. McCaslin
Circuit Court Judge

September 29, 2020



Richland Common Pleas

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

So Ordered

Debra R. McCaslin

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiff,

v.

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

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2020-CP-40-04603

**EX PARTE
TEMPORARY RESTRAINING ORDER**

This matter comes before the Court on Plaintiffs' Motion for a Temporary Restraining Order prohibiting the law firm Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., from transferring, spending, pledging or otherwise encumbering the proceeds of a \$75 Million wire transfer received from the State of South Carolina on September 29, 2020. The transfer was completed prior to a hearing before Judge McCaslin¹ to consider Plaintiffs' motion for a temporary and/or preliminary order enjoining the Defendant Wilson from paying the law firms.

Plaintiffs have now amended their Complaint to add the law firm defendants, thus bringing the current recipients of these disputed proceeds before this Court. Plaintiffs seek an *ex parte* temporary restraining order preventing Defendants from any disbursement of the funds prior to a hearing on their Motion for Preliminary Injunction. The purpose of a preliminary injunction is to

¹ The hearing was scheduled in consultation with counsel for Plaintiffs and Defendant Wilson before Judge McCaslin.

preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

Thus, to prevent transferring, spending, pledging or otherwise encumbering the proceeds of the \$75 Million wire transfer received from the State of South Carolina and to prevent irreparable harm to the Plaintiffs, the Court hereby grants Plaintiffs' motion for an *ex parte* temporary restraining order.

IT IS THEREFORE ORDERED, Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., members of their respective firms and anyone acting in concert with these Defendants, are hereby enjoined 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.

IT IS FURTHER ORDERED that the Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., shall appear before this Court on **October 7th, 2020 at 9:30am, via Webex Events – Hon. Alison Renee Lee Virtual Courtroom**, to show cause why Plaintiffs' motion for a preliminary injunction should not be granted. Defendant Law Firms should be served no later than 12pm noon, Friday, October 2, 2020.

AND IT SO ORDERED.

[Electronic Signature to Follow]



Richland Common Pleas

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

IT IS SO ORDERED!

s/ Alison Renee Lee

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUITSouth 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,

Defendant

Case No. 2020-CP-40-_____

SUMMONS**TO THE DEFENDANT ABOVE-NAMED:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the Plaintiffs or their attorney, James M. Griffin of Griffin Humphries LLC, 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206-3135, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Badge Humphries

James M. Griffin, S.C. Bar No. 9995

Badge Humphries, S.C. Bar No. 72904

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Attorneys for Plaintiffs

Columbia, South Carolina
September 25, 2020

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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,

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2020-CP-40-_____

COMPLAINT

NOW COME the Plaintiffs, by their undersigned attorneys, and as a Complaint against the Defendant, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation (“SCPIF”) is a corporation, not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest including the upholding of the Constitution and laws of the State of South Carolina.
2. Plaintiff John Crangle is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.
3. Defendant Alan Wilson is the Attorney General for the State of South Carolina.
4. This Court possesses jurisdiction under S.C. Constitution, Art. I, § 8, under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public importance standing and citizen or taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina*

Public Interest Foundation v. Lucas, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

5. This action raises constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

FACTS

6. On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade

- plutonium at the Savannah River Site (“SRS”). Affidavit of James M. Griffin, Sept. 25, 2020 (attached hereto as Exhibit A and hereinafter referenced as “Griffin Aff.”), Ex. 1.
7. The agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566 (“Section 2566”).
 8. Section 2566 provides for the construction and operation of a mixed oxide (“MOX”) fuel fabrication facility at the SRS (the “MOX Facility”) to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. The MOX Facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually. The statute further required the DOE to establish a plan to achieve the MOX production objective of “not less than one metric ton of [MOX] fuel per year” by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.
 9. If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022.
 10. The statute further provides that “[i]f the MOX production objective is not achieved as of January 1, 2016, the Secretary [of the DOE] shall, subject to the availability of appropriations, pay to the State of South Carolina . . . for economic and impact assistance an amount equal to \$1 million per day for each day, not to exceed \$100 million per year.” 50 U.S.C. § 2566(d)(1).
 11. The DOE has never met the milestones set forth in 50 USC § 2566.

12. Under the terms of the Settlement Agreement, Defendant Wilson agreed on behalf of the Citizens of South Carolina to forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of violations of 50 USC § 2566 until 2037. Griffin Aff., Ex. 1, ¶ 5(b).
13. In exchange, the United States agreed to an immediate payment to the State of South Carolina in the amount of \$600 million. *Id.* ¶ 5(a).
14. The Settlement Agreement resolves “all claims relating to economic assistance payments or removal of plutonium that have arisen, or will arise.” *Id.* ¶ 13.
15. Defendant Wilson announced at a press conference that he intends to pay two private law firms \$75 million from the \$600 million economic impact and assistance payment for their legal services in representing the State.
16. Upon learning of Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” Griffin Aff., Ex. 2.
17. Governor McMaster concluded the letter stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.*
18. First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that State law requires the entire amount be deposited into the State’s General Fund. Griffin Aff., Ex. 3.

**Attorney General Wilson Does Not Possess Authority to Use Proceeds from
the U.S. DOE Settlement of Economic Impact and Assistance Payments
Owed to South Carolina to Pay Private Law Firms**

19. The payment of \$75 million to private law firms from a settlement of economic impact and assistance payments owed by the DOE to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution.
20. When money under a settlement agreement is payable directly to the State, as in the case with the Settlement Agreement, the proceeds must be deposited in the General Fund, and only the Legislature controls its appropriation.
21. Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement.
22. In this matter, neither the court order nor the settlement exception applies.
23. There is not any order awarding attorneys' fees.
24. The Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees.
25. Rather, the United States expressly disclaims any liability for attorneys' fees in Section 5(a) of the Settlement Agreement, which provides for "[i]mmediate *payment by the United States to the State of South Carolina* in the amount of \$600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1, § 5(a) (emphasis added).
26. Section 5(a) of the Settlement Agreement clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina.

27. Nevertheless, Defendant Wilson plans to pay private lawyers \$75 million, out of the \$600 million, which is required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.
28. The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et. seq.*
29. Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30.
30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay \$75 million to the law firms from the \$600 million his agency will receive through this settlement.
31. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.
32. Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.")

33. Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.*
34. Defendant Wilson’s intent to pay \$75 million from the State’s \$600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

**The Amount of the Fee Is Patently Unreasonable and
Cannot Be Paid Until Approved by Court Order**

35. Even if the settlement was structured in a way that the United States agreed to pay the State’s litigation costs, attorneys fees totaling \$75 million for the amount of work performed in this case appears to be patently unreasonable.
36. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee.” Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3.
37. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).
38. The lawyers brought suit to collect a statutory payment for economic impact and assistance of \$100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.
39. The DOE never contested that it failed to comply with federal law.

40. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.
41. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 Million assistance payment for failing to comply with the statute.
42. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.
43. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.
44. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.
45. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.
46. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.
47. Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6.
48. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated. The Settlement

Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *Id.*, Ex. 2.

49. In apparent recognition that contingency fee agreements entered into with the State of South Carolina may produce an unreasonable fee award, the fee agreement entered into with the law firms expressly provides that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” *Id.*, Ex. 7.
50. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of \$75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.
51. Furthermore, a payment of \$75 million to the law firms exceeds the amount of fee that they would be entitled to receive under the contingency fee agreements entered with these firms.
52. The fee agreement provides for a base contingency fee payment of \$29,250,000, calculated as follows:

\$0 to \$25,000,000	21%	\$5,250,000
\$25,000,000 to \$50,000,000	18%	\$4,500,000
\$50,000,000 to \$75,000,000	15%	\$3,750,000
\$75,000,000 to \$100,000,000	13%	\$3,250,000
\$100,000,000 to \$125,000,000	11%	\$2,750,000
\$125,000,000 to \$150,000,000	9%	\$2,250,000
\$150,000,000 to \$250,000,000	4%	\$4,000,000
\$250,000,000 to \$600,000,000	1%	\$3,500,000
Total Fee		\$29,250,000

Id., Ex. 8.

53. Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. (“Willoughby & Hoefer”) additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm’s representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*
54. The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child’s ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9.
55. On June 7, 2019, Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).
56. Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court.
57. The amended fee agreement was executed on June 13, 2019, by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

58. Under the terms of the amended contingency fee agreement, Willoughby & Hoefer is being paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina.
59. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.
60. Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of \$600 million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court.
61. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over \$65,000 per page for these filings.
62. The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be \$50,250,000, yet Defendant Wilson intends to pay the firms \$75,000,000.
63. The fee agreement was entered into by Defendant Wilson on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract.
64. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

WHEREFORE, Plaintiffs pray the Court:

1. Declare that Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit \$600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
2. Declare that Section 2-65-30 prohibits the Attorney General from spending any portion of the \$600 million in federal funds unless and until he receives authorization from the EBO;
3. Declare that the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
4. Declare that the Attorney General's intended payment of \$75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause;
5. Declare, in the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable;
6. Enjoin, temporarily and permanently, the payment of attorneys' fees;
7. Grant Plaintiffs their costs and attorneys' fees under Section 15-77-300 of the South Carolina Code of Laws; and in the alternative, grant Plaintiffs their reasonable attorneys' fees and costs from the funds preserved through this action for the people of South Carolina, commonly known as the common fund doctrine; and
8. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries

James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
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Attorneys for Plaintiffs

September 25, 2020

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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,

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2020-CP-40-04603

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Plaintiffs hereby move the Court for a temporary restraining order and preliminary injunction pursuant to Rule 65, SCRPC. A temporary restraining order and preliminary injunction are necessary to preserve the status quo during the pendency of this action and to avoid irreparable injury. This motion is supported by the Complaint and Exhibits being filed herewith. Plaintiffs further allege the following:

FACTUAL SUMMARY

On August 31, 2020 Defendant Wilson announced the settlement of a lawsuit against the United States Department of Energy (the “DOE”) resolving the DOE’s liability for violating of the terms of an agreement brokered by former Governor James H. Hodges regarding the disposition of weapons grade plutonium stored at the Savannah River Site (“SRS”). Compl., Ex. A., Affidavit of James M. Griffin, Sept. 25, 2020 (hereinafter, “Griffin Aff.”), Ex. 1, Settlement Agreement. Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the DOE must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016

for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments. Under the terms of the settlement agreement announced by Defendant Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of \$600 million. Under the terms of the Settlement Agreement, the DOE is required to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” Griffin Aff., Ex. 1, ¶ 5(a). According to Wilson, this payment is expected on or after October 1, 2020.

Defendant Wilson has announced that he intends to pay two private law firms \$75 million from the proceeds of the DOE settlement. Upon learning of the Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that the entire amount must be deposited into the State’s General Fund. *Id.*, Ex. 3.

Plaintiffs have filed this action seeking injunctive relief and a declaratory judgment ruling that Defendant Wilson does not possess authority to use the proceeds from the DOE settlement to pay private law firms because the funds are intended solely for the State of South Carolina. Alternatively, if the Court were to conclude that Defendant Wilson is authorized to use these settlement proceeds to pay the private law firms, Plaintiffs seek an order requiring the Defendant to obtain court approval of the reasonableness of the fee as provided by the terms of the fee agreement with the law firms and South Carolina law.

ARGUMENT

The purpose of a temporary restraining order or preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). 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). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

Plaintiffs are entitled to an injunction to prohibit Defendant Wilson from paying \$75 million from a settlement ear-marked exclusively for the benefit of the State of South Carolina. Injunctive relief is necessary to preserve the status quo and prevent Plaintiffs' important constitutional challenge from becoming moot. Moreover, as established below, Plaintiffs have made a sufficient showing that they are entitled to relief.

I. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement

Plaintiffs contend that the payment of \$75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "*Immediate payment by the United States to the State of South Carolina in the amount of \$600 Million (Six Hundred Million), inclusive of interest, with each party to bear its own costs, attorneys fees and expenses.*" Accordingly, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson plans to pay private lawyers \$75 million, out of the \$600 million.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002)

(“[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Wilson’s intent to pay \$75 million from the State’s \$600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act (“Federal Funds Oversight Act”) specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et seq.* Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office (“EBO”) and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay \$75 million to the law firms from the \$600 million his agency will receive through this settlement. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

II. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling \$75 million for the amount of work performed in this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006).

The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this monetary claim,¹ ruling that any such claim must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the lawyers refiled the same claim before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel

¹ The District Court did not dismiss the State's claim for injunctive relief.

to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

In addition, the express terms of the fee agreement with the law firms states that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” *Id.*, Ex. 7. There is nothing prohibiting the Defendant Wilson from seeking judicial approval of the payment of \$75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.² However, the Defendant Wilson seeks to avoid judicial review and intends to pay the law firms \$75 million without making any showing of reasonableness.

Furthermore, a payment of \$75 million to the law firms exceeds the fee amount that the law firms would be entitled to receive under the contingency fee agreements entered with these firms. The fee agreement provides for a base contingency fee payment of \$29,250,000, calculated as follows:

\$0 to \$25,000,000	21%	\$5,250,000
\$25,000,000 to \$50,000,000	18%	\$4,500,000
\$50,000,000 to \$75,000,000	15%	\$3,750,000
\$75,000,000 to \$100,000,000	13%	\$3,250,000
\$100,000,000 to \$125,000,000	11%	\$2,750,000
\$125,000,000 to \$150,000,000	9%	\$2,250,000
\$150,000,000 to \$250,000,000	4%	\$4,000,000
\$250,000,000 to \$600,000,000	1%	\$3,500,000
Total Fee		\$29,250,000

Id., Ex. 8.

² Under South Carolina, the following factors are considered to determine whether an award of attorneys’ fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. (“Willoughby & Hoefer”) additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm’s representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child’s ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 10. On June 7, 2019 Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.11) and a Reply Brief on September 24, 2019 (*id.*, Ex. 12).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 13.

Thus, Willoughby & Hoefer is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State’s case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over \$65,000 per page for these filings.

The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be \$50,250,000, yet Defendant Wilson intends to pay the firms \$75,000,000. There has been no explanation for Defendant Wilson's decision to pay these firms an additional \$24,750,000 for a total payment of \$75 million.

Plaintiffs, individually and on behalf of the Citizens of this State, are third party beneficiaries under the fee agreement entered into with the law firms. Plaintiffs seek an order requiring Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs.

III. Plaintiffs Have Public Interest Standing

Plaintiffs have "public interest" standing to pursue the declaratory action and injunctive relief as recognized in the following cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640

S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

CONCLUSION

THEREFORE, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries

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Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM
	)	OF ATTORNEY GENERAL IN
Alan Wilson, Attorney General for the	)	OPPOSITION TO MOTION FOR
State of South Carolina	)	A TRO OR TEMPORARY
	)	INJUNCTION
Defendant.	)	
_____	)	

Without waiving any other defenses that may exist to this suit, the Attorney General, as named herein, opposes this Motion for injunctive relief for the reasons set forth below. At the outset, the Attorney General wants the Court to be aware that the fees are a part of a binding contract signed with outside counsel several years ago when no one anticipated a settlement anywhere nearly as high as \$600 million. The fee at issue is required by the binding contract, and the Attorney General has the authority to withdraw it from the settlement and pay it having obtained Executive Budget Office approval as discussed below. See Plaintiffs' Exs. 7 and 8. The Plaintiffs have not established grounds for this Court to take the extraordinary step of issuing an injunction here.

BACKGROUND

The motion asks that this Court "prohibit[] the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action" The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due to the

storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money to the State of South Carolina with each party to pay its own costs and attorney fees. Ex. 1, p. 2, ¶5a. The Agreement for Voluntary Dismissal filed today states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorneys' fees and costs. Exhibit 1, attached. The statute under which settlement was reached provides for payment of funds to the State of South Carolina. 50 U.S.C. 2566.

Prior to the filing of this action, the Executive Budget Office approved the withdrawal of attorney's fees from the settlement proceeds under S.C. Code Ann. §2-65-10 which states as follows: "[a] state agency may receive and spend unanticipated federal funds, and funds from private foundations or industries, which are not included in the appropriations act, but state agencies must submit expenditure proposals to the board [the Executive Budget Office (§2-65-15(4))] and receive authorization from the board before expenditure of funds." Exhibit 2, attached. I have just been informed this morning that the money for the fees has been transferred to the attorneys. Therefore, this matter is now moot.

**A TEMPORARY RESTRAINING ORDER AND
TEMPORARY INJUNCTION SHOULD BE DENIED**

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. . . . For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at

law. . . .” *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (2004)(emphasis added). Plaintiffs fail to meet these standards.

A

Plaintiffs Have No Likelihood of Success¹This matter is moot because the Executive Budget Office has approved the withdrawal of fees from the settlement monies and the fees have been transferred to the attorneys

As noted above, the Executive Budget Office approved the withdrawal of fees before this action was filed, and undersigned counsel was informed this morning that the fees have been transferred to the attorneys. Therefore, this matter is moot and nothing remains for this court to decide. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758-59 (2013) (“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.”). Although this case is moot, the following arguments are included should this Court, *arguendo*, wish to consider them.

2

“The Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . . .” Order of the Honorable G. Thomas Cooper, *Cephalon. v. Wilson*, Civil Action No. 2012CP4007317, June 6, 2014 (Exhibit 3)

Judge Cooper approved the withdrawal of fees from a settlement in the attached Order recognizing his authority in the above quote which is stated again below:

In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . . .

Order at p. 9. The Court based its ruling on S.C. Code Ann. § 1-7-170 (Approval by AG of engagement of outside counsel for department or agency), §1-7-85 (AG may obtain reimbursement of costs in representing the State) and *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E. 2d 445, 447-48 (AG has authority as State’s chief legal officer to appoint and approve private counsel to represent the State) as well as other authority cited therein. Order at pp. 8 and 9. As further stated in the Order, “the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85.” Order at p. 14. Accordingly, most significantly, the Order states that §1-7-150(B) “provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute 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.” (emphasis added). Contrary to Plaintiffs contention that this statute does not apply arguing that the fees were not “awarded the State of South Carolina by judgment or settlement . . .,” the settlement provides that each party bears its own fees thereby authorizing just what was done. Moreover, as noted above, the Agreement Dismissing the appeal states that the settlement agreement includes amounts for attorneys’ fees and costs. See Ex. 1, attached. Moreover, the Executive Budget Office, as noted above, has authorized this payment.

Accordingly, the Attorney General has the authority to withdraw attorney’s fees for outside counsel without depositing the money into the general fund. To enjoin him from doing so would be contrary to the above authority. Nothing in the above authority and the statutes

cited authorize a court to review the reasonableness of the fee, particularly in a collateral action such as this one in which Plaintiffs have no standing. Therefore, this Court lacks authority to review the fee. As noted above, the amount of the fee is controlled by contract.

3

Plaintiffs have no standing and present no justiciable controversy

Standing to sue is a fundamental requirement in instituting an action.” *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called “constitutional standing”; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statute confers standing on these Plaintiffs. Constitutional standing and public interest standing also fail.

The principle of standing under the United States Constitution is “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ ” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., supra, 380 at 195-96, 669 S.E.2d at 339). “Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.” *Commander Health Care Facilities, Inc. v. S. Carolina Dep’t of Health & Env’tl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

Whether Plaintiffs are alleging constitutional standing is not clear from the Complaint, but they cannot succeed because have not alleged a direct injury or the immediate danger that a

direct injury will be sustained so as to establish standing. As noted, they are not parties to the Federal suit nor are they parties to the settlement agreement. They also lack taxpayer standing. In another suit brought by Plaintiff South Carolina Public Interest Foundation, the Supreme Court found SCPIF and the individual “are unable to show they suffered a concrete and particularized injury distinct from that shared by other taxpayers; therefore, we find Petitioners do not have constitutional standing.” *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). Moreover, an “interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019, 140 L. Ed. 2d 210 (1998). With the settlement of the *State v. U.S.* action, Plaintiffs have no standing to challenge the fees and no case or controversy exists.

For these same reasons, public interest standing is lacking.

The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of “future guidance” that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (“[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.”) (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (“[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.”) (citations omitted).

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. Although the Court found that a need existed for future guidance in that bridge inspection case, public interest standing is lacking in the instant case because no need exists for “future guidance” in that this settlement is in a non-recurring matter, the matter is moot, and as discussed, *infra*, ample authority supports this payment. As stated by this Court in *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C.

343, 360, 815 S.E.2d 446, 455 (2018) in finding no public interest standing: “we ‘must be cautious with this exception, lest it swallow the rule.’”

Standing fails for the above reasons. Accordingly, Plaintiffs have also not alleged a case or controversy. *ACT S, supra; see also Steele, supra.*

Irreparable Harm

Plaintiffs do not state that they will suffer irreparable harm. Therefore, they have failed to satisfy a critical element of the showing needed to obtain a TRO or temporary injunction.

CONCLUSION

Plaintiffs must show both a likelihood of success and irreparable harm. They have shown neither and this matter is moot. Because they fail to meet those requirements, they are not entitled to a TRO or a temporary injunction, and adequacy of a remedy need not be addressed.

Respectfully submitted,

s/ J. Emory Smith, Jr.
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September 29, 2020

Attorneys for the Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUITSouth 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

AMENDED SUMMONS**TO THE DEFENDANTS ABOVE-NAMED:**

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the Plaintiffs or their attorney, James M. Griffin of Griffin Humphries LLC, 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206-3135, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Badge Humphries

James M. Griffin, S.C. Bar No. 9995

Badge Humphries, S.C. Bar No. 72904

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Attorneys for Plaintiffs

Columbia, South Carolina
September 30, 2020

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,

Case No. 2020-CP-40-04603

Plaintiffs,

AMENDED COMPLAINT

v.

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

Defendants.

NOW COME the Plaintiffs, by their undersigned attorneys, and as a Complaint against the Defendants, would show unto the Court:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff South Carolina Public Interest Foundation ("SCPIF") is a corporation, not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest including the upholding of the Constitution and laws of the State of South Carolina.
2. Plaintiff John Crangle is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.
3. Defendant Alan Wilson is the Attorney General for the State of South Carolina.
4. Defendant Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") is a law firm organized and existing under the laws of the State of South Carolina with its principal offices located in Columbia, Richland County, South Carolina.

5. Defendant Davidson, Wren & DeMasters, P.A. (“Davidson, Wren & DeMasters”) is a law firm organized and existing under the laws of the State of South Carolina with its principal offices located in Columbia, Richland County, South Carolina.
6. This Court possesses jurisdiction under S.C. Constitution, Art. I, § 8, under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public importance standing and citizen or taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep’t. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

7. This action raises constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

FACTS

8. On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached hereto as Exhibit A and hereinafter referenced as "Griffin Aff."), Ex. 1.
9. The agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566 ("Section 2566").
10. Section 2566 provides for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility at the SRS (the "MOX Facility") to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. The MOX Facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.
11. If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all

unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022.

12. The statute further provides that “[i]f the MOX production objective is not achieved as of January 1, 2016, the Secretary [of the DOE] shall, subject to the availability of appropriations, pay to the State of South Carolina . . . for economic and impact assistance an amount equal to \$1 million per day for each day, not to exceed \$100 million per year.” 50 U.S.C. § 2566(d)(1).
13. The DOE has never met the milestones set forth in 50 USC § 2566.
14. Under the terms of the Settlement Agreement, Defendant Wilson agreed on behalf of the Citizens of South Carolina to forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of violations of 50 USC § 2566 until 2037. Griffin Aff., Ex. 1, ¶ 5(b).
15. In exchange, the United States agreed to an immediate payment to the State of South Carolina in the amount of \$600 million. *Id.* ¶ 5(a).
16. The Settlement Agreement resolves “all claims relating to economic assistance payments or removal of plutonium that have arisen, or will arise.” *Id.* ¶ 13.
17. Defendant Wilson announced at a press conference that he intends to pay two private law firms \$75 million from the \$600 million economic impact and assistance payment for their legal services in representing the State.
18. Upon learning of Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous

advocacy and coordination with members of [the State's] Congressional delegation.”
Griffin Aff., Ex. 2.

19. Governor McMaster concluded the letter stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.*
20. First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that State law requires the entire amount be deposited into the State’s General Fund. Griffin Aff., Ex. 3.

**Attorney General Wilson Does Not Possess Authority to Use Proceeds from
the U.S. DOE Settlement of Economic Impact and Assistance Payments
Owed to South Carolina to Pay Private Law Firms**

21. The payment of \$75 million to private law firms from a settlement of economic impact and assistance payments owed by the DOE to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution.
22. When money under a settlement agreement is payable directly to the State, as in the case with the Settlement Agreement, the proceeds must be deposited in the General Fund, and only the Legislature controls its appropriation.
23. Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State’s General Fund, except for investigative costs and litigation costs awarded by court order or settlement.
24. In this matter, neither the court order nor the settlement exception applies.
25. There is not any order awarding attorneys’ fees.
26. The Settlement Agreement does not allocate any portion of the \$600 million to attorneys’ fees.

27. Rather, the United States expressly disclaims any liability for attorneys' fees in Section 5(a) of the Settlement Agreement, which provides for "[i]mmediate *payment by the United States to the State of South Carolina* in the amount of \$600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1, § 5(a) (emphasis added).
28. Section 5(a) of the Settlement Agreement clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina.
29. Nevertheless, Defendant Wilson plans to pay private lawyers \$75 million, out of the \$600 million, which is required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.
30. Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.")
31. Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.*
32. Defendant Wilson's intent to pay \$75 million from the State's \$600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

**The Amount of the Fee Is Patently Unreasonable and
Cannot Be Paid Until Approved by Court Order**

33. Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling \$75 million for the amount of work performed in this case appears to be patently unreasonable.
34. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3.
35. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).
36. The lawyers brought suit to collect a statutory payment for economic impact and assistance of \$100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.
37. The DOE never contested that it failed to comply with federal law.
38. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.
39. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 Million assistance payment for failing to comply with the statute.
40. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. *Griffin Aff.*, Ex. 4.

41. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.
42. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.
43. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.
44. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.
45. Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6.
46. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *Id.*, Ex. 2.
47. In apparent recognition that contingency fee agreements entered into with the State of South Carolina may produce an unreasonable fee award, the fee agreement entered into with the law firms expressly provides that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” *Id.*, Ex. 7.

48. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of \$75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.
49. Furthermore, a payment of \$75 million to the law firms exceeds the amount of fee that they would be entitled to receive under the contingency fee agreements entered with these firms.
50. The fee agreement provides for a base contingency fee payment of \$29,250,000, calculated as follows:

\$0 to \$25,000,000	21%	\$5,250,000
\$25,000,000 to \$50,000,000	18%	\$4,500,000
\$50,000,000 to \$75,000,000	15%	\$3,750,000
\$75,000,000 to \$100,000,000	13%	\$3,250,000
\$100,000,000 to \$125,000,000	11%	\$2,750,000
\$125,000,000 to \$150,000,000	9%	\$2,250,000
\$150,000,000 to \$250,000,000	4%	\$4,000,000
\$250,000,000 to \$600,000,000	1%	\$3,500,000
	Total Fee	\$29,250,000

Id., Ex. 8.

51. Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. (“Willoughby & Hoefer”) additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm’s representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*
52. The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child’s ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9.

53. On June 7, 2019, Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).
54. Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court.
55. The amended fee agreement was executed on June 13, 2019, by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.
56. Under the terms of the amended contingency fee agreement, Willoughby & Hoefer is being paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina.
57. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.
58. Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of \$600 million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court.
59. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over \$65,000 per page for these filings.

60. The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be \$50,250,000, yet Defendant Wilson intends to pay the firms \$75,000,000.
61. The fee agreement was entered into by Defendant Wilson on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract.
62. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

Plaintiff Files Suit, and Defendant Wilson Apparently Disburses the Disputed Fund Before a Hearing Can Be Held on the Propriety of Defendant Wilson's Conduct

63. On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson and filed Plaintiffs' motion for a temporary restraining order and preliminary injunction against Defendant Wilson seeking to enjoin Defendant Wilson's payment of \$75,000,000 to the law firms ("Plaintiffs' Initial Motion").
64. On Friday, September 25, 2020 at 11:10 a.m., Defendant Willoughby & Hoefer and a representative of the Office of the Attorney General received notice of a hearing set for Wednesday, September 30, 2020 in a related case that likewise sought to enjoin the expenditure of the \$600 million in settlement funds. *See Griffin Aff. Ex. 13.*
65. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings while requesting that the Court schedule a hearing on Plaintiffs' Initial Motion. *See Griffin Aff., Ex. 14.*

66. On the morning of Monday, September 28, 2020, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See id.*, Ex. 15.
67. The Court responded by stating that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Motion over Defendant Wilson's objections. *See id.*
68. Counsel for Defendant agreed to accept service as of the Complaint and Plaintiffs' Initial Motion as of September 28, 2020. *See id.*, Ex. 16.
69. On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. In response, counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.
70. Immediately prior to that hearing on September 29, 2020, Defendant Wilson filed a memorandum in opposition to Plaintiffs' Initial Motion in which Defendant Wilson claimed that the funds at issue in this dispute had been transferred to the law firms earlier in the day. Based on this purported transfer of the funds, Defendant Wilson claimed that this matter is now moot. *See* Mem. Atty. General in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3.
71. Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See id.*, Ex. 18.

72. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefer had received the disputed funds. *See id.*
73. During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. That order expires at 5:00 p.m. on Friday, October 2, 2020.
74. On the morning of September 30, 2020 Plaintiffs received confirmation from the State Treasurer that the proceeds were in fact wired to the law firm hours before the 3 p.m. hearing on September 29, 2020. According to Treasurer Loftis: "The Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]. We processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires." *See id.*, Ex. 19.

CLAIMS FOR RELIEF

COUNT I (Declaratory Judgment)

75. Plaintiffs reallege each and every allegation set forth above as if repeated verbatim herein.
76. Pursuant to Section 15-53-30 of the South Carolina Code of Laws, Plaintiffs request declaratory relief from this Court.

77. Plaintiffs are entitled to seek, and do hereby seek, an order of this Court declaring the rights, obligations, and status of the parties to this proceeding, and, in particular, as follows:
- a. That Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit \$600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
 - b. That the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
 - c. That the Attorney General's intended payment of \$75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause; and
 - d. In the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable.

COUNT II
(Constructive Trust)

78. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.
79. The disputed funds have been transferred to and received by Willoughby & Hoefer and/or Davidson, Wren & DeMasters in an attempt to deprive the Court of jurisdiction to determine whether the Defendant Wilson is authorized to make the payment from the settlement proceeds.
80. Willoughby & Hoefer and Davidson, Wren & DeMasters, as special counsel to the Attorney General for the State of South Carolina, owe fiduciary duties to the Attorney

General and the State of South Carolina and are bound to act in good faith and with due regard to the interests of the State of South Carolina.

81. Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters have received the disputed funds with full knowledge that Plaintiffs commenced a lawsuit in this Court seeking a declaration that the Defendant Wilson does not have authority to pay the intended fees from the settlement proceeds and knowing that this Court had scheduled a hearing to enjoin the transfer of these funds.
82. Defendant Wilson's payment of funds to Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters was an *ultra vires* action and is *void ab initio*.
83. The State of South Carolina retains equitable title to those funds because those funds do not equitably belong to these law firms and these law firms cannot in good conscience retain or withhold these funds from the State of South Carolina, who is beneficially entitled to them.
84. Accordingly, Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters hold those funds as trustees for the ultimate benefit of the State of South Carolina for the reasons set forth above.
85. Accordingly, Plaintiffs ask this Court to declare a resulting trust in favor of Plaintiffs.
86. Plaintiffs thus request this Court order possession and ownership to be transferred from Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters to the State of South Carolina
87. In the alternative, Plaintiffs request that the Court enjoin Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters from further distributing the disputed funds and to

continue to hold the disputed funds in trust until this dispute is ultimately resolved on its merits.

COUNT III
(Receipt of Unauthorized Payment/Restitution/Money Had and Received)

88. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.
89. Defendant Wilson lacked authorization to pay attorneys' fees to Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters from the settlement proceeds.
90. Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters are therefore required to return the fees received to the State of South Carolina, together with pre-judgment interest.

COUNT IV
(Injunctive Relief)

91. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.
92. Without the equitable relief requested herein, Plaintiffs will be irreparably harmed.
93. In *Sloan v. School Dist. of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000) the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that “[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.” *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)).
94. In *South Carolina Department of Rev. v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court’s refusal to grant an

injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Department of Rev. v. Richland County*, 422 S.C. at 311, 811 S.E.2d at 768.

95. Plaintiffs have shown it will succeed on the merits of this case by making a prima facie showing that Plaintiffs are entitled to the injunctive relief sought. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005).
96. Plaintiffs have no adequate remedy at law because the equitable relief sought herein is necessary to preserve the subject of controversy in the condition which it is until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. *See id.*, 367 S.C. at 457, 626 S.E.2d at 37-38.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court:

1. Declare that Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit \$600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
2. Declare that the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
3. Declare that the Attorney General's intended payment of \$75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause;

4. Declare, in the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable;
5. Enjoin, temporarily and permanently, the disbursement of the funds at issue in this dispute:
 - a. Ordering the funds be maintained by or returned to the State of South Carolina until this dispute is resolved on its merits; or
 - b. In the alternative, ordering that the funds be maintained by the Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters without further disbursement until this dispute is resolved on its merits.
6. Grant Plaintiffs their costs and attorneys' fees under Section 15-77-300 of the South Carolina Code of Laws; and in the alternative, grant Plaintiffs their reasonable attorneys' fees and costs from the funds preserved through this action for the people of South Carolina, commonly known as the common fund doctrine; and
7. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/Badge Humphries

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Attorneys for Plaintiffs

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September 30, 2020

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,

Case No. 2020-CP-40-04603

Plaintiffs,

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

v.

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

Defendants.

Plaintiffs hereby move the Court for a temporary restraining order and a preliminary injunction pursuant to Rule 65, SCRCPP. A temporary restraining order and preliminary injunction are necessary to preserve the status quo during the pendency of this action and to avoid irreparable injury. This motion is supported by the Amended Complaint and Exhibits being filed herewith. Plaintiffs further allege the following:

FACTUAL SUMMARY

On August 31, 2020 Defendant Wilson announced the settlement of a lawsuit against the United States Department of Energy (the “DOE”) resolving the DOE’s liability for violating of the terms of an agreement brokered by former Governor James H. Hodges regarding the disposition of weapons grade plutonium stored at the Savannah River Site (“SRS”). Compl., Ex. A., Affidavit of James M. Griffin, Sept. 25, 2020 (hereinafter, “Griffin Aff.”), Ex. 1, Settlement Agreement. Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the DOE must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016

for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments. Under the terms of the settlement agreement announced by Defendant Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of \$600 million. Under the terms of the Settlement Agreement, the DOE is required to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” Griffin Aff., Ex. 1, ¶ 5(a). According to Wilson, this payment is expected on or after October 1, 2020.

Defendant Wilson has announced that he intends to pay two private law firms \$75 million from the proceeds of the DOE settlement. Upon learning of the Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that the entire amount must be deposited into the State’s General Fund. *Id.*, Ex. 3.

Plaintiffs have filed this action seeking injunctive relief and a declaratory judgment ruling that Defendant Wilson does not possess authority to use the proceeds from the DOE settlement to pay private law firms because the funds are intended solely for the State of South Carolina. Alternatively, if the Court were to conclude that Defendant Wilson is authorized to use these settlement proceeds to pay the private law firms, Plaintiffs seek an order requiring the Defendant to obtain court approval of the reasonableness of the fee as provided by the terms of the fee agreement with the law firms and South Carolina law.

On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson and filed Plaintiff's motion for a temporary restraining order and preliminary injunction against Defendant Wilson seeking to enjoin Defendant Wilson's payment of \$75,000,000 to the law firms ("Plaintiffs' Initial Motion"). On the morning of Friday, September 25, 2020 at 11:10 a.m., Defendant Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") and a representative of the Office of the Attorney General received notice of a hearing set for Wednesday, September 30, 2020 in a related case that likewise sought to enjoin the expenditure of the \$600 million in settlement funds. *See id.*, Ex. 13. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings while requesting that the Court schedule a hearing on Plaintiffs' Initial Motion. *See id.*, Ex. 14.

On the morning of Monday, September 28, 2020, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See id.*, Ex. 15. The Court responded by stating that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Motion over Defendant Wilson's objections. *See id.* Counsel for Defendant agreed to accept service as of the Complaint and Plaintiffs' Initial Motion as of September 28, 2020. *See id.*, Ex. 16.

On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. In response, counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17. Immediately prior to that hearing on September 29, 2020, Defendant Wilson filed a memorandum in opposition to Plaintiffs' Initial Motion in which Defendant Wilson claimed that the funds at issue in this dispute had been transferred to the law firms earlier in the day. Based on this purported transfer of the funds, Defendant Wilson claimed that this matter is now moot. *See* Mem. Atty. General in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3.

Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See* Griffin Aff., Ex. 18. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefer had received the disputed funds. *See id.* During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. That order expires at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020 Plaintiffs received confirmation from the State Treasurer that the proceeds were in fact wired to the law firm hours before the 3 p.m. hearing on September 29, 2020. According to Treasurer Loftis: "The Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]. We processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account. This was a

standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires.” *See id.*, Ex. 19.

Plaintiffs bring the instant motion to preserve the status quo now that the funds in dispute have been transferred from the State of South Carolina to the Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters. To preserve the status quo while this case is litigated on the merits, Plaintiffs seeks a temporary restraining order requiring Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters to return the disputed funds to the State of South Carolina or, in the alternative, enjoining them from further dispersing or encumbering the funds and, instead, holding them in trust for the benefit of the State of South Carolina while this dispute is litigated to its conclusion.

ARGUMENT

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). Without the equitable relief requested herein, Plaintiffs will be irreparably harmed.

In *Sloan v. School Dist. of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that “[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.” *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). In *South Carolina Department of Rev. v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court’s

refusal to grant an injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Department of Rev. v. Richland County*, 422 S.C. at 311, 811 S.E.2d at 768.

Plaintiffs have shown it will succeed on the merits of this case by making a prima facie showing that Plaintiffs are entitled to the injunctive relief sought. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). 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). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

Plaintiffs have no adequate remedy at law because the equitable relief sought herein is necessary to preserve the subject of controversy in the condition which it is until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. *See Peek*, 367 S.C. at 457, 626 S.E.2d at 37-38. Injunctive relief is necessary to preserve the status quo and prevent Plaintiffs' important constitutional challenge from becoming moot. Moreover, as established below, Plaintiffs have made a sufficient showing that they are entitled to relief.

I. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement

Plaintiffs contend that the payment of \$75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "*Immediate payment by the United States to the State of South Carolina in the amount of \$600 Million (Six Hundred Million), inclusive of interest, with each party to bear its own costs, attorneys fees and expenses.*" Accordingly, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson plans to pay private lawyers \$75 million, out of the \$600 million.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002)

(“[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Wilson’s intent to pay \$75 million from the State’s \$600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act (“Federal Funds Oversight Act”) specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et seq.* Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office (“EBO”) and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay \$75 million to the law firms from the \$600 million his agency will receive through this settlement. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

II. The Amount of the Fee Is Patently Unreasonable and Should Not Have Been Paid Until Approved by Court Order

Even if the settlement was structured in a way that the United States agreed to pay the State’s litigation costs, attorneys fees totaling \$75 million for the amount of work performed in

this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee.” Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006).

The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this monetary claim,¹ ruling that any such claim must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the lawyers refiled the same claim before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

¹ The District Court did not dismiss the State’s claim for injunctive relief.

In addition, the express terms of the fee agreement with the law firms states that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” *Id.*, Ex. 7. There is nothing prohibiting the Defendant Wilson from seeking judicial approval of the payment of \$75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.² However, the Defendant Wilson seeks to avoid judicial review and intends to pay the law firms \$75 million without making any showing of reasonableness.

Furthermore, a payment of \$75 million to the law firms exceeds the fee amount that the law firms would be entitled to receive under the contingency fee agreements entered with these firms. The fee agreement provides for a base contingency fee payment of \$29,250,000, calculated as follows:

\$0 to \$25,000,000	21%	\$5,250,000
\$25,000,000 to \$50,000,000	18%	\$4,500,000
\$50,000,000 to \$75,000,000	15%	\$3,750,000
\$75,000,000 to \$100,000,000	13%	\$3,250,000
\$100,000,000 to \$125,000,000	11%	\$2,750,000
\$125,000,000 to \$150,000,000	9%	\$2,250,000
\$150,000,000 to \$250,000,000	4%	\$4,000,000
\$250,000,000 to \$600,000,000	1%	\$3,500,000
Total Fee		\$29,250,000

Id., Ex. 8.

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm’s representation of the State on

² Under South Carolina, the following factors are considered to determine whether an award of attorneys’ fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019 Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Thus, Willoughby & Hoefer is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages,

for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over \$65,000 per page for these filings.

The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be \$50,250,000, yet Defendant Wilson intends to pay the firms \$75,000,000. There has been no explanation for Defendant Wilson's decision to pay these firms an additional \$24,750,000 for a total payment of \$75 million.

Plaintiffs, individually and on behalf of the Citizens of this State, are third party beneficiaries under the fee agreement entered into with the law firms. Plaintiffs seek an order requiring Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs.

III. Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters Have Received an Unauthorized Payment of Funds, and a Constructive Trust Should Be Deemed to Exist Over the Disputed Funds.

As noted above, Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters have received a disbursement of funds in dispute in this litigation. For the reasons explained above and in more detail in Plaintiffs' Amended Complaint, these law firms are not entitled to the disputed funds that they have received. Accordingly, the disputed funds should be returned to the State of South Carolina or Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters should be enjoined from distributing or encumbering the disputed funds pending a determination of this lawsuit on the merits. *See SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990); *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 334–35, 577 S.E.2d 468, 472–73 (Ct. App. 2003).

IV. Plaintiffs Have Public Interest Standing

Plaintiffs have “public interest” standing to pursue the declaratory action and injunctive relief as recognized in the following cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep’t. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

CONCLUSION

THEREFORE, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys’ fees during the pendency of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries

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Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
South Carolina Public Interest	)	
Foundation and John Crangle,	)	Case No. 2020-CP-40-04603
individually and on behalf of all	)	
others similarly situated,	)	
	)	RESPONSE IN OPPOSITION
Plaintiffs,	)	TO 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.	)	
_____	)	

Defendant Willoughby & Hoefer, P.A. (W&H)¹ submits this response in opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed on September 30, 2020 (the Motion).² Because Plaintiffs lack standing, the case is moot, they are trying to litigate a political question, this Court lacks jurisdiction, and, in any event, Plaintiffs utterly fail to establish the requisite factors for the extraordinary relief requested, the Motion should be denied.

¹ W&H, together with Defendant Davidson, Wren & DeMasters, P.A. (Davidson), are referred to in this Response collectively as the Law Firms.

² This Response also responds to the Supplemental Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed on October 6, 2020 (Supplemental Memorandum), which, in multiple instances, contradicts arguments made by Plaintiffs in their Motion.

Introduction

Although their claims lack any procedural or substantive justification, Plaintiffs challenge the amount of attorneys' fees paid to private counsel pursuant to a valid and existing contract and in accordance with the expenditure laws enacted by the South Carolina General Assembly. As shown by their request for fees paid from some "common fund" which they seek to create by virtue of a putative class action, Plaintiffs really seek no more than a "piece of the action," belying their specious claim to represent some public interest that they have self-identified as vindicating. But not only is there no harm to the State that needs vindicating—as shown below, the resolution of the underlying lawsuit is a win-win for the State of South Carolina—this Court lacks jurisdiction to entertain Plaintiffs' attempted interference in the State's management of its own litigation or the State's subsequent actions fulfilling a valid and enforceable contract entered by its Chief Legal Officer.

Simply put, more than four years ago, the Department of Energy did not remove certain weapons-grade plutonium from the State and pay the amounts due as required by law. In a lawsuit identified to the State by private counsel and supported at their sole cost and risk, a resolution was ultimately achieved by which South Carolina obtained not only payment of the full amount due, but also a contractually binding commitment by the federal government for either future removal of the plutonium or the payment of future amounts (without any further compensation to counsel). South Carolina received this benefit for the payment of attorneys' fees pursuant to a contract at a percentage far less than any typical

contingency fee arrangement. Plaintiffs are unhappy about that, seeking to share in the just reward to the Law Firms with no prior involvement in the efforts supporting the extraordinary outcome and without shouldering any of the burden or risk.

But for multiple reasons, the Court lacks jurisdiction and Plaintiffs have no basis for this lawsuit:

- They lack standing, both taxpayer and the amorphous “public importance” standing.
- The efforts to require proper procedures and processes for payment of the attorneys’ fees are moot because the fees have been paid by the Treasurer pursuant to the process sought by Plaintiffs, *i.e.*, approval of the Executive Budget Office and authorization by the Comptroller General.
- Plaintiffs at bottom seek to have this Court insert itself into the executive branch’s decisions regarding its contracts for outside legal services, a power that the Attorney General has and that they do not challenge.
- Plaintiffs’ challenge to the reasonableness of attorneys’ fees is premised on an alleged violation of the Rules of Professional Conduct for which there is no private right of action for a third-party and over which this Court does not have jurisdiction.
- The Attorney General has the statutory authority to pay the fees to private counsel based on the applicable statutory framework and all applicable budgeting laws.

Consequently, as explained more fully below, Plaintiffs cannot satisfy any of the requirements for obtaining a preliminary injunction because they do not have a likelihood of success on the merits, they cannot show irreparable harm to themselves or the State, and there are adequate remedies at law. This Court therefore should dismiss this case for lack of jurisdiction and deny the Motion.

Procedural History

The initial Summons and Complaint was filed in this matter against the State Attorney General (but not the Law Firms) on September 25, 2020, at 11:58 a.m., with the filing of a Motion for Temporary Restraining Order and Preliminary Injunction (the First TRO Motion) following at 1:41 p.m. that same day. The State of South Carolina made a wire transfer to W&H of \$75 million in attorneys' fees before noon on September 29, 2020, a payment that was approved and authorized by multiple State officials and agencies prior to the filing of Plaintiffs' suit pursuant to a process that had been initiated in the normal course as provided by law on September 17, 2020. At 3:00 p.m. on September 29, a virtual hearing was held on Plaintiffs' First TRO Motion before the Honorable Debra McCaslin. On information and belief, a second virtual hearing was held at 7:00 p.m. on that same day, following which³ 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

³ The First TRO was electronically signed at 9:21 p.m. on September 29, 2020, and electronically filed on September 30, 2020, at 8:32 a.m. It was subsequently dissolved by Judge McCaslin.

on Plaintiff's motion." The First TRO also purported to enjoin the State Treasurer from "disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court." even though the Treasurer was not—and is not—a party to the action and there were no provisions made for notifying the Treasurer of the First TRO.

Plaintiff filed an Amended Summons and Complaint the next day, September 30, 2020, at approximately 12:58 p.m., adding the Law Firms as additional defendants. At 1:01 p.m. on September 30, Plaintiff also filed the instant Motion. At 3:43 p.m. on September 30, 2020, this Court electronically signed an Ex Parte Temporary Restraining Order, which was electronically filed the next day (October 1, 2020) at 8:01 a.m. (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."

Service was made on W&H through delivery of the Amended Summons and Complaint and the Second TRO on the morning of October 1, 2020. On October 2, 2020, W&H filed a Notice of Appeal with the Court of Appeals appealing from the Second TRO. W&H also filed a Petition for Supersedeas seeking dissolution of the Second TRO on the grounds that none of the requirements of Rule 65 of the South Carolina Rules of Civil Procedure—including the requirement of a bond—were met and the Second TRO improperly purported to place the burden of proof with respect

to the instant Motion on Law Firms by requiring them to appear at the hearing in this matter scheduled for October 7, 2020, and “show cause why Plaintiffs’ motion for a preliminary injunction should not be granted.” The Court of Appeals required Plaintiffs to submit a return to the Petition for Supersedeas by 3:00 p.m. on October 5, 2020, and a reply to a return from W&H by 12:00 p.m. on October 6, 2020. Later that day, the Court of Appeals issued an order denying the Petition for Supersedeas and stating that the burden-shifting issue can be addressed at the hearing on the instant Motion.

Factual Background

It is important for this Court to understand at the outset how this lawsuit came to pass. Plaintiffs are challenging the payment of attorneys’ fees to private attorneys as required by contract, fees that were earned through the prosecution of a number of cases in federal courts, including the ultimate settlement of a closed case filed by the State of South Carolina in the Court of Federal Claims. The misinformation on these fundamental points has been rampant since the settlement was announced on August 31, 2020, and now is aided and abetted by the many demonstrably false and defamatory allegations advanced in this lawsuit.

In March of 2014, 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 mixed oxide fuel fabrication facility (“MOX Facility”) at the Savannah River Site (“SRS”). Ex. 1, Sept. 16, 2020 Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, p.1. At that time, the

U.S. Department of Energy (“DOE”) (through the National Nuclear Security Administration) was seeking to place the into “cold standby” status, which would have effectively terminated the MOX project. *Id.* At the time, the Congressional delegation wrote to then-Governor Haley to ask that she work with the Attorney General to explore any legal avenues the State may have to address the pending injustice to the State. *Id.* After being briefed on a legal strategy to achieve that result, the State retained the Law Firms to represent it, and they filed a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14. *Id.* 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, a win for South Carolina. *Id.*

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, 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 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 financial pressure against it in an effort to incentivize continuation of the MOX Facility or removal of the material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to the office of the Attorney General on January 26, 2016, transmitting a formal request that the Attorney General's office initiate litigation on behalf of the State of South Carolina against DOE. *Id.* at 1-2. In accordance with that request, the Attorney General hired the Law Firms to represent the State in litigation against the federal government related to the MOX Facility at SRS. The litigation retention agreement ("Fee Agreement") with the Law Firms took the form of a contingency fee arrangement, using the Attorney General's standard fee scale and litigation retention agreement (modeled on the original fee agreement developed by then-Attorney General McMaster). The Fee Agreement provided that the Law Firms would assume 100% of the risk involved in the litigation, requiring them to advance all costs and work the hours necessary to execute the complex legal strategy without compensation. Mot., Exs. 7, 8. The State bore no risk under this arrangement; if the lawsuit(s) were successful, then the Law Firms would be paid according to the terms effective on February 8, 2016, as amended. If the lawsuit(s) were unsuccessful, the Law Firms could not seek reimbursement for either their costs or the time worked on behalf of the State.

On February 9, 2016, 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 defense plutonium from South Carolina and payment of the economic and impact assistance monies pursuant to 50 U.S.C.A. § 2566. Ex. 1,

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 claim for lack of jurisdiction, 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 defense plutonium from the State. *Id.* The District Court requested additional briefing on the appropriate remedy for the removal claim, and on December 20, 2017, adopted the State's proposal to require removal of the defense plutonium within two years and also required the federal government to provide ongoing status reports on its removal progress. *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 against the federal government seeking to prevent the relocation of the one metric ton of defense plutonium from South Carolina to Nevada in the federal District Court in Nevada. *Id.* 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, 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. Accordingly, on January 3, 2019, the Attorney

General requested W&H to move to intervene in the Nevada case on behalf of the State of South Carolina. *Id.* The State of Nevada opposed South Carolina's participation in the case, and after further briefing by W&H, the court granted the State's motion. *Id.* Nevada then 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 could be returned. *Id.* W&H filed briefs on the motion on behalf of South Carolina. An evidentiary hearing was held and, on January 30, 2019, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. *Id.* Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019. *Id.*

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. *Id.* It also stated it had 15 witnesses to present. *Id.* W&H, on behalf of South Carolina, was prepared to litigate this matter in a full trial. The district court ultimately stayed the case pending the appeal. *Id.* After briefing at the Ninth Circuit, including briefing by W&H, the court dismissed the appeal as moot on August 13, 2019. *Id.* The stay at the district court was lifted, and additional motions were filed and briefing began anew. *Id.* 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. *Id.* at 2-3.

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, the

federal government filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS. *Id.* at 3. During this time, South Carolina learned that the Federal Government was taking active steps to halt construction of the MOX Facility and planned to terminate the program. *Id.* Once the construction was halted, there would be no turning back and hundreds of South Carolina jobs would be lost. 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 was again directed by the Attorney General to move 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, along with a request for an expedited hearing. *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 was at least temporarily successful. It is worth reiterating that none of the foregoing lawsuits regarding injunctive relief described above had a monetary or damages component to their undertaking, meaning that, although W&H agreed to take on these actions under the Fee Agreement with the State, as amended, those actions did not provide an avenue for a corresponding increase in the possibility of damages to the State on which the attorney fee is based.

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. Ex. 1, p.3. On January 8, 2018, the State filed its second complaint seeking to recover another \$100 million. *Id.* These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions between the State, led by W&H, and the Department of Justice ("DOJ") on behalf of DOE and the Federal Government. These efforts were not successful and, in June 2019, South Carolina informed the court that the Federal Government had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. *Id.* 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 assistance payments. *Id.*

Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. *Id.* After briefing and beginning in January 2020,

promising discussions were held between the respective counsel for DOE and the State, which over time 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, all stemming from and following on the heels of the Federal Circuit oral argument, 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 also 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 Mot., Ex. 1. The settlement further provided the Federal Government with a grace period to comply with an obligation to remove additional defense plutonium from the State while still

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.

maintaining the ability of the State to force removal⁵ and receive additional payments⁶ should the Federal Government not comply. *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. 2, 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 Fee Agreement between the Attorney General and the 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

⁵ The 15-year removal period for the remaining 9.5 metric tons of defense 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.

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 based upon the immediate monetary benefit of the settlement only, this fee represents 12.5% of the recovery.

In strict accordance with the applicable statutory provisions, the State Attorney General submitted the request for approval of payment of the attorneys' fees owed pursuant to the Fee Agreement on September 17, 2020—well before this litigation was instituted. Attorney General Mem. in Opp'n to First TRO Motion, Ex. 4, Buckley Affidavit. As required by law, and in direct contravention of the contrary and false allegations advanced by Plaintiffs in the Motion, the payment was authorized by the Comptroller General and Treasurer and, as now acknowledged by Plaintiffs,⁷ was approved by the Executive Budget Office ("EBO") of the Department of Administration. On September 29, 2020, the State made a wire transfer to W&H for the \$75 million, inclusive of attorneys' fees and costs, owed under the Fee

⁷ Despite knowing otherwise at the time they filed their Motion, Plaintiffs assert in the Motion that EBO approval was not obtained. However, in their Supplemental Memorandum, Plaintiffs acknowledge that EBO approval was obtained, directly contradicting their Motion.

Agreement and as contemplated by the dismissal filed in the Federal Court of Claims.⁸ *Id.*

Legal Standard

An injunction is a “drastic remedy.” *E.g., Richland Cty. v. S.C. Dep’t of Rev.*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018). “The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction.” *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). To obtain a temporary injunction under South Carolina law, a party must demonstrate (1) irreparable harm; (2) a likelihood of success on the merits; and (3) an inadequate remedy at law. *See, e.g., Richland Cty.*, 422 S.C. at 309, 811 S.E.2d at 767; *Roach v. Combined Util. Comm’n of City of Easley*, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct. App. 1986). Further, because Plaintiffs have sought to enjoin the conduct of the Attorney General, a State Constitutional Officer leading a governmental office, Plaintiffs are further required to show that the exercise of the Attorney General’s statutory right to hire and pay private counsel on a fee basis to represent the State of South Carolina was arbitrary, capricious, and oppressive. *See Richland Cty.*, 422 S.C. at 310, 811 S.E.2d at 767 (“[I]n order to receive the aid of a Court of equity to

⁸ Plaintiffs suggest in the Motion that the filing of a separate litigation related to the MOX settlement should have caused the State to stop processing the payment of the attorneys’ fees to the Law Firms. Mot., p.3. However, as set forth in the affidavit of C. Bradley Hutto, Esquire, counsel for plaintiffs in that separate litigation, his clients’ claims do not seek to enjoin the payment of the attorneys’ fees, he recognizes such fees were properly paid pursuant to contract, and the day after his clients’ lawsuit was filed, he expressly informed counsel for the State that the lawsuit does not relate to the attorneys’ fee owed to the Law Firms. Ex. 7, Aff. of C. Bradley Hutto.

enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner.”). There is no balancing of these elements; each one must be satisfied. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). The decision regarding whether to enter a temporary injunction is committed to the trial court’s discretion, but an “abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” *Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

Thus, a plaintiff seeking a temporary injunction must make a showing that it will suffer irreparable harm without the entry of an injunction. *Poynter*, 387 S.C. at 586-87, 694 S.E.2d at 17; *see Rawlinson Rd. Homeowners Ass’n, Inc. v. Jackson*, 395 S.C. 25, 36, 716 S.E.2d 337, 343 (Ct. App. 2011). Merely articulating an injury is insufficient. And there is no harm when “the harm at issue can be remedied by money damages.” *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *22 (D.S.C. May 25, 2020) (quoting *Bethesda Softworks, LLC v. Interplay Entm’t Corp.*, 452 F. App’x 351, 353 (4th Cir. 2011)). To show a likelihood of success, a “plaintiff must present a reasonable question as to the existence of [a legal right].” *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 508 (Ct. App. 2009) (citing *Peek v. Spartanburg Reg’l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct.

App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)). And an adequate remedy at law may be provided by a legal cause of action or non-equitable avenue of relief. *Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co.*, 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978) (rejecting a claim for specific performance and holding that an “action at law for damages affords appellant the full relief to which it is entitled”).

Finally, no temporary injunction may be issued “except upon the giving of security by the applicant ... for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” S.C. R. Civ. P. 65(c); *see AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 508 (Ct. App. 2009). A nominal bond is not sufficient. *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007) (holding that a nominal bond is not proper because it does not provide “an amount sufficient to protect [the enjoined party] in the event the injunction is ultimate deemed improper”); *see also Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 609, 790 S.E.2d 430, 434 (Ct. App. 2016) (requiring more than “a ‘nominal security bond [because] it does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper.’”).

Argument

The Motion must be denied and this lawsuit dismissed because Plaintiffs do not have standing and this Court does not have jurisdiction over any of the claims

asserted in the Amended Complaint. But even if Plaintiffs could somehow overcome those obstacles—which they cannot—Plaintiffs are not entitled to a preliminary injunction because they have not established and cannot establish the requisite factors warranting the drastic relief requested: an injunction depriving private citizens of their right to the use and benefit of their property earned and received pursuant to a valid and binding contract with the State of South Carolina.

1. Plaintiffs lack standing and this Court lacks jurisdiction.

As a threshold matter, and before this Court can even reach the merits (or lack thereof) of the Motion, it must make an independent determination as to whether or not Plaintiffs’ have demonstrated that they have standing and this Court has jurisdiction over the claims alleged in the Amended Complaint. *See Senate ex rel. Leatherman v. McMaster*, 425 S.C. 315, 320, 821 S.E.2d 908, 910 (2018) (per curiam) (“[T]he Court must examine the President Pro Tempore’s threshold authority to bring the action.”); *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 804 S.E.2d 854, 858, 421 S.C. 110, 117 (2017) (“A plaintiff must have standing to institute an action.”); *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985) (“Standing to sue is a fundamental requirement in instituting an action.”); *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) (same).

Plaintiffs do not have standing. And this Court does not have jurisdiction for the additional reasons that Plaintiffs’ claims are moot and merely raise non-

justiciable political questions or issues reserved exclusively for determination by the Supreme Court.

A. Plaintiffs lack standing.

As the United States Supreme Court has emphasized, the increasing demand for judicial attention and intervention on most every conceivable perceived grievance “has not eliminated the basic principle that to invoke judicial power the claimant must have a “personal stake in the outcome,” or a “particular, concrete injury,” or “a direct injury”; in short, something more than “generalized grievances.” *United States v. Richardson*, 418 U.S. 166, 179-80 (1974). “Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011). For that reason, “courts must be more careful to insist on the formal rules of standing, not less so.” *Id.* at 146.⁹

“Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is

⁹ At its core, this lawsuit is a challenge to the award of attorneys’ fees to the Law Firms. However, the U.S. Supreme Court has stated definitively that “[a]n **‘interest in attorney’s fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.’**” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (emphasis supplied) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Because it is undisputed that that the attorneys’ fees derive from the settlement of a Federal case, asserting Federal claims, against the Federal Government, with judgment paid out of the Federal

called “constitutional standing”; and (3) under the public importance exception.” *Bodman v. State*, 742 S.E.2d 363, 366, 403 S.C. 60, 66–67 (2013) (citing *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). There is no assertion of statutory standing, so Plaintiffs are left to constitutional standing and the “public importance” exception.¹⁰ They have not met—and cannot meet—their burden demonstrating either.

i. *Plaintiffs do not have constitutional standing.*

To establish constitutional standing, a plaintiff must show all three elements of the test throughout the litigation: “[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must be likely that a favorable decision will redress the injury.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing *Sea Pines Ass’n for the Prot. of Wildlife v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001) (“The party seeking to establish standing carries the burden of demonstrating each of the three elements.”)).

Plaintiffs cannot establish constitutional standing because they have not alleged and cannot allege an injury in fact. *Commander Health Care Facilities, Inc.*

Judgement Fund, in a case that has been finally resolved and dismissed by stipulation filed in federal court, Plaintiffs lack standing.

¹⁰ In their Supplemental Memorandum, Plaintiffs now assert for the first time that they have what they claim is “derivative standing” to pursue claims on behalf of the State. As explained below, there is no such thing and this contention is meritless.

v. S. Carolina Dep't of Health & Env'tl. Control, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) (“Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.”). Plaintiffs are not parties to the contract between the Law Firms and the State Attorney General,¹¹ were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys’ fees.

At bottom, Plaintiffs have only asserted that they have “taxpayer standing” based on an allegation of generalized harm to all taxpayers of South Carolina, but a “taxpayer lacks constitutional standing when he suffers in some *indefinite* way in common with people *generally*.” *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d

¹¹ Plaintiffs’ unsupported suggestion that they, on behalf of themselves and all other citizens of South Carolina, can seek such a determination from this Court on the basis that they are “third party beneficiaries” of the contract is baseless. Mot., p. 12; see *Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 440 S.E.2d 890, 891, 312 S.C. 422, 424 (Ct. App. 1994) (“Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff.”). Simply put, Plaintiffs are not “third party beneficiaries” of the Fee Agreement under South Carolina law as they are not the “direct” beneficiaries of the contract between the Law Firms and the State Attorney General. See *Id.* (“[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.”) (citing *Cothran v. Rock Hill*, 211 S.C. 17, 43 S.E.2d 615 (1947)). Rather, Plaintiffs, like all citizens of South Carolina, are no more than “incidental” beneficiaries to the Fee Agreement. Indeed, to accept Plaintiffs’ contention, this Court would have to find that *every* citizen of South Carolina can challenge *every* contract entered into by the State. This is an absurd proposition and would completely obviate the indisputable threshold requirement that a person must have statutory, constitutional, or “public importance” standing to bring a claim. *Bodman*, 742 S.E.2d at 366, 403 S.C. at 66-67.

40, 43 (2012) (emphasis supplied and internal quotation marks omitted). Indeed, this point is actually evidenced by the fact that Respondent Crangle, by purporting to represent a class consisting of the public, generally, (*see* Am. Compl., pleading on behalf of all others similarly situated), **is necessarily asserting a claim that is common to all citizens of the State of South Carolina on whose behalf he purports to represent as the putative class representative.** *See* Rule 23(a), SCRCP. Plaintiffs cannot simultaneously claim to represent an interest common with the people generally *and* an injury that is distinct and particularized sufficient to satisfy their burden. Plaintiffs state no specific claim that they have regarding the settlement proceeds and, thus, share their alleged claims with all taxpayers and residents in the State. *Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 (“In *ATC*, [the Supreme Court] unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]... .This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.”) (quoting *ATC*, 669 S.E.2d at 340-41, 380 S.C. at 198).

Significantly, the cases relied upon by Plaintiffs with respect to “taxpayer standing” do not afford them with a legitimate claim to standing. *See* Mot., pp. 5-6. First, no taxpayer funds are at issue. As Plaintiffs specifically allege, the funds at issue were paid by the Federal Government pursuant to a settlement agreement. They do not constitute State tax revenues. Second, the cases relied on by Plaintiffs relate to claims against specific counties or municipal entities regarding taxes imposed or

collected by such entities. *Id.* As the Supreme Court has made abundantly clear, this type of “taxpayer standing” does not apply to claims against the State or State officials that allege harm common to all residents. *Bodman*, 742 S.E.2d at 366, 403 S.C. at 67 (“We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing upon him.”); *ATC*, 669 S.E.2d at 341, 380 S.C. at 198 (“[A] taxpayer lacks standing when he ‘suffers in some indefinite way in common with people generally.’”) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).¹²

Plaintiffs therefore have failed to allege an injury in fact and, thus, do not have constitutional standing. Their motion should be denied and the Amended Complaint should be dismissed.

ii. *Plaintiffs do not have standing pursuant to the “public importance” exception.*

Apparently recognizing their lack of statutory or constitutional standing, Plaintiffs primarily rely—or at least they did in their Motion¹³—on their claim they have standing under the “public importance” exception. Mot., p.13. “Public importance” standing allows citizens in some limited instances to seek judicial

¹² W&H presumes, without conceding, that Plaintiff John V. Crangle is a South Carolina taxpayer as alleged in the complaint. However, Plaintiff South Carolina Public Interest Foundation is not a taxpayer as it is a South Carolina non-profit corporation which has sought, and received, exemption from taxation. See attached as Ex. 8 that plaintiff’s 2018 Form 990 filed with the Federal government confirming its tax-exempt status.

¹³ As explained, Plaintiffs appear to also recognize the insurmountable deficiencies of their “public importance” standing argument and have shifted their arguments to a claim of so-called “derivative standing” in their Supplemental Memorandum.

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 it “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, 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 general importance of an issue, without more, is insufficient to invoke the exception because “the same may be said of most legislative and executive actions. 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.

Plaintiffs essentially assert two claims in this case. First, Plaintiffs assert a claim against the State Attorney General alleging that he did not have authority to approve the one-time payment of attorneys’ fees for services performed pursuant to the Fee Agreement, notwithstanding the clear grants of statutory authority to the Attorney General to enter into the Fee Agreement and hire the Law Firms and the undisputable fact that he obtained all necessary approvals and authorizations required by law. Second, Plaintiffs assert a claim against the Law Firms alleging that

the amount of attorneys' fees owed and paid pursuant to the Fee Agreement is "unreasonable." There are two primary reasons why Plaintiffs do not have "public importance" standing for either of these claims.

First, and most importantly, Plaintiffs have utterly failed to meet their burden to show that resolution of its claim "is needed for future guidance." *ATC*, 669 S.E.2d at 341, 380 S.C. at 199 (2008) ("The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance."). Plaintiffs' spurious challenge is to the one-time payment of the attorneys' fees in this particular situation and pursuant to the specific Fee Agreement. Any determination with respect to this challenge would therefore be entirely limited to the Fee Agreement and payment for services performed pursuant to this single contract. *But see Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44 (affirming dismissal of citizen's challenge to invalidate public body's payment to former employee pursuant to severance agreement for lack of "public importance" exception standing because such one-time payment did "not necessitate further guidance."). Such a determination would not provide "future guidance" as to any issue of public importance, especially considering that Plaintiffs do not challenge—nor could they—the Attorney General's authority to enter into the Fee Agreement on behalf of the State. *See discussion infra* Section 2.A.

This conclusion is not changed by Plaintiffs' newfound contention that they have public importance standing because guidance is needed with respect to other

contracts for outside litigation counsel entered into by the Attorney General. Suppl. Mem. at 18. This last-ditch effort to save their “public importance” standing argument is belied by the fact that Plaintiffs’ claims are specific to the Law Firms’ Fee Agreement and the authority to make the payment in this specific case. This is not a case about the Attorney General’s authority to enter into contracts for outside litigation counsel, because Plaintiffs do not challenge that authority. Thus, public importance standing is inappropriate here. Moreover, affording Plaintiffs with public importance standing in this context would allow “this exception [to] 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, 744 S.E.2d 521, 524 (2013)). Affording Plaintiffs public importance standing in this context would ensure that the courts of this state will routinely be faced with lawsuits challenging government contracts because someone or other is unhappy with the contract.

The second main reason that Plaintiffs cannot demonstrate “public importance” standing is because they are seeking to recover damages under a “common fund” theory while purportedly representing taxpayers and the public. Plaintiffs’ claim is essentially distilled to a statement that the Law Firms do not deserve to be compensated in the manner in which the State contracted for their services, but, incredibly, Plaintiffs deserve to appear after-the-fact and take any amount of attorneys’ fees not paid to the Law Firms for themselves. Accordingly, their

self-serving claims “directly conflict[] with the purpose and spirit of the public importance exception.” *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44.

Finally, the “public importance” exception is not applicable—and cannot confer standing upon Plaintiffs—with respect to claims against private entities, like the Law Firms. The “public importance” exception, by definition, only applies to claims against governmental or public bodies and officials.¹⁴ It does not apply to what is essentially a contract claim (asserted by a non-party to the contract) against private entities. Nor does the concept of standing transfer among independent causes of action or defendants. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.” (internal citations and quotation marks omitted)). Thus, Plaintiffs may not use an assertion of purported public importance standing to challenge the Attorney General’s conduct under an independent cause of action to satisfy their burden of standing against the Law Firms. “[S]tanding is not dispensed in gross.” *Lewis v. Casey*, 116 S.Ct. 2174, 2183, 518 U.S. 343, 358 (1996). Because there is no South Carolina authority to support a finding of standing under the public importance exception against private litigants, any arguable claim of public importance standing as to the Attorney

¹⁴ See, e.g., *Sloan v. Dep’t of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (alleged violation of statutory bidding requirements by state agency); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (alleged violation of constitutional requirements for legislation by legislature); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (alleged violation of constitutional provisions regarding Governor’s role in Air Force Reserve); *Sloan v. Greenville Cty.*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (alleged violations of county ordinances governing procurement).

General, which is disputed, would not satisfy Plaintiffs' burden of standing as to the Law Firms in any event.

Therefore, Plaintiffs have no legitimate argument that the "public importance" exception permits them to proceed with their claims in this case.

iii. "Derivative standing" does not exist.

Plaintiffs brazenly and erroneously contend that they can step into the shoes of the State and challenge a contract that the duly elected Attorney General entered into and upheld. They argue that the 1939 decision in *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), which allowed a citizen of a county to assert a claim on behalf of that county, should be extended to the State even though it is a sovereign entity. Pls.' Resp., p.16. They further analogize their purported claim to that of a shareholder derivative action.¹⁵ *Id.* There are several problems with this argument.

First, "a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action." *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801-02 (Ct. App. 1997) (also rejecting claim to proceed as class action "because there is no claim of injury or damage not common to the public"). Plaintiffs have alleged no injury or

¹⁵ In purported support of this contention, they allege that the Attorney General "has refused repeated demands to assert the State of South Carolina's rights," asserting that these demands came in the form of letters from Governor McMaster and State Solicitor Pascoe as well as Plaintiffs' Initial Complaint and Initial Motion. Suppl. Mem., p. 17. This is a frivolous assertion as the Attorney General is the Chief Legal Officer of the State and, as explained in this Response, has the full legal authority (and obligation) to fulfill legally-binding contracts of the State, a point the Attorney General made clear when responding to the Governor's letter. Ex. 9, Sept. 1, 2020 Ltr. to Governor from Attorney General.

damage not common to the public and, thus, cannot proceed with their putative derivative class action. *See Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43 (holding that a “taxpayer lacks constitutional standing when he suffers in some *indefinite* way in common with people *generally*.”) (emphasis supplied and internal quotation marks omitted). Plaintiffs have no discrete injury entitling them to maintain this action.

Second, *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. Critical to analyzing that decision is that *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800 (municipality) (“[T]his power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear that the governmental entity has unjustifiably refused to assert the claim.”) (emphasis added); *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”). Here, however, Plaintiffs seek to extend *Hart* to allow a derivative suit on behalf of the State—a sovereign entity that is not subject to suit in the same manner as local governments may be.

Third, the Supreme Court has recognized that derivative actions are not applicable with respect to government actions by entities such as a historic commission because those entities are in the nature of a “body politic.” *Newman*, 325 S.C. at 74, 480 S.E.2d at 74. Which stands to reason because, for the same reasons that Plaintiffs do not have taxpayer standing, citizens are not shareholders of the government by virtue of being taxpayers and, thus, cannot bring derivative actions. *See id.*; *see also Bodman*, 742 S.E.2d at 366, 403 S.C. at 66–67 (“We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing upon him.”); *ATC*, 380 S.C. at 198, 669 S.E.2d at 341, (“[A] taxpayer lacks standing when he ‘suffers in some indefinite way in common with people generally.’”) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).

Thus, even if Plaintiffs might be able to challenge local government actions under *Hart*, they cannot challenge executive branch action absent some discrete injury not common to the general public. This they do not have. *Berry* is instructive in this regard because it rejected an effort to bring a legal malpractice claim on behalf of a municipality. That is, the town residents brought a claim against the town’s former attorneys, alleging that they committed malpractice in how they handled the issuance of a revenue bond on behalf of the Town of New Ellenton. *Berry*, 328 S.C. at 440, 492 S.E.2d at 797. The Court of Appeals held that the town residents had no standing to sue either on behalf of New Ellenton or as a class of New Ellenton citizens. *Id.*, 328 S.C. at 446-47, 492 S.E.2d at 800. However, the Court noted that the “authority to decide when a claim should or should not be brought by a governmental

entity is vested with the entity.” *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Consequently, absent some plain cause of action, citizens do not have the right to bring a claim on behalf of a government. The Plaintiffs in *Berry* could not avail themselves of that option because “the claim alleged by Residents on behalf of the town is not clearly set forth and is far from plain.” *Id.*, 328 S.C. at 448, 492 S.E.3d at 801. Thus, the Court rejected Plaintiffs’ efforts to bring the claim on behalf of the town because there was no plain remedy, and similarly rejected their efforts to allege a class action “because there [was] no claim of injury or damage not common to the public.” *Id.*, 328 S.C. at 449, 492 S.E.2d at 802. For the same reasons, Plaintiffs cannot proceed with respect to State even if that option were available to them.

At bottom, Plaintiffs are seeking to Monday-morning quarterback the decisions of the Executive and Legislative Branches and to ask the Judiciary to assist in their quest. However, as noted above, governmental officials and entities are given the discretion to determine what action should be taken by the agency or entity for which they are responsible. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Moreover, the law does not in any event afford Plaintiffs that ability because doing so would require the Court to violate Article I, § 8 of the South Carolina Constitution, which mandates that the executive, legislative, and judicial branches shall remain separate and distinct. In other words, Plaintiffs improperly seek to have this Court decide a political question. *See* discussion *infra* Section 1.C.

Finally, even if Plaintiffs could bring a *Hart* claim on behalf of the State of South Carolina (as opposed to a local government), that claim is not available unless

there is “illegality, fraud, or clear abuse of authority.” *Berry*, 328 S.C. at 447, 492 S.E.2d at 801. Plaintiffs have introduced no evidence of any of those factors beyond just stating what amounts to unhappiness with the payment made to the Law Firms. There is no evidence of illegality because payment of the fees was required by contract, because the EBO approved the payment, and because the fee is reasonable. *See, e.g.*, Ex. 3, Aff. of Leonidas E. Stavrinakis, Ex. 4, Aff. of John Freeman. There is no fraud because the litigation was resolved and, thus, payment was due under the contract. And, finally, there is no evidence of “clear abuse of authority” because—again—there was a contract that required payment of the fees. Simply put, there is no “plain” cause of action or remedy that would justify this Court’s intrusion into matters assigned to a co-equal branch of government. *See Berry*, 328 S.C. at 446, 447-48, 492 S.E.2d at 800-01 (noting that *Hart* applies only to plain causes of action because, generally, the “authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity”).

B. Plaintiffs’ claims are moot.

It is undisputed that payment of the attorneys’ fees has already been made by the State pursuant to the approval of the EBO and the authorization of the State Treasurer based on a warrant issued by the State Comptroller General. Attorney General Mem. in Opp’n to First TRO Motion, Ex. 4, Buckley Affidavit; *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (“A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.”). Plaintiffs’ claims therefore become a request for an advisory

opinion because their claims have been rendered moot by payment of the fees to private counsel pursuant to the Attorney General's contract with those attorneys and the approval of four separate State officials and agencies. *See id.* ("The court does not concern itself with moot or speculative questions."); *Matter of Angela Suzanne C.*, 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) ("It is settled law that this Court will not issue advisory opinions on questions for which no meaningful relief can be granted."). Plaintiffs' Motion therefore should be denied.

C. Plaintiffs' claims present non-justiciable political questions because, at bottom, they allege that the Court should violate the separation of powers.

"The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) (citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 393–94, 110 S.Ct. 1964 (1990)). "Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial." *Id.* (citing *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Brd.*, 333 U.S. 103, 111, 68 S.Ct. 431 (1948)). Unlike the Federal Constitution, the South Carolina Constitution expressly requires that the branches of government remain separate so that one branch does not claim or exercise powers belonging to another branch. S.C. Const. art. I, § 8.

Here, because the proper procedures for processing the payment under South Carolina law were expressly followed by the Attorney General, the State Treasurer,

the Comptroller General, and the EBO, which Plaintiffs cannot dispute,¹⁶ the Amended Complaint's request that the judicial branch invalidate the Attorney General's ability to request payment through the lawful procedures set forth in the law, and the EBO's (a non-party to this lawsuit) ability to process same, requests a judicial violation of separation of powers, including weighing in on what amounts to a nonjusticiable political question. *E.g., Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) ("The nonjusticiability of a political question is primarily a function of the separation of powers.") (quoting *Judicial Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006)).

If the executive expends money pursuant to a contract and in accordance with the procedures established by the legislature, this Court has no role in that process. Therefore, contrary to Plaintiffs' unsupported assertion that the Attorney General, Treasurer, Comptroller General, and EBO's processing of the payment pursuant to the applicable law and a binding contract somehow is a violation of separation of powers under Article I, § 8 of the South Carolina Constitution, the converse is actually true: it would be a violation of separation of powers under Article I, § 8 of the South Carolina Constitution for the judicial branch to weigh in on the statutory procedures established for such payments, thereby usurping the Attorney General's, Treasurer's, Comptroller General's, and EBO's respective authorities to make the payment.

¹⁶ Indeed, the very EBO approval that Plaintiffs claim in their Motion, *see* Mot., p. 8, was required but was not obtained was, in fact, obtained. Once again, this demonstrates the frivolity of Plaintiffs' claims and that this suit was not filed based on facts but greed and political motivations.

At bottom, Plaintiffs' complaint states nothing more than a generalized grievance with a decision of the Attorney General, and Plaintiffs are attempting to put this Court in the position of wading into matters reserved for the Attorney General as the Chief Legal Officer of the State. However, Plaintiffs do not challenge—nor could they challenge—the Attorney General's authority to enter into the Fee Agreement or to hire private counsel on a contingency basis. Indeed, as discussed below, South Carolina Code Section 1-7-170 unequivocally grants the Attorney General that authority, which he exercised here. *See also Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943) (“[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, ***on a contingent basis.***”) (emphasis supplied). The Attorney General determined that the Fee Agreement was in the best interests of the State, and Plaintiffs' mere disagreement does not support a legally-cognizable claim, nor does it provide this Court jurisdiction or authority to require judicial approval of the Fee Agreement. *See Order Granting Mot. to Intervene on behalf of Attorney General Henry D. McMaster, Sloan v. The S.C. Board of Physical Therapy*, No. 04-CP-40-1797, 2004 WL 5353216 (S.C.Com.Pl. July 02, 2004) (“[T]he Attorney General of South Carolina possesses the right to control and manage the State's litigation.”) (citing *Cooley*, 204 S.C. 10, 28 S.E.2d at 450).

D. This Court does not have jurisdiction to review the reasonableness of the attorneys' fees paid pursuant to the Fee Agreement.

The foundation for Plaintiffs' claim that the attorneys' fees to the Law Firms are unreasonable is its assertion that the Fee Agreement with the Attorney General

violates Rule 1.5 of the South Carolina Rules of Professional Conduct. *See* Am. Compl., ¶¶ 33-35. However, even putting aside that, as discussed below, there is no legal basis to require the State Attorney General to seek judicial approval of his contracts with outside legal counsel, there is no private right of action for a third party to challenge the attorneys' fees as violative of the Rules of Professional Conduct, and, in any event, any allegations of violations of the Rules of Professional Conduct are within the **exclusive** province of the Supreme Court. *See In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) (“[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.”) (citing *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *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). Just as this Court cannot usurp the role of the State Attorney General as Chief Legal Officer, it cannot usurp the Supreme Court's exclusive role or create a private right of action the Supreme Court has found does not exist, which is exactly what Plaintiffs are improperly asking this Court to do.

2. Plaintiffs have not established a likelihood of success on the merits for any of their causes of action.

In addition to the reasons set forth in Section 1, *supra*, Plaintiffs are not entitled to a preliminary injunction because they cannot show a reasonable question

as to the existence of a legal right working in their favor and therefore cannot establish a likelihood of success on the merits. Their arguments are abstract assertions regarding non-existent claims, all designed to afford them a piece of the action regarding a legal matter which they did not conceive of, participate in, advance, or assist in resolving.

A. The Attorney General had authority to pay the attorneys' fees without the necessity of depositing those amounts into the General Fund.

Plaintiffs' contention that S.C. Code Ann. § 1-7-150 precluded the Attorney General's payment of \$75 million pursuant to the Fee Agreement is wrong.¹⁷ There are two primary reasons for this. First, Plaintiffs' reading of § 1-7-150 is not consistent with the statute or with the prior interpretations of that statute by the judiciary. *See* Rule 11(a), SCRCF. Second, even assuming without conceding that Plaintiffs' reading is correct, none of the MOX settlement funds would ever reach the General Fund in any event because § 1-7-150 has been superseded by a proviso in the current State budget, which directs any litigation recovery funds that "otherwise" would go to the General Fund to a separate account. Plaintiffs' lack of basic

¹⁷ Plaintiffs do not challenge the Attorney General's authority to retain outside counsel. Nor could they make such a challenge in good faith, as the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by the judiciary. *See* S.C. Code Ann. §§ 1-7-85, 170; *Cephalon v. Wilson*, 2012-CP-40-7317 (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 (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 in *Cephalon* 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.*

comprehension of what laws even apply to the settlement funds is reason alone to deny the Motion.

First, § 1-7-150 provides that “monies, except ... costs of litigation ... awarded the State of South Carolina by ... settlement in actions or claims brought by the Attorney General on behalf of the State ... must be deposited in the general fund ... except ... where some other disposition is required by law.” There are several reasons the Attorney General’s actions comply with § 1-7-150 and the funds representing the attorneys’ fees were not required to be deposited in the General Fund. Because the Attorney General retained outside counsel to prosecute these cases, as he was authorized by law to do, the contractual legal fees are a “cost[] of litigation” that the Attorney General is authorized to pay. *State v. Eli Lilly and Co.*, No. 2007-CP-42-1855, 2009 WL 6058383 (S.C. Com. Pl. Sep. 22, 2009) (“The flaw with this argument is that the statute expressly authorizes payment of ‘the costs of litigation’ out of litigation proceeds, and a ‘cost of litigation’ is precisely what legal fees are.”); *see also Cephalon*, No. 2012-CP-40-7317 (determining that § 1-7-150 “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.”). Consequently, § 1-7-150 authorized the Attorney General to pay the amounts to the Law Firms without first depositing those monies in the General Fund.

Second, § 1-7-150(B) exempts from its coverage monies “where some other disposition is required by law.” The fulfillment of valid and binding contracts entered

into by the State's Chief Legal Officer and approved by the EBO is a disposition "required by law." Further, S.C. Code Ann. § 1-7-85 expressly provides 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 ..." Plaintiffs' contentions, therefore, have no support in the plain language of the statute.

And third, even if Plaintiffs' interpretation of § 1-7-150(b) was somehow correct—which it is not—it is irrelevant to this case because Proviso 59.8 precluded the Attorney General from transferring **any** funds to the General Fund and instead directed him to deposit those funds in a separate account:

(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 at present. 2020 S.C. Acts 135, § 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 portion of the settlement awarded for attorneys’ fees generally would have to be deposited in the General Fund, they would not be in this case. The argument articulated by Plaintiffs is therefore inapplicable. But even if it was applicable, the question becomes the Attorney General’s compliance with the requirement that expenditures from the Litigation Recovery Account must be “prescribed by law.” Again, fulfilling a contractual obligation is a duty “prescribed by law” for the Attorney General.

The payment of the contractual attorneys’ fees also constituted a “disposition required by law” and an “expend[iture] ... prescribed by law” because the Attorney General complied with all prerequisites to authorize a distribution of money. Specifically, the EBO approved the payment of the contract fees as it was expressly authorized to do 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.”); S.C. Code Ann. § 2-65-10, *et seq.*; *see also* Ex. 3, Stavrinakis Aff. ¶¶5-6. Moreover, as Plaintiffs acknowledge in their Motion, the Treasurer’s Office processed the payment for the attorneys’ fees pursuant to a warrant from the Comptroller General, as the law requires. *See* Mot., pp.4-5 & Am. Compl., Exh. 19.

Plaintiffs claim, without citing to any statutory provision, that an additional approval by the Joint Other Funds Oversight Committee was required and even

allege “the EBO Director apparently by-passed the approval process.” Suppl. Mem., p. 11. Plaintiffs also have submitted an affidavit from one member of the General Assembly, Nikki Setzler, in purported support of this contention. However, the simple fact is that Plaintiffs are completely wrong. Pursuant to the continuing resolution passed by the General Assembly now in effect, the General Assembly has 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 (“The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.”); 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].”). This is, of course, the reason that, as Mr. Setzler asserts, there was no application for payment of the fees submitted to the Joint Other Funds Oversight Committee—it simply was not needed. The EBO Director therefore did not by-pass the requisite approval process, and Plaintiffs’ willingness to allege such serious charges against multiple State officials and the Law Firms without having even a basic comprehension of the facts and the applicable law reveals this case for what it is—a baseless political attack.

Thus, the Attorney General’s payment of the attorney’s fees was proper because the payment was required by contract and because the payment was approved by the EBO. Plaintiffs therefore have no likelihood of success on the merits

with respect to the Attorney General's authority to fulfil the obligation to pay the attorneys' fees owed pursuant to the Fee Agreement.

- B. Plaintiffs' ambiguous challenge to the reasonableness of the fees paid pursuant to the Law Firms' contract with the Attorney General has no likelihood of success on the merits.**
- i. This Court does not have the authority to require the Attorney General to obtain judicial approval of the Law Firms' contract.*

Plaintiffs ask this Court to **require** the Attorney General to obtain judicial approval of the amount of fees paid to the Law Firms for services performed and costs incurred pursuant to their contract. As discussed above, Plaintiffs do not have standing to make such a request as they are not parties to the contract and the "public importance" exception does not apply; only the Supreme Court has jurisdiction to entertain a complaint regarding the reasonableness of attorneys' fees that is based on allegations of violations of the Rules of Professional Conduct; and requiring judicial approval of the validity of executive branch contracts is a prima facie violation of the separation of powers provisions of the Constitution. But even assuming none of that is true, Plaintiffs do not have a valid claim and this Court does not have authority to even entertain Plaintiffs' claim because there is no contractual or statutory provision or any other mechanism that imposes a requirement that the Attorney General obtain judicial approval of the contract or the fees paid. This is undeniably fatal to Plaintiffs' request.

Plaintiffs have not identified any statutory provision—because there is not one—imposing any requirement that the Attorney General "seek judicial approval of the amount of any fee awarded to counsel under the fee agreement." Compl. ¶62. The

settlement reached between the State and the Federal Government also did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, there is absolutely nothing that supports Plaintiffs' request or that would permit this Court to require the Attorney General to seek judicial approval of the Fee Agreement.

Plaintiffs' allegation that the Fee Agreement—which provides for an effective contingency fee rate of 12.5% for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon this Court authority to review the Fee Agreement. A mere allegation of a violation of the South Carolina Rules of Professional Conduct does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have approved and authorized the payment of the fee.

ii. *The attorneys' fees earned and paid are eminently reasonable.*

As discussed, there is absolutely no basis for this Court to require the Attorney General seek approval of the attorneys' fees paid pursuant to the Fee Agreement or for this Court to judge the reasonableness of the attorneys' fees. But even if the reasonableness of the fees were at issue, Plaintiffs cannot demonstrate any likelihood

of success on the merits of its claim that the Fee Agreement provides for an “unreasonable” fee.

While the Law Firms do not concede that such analysis is directly applicable because the reasonableness of the fee in this case is not subject to judicial evaluation, the “common fund” approach is often utilized to calculate the attorneys’ fee award. *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 would be 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, which 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—one of which involved agreed payments by a State authority. *See also Condon v. State*, 354 S.C. 634, 643, 583 S.E.2d 430, 435 (2003) (finding competent evidence to support an award of attorneys’ fees on a common fund created **against**

the State in the amount of 28% of the fund in a “case that took 10 months to settle [and] achieved a good result ... including securing prospective enforcement of a tax exemption” in circumstances where counsel “took the risk of not earning any fee at all.”).

The fee is reasonable. *See* Ex. 4, Freeman Aff.; Ex. 5, Virzi Aff.; Ex. 6, Protopapas Aff.¹⁸ As detailed above and in the several expert affidavits that are attached, the work performed included litigation of four cases in three separate Federal trial courts, three separate Federal courts of appeal, and the United States Supreme Court over a four-year time period. 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, 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 (the Federal Government had four separate legal teams defending these cases). It also involved coordination and communication with multiple Congressional offices and staff—including offices and staff outside of South Carolina—and the White House.

Plaintiffs cite to *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) as support for their Monday-morning quarterbacking. They characterize the

¹⁸ By separate filing W&H shall be providing a separate affidavit of Professor Nathan Crystal, who provides the opinion, among other opinions, that the attorneys’ fees do not violate the Rules of Professional Conduct.

case as flatly reversing a fee award of \$19 million because of its size. As Professor Freeman points out, each case must be considered on its own facts, although this case is quite consistent with other fee awards in similar cases in this jurisdiction. Ex. 4, Freeman Aff. pp. 10-14. Moreover, the *Cendant* court actually reversed the award because “the District Court's fee opinion in this case was too cursory for us to have a sufficient basis to review for abuse of discretion.” *Cendant*, 243 F.3d at 733 (internal quotation marks and citation omitted). On remand, the district court approved an award of approximately \$14 million in attorneys’ fees or about 4% of the fund. *See In re Cendant*, No. 98-cv-02819, pp.28-29 (June 11, 2002).

Regardless, *Cendant* provides no guidance for the Court in this case. There are quite a few differences between this case and *Cendant*, in particular:

- *Cendant* had conceded liability, whereas DOE contested liability in multiple forums.
- *Cendant* was settled only about four months after the complaint was filed, whereas this litigation continued for four years.
- *Cendant* had a minimal amount of motion practice, whereas this litigation had extensive motion practice and briefing— not to mention multiple appeals requiring separate briefing.

Cendant, 243 F.3d at 735-36. Moreover, as Professor Freeman observes, this case involved substantial time and effort and presented large, novel challenges; posed great risk; was consistent with fees awarded in other cases; achieved excellent

results; and involved the work of professional and experienced counsel, all with no downside risk to the client. Ex. 4, Freeman Aff. pp.8-20.

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. 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 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 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 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. These are benefits that the State received for no additional compensation.

C. Plaintiffs “constructive trust” claim has no likelihood of success.

As discussed throughout, the Law Firms received payment of their fee for services performed pursuant to a legally-binding contract entered into with the State Attorney General. The payment of the fee was authorized and approved by the State Attorney General, the State Treasurer’s Office, the State Comptroller General’s Office, and the EBO in accordance with the applicable statutory provisions. Indeed, the very approval by EBO that Plaintiffs contend was needed for payment to be made was obtained *prior* to Plaintiffs filing suit. *See* TRO Mot., p.8; Attorney General Mem. in Opp’n to First TRO Motion, Ex. 4, Buckley Affidavit. No statute requires court approval of the payment of the fee. And payment was intentionally and voluntarily made by the State to meet the State’s binding contractual obligations. Critically, none of those State officials contend that payment was somehow induced by “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty” or that the Law Firms are not entitled to their contractual fees. *Lollis v. Lollis*, 354 S.E.2d 559, 561, 291 S.C. 525, 529 (1987) (discussing requirements to impose constructive trust).

Despite all this, which they know, Plaintiffs nevertheless seek to stand in the shoes of the State and non-party State Executive Branch officials to contend a “constructive trust” should be created “*in favor of Plaintiffs*,” Am. Compl. ¶85, to deprive the Law Firms of their rights to the fee owed and already paid to them for services performed and costs incurred pursuant to their contract with the State. This

contention completely lacks merit. “A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.” *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. “Fraud is an essential element, although it need not be actual fraud.” *Id.* “In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.” *Id.*

Plaintiffs make the remarkable (and entirely frivolous) claim that the Law Firms’ receipt of the funds owed and paid to them pursuant to a legally-binding and valid contract for services performed and for which payment was authorized by four separate State officials was somehow wrongful and necessitates the creation of a constructive trust, thereby depriving the Law Firms of their rights to and the benefit of these funds. However, Plaintiffs do not allege, nor could they allege, a single act on the part of either of the Law Firms that in any way amounts to “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty.” *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. The closest Plaintiffs come to such an allegation is their contention that the Law Firms’ contingency fee pursuant to its contract is not “reasonable” under the Rules of Professional Conduct. But, as discussed, the circuit court does not have jurisdiction over such claims, the Rules of Professional Conduct do not give rise to a private cause of action, Plaintiffs are not parties to the underlying contract, and Plaintiffs have no standing to assert such a claim. And the actual party to the contract—the Attorney General—approved the fee, and multiple other State officials authorized payment of the fee.

Like with their reasonableness claim, at bottom, the Plaintiffs are not only asking this Court to usurp the statutory powers of the Attorney General but also to force the State to breach its contract with the Law Firms after the contract has been fully performed by all parties. Plaintiffs cite to no authority—because there is none—that would allow this Court to take such drastic action and create additional litigation against the State. Therefore, Plaintiffs’ request for imposition of a constructive trust is devoid of merit and must be denied.

3. No irreparable harm will occur if the injunction is not granted and there are adequate remedies at law.

In addition to having no likelihood of success on the merits, Plaintiffs cannot demonstrate that irreparable harm will occur if the injunction is not granted or that there is no adequate remedy at law. As noted above, injuries that can be remedied by money damages do not constitute irreparable injuries requiring the drastic remedy of injunction, both because the nature of the injury does not require the intervention of equity and because there is available an adequate remedy at law. *E.g., Thomas*, 2020 WL 2617329, at *22; *Van Robinson Ins. Agency*, 272 S.C. at 128-29, 249 S.E.2d at 745. Plaintiffs’ claims can be remedied by money damages, especially since no specific property was transferred to the Law Firms.

4. Plaintiff has not demonstrated that the Attorney General’s payment of the attorneys’ fees was arbitrary and capricious.

Plaintiffs cannot demonstrate that the payment of fees was arbitrary and capricious. Along with the other requirements for a preliminary injunction, “in order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must

be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner.” *Richland Cty.*, 422 S.C. at 310, 811 S.E.2d at 767 (quoting *Headdon v. State Highway Dep’t*, 197 S.C. 118, 14 S.E.2d 586, 588 (1941)).

Plaintiffs have not made and cannot make this requisite showing. The fulfillment by the State Attorney General of a contractual obligation of the State for the payment of fees owed for services performed and for which approval by three separate State officials and agencies was obtained pursuant to applicable law is not arbitrary and capricious. Indeed, contrary to Plaintiffs’ contentions, it would be arbitrary and capricious if the Attorney General had failed to authorize and make payment of the fees in breach of the Fee Agreement, thereby depriving the Law Firms of their earned property and effectuating a de facto taking by the State. Plaintiffs are not entitled to any injunction here.

5. **In order for a preliminary injunction to be entered, Plaintiffs must provide a sufficient bond to compensate the Law Firms for the deprivation of their property and the damages and costs that will be incurred.**

For the reasons set forth above, no legal basis supports this Court entering the requested preliminary injunction against the Law Firms. However, should this Court be inclined to enter any injunction, it can only do so if the Plaintiffs post an adequate bond to compensate the Law Firms for the deprivation of their property and the damages and costs that will be incurred.

Plaintiffs essentially argue that the Law Firms should be required to post the bond for their injunction. Supp. Mem. p.24 (arguing that Law Firms should be

required to set aside money in an interest-bearing account). Contrary to Plaintiffs' argument, they are required to post a bond to protect the Law Firms against the deprivation of their property and the damages and costs that will be incurred. Rule 65(c) contains no exceptions to its application and its provisions are mandatory. *Spartanburg Buddhist Ctr.*, 417 S.C. at 609, 790 S.E.2d at 434; *AJG Holdings*, 382 S.C. at 49, 674 S.E.2d at 508. A nominal bond is not sufficient. *Atwood*, 374 S.C. at 73, 646 S.E.2d at 884 (holding that a "nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper").¹⁹ Plaintiffs seek to shift all of the burden to the Law Firms rather than shoulder any of it. However, because the purpose of the bond is to protect the enjoined party against its costs and damages incurred as a result of a wrongfully entered injunction, a bond protects a defendant and also informs the Plaintiffs "of the

¹⁹ See, e.g., *Town of McBee v. Alligator Rural Water & Sewer Company, Inc., et al.*, 2019 WL 2613742, Op. No. 2019-UP-176 (S.C. Ct. App. filed June 26, 2019) (finding that the circuit court erred in failing to require *Alligator*, a non-for-profit corporation, to post a security for its injunction and remanding to the circuit court to set a bond in accordance with the mandatory requirements of Rule 65(c)). Appellant and its counsel are conscious of Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. The appellate opinions in *Alligator* are not cited as binding precedent but rather as an indisputable fact that this Court has rejected an assertion that a not-for-profit corporation can find cover in the limited exception to Rule 65(c)'s security requirement. Appellant submits that this Court may take judicial notice of these facts and its files in the *Alligator* case pursuant to the guidelines set forth in *Masters v. Rodgers Development Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). At bottom, the opinion was unpublished because it did not break new ground regarding the requirement that the party seeking an injunction post a bond.

price they can expect to pay if the injunction was wrongfully issued.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804–05 (3d Cir. 1989)

Plaintiffs argue for no bond because they have self-appointed as representing the public interest. But as discussed elsewhere in this Response, Plaintiffs have no standing or authority to step into the shoes of the State and the duly-elected Attorney General. *See* discussion *supra*. Therefore, their self-appointment as a defender of the public interest in lieu of the duly-elected Attorney General does not support their effort to avoid a bond, an assertion routinely rejected by the courts of this State.

Finally, Plaintiffs’ arguments regarding how the funds should be set aside fully illustrates that they are attempting to interfere with and suspend some or all of the general and ordinary business of Appellant. *See* Rule 65(e), SCRCF; *cf. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601–02, 553 S.E.2d 110, 121 (2001) (holding that it was error for the trial court to issue an *ex parte* order enjoining a partnership from accessing funds in its account and making lawful disbursements absent a hearing, stating that where “the factual basis for the TRO was not fully developed ... a hearing on the matter was imperative.”). In this action, Plaintiffs brazenly seek to substitute their judgment for that of the State and its elected officials and also to interfere with the business operations of private law firms. It is impossible to conclude that they should not be required to post a bond for seeking to enjoin the activities of the Law Firms actively engaged in business. *See AJG Holdings*, 382 S.C. at 50, 674 S.E.2d at 508 (holding that bond was required for property that “at some point ... may have been used for commercial purposes”). Plaintiffs therefore should be required to post

an adequate bond. *See id*, 382 S.C. at 50, n.3, 674 S.E.2d at 508, n.3 (noting that Rule 65(c) requires a bond in the event that an injunction was wrongfully entered).

Conclusion

For the reasons set forth above, the Motion should be denied and this frivolous case dismissed in its entirety.

Respectfully submitted,

s./ John S. Simmons, S.C. Bar No. 10260

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Columbia, South Carolina
October 6, 2020

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,

Case No. 2020-CP-40-04603

Plaintiffs,

**SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

v.

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

Defendants.

Come Plaintiffs, by counsel, and for their Supplemental Memorandum in Support of their Motion for Temporary Restraining Order and Preliminary Injunction, state as follows:

I. INTRODUCTION

Plaintiffs South Carolina Public Interest Foundation (“SCPIF”) and John Crangle (“Crangle”) [collectively the Plaintiffs] submit this supplemental memorandum in support of their motion for a temporary injunction freezing \$75 Million of settlement proceeds that was unlawfully transferred to Defendant Willoughby & Hoefer, at the direction of Defendant Alan Wilson. Plaintiffs seek this injunctive relief on behalf of the taxpayers of this State and have standing under well-established South Carolina Supreme Court precedent. The South Carolina Supreme Court, consistent with general black letter law, has held that a circuit court must enjoin the expenditure of specifically identified funds sought to be recovered in equitable proceedings such as this. Plaintiffs Amended Complaint, supported by an affidavit and exhibits, establishes their right to preliminary injunctive relief at this stage of the proceedings. Furthermore, because the Plaintiffs

are suing in a derivative capacity on behalf of the State of South Carolina, there is no requirement for the posting of a bond.

Moreover, courts exercising equitable jurisdiction are permitted to “give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” *United States v. First Nat’l City Bank*, 379 U.S. 378, 383, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965). The public interest in this litigation is paramount. Plaintiffs seek the return of \$75 Million of taxpayer money to the coffers of the State of South Carolina that was transferred unlawfully to Defendant Willoughby & Hoefer after Plaintiffs filed this lawsuit to enjoin this very transfer. \$75 Million is more than the annual judicial budget and more than all the funding that is provided by the State to every solicitor and public defender’s office. In addition, Defendant Wilson, the Attorney General of the State of South Carolina, sought to undermine this Court’s jurisdiction and prevent Plaintiffs from obtaining injunctive relief by facilitating this unauthorized transfer hours before the Court’s scheduled hearing on Plaintiffs’ motion for a temporary injunction. Thus, the public’s interest in the fair administration of justice is also implicated in this proceeding.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the “Settlement Agreement”) regarding the failure by the United States Department of Energy (“DOE”) to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site (“SRS”). Affidavit of James M. Griffin, Sept. 25, 2020 (attached as Exhibit A to the attached Amended Complaint and hereinafter referenced as “Griffin Aff.”), Ex. 1. Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the DOE must pay the State of South Carolina “economic impact and

assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments. Under the terms of the Settlement Agreement announced by Respondent Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of \$600 million. Significantly, under the terms of the Settlement Agreement, the DOE is required to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” Griffin Aff., Ex. 1, ¶ 5(a).

Defendant Wilson announced at an August 31, 2020 press conference that he intended to pay two private law firms \$75 million from the proceeds of the DOE settlement. According to Wilson’s statement at the press conference, this payment was expected on or after October 1, 2020. Upon learning of Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that the entire amount must be deposited into the State’s General Fund. *Id.*, Ex. 3.

On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson. *See* Compl., Sept. 25, 2020 (Plaintiffs' "Initial Complaint" attached hereto as Exhibit B). That same day, Plaintiffs filed their motion for a temporary restraining order and preliminary injunction against Defendant Wilson, seeking to enjoin Defendant Wilson's payment of \$75,000,000 to the law firms (Plaintiffs' "Initial Motion" attached hereto as Exhibit C). On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings when requesting that the circuit court schedule a hearing on Plaintiffs' Initial Motion. *See* Griffin Aff., Ex. 14.

On the morning of Monday, September 28, 2020, The State newspaper ran an article on the pending lawsuit with links to relevant court filings. John Monk, *Should 2 law firms get \$75M of SC's \$600M plutonium Settlement? This lawsuit says no.*, The State, Sept. 28, 2020, attached hereto as Exhibit D. The same morning, counsel for Defendant Wilson emailed the circuit court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See* Griffin Aff., Ex. 15. The circuit court responded that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Initial Motion over Defendant Wilson's objections. *See id.* On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Defendant Wilson ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.

Unbeknownst to Plaintiffs and the circuit court, Defendant Wilson had already received the \$600 million in settlement proceeds and initiated the process to transfer \$75 million to Defendant by Monday, September 28, 2020. Defendant Wilson was aware of this fact at the time that Defendant's counsel was emailing with the circuit court about the hearing to be held the next

day. Defendant Wilson was aware of this fact when his counsel was emailing with Plaintiffs' counsel about Plaintiffs' request for an agreement not to distribute the funds until after the hearing. Instead of being candid with the circuit court and Plaintiffs' counsel about the status of the disputed funds, Defendant Wilson was actively engaging the Office of the State Treasurer to ensure the disputed \$75 million would be transferred to Willoughby & Hoefer ahead of the 3:00 p.m. hearing the next day, as shown by an email from the Finance Director for the Attorney General's Office. See Email K. Buckley to M. Simmons (Sept. 28, 2020), attached hereto as Exhibit E.

In fact, Attorney General Wilson's staff expedited payment to Willoughby & Hoefer via wire transfer on Monday afternoon, September 28, 2020, after the circuit court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. See Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Prior to the afternoon of September 28, 2020, the authorization request from the Attorney General to the Treasurer's Office was for payment to be made by check in the amount of \$75 million. However, after the hearing was scheduled, Ms. Buckley emailed her counterpart at the Treasurer's office requesting that the payment be made via wire transfer. The request for a wire transfer came from Defendant on Monday as well. See *id.* As a result, the disputed funds were irrevocably deposited into the law firm's bank account mere hours before the hearing, depriving the circuit court of the opportunity to restrain the transfer of funds. If a check had been issued instead, the circuit court could have ordered that payment of the check be stopped before actual funds were transferred.

The circuit court and counsel for Plaintiffs first learned that the disputed \$75 million had been disbursed to Defendant moments before the 3:00 p.m. hearing on Monday, September 28, 2020. In his memorandum in opposition to the Plaintiffs' request for a temporary restraining order circulated at 2:12 p.m., Defendant Wilson announced that the disputed funds had been transferred

to Defendant and, therefore, Plaintiffs' entire case was moot. *See* Mem. Att'y Gen. in Opp'n to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3, attached hereto as Exhibit G.

Following the hearing, Respondent Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See* Griffin Aff., Ex. 18. Thereafter, the circuit court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the Defendant had received the disputed funds. *See id.* During the hearing, the circuit court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. Order Granting Temporary Injunction Pendente Lite, signed on September 29, 2020 and entered on September 30, 2020, attached hereto as Exhibit H. That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, Plaintiffs received confirmation from the Treasurer that the proceeds were in fact wired to the law firm mere hours before the 3:00 p.m. hearing on September 29, 2020. According to Treasurer Loftis, "[t]he Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]." Therefore, the Treasurer's Office "processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account." *See id.*, Ex. 19.

Later in the morning of September 30, 2020, Plaintiffs filed their amended complaint (attached hereto as Exhibit A) naming Defendant and Defendant Wren & DeMasters, P.A. as additional defendants (collectively, the "Law Firms"). At the same time, Plaintiffs filed their

second Motion for Temporary Restraining Order and Preliminary Injunction, attached hereto as Exhibit I. Thereafter, the circuit court entered its Ex Parte Temporary Restraining Order, attached hereto as Exhibit J.

III. PLAINTIFFS' DECLARATORY JUDGMENT ALLEGATIONS

A. **Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement.**

Plaintiffs contend that the payment of \$75 million to the private Law Firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "*Immediate payment by the United States to the State of South Carolina in the amount of \$600 Million (Six Hundred Million), inclusive of interest, with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1 (emphasis added). Accordingly, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Respondent Wilson

paid private lawyers \$75 million, out of the \$600 million, which was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. See *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) (“[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Defendant Wilson's payment of \$75 million from the State's \$600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution Art. I, § 8.

As acknowledged by Defendant Wilson in the litigation pending in Barnwell County over the \$600 million in settlement proceeds, the General Assembly is the proper body to determine how the \$600 million is allocated, not the Attorney General:

The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money to the State of South Carolina. The statute under which settlement was reached provides for payment of funds to the State of South Carolina and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but ***the General Assembly is the proper body to determine how the funds at issue in this action should be allocated***, rather than him or this Court.

Mem. Att’y Gen. in Opp’n to Mot. to TRO or Temp. Inj. 1-2, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020) (emphasis added, citation to exhibit omitted) (attached hereto as Exhibit K).

Moreover, according to the Defendant Wilson, he has no authority as the Attorney General to appropriate money that is payable to the State of South Carolina:

The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90–91, 678 S.E.2d 412, 416–17 (2009).

Id. at 4-5.

In an attempt to circumvent Section 1-7-150’s requirement that the full \$600 million be deposited in the General Fund, the Defendant Wilson purportedly relied on the South Carolina

Federal Funds Oversight Act, S.C. Code § 2-65-10 *et. seq.* However, a close reading of this statute further supports the Plaintiffs' position that, absent an award of attorneys' fees, only the General Assembly can appropriate funds to pay the Law Firms from these settlement proceeds.

Section 2-65-20 provides that "the General Assembly shall appropriate all anticipated *federal funds and other funds.*" S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds "means financial assistance made to a state agency by the United States Government in any form." S.C. Code Ann. § 2-65-15(5). Examples of federal funds include "a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land." *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition.

The settlement proceeds were not intended as financial assistance for the South Carolina Attorney General's Office or any other State agency. Instead, the settlement proceeds are payable to the "State of South Carolina" and thus may possibly qualify as "other funds." The term "other funds" means "any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act." S.C. Code Ann. § 2-65-15(8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the appropriations act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budget Office ("EBO") for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO's authorization to approve expenditures of "other funds" is limited to "funds from private foundations or industries which are not included in the appropriations act." *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private

foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that “the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO.” See South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at <https://admin.sc.gov/budget/otherfundsauthorization>). The EBO Request submitted on behalf of Defendant Wilson requesting authorization for the \$75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. See Form BD-100, Exhibit G, Mem. Att’y Gen. in Opp’n to Mot. for TRO or Temp. Inj, Ex. 2. Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. Honorable Nikki G. Setzler Affidavit, Exhibit L. In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the \$75 million fee from funds that the Director lacks authority to appropriate.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general “other funds” provisions. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general

statute and given such effect.” *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), reh’g denied (June 26, 2018) (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted)). The EBO has no authority to authorize the payment of attorneys’ fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

B. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order.

Even if the settlement was structured in a way that the United States agreed to pay the State’s litigation costs, attorneys’ fees totaling \$75 million for the amount of work performed in this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee.” Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

In 2016,¹ the Law Firms first sued in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this claim for damages,² ruling that any such lawsuit must be filed in the U.S. Court of Federal Claims. *Griffin Aff.*, Ex. 4. Subsequently, the Law Firms refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the Law Firms lost the case. The Court of

¹ Defendant attempts to justify their \$75 million fee by providing a summary of work performed prior to January 2016. However, the earliest effective date of Defendant’s contingency fee agreement is February 8, 2016. *Griffin Aff.* Ex. 7.

² The District Court did not dismiss the State’s claim for injunctive relief.

Federal Claims ruled with the DOE. *Id.*, Ex. 5. The Law Firms then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers for the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

The Court in *Cendant Corporation Prides Litigation*, 243 F.3d 722 (3rd Cir. 2001), under similar circumstances, overturned a \$19 Million fee award that represented only 5.7% of the total recovery because the settlement resulted from the efforts of public agencies and the attorneys did very little work, as compared other cases involving settlements over \$100 Million. The Third Circuit Court of Appeals noted that there was very little motion practice and discovery was virtually non-existent. Class counsel spent approximately 5,600 hours on the case. The Court compared the fee award to other large class settlements where the common fund exceeded \$100 Million. The Court observed that the fee awards in those cases ranged from 2.8% to 36% to the total settlement fund. A fee of 5.7% appeared to be in line when just comparing percentages. However, the attorneys in those other cases spent far more hours (45,000 in one case) and engaged in significantly more complex discovery (reviewing 11 Million pages of documents). The Court summarized its review of the other cases involving large fee awards, “in case after case, the same factors recur: complex and/or novel legal issues, extensive discovery, acrimonious litigation, and

tens of thousands of hours spent on the case...Because none of these factors which increase the complexity of class litigation was present here, it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.” *Id.* at 741.

Lastly, the Court concluded that much of the work done to facilitate the settlement was accomplished by regulators, not counsel. The Court explained, “allowing private counsel to receive fees based on the benefits created by public agencies would undermine equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to minimize the cost of failure by free riding on the...efforts of others.” *Id.*

In addition, the express terms of the fee agreement with the Law Firms states that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” *Id.*, Ex. 7. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of \$75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.³ However, Defendant Wilson seeks to avoid judicial review and paid the law firms \$75 million without making any showing of reasonableness.

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Defendant additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm’s representation of the State on its claim

³ Under South Carolina, the following factors are considered to determine whether an award of attorneys’ fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019, Defendant along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Defendant 2% of the ultimate recovery for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Defendant, *after* the State had lost in the Fourth Circuit and *after* the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Under the terms of the amended contingency fee agreement, Defendant is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Defendant had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Defendant is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief

filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Defendant over \$65,000 per page for these filings.

The fee agreement was entered into by the Defendant Wilson as Attorney General on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

C. Plaintiffs Have Standing to Assert the Claims in Their Amended Complaint.

Plaintiffs assert both constitutional and public interest standing. Plaintiffs also have derivative standing to pursue the claims for the recovery of State funds asserted under *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), and Plaintiffs have standing based on the public importance of the matters at issue in the lawsuit.

1. Plaintiffs Have Adequately Alleged Their Standing to Pursue the Equitable Claims at Issue Derivatively on Behalf of the State of South Carolina.

The South Carolina Supreme Court first addressed the ability of a citizen to assert claims for the recoupment of money on behalf of a governmental entity in the case of *Ex parte Hart*, stating as follows:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .

Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54.

It is a logical extension of this precedent that Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.” (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that “[e]quity will not suffer a wrong without a remedy”). Indeed, “[t]he requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000) (internal quotation marks omitted).

As shown by proof submitted via affidavit, Defendant Wilson has refused repeated demands to assert the State of South Carolina’s rights vis-à-vis the Defendant and has instead violated the South Carolina Constitution in an attempt to overpay Defendant for its services. First, Defendant Wilson refused to act in response to Governor McMaster’s August 30, 2020 letter questioning the amount of attorneys’ fees that Defendant Wilson intended to pay. *See Griffin Aff.*, Ex. 2. Next, Defendant Wilson refused to act in response to the September 10, 2020 letter of First Circuit Solicitor David Pascoe. *See id.*, Ex. 3. Then, Defendant Wilson refused to act in response to Plaintiffs’ Initial Complaint and Initial Motion, filed and provided to Defendant Wilson on

September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment to Defendant of the disputed \$75,000,000, Defendant Wilson instead expedited payment to Defendant via wire transfer on the afternoon of September 28, 2020, after the circuit court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. *See* Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Finally, Defendant Wilson then argued to the circuit court that Plaintiffs' claims were now moot on the basis of this wire transfer.

Under these particular circumstances, where the Attorney General has repeatedly refused to assert the State's claims against Defendant and instead has taken drastic unconstitutional and inequitable actions to make a patently unreasonable \$75 million payment to Defendant, Plaintiffs have standing to assert the State of South Carolina's claims against Defendant. *See Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 53-54; *see also Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Ex parte Hart* with approval).

2. Plaintiffs Have Public Importance Standing.

Plaintiffs have public importance because a resolution of this dispute is needed for future guidance. *See S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). Upon information and belief, Defendant Wilson has issued several contingent fee contracts, similar to the one at issue in this matter, and plans to continue to issue them. *See* Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements, <http://www.scag.gov/litigation-retention-agreements>.

IV. PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF UNDER RULE 65

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). 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). The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. *AJG Holdings LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009). When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate. *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826.

A. Injunctive Relief Is a Proper Remedy in Taxpayer Public Interest Suits Challenging Unauthorized Expenditure of Public Funds

In *Sloan v. School District of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that “[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.” *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). Also, in *South Carolina Department of Revenue v. Richland*

County, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court's refusal to grant a temporary injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Dep't of Rev. v. Richland Cnty.*, 422 S.C. at 311, 811 S.E.2d at 768.

B. Preliminary Injunctive Relief Freezing the Disputed Funds Is Proper

As noted above, Defendant Willoughby & Hoefer has received a disbursement of the very funds in dispute in this litigation, after the commencement of this lawsuit, and hours before a scheduled hearing on Plaintiffs' motion for a preliminary injunction. Plaintiffs allege that Defendant Wilson did not have legal authority to pay the Law Firms from the proceeds of the settlement. In the Amended Complaint, Plaintiffs seek restitution on behalf of the State of South Carolina and the imposition of a constructive trust over these funds.

Preliminary injunctive relief has long been recognized as an appropriate remedy in equitable actions seeking restitution and the imposition of a constructive trust. For example, in *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005), the South Carolina Supreme Court reversed the circuit court's refusal to order an injunction on the grounds that plaintiffs had an adequate remedy at law. The Court held that a preliminary injunction to restrain \$2 million in financial accounts is the appropriate remedy in equitable actions. In *Grosshuesch*, the plaintiffs were seeking to set aside transfers on the grounds of fraud and undue influence.

In a very thoughtful and instructive opinion, the Fourth Circuit Court of Appeals in *U.S. ex rel Rahman v. Oncology Associates*, 198 F.3d 489 (4th Cir. 1999), held that courts have the inherent equitable authority to order a preliminary injunction restraining assets where there is a specific nexus between the assets and plaintiff's equitable claims.

In *Rahman*, the District Court entered a temporary restraining order in reliance upon the United States Supreme Court decision in *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), ruling that courts have the equitable authority to restrain the spending of specifically identified assets as an aid in granting the ultimate equitable relief of rescission. The District Court, in *Rahman*, ruled as follows:

The request has been made that the Court impose a constructive trust. Significant issues are therefore presented by the equitable aspects of this suit. Under these circumstances, the conditional freeze of assets imposed by the TRO is an appropriate exercise of this Court's equity jurisdiction.

Id. at 494.

On appeal, the defendant argued that the suit was “overwhelmingly a suit at law for money damages” and therefore equitable injunctive relief was not proper. The defendant relied upon another Supreme Court decision, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), where the Court held that an injunction freezing assets may not be entered in an action for damages where no lien or equitable interest in the assets is claimed.

The Fourth Circuit rejected the defendants’ assertion that a temporary restraining order is not appropriate in a lawsuit that alleges both legal and equitable claims. The Fourth Circuit relied upon a third Supreme Court decision, *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), where the Court ruled that “[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.” *De Beers*, 325 U.S. 220.

Rahman distilled the principles guiding a court’s equitable authority to enter asset freezing injunctions:

From these controlling precedents, we draw several principles applicable to the case before us. First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor’s use of his property before obtaining judgment. A debt claim leads only to a money

judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor's assets.

On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets. Thus, the Court in *Deckert* entered an injunction freezing assets "in aid of the recovery" sought by the lawsuit. 311 U.S. at 289, 61 S. Ct. 229. In *De Beers*, the Court noted in a similar vein, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." 325 U.S. at 220, 65 S. Ct. 1130. And finally, *Grupo Mexicano* held that because the plaintiff claimed no interest in the defendant's assets (by way of lien or an equitable interest), but rather claimed only a money judgment, the district court lacked authority to freeze or otherwise interfere with the defendant's assets. See 527 U.S. at —, 119 S. Ct. at 1975.

Rahman, 198 F.3d at 496-497.

Furthermore, the Fourth Circuit recognized that "when interim equitable relief is authorized and the public interest is involved, the doctrine applies that '[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved,'" *Id.* at 497 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 383, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965)).

Rahman was a qui tam action brought by a "whistleblower" under the False Claims Act alleging that the defendant had been over-paid by the Medicare program. The Court stated "the justification for a preliminary injunction in this case is heightened by the fact that the public interest is at stake. In *First National*, the public interest was represented by \$19 million in taxes allegedly owed the United States by a foreign corporation . . . Here, it lies in the \$12 million allegedly diverted from the Medicare and CHAMPUS programs . . ." *Rahman*, 198 F.3d at 499.

The Amended Complaint in this action does not allege any legal claims. Rather Plaintiffs allege only equitable claims for declaratory judgment (Count I, Am. Comp.), constructive trust (Count II, Am. Comp.), restitution (Count III, Am. Comp.) and injunctive relief (Count IV, Am. Comp.). The Amended Complaint specifically identifies the \$75 million wire transfer to Willoughby & Hoefer as the sole asset that Plaintiffs request be restrained. For these reasons alone, Plaintiffs are entitled to obtain a preliminary injunction.

However, when the public interest is considered, there should be no question of Plaintiffs' right to obtain preliminary injunctive relief. In *First National*, the complaint sought to recover \$19 Million of taxpayer funds. In *Rahman*, the complaint sought to recover \$12 million in Medicare and CHAMPUS funds. Here, Plaintiffs seek to restrain the spending of \$75 million of funds that should be deposited into the State's General Fund for the benefit of all State taxpayers.

C. The Court Has Equity Authority to Order Injunctive Relief to Preserve Its Jurisdiction

Defendant Wilson argued before the circuit court that the Plaintiffs' lawsuit is moot because the fee had been wired before the circuit court could restrain the payment. Under these circumstances, the circuit court has authority to restrain further disbursements of these disputed funds in order to prevent this action from becoming moot.⁴ In *Seabrook v. Carolina Power & Light Company*, 159 S.C. 1, 156 S.E. 1, 3 (1930), the court held that the circuit court erred by refusing to grant a temporary injunction when that was the only relief sought in the complaint. The court explained, "the Plaintiffs' action was brought solely for obtaining an injunction, and the refusal to grant the temporary injunction practically disposed of the case without a hearing upon the merits." *Seabrook*, 159 S.C. 1, 156 S.E. at 3.

⁴ Plaintiffs disagree that this case will become moot if the Law Firms are not restrained from spending all or a portion of the disputed funds.

D. Bond Is Not Required

Plaintiffs are suing on behalf of the State in this public interest and taxpayer lawsuit. See *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939). Under *Ex parte Hart*, Plaintiffs have standing to sue to enforce the rights of the State recover funds transferred to Defendants in violation of Section 1-7-150 of the South Carolina Code of Laws for the benefit of the State. Rule 65(c) does not require security be posted on behalf of the State.

Furthermore, even if a bond is required, the amount should be minimal as the Defendants will not suffer any damages from an injunction freezing the expenditure of the disputed proceeds. During the pendency of the litigation, the disputed funds should be deposited into an interest-bearing account. If the Law Firms prevail in this action, the Law Firms will receive the proceeds plus interest. The Law Firms have no basis to complain that their fee is being subject to judicial review. In fact, the Law Firms fee agreement expressly provides that the fee shall be approved by a court of competent jurisdiction. They will not suffer harm from the delay in receipt of payment.

Furthermore, placing these funds under a court ordered freeze is of equal benefit to the Law Firms. Absent a court order, Law Firms, its members and others, will collectively receive \$75 million in income and will be required to pay federal and state taxes on these proceeds. If Plaintiffs prevail in this action the Law Firms and their members will be required to return the \$75 Million to the State. Yet, they would have given approximately one-third (1/3) or \$25 Million back to the federal government in taxes. Law Firms will also be liable for pre-judgment interest on \$75 million, which is approximately \$6.5 million per year. But, if Law Firms are enjoined from accessing these funds during the course of the litigation, there will be no exposure to pre-judgment interest, no federal or state income tax liability and the entire \$75 million will be preserved and accruing interest.

V. CONCLUSION

Plaintiffs have established their right to a preliminary injunction to maintain the status quo during the pendency of this case. Under the Supreme Court's rulings in *Grosshuesch v. Cramer* and *South Carolina Dep't of Rev. v. Richland Cnty.*, this Court would be abusing its discretion if the Court were to deny the Plaintiffs' motion. Furthermore, the public's interest in \$75 Million of taxpayer funds and in the fair administration of justice would be undermined.

Therefore, Plaintiffs request this Court to grant its motion for preliminary injunction.

Respectfully submitted,

s/Badge Humphries

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October 6, 2020

Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	RETURN OF ATTORNEY GENERAL
Alan Wilson, Attorney General for the	)	TO SUPPLEMENTAL
State of South Carolina, Willoughby &	)	MEMORANDUM OF PLAINTIFFS
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
_____	)	

Without waving any defenses in this case, the Attorney General Submits this Memorandum to address Plaintiffs assertion in their Supplemental Memorandum regarding their Motion for TRO and Preliminary Injunction as to the law firm defendants. That position is contrary to ample authority recognizing that the Attorney General is the State's chief legal officer. The instant motion is directed to the law firm defendants rather than the Attorney General. The Honorable Debra R. McCaslin denied an earlier Motion for a Preliminary Injunction as to the Attorney General as it was moot. Form 4 Order of October 1, 2020.

BACKGROUND

The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due to the storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State

of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money to the State of South Carolina with each party to pay its own costs and attorney fees. Ex. 1, p. 2, ¶5a. The Agreement for Voluntary Dismissal filed on September 29 states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorneys' fees and costs. Ex. 1 (former exhibit 1 to earlier memo). The statute under which settlement was reached provides for payment of funds to the State of South Carolina. 50 U.S.C. 2566.

Prior to the filing of this action, the Executive Budget Office approved the withdrawal of attorney's fees from the settlement proceeds under S.C. Code Ann. §2-65-10 which states as follows: "[a] state agency may receive and spend unanticipated federal funds, and funds from private foundations or industries, which are not included in the appropriations act, but state agencies must submit expenditure proposals to the board [the Executive Budget Office (§2-65-15(4))] and receive authorization from the board before expenditure of funds." See Exhibit 2, Buckley affidavit attached.

Plaintiffs omit some key information from their chronology so the Attorney General's Office provides the following time line as background for the Court including references to the attached affidavit of its Director of Finance attached as Exhibit 2.

1. The funds for payment were received on September 15, 2020 and deposited in agency's escrow fund on September 17, 2020. Ex. 2, Buckley affidavit.
2. 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. Ex. 2.

2. The Finance Department submitted the request for payment to Willoughby and Hoefer to the Executive Budget office (EOB) for approval on September 17, 2020. EOB emailed its approval of the payment to Ms. Buckley at 9:21 a.m on the 25th. Ex. 2.
4. Following receipt of the above approval of the payment from EOB, the Finance Division of the Attorney General's Office began processing the payment. 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. on the 25th, Accounting Supervisor approved the payment. Ex. 2.
5. The Complaint in this action was efiled on September 25, at 11:58 a.m.
6. At 1:41 p.m. on the 25th, the Motion for TRO and Preliminary Injunction was efiled.
7. At 1:43 p.m., Ms. Buckley, following review, approved the payment and sent it through the State Financial System to the Comptroller General's Office. Ex. 2
8. At 2:56 p.m. and 2:59 p.m. on the 25th, counsel downloaded a copy of the Complaint and Motion respectively from Richland County records following receipt of a report that suit had been filed.
9. At 4:58 pm on the 25th, counsel for Plaintiffs copied the Attorney General on an email to the Honorable Alison Lee requesting that a hearing be scheduled concerning this Motion. See Defendant's Exhibit 4.
10. At 12:01 p.m on the 28th, Counsel for Plaintiffs emailed counsel for the Defendant the summons and complaint and requesting acceptance of service which undersigned counsel promptly agreed to do as of the 28th. See Exhibit 4. With the agreement of counsel for the parties, following discussion including whether to

request that the Honorable Clifton Newman to hear the Motion on September 30 along with another Motion in a different case regarding settlement monies, the Court scheduled the hearing for 3:00 on September 29. See email of counsel for the Attorney General to the Court on September 28 at 1:48 p.m. including string. Exhibit 4, attached. Counsel for the Attorney General never objected to holding the hearing at 3 p.m. on the 29th. Exhibit 4 string.

11. According to Ex. 2, the Buckley affidavit, the affiant's 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 Ms. Buckley a wire request form for the payment. She reviewed what the Treasurer's Office sent over and then sent it back on the 28th. Ex. 3 and attachments.
12. The Treasurer's Office confirmed that it wired the funds to the law firm on September 29 at 9:14 a.m. See Exhibit 2. See also, Ex. 4 (Griffin email reporting information from the State Treasurer that the funds were wired and stating that "[t]his was a standard transaction" and that the Treasurer's Office had "completed our ministerial duty as the statute requires.")

This timeline shows that the process for the payment of the fee was instituted well before this litigation was filed.

**THE ATTORNEY GENERAL IS THE STATE'S CHIEF LEGAL OFFICER, AND
PLAINTIFFS ARE NOT AUTHORIZED TO APPEAR FOR THE STATE OR
REPRESENT STATE INTERESTS**

Plaintiffs rely on cases involving counties for authority to represent State interests. Those cases have no applicability to the State. 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. For example, as our 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 Constitution." [footnote omitted] 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 that "we find the situation to be that the State of South Carolina, acting by counsel for whom provision is made in the Constitution and statutes of the State [Attorney General], with the knowledge and acquiescence of the State agency directly charged with the handling of the problem in question [Tax Commission], came to the conclusion that the best interests of the State lay in the settlement of the litigation." 28 S.E.2d at 449-450.

Importantly 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) 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 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), *affd.* 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).

And, in *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Court explained that [t]he 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.” The Court stressed that the Attorney General must be a party in the case to be heard regarding attorneys fees; nevertheless, *Condon v. State* emphasized the broad authority of the Attorney General to speak for the State in legal matters. *See also, State v. Cooper*, 110 S.C. 256, 96 S.E. 398 (1918) [“The history of the case satisfies us that

the Attorney General would have been well within his rights to have directed the solicitor not to hand out a bill [of indictment] against the defendant. As the case stands, the anomalous spectacle is presented of one of the state's solicitors prosecuting one of the state's public servants engaged in a difficult and important charity and that servant is defended by the state's chief law officer.”]; *State v. Southern Ry. Co.*, 82 S.C. 12, 62 S.E. 1116 (1908) [Court expresses concern that legislative directive to Attorney General not deny “him 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 Exercised His Authority As Chief Legal Officer to Contract with the Willoughby & Hoefer To Represent the State in its Action Against the United States And Had Express Authority to Pay the Firm Pursuant To State Processes Without A Direct Appropriation From the General Assembly

Judge Cooper approved the withdrawal of fees from a settlement in the attached Order recognizing his authority in the above quote which is stated again below:

In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . . .

Cephalon v. Wilson, Exhibit 3 (Order at p. 9). The Court based its ruling on S.C. Code Ann. § 1-7-170 (Approval by AG of engagement of outside counsel for department or agency), §1-7-85 (AG may obtain reimbursement of costs in representing the State) and *Cooley v. S.C. Tax Comm.*, *supra* (AG has authority as State's chief legal officer to appoint and approve private counsel to represent the State)¹. as well as other authority cited therein. Order at pp. 8 and 9. As further stated in the

¹ “At some stage of these discussions, the Tax Commission came to the conclusion that private counsel should be employed for the purpose of further dealing with the situation. The reasons which actuated the Commission, and the course followed by it, are thus set forth in the answer of the Commission and of the Attorney General to the original complaint, as follows: “In

Order, “the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85.” Order at p. 14. Accordingly, most significantly, the Order states that §1-7-150(B) “provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute 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.” (emphasis added). Contrary to Plaintiffs contention that this statute does not apply arguing that the fees were not “awarded the State of South Carolina by judgment or settlement . . .,” the settlement provides that each party bears its own fees thereby authorizing just what was done. Moreover, as noted above, the Agreement Dismissing the appeal states that the settlement agreement includes amounts for attorneys’ fees and costs. See Ex. 1, attached. Moreover, the Executive Budget Office, as noted above, has authorized this payment.

view of the large sums involved and the intricacies and complexities of a case of this character, as reflected in the decisions of the Supreme Court of the United States and other Courts dealing with the question of domicile, and the extensive labor required to develop the facts relating to domicile and to prosecute an appropriate action thereon, if warranted, South Carolina Tax Commission was of the opinion that special counsel should be employed for the purpose of making an investigation of all the facts relating to the residence and domicile of the decedent. Special counsel, it was believed, would have the time to explore the facts, particularly in the City of Charleston and in the State of New Jersey, for the purpose of advising the Commission as to the proper course to be followed, the Commission having only a single counsel whose time is fully occupied with the regular duties of his office. The Commission, thereupon, requested the Attorney General of South Carolina for permission to employ special counsel for these purposes and the Attorney General, pursuant to the powers vested in him as the Supreme Law Officer of the State of South Carolina, authorized and directed the employment of special counsel in this case to represent *448 and protect the interests of the State in respect to the collection of all taxes which might be due it by said decedent or her estate.”

Cooley v. S.C. Tax Comm'n, 28 S.E.2d at 447–48.

Accordingly, the Attorney General has the authority to withdraw attorney's fees for outside counsel without depositing the money into the general fund. Nothing in the above authority and the statutes cited authorize a court to review the reasonableness of the fee, particularly in a collateral action such as this one in which Plaintiffs purport to act for the State. Therefore, this Court lacks authority to review the fee, and Plaintiffs do not have authority to act for the State as to this matter.

CONCLUSION

Plaintiffs have no authority to act for the State in this matter.

Respectfully submitted,

s/ J. Emory Smith, Jr.
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October 6, 2020

Attorneys for the Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2020-CP-40-04603

(PLAINTIFFS' PROPOSED)
**ORDER GRANTING
PRELIMINARY INJUNCTION**

I. INTRODUCTION

This matter is before the Court upon Plaintiffs' South Carolina Public Interest Foundation ("SCPIF") and John Crangle ("Crangle") [collectively the Plaintiffs] motion for a preliminary injunction freezing \$75 million of settlement proceeds that Plaintiffs allege was unlawfully transferred to Defendant Willoughby & Hoefer P.A. ("Willoughby & Hoefer") at the direction of Defendant Alan Wilson for the payment of attorneys' fees. Plaintiffs bring this action on behalf of the taxpayers of this State and assert standing under the public importance exception which was most recently applied by the South Carolina Supreme Court in *Adams v. McMaster*, Op. No. 28000 (S.C. Sup. Ct. filed Oct. 7, 2020).

Plaintiffs allege that Defendant, Attorney General Wilson lacked statutory authority to pay two law firms, Willoughby & Hoefer and Davidson, Wren & DeMasters P.A. ("Davidson, Wren & Demasters") [collectively Law Firms] from a settlement with the United States because the

settlement did not provide for an award of attorneys' fees and there has not been any court order awarding fees.

Plaintiffs rely upon S.C. Code Section 1-7-150 (b) which states in pertinent part:

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 . . . must be deposited in the general fund of the State, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law. (emphasis added)

According to Plaintiffs, this provision requires either a specific award of attorneys' fees by court order or a specific fee award in the settlement agreement before the Attorney General can use any portion of the proceeds to pay private attorneys under contingency fee agreements.

Law Firms and Defendant Wilson contend that there is no requirement for a specific award for attorneys' fees from either court order or settlement and that Section 1-7-150(b) provides the Attorney General absolute authority to pay outside law firms from a settlement any amount he chooses. Law Firms argue that because the Attorney General is a Constitutional officer, the only check on his authority to pay outside attorneys is at the ballot box. In addition, Law Firms contend that the Attorney General was authorized to pay Law Firms because the Director of the Executive Budget Office ("EBO") approved the payment request. Law Firms and Defendant Wilson also assert that the Plaintiffs lack standing because they cannot show any individual harm from the decision of the Attorney General to pay \$75 million to Law Firms.

After carefully considering the pleadings, exhibits, and the extensive briefs submitted by the parties, as well as the arguments of counsel made during a hearing conducted on October 7, 2020, and for the reasons set forth herein, the Court finds that the Plaintiffs have met their burden to establish the right to a preliminary injunction.

II. PRELIMINARY INJUNCTION STANDARD

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). 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.*

The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. *AJG Holdings LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009). When a court is requested to issue a temporary injunction, it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate. *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826.

III. FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the “Settlement Agreement”) regarding the failure by the United States Department of Energy (“DOE”) to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site (“SRS”). Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the DOE must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments. Under the terms of the Settlement Agreement announced by Respondent Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of \$600 million. Significantly, under the terms of the Settlement Agreement, the DOE is required to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.”

Defendant Wilson announced at an August 31, 2020 press conference that he intended to pay two private law firms \$75 million from the proceeds of the DOE settlement. According to Wilson’s statement at the press conference, this payment was expected on or after October 1, 2020. Upon learning of Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the

payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." Governor McMaster concluded the letter by stating that he "could not endorse the payment of \$75 million in attorneys' fees under the circumstances." First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund.

On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson. That same day, Plaintiffs filed their motion for a temporary restraining order and preliminary injunction against Defendant Wilson, seeking to enjoin Defendant Wilson's payment of \$75,000,000 to the law firms. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings when requesting that the circuit court schedule a hearing on Plaintiffs' Initial Motion.

On the morning of Monday, September 28, 2020, The State newspaper ran an article on the pending lawsuit with links to relevant court filings. John Monk, *Should 2 law firms get \$75M of SC's \$600M plutonium Settlement? This lawsuit says no.*, The State, Sept. 28, 2020. The same morning, counsel for Defendant Wilson emailed the circuit court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. The circuit court responded that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Initial Motion over Defendant Wilson's objections. On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Defendant Wilson ultimately responded

“I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him.”

Unbeknownst to Plaintiffs and the circuit court, Defendant Wilson had already received the \$600 million in settlement proceeds and initiated the process to transfer \$75 million to Defendant by Monday, September 28, 2020. Defendant Wilson was aware of this fact at the time that Defendant’s counsel was emailing with the circuit court about the hearing to be held the next day. Defendant Wilson was aware of this fact when his counsel was emailing with Plaintiffs’ counsel about Plaintiffs’ request for an agreement not to distribute the funds until after the hearing. Instead of being candid with the circuit court and Plaintiffs’ counsel about the status of the disputed funds, Defendant Wilson was actively engaging the Office of the State Treasurer to ensure the disputed \$75 million would be transferred to Willoughby & Hoefer ahead of the 3:00 p.m. hearing the next day, as shown by an email from the Finance Director for the Attorney General’s Office.

In fact, Attorney General Wilson’s staff expedited payment to Willoughby & Hoefer via wire transfer on Monday afternoon, September 28, 2020, after the circuit court had set a hearing on Plaintiffs’ Initial Motion for the following afternoon at 3:00 p.m. Prior to the afternoon of September 28, 2020, the authorization request from the Attorney General to the Treasurer’s Office was for payment to be made by check in the amount of \$75 million. However, after the hearing was scheduled, Ms. Buckley emailed her counterpart at the Treasurer’s office requesting that the payment be made via wire transfer. The request for a wire transfer came from Defendant on Monday as well. As a result, the disputed funds were irrevocably deposited into the law firm’s bank account mere hours before the hearing, depriving the circuit court of the opportunity to restrain the transfer of funds. If a check had been issued instead, the circuit court could have ordered that payment of the check be stopped before actual funds were transferred.

The circuit court and counsel for Plaintiffs first learned that the disputed \$75 million had been disbursed to Defendant moments before the 3:00 p.m. hearing on Monday, September 28, 2020. In his memorandum in opposition to the Plaintiffs' request for a temporary restraining order circulated at 2:12 p.m., Defendant Wilson announced that the disputed funds had been transferred to Defendant and, therefore, Plaintiffs' entire case was moot.

Following the hearing, Respondent Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. Thereafter, the circuit court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the Defendant had received the disputed funds. During the hearing, the circuit court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. Order Granting Temporary Injunction Pendente Lite, signed on September 29, 2020 and entered on September 30, 2020. That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, Plaintiffs received confirmation from the Treasurer that the proceeds were in fact wired to the law firm mere hours before the 3:00 p.m. hearing on September 29, 2020. According to Treasurer Loftis, "[t]he Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]." Therefore, the Treasurer's Office "processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account."

Later in the morning of September 30, 2020, Plaintiffs filed their amended complaint naming Willoughby & Hoefer and Wren & DeMasters as additional defendants. At the same time, Plaintiffs filed their second Motion for Temporary Restraining Order and Preliminary Injunction. Thereafter, the circuit court entered its Ex Parte Temporary Restraining Order.

IV. PLAINTIFFS STANDING

Plaintiffs assert public importance standing. Defendants counter that Plaintiffs have neither. Based on its careful analysis of the facts and circumstances of this case, the Court finds that Plaintiffs have standing.

A. Plaintiffs Have Public Importance Standing.

As explained by the South Carolina Supreme Court in the recent decision of *Adams v. McMaster*, Op. No. 28000 (S.C. Sup. Ct. filed Oct. 7, 2020) “[u]nlike with constitutional standing, a party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing.” *Adams*, Op. No. 28000 at 7 (quoting *S.C. Pub. Interest Found*, 421 S.C. at 118, 804 S.E.2d at 858). “The party also need not show that he has ‘an interest greater than other potential plaintiffs.’” *Id.* (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007)). “Instead, standing under this exception ‘may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.’” *Id.* (quoting *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008)).

“Whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented” *Id.* (quoting *ATC S., Inc.*, 380 S.C. at 198, 669 S.E.2d at 341).

In that regard, the South Carolina Supreme Court has stated as follows:

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, 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.

Id. at 7-8 (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)).

Having considered the appropriate balance between the competing policy concerns, the Court finds that Plaintiffs have public importance because a resolution of this dispute is needed for future guidance. *See S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017) The meaning of Section 1-7-150 of the South Carolina Code of Laws is a matter upon which future guidance is needed in light of the Attorney General's regular practice of hiring special counsel pursuant to contingency fee agreements. Although the Court finds that its language is clear and unambiguous, a judicial determination in this regard is needed based on the Attorney General's contrary position as to its meaning and the fact that the Attorney General regularly employs outside counsel as shown by the number of contingency fee contracts available on the Attorney General's website. *See* Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements, <http://www.scag.gov/litigation-retention-agreements>.

In *Adams v. McMaster*, a case involving the Governor's ability to spend federal coronavirus relief funds on private schools, the South Carolina Supreme Court found that "[a] resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future *if and when* Congress approves additional education funding in response to the continued COVID-19 pandemic." *Adams*, Op. No. 28000 at 8 (emphasis added). In so finding, *Adams* cited *S.C. Public Interest Foundation v. S.C. Department of Transportation* for the proposition that "although a 'close call,' the balance of the policy concerns weighed in favor of conferring public importance standing where the matter involved the conduct of a government

entity and the expenditure of public funds and there was evidence the entity would undertake the conduct at issue again.” *Id.*

Similarly, this matter involves the expenditure of public funds, and here, the Attorney General has repeatedly engaged special counsel over the years and has already retained special counsel for several other matters as indicated by his website. His repeated refusal to seek a judicial determination of the Law Firms’ fee and cost award and his adverse position to this lawsuit has aptly demonstrated that this important issue is likely to recur again in the context of those cases. Accordingly, the Court finds that Plaintiffs have public importance standing to prosecute this matter.

B. Plaintiffs Have Adequately Alleged Their Standing to Pursue the Claims at Issue Derivatively on Behalf of the State of South Carolina.

Plaintiffs state that that they have derivative standing to pursue the claims for the recovery of State funds asserted under *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939). The South Carolina Supreme Court first addressed the ability of a citizen to assert claims for the recoupment of money on behalf of a governmental entity in the case of *Ex parte Hart*, stating as follows:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .

Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54.

There is a nothing inconsistent with this precedent and finding that Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this

case. This is particularly so because the South Carolina Supreme Court cited and quoted with approval precedent from the State of Wisconsin, where derivative claims on behalf of the state are a longstanding part of that state’s jurisprudence. *See Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 54 (noting that “[t]he rationale of the general doctrine under discussion is so well expressed in the case of *Estate of Cole*, 102 Wis. 1, 78 N.W. 402, 404, 72 Am.St.Rep. 854, that we quote from that case); A.M. Swarthout, Annotation, *Necessity and Sufficiency of Efforts to Induce Public Officers to Bring Suit As Condition of Taxpayer’s Right to Bring Suit*, 124 A.L.R. 585 (Originally published in 1940) (“In Wisconsin there are a number of cases involving the right of a state taxpayer to bring a taxpayer’s suit in which the view is taken that such an action may not be brought in a lower court, but that upon refusal of the state attorney general to sue, a state taxpayer may petition the supreme court for permission to bring an original action in that court for the prevention of a loss or disbursement of state funds without authority of law.”).¹ Other courts have likewise recognized the ability to sue on behalf of a state when the state attorney general has refused to prosecute a claim on behalf the state’s behalf. *See* 124 A.L.R. 585 (noting that Washington, Minnesota, Tennessee, Arizona, and South Dakota afford taxpayer standing to derivatively pursue claims on behalf of those states upon the refusal to prosecute the claims by the states’ respective attorneys general).

Additionally, affording Plaintiffs standing here is consistent with equitable principles because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009)

¹ Similarly, here Plaintiffs have filed a Petition for Original Jurisdiction with the South Carolina Supreme Court. *See South Carolina Public Interest Foundation v. Wilson*, No. 2020-001317 (S.C. Sup. Ct. filed Oct. 5, 2020).

(“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.” (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that “[e]quity will not suffer a wrong without a remedy”); Moreover, “[t]he requirement of standing is not an inflexible one.”). *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000) (internal quotation marks omitted).

As discussed in more detail below, Plaintiffs claim that Defendant Wilson violated Section 1-7-150 of the South Carolina Code of Laws and the terms of 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 (the “Litigation Retention Agreement”) by not seeking a judicial determination of the award of attorneys’ fees and costs to the Law Firms. For the reasons explained below, the language of the Section 1-7-150 and the Litigation Retention Agreement is clear. *See* S.C. Code Ann. § 1-7-150 (stating that “[a]ll 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”); Pls.’ Compl., Ex. A, Griffin Aff., Ex. 7, at 9 (providing that “[w]hen *possible*, the attorneys’ fees and costs *awarded* to [the Law Firms] *shall be approved* by a Court of competent jurisdiction”). It is clear that the Attorney General has not only the right but the obligation to seek a judicial determination of the Law Firms’ entitlement to an award of attorneys’ fees and costs.

As shown by proof submitted via affidavit, Defendant Wilson has refused repeated demands to fulfill the obligations of Section 1-7-150 and to assert the State of South Carolina's rights vis-à-vis the Law Firms in the Litigation Retention Agreement. First, Defendant Wilson refused to act in response to Governor McMaster's August 30, 2020 letter questioning the amount of attorneys' fees that Defendant Wilson intended to pay. Next, Defendant Wilson refused to act in response to the September 10, 2020 letter of First Circuit Solicitor David Pascoe. Then, Defendant Wilson refused to act in response to Plaintiffs' Initial Complaint and Initial Motion, filed and provided to Defendant Wilson on September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment to Defendant of the disputed \$75,000,000, Defendant Wilson instead expedited payment to Defendant via wire transfer on the afternoon of September 28, 2020, after the circuit court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. Finally, Defendant Wilson then argued to this Court that Plaintiffs' claims were now moot on the basis of this wire transfer.

Under these particular circumstances, where the Attorney General has repeatedly refused to assert the State's claims against the Law Firms and instead has taken such drastic inequitable actions to make a patently unreasonable \$75 million payment to them, the Court finds that Plaintiffs have standing to assert the State of South Carolina's claims against the Law Firms. *See Hart*, 190 S.C. 473, 2 S.E.2d at 53-54; *see also Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Hart* with approval).

Before the Court at this juncture is a declaratory judgment action seeking a determination as to the reasonableness of the Law Firm's fee as contemplated by both Section 1-7-150 and the Litigation Retention Agreement. Also before the Court is the South Carolina Attorney General and the Law Firms. Accordingly, before the Court are all the necessary parties and the necessary cause

of action to reach a determination of an award of attorneys' fees and costs to the Law Firms as contemplated by Section 1-7-150 and the Litigation Retention Agreement. The fact that this action was initiated by taxpayers adequately asserting taxpayer-derivative and public-importance standing as opposed to the Attorney General should not deprive the Court of jurisdiction whereas a derivative lawsuit is a matter of equity and whereas the requirement of standing is not an inflexible one. Accordingly, in light of the facts and circumstances of the Attorney General's repeated refusal to exercise the State's clear rights to initiate this action, the Court finds that Plaintiffs adequately allege taxpayer derivative standing on behalf of the State of South Carolina.

V. MOOTNESS

Defendant Willoughby & Hoefer and the Attorney General asserts that Plaintiffs' claims are somehow moot. Defendant Willoughby & Hoefer argues that because the \$75 million has been paid to the Law Firms that this Court lacks jurisdiction over this matter because any "judgment, if rendered, will have no practical effect upon the existing controversy." Defs.' Resp. 29 (quoting *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E. 2d 663, 667 (Ct. App. 2009)) However, the Court finds that so long as the Law Firms retain the funds and there has not been a judicial determination as to an award of attorneys' fees and costs to the Law Firms, this case will not be moot.

VI. PLAINTIFFS' DECLARATORY JUDGMENT ALLEGATIONS

A. Application of S.C. Code Section 1-7-150

Plaintiffs contend that the payment of \$75 million to the private Law Firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. Plaintiffs rely upon S.C. Code

Section 1-7-150, which requires that monies awarded to the State by judgment or settlement from claims brought by the Attorney General must be deposited into the State's General Fund, "except for investigative costs and litigation costs awarded by court order or settlement." *Id.* According to Plaintiffs, this provision requires either a specific award of attorneys' fees by court order or a specific fee award in the settlement agreement before the Attorney General can use any portion of the proceeds to pay private attorneys under contingency fee agreements.

Law Firms and Defendant Wilson contend that there is no requirement for a specific award for attorneys' fees from either court order or settlement and that Section 1-7-150(b) provides the Attorney General absolute authority to pay outside law firms from a settlement any amount he chooses. Thus, the success of Plaintiffs' claims depends on the interpretation of Section 1-7-150(b), specifically the language of this provision stating:

*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 ...must be deposited in the general fund of the State.*

Id.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261, 262 (1998) (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Odom v. Town of McBee Election Commn.*, 427 S.C.

305, 310, 831 S.E.2d 429, 432 (S.C. 2019). Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Id.*

In Section 1-7-150(b), the General Assembly used the verb “awarded” when describing the circumstances in which the Attorney General may use funds recovered in a civil action to pay costs of litigation. Black’s Law Dictionary defines awarded as “to grant by formal process or by judicial decree (the company **awarded** the contract to the low bidder) (the jury **awarded** punitive damages)” Black’s Law Dictionary (11th ed, 2019). Merriam-Webster likewise defines awarded “to give by judicial decree or after careful consideration // The jury *awarded* damages to the defendant. // *award* a contract.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/awarded> (last visited Oct. 8, 2020).

Thus, from the use of the verb “awarded,” it appears that the Legislature intended that there be a grant or decree that specifically provides for the payment of litigation costs in a court order or settlement. This construction becomes clearer when the statute’s treatment of litigation costs is examined where litigation concludes with a judgment, instead of a settlement. According to Section 1-7-150(b), all monies “awarded the State of South Carolina by judgment” must be deposited into the General Fund. The Attorney General is only permitted to use monies to pay litigation costs that are “awarded by court order.” Absent a “court order” awarding litigation costs, the entire amount “awarded the State of South Carolina by judgment” must be deposited into the General Fund. S.C. Code Ann. § 1-7-150.

Obviously, a court order is significantly different, and narrower, than a judgment. There can be a judgment for the State without a court order awarding attorneys’ fees. By the use of the

phrase “awarded by court order,” the Legislature clearly did not grant the Attorney General authority to obtain reimbursement for litigation costs from the proceeds of every judgment awarded to the State. Instead, the Attorney General’s authority is limited to reimbursement of “litigation costs awarded by court order.” *Id.*

There is nothing in Section 1-7-150 that distinguishes an award by court order from an award by settlement. To interpret this statute to allow the Attorney General to use proceeds from a settlement agreement that lacks any specific provision awarding litigation costs when the Attorney General is clearly prohibiting from using proceeds from a judgment to pay litigation costs would lead to an impermissible absurd result. *Unisun Ins. V. Schmidt*, 529 S.E.2d 280, 283 (SC 2000)(“We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the Legislature.”)

In addition, construing S.C. Code Section 1-7-150(b) in a manner that limits the Attorney General’s authority to spend proceeds from litigation, rather than expands the Attorney General’s authority, is supported by the legislative history of Section 1-7-150(b). This subsection was added to Section 150 in the 1998 Appropriations Act. *See*, 1998 South Carolina Laws Act 419 (H.B. 4700). Prior to the 1998 Amendment, Section 1-7-150 stated “The Attorney General shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office.” S.C. Code Ann. § 1-7-150. The purpose for the amendment was to “require that all monies, except certain costs and monies deposited in the mitigation trust fund for losses or damages to natural resources, awarded to 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.” *Id.*

This Court therefore agrees with Plaintiffs that S.C. Code Section 1-7-150(b) prohibits the Attorney General from using any portion of monies awarded to the State of South Carolina by settlement unless there is an order awarding litigation costs or there are specific provisions in the settlement agreement where the defendant agrees to a particular amount of litigation costs in compromise of the State's claim for attorneys' fees and costs.

In this case, there has not been an award of attorneys' fees by court order. In addition, it appears that there is not any specific provision in the Settlement Agreement for the payment of attorneys' fees, much less \$75 million in attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "*Immediate payment by the United States to the State of South Carolina in the amount of \$600 Million (Six Hundred Million), inclusive of interest, with each party to bear its own costs, attorneys fees and expenses.*" (emphasis added). Accordingly, Section 5(a) requires that payment of the entire \$600 million be made directly to the State of South Carolina.

Law Firms argue that the provision in Section 1-7-150(B) that recognizes that settlement funds are not required to be deposited in the General Fund "where some other disposition is required by law" controls the disposition of the funds. *Id.* Law Firm Defendants contend that the Attorney General entered a binding contingency fee contract and that the law requires the agreement to be honored. The Court rejects this argument for two reasons. First, the Attorney General cannot enter into a binding agreement that requires the performance of an act that violates constitutional provisions, statutory law, or judicial decisions. *White v. J.M. Brown Amuse. Co., Inc.*, 360 SC 366, 601 S.E.2d 342, 345 (S.C. 2004). Second, Law Firms agreed that any fees to be paid under the contingency fee agreement is subject to approval by a court of competent jurisdiction. The Litigation Retention Agreement expressly states that "[w]hen possible, the

attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." Pls.' Am. Compl., Ex. A, Griffin Aff., Ex. 7, at 9. Law Firms have never attempted to obtain court approval of the attorneys' fees claimed.

Law Firms and Defendant Wilson also rely upon the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et. seq.* Section 2-65-20 provides that "the General Assembly shall appropriate all anticipated *federal funds* and *other funds*." S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds "means financial assistance made to a state agency by the United States Government in any form." S.C. Code Ann. § 2-65-15(5). Examples of federal funds include "a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land." *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition.

The settlement proceeds were not intended as financial assistance for the South Carolina Attorney General's Office or any other State agency. Instead, the settlement proceeds are payable to the "State of South Carolina" and thus may possibly qualify as "other funds." The term "other funds" means "any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act." S.C. Code Ann. § 2-65-15(8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the appropriations act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budget Office ("EBO") for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO's authorization to approve expenditures of "other funds" is limited to "funds from private foundations or industries which are not included in the appropriations act." *Id.* Thus, it appears that the EBO lacked authority to

approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that “the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO.” *See* South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at <https://admin.sc.gov/budget/otherfundsauthorization>). The EBO Request submitted on behalf of Defendant Wilson requesting authorization for the \$75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the \$75 million fee from funds that the Director lacks authority to appropriate.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general “other funds” provisions. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton*

Chamber of Com., 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), reh’g denied (June 26, 2018) (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted)). The EBO has no authority to authorize the payment of attorneys’ fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

VII. Injunctive Relief Is a Proper Remedy in Taxpayer Public Interest Suits Challenging Unauthorized Expenditure of Public Funds

In *Sloan v. School District of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that “[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.” *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). Also, in *South Carolina Department of Revenue v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court’s refusal to grant a temporary injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Dep’t of Rev. v. Richland Cnty.*, 422 S.C. at 311, 811 S.E.2d at 768.

A. Preliminary Injunctive Relief Freezing the Disputed Funds Is Proper

As noted above, Defendant Willoughby & Hoefer has received a disbursement of the very funds in dispute in this litigation, after the commencement of this lawsuit, and hours before a scheduled hearing on Plaintiffs’ motion for a preliminary injunction. Plaintiffs allege that Defendant Wilson did not have legal authority to pay the Law Firms from the proceeds of the

settlement. In the Amended Complaint, Plaintiffs seek restitution on behalf of the State of South Carolina and the imposition of a constructive trust over these funds.

Preliminary injunctive relief has long been recognized as an appropriate remedy in equitable actions seeking restitution and the imposition of a constructive trust. For example, in *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005), the South Carolina Supreme Court reversed the circuit court's refusal to order an injunction on the grounds that plaintiffs had an adequate remedy at law. The Court held that a preliminary injunction to restrain \$2 million in financial accounts is the appropriate remedy in equitable actions. In *Grosshuesch*, the plaintiffs were seeking to set aside transfers on the grounds of fraud and undue influence.

In a very thoughtful and instructive opinion, the Fourth Circuit Court of Appeals in *U.S. ex rel Rahman v. Oncology Associates*, 198 F.3d 489 (4th Cir. 1999), held that courts have the inherent equitable authority to order a preliminary injunction restraining assets where there is a specific nexus between the assets and plaintiff's equitable claims.

In *Rahman*, the District Court entered a temporary restraining order in reliance upon the United States Supreme Court decision in *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), ruling that courts have the equitable authority to restrain the spending of specifically identified assets as an aid in granting the ultimate equitable relief of rescission. The District Court, in *Rahman*, ruled as follows:

The request has been made that the Court impose a constructive trust. Significant issues are therefore presented by the equitable aspects of this suit. Under these circumstances, the conditional freeze of assets imposed by the TRO is an appropriate exercise of this Court's equity jurisdiction.

Id. at 494.

On appeal, the defendant argued that the suit was “overwhelmingly a suit at law for money damages” and therefore equitable injunctive relief was not proper. The defendant relied upon

another Supreme Court decision, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), where the Court held that an injunction freezing assets may not be entered in an action for damages where no lien or equitable interest in the assets is claimed.

The Fourth Circuit rejected the defendants' assertion that a temporary restraining order is not appropriate in a lawsuit that alleges both legal and equitable claims. The Fourth Circuit relied upon a third Supreme Court decision, *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), where the Court ruled that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers*, 325 U.S. 220.

Rahman distilled the principles guiding a court's equitable authority to enter asset freezing injunctions:

From these controlling precedents, we draw several principles applicable to the case before us. First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor's use of his property before obtaining judgment. A debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor's assets.

On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets. Thus, the Court in *Deckert* entered an injunction freezing assets "in aid of the recovery" sought by the lawsuit. 311 U.S. at 289, 61 S. Ct. 229. In *De Beers*, the Court noted in a similar vein, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." 325 U.S. at 220, 65 S. Ct. 1130. And finally, *Grupo Mexicano* held that because the plaintiff claimed no interest in the defendant's assets (by way of lien or an equitable interest), but rather claimed only a money judgment, the district court lacked authority to freeze or otherwise interfere with the defendant's assets. See 527 U.S. at —, 119 S. Ct. at 1975.

Rahman, 198 F.3d at 496-497.

Furthermore, the Fourth Circuit recognized that “when interim equitable relief is authorized and the public interest is involved, the doctrine applies that ‘[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved,’” *Id.* at 497 (quoting *United States v. First Nat’l City Bank*, 379 U.S. 378, 383, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965)).

Rahman was a qui tam action brought by a “whistleblower” under the False Claims Act alleging that the defendant had been over-paid by the Medicare program. The Court stated “the justification for a preliminary injunction in this case is heightened by the fact that the public interest is at stake. In *First National*, the public interest was represented by \$19 million in taxes allegedly owed the United States by a foreign corporation . . . Here, it lies in the \$12 million allegedly diverted from the Medicare and CHAMPUS programs . . .” *Rahman*, 198 F.3d at 499.

The Amended Complaint in this action does not allege any legal claims. Rather Plaintiffs allege only equitable claims for declaratory judgment (Count I, Am. Comp.), constructive trust (Count II, Am. Comp.), restitution (Count III, Am. Comp.) and injunctive relief (Count IV, Am. Comp.). The Amended Complaint specifically identifies the \$75 million wire transfer to Willoughby & Hoefer as the sole asset that Plaintiffs request be restrained. For these reasons alone, Plaintiffs are entitled to obtain a preliminary injunction.

However, when the public interest is considered, there should be no question of Plaintiffs’ right to obtain preliminary injunctive relief. In *First National*, the complaint sought to recover \$19 Million of taxpayer funds. In *Rahman*, the complaint sought to recover \$12 million in Medicare and CHAMPUS funds. Here, Plaintiffs seek to restrain the spending of \$75 million of funds that should be deposited into the State’s General Fund for the benefit of all State taxpayers.

B. The Court Has Equity Authority to Order Injunctive Relief to Preserve Its Jurisdiction

Defendant Wilson argued before the circuit court that the Plaintiffs' lawsuit is moot because the fee had been wired before the circuit court could restrain the payment. Under these circumstances, the circuit court has authority to restrain further disbursements of these disputed funds in order to prevent this action from becoming moot.² In *Seabrook v. Carolina Power & Light Company*, 159 S.C. 1, 156 S.E. 1, 3 (1930), the court held that the circuit court erred by refusing to grant a temporary injunction when that was the only relief sought in the complaint. The court explained, "the Plaintiffs' action was brought solely for obtaining an injunction, and the refusal to grant the temporary injunction practically disposed of the case without a hearing upon the merits." *Seabrook*, 159 S.C. 1, 156 S.E. at 3.

VIII. BOND IS NOT REQUIRED

Plaintiffs are suing on behalf of the State in this public interest and taxpayer lawsuit. *See Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939). Under *Ex parte Hart*, Plaintiffs have standing to sue to enforce the rights of the State recover funds transferred to Defendants in violation of Section 1-7-150 of the South Carolina Code of Laws for the benefit of the State. Rule 65(c) does not require security be posted on behalf of the State.

Furthermore, even if a bond were required, the Court finds that the amount should be minimal as the Defendants will not suffer any damages from an injunction freezing the expenditure of the disputed proceeds. During the pendency of the litigation, the disputed funds may be deposited into an interest-bearing account. If the Law Firms prevail in this action, the Law Firms will receive the proceeds plus interest. The Law Firms have no basis to complain that their fee is

² Plaintiffs disagree that this case will become moot if the Law Firms are not restrained from spending all or a portion of the disputed funds.

being subject to judicial review. In fact, the Law Firms fee agreement expressly provides that the fee shall be approved by a court of competent jurisdiction. They will not suffer harm from the delay in receipt of payment.

IX. CONCLUSION

Plaintiffs have established their right to a preliminary injunction to maintain the status quo during the pendency of this case. Under the Supreme Court's rulings in *Grosshuesch v. Cramer* and *South Carolina Dep't of Rev. v. Richland Cnty.*, this Court would be abusing its discretion if the Court were to deny the Plaintiffs' motion. Furthermore, the public's interest in \$75 Million of taxpayer funds and in the fair administration of justice would be undermined.

Therefore, Plaintiffs motion for preliminary injunction is granted.

IT IS SO ORDERED.

The Honorable Allison Renee Lee
Circuit Court Judge

October __, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PROPOSED ORDER INSERTION
	)	AS TO ATTORNEY GENERAL
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
_____	)	

The Attorney General has appeared as to the Plaintiffs' Motion for TRO and Preliminary Injunction as to the law firm defendants in order to oppose Plaintiffs' contention that they have derivative standing to represent State interests. Plaintiffs' position is contrary to numerous cases recognizing that the Attorney General is the State's chief legal officer and is authorized to represent State interests.

The instant motion is directed to the law firm defendants rather than the Attorney General. The Honorable Debra R. McCaslin denied an earlier Motion for a Preliminary Injunction as to the Attorney General as it was moot. Form 4 Order of October 1, 2020. As to the instant motion, the Attorney General's interest is in defending against Plaintiffs' erroneous assertion of State interests, as well as their misinterpretation of the authority of his Office.

The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due

to the storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money to the State of South Carolina with each party to pay its own costs and attorney fees. Ex. 1, p. 2, ¶5a. The State of South Carolina received the settlement funds on September 15. On September 17, the Office of the Attorney General requested the approval of the Executive Budget Office to pay the two law firms. The EOB granted approval on September 25, and the Finance Department sent the request for payment to the Comptroller General's Office. Plaintiff's filed their motion for a temporary injunction that afternoon. The State Treasurer's Office ultimately wired the funds to Willoughby & Hoefer on September 29.

To support their assertion that they can represent State interests, Plaintiffs rely on cases that are inapposite and do not involve a decision regarding the State as a party or the Attorney General's authority. In particular, they quote from *Ex parte Harte*, 190 S.C. 473, 2 S.E.2d 52 at 53-54 (1930), a case involving a county governing body, and they also cite a shareholder derivative action. Instead, the Attorney General's authority to represent State interests is governed by his authority as provided 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. For example, as our 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 Constitution." [footnote omitted] 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 that the Attorney General had the authority to settle that case.

Importantly also, in *State ex rel. Condon v. Hodges*, 349 S.C. 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:

[The 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 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), *affd.* 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).

And, in *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the

Court explained that [t]he 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.” The Court stressed that the Attorney General must be a party to the case to be heard regarding attorney’s fees; nevertheless, *Condon v. State* emphasized the broad authority of the Attorney General to speak for the State in legal matters. *See also, State v. Cooper*, 110 S.C. 256, 96 S.E. 398 (1918) [“The history of the case satisfies us that the Attorney General would have been well within his rights to have directed the solicitor not to hand out a bill [of indictment] against the defendant. As the case stands, the anomalous spectacle is presented of one of the state’s solicitors prosecuting one of the state’s public servants engaged in a difficult and important charity and that servant is defended by the state’s chief law officer.”]; *State v. Southern Ry. Co.*, 82 S.C. 12, 62 S.E. 1116 (1908) [Court expresses concern that legislative directive to Attorney General not deny “him 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 Willoughby & Hoefer 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.

Due to the lack of constitutional or taxpayer standing of Plaintiffs, discussed elsewhere in

this order, the following quotation from *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) cautions against issuance of an injunction in this case: “[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’” This Court will not issue an injunction for that reason and also because Plaintiffs have shown no likelihood of success on their claim that the Attorney General lacked the authority to make the payment of fees to Willoughby and Hoefer. The Attorney General did have such authority as discussed below.

Under the separation of powers provision of our State Constitution (Article I, § 8), “the Executive Branch is vested with the power to decide when and how to prosecute a case.” *State v. Thrift*, 312 S.C. 282, 291, 440 S.E.2d 341, 346 (1994). Pursuant to Article V, § 24 of the Constitution, the Attorney General is the chief prosecuting officer of the State for both criminal and civil proceedings. *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014).). In *State v. Peake*, 353 S.C. 499, 579 S.E.2d 297 (2003), the Supreme Court concluded that Article V, § 24 cannot be undermined, holding that DHEC could not serve as a substitute for the Attorney General.

Here, the Attorney General, as the State’s chief legal officer and chief prosecuting officer, was possessed with the clear authority to initiate the underlying action against federal authorities, and to employ private attorneys pursuant to a contingency fee agreement in that action. He possessed authority to pay his retained attorneys their fees from the proceeds of any settlement. 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 judgement obtained in the case.” Order at 9 (Exhibit 3 to Attorney General’s Memorandum).

Plaintiffs’ arguments regarding interpretation of 1-7-150 are unconvincing. That statute states that “[a]ll 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 . . . must be deposited in the general fund of the State” Plaintiffs contend that the fees are neither “costs of litigation” nor were they awarded by settlement.

The Honorable Roger Couch rejected their first contention about §1-7-150 in *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009), concluding that the statute “expressly authorizes payment of ‘the costs of litigation’ out of litigation proceeds and a ‘cost of litigation’ is certainly what legal fees are.” He added that “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 19-20. Similarly, in *Cephalon, supra*, Judge Cooper concluded that “[a]s 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 authorizing just what was done from the settlement proceeds. This understanding is ratified by the “Agreement To Voluntary Dismissal of Appeal” which 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” Moreover, the Executive Budget Office has authorized this payment.

This Court concludes that the Attorney General had the authority to pay the attorney’s fees from settlement proceeds without depositing the money into the general fund. Therefore, Plaintiffs have no likelihood of success, and as set forth above, have no authority to act for the State as to this matter.

[Electronic signature of Alison Renee Lee, Circuit Court Judge, follows]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
South Carolina Public Interest	)	
Foundation and John Crangle,	)	Case No. 2020-CP-40-04603
individually and on behalf of all	)	
others similarly situated,	)	
	)	ORDER DENYING PLAINTIFFS'
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, for a noticed virtual hearing on the motion for preliminary injunction (Motion) of Plaintiffs South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated (collectively Plaintiffs), at which all parties were represented by counsel. In their 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 a litigation retention agreement. Previously, this Court granted an *Ex Parte* Temporary Restraining Order against the Law Firms to maintain the status quo until the Motion could be heard. At the hearing, the Court advised the parties that it was primarily interested in the issues of (1) Plaintiffs' standing to maintain this action and (2) the Attorney General's right to pay the attorneys' fees pursuant to South Carolina Code Section 1-7-150. After hearing the issues and arguments of counsel and

considering the materials submitted to the Court as part of the case, the Court DENIES Plaintiffs' Motion for Preliminary Injunction and dissolves the Temporary Restraining Order in effect.

Procedural History

The initial Summons and Complaint was filed in this matter against the State Attorney General (but not the Law Firms) on September 25, 2020, at 11:58 a.m., with the filing of a Motion for Temporary Restraining Order and Preliminary Injunction (the First TRO Motion) following at 1:41 p.m. that same day. The State of South Carolina made a wire transfer to W&H of \$75 million in attorneys' fees before noon on September 29, 2020, a payment that was approved and authorized by multiple State officials and agencies prior to the filing of Plaintiffs' suit pursuant to a process that had been initiated in the normal course on September 17, 2020. At 3:00 p.m. on September 29, a virtual hearing was held on Plaintiffs' First TRO Motion before the Honorable Debra McCaslin. A second virtual hearing was held at 7:00 p.m. on that same day, following which¹ 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." 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." But at the time 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, at approximately 12:58 p.m., adding the Law Firms as additional defendants. At 1:01 p.m. on September 30, Plaintiffs also filed the instant Motion. At 3:43 p.m. on September 30, 2020, this

¹ The First TRO was electronically signed at 9:21 p.m. on September 29, 2020, and electronically filed on September 30, 2020, at 8:32 a.m. It was subsequently dissolved by Judge McCaslin.

Court electronically signed an *Ex Parte* Temporary Restraining Order, which was electronically filed the next day (October 1, 2020) at 8:01 a.m. (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.” Service was made on W&H through delivery of the Amended Summons and Complaint and the Second TRO on the morning of October 1, 2020.

This Court proceeded with the hearing on October 7, 2020. James Griffin and Badge Humphries appeared on behalf of Plaintiffs. Todd Rutherford, John Simmons, and Gerald Malloy appeared on behalf of Defendant Willoughby & Hoefer, P.A. Will Davidson appeared on behalf of Defendant Davidson, Wren & DeMasters, P.A. J. Emory Smith appeared on behalf of Defendant Alan Wilson. At the hearing, the Court modified and extended the existing restraining order until Wednesday, October 14, 2020.

Factual Background

As it appears from the record, more than four and one-half years ago, in February 2016 the State of South Carolina, represented by the Law Firms, initiated what became several lawsuits against the Federal Government—in particular, 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—in what appears to be the largest single recovery ever by the State of South Carolina—from the Federal

Government’s “Judgment Fund.”² W&H Resp. to Pls.’ Mot. for Prelim. Inj. (W&H Resp.), Ex. 1. The settlement further provided the Federal Government with a grace period to comply with an obligation to remove additional defense plutonium from the State while still maintaining the ability of the State to force removal and receive additional payments should the Federal Government not comply. *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 Court of Appeals for the Federal Circuit—where the litigation was currently pending—on September 29, 2020. W&H Resp., Ex. 2, Agreement to Voluntary Dismissal of Appeal.

For the fees in this case, the Fee Agreement between the Attorney General and the 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—uses a decreasing percentage scale 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 based upon the immediate monetary benefit of the settlement only, this fee represents 12.5% of the cash recovery.³

The State Attorney General submitted the request for approval of payment of the attorneys’ fees owed pursuant to the Fee Agreement on September 17, 2020. Attorney General Mem. in

² 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 U.S. Department of Justice in settlement of claims arising under actual or imminent litigation under appropriate circumstances. 31 C.F.R. § 256.1.

³ Counsel for Plaintiffs acknowledged at the hearing that 12.5% is a reasonable percentage for fees from a common fund. Moreover, as discussed below, Plaintiffs did not introduce any evidence that the fee is unreasonable.

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 the \$75 million, inclusive of attorneys' fees and costs, owed under the Fee Agreement and as contemplated by the dismissal filed in the Federal Circuit. *Id.*

Legal Standard

An injunction is a “drastic remedy.” *E.g., Richland Cty. v. S.C. Dep’t of Rev.*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018). “The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction.” *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). To obtain a temporary injunction under South Carolina law, a party must demonstrate (1) irreparable harm; (2) a likelihood of success on the merits; and (3) an inadequate remedy at law. *See, e.g., Richland Cty.*, 422 S.C. at 309, 811 S.E.2d at 767; *Roach v. Combined Util. Comm’n of City of Easley*, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct. App. 1986). Further, because Plaintiffs have sought to enjoin the conduct of the Attorney General, a State Constitutional Officer leading a governmental office, Plaintiffs are further required to show that the exercise of the Attorney General’s statutory right to hire and pay private counsel on a fee basis to represent the State of South Carolina was arbitrary, capricious, and oppressive. *See Richland Cty.*, 422 S.C. at 310, 811 S.E.2d at 767 (“[I]n order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner.”). There is no balancing of these elements; each one must be satisfied. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). The decision regarding whether

to enter a temporary injunction is committed to the trial court's sound discretion, but an "abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

Thus, a plaintiff seeking a temporary injunction must make a showing that it will suffer irreparable harm without the entry of an injunction. *Poynter*, 387 S.C. at 586-87, 694 S.E.2d at 17; *see Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 36, 716 S.E.2d 337, 343 (Ct. App. 2011). Merely articulating an injury is insufficient. And there is no harm when "the harm at issue can be remedied by money damages." *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *22 (D.S.C. May 25, 2020) (quoting *Bethesda Softworks, LLC v. Interplay Entm't Corp.*, 452 F. App'x 351, 353 (4th Cir. 2011)). To show a likelihood of success, a "plaintiff must present a reasonable question as to the existence of [a legal right]." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 508 (Ct. App. 2009) (citing *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005), *holding modified by Poynter*, 387 S.C. 583, 694 S.E.2d 15). And an adequate remedy at law may be provided by a legal cause of action or non-equitable avenue of relief. *Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co.*, 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978) (rejecting a claim for specific performance and holding that an "action at law for damages affords appellant the full relief to which it is entitled").

As a threshold matter to entertaining any motion before the Court, however, the Supreme Court has stated that "[t]he existence of an actual, justiciable controversy is essential to jurisdiction to render a declaratory judgment," and "[a] justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination" *Orr v.*

Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982) (citing *Notios Corp. v. Hanvey*, 256 S.C. 275, 182 S.E.2d 55 (1971)); *see also Waters v. S.C. Land Resources Conservation Comm’n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917 (1996). Accordingly, “[a] threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy” and that “[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and standing.” *Holden v. Cribb*, 349 S.C. 132, 136, 561 S.E.2d 634, 637 (Ct. App. 2002).

Analysis

For the reasons that follow, the Court finds that Plaintiffs’ Motion must be denied because Plaintiffs do not have standing and, furthermore, are not entitled to an injunction because they cannot show a likelihood of success on the merits.

1. Plaintiffs lack standing and this Court lacks jurisdiction.

Before the Court can reach the questions raised in the Motion, it first must determine whether or not Plaintiffs have standing and this Court has jurisdiction over the claims alleged in the Amended Complaint. *See Holden, supra*; *see also Senate ex rel. Leatherman v. McMaster*, 425 S.C. 315, 320, 821 S.E.2d 908, 910 (2018) (per curiam) (“[T]he Court must examine the President Pro Tempore’s threshold authority to bring the action.”); *S.C. Public Interest Foundation v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (“A plaintiff must have standing to institute an action.”); *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985) (“Standing to sue is a fundamental requirement in instituting an action.”); *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) (same). After considering the arguments of counsel and evaluating the issues, the Court finds that Plaintiffs do not have standing. The Court further finds that it does not have jurisdiction over this matter for the

additional reasons that Plaintiffs' claims are moot and merely raise non-justiciable political questions or issues reserved exclusively for determination by the Supreme Court.

A. Plaintiffs lack 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 S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). Plaintiffs have made no assertion that they have statutory standing, so the question is whether they have standing through either constitutional standing or the "public importance" exception. The Court finds that they have not met their burden to demonstrate either.

i. Plaintiffs do not have constitutional standing because they have not suffered a cognizable injury in fact.

To establish constitutional standing, a plaintiff must show the following: "[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must be likely that a favorable decision will redress the injury." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001) ("The party seeking to establish standing carries the burden of demonstrating each of the three elements.")).

The Court finds that Plaintiffs do not have constitutional standing because they have not alleged and cannot allege an injury in fact. *Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Env'tl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) ("Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct

injury or the immediate danger a direct injury will be sustained.”). Plaintiffs are not parties to the contract between the Law Firms and the State Attorney General,⁴ were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys’ fees. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (holding that “[a]n ‘interest in attorney’s fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.’”) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)).

Plaintiffs claim “taxpayer standing” as a basis for an injury-in-fact, but a “taxpayer lacks constitutional standing when he suffers in some *indefinite* way in common with people *generally*.” *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012) (emphasis in original & internal quotation marks omitted). Indeed, this point is actually evidenced by the fact that Plaintiff Crangle, by purporting to represent a class consisting of the public, generally, (*see* Am. Compl., pleading on behalf of all others similarly situated), is necessarily asserting a claim that he contends is common to all citizens of the State of South Carolina on whose behalf he purports to represent as the putative class representative. *See* Rule 23(a), SCRCP. Plaintiffs cannot simultaneously claim to represent an interest common with the people generally **and** an injury that is distinct and particularized sufficient to satisfy their burden. Plaintiffs state no specific claim that they have regarding the settlement proceeds and, thus, share their alleged claims with all taxpayers and residents in the State. *Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 (“In *ATC*, [the Supreme Court]

⁴ Plaintiffs’ suggestion that they have standing because they are “third party beneficiaries” of the contract is unsupported in law or fact. *See Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) (“Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff.”). Under Plaintiffs’ argument, every citizen of South Carolina has a cognizable interest in every contract entered into by the State and its officials. The Court rejects this argument.

unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]....This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.”) (quoting *ATC*, 380 S.C. at 198, 669 S.E.2d at 340-41).

The Court finds that the cases relied upon by Plaintiffs with respect to “taxpayer standing” do not afford them with a legitimate claim to standing. First, no taxpayer funds are at issue in this case. As Plaintiffs specifically allege, the funds at issue were paid by the Federal Government pursuant to a settlement agreement. They therefore do not constitute State tax revenues. Second, the cases relied on by Plaintiffs relate to claims against specific counties or municipal entities regarding taxes imposed or collected by such entities. *Id.* As the Supreme Court has made abundantly clear, this type of “taxpayer standing” does not apply to claims against the State or State officials that allege harm common to all residents. *Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 (“We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing upon him.”); *ATC*, 380 S.C. at 198, 669 S.E.2d at 341 (“[A] taxpayer lacks standing when he ‘suffers in some indefinite way in common with people generally.’”) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).

For these reasons, the Court finds that Plaintiffs have failed to allege an injury in fact and, thus, do not have constitutional standing.

- ii. ***Plaintiffs do not have standing pursuant to the “public importance” exception because they have not identified a need for future guidance and because their claims of derivative standing vis a vis the State of South Carolina lack merit.***

Plaintiffs contend that they have standing under the “public importance” exception. As a corollary to this argument, Plaintiffs assert that they have standing to derivatively assert claims on behalf of the State. The Court rejects both of these arguments.

- a. ***Plaintiffs have not identified a need for future guidance that a decision in this case will advance.***

“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, 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 *sine qua non* for finding that public importance standing is warranted is a need for future guidance. As the Supreme Court has stated:

The general importance of an issue, without more, is insufficient to invoke the exception because the same may be said of most legislative and executive actions. 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).

The Court finds that Plaintiffs have not shown that resolution of their claims “is needed for future guidance.” *ATC*, 380 S.C. at 199, 669 S.E.2d at 341 (“It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.”); *cf. Adams v. McMaster*, No. 2020-001069 (Slip. Op. Oct. 7, 2020) (granting public interest standing because it was likely that the same situation would occur in the future). Plaintiffs challenge the one-time payment of the attorneys’ fees in this particular situation with respect to the particular settlement and pursuant to the particular Fee Agreement. Any determination with respect to this challenge would therefore be entirely limited to the Fee 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”). For these reasons, and also because Plaintiffs do not challenge the Attorney General’s authority to enter into fee retention agreements with outside counsel, the Court finds that this is not a situation requiring future guidance. *See Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44 (affirming dismissal of citizen’s challenge to invalidate public body’s payment to former employee pursuant to severance agreement for lack of “public importance” exception standing because such one-time payment did “not necessitate further guidance.”); *cf. S.C. Pub. Interest Found.*, 403 S.C. at 646, 744 S.E.2d at 524 (granting public importance standing because claim that board was unconstitutionally comprised could undermine future decisions of that board). Any determination the Court might make would not provide “future guidance” as to any issue of public importance.

This conclusion is not changed by Plaintiffs’ contention that future guidance is needed with respect to other contracts for outside litigation counsel entered into by the Attorney General.

Again, Plaintiffs’ claims in this instance are specific to the Law Firms’ Fee Agreement⁵ and the authority to make the payment in this specific case. This is not a case about the Attorney General’s authority to enter into contracts for outside litigation counsel, because Plaintiffs do not challenge that authority. Thus, public importance standing is inappropriate here because no ruling that the Court might make in this case would assist other courts in resolving future arguments regarding outside litigation. *See Jowers*, 423 S.C. at 360, 815 S.E.2d at 455 (“We find the public importance exception does not apply to the plaintiffs’ takings and due process claims in this case because there is no need for ‘future guidance.’”).

In reaching this decision, the Court is mindful of the Supreme Court’s concern about allowing “this exception [to] swallow the rule.” *Id.*, 423 S.C. at 360, 815 S.E.2d at 455 (quoting *S.C. Pub. Interest Found.*, 403 S.C. at 646, 744 S.E.2d at 524). The Court finds that affording Plaintiffs public importance standing in this context would not assist in resolving future cases and would also expand the universe of persons complaining about governmental contracts even when there is no dispute over the government’s authority to enter into those contracts.

The Court also concludes that the “public importance” exception does not confer standing upon Plaintiffs with respect to claims against private entities, like the Law Firms. The “public importance” exception, by definition, only applies to claims against governmental or public bodies

⁵ For instance, at the hearing, Plaintiffs’ counsel acknowledged that the size of the fee in this case motivated their interest in this matter. The Court finds that neither the amount of the fee nor Plaintiffs’ subjective interest in the fee is sufficient to implicate a need for future guidance because fees will be different in all cases depending on myriad factors. Public importance standing does not depend upon the level of the applicant’s interest. *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 (1982) (“[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy” because fervor “is not a permissible substitute for the showing of injury itself.”). The Court further finds that the amount of the fee does not afford guidance to future courts on when to allow standing to challenge governmental contracts—not just litigation contracts, but all governmental contracts.

and officials.⁶ It does not apply to what is essentially a contract claim—here asserted by a non-party to the contract—against *private entities*. Plaintiffs may not use an assertion of purported public importance standing to challenge the Attorney General’s conduct to satisfy their burden of standing against the Law Firms. “[S]tanding is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 (1996). At bottom, based in part on their request for an award of fees from the very money that they contend should not have been paid to the Law Firms, Plaintiffs’ claims are seeking part of the Law Firms’ fees and, thus, are not a matter of public interest. *Cf. ATC*, 380 S.C. at 199-200, 669 S.E.2d at 341 (“There is nothing *public* about ATC’s concern with a competing cell-phone tower.”) (emphasis in original). Rather, Plaintiffs must independently establish that they have standing to bring a suit against the Law Firms. This they have not done because they have no direct interest in the Fee Agreement.

The Court therefore finds that Plaintiffs have not established that the “public importance” exception to standing permits them to proceed with their claims in this case. They therefore are not entitled to a preliminary injunction.

b. “Derivative standing” does not exist.

Plaintiffs contend that they have standing because they are entitled to step into the shoes of the State and challenge a contract that the duly elected Attorney General entered into and carried out. They argue that the 1939 decision in *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), which allowed a citizen of a county to assert a plain claim on behalf of that county, should be extended

⁶ See, e.g., *Sloan v. Dep’t of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (alleged violation of statutory bidding requirements by state agency); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (alleged violation of constitutional requirements for legislation by legislature); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (alleged violation of constitutional provisions regarding Governor’s role in Air Force Reserve); *Sloan v. Greenville Cty.*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (alleged violations of county ordinances governing procurement).

to the State even though it is a sovereign entity and there is no plain claim. Pls.’ Suppl. Mem., p. 16. Plaintiffs further analogize their purported claim to that of a shareholder derivative action.⁷ *Id.* The Court finds that Plaintiffs’ argument is without merit for several reasons.

The Court notes at the outset that “a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action.” *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801-02 (Ct. App. 1997) (also rejecting claim to proceed as class action “because there is no claim of injury or damage not common to the public”). As the Court previously found, Plaintiffs have alleged no injury or damage not common to the public. *See Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43 (holding that a “taxpayer lacks constitutional standing when he suffers in some *indefinite* way in common with people *generally*.”) (emphasis in original & internal quotation marks omitted). Because Plaintiffs have no discrete injury with respect to the Fee Agreement, they cannot challenge the Attorney General’s actions with respect to that agreement. The opinion of the Court of Appeals in *Berry* is binding on this point.

Plaintiffs seek to escape this restriction by arguing that they can step into the role of the Attorney General and assert claims on his behalf and on behalf of the State—uncertain and indefinite claims based on the fact that the Attorney General upheld the Fee Agreement and discharged his obligations under that agreement. They contend that *Hart* allows them to do this, but the Court finds that *Hart* is inapplicable here. *Hart* allowed a county resident to assert a “plain”

⁷ In purported support of this contention, they allege that the Attorney General “has refused repeated demands to assert the State of South Carolina’s rights,” asserting that these demands came in the form of letters from Governor McMaster and State Solicitor Pascoe as well as Plaintiff’s Initial Complaint and Initial Motion. Suppl. Mem., p. 17. The Court rejects this assertion because the Attorney General is the Chief Legal Officer of the State and has the full legal authority (and obligation) to fulfill legally-binding contracts of the State. *See W&H Resp.*, Ex. 9, Sept. 1, 2020 Ltr. to Governor from Attorney General.

claim on behalf of a county. *See Hart*, 190 S.C. at 477, 2 S.E.2d at 53. But critical to analyzing that decision is that *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800 (municipality) (“[T]his power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear that the governmental entity has unjustifiably refused to assert the claim.”) (emphasis added); *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”). Here, however, Plaintiffs seek to extend *Hart* to allow a derivative suit on behalf of the State—a sovereign entity that is not subject to suit in the same manner as local governments may be.

Plaintiffs analogize their case to a shareholder derivative action, but the Court rejects this analogy. The Supreme Court has recognized that derivative actions are not applicable with respect to actions by local government entities such as a historic commission because those entities are a “body politic,” not a corporation. *Newman*, 325 S.C. at 82-83, 480 S.E.2d at 74. If derivative actions are not available with respect to local governments, they certainly are not available with respect to the State as a sovereign entity. Moreover, the Court concludes that, for the same reasons that Plaintiffs do not have taxpayer standing, citizens are not shareholders of the government by virtue of being taxpayers and, thus, cannot bring derivative actions. *See id.*; *see also Bodman*, 742 S.E.2d at 366, 403 S.C. at 66–67 (“We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing upon him.”); *ATC*, 380 S.C. at 198, 669 S.E.2d

at 341 (“[A] taxpayer lacks standing when he ‘suffers in some indefinite way in common with people generally.’”) (quoting *Frothingham*, 262 U.S. at 488). In sum, Plaintiffs have no right to bring a derivative action on behalf of the State of South Carolina and its Attorney General.

The Court therefore concludes that even if Plaintiffs might be able to challenge local government actions under *Hart*, they cannot challenge State executive branch action absent some discrete injury not common to the general public. This they do not have. The Court finds that *Berry* is instructive in this regard because it rejected an effort to bring a legal malpractice claim on behalf of a municipality. That is, town residents brought a claim against the town’s former attorneys, alleging that they committed malpractice in how they handled the issuance of a revenue bond on behalf of the Town of New Ellenton. *Berry*, 328 S.C. at 440, 492 S.E.2d at 797. The Court of Appeals held that the town residents had no standing to sue either on behalf of New Ellenton or as a class of New Ellenton citizens. *Id.*, 328 S.C. at 446-47, 492 S.E.2d at 800. The Court of Appeals further noted that the “authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity.” *Id.*, 328 S.C. at 447, 492 S.E.2d at 800. Consequently, absent some obvious or “plain” cause of action, citizens do not have the right to bring a claim on behalf of a local government. The plaintiffs in *Berry* could not avail themselves of that option because “the claim alleged by Residents on behalf of the town is not clearly set forth and is far from plain.” *Id.*, 328 S.C. at 448, 492 S.E.2d at 801. Thus, the Court of Appeals rejected plaintiff’s efforts to bring the claim on behalf of the town because there was no plain remedy, and similarly rejected their efforts to allege a class action “because there [was] no claim of injury or damage not common to the public.” *Id.*, 328 S.C. at 449, 492 S.E.2d at 802.

For the same reasons, the Court finds that Plaintiffs do not have any standing or, indeed, any legal basis to step into the shoes of the State and its Attorney General and alter their actions.

As noted above, governmental officials and entities are given the discretion to determine what action should be taken by the agency or entity for which they are responsible. *Id.*, 328 S.C. at 447, 492 S.E.2d at 800. There is no plain remedy that the State is not asserting because the Attorney General entered into and discharged his obligations under the Fee Agreement, and there is no plain claim that he is not asserting in view of the fact that the Law Firms were entitled to payment of a fee and a 12.5% contingent fee is not an unreasonable fee by comparison to other lawsuits.

Moreover, if accepted, Plaintiffs' derivative claim argument would require the Court to violate Article I, § 8 of the South Carolina Constitution, which mandates that the executive, legislative, and judicial branches shall remain separate and distinct. In other words, Plaintiffs improperly seek to have this Court decide a political question. *See* discussion *infra* Section 1.C. For obvious reasons, the Court declines Plaintiffs' invitation to do so.

Finally, the Court finds that even if Plaintiffs could bring a *Hart* claim on behalf of the State of South Carolina (as opposed to a local government), that claim is not available unless there is "illegality, fraud, or clear abuse of authority." *Berry*, 328 S.C. at 447, 492 S.E.2d at 801. Plaintiffs have introduced no evidence of any of those factors beyond just stating what amounts to unhappiness with the payment made to the Law Firms. The Court finds that there is no evidence of illegality because payment of the fees was required by contract, because the EBO approved the payment, and because the fee is reasonable. *See, e.g.,* W&H Resp., Ex. 3, Aff. of Leonidas E. Stavrinakis, Ex. 4, Aff. of John Freeman, Ex. 5, Aff. of Michael Virzi, Ex. 6, Aff. of Peter Protopapas; Aff. of Nathan Crystal. The Court further finds that there is no evidence of fraud because the Federal litigation was successfully resolved and, thus, payment was due under the Fee Agreement. And the Court also finds that there is no evidence of "clear abuse of authority" because—again—there was a contract that required payment of the fees.

Simply put, Plaintiffs have not met their burden to show that *Hart* applies, that there was illegality, fraud, or clear abuse of discretion, or that there is a “plain” cause of action or remedy that would justify this Court’s intrusion into matters assigned to a co-equal branch of government. *See Berry*, 328 S.C. at 446-48, 492 S.E.2d at 800-01 (noting that *Hart* applies only to plain causes of action because, generally, the “authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity”). The Court finds that *Hart* does not afford them with standing in this instance and, thus, finds that they are not entitled to a preliminary injunction.

B. Plaintiffs’ claims are moot.

The Court finds that Plaintiffs’ claims also are moot because it is undisputed that payment of the attorneys’ fees has already been made by the State pursuant to the approval of the EBO and the authorization of the State Treasurer based on a warrant issued by the State Comptroller General. Attorney General Mem. in Opp’n to First TRO Motion, Ex. 4, Buckley Aff.; *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (“A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.”). Plaintiffs now are seeking an advisory opinion because their claims have been rendered moot by payment of the fees to private counsel pursuant to the Attorney General’s contract with those attorneys and the approval of four separate State officials and agencies. *See id.* (“The court does not concern itself with moot or speculative questions.”); *Matter of Angela Suzanne C.*, 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) (“It is settled law that this Court will not issue advisory opinions on questions for which no meaningful relief can be granted.”); *see also Sloan v. Greenville Cty.*, 361 S.C. 568, 571–72, 606 S.E.2d 464, 466 (2004) (holding that completion of project and amendment of challenge ordinance rendered alleged public importance matter moot). Plaintiffs therefore are not entitled to a preliminary injunction.

C. Plaintiffs' claims present non-justiciable political questions because, at bottom, they allege that the Court should violate the separation of powers.

As the Court referenced above, Plaintiffs are seeking to have the Court decide a political question. “The fundamental characteristic of a nonjusticiable ‘political question’ is that its adjudication would place a court in conflict with a coequal branch of government.” *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) (citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 393–94 (1990)). “Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial.” *Id.* (citing *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Brd.*, 333 U.S. 103, 111 (1948)). Unlike the Federal Constitution, the South Carolina Constitution expressly requires that the branches of government remain separate so that one branch does not claim or exercise powers belonging to another branch. S.C. Const. art. I, § 8.

Here, the Amended Complaint’s request that the judicial branch invalidate the Attorney General’s ability to request payment through the procedures set forth in the law, and the Treasurer’s, Comptroller General’s, and EBO’s (all non-parties to this lawsuit) ability to process same, requests a judicial violation of separation of powers, including weighing in on what amounts to a nonjusticiable political question. *E.g.*, *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”) (quoting *Judicial Merit Selection Comm’n*, 369 S.C. at 142, 632 S.E.2d at 278). Therefore, contrary to Plaintiffs’ assertion that the Attorney General’s, Treasurer’s, Comptroller General’s, and EBO’s processing of the payment pursuant to the applicable law and a binding contract somehow is a violation of separation of powers under Article I, § 8 of the South Carolina Constitution, the converse is actually true: it would be a violation of separation of powers under Article I, § 8 of the South Carolina Constitution

for the judicial branch to intrude upon the process followed for such payments, thereby usurping the Attorney General's, Treasurer's, Comptroller General's, and EBO's respective authorities to make a contractually-required payment.

At bottom, Plaintiffs' complaint states nothing more than a generalized grievance with a decision of the Attorney General, and Plaintiffs are attempting to put this Court in the position of wading into matters reserved for the Attorney General as the Chief Legal Officer of the State. Importantly, however, Plaintiffs do not challenge the Attorney General's authority to enter into the Fee Agreement or to hire private counsel on a contingency basis. Indeed, as discussed below, South Carolina Code Section 1-7-170 unequivocally grants the Attorney General that authority, which he exercised here. *See also Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943) (“[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, on a contingent basis.”).

The Court finds that the Attorney General determined that the Fee Agreement was in the best interests of the State, and Plaintiffs' mere disagreement does not support a legally-cognizable claim, nor does it provide this Court jurisdiction or authority to require judicial approval of the Fee Agreement. *See Order Granting Mot. to Intervene on behalf of Att'y Gen. Henry D. McMaster, Sloan v. The S.C. Board of Physical Therapy*, No. 04-CP-40-1797, 2004 WL 5353216 (S.C. Com. Pl. July 02, 2004) (“[T]he Attorney General of South Carolina possesses the right to control and manage the State's litigation.”) (citing *Cooley*, 204 S.C. 10, 28 S.E.2d at 450).

D. This Court does not have jurisdiction to review the reasonableness of the attorneys' fees paid pursuant to the Fee Agreement.

The foundation for Plaintiffs' claim that the attorneys' fees to the Law Firms are unreasonable is its assertion that the Fee Agreement with the Attorney General violates Rule 1.5 of the South Carolina Rules of Professional Conduct. *See Am. Compl.*, ¶¶ 33-35. However—even

putting aside that, as discussed below, there is no legal basis to require the State Attorney General to seek judicial approval of his contracts with outside legal counsel—there is no private cause of action for a third party to challenge the attorneys’ fees as violative of the Rules of Professional Conduct and, in any event, any allegations of violations of the Rules of Professional Conduct are within the *exclusive* province of the Supreme Court. See *In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) (“[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.”) (citing *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *In re Unauthorized Practice of Law Rules Proposed by S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124, (1992) (“The Constitution commits to [the Supreme Court] the duty to regulate the practice of law in South Carolina.”); Scope ¶ 7, RPC, Rule 407, SCACR (“Violation of a Rule should not itself give rise to a cause of action against a lawyer ... The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *They are not designed to be a basis for civil liability.*”) (emphasis added); 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). Just as this Court cannot usurp the role of the State Attorney General as Chief Legal Officer, it cannot usurp the Supreme Court’s exclusive role or create a private cause of action the Supreme Court has found does not exist, which is exactly what Plaintiffs are improperly asking this Court to do.

2. Plaintiffs have not established a likelihood of success on the merits for any of their causes of action.

Even assuming that Plaintiffs have standing or this Court has jurisdiction over some or all of their claims, assumptions the Court rejects, the Court further finds that Plaintiffs are not entitled

to a preliminary injunction because they have not met their burden to establish a likelihood of success on the merits.

A. The Attorney General had authority to pay the attorneys’ fees without the necessity of depositing those amounts into the General Fund.

Plaintiffs’ primary contention in this matter is that the Attorney General did not possess the authority to authorize the payment of the attorneys’ fees to meet the obligations of the Fee Agreement. Specifically, Plaintiffs contend that the entire settlement amount of \$600 million—including the \$75 million owed for attorneys’ fees—was required to be deposited in the General Fund pursuant to § 1-7-150 and, correspondingly, no amount could be paid to the Law Firms pursuant to the Fee Agreement unless and until the General Assembly specifically said so. For the several reasons set forth below, the Court disagrees, and finds that Plaintiffs have no likelihood of success on the merits of this claim.

As initial matter, the Court notes that Plaintiffs do not challenge the Attorney General’s authority to retain outside private counsel on a contingency basis in general or to retain the Law Firms on a contingency basis in this case. Indeed, the Attorney General’s ability to engage outside counsel on a contingency fee basis has been codified and affirmed by the judiciary. *See* S.C. Code Ann. §§ 1-7-85, 170; *Cooley*, 204 S.C. at 10, 28 S.E.2d at 450 (“[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, on a contingent basis.”); *Cephalon v. Wilson*, 2012-CP-40-7317 (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 (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 court in *Cephalon* 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.*

Accordingly, there is no dispute in this case regarding the Attorney General's authority to hire the Law Firms to perform the services requested pursuant to the Fee Agreement and to do so on a contingency basis.

Plaintiffs' argument is instead that § 1-7-150(B) precluded the Attorney General from authorizing the payment of the amount owed to the Law Firms pursuant to the Fee Agreement without approval from either a court or the General Assembly, notwithstanding that the contract has already been performed in full and the benefit to the State received. "In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature." *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Chem-Nuclear Sys., LLC v. S.C. Bd. of Health & Envtl. Control*, 374 S.C 201, 205, 648 S.E.2d 601, 603 (2007). "The language of a statute must be read in a sense which harmonizes with its subject matter and accords with a general purpose." *Id.* Neither the plain language nor a reasonable interpretation of § 1-7-150(B) supports Plaintiffs' contention in this matter.

First, § 1-7-150(B) provides that "monies, except ... costs of litigation ... awarded the State of South Carolina by ... settlement in actions or claims brought by the Attorney General on behalf of the State ... must be deposited in the general fund ... except ... where some other disposition is required by law." Plaintiffs' argument hinges on their contention that the attorneys' fees cannot be paid because they allegedly were not awarded by settlement. However, because the Attorney General retained outside counsel to prosecute these cases, as he was authorized by law to do, the contractual contingency fees are a "cost[] of litigation" that the Attorney General is specifically authorized to pay under the statute. *State v. Eli Lilly and Co.*, No. 2007-CP-42-1855, 2009 WL 6058383 (S.C. Com. Pl. Sep. 22, 2009) ("The flaw with this argument is that the statute expressly

authorizes payment of ‘the costs of litigation’ out of litigation proceeds, and a ‘cost of litigation’ is precisely what legal fees are.”); *see also Cephalon*, No. 2012-CP-40-7317 (determining that § 1-7-150 “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.”). Consequently, the plain language of § 1-7-150(B) authorizes the Attorney General to pay the amounts to the Law Firms without first depositing those monies in the General Fund. If, as Plaintiffs’ contend, the General Assembly desired to require the Attorney General to obtain approval from a court or the General Assembly for payment of attorneys’ fee pursuant to every fee agreement entered into with outside counsel, it would have expressly said so. However, neither § 1-7-150 nor any other statute imposes any such requirement.⁸ Interpreting the statute to impose that requirement in the absence of any express

⁸ To the extent Plaintiffs interpret § 1-7-150 to require the Attorney General to have obtained the consent of the opposing party in the MOX litigation—the Federal Government—to the payment of attorneys’ fees out of the settlement proceeds, or to the amount of the attorneys’ fees, in order for the Attorney General to pay such fees to the Law Firms, such contention is patently unreasonable. *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (“Statutes should not be construed so as to lead to an absurd result.”). Plaintiffs’ interpretation would mean that the issue of the availability of a fee would turn on, and be dictated by, a party with no particular interest in that issue, and with no reason to have an interest in that issue. Regardless, that argument would still fail here because the Federal Government expressly acknowledged as part of the settlement and dismissal of the Federal Circuit appeal that the payment of the State’s costs and fees would be paid from the settlement proceeds. *See W&H Resp., Ex. 2, Agreement to Voluntary Dismissal of Appeal* (wherein the Federal Government 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.”).

language or requirement could lead to a violation of the constitutionally-required separation of powers, as discussed above.⁹

Second, even if Plaintiffs' interpretation of the language discussed above was correct, the attorneys' fees were still payable directly to the Law Firms and were not required to be deposited in the General Fund because § 1-7-150(B) exempts from its coverage monies "where some other disposition is required by law," a point Plaintiffs do not address at all. The fulfillment of valid and binding contracts entered into by the State's Chief Legal Officer is, of course, a disposition "required by law." Further, § 1-7-85 expressly provides 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, which are expressly authorized under § 1-7-85, pursuant to a valid and binding contract for services rendered in connection with the civil proceedings brought on behalf of the State constitutes a cost for which the Attorney General is authorized to pay. Plaintiffs' contentions, therefore, find no support in the plain language of the applicable statutory provisions.

Another problem for Plaintiffs is that their contentions rely on the theory that the entire \$600 million should have been deposited into the General Fund. However, Proviso 59.8 of the State's current budget precluded the Attorney General from transferring *any* funds to the General

⁹ The Court notes that the fee payment in this matter does not involve fee shifting, where the party paying the fees, usually a non-prevailing defendant, is required by a court to pay a specific amount of attorneys' fees to the prevailing party, usually the plaintiff. *See* W&H Resp., Crystal Aff. Nor does it involve the typical class action situation where the attorneys' fees are taken from a common fund which is to be distributed among many class members, often persons with relatively small claims, and court approval is required. Nor does this matter involve any other situation in which court approval or involvement is required, such as settlements involving minors. Instead, the present situation is closely analogous to one where the attorney represents just one client, with whom the fee arrangement has been agreed upon in advance, and where there is no suggestion that the attorney took unfair advantage of the client.

Fund and instead directed him to deposit any funds that “otherwise” would go to the General Fund in a separate account:

(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 at present. 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 portion of the settlement awarded for attorneys’ fees generally would have to be deposited in the General Fund, they would not be in this case. The argument articulated by Plaintiffs is therefore inapplicable. But even if it was applicable, the question becomes the Attorney General’s compliance with the requirement that expenditures from the Litigation Recovery Account must be “prescribed by law.” Again, fulfilling a contractual obligation is a duty “prescribed by law” for the Attorney General.

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 it was expressly authorized to do 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 in their Motion, 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.

Plaintiffs claim, without citing to any statutory provision, that an 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, pursuant to the continuing resolution passed by the General Assembly now in effect, the General Assembly has 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 (“The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.”); 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, and Plaintiffs’ contention that further approvals were required is simply incorrect.

Finally, and particularly pertinent to Plaintiffs’ burden to demonstrate the requisite likelihood of success on the merits of this claim, Plaintiffs cite to no authority to support their interpretation of the applicable statute. In contrast, and in addition to the court decisions identified above, both the Attorney General—who is the Chief Legal Officer of the State and is specifically charged with administering § 1-7-150—and the EBO—who is responsible for overseeing the

expenditure of funds in this State—approved and authorized the payment of the attorneys’ fees. The payment also was authorized by the Comptroller General and the Treasurer. Accordingly, even if there was some ambiguity as to whether § 1-7-150(B) authorized the payment of attorneys’ fees in this case—which, as discussed above, this Court does not find to be the case—the agencies charged with administering this statute necessarily have determined that the 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.”). Therefore, for Plaintiffs to succeed in this matter, they need to demonstrate not only that their interpretation comports with the plain language but also that the Attorney General’s and EBO’s authorization of the payment of the fees owed pursuant to the Fee Agreement was “arbitrary, capricious, or manifestly contrary to [§1-7-150(B)].” *Id.* Because both the plain language and a reasonable interpretation of the applicable statutes support the Attorney General’s payment of the fees, Plaintiffs have no likelihood of success of making such a demonstration.

Thus, the Attorney General’s payment of the attorney’s fees was proper because the payment was required by contract and because the payment was approved by the EBO. The Court finds Plaintiffs therefore have no likelihood of success on the merits with respect to the Attorney General’s authority to fulfil the obligation to pay the attorneys’ fees owed pursuant to the Fee Agreement.

- B. Plaintiffs’ ambiguous challenge to the reasonableness of the fees paid pursuant to the Law Firms’ contract with the Attorney General has no likelihood of success on the merits.**
- i. *This Court does not have the authority to require the Attorney General to obtain judicial approval of the Law Firms’ contract.*

Plaintiffs ask this Court to *require* the Attorney General to obtain judicial approval of the amount of fees paid to the Law Firms for services performed and costs incurred pursuant to their contract. As discussed above, Plaintiffs do not have standing to make such a request as they are not parties to the contract and the “public importance” exception does not apply; only the Supreme Court has jurisdiction to entertain a complaint based on allegations of violations of the Rules of Professional Conduct and there is no private cause of action; and requiring judicial approval of the validity of executive branch contracts is a prima facie violation of the separation of powers provisions of the Constitution.

But even assuming none of that is true, Plaintiffs do not have a valid claim and this Court does not have authority to even entertain Plaintiffs’ claim because there is no contractual or statutory provision or any other mechanism that imposes a requirement that the Attorney General obtain judicial approval of the contract or the fees paid. Plaintiffs note that the Fee Agreement contains a provision regarding judicial approval of the fees when possible, but that provision is optional and does not constitute a requirement that he obtain judicial approval. Moreover, given that the parties to the Fee Agreement—the Attorney General and the Law Firms—agree on the payment of the fee, the Court concludes that a declaratory judgement would not be available because there would be no live controversy affording jurisdiction to a trial court. The settlement reached between the State and the Federal Government also did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his

contracts. In short, Plaintiffs have not met their burden to adduce anything that would have required the Attorney General to seek judicial approval of the Fee Agreement.

Plaintiffs' allegation that the Fee Agreement—which provides for an effective contingency fee rate of 12.5% for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon this Court authority to review the Fee Agreement. A mere allegation of a violation of the South Carolina Rules of Professional Conduct does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have authorized the payment of the fee.

ii. *Plaintiffs have not met their burden to show that the attorneys' fees earned and paid were unreasonable.*

As discussed, there is absolutely no basis for this Court to require the Attorney General to seek approval of the attorneys' fees paid pursuant to the Fee Agreement or for this Court to judge the reasonableness of the attorneys' fees. But even if the reasonableness of the fees were at issue, Plaintiffs have not met their burden to show a likelihood of success on their claim that the Fee Agreement provides for an “unreasonable” fee. Plaintiffs did not introduce *any* evidence at the hearing on their Motion that the fee paid was unreasonable, and the arguments of their counsel to the contrary are insufficient to meet their burden. *Sessions v. Withers*, 327 S.C. 409, 414, 488 S.E.2d 888, 891 (Ct. App. 1997) (explaining “statements of fact appearing only in argument of counsel [are not] considered” evidence). In contrast, W&H introduced the affidavits of Professor Nathan Crystal, Professor John Freeman, Professor Michael Verzi, and Peter

Protopapas, Esquire, all recognized experts in the field of legal ethics and all of whom testified that the 12.5% fee paid in this case is reasonable. *See* W&H Resp., Ex. 4 (Freeman Aff.), Ex. 5 (Virzi Aff.), Ex. 6 (Protopapas Aff.), and the Crystal Aff., filed separately.

Plaintiffs cite to *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) as support for their argument. They characterize the case as flatly reversing a fee award of \$19 million because of its size. As Professor Freeman points out, each case must be considered on its own facts, although this case is quite consistent with other fee awards in similar cases in this jurisdiction. W&H Resp., Ex. 4, Freeman Aff., pp. 10-14. Moreover, the *Cendant* court actually reversed the award because “the District Court’s fee opinion in this case was too cursory for us to have a sufficient basis to review for abuse of discretion.” *Cendant*, 243 F.3d at 733 (internal quotation marks and citation omitted). On remand, the district court approved an award of approximately \$14 million in attorneys’ fees or about 4% of the fund. *See In re Cendant*, No. 98-cv-02819, pp. 28-29 (June 11, 2002).

The Court finds that, regardless, *Cendant* provides no guidance for the Court in this case. There are quite a few differences between this case and *Cendant*, in particular:

- *Cendant* had conceded liability, whereas DOE contested any wrongdoing in multiple forums.
- *Cendant* was settled only about four months after the complaint was filed, whereas this litigation continued for over four and one-half years.
- *Cendant* had a minimal amount of motion practice, whereas this litigation had extensive motion practice and briefing—not to mention multiple appeals in multiple courts requiring separate briefing.

Cendant, 243 F.3d at 735-36. Moreover, as Professor Freeman observes, this case involved substantial time and effort and presented large, novel challenges; posed great risk; was consistent with fees awarded in other cases; achieved outstanding results; and involved the work of professional and experienced counsel, all with no downside risk to the client. W&H Resp., Ex. 4, Freeman Aff., pp. 8-20. Professor Virzi, Professor Crystal, and Mr. Protopapas all agree. *Id.*, Ex. 5, Verzi Aff., Ex. 6, Protopapas Aff., Crystal Aff. Plaintiffs did not present any evidence to refute any of the expert testimony presented by W&H and a 12.5% contingency fee is generally considered reasonable, which Plaintiffs acknowledged at the hearing on the Motion. Therefore, the Court finds that Plaintiffs have not met their burden to demonstrate they have a likelihood of success on the merits of their claim.

C. Plaintiff’s “constructive trust” claim has no likelihood of success.

The Court finds that Plaintiffs have no likelihood of success on their claim for imposing a constructive trust on the proceeds. As discussed above, the Court finds and concludes that the Law Firms received payment of their fee for services performed pursuant to a legally-binding contract entered into with the State Attorney General. The payment of the fee was authorized and approved by the State’s Attorney General, Treasurer, Comptroller General, and the EBO in accordance with the applicable statutory provisions. Indeed, the very approval by EBO that Plaintiffs contend was needed for payment to be made was obtained *prior* to Plaintiffs filing suit. *See* Mot., p. 8; Attorney General Mem. in Opp’n to First TRO Motion, Ex. 4, Buckley Affidavit. As noted above, no statute requires court approval of the payment of the fee, and payment was intentionally and voluntarily made by the State to meet the State’s binding contractual obligations. Critically, none of those State officials contend that payment was somehow induced by “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty” or that the Law Firms are not entitled to their

contractual fees. *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) (discussing requirements to impose constructive trust).

Despite all this, Plaintiffs nevertheless seek to stand in the shoes of the State and non-party State Executive Branch officials to contend a “constructive trust” should be created “*in favor of Plaintiffs*,” Am. Compl. ¶ 85 (emphasis added), to deprive the Law Firms of their rights to the fee owed and already paid to them for services performed and costs incurred pursuant to their contract with the State. The Court rejects this argument. “A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.” *Lollis*, 291 S.C. at 529, 354 S.E.2d at 561. “Fraud is an essential element, although it need not be actual fraud.” *Id.* “In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.” *Id.*

Plaintiffs make the claim that the Law Firms’ receipt of the funds owed and paid to them pursuant to a legally-binding and valid contract for services performed and for which payment was authorized by four separate State officials was wrongful and necessitates the creation of a constructive trust. However, Plaintiffs do not allege a single act on the part of either of the Law Firms that in any way amounts to “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty.” *Id.* The closest Plaintiffs come to such an allegation is their contention that the Law Firms’ contingency fee pursuant to its contract is not “reasonable” under the Rules of Professional Conduct.¹⁰ But, as discussed, the circuit court does not have jurisdiction over such claims, the Rules of Professional Conduct do not give rise to a private cause of action, Plaintiffs are not parties to the underlying contract, and Plaintiffs have no standing to assert such a claim. And the actual

¹⁰ Moreover, Plaintiffs’ argument that a constructive trust should be imposed is further belied by the fact that they admitted at the hearing the Law Firms should be paid some amount in attorneys’ fees for their efforts under the contract.

party to the contract—the Attorney General—approved the fee, and multiple other State officials authorized payment of the fee.

Like with their reasonableness claim, at bottom, the Plaintiffs are not only asking this Court to usurp the statutory powers of the Attorney General but also to force the State to breach its contract with the Law Firms after the contract has been fully performed by all parties. Plaintiffs cite to no authority—nor is the Court aware of any authority—that would allow this Court to take such drastic action and create additional litigation against the State. Therefore, Plaintiffs’ claim for imposition of a constructive trust is without merit as a matter of law and cannot form the basis for a conclusion that Plaintiffs are likely to succeed on the merits.

3. No irreparable harm will occur if the injunction is not granted and there are adequate remedies at law.

In addition to having no likelihood of success on the merits, Plaintiffs cannot demonstrate that irreparable harm will occur if the injunction is not granted or that there is no adequate remedy at law. Injuries that can be remedied by money damages do not constitute irreparable injuries requiring the drastic remedy of injunction, both because the nature of the injury does not require the intervention of equity and because there is available an adequate remedy at law. *E.g., Thomas*, 2020 WL 2617329, at *22; *Van Robinson Ins. Agency*, 272 S.C. at 128-29, 249 S.E.2d at 745. Plaintiffs’ claims can be remedied by money damages if there was any validity to them, especially since no unique property was transferred to the Law Firms.

4. Plaintiff has not demonstrated that the Attorney General’s payment of the attorneys’ fees was arbitrary and capricious.

Plaintiffs cannot demonstrate that the payment of fees was arbitrary and capricious. Along with the other requirements for a preliminary injunction, “in order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions

or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner.” *Richland Cty.*, 422 S.C. at 310, 811 S.E.2d at 767 (quoting *Headdon v. State Highway Dep’t*, 197 S.C. 118, 14 S.E.2d 586, 588 (1941)).

Plaintiffs have not made and cannot make this requisite showing. The fulfillment by the State Attorney General of a contractual obligation of the State for the payment of fees owed for services performed and for which approval by three separate State officials and agencies was obtained pursuant to applicable law is not arbitrary and capricious. Indeed, contrary to Plaintiffs’ contentions, it would be arbitrary and capricious if the Attorney General had failed to authorize and pay the fees in breach of the Fee Agreement, thereby depriving the Law Firms of their earned property and effectuating a de facto taking by the State. The Court therefore finds that Plaintiffs are not entitled to any injunction involving the Attorney General and his payment of fees pursuant to the Fee Agreement or the Law Firms’ receipt of payment for their earned fees and costs.

Conclusion

For the reasons set forth above, it is **ORDERED, ADJUDGED, AND DECREED** that Plaintiff’s Motion for Preliminary Injunction is denied and the Temporary Restraining Order presently in effect is dissolved.

AND IT IS SO ORDERED.

Alison Renee Lee
Chief Administrative Judge, Civil
Fifth Judicial Circuit

October __, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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 &
Hofer, P.A. and Davidson, Wren &
DeMasters, P.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2020-CP-40-04603

MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6), SCRCF, Defendant Davidson, Wren & DeMasters, P.A., respectfully moves for dismissal of Plaintiffs' Amended Complaint filed on September 30, 2020.

This Motion is based on the following grounds:

1. For the reasons set forth in this Court's October 14, 2020 Order Denying Plaintiff's Motion for Preliminary Injunction (Order), Plaintiffs lack standing to pursue their claims.

2. Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because, as further explained in the Order, the applicable statutory provisions unambiguously authorize the Attorney General to pay the Defendant law firms their attorneys' fees and costs earned and owed under the Litigation Retention Agreement.

3. Plaintiffs' claims further fail to raise a justiciable controversy and this Court lacks jurisdiction because:

- a. Plaintiffs' claims are moot;
- b. Plaintiffs' claims merely present non-justiciable political questions;
- c. There is no private right of action for a third party to challenge the attorneys' fees as violative of the Rules of Professional Conduct; and
- d. Any allegations of violations of the Rules of Professional Conduct are within the exclusive province of the Supreme Court.

4. In addition, Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because there is no contractual or statutory provision or any other mechanism that requires the Attorney General to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

5. Plaintiffs have otherwise failed to state facts sufficient to constitute causes of action for declaratory judgment, constructive trust, restitution, and injunctive relief.

This motion is based on the pleadings, the parties' prior briefings and arguments on Plaintiffs' motion for preliminary injunction, the South Carolina Rules of Civil Procedure, other applicable law, the Court's Order, and such other or additional filings or matters of which the Court may take notice.

[Signature block is on following page]

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Columbia, South Carolina

October 20, 2020

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

Pursuant to Rules 12(b)(1) and 12(b)(6), SCRCPP, Defendant Willoughby & Hoefer, P.A. (W&H) respectfully moves for dismissal of Plaintiffs' Amended Complaint filed on September 30, 2020.

This Motion is based on the following grounds:

1. For the reasons set forth in this Court's October 14, 2020 Order Denying Plaintiff's Motion for Preliminary Injunction (Order), Plaintiffs lack standing to pursue their claims.
2. Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because, as further explained in the Order, the applicable statutory provisions unambiguously authorize the Attorney General to pay W&H its attorneys' fees and costs earned and owed under the Litigation Retention Agreement.

3. Plaintiffs' claims further fail to raise a justiciable controversy and this Court lacks jurisdiction because:
 - a. Plaintiffs' claims are moot;
 - b. Plaintiffs' claims merely present non-justiciable political questions;
 - c. There is no private right of action for a third party to challenge the attorneys' fees as violative of the Rules of Professional Conduct; and
 - d. Any allegations of violations of the Rules of Professional Conduct are within the exclusive province of the Supreme Court.
4. In addition, Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because there is no contractual or statutory provision or any other mechanism that requires the Attorney General to obtain judicial approval of the Litigation Retention Agreement or the fees paid.
5. Plaintiffs have otherwise failed to state facts sufficient to constitute causes of action for declaratory judgment, constructive trust, restitution, and injunctive relief.

This motion is based on the pleadings, the parties' prior briefings and arguments on Plaintiffs' motion for preliminary injunction, the South Carolina Rules of Civil Procedure, other applicable law, and the Court's Order.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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Columbia, South Carolina
October 20, 2020

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,

Case No. 2020-CP-40-04603

Plaintiffs,

**PLAINTIFFS' MOTION PURSUANT TO
RULES 52(b) AND 59(a), SCRPC, TO
ALTER OR AMEND ORDER**

v.

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

Defendants.

Come Plaintiffs, South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, by and through undersigned counsel, and hereby submit this Motion to Alter or Amend the Court's Order Denying Plaintiffs' Motion for Preliminary Injunction (the "Order"), pursuant to Rules 52(b) and 59(a), SCRPC. Plaintiffs received written notice of the entry of the Order on October 14, 2020.

I. ARGUMENT

A. The Court failed to address the South Carolina Supreme Court's holding in *Adams v. McMaster*.

The Court failed to address, much less apply, the most recent South Carolina Supreme Court decision to address public importance standing in *Adams v. McMaster*, No. 2020-001069, 2020 WL 5939936 (S.C. Oct. 7, 2020). In that case, the court ruled that the petitioners had public importance standing based on the nature of a dispute over a one-time payment to the state of \$48,467,924 in federal coronavirus relief funds for educational purposes. *Adams*, 2020 WL 5939936, at *2. Prompting the lawsuit was Governor McMaster's decision to make \$32,000,000 of the funds available for grants and making those grants available to students attending private

schools. *Id.* Petitioners challenged that decision, and Governor McMaster challenged their standing to bring suit. *Id.* at *3. In finding that the petitioners had public importance standing, the court discussed the nature of the coronavirus pandemic and concluded that “[a] resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future *if* and when Congress approves additional education funding in response to the continued COVID-19 pandemic.” *Id.* at *4 (emphasis added).

Here, the Court did not undertake the careful analysis prescribed by *Adams*, in which “[t]he key to the public importance analysis is whether a resolution is needed for future guidance.” *Adams*, 2020 WL 5939936, at *3 (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)). As in *Adams*, this case involves the conduct of government entities. It involves the expenditure of even more public funds. A prompt decision is necessary in this case as it was in *Adams*. And it is likely that the same situation will occur in the future if and when the Attorney General attempts to pay hired special counsel from a judgment or settlement without an award of “investigative costs or costs of litigation” by court order or settlement as required by Section 1-7-150(B) of the South Carolina Code of Laws.

Instead of addressing Plaintiffs’ standing as required by *Adams*, the Court wrongfully turned to the underlying merits of Plaintiffs’ claim. The Court then wrongly interpreted the relevant statutes for the reasons discussed in more detail below. However, the Court purportedly hinged its ruling on Plaintiffs’ lack of standing. In so doing, the Court effectively concluded that Plaintiffs lacked standing because Plaintiffs’ interpretation of the relevant statute was wrong. Thereby, the Court fully supplanted a proper standing inquiry with the Court’s premature conclusion that

Plaintiffs' claims lacked merit. Doing so ignored *Adams* and other cases setting forth the proper public importance standing analysis.

B. The Court failed to address the meaning of the operative word “awarded” in the relevant statute.

The operative word in Section 1-7-150(b) is the term “awarded,” and the Court failed to address its meaning. Section 1-7-150(B) reads as follows:

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, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.

S.C. Code Ann. § 1-7-150(B) (emphasis added).

The General Assembly used the verb “awarded” when describing the circumstances in which the Attorney General may use funds recovered in a civil action to pay costs of litigation. As explained in Plaintiffs' submitted proposed order, Black's Law Dictionary defines awarded as “to grant by formal process or by judicial decree (the company **awarded** the contract to the low bidder) (the jury **awarded** punitive damages)” BLACK'S LAW DICTIONARY (11th ed. 2019). Merriam-Webster likewise defines awarded “to give by judicial decree or after careful consideration // The jury *awarded* damages to the defendant. // *award* a contract.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/awarded> (last visited Oct. 19, 2020).

The plain meaning of the verb “awarded” evidences the General Assembly's intent that there be a grant or decree that specifically provides for the payment of litigation costs in a court order or settlement. The Court did not address the meaning of the operative term “awarded.” Instead, the Court simply concluded without explanation that “[t]he statute does not require court approval for the payment of the fee.” Order 6.

C. The Court failed to consider how Section 1-7-150(B) applies when funds are awarded to the state by judgment instead of settlement in interpreting its meaning.

Plaintiffs' construction of Section 1-7-150(B) becomes even clearer when the statute's treatment of litigation costs is examined where litigation concludes with a judgment, instead of a settlement. According to Section 1-7-150(B), all monies "awarded the State of South Carolina by judgment" must be deposited into the General Fund. S.C. Code Ann. § 1-7-150(B). In that case, the Attorney General is only permitted to use monies to pay litigation costs that are "awarded by court order." *Id.* Absent a "court order" awarding litigation costs, the entire amount "awarded the State of South Carolina by judgment" must be deposited into the General Fund. *Id.*

Obviously, a court order is significantly different, and narrower, than a judgment. There can be a judgment for the state without a court order awarding attorneys' fees. By the use of the phrase "awarded by court order," the General Assembly clearly did not grant the Attorney General authority to obtain reimbursement for litigation costs from the proceeds of every judgment awarded to the state. Instead, the Attorney General's authority is limited to reimbursement of "litigation costs awarded by court order." *Id.*

There is nothing in Section 1-7-150(B) that distinguishes an award by court order from an award by settlement. To interpret this statute to allow the Attorney General to use proceeds from a settlement agreement that lacks any specific provision awarding litigation costs when the Attorney General is clearly prohibiting from using proceeds from a judgment to pay litigation costs would lead to an impermissible absurd result. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature . . ."). The Court did not consider the meaning of Section 1-7-150(B) in light of its full terms and how those terms

evidence the General Assembly's intent for costs of litigation to actually be awarded by a court order or settlement.

D. The Court failed to consider the full text of Section 1-7-85 and its relationship to Section 1-7-150(B) in the statutory scheme.

The Court erroneously concluded that Section 1-7-85 of the South Carolina Code of Laws provides the Attorney General with authority to pay special counsel \$75,000,000 of the \$600 million in settlement proceeds. *See* Order 6 (finding 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”). In so doing, the Court relied on the excerpt provided by Defendant rather than reading the full text of Section 1-7-85, which states as follows:

Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation ***awarded by court order or settlement***, travel expenditures, depositions, printing, transcripts, and personnel costs. ***Reimbursement of these costs may be obtained by the Office of the Attorney General from the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses, with the approval of the State Budget and Control Board.***

S.C. Code Ann. § 1-7-85 (emphasis added).

As made clear by its full text, this statute has the same language as Section 1-7-150(B) limiting reimbursement to “attorney fees or investigative costs or costs of litigation ***awarded by court order or settlement.***” *Compare* S.C. Code Ann. § 1-7-85 with *id.* § 1-7-150; *see also Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) (“In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.”). Also as shown by the full text of this statute, to the extent not awarded by court order or settlement,

these costs may be reimbursed from the “the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses.” S.C. Code Ann. § 1-7-85.

This statute does not contemplate that the Attorney General can rely upon Section 1-7-85 to ignore the more particular statutory provision in Section 1-7-150(B) addressing how the Attorney General must handle recoveries awarded the state by judgment or settlement. To the extent these statutory provisions are inconsistent, Section 1-7-150(B) should control because it is more specific in addressing proceeds of a settlement or judgment. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), *reh’g denied* (June 26, 2018) (“Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” (internal quotation marks omitted)).

E. The Court failed to consider how Proviso 59.8 is immaterial.

The Court also relied upon Proviso 59.8 of the state’s current budget in ruling that Plaintiffs’ entire argument “is therefore inapplicable.” Order 6. Proviso 59.8 simply states that, for the current fiscal year, any funds received by the Attorney General that would otherwise have been credited to the General Fund shall be deposited first in a special account entitled the “Litigation Recovery Account” and that then those funds “must be expended only as prescribed by law.” 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). It does not otherwise suspend or contradict Section 1-7-150(B). Rather, Section 1-7-150(B) and Proviso 59.8 should be read consistently with one another. Accordingly, Proviso 59.8’s requirement that the funds “must be expended only as prescribed by law” should be read in conjunction with Section 1-7-150(B) and not as an exception to Section 1-7-150(B)’s requirements. Accordingly, Proviso 59.8 is immaterial.

F. The Court failed to consider how Executive Budget Office (EBO) approval is irrelevant.

The Court wrongfully concluded that “[t]he 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 it was expressly authorized to do by the General Assembly.” Order 7. In support of this conclusion, the Court relied on the fact that “[t]he Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.” *Id.* (quoting 2020 S.C. Acts 135, § 7).

The Court did not address Plaintiffs’ argument that EBO approval is irrelevant. Section 2-65-30 of the South Carolina Code of Laws addresses the receipt and expenditure of unanticipated funds received after the passage of the appropriations act and that this statute. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the EBO for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO’s authorization to approve expenditures of “other funds” is limited to “funds from private foundations or industries which are not included in the appropriations act.” *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

The statute dealing with litigation costs from settlements is specific and controls over the general “other funds” provisions. “‘Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.’” *DomainsNewMedia.com, LLC*, 423 S.C. at 304, 814 S.E.2d at 518 (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006))

(citation omitted).). The EBO has no authority to authorize the payment of attorneys' fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

G. The Court did not address the relevant terms of the Litigation Retention Agreement.

The Litigation Retention Agreement required that “[w]hen possible, the attorneys’ fees and costs awarded to Special Counsel **shall be approved** by a Court of competent jurisdiction.” Pls.’ Compl., Ex. A, Griffin Aff., Ex. 7, at 9 (emphasis added). The Court failed to consider that it was eminently possible for the Defendants to seek court approval of the attorneys’ fees payable under the Litigation Retention Agreement. Accordingly, the Litigation Retention Agreement requires Defendants to do so. The Court failed to consider this fact in its analysis.

II. CONCLUSION

For these reasons, Plaintiffs request that the Court reconsider its Order Denying Plaintiffs’ Motion for Preliminary Injunction.

Respectfully submitted,

s/ Badge Humphries

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Sullivan’s Island, South Carolina
 October 23, 2020

Counsel for Plaintiffs

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	MOTION TO DISMISS
	)	AMENDED COMPLAINT
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
_____	)	

The Defendant Alan Wilson, Attorney General, as named herein, hereby moves to dismiss the Amended Complaint in this case pursuant to Rules 12(b)(1) and (6), SCRCPP, in that, for reasons that include but are not limited to those set forth below, this Court lacks subject matter jurisdiction, and Plaintiffs have failed to state facts sufficient to constitute a cause of action.

1. Plaintiffs do not have standing to bring this action.
2. Plaintiffs do not have authority to represent State interests.
3. Plaintiffs' claims are moot.
4. This action presents a political question, and the matters at issue are not subject to review because of the separation of powers clause of the Constitution. S.C. Const. art. I, § 8.
5. This suit does not present a justiciable controversy.
6. The Attorney General had express authority to contract with the attorneys and to pay them pursuant to State processes without judicial review of the fee, deposit into

the general fund or an appropriation from the General Assembly.

7. No private right of action exists for a third party to challenge the attorney's fees pursuant to the Rules of Professional Conduct.
8. No constructive, resulting or other trust applies to the funds at issue.
9. The ruling of this Court of October 14, 2020, supports the dismissal of this case.

Respectfully submitted,

s/ J. Emory Smith, Jr.
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October 27, 2020

Attorneys for the Attorney General

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

This matter is before the Court on the motions of Defendants Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A. each for an order dismissing Plaintiffs' Amended Complaint. For the reasons set forth below, the Court **GRANTS** the motions and **DISMISSES** the Amended Complaint with prejudice.

Procedural History

In the Amended Complaint, Plaintiffs instituted this action against Alan Wilson, 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 entered into between the Attorney

General and the Law Firms.¹ Plaintiffs also filed a Motion for Temporary Restraining Order and Preliminary Injunction.

On October 1, 2020, this Court issued an *Ex Parte* Temporary Restraining Order, but scheduled and proceeded to conduct a hearing on the Motion for Preliminary Injunction on October 7, 2020. James Mixon Griffin, Esquire, and Badge Humphries, Esquire, appeared on behalf of Plaintiffs. J. Todd Rutherford, Esquire, John S. Simmons, Esquire, and Gerald Malloy, Esquire, appeared on behalf of W&H. William H. Davidson, II, Esquire, appeared on behalf of DW&D. J. Emory Smith, Esquire, appeared on behalf of Attorney General Wilson. At the close of the hearing, this Court extended the Temporary Restraining Order an additional seven days. On October 14, 2020, this Court issued an order denying the Motion for Preliminary Injunction and dissolving the extended Temporary Restraining Order on the grounds that Plaintiffs lacked standing and had not demonstrated a likelihood of success on the merits of their claims or the lack of an adequate remedy at law (the “PI 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), SCRPC, on the grounds that Plaintiffs lack standing and have failed to state facts sufficient to constitute a cause of action against the Defendants.

Factual Background

It appears from the Amended Complaint and its incorporated affidavit and attachments that, in February 2016, the State of South Carolina, represented by the Law Firms, initiated several

¹ The Attorney General 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 Mixed Oxide (“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 MOX Facility.

lawsuits against the Department of Energy (“DOE”) related to the 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.” 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, both of which are contractually enforceable by the State. The Federal Government submitted the settlement payment to the State on September 15, 2020. Thereafter, the State and Federal Government jointly filed with the U.S. Court of Appeals for the Federal Circuit an agreement for voluntary dismissal dismissing the pending litigation on September 29, 2020. Agreement to Voluntary Dismissal of Appeal, *State of South Carolina v. United States*, No. 19-2324 (Fed. Cir. Sept. 29, 2020).

The Litigation Retention Agreement, as amended, provides for the payment of attorneys’ fees based upon a decreasing percentage scale contingent upon the amount of the recovery for two 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 upfront settlement amount recovered on behalf of the State by the Law Firms.

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys’ fees owed pursuant to the Litigation Retention Agreement on September 17, 2020. The payment was authorized by the Comptroller General and Treasurer and was approved by the Executive Budget Office (“EBO”) of the Department of Administration in the normal course. 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.

Discussion

For the reasons set forth below and in the PI Order, viewing the facts and inferences in the light most favorable to Plaintiffs, the Court finds that the Motions to Dismiss should be granted and the Amended Complaint dismissed.

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—nor do they have—statutory standing or constitutional standing.² Instead, 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."

² Plaintiffs do not have constitutional standing because they have not alleged and cannot allege an injury in fact. *Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Env'tl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) ("Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained."). Plaintiffs are not parties to the contract between the Law Firms and the Attorney General, were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys' fees. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (holding that "[a]n 'interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'") (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Likewise, Plaintiffs do not have "taxpayer standing" because Plaintiffs state no specific claim that they have regarding the settlement proceeds and, thus, have no harm arising from their alleged claims that differs from all other taxpayers and residents in the State. *See Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 ("In

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, 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 have contended that 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.

ATC, [the Supreme Court] unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]....This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.”) (quoting *ATC*, 380 S.C. at 198, 669 S.E.2d at 340-41).

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 have challenged 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 have acknowledged that it is because of the amount of the fee that they allege the statute requires interpretation.

Plaintiffs have not challenged 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 costs 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:

(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, the Proviso would prevent Plaintiffs’ sought-after action in this case even if they 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 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. Am. Compl., ¶ 74 & Exs. 18, 19; 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. Am. Compl., ¶ 74 & Exs. 18, 19.

Notwithstanding the above, Plaintiffs have contended that the Supreme Court's recent decision in *Adams v. McMaster*, 2020 WL 5939936, Op. No. 2020-001069 (Slip. Op. Oct. 7, 2020) supports their claim of standing in this case. However, the facts and circumstances faced by the Supreme Court in that case are easily distinguishable from those presented here. *See ATC*, 380 S.C. at 199, 669 S.E.2d at 341 (2008) ("Yet the very nature of the public importance exception to general standing requirements *resists a formulaic approach, as each case must turn on "the competing policy concerns"* as we expressed in *Sloan v. Sanford* [, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)].") (emphasis supplied). The Supreme Court's analysis in *Adams* also did not change the law with respect to the application of the public importance exception. Instead, just as this Court is doing here, the Supreme Court applied the specific facts, interests, and arguments advanced by the plaintiffs in that case to decide whether the exception applied.

Plaintiffs also have suggested that it is an incorrect application of the standard for applying the public importance exception for the Court to analyze Plaintiffs' claims on the merits. But Plaintiffs' suggestion in that regard reflects a misunderstanding of the application of the exception;

the Court’s analysis of the “future guidance” question deemed by the Supreme Court to be paramount in application of the exception, *see id.* (“[t]he key to the public importance analysis is whether a resolution is needed for future guidance.”), necessarily requires this Court to analyze the nature of Plaintiffs’ underlying claims. Here, as discussed above, Plaintiffs’ claims challenge only the one-time payment of the attorneys’ fees in this case based upon this particular settlement and pursuant to this Litigation Retention Agreement. Plaintiffs have not challenged the Attorney General’s statutory authority to hire outside counsel or pay such counsel on a contingency basis. Accordingly, any judicial ruling on Plaintiffs’ claims would be entirely limited to payment to the Law Firms under the Litigation Retention Agreement for services rendered, and there is no need for future guidance.³

Therefore, because they cannot show that future guidance is needed on this issue, Plaintiffs lack standing under the public importance exception.

PLAINTIFFS LACK DERIVATIVE STANDING

Although not alleged in their Amended Complaint, Plaintiffs also have contended in this matter 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 a citizen of the State even the State it is a sovereign entity and there is no “plain” claim.

This Court finds that *Hart* is inapplicable here. *Hart* allowed a county resident to assert a

³ Moreover, the public importance exception has never been applied to *private entities*, like the Law Firms, on what amounts to a third-party contract claim asserted by a non-party and non-beneficiary to the contract. *See ATC*, 380 S.C. at 199-200, 669 S.E.2d at 341 (“There is nothing *public* about ATC’s concern with a competing cell-phone tower.”) (emphasis in original).

“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 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 expressing disbelief that 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 Law Firms to represent the State in its actions 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 judgment obtained in the case.”

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.” 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.” 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.”

Contrary to Plaintiffs’ assertions, 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” (Emphasis supplied).

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 have no authority to act for the State as to this matter and thus lack standing.

PLAINTIFFS’ CLAIMS FAIL TO RAISE A JUSTICIABLE CONTROVERSY

Even if Plaintiffs had standing, an assumption the Court rejects, their claims fail to raise a justiciable controversy and this Court lacks jurisdiction because (1) the claims are moot; (2) the claims merely present non-justiciable political questions; (3) there is no private right of action for a third party to challenge the attorneys’ fees as violative of the Rules of Professional Conduct; and (4) any allegations of violations of the Rules of Professional Conduct are within the exclusive province of the Supreme Court.

1. Plaintiffs' claims are moot.

The Court finds that Plaintiffs' claims are moot because the payment of the attorneys' fees has already been made by the State pursuant to the approval of the EBO and the authorization of the State Treasurer based on a warrant issued by the State Comptroller General. Am. Compl., ¶ 74 & Exs. 18, 19.; *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy."). Plaintiffs now are seeking an advisory opinion because their claims have been rendered moot by payment of the fees to private counsel pursuant to the Attorney General's contract with those attorneys and the approval of four separate State officials and agencies. *See id.* ("The court does not concern itself with moot or speculative questions."); *Matter of Angela Suzanne C.*, 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) ("It is settled law that this Court will not issue advisory opinions on questions for which no meaningful relief can be granted."); *see also Sloan v. Greenville Cty.*, 361 S.C. 568, 571–72, 606 S.E.2d 464, 466 (2004) (holding that completion of project and amendment of challenge ordinance rendered alleged public importance matter moot). Plaintiffs' claims therefore are moot and, for this additional reason, are dismissed.

2. Plaintiffs' claims present non-justiciable political questions.

"The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) (citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 393–94 (1990)). "Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial." *Id.* (citing *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Brd.*, 333 U.S. 103, 111 (1948)). Unlike the Federal Constitution, the South Carolina Constitution expressly requires that

the branches of government remain separate so that one branch does not claim or exercise powers belonging to another branch. S.C. Const. art. I, § 8.

Here, the Amended Complaint's request that the judicial branch invalidate the Attorney General's ability to request payment through the procedures set forth in the law, and the ability of the EBO, Comptroller General, and Treasurer (all non-parties to this lawsuit) to process same, requests a judicial violation of separation of powers, including weighing in on what amounts to a nonjusticiable political question. *E.g., Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) ("The nonjusticiability of a political question is primarily a function of the separation of powers.") (quoting *Judicial Merit Selection Comm'n*, 369 S.C. at 142, 632 S.E.2d at 278). Therefore, contrary to Plaintiffs' assertion that the processing of the payment by the Attorney General, EBO, Comptroller General, and Treasurer pursuant to the applicable law and a binding contract somehow is a violation of separation of powers under Article I, § 8 of the South Carolina Constitution, the converse is actually true: it would be a violation of separation of powers under Article I, § 8 of the South Carolina Constitution for the judicial branch to intrude upon the process followed for such payments, thereby usurping the authority of the Attorney General, EBO, Comptroller General, and Treasurer, respectively, to make a contractually-required payment.

At bottom, Plaintiffs' Amended Complaint states nothing more than a generalized grievance with a decision of the Attorney General, and Plaintiffs are attempting to put this Court in the position of wading into matters reserved for the Attorney General as the Chief Legal Officer of the State. Importantly, however, Plaintiffs do not challenge the Attorney General's authority to enter into the Litigation Retention Agreement or to hire private counsel on a contingency basis. Indeed, as discussed above, South Carolina Code Section 1-7-170 unequivocally grants the

Attorney General that authority, which he exercised here. *See also Cooley*, 204 S.C. 10, 28 S.E.2d 445 (“[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, on a contingent basis.”).

The Court finds that the Attorney General determined that the Litigation Retention Agreement was in the best interests of the State, and Plaintiffs’ mere disagreement with that determination does not support a legally-cognizable claim, nor does it provide this Court jurisdiction or authority to require judicial approval of the Litigation Retention Agreement. *See Order Granting Mot. to Intervene on behalf of Att’y Gen. Henry D. McMaster, Sloan v. The S.C. Board of Physical Therapy*, No. 04-CP-40-1797, 2004 WL 5353216 (S.C. Com. Pl. July 02, 2004) (“[T]he Attorney General of South Carolina possesses the right to control and manage the State’s litigation.”) (citing *Cooley*, 204 S.C. 10, 28 S.E.2d at 450).

3. This Court does not have jurisdiction to review the reasonableness of the attorneys’ fees paid pursuant to the Litigation Retention Agreement.

The foundation for Plaintiffs’ claim that the attorneys’ fees to the Law Firms are unreasonable is its assertion that the Litigation Retention Agreement with the Attorney General violates Rule 1.5 of the South Carolina Rules of Professional Conduct. *See Am. Compl.*, ¶¶ 33-35. However—even putting aside that, as discussed below, there is no legal basis to require the State Attorney General to seek judicial approval of his contracts with outside legal counsel—there is no private cause of action for a third party to challenge the attorneys’ fees as violative of the Rules of Professional Conduct and, in any event, any allegations of violations of the Rules of Professional Conduct are within the *exclusive* province of the Supreme Court. *See In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) (“[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.”) (citing *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *In re Unauthorized Practice of Law Rules*

Proposed by S.C. Bar, 309 S.C. 304, 305, 422 S.E.2d 123, 124, (1992) (“The Constitution commits to [the Supreme Court] the duty to regulate the practice of law in South Carolina.”); Scope ¶ 7, RPC, Rule 407, SCACR (“Violation of a Rule should not itself give rise to a cause of action against a lawyer ... The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. ***They are not designed to be a basis for civil liability.***”) (emphasis added); *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). Just as this Court cannot usurp the role of the State Attorney General as Chief Legal Officer, it cannot usurp the Supreme Court’s exclusive role or create a private cause of action the Supreme Court has found does not exist, which is exactly what Plaintiffs are improperly asking this Court to do.

**PLAINTIFFS FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE
A CAUSE OF ACTION AGAINST DEFENDANTS**

Even assuming that Plaintiffs have standing or this Court has jurisdiction over some or all of their claims, assumptions which this Court rejects, the Court further finds that Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because (1) the applicable statutory provisions unambiguously authorize the Attorney General to pay the Law Firms their attorneys’ fees and costs earned and owed under the Litigation Retention Agreement; and (2) there is no contractual or statutory provision or any other mechanism that requires the Attorney General to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

1. The Attorney General had authority to pay the attorneys' fees without the necessity of depositing those amounts into the General Fund.

Plaintiffs' primary contention in this matter is that the Attorney General did not possess the authority to authorize the payment of the attorneys' fees to meet the obligations of the Litigation Retention Agreement. However, as discussed in detail 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. Moreover, Plaintiffs' claims in the Amended Complaint rely on the theory that the entire \$600 million should have been deposited into the General Fund. However, as discussed above, Proviso 59.8 of the State's current budget precluded the Attorney General from transferring *any* funds to the General Fund and instead directed him to deposit any funds that "otherwise" would go to the General Fund into the separate "Litigation Recovery Account," from which such funds could be expended as "prescribed by law." 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). Therefore, even if Plaintiffs were correct that the portion of the settlement awarded for attorneys' fees generally would have to be deposited in the General Fund, Proviso 59.8 makes clear that they would not be in this case. The argument articulated by Plaintiffs is completely inapplicable.

Plaintiffs also cite to no authority to support their interpretation of the applicable statutes. In contrast, and in addition to the court decisions identified above, both the Attorney General—who is the Chief Legal Officer of the State and is specifically charged with administering § 1-7-150—and the EBO—who is responsible for overseeing the expenditure of funds in this State—approved and authorized the payment of the attorneys' fees. The payment also was authorized by the Comptroller General and the Treasurer. Accordingly, even if there was some

ambiguity as to whether § 1-7-150(B) authorized the payment of attorneys' fees in this case—which, as discussed above, this Court does not find to be the case—the agencies charged with administering this statute necessarily have determined that the payment of the fees was authorized pursuant to the statute. See *Kiawah Development Partners, II v. S.C. Dep't of Health & Env'tl. 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.”). Because both the plain language and a reasonable interpretation of the applicable statutes support the Attorney General’s payment of the fees, Plaintiffs’ claims fail as a matter of law and must be dismissed.

2. The Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

In the Amended Complaint, Plaintiffs also ask this Court to *require* the Attorney General to obtain judicial approval of the amount of fees paid to the Law Firms for services performed and costs incurred pursuant to their contract. As discussed above, Plaintiffs do not have standing to make such a request as they are not parties to the contract and the “public importance” exception does not apply; only the Supreme Court has jurisdiction to entertain a complaint based on allegations of violations of the Rules of Professional Conduct and there is no private cause of action; and requiring judicial approval of the validity of executive branch contracts is a prima facie violation of the separation of powers provisions of the Constitution.

But even assuming none of that is true, Plaintiffs do not have a valid claim and this Court does not have authority to even entertain Plaintiffs’ claim because there is no contractual or statutory provision or any other mechanism that imposes a requirement on the Attorney General to obtain judicial approval of his own contract or the fees paid thereunder. Plaintiffs note in the Amended Complaint that the Litigation Retention Agreement contains a discretionary provision

regarding judicial approval of the fees when possible, but that provision is optional and does not constitute a requirement that he obtain judicial approval. *See* Litigation Retention Agreement at p.9 (stating only that “[w]hen possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.”). Thus, Plaintiffs’ argument that approval is mandatory is directly contradicted by the use of the prefatory condition “when possible” and renders such argument inapposite. Moreover, given that the parties to the Litigation Retention Agreement—the Attorney General and the Law Firms—agree on the payment of the fee, the Court concludes that a declaratory judgment would not be available because there would be no live controversy affording jurisdiction to a trial court, and Plaintiffs’ attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing. This Court also notes that the settlement reached between the State and the Federal Government did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Law Firms under the Litigation Retention Agreement.

Plaintiffs’ (unfounded) allegation that the Litigation Retention Agreement—which provides for an effective contingency fee rate of 12.5% for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon this Court authority to review the Litigation Retention Agreement. A mere allegation of a violation of the South Carolina Rules of Professional Conduct does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—has already approved

the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have authorized the payment of the fee. Accordingly, Plaintiffs’ claims seeking to require the Attorney General to seek judicial approval of the Litigation Retention Agreement or the fees paid pursuant to such contract fail as a matter of law and must be dismissed.⁴

Conclusion

For the reasons set forth above, it is **ORDERED, ADJUDGED, AND DECREED** that the Motions to Dismiss of W&H and DW&D are **GRANTED** and this case is **DISMISSED**, with prejudice.

AND IT IS SO ORDERED.

Alison Renee Lee
Chief Administrative Judge, Civil
Fifth Judicial Circuit

October __, 2020
Columbia, South Carolina

⁴ The foregoing grounds for lack of standing and jurisdiction and failure to state a claim were raised by the Defendants in opposition to Plaintiffs’ motion for preliminary injunction and were fully briefed by the parties, including in the context of this Court’s jurisdiction to hear these claims and as to Plaintiffs’ likelihood of success on the merits of its claims. These grounds were discussed at length in the October 7, 2020, hearing on Plaintiffs’ motion for preliminary injunction and were fully addressed in the PI Order. Accordingly, the Court finds these issues have been fully and comprehensively briefed, and after reviewing all submissions, the Court further finds that further hearings are not necessary and the Motions to Dismiss may readily be decided without further input from the parties.

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

Defendant Willoughby & Hoefer, P.A. (W&H) respectfully submits this Opposition to Plaintiffs' Motion to Alter or Amend Order (Motion) this Court's October 14, 2020 Order Denying Motion for Preliminary Injunction (the Order).

INTRODUCTION

Plaintiffs make essentially five arguments that they contend entitle them to this Court's reconsideration the Order. All of these arguments are meritless, and Plaintiffs' Motion should be denied because it does not provide any basis for this Court to reconsider or amend the Order. First, contrary to Plaintiffs' contention, this Court conducted the proper analysis in determining that Plaintiffs do not have "public importance" standing. This Court also correctly interpreted and applied the relevant statutory provisions, and Plaintiffs' new argument regarding Proviso 59.8 is improperly made for the first time in a motion for reconsideration and, in any event, is wrong. Notwithstanding Plaintiffs' ever-changing and new arguments, this Court also properly recognized the import of the Executive Budget Office's approval of the payment of the attorneys' fees. Finally,

Plaintiffs' rehearsed contention regarding the Litigation Retention Agreement is meritless and was properly rejected.

ARGUMENT

I. This Court properly determined that Plaintiffs do not have “public importance” standing.

In the Motion, Plaintiffs, once again, contend that the Supreme Court's decision in *Adams v. McMaster*, 2020 WL 5939936, Op. No. 2020-001069 (Slip. Op. Oct. 7, 2020) supports their claim of standing in this case, and they further claim that this Court did not properly consider this decision. However, the very nature of the public importance exception to standing defies the formulaic and precedential application that Plaintiffs advocate in their Motion, and the facts and circumstances faced by the Supreme Court in that case are readily distinguishable from those presented here. *See ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) (“Yet the very nature of the public importance exception to general standing requirements *resists a formulaic approach, as each case must turn on “the competing policy concerns”* as we expressed in *Sloan v. Sanford* [, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)].”) (Emphasis supplied); *see also Jowers v. S.C. Dep't Health & Envtl. Control*, 423 S.C. 343, 360, 815 S.E.2d 446, 455 (2018) (recognizing that courts “must be cautious with this exception, lest it swallow the rule.”) (quoting *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 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 at 434, 593 S.E.2d at 472. The Supreme Court's analysis in *Adams* did not change the law with respect to the application of the public importance exception. Instead, just as this

Court did in the Order, the Supreme Court in *Adams* applied the specific facts, interests, and arguments advanced by the plaintiffs to decide whether the exception applied.

Plaintiffs also contend that it was an incorrect application of the standard for applying the public importance exception for this Court to analyze Plaintiffs' claims on the merits. But Plaintiffs' contention in that regard reflects a misunderstanding of the application of the exception. This Court's analysis of the "future guidance" question deemed by the Supreme Court to be paramount in application of the exception, *see ATC*, 380 S.C. at 199, 669 S.E.2d at 341 ("[t]he key to the public importance analysis is whether a resolution is needed for future guidance."), necessarily required this Court to analyze the nature of Plaintiffs' underlying claims. Here, as discussed in the Order, Plaintiffs' claims challenge only the one-time payment of the attorneys' fees in this case based upon this particular settlement and pursuant to this Litigation Retention Agreement. Plaintiffs have not challenged—nor could they properly challenge—the Attorney General's general statutory authority to hire outside counsel or pay such counsel on a contingency basis.¹ Nor has the public importance exception ever been applied to ***private entities***, like the Law Firms, on what amounts to a third-party contract claim asserted by a non-party and non-beneficiary to the contract. *See Id.* at 199-200, 669 S.E.2d at 341 ("There is nothing *public* about ATC's concern with a competing cell-phone tower.") (emphasis in original). Accordingly, as this Court properly found, any judicial ruling on Plaintiffs' claims would be entirely limited to the one-time payment under the Litigation Retention Agreement for services rendered, and there is no need for future guidance.

¹ Plaintiffs now contend that future guidance is required if and when the Attorney General attempts to hire and pay other special counsel in the manner that it has to the Law Firms, but because there is no challenge—nor could there be any challenge—to the Attorney General's authority to enter into these retention agreements, the questions raised in this case are unique to this contract and, thus, do not require guidance for future resolution.

II. This Court correctly interpreted and applied the relevant statutory provisions.

In the Motion, Plaintiffs merely contend that this Court should have adopted their unsupported interpretation of S.C. Code § 1-7-150(B) and (oddly) assert that this Court failed to address their argument that the Attorney General could not authorize payment of the contractually-owed attorneys' fees for services rendered because they allegedly were not "awarded by settlement." Mot. at 3-5. However, this Court properly **and expressly** rejected Plaintiffs' arguments in that regard in the Order. Order at 12 ("Contrary to Plaintiffs' second assertion, these fees were also 'awarded by settlement.'"). Plaintiffs' request for reconsideration on this basis therefore completely lacks merit.²

Plaintiffs also contend that the Court "erroneously concluded" that the payment of the attorneys' fees was authorized by S.C. Code Ann. § 1-7-85. Mot. at 6-7. Although not entirely clear, it appears Plaintiffs' contention is that § 1-7-85 somehow conflicts with § 1-7-150(B) and therefore Plaintiffs' interpretation of § 1-7-150(B) should carry the day because that statute is more specific than § 1-7-85. But there is no conflict between those statutory provisions. They are consistent, and, when properly read (*i.e.*, their unambiguous language is given its plain and reasonable meaning), as this Court did, both authorize the payment by the Attorney General of the attorneys' fees owed pursuant to the Litigation Retention Agreement and approved by EBO. Plaintiffs' attempt to suggest otherwise is meritless.

² Indeed, Plaintiffs continue to ignore that the "Agreement to Voluntary Dismissal of Appeal" filed with the Court of Appeals for the Federal Circuit and executed by all parties to the Federal litigation specifically states that the settlement payment 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" Agreement to Voluntary Dismissal of Appeal, *State of South Carolina v. United States*, No. 19-2324 (Fed. Cir. Sept. 29, 2020) (Emphasis supplied).

III. Plaintiffs' newfound argument regarding Proviso 59.8 fails.

Plaintiffs' *primary* argument in this case is that the full settlement payment, including the amount for attorneys' fees, should have been deposited in the General Fund. As this Court recognized, the existence of Proviso 59.8 renders Plaintiffs' argument inapplicable. Order at 7. Now, in a belated attempt to avoid appearing as though they brought a lawsuit accusing the State's Chief Legal Officer (and the third-party EBO) of impropriety without having even a basic comprehension of the applicable law, Plaintiffs contend for the first time that the Proviso is "immaterial" to their position. Mot. at 6. *But see Hickman v. Hickman*, 301 S.C. 455, 456–57, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Thus, this argument does not present a legally cognizable basis for reconsideration of the Order under Rule 59(e). Regardless, as this Court correctly ruled, the Proviso plainly provides that "any funds that would have otherwise been credited to the General Fund" shall be deposited in the special "Litigation Recovery Account," which means that, even if Plaintiffs were correct that the entire settlement payment generally would have been deposited in the General Fund under § 1-7-150(B), it would not be in this case. Order at 7.

Plaintiffs do not contend the Proviso is ineffective or inapplicable, nor do they challenge the Proviso's plain and unambiguous language. Instead, Plaintiffs contend for the first time in their Motion that the Proviso essentially is meaningless. Specifically, Plaintiffs contend that, notwithstanding the Proviso's plain requirement directing "any funds that would have otherwise been credited to the General Fund" to the "Litigation Recovery Account," the Proviso should nevertheless be interpreted in conjunction with § 1-7-150(B) in a manner that ultimately results in the funds ending up in the General Fund. Mot. at 6. But the Proviso clearly evidences the General

Assembly's intent to direct any settlement funds that "otherwise" would go to the General Fund to the "Litigation Recovery Account" for the period it is effective. See Return of Attorney General to Suppl. Mem. of Pls., Ex. 4, Buckley Aff., Attachment, Sept. 25, 2020 Email from EBO to Attorney General's Office ("[Attorneys' fees payment] has been approved. ***Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account.***" (Emphasis supplied)). Plaintiffs' circular argument is therefore not only unpreserved but wrong.

IV. Plaintiffs' arguments regarding EBO approval are wrong.

Plaintiffs further contend that the "Court did not address Plaintiffs' argument that EBO approval is irrelevant." Mot. at 7. fAs an initial matter, Plaintiffs' argument in this regard demonstrates that their arguments regarding EBO are ever-changing. In their original complaint, Plaintiffs' alleged that the payment of the attorneys' fees was not allowed because it had not been approved by EBO. When that allegation was shown to be completely false because EBO approval had been obtained, Plaintiffs changed their argument to allege that payment was not allowed because EBO allegedly was required to obtain review of the payment request from the Joint Other Funds Oversight Committee, which it did not do. However, this allegation also was proved false because EBO was not required to obtain such review pursuant to the applicable law. Now, backtracking even further, Plaintiffs simply allege that EBO approval is irrelevant.

At bottom, Plaintiffs' newfound and unpreserved argument does no more than rehash their main argument in this case: payment was not permitted under the relevant statutory provisions, so neither the Attorney General nor EBO was authorized to approve such payment. However, as discussed above, this Court thoroughly and correctly addressed this argument and found that the applicable law unambiguously authorized the Attorney General to pay the attorneys' fees earned and owed pursuant to the Litigation Retention Agreement. As this Court also found in its Order,

the EBO approval was further confirmation of this as the payment had been approved by the agencies charged with administering the relevant statutes. Order at 8 (citing *Kiawah Development Partners, II v. S.C. Dep't of Health & Env'tl. 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’ arguments with respect to EBO’s approval of the payment of the attorneys’ fees therefore provide no basis for this Court to reconsider or modify its Order.³

V. This Court properly considered all relevant matters in denying Plaintiffs’ motion for preliminary matter.

Plaintiffs continue to argue that the Litigation Retention Agreement requires judicial approval of the fees, despite the plain language of the provision cited by Plaintiffs that provides that approval may be sought “when possible.” Plaintiffs claim this Court failed to consider that issue, Mot. at 8, but this argument has no bearing on this Court’s findings that Plaintiffs’ lack standing or that the applicable law authorized payment of the attorneys’ fees earned and paid pursuant to the Litigation Retention Agreement. In any event, the referenced provision is optional and does not constitute a requirement that the Attorney General obtain judicial approval. See Litigation Retention Agreement at p.9 (stating only that “[w]hen possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.”). Thus,

³ Plaintiffs also contend that EBO did not have the authority to approve the payment of the fees. Mot. at 7. This contention completely lacks merit. As this Court correctly recognized in the Order, the applicable law unambiguously authorizes EBO to approve such payment requests. See 2020 S.C. Acts 135, § 7 (“The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.”); see also S.C. Code Ann. § 2-65-30 (authorizing expenditure of unanticipated federal funds); -40 (authorizing expenditure of “other funds”). But even assuming Plaintiffs’ are correct when they assert that EBO approval is irrelevant, which they are not, this would only mean that from the Plaintiffs’ newfound perspective the payment of the attorneys’ fees obtained *more* approvals than required.

Plaintiffs' argument that approval is mandatory is directly contradicted by the use of the prefatory condition "when possible" and renders such argument inapposite. Moreover, given that the parties to the Litigation Retention Agreement—the Attorney General and the Law Firms—agree on the payment of the fee, a declaratory judgment would not be available because there would be no live controversy affording jurisdiction to a trial court, and Plaintiffs' attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing, as this Court found in its Order. The settlement reached between the State and the Federal Government also did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Law Firms under the Litigation Retention Agreement.

CONCLUSION

For the foregoing reasons, W&H respectfully requests that this Court deny Plaintiffs' Motion to Alter or Amend this Court's Order denying their motion for preliminary injunction.

[Signature Block Follows]

Respectfully submitted,

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November 20, 2020

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	RETURN OF ATTORNEY GENERAL
	)	TO MOTION TO ALTER OR AMEND
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
_____	)	

Subject to his Motion to Dismiss, in Response to the Plaintiffs' Motion to Alter and Amend, the Attorney General concurs in the legal arguments made in the Memorandum of Willoughby & Hoefer, P.A., in opposition to the Motion to Alter or Amend this Court's Order of October 14, 2020, denying a temporary injunction. Although the Attorney General was not a party to Plaintiffs' temporary injunction motion which was directed to the law firm defendants, we do strongly agree that the Motion to Alter or Amend this Court's Order should be denied. Therefore, we concur in legal arguments in the Memorandum in Opposition to that Motion.

Respectfully submitted,

s/ J. Emory Smith, Jr.
S.C. Bar No. 5262
Deputy Solicitor General

[Signature block continues next page]

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November 23, 2020

Attorneys for the Attorney General

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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.)
_____)

IN THE COURT OF COMMON PLEAS

Case No. 2020-CP-40-04603

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION TO ALTER OR
AMEND ORDER**

Defendant Davidson, Wren & DeMasters, P.A., opposes Plaintiffs' Motion to Alter or Amend this Court's October 14, 2020 Order Denying Preliminary Injunction for the same reasons set forth in Defendant Willoughby & Hoefer, P.A.'s Memorandum in Opposition, filed November 20, 2020 to Plaintiffs' motion. That Memorandum in Opposition is incorporated herein by reference.

[Signature block is on following page]

Respectfully submitted,

DAVIDSON, WREN & DEMASTERS, P.A.

BY: s/ Kenneth P. Woodington

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*Counsel for Defendant Davidson, Wren &
DeMasters, P.A.*

Columbia, South Carolina

November 23, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	ATTORNEY GENERAL'S
	)	MOTION TO DISMISS
	)	AMENDED COMPLAINT
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

The Defendant Alan Wilson, Attorney General, as named herein, hereby has moved to dismiss the Amended Complaint in this case pursuant to Rules 12(b)(1) and (6), SCRCF, in that, for reasons discussed below this Court lacks subject matter jurisdiction, and Plaintiffs have failed to state facts sufficient to constitute a cause of action. Respectfully, the Order of the Honorable Alison Lee denying a temporary injunction in this case should be followed as it is dispositive.

INTRODUCTION

This case challenges the authority of the Office of the Attorney General to pay attorney's fees to the two law firm Defendants pursuant to a retainer agreement (*see* exhibit 7 to Complaint) for representation of the State in federal litigation over plutonium at the Savannah River Site. That federal case was settled in August, 2020. The settlement agreement provides for the payment of the \$600 million to the State of South Carolina with each party to pay its own costs and attorney fees. Complaint Ex. 1, p. 2, ¶5a. In her attached Order of October 14, 2020, denying a temporary

injunction as to the defendant law firms in this case¹, Judge Lee, found that Plaintiffs lack standing and had not shown a likelihood of success as follows:

Plaintiffs also have not shown a 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. (emphasis added).

Judge Lee denied their Motion to Alter or Amend by Order dated December 17, 2020, concluding that the October 14 Order properly considered all arguments, that Plaintiffs lack standing and that the “Court appropriately applied and considered the language of S. C. Code Ann. §1-7-150(B) and S.C. Code Ann. §1-7-85.” Plaintiffs have not appealed these Orders denying their Temporary Injunction Motions.

ARGUMENT

For the reasons set forth above as further discussed and with other arguments below, this case should be dismissed.

I

THE COURT LACKS SUBJECT MATTER JURISDICTION OF THIS CASE

As discussed below, this Court has no subject matter jurisdiction of this case because no justiciable case or controversy exists in that the Plaintiffs lack standing and the suit is moot and presents political questions barred from review by the separation of powers clause. “South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached. *See Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Crocker v. Barr*, 303 S.C. 1, 397 S.E.2d 665 (Ct.App. 1990)

¹ In a Form 4 Order, filed October 1, the Honorable Debra R. McCaslin denied the Petitioners’ Motion for a Temporary Injunction as to the Attorney General as moot.

(Goolsby, J., concurring), rev'd on other grounds, 305 S.C. 406, 409 S.E.2d 368 (1991).” *Lennon v. South Carolina Coastal Council*, 498 S.E.2d 906, 908, 330 S.C. 414, 417-18 (S.C.App., 1998).

A

Plaintiffs Have No Standing

Standing to sue is a fundamental requirement in instituting an action.” *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called “constitutional standing”; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statute confers standing on these Plaintiffs. Constitutional standing and public interest standing also fail.

The principle of standing under the United States Constitution is “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ ” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., supra, 380 at 195-96, 669 S.E.2d at 339). “Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.” *Commander Health Care Facilities, Inc. v. S. Carolina Dep’t of Health & Env’tl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

Whether Plaintiffs are alleging constitutional standing is not clear from the Complaint, but they cannot succeed because they have not alleged a direct injury or the immediate danger that a direct injury will be sustained so as to establish standing. As noted, they are not parties to the

Federal suit nor are they parties to the settlement agreement. They also lack taxpayer standing. In another suit brought by Plaintiff South Carolina Public Interest Foundation, the Supreme Court found SCPIF and the individual “are unable to show they suffered a concrete and particularized injury distinct from that shared by other taxpayers; therefore, we find Petitioners do not have constitutional standing.” *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). Moreover, an “interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019, 140 L. Ed. 2d 210 (1998). With the settlement of the *State v. U.S.* action, Plaintiffs have no standing to challenge the fees, and no case or controversy exists.

Public importance standing is absent here.

The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of “future guidance” that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (“[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.”) (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (“[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.”) (citations omitted).

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. As Judge Lee stated regarding the lack of need for future guidance and the absence of public importance standing:

S.C. Code Ann. § 1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. . . . 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.

The Court also found that Plaintiffs lack derivative standing to represent State interests.

Judge Lee’s reasoning is dispositive:

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. . . .

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 county historic preservation commission); *Johnston v. City of Myrtle* 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

* * *

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.

Order at pp. 9 – 11.

B

This Case Is Moot

Because the money at issue has already been paid to the law firm defendants, this case is moot. See Amended Complaint, ¶74. *S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758-59 (2013) ("A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant

of effectual relief impossible for the Court.”). Courts “will not pass on moot and academic questions or make an adjudication when there remains no actual controversy.” *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). “A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy.” *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

C

This Action Presents A Political Question, And The Matters At Issue Are Not Subject To Review Because Of The Separation Of Powers Clause Of The Constitution. S.C. Const. Art. I, § 8

As stated in *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006),

The nonjusticiability of a political question is primarily a function of the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210–11 (1962). “Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.” *Id.* at 211, 82 S.Ct. 691; *See Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (stating the political question doctrine, which derives from the separation of powers doctrine, excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch).

45 The fundamental characteristic of a nonjusticiable “political question” is that its adjudication would place a court *143 in conflict with a coequal branch of government. *U.S. v. Munoz-Flores*, 495 U.S. 385, 393–94 (1990). Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial. *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 111 (1948).

The payment of attorney’s fees is committed to the Attorney General and thus the Executive Branch by the above authority. Therefore, the questions presented are political, and for this Court to review they payment of the fee would violate the separation of powers clause.

Accordingly, this Court lacks subject matter jurisdiction of this case.

II

NO PRIVATE RIGHT OF ACTION EXISTS FOR A THIRD PARTY TO CHALLENGE THE ATTORNEY'S FEES PURSUANT TO THE RULES OF PROFESSIONAL CONDUCT

Plaintiffs allege that the attorney's fees paid are unreasonable and unenforceable under Rule 1.5 of the South Carolina Rules of Professional Conduct, Rule 407, SCACR. Those rules do not create a cause of action for unreasonable fees or authorize a circuit court to strike them upon the request of a third party. *Spence v. Wingate*, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) (“the Rules of Professional Conduct do not, in themselves, create a cause of action . . . the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation.”) *Cf. Whitworth v. Fast Fare Markets of S.C., Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985). (“the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.”).²

III

THE ATTORNEY GENERAL HAD EXPRESS AUTHORITY TO CONTRACT WITH THE ATTORNEYS AND TO PAY THEM PURSUANT TO STATE PROCESSES WITHOUT JUDICIAL REVIEW OF THE FEE, DEPOSIT INTO THE GENERAL FUND OR AN APPROPRIATION FROM THE GENERAL ASSEMBLY

Judge Lee ruled as follows about the authority of the Attorney General as to the payment of the fees at issue and found that Plaintiffs had no likelihood of success on the merits in this case:

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

² Plaintiffs's citation of *Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 379, 475 S.E.2d 743, 744 (1996) is misplaced in that the Court followed Florida law regarding attorney's fees.

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. . . .

Order at p. 5. As the Court further stated:

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 judgement obtained in the case.” Order at 9 [Exhibit 1 to this 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. [Exhibit 2 to this Memorandum]. 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. . . .

Plaintiffs also have not shown a 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.

Order at pp. 11 – 14.³ In her Order of December 17, 2020, denying the Plaintiffs' Motion to Alter or Amend, Judge Lee found that her decision had "appropriately applied and considered the language of S.C. Code Ann. § 1-7-150(B) and S.C. Code Ann. § 1-7-85." Accordingly, this Court should dismiss this case because the above statutes authorize the Attorney General to pay the fee at fee and that court approval of it is unnecessary.

IV

NO CONSTRUCTIVE, RESULTING OR OTHER TRUST APPLIES TO THE FUNDS AT ISSUE

Plaintiffs ask that this Court declare a constructive or resulting trust. Both are types of

³ Judge Lee also found that

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:

(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). . . .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.

Order, October 14, at pp. 5 & 6. She further explained in her December 17 Order that "[t]he 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." Order at p. 2.

implied trusts. “Implied trusts are those which, without being expressed, are implied in law from the nature of the transaction, or that are imposed on the transaction by operation of law as matters of equity, independently of the particular intention of the parties.” 90 C.J.S. Trusts § 9; see also, *Beard v. Stanton*, 15 S.C. 164, 168 (1881)(“implied trusts are those raised and created by act or construction of law.”). Implied “trusts are said to be either resulting or constructive trusts.” *Green v. Green*, 56 S.C. 193, 34 S.E. 249, 254 (1899). “Resulting trusts are trusts that the courts presume to arise out of the transactions of parties; that a trust was intended. Constructive trusts are trusts which arise when a person clothed with some fiduciary character, by fraud or otherwise, has gained some advantage to himself, or where equity will not permit him to retain it, though acquired without fraud.” *Traywick v. Wannamaker*, 153 S.C. 146, 150 S.E. 655, 662 (1929)

The allegations in the complaint do not support the creation of any of these types of trusts. Although an implied trust may arise from a fiduciary relationship (*see State v. Parris*, 353 S.C. 582, 592, 578 S.E.2d 736, 741–42 (Ct. App. 2003), *rev'd*, 363 S.C. 477, 611 S.E.2d 501 (2005)), the creation of any such trust would be subject to State law including the Constitution and statutes. *See, S.C. Const.* art. I §23 (Provisions of the Constitution are mandatory except where made “directory or permissive by its own terms.”); *see also Brewster v. Gillison*, 31 S.C. Eq. 435, 438 (S.C. App. Eq. 1859)(“the statute of limitations will bar a demand arising out of a trust raised by implication of law.”); *Joyce v. Gunnels*, 19 S.C. Eq. 259 (S.C. App. Eq. 1846)(“implied trusts constitute no exception to the operation of the statute” of limitations). The trusts that Plaintiffs envision would directly conflict with and be precluded by the statutory authority of the Attorney General to pay the fees as set forth above and as found by Judge Lee and also by Judges Cooper and Couch as set forth in their Orders.

CONCLUSION

Respectfully, the Orders of Judge Lee, as discussed herein, should be followed and this case should be dismissed for the reasons set forth in her Orders and otherwise set forth above.

Respectfully submitted,

s/ J. Emory Smith, Jr.
S.C. Bar No. 5262
Deputy Solicitor General

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January 20, 2021

Attorneys for the Attorney General

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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.

IN THE COURT OF COMMON PLEAS

Case No. 2020-CP-40-04603

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Defendant Davidson, Wren & DeMasters, P.A., has moved to dismiss this action on grounds essentially identical to those of the other Defendants. In lieu of a supporting Memorandum or additional argument, this Defendant adopts and incorporates by reference the Memoranda in Support of Motion to Dismiss filed by Defendants Willoughby and Hoefer, P.A., and Alan Wilson on January 20, 2021, to the extent applicable to this Defendant.

DAVIDSON, WREN & DEMASTERS, P.A.

BY: s/ Kenneth P. Woodington

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Columbia, South Carolina

January 20, 2020

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

Defendant Willoughby & Hoefer, P.A. (W&H)¹ submits this memorandum in support of its Motion to Dismiss filed with this Court on October 20, 2020 (the Motion). First and foremost, the Amended Complaint should be dismissed because the Honorable Alison Renee Lee, in denying Plaintiffs' prior motion for preliminary injunction in this matter, already has found that Plaintiffs do not have standing and this Court does not have jurisdiction over any of the claims asserted in the Amended Complaint. Because this Court cannot modify or overrule Judge Lee's findings, this Court must now dismiss the Amended Complaint in accordance with Judge Lee's prior orders.

But even if Judge Lee's prior findings were not binding—which they are—dismissal is still required because, as explained below, Plaintiffs do not have standing; the case is moot; the

¹ W&H, together with Defendant Davidson, Wren & DeMasters, P.A. (DW&D), are referred to in this memorandum collectively as the Law Firms. The Law Firms, together with the Attorney General for the State of South Carolina, are referred to collectively as the Defendants.

allegations present a political question; this Court lacks jurisdiction; and, finally, Plaintiffs have not stated facts sufficient to support a cause of action against Defendants.

Introduction

With no procedural or substantive justification, Plaintiffs challenge the amount of attorneys' fees paid to private counsel pursuant to a valid and existing contract and in accordance with the pertinent payment processing laws enacted by the South Carolina General Assembly. As shown by their request for fees paid from some "common fund" which they seek to create by virtue of a putative and nebulous class action, what Plaintiffs really seek is to be paid from the efforts and ingenuity of others, belying their specious claim to represent some public interest that they have self-identified as vindicating. But there is no harm to the State that needs vindicating as the resolution of the underlying Federal lawsuit was a significant win-win for the State of South Carolina. Moreover, and in any event, this Court lacks jurisdiction to entertain Plaintiffs' attempted interference in the State's management of its own litigation or the State's subsequent actions fulfilling a valid and enforceable contract entered into by its Chief Legal Officer.

Simply put, more than five years ago, the United States Department of Energy (DOE) did not remove certain weapons-grade plutonium from the State and pay the amounts due as required by law. In a lawsuit identified to the State by private counsel and supported at their sole cost and risk, a resolution was ultimately achieved by which South Carolina obtained not only payment of the full amount due (\$600 million), but also a contractually binding commitment by the Federal Government for either future removal of the plutonium (9.5 metric tons) or the payment of future amounts (up to \$1.5 billion) (without any further compensation to counsel). South Carolina received this benefit for the payment of attorneys' fees pursuant to a contract at a percentage far less than any typical contingency fee arrangement. Nevertheless, Plaintiffs express unhappiness

with the fees, while simultaneously seeking to share in the compensation paid under the contract to the Law Firms even though they had no prior involvement in the efforts supporting the extraordinary outcome and did not shoulder any of the burden or risk.

But for multiple reasons, this Court lacks jurisdiction and Plaintiffs have no basis for this lawsuit:

- As Judge Lee previously ruled in her October 14, 2020 Order Denying Plaintiffs' Motion for Preliminary Injunction Order (PI Order) and affirmed in her December 17, 2020 Order Denying Plaintiffs' Motion to Alter or Amend (Reconsideration Order), Plaintiffs lack standing.²
- Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because, as further explained in the PI Order and Reconsideration Order, the applicable statutory provisions unambiguously authorize the Attorney General to pay the Law Firms their attorneys' fees and costs earned and owed under the Litigation Retention Agreement and, in addition and in any event, the Attorney General followed the payment processing procedures under law.
- Plaintiffs' claims further fail to raise a justiciable controversy and this Court lacks jurisdiction because:
 - Plaintiffs' claims are moot;
 - Plaintiffs' claims merely present non-justiciable political questions;
 - There is no private right of action for a third party to challenge the attorneys' fees as violative of the Rules of Professional Conduct; and
 - Any allegations of violations of the Rules of Professional Conduct are within the exclusive province of the Supreme Court.
- Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because there is no contractual or statutory provision or any other mechanism that requires the Attorney General to obtain judicial approval of the Litigation Retention Agreement or the fees paid, particularly in an action brought, litigated, and settled in Federal courts.

Consequently, this Court should grant the Motion and dismiss this case with prejudice.

² Copies of Judge Lee's PI Order and Reconsideration Order are attached hereto as Exhibits A and B, respectively.

Procedural History

Plaintiffs instituted this action against the Attorney General and 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 entered into between the Attorney General and the Law Firms. Plaintiffs also filed a motion seeking a temporary restraining order and preliminary injunction.

On October 1, 2020, Judge Lee issued an *Ex Parte* Temporary Restraining Order, but scheduled and proceeded to conduct 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. On October 14, 2020, Judge Lee denied the Motion for Preliminary Injunction and dissolved the extended Temporary Restraining Order because Plaintiffs lack standing and have not demonstrated a likelihood of success on the merits of their claims or the lack of an adequate remedy at law. *See* PI Order. Plaintiffs subsequently filed a motion to reconsider the PI Order, which Judge Lee denied on December 17, 2020. *See* Reconsideration Order.

On October 20, 2020, W&H and DW&D each filed and served Motions to Dismiss seeking dismissal pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP, on the grounds that Plaintiffs lack standing and have failed to state facts sufficient to constitute a cause of action against the Defendants. On October 27, 2020, the Attorney General filed his own Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP.

Factual Background

It is important for this Court to understand at the outset how this lawsuit came to pass. Plaintiffs are challenging the payment of attorneys' fees to private attorneys as required by

contract, fees that were earned through the prosecution of a number of cases in Federal courts, including the ultimate settlement of a closed case filed by the State of South Carolina in the Court of Federal Claims. The misinformation on these fundamental points has been rampant since the settlement was announced on August 31, 2020, and now is aided and abetted by the many demonstrably false and defamatory allegations advanced in this lawsuit.

In March of 2014, 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 mixed oxide fuel fabrication facility ("MOX Facility") at the Savannah River Site ("SRS"). Oct. 6, 2020 W&H Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. ("W&H Opp'n"), Ex. 1, Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, p.1. At that time, the U.S. Department of Energy ("DOE") (through the National Nuclear Security Administration) was seeking to place the MOX Facility into "cold standby" status, which would have effectively terminated the MOX project. *Id.* The Congressional delegation wrote to then-Governor Haley to ask that she work with the Attorney General to explore any legal avenues the State may have to address the pending injustice to the State. *Id.* After being briefed on a legal strategy to achieve that result, the State retained the Law Firms to represent it, and they filed a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14. *Id.* 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, a win for South Carolina. *Id.*

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, 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 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 financial pressure against it in an effort to incentivize continuation of the MOX Facility or removal of the material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to the office of the Attorney General on January 26, 2016, transmitting a formal request that the Attorney General's office initiate litigation on behalf of the State of South Carolina against DOE. *Id.* at 1-2. In accordance with that request, the Attorney General hired the Law Firms to represent the State in litigation against the Federal Government related to the MOX Facility at SRS. The Litigation Retention Agreement with the Law Firms took the form of a contingency fee arrangement, providing that the Law Firms would assume 100% of the risk involved in the litigation and requiring them to advance all costs and work the hours necessary to execute the complex legal strategy without compensation. Am. Compl., Exs. 7, 8. The State bore no risk under this arrangement; if the lawsuit(s) were successful, then the Law Firms would be paid according to the terms effective on February 8, 2016, as amended. If the lawsuit(s) were unsuccessful, the Law Firms could not seek reimbursement for either their costs or the time worked on behalf of the State.

On February 9, 2016, 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 defense plutonium from South Carolina and payment of the economic and impact assistance monies pursuant to 50 U.S.C.A. § 2566. W&H Opp'n, Ex. 1, 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 claim for lack of jurisdiction, 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 defense plutonium from the State. *Id.* The District Court requested additional briefing on the appropriate remedy for the removal claim, and on December 20, 2017, adopted the State's proposal to require removal of the defense plutonium within two years and also required the Federal Government to provide ongoing status reports on its removal progress. *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 against the Federal Government seeking to prevent the relocation of the one metric ton of defense plutonium from South Carolina to Nevada in the Federal District Court in Nevada. *Id.* 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, 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. Accordingly, on January 3, 2019, the Attorney General requested W&H to move to intervene in the Nevada case on behalf of the State of South Carolina. *Id.* The State of Nevada opposed South Carolina's participation in the case, and after further briefing by W&H, the court granted the State's motion. *Id.* Nevada then 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 could be returned. *Id.* W&H filed briefs on the motion on behalf of South Carolina.

An evidentiary hearing was held and, on January 30, 2019, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. *Id.* Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019. *Id.*

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. *Id.* It also stated it had 15 witnesses to present. *Id.* W&H, on behalf of South Carolina, was prepared to litigate this matter in a full trial. The district court ultimately stayed the case pending the appeal. *Id.* After briefing at the Ninth Circuit, including briefing by W&H, the court dismissed the appeal as moot on August 13, 2019. *Id.* The stay at the district court was lifted, and additional motions were filed and briefing began anew. *Id.* 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. *Id.* at 2-3.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the District Court in South Carolina ordered its removal, the Federal Government filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS. *Id.* at 3. During this time, South Carolina learned that the Federal Government was taking active steps to halt construction of the MOX Facility and planned to terminate the program. *Id.* Once the construction was halted, there would be no turning back and hundreds of South Carolina jobs would be lost. 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 was again directed by the Attorney General to move 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, along with a request for an expedited hearing. *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 was at least temporarily successful. It is worth reiterating that none of the foregoing lawsuits regarding injunctive relief described above had a monetary or damages component to their undertaking, meaning that, although W&H agreed to take on these actions under the Litigation Retention Agreement with the State, as amended, those actions did not provide an avenue for a corresponding increase in the possibility of damages to the State on which the attorney fee is based.

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. W&H Opp'n, Ex. 1, p.3. On January 8, 2018, the State filed its second complaint seeking to recover another \$100 million. *Id.* These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions between the State, led by W&H, and the Department of Justice ("DOJ") on behalf of DOE and the Federal Government. These efforts were not successful and, in June 2019, South

Carolina informed the court that the Federal Government had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. *Id.* 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 assistance payments. *Id.*

Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. *Id.* After briefing and beginning in January 2020, promising discussions were held between the respective counsel for DOE and the State, which over time 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, all stemming from and following on the heels of the Federal Circuit oral argument, 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 also 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."³ Am. Compl., Ex. 1. The settlement further provided the Federal Government

³ 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

with a grace period to comply with an obligation to remove additional defense plutonium from the State while still maintaining the ability of the State to force removal⁴ and receive additional payments⁵ (up to an additional \$1.5 Billion) should the Federal Government not comply. *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* W&H Opp’n, Ex. 2, Agreement to Voluntary Dismissal of Appeal, *State of South Carolina v. United States*, No. 19-2324 (Fed. Cir. Sept. 29, 2020) (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 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

settlement of claims arising under actual or imminent litigation under appropriate circumstances. 31 C.F.R. § 256.1.

⁴ The 15-year removal period for the remaining 9.5 metric tons of defense 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.

⁵ 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.

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 based upon the immediate monetary benefit of the settlement only, this fee represents 12.5% of the recovery.

Following receipt of the settlement amount from the Federal Government, the Attorney General approved 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 in the normal course. On September 29, 2020, the State made a wire transfer to W&H for the \$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.*

Argument

The Motion should be granted and this lawsuit dismissed with prejudice because, as Judge Lee has already determined, Plaintiffs do not have standing and this Court does not have jurisdiction over any of the claims asserted in the Amended Complaint. Moreover, even if Plaintiffs could somehow overcome those obstacles—which they cannot—Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because (1) the applicable statutory provisions have been complied with and unambiguously authorize the Attorney General to pay the Law Firms their attorneys' fees and costs earned and owed under the Litigation Retention Agreement; and (2) there is no contractual or statutory provision or any other mechanism that requires the Attorney General to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

1. Dismissal is required because Judge Lee already has determined that Plaintiffs lack standing.

“It is settled [law] that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.” *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 334 S.E.2d 528 (1985) (citing cases); *see Graham v. Town of Loris*, 248 S.E.2d 594, 597, 272 S.C. 442, 449 (S.C.,1978) (“The Court of Common Pleas is a unity. . . .There is no appeal from one Circuit Judge to another.”) (quoting *Steele v. C., C. & A. Railroad Co.*, 14 S.C. 324 (1880)). Here, in the PI Order and the Reconsideration Order, Judge Lee specifically found that Plaintiffs do not have standing to pursue any of their claims in this action against the Defendants. PI Order at 4-12; Reconsideration Order at 1-2. Because this Court does not have the authority to review or reverse Judge Lee’s determination, it must grant the Motions to Dismiss and dismiss this action in its entirety on the basis that Plaintiffs lack standing.

2. Plaintiffs lack standing and this Court lacks jurisdiction.

Even if this Court had the authority to re-examine the issue of standing, which it does not, for the reasons thoroughly explained in the PI Order and as set forth below, Plaintiffs do not have standing. This Court also does not have jurisdiction for the additional reasons that Plaintiffs’ claims are moot and merely raise non-justiciable political questions and issues that are reserved exclusively for determination by the Supreme Court.

A. Plaintiffs lack standing.

As the United States Supreme Court has emphasized, the increasing demand for judicial attention and intervention on most every conceivable perceived grievance “has not eliminated the basic principle that to invoke judicial power the claimant must have a “personal stake in the outcome,” or a “particular, concrete injury,” or “a direct injury”; in short, something more than “generalized grievances.” *United States v. Richardson*, 418 U.S. 166, 179-80 (1974). “Few

exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011). For that reason, “courts must be more careful to insist on the formal rules of standing, not less so.” *Id.* at 146; see *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (“A plaintiff must have standing to institute an action.”); *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985) (“Standing to sue is a fundamental requirement in instituting an action.”); *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) (same).

“Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called “constitutional standing”; and (3) under the public importance exception.” *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013) (citing *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). There is no assertion in this case of statutory standing, so Plaintiffs are left to constitutional standing and the “public importance” exception.⁶ They have not met—and cannot meet—their burden demonstrating either.

i. Plaintiffs do not have constitutional standing.

Plaintiffs do not have constitutional standing because they have not alleged and cannot allege an injury in fact. *Commander Health Care Facilities, Inc. v. S.C. Dep’t of Health & Env’tl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) (“Constitutional standing

⁶ Plaintiffs also have argued that they have what they claim is “derivative standing” to pursue claims on behalf of the State. As explained below, and as set forth in the PI Order, there is no such thing and this contention is meritless.

requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.”). Plaintiffs are not parties to the contract between the Law Firms and the Attorney General, were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys’ fees. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (holding that “[a]n ‘interest in attorney’s fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.”) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Likewise, Plaintiffs do not have so-called “taxpayer standing” because Plaintiffs state no specific claim that they have regarding the settlement proceeds and, thus, have no harm arising from their alleged claims that differs from all other taxpayers and residents in the State. *See Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 (“In *ATC*, [the Supreme Court] unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]....This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.”) (quoting *ATC*, 380 S.C. at 198, 669 S.E.2d at 340-41).

Plaintiffs therefore have failed to allege an injury in fact and, thus, do not have constitutional standing.

ii. Plaintiffs do not have standing pursuant to the “public importance” exception.

“Public importance” standing allows citizens in some limited instances, which are not present here, 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 it “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, 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 general importance of an issue, without more, is insufficient to invoke the exception because “the same may be said of most legislative and executive actions. 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.

Plaintiffs essentially assert two claims in this case. First, Plaintiffs assert a claim against the State Attorney General alleging that he did not have authority to approve the one-time payment of attorneys’ fees for services performed pursuant to the Litigation Retention Agreement, notwithstanding the clear grants of statutory authority to the Attorney General to enter into the Litigation Retention Agreement and hire the Law Firms and the undisputable fact that he obtained all necessary approvals and authorizations required by law. Second, Plaintiffs assert a claim against the Law Firms alleging that the amount of attorneys’ fees owed and paid pursuant to the Litigation Retention Agreement is “unreasonable.” There are two primary reasons why Plaintiffs do not have “public importance” standing for either of these claims.

First, and most importantly, Plaintiffs have not and cannot meet their burden to show that resolution of its claim “is needed for future guidance.” *ATC*, 669 S.E.2d at 341, 380 S.C. at 199 (2008) (“The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.”). Plaintiffs’ challenge is to the

one-time payment of the attorneys' fees in this particular situation and pursuant to this specific Litigation Retention Agreement. Any determination with respect to this challenge would therefore be entirely limited to the Litigation Retention Agreement and payment for services performed pursuant to this single contract. *See Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44 (affirming dismissal of citizen's challenge to invalidate public body's payment to former employee pursuant to severance agreement for lack of "public importance" exception standing because such one-time payment did "not necessitate further guidance."). Such a determination would not provide "future guidance" as to any issue of public importance, especially considering that Plaintiffs do not—nor could they—challenge the Attorney General's authority to enter into the Litigation Retention Agreement on behalf of the State. *See discussion, infra*, Section 3.A.

This conclusion is not changed by Plaintiffs' contention that guidance is needed with respect to other contracts for outside litigation counsel entered into by the Attorney General. Plaintiffs' claims are specific to the Law Firms' Litigation Retention Agreement and the authority to make the payment in this specific case. This is not a case about the Attorney General's authority to enter into contracts for outside litigation counsel, because Plaintiffs do not challenge that authority. Thus, public importance standing is inappropriate because granting it here would allow the "exception [to] swallow the rule." *Jowers v. S.C. Dep't Health & Env'tl. 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, 744 S.E.2d 521, 524 (2013)). Simply put, affording Plaintiffs public importance standing in this context would ensure that the courts of this state will routinely be faced with lawsuits challenging government contracts because some one person or another is unhappy with the contract.

The second main reason that Plaintiffs cannot demonstrate “public importance” standing is because they are seeking to recover damages under a “common fund” theory while purportedly representing taxpayers and the public. Plaintiffs’ claim essentially devolves into a statement that the Law Firms do not deserve to be compensated in the manner in which the State contracted for their services. That assessment apparently does not apply to Plaintiffs, however, because they seek to appear after-the-fact and take any amount of attorneys’ fees not paid to the Law Firms for themselves. Accordingly, their self-serving claims “directly conflict[] with the purpose and spirit of the public importance exception.” *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44.

Finally, the “public importance” exception does not apply to claims against the Law Firms, which are private entities. The “public importance” exception, by definition, only applies to claims against governmental or public bodies and officials.⁷ It does not apply to a contract claim against private entities asserted by a non-party to the contract. Nor do the principles of standing transfer among independent causes of action or defendants. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.” (internal citations and quotation marks omitted)). Thus, Plaintiffs may not satisfy their burden of standing against the Law Firms through an assertion of purported public importance standing to challenge the Attorney General’s conduct under a wholly independent claim. “[S]tanding is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 (1996). Because there is no South Carolina authority to support a finding of standing under the public importance exception against private

⁷ See, e.g., *Sloan v. Dep’t of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (alleged violation of statutory bidding requirements by state agency); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (alleged violation of constitutional requirements for legislation by legislature); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (alleged violation of constitutional provisions regarding Governor’s role in Air Force Reserve); *Sloan v. Greenville Cty.*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (alleged violations of county ordinances governing procurement).

litigants, any arguable claim of public importance standing as to the Attorney General, which is disputed, would not satisfy Plaintiffs' burden of standing as to the Law Firms in any event.

Therefore, as Judge Lee correctly ruled in the PI Order, Plaintiffs have no legitimate argument that the "public importance" exception permits them to proceed with their claims in this case.

iii. "Derivative standing" does not exist.

Plaintiffs erroneously contend that they can step into the shoes of the State and challenge a contract that the duly elected Attorney General entered into and upheld. They have argued that the 1939 decision in *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), which allowed a citizen of a county to assert a claim on behalf of that county, should be extended to the State even though it is a sovereign entity. They further have analogized their purported claim to that of a shareholder derivative action. As Judge Lee correctly recognized in the PI Order, there are several problems with this argument.

First, "a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action." *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801-02 (Ct. App. 1997) (also rejecting claim to proceed as class action "because there is no claim of injury or damage not common to the public"). Plaintiffs have alleged no injury or damage not common to the public and, thus, cannot proceed with their putative derivative class action. *See Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43 (holding that a "taxpayer lacks constitutional standing when he suffers in some *indefinite* way in common with people *generally*."") (emphasis supplied and internal quotation marks omitted). Plaintiffs have no discrete injury entitling them to maintain this action.

Second, *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. Critical to analyzing that decision is that *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800 (municipality) (“[T]his power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear that the governmental entity has unjustifiably refused to assert the claim.”) (emphasis added); *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”). Here, however, Plaintiffs seek to extend *Hart* to allow a derivative suit on behalf of the State—a sovereign entity that is not subject to suit in the same manner as local governments may be.

Third, the Supreme Court has recognized that derivative actions are not applicable with respect to government actions by entities such as a historic commission because those entities are in the nature of a “body politic.” *Newman*, 325 S.C. at 74, 480 S.E.2d at 74. Which stands to reason because, for the same reasons that Plaintiffs do not have taxpayer standing, citizens are not shareholders of the government by virtue of being taxpayers and, thus, cannot bring derivative actions. *See id.*; *see also Bodman*, 742 S.E.2d at 366, 403 S.C. at 66–67 (“We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing upon him.”); *ATC*, 380 S.C. at 198, 669 S.E.2d at 341, (“[A] taxpayer lacks standing when he

‘suffers in some indefinite way in common with people generally.’”) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).

Thus, even if Plaintiffs might be able to challenge local government actions under *Hart*, they cannot challenge executive branch action absent some discrete injury not common to the general public. This they do not have. *Berry* is instructive in this regard because it rejected an effort to bring a legal malpractice claim on behalf of a municipality. That is, the town residents brought a claim against the town’s former attorneys, alleging that they committed malpractice in how they handled the issuance of a revenue bond on behalf of the Town of New Ellenton. *Berry*, 328 S.C. at 440, 492 S.E.2d at 797. The Court of Appeals held that the town residents had no standing to sue either on behalf of New Ellenton or as a class of New Ellenton citizens. *Id.*, 328 S.C. at 446-47, 492 S.E.2d at 800. However, the Court noted that the “authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity.” *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Consequently, absent some plain cause of action, citizens do not have the right to bring a claim on behalf of a government. The plaintiffs in *Berry* could not avail themselves of that option because “the claim alleged by Residents on behalf of the town is not clearly set forth and is far from plain.” *Id.*, 328 S.C. at 448, 492 S.E.3d at 801. Thus, the Court rejected plaintiff’s efforts to bring the claim on behalf of the town because there was no plain remedy, and similarly rejected their efforts to allege a class action “because there [was] no claim of injury or damage not common to the public.” *Id.*, 328 S.C. at 449, 492 S.E.2d at 802. For the same reasons, Plaintiffs cannot proceed with respect to State even if that option were available to them.

At bottom, Plaintiffs are seeking to exercise the powers entrusted to the Executive and Legislative Branches and are asking the Judiciary to assist in their quest. However, as noted above, governmental officials and entities are given the discretion to determine what action should be

taken by the agency or entity for which they are responsible. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Moreover, the law does not in any event afford Plaintiffs that ability because doing so would require this Court to violate Article I, § 8 of the South Carolina Constitution, which mandates that the executive, legislative, and judicial branches shall remain separate and distinct. In other words, Plaintiffs improperly seek to have this Court decide a political question. *See* discussion *infra* Section 2.C.

B. Plaintiffs' claims are moot.

Plaintiffs' claims are moot because the payment of the attorneys' fees has already been made by the State pursuant to the approval of the EBO and the authorization of the State Treasurer based on a warrant issued by the State Comptroller General. Am. Compl., ¶ 74 & Exs. 18, 19.; *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy."). Plaintiffs' claims therefore become a request for an advisory opinion because their claims have been rendered moot by payment of the fees to private counsel pursuant to the Attorney General's contract with those attorneys and the approval of four separate State officials and agencies. *See id.* ("The court does not concern itself with moot or speculative questions."); *Matter of Angela Suzanne C.*, 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) ("It is settled law that this Court will not issue advisory opinions on questions for which no meaningful relief can be granted."). Plaintiffs' claims therefore are moot and, for this additional reason, should be dismissed.

C. Plaintiffs' claims present non-justiciable political questions because, at bottom, they allege that this Court should violate the separation of powers.

"The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *South Carolina*

Public Interest Foundation v. Judicial Merit Selection Com'n, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) (citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 393-94 (1990)). “Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial.” *Id.* (citing *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Brd.*, 333 U.S. 103, 111 (1948)). Unlike the Federal Constitution, the South Carolina Constitution expressly requires that the branches of government remain separate so that one branch does not claim or exercise powers belonging to another branch. S.C. Const. art. I, § 8.

Here, the Amended Complaint’s request that the judicial branch invalidate not only the Attorney General’s ability to request payment through the procedures set forth in the law, but also the ability of the EBO, Comptroller General, and Treasurer (all non-parties to this lawsuit) to process the requested payments, seeks to have the Court violate the separation of powers by asking it to rule on what amounts to a nonjusticiable political question. *E.g.*, *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”) (quoting *Judicial Merit Selection Comm’n*, 369 S.C. at 142, 632 S.E.2d at 278). Therefore, contrary to Plaintiffs’ assertions, it would be a violation of the separation of powers required by Article I, § 8 of the South Carolina Constitution for the judicial branch to intrude upon the process followed for government payments, thereby usurping the authority of the Attorney General, EBO, Comptroller General, and Treasurer, respectively, to make a contractually-required payment.

At bottom, Plaintiffs’ complaint states nothing more than a generalized grievance with a decision of the Attorney General, and Plaintiffs are attempting to put this Court in the position of wading into matters reserved for the Attorney General as the Chief Legal Officer of the State.

However, Plaintiffs do not challenge—nor could they challenge—the Attorney General’s authority to enter into the Litigation Retention Agreement or to hire private counsel on a contingency basis. Indeed, as discussed below, South Carolina Code § 1-7-170 unequivocally grants the Attorney General that authority, which he exercised here. *See also Cooley v. S.C. Tax Comm’n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943) (“[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, *on a contingent basis*.”) (emphasis supplied). The Attorney General determined that the Litigation Retention Agreement was in the best interests of the State, and Plaintiffs’ mere disagreement with it, especially after it has been fully performed, does not support a legally-cognizable claim, nor does it provide this Court jurisdiction or authority to require judicial approval of the Litigation Retention Agreement. *See Order Granting Mot. to Intervene on behalf of Attorney General Henry D. McMaster, Sloan v. The S.C. Board of Physical Therapy*, No. 04-CP-40-1797, 2004 WL 5353216 (S.C.Com.Pl. July 02, 2004) (“[T]he Attorney General of South Carolina possesses the right to control and manage the State’s litigation.”) (citing *Cooley*, 204 S.C. 10, 28 S.E.2d at 450).

D. This Court does not have jurisdiction to review the reasonableness of the attorneys’ fees paid pursuant to the Litigation Retention Agreement.

The foundation for Plaintiffs’ claim that the attorneys’ fees to the Law Firms are unreasonable is its assertion that the Litigation Retention Agreement with the Attorney General violates Rule 1.5 of the South Carolina Rules of Professional Conduct. *See Am. Compl.*, ¶¶ 33-35. However, even putting aside that, as discussed below, there is no legal basis to require the State Attorney General to seek judicial approval of his contracts with outside legal counsel, there is no private right of action for a third party to challenge the attorneys’ fees as violative of the Rules of Professional Conduct, and, in any event, there is no avenue for this Court to consider any allegations of violations of the Rules of Professional Conduct, which are committed to the

exclusive province of the Supreme Court. See *In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) (“[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.”) (citing *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *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). Respectfully, just as this Court cannot usurp the role of the State Attorney General as Chief Legal Officer, it also cannot usurp the Supreme Court’s exclusive role or create a private right of action the Supreme Court has found does not exist, which is exactly what Plaintiffs are improperly asking this Court to do.

3. Plaintiffs fail to state facts sufficient to constitute a cause of action against Defendants.

Even assuming, without conceding, that Plaintiffs have standing or this Court has jurisdiction over some or all of their claims, Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants because (1) the applicable statutory provisions unambiguously authorize the Attorney General to pay the Law Firms their attorneys’ fees and costs earned and owed under the Litigation Retention Agreement; and (2) there is no contractual or statutory provision or any other mechanism that requires the Attorney General to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

A. The Attorney General had authority to pay the attorneys’ fees without the necessity of depositing those amounts into the General Fund.

As Judge Lee held in the PI Order, Plaintiffs’ contention that S.C. Code Ann. § 1-7-150 precluded the Attorney General’s payment of \$75 million pursuant to the Litigation Retention

Agreement is wrong.⁸ There are two primary reasons for this. First, Plaintiffs' reading of § 1-7-150 is not consistent with the statute or with the prior interpretations of that statute by the judiciary. *See* Rule 11(a), SCRCP. Second, even assuming without conceding that Plaintiffs' reading is correct, none of the MOX settlement funds would ever reach the General Fund in any event because § 1-7-150 has been superseded by a proviso in the current State budget, which directs any litigation recovery funds that "otherwise" would go to the General Fund to a separate account. Plaintiffs' lack of basic comprehension of what laws even apply to the settlement funds is reason alone to dismiss this case. And the fact that Plaintiffs brought a lawsuit accusing the State's Chief Legal Officer (and the third-party EBO) of impropriety without having even a basic understanding of the applicable law is disturbing and clearly demonstrates that this lawsuit is just a baseless effort to enrich themselves.

Section 1-7-150 provides: "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... except ... where some other disposition is required by law." There are several reasons the Attorney General's actions comply with § 1-7-150 and the funds representing the attorneys' fees were not required to be deposited in the General Fund. Because the Attorney General retained outside counsel to

⁸ Plaintiffs do not challenge the Attorney General's authority to retain outside counsel. Nor could they make such a challenge in good faith, as the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by the judiciary. *See* S.C. Code Ann. §§ 1-7-85, 170; *Cephalon v. Wilson*, 2012-CP-40-7317 (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 (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 in *Cephalon* 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.*

prosecute these cases, as he was authorized by law to do, the contractual legal fees are a “cost[] of litigation” that the Attorney General is authorized to pay. *State v. Eli Lilly and Co.*, No. 2007-CP-42-1855, 2009 WL 6058383 (S.C. Com. Pl. Sep. 22, 2009) (“The flaw with this argument is that the statute expressly authorizes payment of ‘the costs of litigation’ out of litigation proceeds, and a ‘cost of litigation’ is precisely what legal fees are.”); *see also Cephalon*, No. 2012-CP-40-7317 (determining that § 1-7-150 “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.”). Consequently, § 1-7-150 authorized the Attorney General to pay the amounts to the Law Firms without first depositing those monies in the General Fund.

Second, § 1-7-150(B) exempts from its coverage monies “where some other disposition is required by law.” The fulfillment of valid and binding contracts entered into by the State’s Chief Legal Officer and approved by the EBO is a disposition “required by law.” Further, S.C. Code Ann. § 1-7-85 expressly provides 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....” Plaintiffs’ contentions, therefore, have no support in the plain language of the statute.

And third, even if Plaintiffs’ interpretation of § 1-7-150(b) was somehow correct—which it is not—it is irrelevant to this case because Proviso 59.8 precluded the Attorney General from transferring *any* funds to the General Fund and instead directed him to deposit those funds in a separate account:

(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 at present. 2020 S.C. Acts 135, § 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 portion of the settlement awarded for attorneys’ fees generally would have to be deposited in the General Fund, they would not be in this case. The argument articulated by Plaintiffs is therefore inapplicable. But even if it was applicable, the question becomes the Attorney General’s compliance with the requirement that expenditures from the Litigation Recovery Account must be “prescribed by law.” Again, fulfilling a contractual obligation is a duty “prescribed by law” for the Attorney General.

The payment of the contractual attorneys’ fees also constituted a “disposition required by law” and an “expend[iture] ... prescribed by law” because the Attorney General complied with all prerequisites to authorize a distribution of money. Specifically, the EBO approved the payment of the contract fees as it was expressly authorized to do 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.”); S.C. Code Ann. § 2-65-10, *et seq.* Moreover, the

Treasurer's Office processed the payment for the attorneys' fees pursuant to a warrant from the Comptroller General, as the law requires. Am. Compl., ¶ 74 & Exs. 18, 19.

Indeed, because both the Attorney General—who is the Chief Legal Officer of the State and is specifically charged with administering § 1-7-150—and the EBO—who is responsible for overseeing the expenditure of funds in this State—approved and authorized the payment of the attorneys' fees, even if there was some ambiguity regarding the applicable statutory provisions, the agencies charged with administering this statute necessarily have determined that the 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”). Because both the plain language and the reasonable interpretation of the applicable statutes support the Attorney General’s payment of the fees, Plaintiffs’ claims fail as a matter of law.

Finally, and contrary to Plaintiffs’ contention, the fees paid to the Law Firms were also “awarded by settlement.” Indeed, in making this contention, Plaintiffs completely ignore the fact that the “Agreement to Voluntary Dismissal of Appeal” filed with the Court of Appeals for the Federal Circuit and executed by all parties to the Federal litigation specifically states that the settlement payment 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” W&H Opp’n, Ex. 2, Agreement to Voluntary Dismissal of Appeal (emphasis supplied).

Thus, the Attorney General's payment of the attorney's fees was proper and in accordance with the applicable law, and Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants.

B. The Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

Plaintiffs ask this Court to *require* the Attorney General to obtain judicial approval of the amount of fees paid to the Law Firms for services performed and costs incurred pursuant to their contract. But there is no contractual or statutory provision or any other mechanism that imposes a requirement or establishes a process for the Attorney General to obtain judicial approval of his own contract or the fees paid thereunder. And any procedure in that regard would violate the separation of powers by putting this Court in the position of supervising the executive branch's discharge of its duties.

Plaintiffs note in the Amended Complaint that the Litigation Retention Agreement contains a discretionary provision regarding judicial approval of the fees when possible, but that provision is optional and does not constitute a requirement that he obtain judicial approval. *See* Litigation Retention Agreement at p.9 (stating only that "[w]hen possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction."). Thus, Plaintiffs' argument that approval is mandatory is directly contradicted by the use of the prefatory condition "when possible" and renders such argument inapposite. Moreover, given that the parties to the Litigation Retention Agreement—the Attorney General and the Law Firms—agree on the payment of the fee, a declaratory judgment would not be available because there would be no live controversy affording jurisdiction to a trial court, and Plaintiffs' attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing. The settlement reached between the State and the Federal Government also did not require court approval, and

there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Law Firms under the Litigation Retention Agreement.

Plaintiffs' (unfounded) allegation that the Litigation Retention Agreement—which provides for an effective contingency fee rate of 12.5%⁹ for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon this Court authority to review the Litigation Retention Agreement. A mere allegation of a violation of the South Carolina Rules of Professional Conduct does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have approved and authorized the payment of the fee. Accordingly, Plaintiffs' claims seeking to require the Attorney General to seek judicial approval of the Litigation Retention Agreement or the fees paid pursuant to such contract fail as a matter of law and should be dismissed.

C. Plaintiffs' constructive trust and restitution claims fail as a matter of law.

As discussed throughout, the Law Firms received payment of their fee for services performed pursuant to a legally-binding contract entered into with the Attorney General. As

⁹ This 12.5% contingency is calculated against the immediate cash settlement payment of \$600 million and does not allocate any of the fees to the additional benefits of securing the removal of one metric ton of plutonium (valued at least at \$100 million) and the agreement to remove 9.5 additional metric tons or pay the State the additional sum of \$1.5 billion.

established by the Amended Complaint, the payment of the fee was authorized and approved by the Attorney General, the Treasurer's Office, the Comptroller General's Office, and the EBO. No statute requires court approval of the payment of the fee. And payment was intentionally and voluntarily made by the State to meet the State's binding contractual obligations. Critically, none of those State officials contend that payment was somehow induced by "fraud, bad faith, abuse of confidence, or violation of a fiduciary duty" or that the Law Firms are not entitled to their contractual fees. *Lollis v. Lollis*, 354 S.E.2d 559, 561, 291 S.C. 525, 529 (1987) (discussing requirements to impose constructive trust); *JASDIP Properties SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (Ct. App. 2011) ("[I]f there is no basis for unjust enrichment, there is no basis for restitution.").

Despite all this, which they know, Plaintiffs nevertheless seek to stand in the shoes of the State and non-party State Executive Branch officials to contend a "constructive trust" should be created "*in favor of Plaintiffs*," Am. Compl. ¶85, to deprive the Law Firms of their rights to the fee owed and already paid to them for services performed and costs incurred pursuant to their contract with the State. This contention completely lacks merit. "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. "Fraud is an essential element, although it need not be actual fraud." *Id.* "In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal." *Id.*

Plaintiffs make the remarkable (and entirely frivolous) claim that the Law Firms' receipt of the funds—which were owed and paid to them pursuant to a legally-binding and valid contract for services performed and for which payment was authorized by four separate State officials—was somehow wrongful and necessitates the creation of a constructive trust, thereby depriving the

Law Firms of their rights to and the benefit of these funds. However, Plaintiffs do not allege, nor could they allege, a single act on the part of either of the Law Firms that in any way amounts to “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty.” *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. The closest Plaintiffs come to such an allegation is their contention that the Law Firms’ contingency fee pursuant to its contract is not “reasonable” under the Rules of Professional Conduct.¹⁰ But, as discussed, the circuit court does not have jurisdiction over such claims; the Rules of Professional Conduct do not give rise to a private cause of action; Plaintiffs are not parties to the underlying contract; and Plaintiffs have no standing to assert such a claim. And the actual party to the contract—the Attorney General—approved the fee, and multiple other State officials authorized payment of the fee.

Like with their reasonableness claim, at bottom, Plaintiffs not only ask this Court to usurp the statutory powers of the Attorney General, but also seek to force the State to breach its contract with the Law Firms after the contract has been fully performed by all parties. Plaintiffs cite to no authority—because there is none—that would allow this Court to take such drastic action and create additional litigation against the State. Therefore, Plaintiffs’ request for imposition of a constructive trust and for restitution are devoid of merit and must be dismissed for this reason as well.

¹⁰ Other than this mere contention, there also is nothing in Plaintiffs’ Amended Complaint that supports their claim that the 12.5% fee paid is unreasonable. Notably, as part of the proceedings before Judge Lee, W&H introduced the affidavits of Professor Nathan Crystal, Professor John Freeman, Professor Michael Verzi, and Peter Protopapas, Esquire, all recognized experts in the field of legal ethics and all of whom testified that the 12.5% fee paid is reasonable. In contrast, Plaintiffs did not submit any expert testimony or any other evidence in support of their contention that the fee is unreasonable.

Conclusion

For the reasons set forth above, the Motion should be granted and this frivolous case dismissed in its entirety.

Respectfully submitted,

s/ John S. Simmons

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Columbia, South Carolina
January 20, 2021

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,

Case No. 2020-CP-40-04603

Plaintiffs,

**MEMORANDUM IN OPPOSITION TO
MOTION TO DISMISS**

v.

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

Defendants.

Come Plaintiffs, by counsel, and for their Memorandum in Opposition to Defendants' Motion to Dismiss, state as follows:

I. INTRODUCTION

Plaintiffs South Carolina Public Interest Foundation ("SCPIF") and John Crangle ("Crangle") [collectively "Plaintiffs"] have public interest standing to pursue their claims for declaratory and equitable relief seeking the imposition of a constructive trust over \$75 Million unlawfully paid to Willoughby & Hoefer, P.A. ("WH") and Davidson, Wren & DeMasters ("DWD") [collectively the "Law Firms"] by Attorney General Alan Wilson ("Wilson").

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached as Exhibit A to the Amended

Complaint and hereinafter referred to as “Griffin Aff.”), Ex. 1. Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the DOE must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments. Under the terms of the Settlement Agreement announced by Respondent Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a substantially reduced economic impact and assistance payment of \$600 million. Significantly, under the terms of the Settlement Agreement, the DOE is required to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” Griffin Aff., Ex. 1, ¶ 5(a).

Defendant Wilson announced at an August 31, 2020 press conference that he intended to pay two private law firms \$75 million from the proceeds of the DOE settlement. According to Wilson’s statement at the press conference, this payment was expected on or after October 1, 2020. Upon learning of Defendant Wilson’s intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys’ fee. The Governor stated that he had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.* First Circuit Solicitor David Pascoe likewise wrote

to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson. *See* Compl., Sept. 25, 2020 (Plaintiffs' "Initial Complaint" attached hereto as Exhibit B). That same day, Plaintiffs filed their motion for a temporary restraining order and preliminary injunction against Defendant Wilson, seeking to enjoin Defendant Wilson's payment of \$75,000,000 to the Law Firms (Plaintiffs' "Initial Motion" attached hereto as Exhibit C). On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings when requesting that the circuit court schedule a hearing on Plaintiffs' Initial Motion. *See* Griffin Aff., Ex. 14.

On the morning of Monday, September 28, 2020, The State newspaper ran an article on the pending lawsuit with links to relevant court filings. John Monk, *Should 2 law firms get \$75M of SC's \$600M plutonium Settlement? This lawsuit says no.*, The State, Sept. 28, 2020, attached hereto as Exhibit D. The same morning, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See* Griffin Aff., Ex. 15. The Court responded that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Initial Motion over Defendant Wilson's objections. *See id.* On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Defendant Wilson ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.

Unbeknownst to Plaintiffs and the Court, Defendant Wilson had already received the \$600 million in settlement proceeds and initiated the process to transfer \$75 million to Defendant WH by Monday, September 28, 2020. Defendant Wilson was aware of this fact at the time that Defendant's counsel had emailed the Court about the hearing to be held the next day. Defendant Wilson was aware of this fact when his counsel was emailing with Plaintiffs' counsel about Plaintiffs' request for an agreement not to distribute the funds until after the hearing. Instead of being candid with the Court and Plaintiffs' counsel about the status of the disputed funds, Defendant Wilson had actively engaged the Office of the State Treasurer to ensure the disputed \$75 million would be transferred to Willoughby & Hoefer ahead of the 3:00 p.m. hearing the next day, as shown by an email from the Finance Director for the Attorney General's Office. *See* Email K. Buckley to M. Simmons (Sept. 28, 2020), attached hereto as Exhibit E.

In fact, Attorney General Wilson's staff expedited payment to Willoughby & Hoefer via wire transfer on Monday afternoon, September 28, 2020, after the Court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. *See* Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Prior to the afternoon of September 28, 2020, the authorization request from the Attorney General to the Treasurer's Office was for payment to be made by check in the amount of \$75 million. However, after the hearing was scheduled, Ms. Buckley emailed her counterpart at the Treasurer's office requesting that the payment be made via wire transfer. The request for a wire transfer came from Defendant WH on Monday as well. *See id.* As a result, the disputed funds were irrevocably deposited into the law firm's bank account mere hours before the hearing, depriving this Court of the opportunity to restrain the transfer of funds. If a check had been issued instead, the Court could have ordered that payment of the check be stopped before actual funds were transferred.

The Court and counsel for Plaintiffs first learned that the disputed \$75 million had been disbursed to Defendant WH moments before the 3:00 p.m. hearing on Monday, September 28, 2020. In his memorandum in opposition to the Plaintiffs' request for a temporary restraining order circulated at 2:12 p.m., Defendant Wilson announced that the disputed funds had been transferred to Defendant WH and, therefore, Plaintiffs' entire case was moot. *See* Mem. Att'y Gen. in Opp'n to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3, attached hereto as Exhibit G.

Following the hearing, Respondent Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See* Griffin Aff., Ex. 18. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the Defendant WH had received the disputed funds. *See id.* During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. Order Granting Temporary Injunction Pendente Lite, signed on September 29, 2020 and entered on September 30, 2020, attached hereto as Exhibit H. That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, Plaintiffs received confirmation from the Treasurer that the proceeds were in fact wired to the law firm mere hours before the 3:00 p.m. hearing on September 29, 2020. According to Treasurer Loftis, "[t]he Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]." Therefore, the Treasurer's Office "processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account." *See id.*, Ex. 19.

Later in the morning of September 30, 2020, Plaintiffs filed their amended complaint naming Defendant WH and Defendant Wren & DeMasters, P.A. as additional defendants (collectively, the “Law Firms”). At the same time, Plaintiffs filed their second Motion for Temporary Restraining Order and Preliminary Injunction, attached hereto as Exhibit I. Thereafter, the Court, the Honorable Debra R. McCaslin, entered its Ex Parte Temporary Restraining Order, attached hereto as Exhibit J.

On October 7, 2020 the Honorable Alison R. Lee heard Plaintiffs’ Motion for a Preliminary Injunction. Judge Lee denied the motion in a written order entered on October 14, 2020. Defendants thereafter filed the instant motions to dismiss relying upon certain findings of fact and conclusions of law contained in Judge Lee’s Order denying the motion for preliminary injunction. Counsel for Defendants submitted the motion to dismiss to Judge Lee requesting an immediate ruling on the same. In an email to counsel dated October 28, 2020, Judge Lee advised that she was not considering Defendants’ motions to dismiss. Exhibit K, Judge Lee email to Counsel, Oct. 28, 2020. Significantly, Defendants did not request Judge Lee to enter judgment against Plaintiffs under Rule 54(b), SCRCP, based upon the October 14, 2020 Order denying Plaintiffs’ motion for preliminary injunction, and Judge Lee never directed the entry of judgment on any of Plaintiffs’ causes of action.

III. STANDARD OF REVIEW

In deciding a Rule 12(b)(6) motion, the court looks only at the complaint and, taking the facts alleged as true and construing all reasonable inferences and doubts in plaintiffs’ favor, asks whether the complaint would entitle the plaintiff to relief under any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007); *Farmer v. CAGC Ins. Co.*, 819 S.E.2d 142, 147 (S.C. App. 2018). Furthermore, novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion. *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015).

In addition, the previous factual findings and legal rulings made by Judge Lee, when denying Plaintiffs' motion for a preliminary injunction are not binding on the merits of Plaintiffs' claims. In *University of Texas v. Camenish*, 451 U.S. 390 (1981), the United States Supreme Court explained that "given the haste that is often necessary" when addressing a motion for preliminary injunction, "the findings of fact and conclusions of law made by a court . . . are not binding at trial on the merits." Moreover, the South Carolina Supreme Court has stated as follows:

The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right...Ordinarily an interlocutory ruling which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

Rule 54(b), SCRCP further provides "[i]n the absence of [the court directing entry of a final judgment as to one or more but fewer than all the claims], any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . , and *the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*" Rule 54(b), SCRCP (emphasis added). Here, Judge Lee did not direct entry of a final judgment on the merits of Plaintiffs' claims. In fact, Defendants filed their motions to dismiss after Judge Lee issued the order denying preliminary injunctive relief and requested that she rule upon the same. Judge Lee refused. Exhibit K, Judge Lee email to Counsel, Oct. 28, 2020. Thus, the preliminary factual findings and legal rulings contained in the order denying Plaintiffs' motion for preliminary injunction are non-binding and subject to revision at any time prior to the entry of a final judgment.

Lastly, the standard for granting a motion to dismiss is significantly different from the standard on motion for preliminary injunction. At the motion to dismiss stage, this Court is

required to accept all facts alleged in the Complaint as true. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007). By contrast, in evaluating whether a plaintiff is entitled to a preliminary injunction, the Court must examine the merits of the underlying case to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

IV. PLAINTIFFS' DECLARATORY JUDGMENT ALLEGATIONS

A. **Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement.**

Plaintiffs contend that the payment of \$75 million to the private Law Firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. The operative word in Section 1-7-150(b) is the term "awarded." Section 1-7-150(B) reads as follows:

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, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.

S.C. Code Ann. § 1-7-150(B) (emphasis added).

In this matter, neither exception applies because there was not an order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "*Immediate payment by the United States to the State of South Carolina in the amount of \$600 Million (Six Hundred Million), inclusive of interest, with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1 (emphasis added). Accordingly, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Respondent Wilson paid private lawyers \$75 million, out of the \$600 million, which was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code.

The General Assembly used the verb "awarded" when describing the circumstances in which the Attorney General may use funds recovered in a civil action to pay costs of litigation. Black's Law Dictionary defines awarded as "to grant by formal process or by judicial decree (the company **awarded** the contract to the low bidder) (the jury **awarded** punitive damages)" Black's Law Dictionary (11th ed. 2019) (emphasis added). Merriam-Webster likewise defines awarded "to give by judicial decree or after careful consideration // The jury *awarded* damages to the defendant. // *award* a contract." Merriam-Webster, <https://www.merriam-webster.com/dictionary/awarded> (last visited Oct. 19, 2020) (emphasis added).

Plaintiffs' construction of Section 1-7-150(B) becomes even clearer when the statute's treatment of litigation costs is examined where litigation concludes with a judgment, instead of a settlement. According to Section 1-7-150(B), all monies "awarded the State of South Carolina by judgment" must be deposited into the General Fund. S.C. Code Ann. § 1-7-150(B). In that case,

the Attorney General is only permitted to use monies to pay litigation costs that are “awarded by court order.” *Id.* Absent a “court order” awarding litigation costs, the entire amount “awarded the State of South Carolina by judgment” must be deposited into the General Fund. *Id.*

Obviously, a court order is significantly different, and narrower, than a judgment. There can be a judgment for the State without a court order awarding attorneys’ fees. By the use of the phrase “awarded by court order,” the General Assembly clearly did not grant the Attorney General authority to obtain reimbursement for litigation costs from the proceeds of every judgment awarded to the State. Instead, the Attorney General’s authority is limited to reimbursement of “litigation costs awarded by court order.” *Id.*

There is nothing in Section 1-7-150(B) that distinguishes an award by court order from an award by settlement. To interpret this statute to allow the Attorney General to use proceeds from a settlement agreement that lacks any specific provision awarding litigation costs when the Attorney General is clearly prohibited from using proceeds from a judgment to pay litigation costs would lead to an impermissible, absurd result. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (“We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature . . .”). The Court did not consider the meaning of Section 1-7-150(B) in light of its full terms and how those terms evidence the General Assembly’s intent for costs of litigation to actually be awarded by a court order or settlement.

The plain meaning of the verb “awarded” evidences the General Assembly’s intent that there be a grant or decree that specifically provides for the payment of litigation costs in a court order or settlement. Absent an award of attorneys’ fees through settlement or court order, Defendant Wilson lacks authority to pay fees from the settlement proceeds to the Law Firms.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) (“[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Defendant Wilson's payment of \$75 million from the State's \$600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution Art. I, § 8.

As acknowledged by Defendant Wilson in the litigation pending in Barnwell County over the \$600 million in settlement proceeds, the General Assembly is the proper body to determine how the \$600 million is allocated, not the Attorney General:

The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money to the State of South Carolina. The statute under which settlement was reached provides for payment of funds to the State of South Carolina and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but ***the General Assembly is the proper body to determine how the funds at issue in this action should be allocated***, rather than him or this Court.

Mem. Att'y Gen. in Opp'n to Mot. to TRO or Temp. Inj. 1-2, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020) (emphasis added, citation to exhibit omitted) (attached hereto as Exhibit L).

Moreover, according to Defendant Wilson, he has no authority as the Attorney General to appropriate money that is payable to the State of South Carolina:

The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90–91, 678 S.E.2d 412, 416–17 (2009).

Ex. L at 4-5.

In an attempt to circumvent Section 1-7-150's requirement that the full \$600 million be deposited in the General Fund, Defendant Wilson purportedly relied on the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* However, a close reading of this statute further supports the Plaintiffs' position that, absent an award of attorneys' fees, only the General Assembly can appropriate funds to pay the Law Firms from these settlement proceeds.

Section 2-65-20 provides that “the General Assembly shall appropriate all anticipated *federal funds* and *other funds*.” S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds “means financial assistance made to a state agency by the United States Government in any form.” S.C. Code Ann. § 2-65-15(5). Examples of federal funds include “a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land.” *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition.

The settlement proceeds were not intended as financial assistance for the South Carolina Attorney General’s Office or any other State agency. Instead, the settlement proceeds are payable to the “State of South Carolina” and thus may possibly qualify as “other funds.” The term “other funds” means “any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act.” S.C. Code Ann. § 2-65-15 (8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the Appropriations Act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budget Office (“EBO”) for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO’s authorization to approve expenditures of “other funds” is limited to “funds from private foundations or industries which are not included in the appropriations act.” *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that “the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO.” See South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at <https://admin.sc.gov/budget/otherfundsauthorization>). The EBO Request submitted on behalf of Defendant Wilson requesting authorization for the \$75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. See Form BD-100, Exhibit G, Mem. Att’y Gen. in Opp’n to Mot. for TRO or Temp. Inj, Ex. 2. Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. Honorable Nikki G. Setzler Affidavit, Exhibit M. In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the \$75 million fee from funds that the Director lacks authority to appropriate.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general “other funds” provisions. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), reh’g denied (June 26, 2018)

(quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted).). The EBO has no authority to authorize the payment of attorneys' fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

B. Section 1-7-85 and its relationship to Section 1-7-150(B) in the statutory scheme.

Defendants erroneously assert that Section 1-7-85 of the South Carolina Code of Laws provides the Attorney General with authority to pay special counsel \$75,000,000 of the \$600 million in settlement proceeds. Section 1-7-85 states as follows:

Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation ***awarded by court order or settlement***, travel expenditures, depositions, printing, transcripts, and personnel costs. ***Reimbursement of these costs may be obtained by the Office of the Attorney General from the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses, with the approval of the State Budget and Control Board.***

S.C. Code Ann. § 1-7-85 (emphasis added).

As made clear by its full text, this statute has the same language as Section 1-7-150(B) limiting reimbursement to “attorney fees or investigative costs or costs of litigation ***awarded by court order or settlement.***” Compare S.C. Code Ann. § 1-7-85 with *id.* § 1-7-150 (emphasis added); see also *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) (“In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.”). Also as shown by the full text of this statute, to the extent not awarded by court order or settlement, these costs may be reimbursed from the “the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses.” S.C. Code Ann. § 1-7-85.

This statute does not contemplate that the Attorney General can rely upon Section 1-7-85 to ignore the more particular statutory provision in Section 1-7-150(B) addressing how the Attorney General must handle recoveries awarded to the State by judgment or settlement. To the extent these statutory provisions are inconsistent, Section 1-7-150(B) should control because it is more specific in addressing proceeds of a settlement or judgment. *DomainsNewMedia.com, LLC*, 423 S.C. at 304, 814 S.E.2d at 518 (“Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” (internal quotation marks omitted)).

C. Proviso 59.8 is immaterial.

Defendants also rely upon Proviso 59.8 of the state’s current budget in ruling that Plaintiffs’ entire argument “is therefore inapplicable.” Proviso 59.8 simply states that, for the current fiscal year, any funds received by the Attorney General that would otherwise have been credited to the General Fund shall be deposited first in a special account entitled the “Litigation Recovery Account” and that then those funds “must be expended only as prescribed by law.” 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). It does not otherwise suspend or contradict Section 1-7-150(B). Rather, Section 1-7-150(B) and Proviso 59.8 should be read consistently with one another. Accordingly, Proviso 59.8’s requirement that the funds “must be expended only as prescribed by law” should be read in conjunction with Section 1-7-150(B) and not as an exception to Section 1-7-150(B)’s requirements. Accordingly, Proviso 59.8 is immaterial.

D. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order.

Even if the settlement was structured in a way that the United States agreed to pay the State’s litigation costs, attorneys’ fees totaling \$75 million for the amount of work performed in

this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee.” Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

In 2016,¹ the Law Firms first sued in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this claim for damages,² ruling that any such lawsuit must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the Law Firms refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the Law Firms lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The Law Firms then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers for the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government political

¹ Defendant attempts to justify their \$75 million fee by providing a summary of work performed prior to January 2016. However, the earliest effective date of Defendant’s contingency fee agreement is February 8, 2016. Griffin Aff. Ex. 7.

² The District Court did not dismiss the State’s claim for injunctive relief.

leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

The court in *Cendant Corporation Prides Litigation*, 243 F.3d 722 (3rd Cir. 2001), under similar circumstances, overturned a \$19 Million fee award that represented only 5.7% of the total recovery because the settlement resulted from the efforts of public agencies and the attorneys did very little work, as compared to other cases involving settlements over \$100 Million. The Third Circuit Court of Appeals noted that there was very little motion practice and discovery was virtually non-existent. Class counsel spent approximately 5,600 hours on the case. The Court compared the fee award to other large class settlements where the common fund exceeded \$100 Million. The Court observed that the fee awards in those cases ranged from 2.8% to 36% to the total settlement fund. A fee of 5.7% appeared to be in line when just comparing percentages. However, the attorneys in those other cases spent far more hours (45,000 in one case) and engaged in significantly more complex discovery (reviewing 11 million pages of documents). The Court summarized its review of the other cases involving large fee awards, “in case after case, the same factors recur: complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case Because none of these factors which increase the complexity of class litigation was present here, it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.” *Id.* at 741.

Lastly, the court concluded that much of the work done to facilitate the settlement was accomplished by regulators, not counsel. The court explained, “allowing private counsel to receive fees based on the benefits created by public agencies would undermine equitable principles which

underlie the concept of the common fund, and would create an incentive for plaintiffs' attorneys to minimize the cost of failure by free riding on the . . . efforts of others." *Id.*

In *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), the attorneys' fees were awarded against the losing party (the State) under the fee-shifting "state action" statute (S.C. Code Ann. § 15-77-300), rather than via the common fund doctrine, as in this case, but *Layman* emphasized the requirement of reasonableness using either method:

Regardless of any theoretical preference for one method of fee calculation over another, ***the overriding benchmark for awards of attorneys' fees under both the state action statute and the general premise of the common fund doctrine is that attorneys' fees must be "reasonable."*** See [*Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986)]. In light of the circumstances of this case, we hold that an award of \$8.66 million in attorneys' fees is entirely unreasonable.

Layman, 376 S.C. at 455, 658 S.E.2d at 331 (emphasis added).

In addition, the express terms of the fee agreement with the Law Firms states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." Griffin Aff., Ex. 7, Fee Agreement at 9. There is nothing prohibiting Defendant Wilson or the Law Firms from seeking judicial approval of the payment of \$75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.³ However, Defendant Wilson and the Law Firms seek to avoid judicial review, and accordingly, Defendant Wilson paid the Law Firms \$75 million without making any showing of reasonableness.

³ Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Defendant WH additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019, Defendant WH along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Defendant WH 2% of the ultimate recovery for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Defendant WH, *after* the State had lost in the Fourth Circuit and *after* the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Under the terms of the amended contingency fee agreement, Defendant WH is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Defendant

WH had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Defendant WH is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Defendant WH over \$65,000 per page for these filings.

The fee agreement was entered into by the Defendant Wilson as Attorney General on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

E. Plaintiffs Have Standing to Assert the Claims in Their Amended Complaint.

Plaintiffs assert both constitutional and public interest standing. Plaintiffs also have derivative standing to pursue the claims for the recovery of State funds asserted under *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), and Plaintiffs have standing based on the public importance of the matters at issue in the lawsuit.

1. Plaintiffs Have Adequately Alleged Their Standing to Pursue the Equitable Claims at Issue Derivatively on Behalf of the State of South Carolina.

The South Carolina Supreme Court first addressed the ability of a citizen to assert claims for the recoupment of money on behalf of a governmental entity in the case of *Ex parte Hart*, stating as follows:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .

Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54.

Accordingly, Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Richardson v. Blackburn*, 41 Del. Ch. 54, 55-56, 187 A.2d 823, 823-24 (1963); *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.” (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that “[e]quity will not suffer a wrong without a remedy”). Indeed, “[t]he requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000) (internal quotation marks omitted).

As shown by proof submitted via affidavit, Defendant Wilson has refused repeated demands to assert the State of South Carolina’s rights vis-à-vis the Defendant and has instead violated the South Carolina Constitution in an attempt to overpay Defendant Law Firms for their services. First, Defendant Wilson refused to act in response to Governor McMaster’s August 30,

2020 letter questioning the amount of attorneys' fees that Defendant Wilson intended to pay. See Griffin Aff., Ex. 2. Next, Defendant Wilson refused to act in response to the September 10, 2020 letter from First Circuit Solicitor David Pascoe. See *id.*, Ex. 3. Then, Defendant Wilson refused to act in response to Plaintiffs' Initial Complaint and Initial Motion, filed and provided to Defendant Wilson on September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment to Defendant Law Firms of the disputed \$75,000,000, Defendant Wilson expedited payment to Defendant Law Firms via wire transfer on the afternoon of September 28, 2020, after the Court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. See Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Finally, Defendant Wilson then argued to the circuit court that Plaintiffs' claims were now moot on the basis of this wire transfer.

Under these particular circumstances, where the Attorney General has repeatedly refused to assert the State's claims against Defendant Law Firms and instead has taken drastic unconstitutional and inequitable actions to make a patently unreasonable \$75 million payment to Defendant Law Firms, Plaintiffs have standing to assert the State of South Carolina's claims against Defendants. See *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 53-54; see also *Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Ex parte Hart* with approval); *Richardson*, 41 Del. Ch. at 55-56, 187 A.2d at 823-24.

2. Plaintiffs Have Public Importance Standing.

Plaintiffs have public importance standing because a resolution of this dispute is needed for future guidance. See *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017), *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v Friends of the Hunley*, 393

S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

The South Carolina Supreme Court recently addressed public importance standing in *Adams v. McMaster*, No. 2020-001069, 2020 WL 5939936 (S.C. Oct. 7, 2020). In that case, the court ruled that the petitioners had public importance standing based on the nature of a dispute over a one-time payment to the state of \$48,467,924 in federal coronavirus relief funds for educational purposes. *Adams*, 2020 WL 5939936, at *2. Prompting the lawsuit was Governor McMaster's decision to make \$32,000,000 of the funds available for grants and making those grants available to students attending private schools. *Id.* Petitioners challenged that decision, and Governor McMaster challenged their standing to bring suit. *Id.* at *3. In finding that the petitioners had public importance standing, the court discussed the nature of the coronavirus pandemic and concluded that "[a] resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future *if* and when Congress approves additional education funding in response to the continued COVID-19 pandemic." *Id.* at *4 (emphasis added).

Under *Adams*, “[t]he key to the public importance analysis is whether a resolution is needed for future guidance.” *Adams*, 2020 WL 5939936, at *3 (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)). As in *Adams*, this case involves the conduct of government entities. It involves the expenditure of even more public funds. A prompt decision is necessary in this case as it was in *Adams*. And it is likely that the same situation will occur in the future if and when the Attorney General attempts to pay hired special counsel from a judgment or settlement without an award of “investigative costs or costs of litigation” by court order or settlement as required by Section 1-7-150(B) of the South Carolina Code of Laws. In fact, Defendant Wilson has issued several contingency fee contracts, similar to the one at issue in this matter, and plans to continue to issue them. See Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements, <http://www.scag.gov/litigation-retention-agreements>.

F. Plaintiffs’ Claims Are Not Moot

Defendants incorrectly contend that Plaintiffs’ claims are moot because Defendant Wilson transferred the funds to the Law Firms after this lawsuit was filed. As a result of this transfer, which was clearly conducted in an attempt to deprive this Court of jurisdiction over Plaintiffs’ claims, Plaintiffs filed an Amended Complaint adding the Law Firms seeking the imposition of a constructive trust over the disputed funds. Am. Compl. Count II. A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.” *SSI Medical Servs.*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990); *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (S.C. App. 1998); see also *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) (holding that constructive

trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995) (finding that constructive trust results from fraud, bad faith, abuse of confidence, or violation of fiduciary duty which gives rise to obligation in equity to make restitution).

In addition, Plaintiffs have pled a cognizable claim for restitution. Am. Compl. Count III. In *Trotter v. Merchants & Farmers Bank*, 180 SC 449, 186 S.E. 371 (1936), the South Carolina Supreme Court ruled that the recipient of funds paid under a mistake of law is required to make restitution to the lawful title holder. *Trotter* involved the improper payment of funds by a court appointed receiver to a creditor of an insolvent corporation. The trial judge explained “I do not think a receiver can make a voluntary payment of money under a mistake of law when he had no title to the money and it is not his own and he has no beneficial interest in same. The receiver paid the money to the defendant, but title to same did not pass, and his successor is entitled to restitution of the amount so paid with interest from the date on which demand for return of same was made.” *Id.*; see also *United States v. Wurts*, 303 U.S. 414, 58 S. Ct. 637, 82 L. Ed. 932 (1938) (“It is a well-established principle that the Government generally can “recover funds which its agents have wrongfully, erroneously or illegally paid”); *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 806 (D.D.C. 1981) (holding that this common law basis for recovery of funds runs against a person who received them by mistake and without rights”).

Plaintiffs’ claims for declaratory judgment and injunctive relief against Defendant Wilson are also not moot. In *Sloan v. Dept. of Transp.*, 666 S.E.2d 236, 240 (S.C. 2008), the plaintiff filed a public interest lawsuit challenging the Department of Transportation’s use of emergency procurement procedures on a construction project, bypassing competitive bidding. The trial court granted summary judgment ruling the claim as moot because the construction project had been

completed before the case was decided on the merits. The Supreme Court reversed, explaining there are three exceptions to the mootness doctrine:

First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *E.g., id.; Sloan v. Department of Transp.*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996). “Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.” *Curtis v. State*, 345 S.C. at 568, 549 S.E.2d at 596. Third, “if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.” *Id.; accord Sloan v. Department of Transp.*, 365 S.C. at 303, 618 S.E.2d at 878.

Sloan v. Dept. of Transp., 666 S.E.2d 236, 240 (S.C. 2008).

Here, all three exceptions are applicable. First, the issue raised is capable of repetition but will generally evade review. As explained previously, Defendant Wilson has numerous active contingency fee agreements, and by his conduct in this case, Defendant Wilson has clearly demonstrated that he will go to significant lengths to evade judicial scrutiny of his actions. Second, there is significant public interest in establishing a rule for future conduct.

Lastly, there are significant collateral consequences from a ruling on Plaintiffs’ challenges. Plaintiffs challenge the legal authority of Defendant Wilson to pay the Law Firms \$75 Million in fees from the Settlement. If Defendant Wilson lacked authority to make such payments, then the Law Firms will be legally obligated to return the money to the State, sooner or later. The recovery of Government funds, paid by mistake to one having no just right to keep the funds, is not barred by the passage of time. *U.S. v. Wurts*, 303 U.S. 414, 416 (1938). Therefore, if this issue is not settled now, the Law Firms will be exposed to future litigation seeking return of these funds by a successor Attorney General because of the significant public interest and outrage over the payment of \$75 Million to Defendant Wilson’s political benefactors and cronies.

V. CONCLUSION

For the reasons stated, the Defendants' motions to dismiss must be denied.

Respectfully submitted,

s/James M. Griffin

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Attorneys for Plaintiffs

Columbia, South Carolina
January 20, 2021

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

This matter is before the Court on the motions of Defendants Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A. (collectively, the “Defendants”) each for an order dismissing Plaintiffs’ Amended Complaint. For the reasons set forth below, this Court **GRANTS** the motions and **DISMISSES** the Amended Complaint with prejudice.

Procedural History

In the Amended Complaint, Plaintiffs instituted this action against Alan Wilson, 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 entered into between the Attorney

General and the Law Firms.¹ Plaintiffs 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 Plaintiffs lacked standing and also had not demonstrated that they met the legal standards for the issuance of a preliminary injunction. *See Order Denying Plaintiffs' Motion for Preliminary Injunction Order* ("PI Order"). Plaintiffs subsequently filed a motion to reconsider the PI Order, which Judge Lee denied on December 17, 2020. *See Order Denying Plaintiffs' Motion to Alter or Amend* ("Reconsideration 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), SCRPC, on the grounds that Plaintiffs lack standing and have failed to state facts sufficient to constitute a cause of action against the Defendants. The Attorney General filed his own Motion to Dismiss on October 27, 2020, seeking dismissal on similar grounds. On January 20, 2021, Defendants filed memoranda in support of their Motions to Dismiss and Plaintiffs filed a memorandum in opposition. On January 26, 2021, this Court conducted a hearing via WebEx on the Motions to Dismiss. James Mixon Griffin,

¹ The Attorney General 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 Mixed Oxide ("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 MOX Facility.

Esquire, and Badge Humphries, Esquire, appeared on behalf of Plaintiffs. J. Todd Rutherford, Esquire, John S. Simmons, Esquire, and Gerald Malloy, Esquire, appeared on behalf of W&H. William H. Davidson, II, Esquire, and Kenneth P. Woodington, Esquire, appeared on behalf of DW&D. J. Emory Smith, Esquire, appeared on behalf of Attorney General Wilson.

Factual Background

It appears from the Amended Complaint and its incorporated affidavit and attachments that, in February 2016, the State of South Carolina, represented by the Law Firms, initiated what ultimately became several lawsuits against the Department of Energy (“DOE”) and/or the United States related to the MOX Facility at the Savannah River Site (“SRS”) and certain weapons grade (defense) plutonium stored at SRS. After several years of litigation before several different federal district and appellate courts, 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.” 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, both of which are contractually enforceable by the State. The Federal Government submitted the settlement payment to the State on September 15, 2020. Thereafter, the State and Federal Government jointly filed with the U.S. Court of Appeals for the Federal Circuit an agreement for voluntary dismissal dismissing the pending litigation on September 29, 2020. Agreement to Voluntary Dismissal of Appeal, *State of South Carolina v. United States*, No. 19-2324 (Fed. Cir. Sept. 29, 2020).

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

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 upfront settlement amount recovered on behalf of the State by the Law Firms.²

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys' fees owed pursuant to the Litigation Retention Agreement on September 17, 2020. The payment was authorized by the Comptroller General and Treasurer and was approved by the Executive Budget Office ("EBO") of the Department of Administration in the normal course. On the morning of 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.

Discussion

For the reasons set forth herein and in the PI Order, this Court finds that the Motions to Dismiss should be granted and the Amended Complaint dismissed with prejudice. In the PI Order, Judge Lee specifically found that Plaintiffs do not have standing to pursue any of their claims against the Defendants. PI Order at 4-12; *see also* Reconsideration Order at 1-2.

Initially, Judge Lee's findings are dispositive.³ "It is settled [law] that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge."

² 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 Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove nine additional metric tons or pay the State the additional sum of \$1.5 billion.

³ Plaintiffs contend that Judge Lee's findings are not binding in this case, citing to Rule 54(b), SCRCF, in purported support. However, Rule 54(b) is inapplicable as it applies only to instances in which a court "adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties." Here, Judge Lee determined that Plaintiffs lacked standing for *all* of their claims and had *no* rights to assert such claims against the Defendants.

State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (1985) (citing cases); *see Graham v. Town of Loris*, 248 S.E.2d 594, 597, 272 S.C. 442, 449 (1978) (“The Court of Common Pleas is a unity. . . . There is no appeal from one Circuit Judge to another.”) (quoting *Steele v. C., C. & A. Railroad Co.*, 14 S.C. 324 (1880)). Therefore, even if this Court had identified any reason to modify Judge Lee’s orders, which, as explained below, it has not, Judge Lee’s findings are dispositive and require dismissal.

Nonetheless and in the alternative, this Court has thoroughly reviewed the PI Order and Reconsideration Order and concurs with and adopts Judge Lee’s well-reasoned analysis and findings. Plaintiffs lack standing to maintain their claims against Defendants, and therefore, the Motions to Dismiss must be granted.

Conclusion

For the reasons set forth above and in Judge Lee’s PI Order and Reconsideration Order, it is **ORDERED, ADJUDGED, AND DECREED** that the Motions to Dismiss of Defendants are **GRANTED** and this case is **DISMISSED**, with prejudice.

AND IT IS SO ORDERED.

The Honorable R. Kirk Griffin
Court of Common Pleas

February __, 2021
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Case No. 2020-CP-40-04063

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.

NOTICE OF APPEAL

South Carolina Public Interest Foundation, and John Crangle, individually and on behalf of all others similarly situated, appeal the order of the Honorable R. Kirk Griffin, entered March 5, 2021 granting Respondents' motions to dismiss. Appellant received written notice of entry of the order on the same date.

March 29, 2021

s/James M. Griffin

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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

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;

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]

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May 5, 2021
Columbia, South Carolina

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.

**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), SCRCF, 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 removal⁵ and receive additional payments⁶ 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

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.

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May 5, 2021

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
R. Kirk Griffin, Circuit Court Judge
Circuit Court Case 2020CP4004603

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,

RETURN OF ATTORNEY GENERAL TO MOTION FOR CERTIFICATION

Alan Wilson, Attorney General for the State of South Carolina, concurs that this Court should certify this case for review for legal reasons that include, but are not limited to, those set forth in the Motion. The Attorney General strongly believes that Appellants lack standing and that this case has no legal merit. Two circuit court judges have rejected Appellants' standing or other arguments. Because the case has generated public interest (Rule 204(b), SCACR) and Appellants' arguments have no merit, deciding this matter in this Court will serve judicial economy by resolving this case with finality.

Respectfully submitted,

/s J. EMORY SMITH, JR.

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May 13, 2021

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

RECEIVED

May 17 2021

S.C. SUPREME COURT

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.

**APPELLANTS’
MOTION TO CERTIFY CASE FOR REVIEW**

Pursuant to Rule 204(b), SCACR, South Carolina Public Interest Foundation (“SCPIF”) and John Crangle (“Crangle”) hereby move to certify for review by this Court the case of *South Carolina Public Interest Foundation et al. v. Alan Wilson, Attorney General for the State of South Carolina, et al.*, which is currently pending before the South Carolina Court of Appeals. Certification is appropriate because the case involves issues of significant public interest and legal principles of major importance.

This Motion is supported by 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.

Respectfully submitted,

s/ James M. Griffin

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May 17, 2021

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

May 17 2021

APPEAL FROM RICHLAND COUNTY

S.C. SUPREME COURT

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

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.

**APPELLANTS’
MEMORANDUM IN SUPPORT OF
MOTION TO CERTIFY CASE FOR REVIEW**

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Appellants South Carolina Public Interest Foundation (“SCPIF”) and John Crangle (“Crangle”) hereby move to certify for review by this Court this appeal, which is currently pending before the South Carolina Court of Appeals. Certification is appropriate because the case involves the following issues of significant public interest and legal principles of major importance:

1. When the Attorney General pays \$75 million of public funds to private law firms without authorization from a court, the General Assembly, or any public authority, and for many years has made similar payments and Appellants challenge the legality of the payment, does his unreviewed expenditure of public funds raise an issue of great public importance, requiring judicial guidance, and supporting the grant of public importance standing to Appellants?
2. When attorneys take a case on a contingency fee basis and lose in the U.S. District Court, lose in the Court of Claims, lose in the Court of Appeals for the Federal Circuit, and lose a petition for writ of certiorari to the United States Supreme Court; but elected officials pressure the federal government to settle the case, is a payment of \$75 million in attorneys’ fees excessive and patently unreasonable for the work done?
3. Was the Attorney General’s payment of \$75 million of public funds to private attorneys, without authorization from a court or the General Assembly unlawful?
4. Is an interlocutory ruling on a temporary injunction considered the law of the case for purposes of a subsequent motion to dismiss?

STATEMENT OF THE CASE

Former Governor James H. Hodges brokered an agreement pertaining to the storage of weapons-grade plutonium at the Savannah River Site (“SRS”). Governor Hodges’ brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the United States Department of Energy (“DOE”) must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566. The DOE failed to comply with the terms of the agreement. The DOE has not met the deadlines set forth in Section 2566 and, as of 2020, was liable to the State of

South Carolina for at least \$400 million in economic impact and assistance payments (Ex. A, Affidavit of James M. Griffin, May 17, 2021 (“Griffin Aff.”)).

On August 28, 2020, Attorney General Alan Wilson (“Wilson”) entered into a settlement agreement with the United States (the “Settlement Agreement”) regarding the DOE’s failure to abide by the Hodges agreement. Wilson agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE agreed to pay the State of South Carolina a substantially reduced economic impact and assistance payment of \$600 million. The Settlement Agreement requires the DOE to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” (Griffin Aff., Ex. 1, Settlement Agreement ¶ 5(a), *South Carolina v. United States*, Fed. Cir. No. 19-2324, Aug. 28, 2020).

At an August 31, 2020 press conference, Wilson announced that he intended to pay two law firms, Willoughby & Hoefer, P.A. (“WH”) and Davidson, Wren & DeMasters (“DWD”) (collectively the “Law Firms”) \$75 million from the proceeds of the DOE settlement. Wilson stated this settlement payment was expected on or after October 1, 2020.

Upon learning of Wilson’s intent, Governor Henry McMaster wrote Wilson objecting to the attorneys’ fee. The Governor had “concerns regarding the payment of attorneys’ fees” because the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” (Griffin Aff., Ex. 2, Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General, Aug. 30, 2020). Governor McMaster concluded by stating that he “could not endorse the payment of \$75 million in attorneys’ fees under the circumstances.” *Id.* David Pascoe, First Circuit Solicitor, likewise wrote Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that the entire amount must be deposited into the State’s

General Fund. (Griffin Aff., Ex. 3, Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General, Sept. 10, 2020).

September 25, 2020, Appellants South Carolina Public Interest Foundation (“SCPIF”) and John Crangle (“Crangle”) (collectively “Appellants”) filed this action against Wilson seeking a declaratory judgment that Wilson lacked authority to pay \$75 million from a DOE settlement to private law firms as attorneys’ fees absent a court order, authorization from the General Assembly, or provision in the Settlement Agreement providing that the DOE was paying the fees. (Griffin Aff., Ex. 4, Complaint 12, Sept. 25, 2020)

Appellants contend that the payment of \$75 million to the Law Firms from a settlement intended solely for the benefit of the State is unconstitutional, in violation of the Separation of Powers Clause of the South Carolina Constitution. Even if the United States had agreed to pay the State’s attorneys’ fees, the \$75 million for the work in this case seems patently unreasonable.

With the Complaint, Appellants filed a motion for a temporary restraining order and preliminary injunction on September 25, 2020, seeking to enjoin Wilson’s payment of \$75 million to the law firms (Plaintiffs’ “Initial Motion”). (Griffin Aff., Ex. 5, Motion for Temporary Restraining Order and Preliminary Injunction, Sept. 25, 2020). That afternoon, Appellants’ counsel provided Wilson copies of Appellants’ filings and asked the circuit court to schedule a hearing on Appellants’ Initial Motion. (Griffin Aff., Ex. 6, James Carpenter email to Judge Lee and counsel re Hearing on Temp. and Prelim. Inj., Sept. 25, 2020).

Wilson’s counsel emailed the circuit court on Monday morning, September 28, 2020 at 10:13 a.m. requesting that the hearing on Appellants’ Initial Motion not be held until Thursday, October 1, 2020. (Griffin Aff., Ex. 7, Bruce Norton email thread with counsel re SCPIF v. Wilson 2020CP4004603, Sept. 28, 2020). On Monday, September 28, at 11:53 a.m. the circuit court

emailed counsel tentatively scheduling the hearing for Tuesday, September 29, at 3:00 pm. (*Id.*) Thereafter, at 3:30 pm on Monday, September 28, Randy Lowell, an attorney with Appellant W&H, emailed wire instructions to Ms. Kim Buckley with the Finance Department at the Attorney General's Office, stating "Here is the wire transfer info that the Treasurer is going to ask you for." (Griffin Aff., Ex. 8, Jeff Young email exchange with Kim Buckley and Randy Lowell, Sept. 28, 2020). At 3:34 p.m. the same day, Deputy Attorney General Jeff Young emailed Mr. Lowell, stating as follows: "Just got back from CG [Comptroller General] office. RE [Richard Eckstrom] said all was well and it would go to Treasurer today." (*Id.*).¹

Also, on the afternoon of September 28, 2020, Appellants' counsel emailed counsel for Wilson asking that Wilson agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Wilson ultimately responded, writing as follows: "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." (See Griffin Aff., Ex. 9, Emory Smith email exchange with Jim Griffin re SCPIF v. Wilson 2020CP4004603, Sept. 28, 2020). The next day, Tuesday, September 29 at 2:12 pm, less than an hour before the hearing, Wilson emailed a memorandum informing the court and opposing counsel that the disputed funds had been wired to the law firms and asserting that, therefore, the Appellants' entire case was moot. (Griffin Aff., Ex. 10, Emory Smith email exchange with Bruce Norton and counsel for parties re SCPIF v. Wilson 2020CP4004603, Sept. 29, 2020; *id.*, Ex. 11, Mem. Att'y Gen. in Opp'n to Mot. to TRO or Temp. Inj., Sept. 29, 2020).

Following the hearing, Appellant Crangle contacted the South Carolina Office of the State Treasurer and was misinformed that the funds had not been transferred to the Law Firms.

¹ On April 12, 2021 Appellants received a copy of Young's email communication regarding his meeting with the Comptroller General in response to a Freedom of Information Request made to the Attorney General made on November 19, 2020.

Appellants' counsel informed the Court of this purported fact. (Griffin Aff., Ex. 12, Jim Griffin email thread with B. Norton and counsel for the parties re SCPIF v. Wilson 2020CP4004603, Sept. 28-30, 2020). The circuit court set another hearing for 7:00 p.m. on September 29, 2020. (*Id.*) Prior to and during that hearing, counsel for Wilson stated that his office had confirmed that the Law Firms had received the disputed funds. (*See id.*). During the hearing, out of an abundance of caution, the circuit court announced its intent to enter a temporary restraining order preventing the State from transferring funds to the Law Firms, in the event the funds had not been transferred. Following the hearing, the Court entered such order. (Griffin Aff., Ex. 13, Order Granting Temporary Injunction Pendente Lite, signed on September 29, 2020 and entered on September 30, 2020). That order expired at 5:00 p.m. on Friday, October 2, 2020. (*Id.*)

On the morning of September 30, 2020, the Treasurer confirmed that the proceeds had been wired to the law firm on September 29, 2020, just hours before the 3:00 p.m. hearing: “[t]he Treasurer’s office received a warrant for payment from the Comptrollers’ Office Monday night [September 28, 2020].” The Treasurer’s Office therefore “processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm’s account.” (Griffin Aff., Ex 12).

Later in the morning of September 30, 2020, Appellants filed their amended complaint naming the Law Firms as additional defendants. (Griffin Aff., Ex. 14, Amended Complaint, Sept. 30, 2020). At the same time, Appellants filed their second Motion for Temporary Restraining Order and Preliminary Injunction. (Griffin Aff., Ex. 15, Mot. for Temporary Restraining Order and Preliminary Injunction, Sept. 30, 2020). Thereafter, the circuit court, the Honorable Alison R. Lee, entered an Ex Parte Temporary Restraining Order (TRO) restraining Law Firms from dispersing the proceeds. (*Id.*, Ex. 16, Ex Parte TRO Order, Oct. 1, 2020).

On October 2, 2020, the Law Firms filed a Petition for Writ of Supersedeas with the South Carolina Court of Appeals seeking to vacate Judge Lee's TRO. Appellants filed their response to the Petition on October 5, 2020. Appellants also filed a Petition for Original Jurisdiction in the South Carolina Supreme Court on October 5, 2020. On October 6, 2020 Respondents filed a Motion to Certify Respondents' Petition for Writ of Supersedeas with the South Carolina Supreme Court. Also, on October 6, 2020 the Court of Appeals entered an order denying the Petition.² On October 26, 2020 the Law Firms' appeal from the entry of a TRO was dismissed.

On October 7, 2020, Judge Lee conducted a hearing on Appellants' Motion for Preliminary Injunction. On October 14, 2020, Judge Lee denied Appellants' motion. (Griffin Aff., Ex. 17, Order Denying Mot. for Prelim. Inj., Oct. 14, 2020). On December 17, 2020, Judge Lee denied the motion to alter or amend. (*Id.*, Ex. 18, Order Denying Mot. to Alter or Amend, Dec. 17, 2020).

The Law Firms filed separate motions to dismiss the Amended Complaint on October 20, 2020. The Honorable R. Kirk Griffin conducted a hearing on the motion to dismiss on January 27, 2021. Judge Griffin granted the Motion to Dismiss on March 5, 2021, ruling that the Plaintiffs lacked standing and declining to rule on the merits. Judge Griffin also ruled that Judge Lee's prior order denying Appellants' motion for preliminary injunction, concluding in part that Appellants lacked standing, was binding on him as the law of the case. (*Id.*, Ex. 19, Order Granting Motions to Dismiss, Mar. 5, 2021). Appellants filed a timely Notice of Appeal on March 29, 2021. (*Id.*, Ex. 20, Notice of Appeal, Mar. 29, 2021).

² On November 18, 2020, the Supreme Court entered an order denying the Motion to Certify as moot.

ARGUMENT

I. This Court Should Grant Certification to Further Clarify the Scope of Public Importance Standing.

This Court recently addressed public importance standing in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020). *Adams* addressed a one-time federal payment to the state of \$48,467,924 in coronavirus relief funds for educational purposes. Governor McMaster decided to make \$32,000,000 of the funds available for grants to students attending private schools, and Petitioners challenged that decision. Governor McMaster then challenged their standing to bring suit. The Court ruled that the petitioners had public importance standing. The Court discussed the nature of the coronavirus pandemic and concluded as follows: “[a] resolution for future guidance is needed here because **this case involves the conduct of government entities and the expenditure of public funds**, a prompt decision is necessary, and it is **likely the situation will occur in the future** if and when Congress approves additional education funding in response to the continued COVID-19 pandemic.” *Id.*, 432 S.C. at 236, 851 S.E.2d at 707 (emphasis added). Under *Adams*, “[t]he key to the public importance analysis is whether a resolution is needed for future guidance.” *Id.* (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)).

As in *Adams*, this case involves the conduct of government entities. It also involves the expenditure of public funds. A prompt decision is necessary in this case as it was in *Adams* because it is likely that the same situation will recur. Wilson has issued several contingency fee contracts, similar to the one at issue here, and upon information and belief, he plans to continue to issue them. See Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements, <http://www.scag.gov/litigation-retention-agreements>.

Appellants should have public importance standing because this dispute involves a challenge to the unauthorized expenditure of government funds by the Attorney General and a

resolution of this dispute is needed for future guidance. See *South Carolina Pub. Interest Found. v. South Carolina Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017); *South Carolina Pub. Interest Found. v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Found. v. South Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *Am. Petroleum Inst. v. South Carolina Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Found. v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee Cnty.*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School Dist. of Greenville Cnty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland Cnty. Historic Preservation Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997).

II. This Court Should Grant Certification to Further Clarify that Appellants Have Adequately Alleged Standing to Pursue the Equitable Claims Asserted.

The Amended Complaint alleges an equitable claim of restitution and the imposition of a constructive trust over the disputed attorneys' fees that were transferred to the Law Firms after the commencement of this lawsuit, just hours before the circuit court conducted a hearing on Appellants' motion for a preliminary injunction. A constructive trust arises whenever a party has obtained money that does not equitably belong to him and that he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94

(1990); *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (S.C. App. 1998); *see also*, *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) (holding that a constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title). *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) (stating that a constructive trust results from fraud, bad faith, abuse of confidence, or violation of fiduciary duty that gives rise to an obligation in equity to make restitution).

In addition, that the recipient of funds paid under a mistake of law is required to make restitution to the lawful title holder. *Trotter v. Merchants & Farmers Bank*, 180 SC 449, 186 S.E. 371 (1936). *Trotter* involved the improper payment of funds by a court appointed receiver to a creditor of an insolvent corporation. The trial judge explained as follows:

I do not think a receiver can make a voluntary payment of money under a mistake of law when he had no title to the money, and it is not his own and he has no beneficial interest in same. The receiver paid he money to the defendant, but title to same did not pass, and his successor is entitled to restitution of the amount so paid with interest from the date on which demand for return of same was made.”

Id.; *see also United States v. Wurts*, 303 U.S. 414, 58 S. Ct. 637, 82 L. Ed. 932 (1938) (“It is a well-established principle that the Government generally can “recover funds which its agents have wrongfully, erroneously or illegally paid); *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 806 (D.D.C. 1981) (holding that this common law basis for recovery of funds runs against a person “who received them by mistake and without rights”).

As established above, Appellants have public importance standing to challenge Wilson’s unauthorized expenditure of government funds. Wilson cannot defeat the Court’s jurisdiction over this matter simply by transferring the disputed funds to the Law Firms during the pendency of this action. Under these circumstances, Appellants’ public importance standing permits the enforcement of a constructive trust over these funds.

Additionally, Plaintiffs have adequately alleged derivative standing. This Court first addressed the ability of a citizen to assert claims for the recoupment of money on behalf of a governmental entity in *Ex Parte Hart*, writing as follows:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .

Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex Parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54 (1939).

Accordingly, Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Richardson v. Blackburn*, 41 Del. Ch. 54, 55-56, 187 A.2d 823, 823-24 (1963); *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other” (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that “[e]quity will not suffer a wrong without a remedy”). Indeed, “[t]he requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. at 524, 537 S.E.2d at 304 (internal quotation marks omitted).

Wilson refused repeated demands to assert the State of South Carolina's rights vis-à-vis the Defendant and has instead violated the South Carolina Constitution in an attempt to overpay the Law Firms for their services. First, Wilson refused to act in response to Governor McMaster's August 30, 2020 letter questioning the attorneys' fees Wilson intended to pay. (See Griffin Aff., Ex. 2). Next, Wilson refused to act in response to the September 10, 2020 letter from First Circuit Solicitor David Pascoe. (See Griffin Aff., Ex. 3). Then, Wilson refused to act in response to Plaintiffs' Initial Complaint and Initial Motion, filed and provided to Defendant Wilson on September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment of the disputed \$75,000,000 to the Law Firms, Wilson expedited payment to the Law Firms via wire transfer on the afternoon of September 28, 2020, after the circuit court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. (See Griffin Aff., Ex. 21, Affidavit of Kimberly Buckley, Oct. 1, 2020). Finally, Wilson argued to the circuit court that this wire transfer made Plaintiffs' claims moot.

Under these circumstances, where the Attorney General has repeatedly refused to assert the State's claims against the Law Firms and instead has taken drastic unconstitutional and inequitable actions to make a patently unreasonable \$75 million payment to the Law Firms, Plaintiffs have standing to assert the State of South Carolina's claims against Defendants. See *Ex Parte Hart*, 190 S.C. 473, 2 S.E.2d at 53-54; see also *Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Ex Parte Hart* with approval); *Richardson*, 41 Del. Ch. at 55-56, 187 A.2d at 823-24.

III. This Court Should Grant Certification to Address the Jurisdiction of the Circuit Court to Determine the Reasonableness of Attorneys' Fees Paid from State Settlement Funds.³

A “lawyer shall not make an agreement for, charge, or collect an unreasonable fee.” Rule 1.5, South Carolina Rules of Professional Conduct (“RPC”); *see also* Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006). Attorneys’ fees totaling \$75 million for the work performed in this case appears to be patently unreasonable.

In 2016,⁴ the Law Firms first sued in the United States District Court for the District of South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed the claim for damages,⁵ ruling that such a claim must be filed in the United States Court of Federal Claims. (Griffin Aff., Ex. 23, Order, *South Carolina v. United States*, Case No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76). The Law Firms refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance

³ Appellants request that this Court address the merits of their substantive claims in the interest of justice and judicial economy. *See, e.g., Widdicombe v. Tucker-Cales*, 366 S.C. 75, 85, 620 S.E.2d 333, 338-39 (Ct. App. 2005) (“[T]he issues raised by [the m]other on appeal have been the subject of much contention in this case. They will inevitably be raised to the family court again in the future, and because they have been fully briefed by the parties, we find that it would be in the interest of judicial economy to decide the matters now.”), *aff’d in part and vacated in part on other grounds*, 375 S.C. 427, 428, 653 S.E.2d 276, 276 (2007).

⁴ Respondents attempt to justify their \$75 million fee by providing a summary of work performed prior to January 2016. However, the earliest effective date of Defendant’s contingency fee agreement is February 8, 2016. Griffin Aff. Ex. 22, 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 (hereinafter “Fee Agreement”).

⁵ The District Court did not dismiss the State’s claim for injunctive relief.

payments because the DOE had not complied with Section 2566 for 2017. Once again, the Law Firms lost the case as the Court of Federal Claims ruled with the DOE. (*Id.*, Ex. 24, Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32). The Law Firms then appealed the ruling to the United States Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. (*Id.*, Ex. 1).

Upon information and belief, the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE must pay South Carolina the statutory penalty from funds appropriated by Congress. (*See id.*, Ex. 25, Court Docket Sheets, *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS (D.S.C.)). Wilson had no need to hire private counsel to address a relatively straightforward issue that elected leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. (*See id.*, Ex. 2).

Under similar circumstances, *Cendant Corporation Prides Litigation*, 243 F.3d 722 (3d Cir. 2001) overturned a \$19 Million fee award amounting to 5.7% of the total recovery because the settlement resulted from the efforts of public agencies, and the attorneys did very little work, compared to other cases involving settlements over \$100 Million. In *Cendant*, Third Circuit Court of Appeals noted that there was very little motion practice and that discovery was virtually non-existent. Class counsel spent approximately 5,600 hours on the case. The court compared the fee award to other large class settlements where the common fund exceeded \$100 Million. The court observed that the fee awards in those cases ranged from 2.8% to 36% to the total settlement fund, and a fee of 5.7% appeared to be in line when just comparing percentages. However, the attorneys

in those other cases spent far more hours (45,000 in one case) and engaged in significantly more complex discovery (reviewing 11 million pages of documents). The court summarized its review of the other cases involving large fee awards, “in case after case, the same factors recur: complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case Because none of these factors which increase the complexity of class litigation was present here, it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.” *Id.* at 741.

The court concluded that much of the work done to facilitate the settlement was accomplished by regulators, not counsel. The court explained that “allowing private counsel to receive fees based on the benefits created by public agencies would undermine equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs’ attorneys to minimize the cost of failure by free riding on the . . . efforts of others.” *Id.*

In *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), the attorneys’ fees were awarded against the State under the fee-shifting “state action” statute (S.C. Code Ann. § 15-77-300), rather than via the common fund doctrine, as in this case. However, *Layman* emphasized the requirement of reasonableness using either method:

Regardless of any theoretical preference for one method of fee calculation over another, ***the overriding benchmark for awards of attorneys’ fees under both the state action statute and the general premise of the common fund doctrine is that attorneys’ fees must be “reasonable.”*** See [*Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 562 (1986)]. In light of the circumstances of this case, we hold that an award of \$8.66 million in attorneys’ fees is entirely unreasonable.

Layman, 376 S.C. at 455, 658 S.E.2d at 331 (emphasis added).

Importantly, the fee agreement between the Attorney General and the Law Firms expressly states that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be

approved by a court of competent jurisdiction.” (Griffin Aff., Ex. 22, Fee Agreement at 9). There is nothing prohibiting Wilson or the Law Firms from seeking judicial approval of the payment of \$75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.⁶ However, Wilson and the Law Firms seek to avoid judicial review, and accordingly, Wilson paid the Law Firms \$75 million without making any showing of reasonableness.

Wilson entered into an amended fee agreement dated June 13, 2019 that is patently unreasonable given the status of the litigation. (*Id.*, Ex. 26, Amendment to Fee Agreement, June 13, 2019). In that amended fee agreement, the Attorney General agreed to provide WH additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm’s representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. (*See id.*). The State had prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child’s ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). (*Id.*, Ex. 27). On June 7, 2019, WH along with Wilson had filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex. 28, Pet. for Writ of Certiorari, *South Carolina v. United States*, No. 18-1531, 2019 WL 246930 (2019)) and a Reply Brief on September 24, 2019 (*id.*, Ex. 29, Reply Br. for Pet’r, *South Carolina v. United States*, No. 18-1531, 2019 WL 4730104 (2019)).

⁶ Under South Carolina, the following factors are considered to determine whether an award of attorneys’ fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Under the terms of the June 13, 2019 amended fee agreement, Wilson agreed to pay WH 2% of the ultimate recovery for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. (See Griffin Aff., Ex. 26). The amended fee agreement was executed on June 13, 2019 by WH, *after* the State had lost in the Fourth Circuit and *after* the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court ultimately denied that Petition on October 15, 2019 in *South Carolina v. United States*, 140 S. Ct. 392 (2019). (Griffin Aff., Ex. 30).

Under the terms of the June 13, 2019 amended fee agreement, WH is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the District of South Carolina. Wilson was fully aware that WH had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, WH is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Wilson pays WH over \$65,000 per page for these filings.

Wilson as Attorney General entered into the fee agreement on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Plaintiffs, individually and on behalf of the Citizens of this State, demanded that Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement, if he is permitted to use any portion of the settlement proceeds to pay litigation costs, as required by the express terms of the fee agreement and South Carolina law.

IV. This Court Should Grant Certification to Address the Attorney General’s Authority to Pay Private Law Firms a \$75 Million Contingency Fee when the Fee is not Awarded by Court Order or Settlement, as required by Statute.

In litigation over the allocation of the \$600 million in settlement proceeds, Wilson acknowledged that as the Attorney General, **he has no authority** to appropriate money that is payable to the State of South Carolina:

The Attorney General has no authority to appropriate money. The money in the settlement was **payable to the State of South Carolina** pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90–91, 678 S.E.2d 412, 416–17 (2009).

(Griffin Aff., Ex. 31, Mem. Att’y Gen. in Opp’n to Mot. to TRO or Temp. Inj., 4-5, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020)) (emphasis added, citation to exhibit omitted).

Moreover, Wilson stated the General Assembly is the proper body to determine how the \$600 million is allocated, not the Attorney General:

The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money **to the State of South Carolina**. The statute under which settlement was reached provides for payment of funds **to the State of South Carolina** and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but **the General Assembly is the proper body to determine how the funds at issue in this action should be allocated**, rather than him or this Court.

Id. at 1-2 (emphasis added).

A. Neither S.C. Code Ann. § 1-7-85 Nor § 1-7-150(b) Authorizes the Attorney General to Make Payment of the Attorneys' Fees at Issue.

Respondents assert that S.C. Code Ann. §§ 1-7-85 and 1-7-150(b) of the South Carolina Code of Laws provide the Attorney General with authority to pay special counsel \$75 Million of the \$600 million in settlement proceeds. Respondents' contention is not well founded.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, **except for investigative costs and litigation costs awarded by court order or settlement**. *Id.* (emphasis added). The Law Firms were not awarded attorneys' fees by court order. Furthermore, the DOE Settlement Agreement expressly disclaims any obligation by the DOE to pay the Law Firms attorneys' fees.

Respondents also erroneously rely upon S.C. Code § 1-7-85, which has the same language as § 1-7-150(B) limiting reimbursement to "attorney fees or investigative costs or costs of litigation **awarded by court order or settlement**."

Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation **awarded by court order or**

settlement, travel expenditures, depositions, printing, transcripts, and personnel costs. ***Reimbursement of these costs may be obtained by the Office of the Attorney General from the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses, with the approval of the State Budget and Control Board.***

S.C. Code Ann. § 1-7-85 (emphasis added). *See also, Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) (“In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.”).

These costs may be reimbursed from the “the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses.” S.C. Code Ann. § 1-7-85. This statute does not contemplate that the Attorney General can rely upon § 1-7-85 to ignore the more particular statutory provision in § 1-7-150(B) addressing how the Attorney General must handle recoveries awarded to the State by judgment or settlement. To the extent these statutory provisions are inconsistent, § 1-7-150(B) should control because it is more specific in addressing proceeds of a settlement or judgment. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), *reh’g denied* (June 26, 2018) (“Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect” (internal quotation marks omitted)).

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State’s General Fund, ***except for investigative costs and litigation costs awarded by court order or settlement.*** S.C. Code Ann. § 1-7-150. The operative word in Section 1-7-150(b) is the term “awarded.”

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***, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.

Id. § 1-7-150(B) (emphasis added).

In this matter, neither exception applies because there was not an order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate ***payment by the United States to the State of South Carolina*** in the amount of \$600 Million (Six Hundred Million), inclusive of interest, ***with each party to bear its own costs, attorneys fees and expenses.***" (Griffin Aff., Ex. 1 (emphasis added)). Accordingly, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Respondent Wilson paid private lawyers \$75 million out of the \$600 million, which was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code.

The General Assembly used the verb "awarded" when describing the circumstances in which the Attorney General may use funds recovered in a civil action to pay costs of litigation. Black's Law Dictionary defines awarded as "to grant by formal process or by judicial decree (the company ***awarded*** the contract to the low bidder) (the jury ***awarded*** punitive damages)" Black's Law Dictionary (11th ed. 2019) (emphasis added). Merriam-Webster likewise defines awarded "to give by judicial decree or after careful consideration // The jury ***awarded*** damages to the defendant. // ***award*** a contract." Merriam-Webster, <https://www.merriam-webster.com/dictionary/awarded> (last visited May 11, 2021) (emphasis added).

A proper construction of Section 1-7-150(b) becomes even clearer when the statute's treatment of litigation costs is examined where litigation concludes with a judgment, instead of a settlement. According to Section 1-7-150(B), all monies "awarded the State of South Carolina by judgment" must be deposited into the General Fund. S.C. Code Ann. § 1-7-150(B). In that case, the Attorney General is only permitted to use monies to pay litigation costs that are "awarded by court order." *Id.* Absent a "court order" awarding litigation costs, the entire amount "awarded the State of South Carolina by judgment" must be deposited into the General Fund. *Id.*

Obviously, a court order is significantly different from, and narrower than, a judgment. There can be a judgment for the State without a court order awarding attorneys' fees. By the phrase "awarded by court order," the General Assembly clearly did not grant the Attorney General authority to obtain reimbursement for litigation costs from the proceeds of every judgment awarded to the State. Instead, the Attorney General's authority is limited to reimbursement of "litigation costs awarded by court order." *Id.*

There is nothing in Section 1-7-150(b) that distinguishes an award by court order from an award by settlement. To interpret this statute to allow the Attorney General to use proceeds from a settlement agreement that lacks any specific provision awarding litigation costs when the Attorney General is clearly prohibited from using proceeds from a judgment to pay litigation costs would lead to an impermissible, absurd result. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature . . ."). The Court must consider the meaning of Section 1-7-150(b) in light of its full terms and how those terms evidence the General Assembly's intent for costs of litigation to actually be awarded by a court order or settlement.

The plain meaning of the verb “awarded” evidences the General Assembly’s intent that there be a grant or decree that specifically provides for the payment of litigation costs in a court order or settlement. Absent an award of attorneys’ fees through settlement or court order, Wilson lacks authority to pay fees from the settlement proceeds to the Law Firms.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State’s general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) (“[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Wilson’s payment of \$75 million from the State’s \$600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

B. Federal Funds Oversight Act Does Not Authorize the Payment of the Attorneys’ Fees at Issue.

In an attempt to circumvent Section 1-7-150’s requirement that the full \$600 million be deposited in the General Fund, Wilson purportedly relied on the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* However, a careful reading of this statute further supports the Appellants’ position that, absent an award of attorneys’ fees, only the General Assembly can appropriate funds to pay the Law Firms from these settlement proceeds.

Section 2-65-20 provides that “the General Assembly shall appropriate all anticipated *federal funds and other funds.*” S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds “means

financial assistance made to a state agency by the United States Government in any form.” S.C. Code Ann. § 2-65-15(5). Examples of federal funds include “a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land.” *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition. Respondent’s reliance upon the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* is misplaced. The DOE settlement proceeds were not intended as financial assistance for the South Carolina Attorney General’s Office or any other State agency and thus not within the purview of the South Carolina Federal Funds Oversight Act.

The settlement proceeds are payable to the “State of South Carolina” and thus may possibly qualify as “other funds.” The term “other funds” means “any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act.” S.C. Code Ann. § 2-65-15 (8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the Appropriations Act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budget Office (“EBO”) for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO’s authorization to approve expenditures of “other funds” is limited to “funds from private foundations or industries which are not included in the appropriations act.” *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. *Id.*

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that “the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO.” (See South Carolina Dept. of Admin. Request for Other Funds Auth. Form, Sept. 2019 (available at <https://admin.sc.gov/budget/otherfundsauthorization>)). The EBO Request submitted on behalf of Wilson requesting authorization for the \$75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. (See Griffin Aff., Ex. 32, South Carolina Dep’t of Admin. Form BD-100 Request for Other Funds Authorization, Sept. 17, 2020). Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. (Griffin Aff., Ex. 33, Honorable Nikki G. Setzler Affidavit ¶ 4). In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the \$75 million fee from funds that the Director lacks authority to appropriate.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general “other funds” provisions. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *DomainsNewMedia.com, LLC*, 423 S.C. at 304, 814 S.E.2d at 518 (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38,

41 (2006) (citation omitted).). The EBO has no authority to authorize the payment of attorneys' fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

C. Proviso 59.8 Is Immaterial.

Respondents also rely upon Proviso 59.8 of the State's 2020 budget and argue that Plaintiffs' entire argument "is therefore inapplicable." Proviso 59.8 simply states that, for the current fiscal year, any funds received by the Attorney General that would otherwise have been credited to the General Fund shall be deposited first in a special account entitled the "Litigation Recovery Account" and that then those funds "must be expended only as prescribed by law." 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). It does not otherwise suspend or contradict Section 1-7-150(B). Rather, Section 1-7-150(B) and Proviso 59.8 should be read consistently with one another. Accordingly, Proviso 59.8's requirement that the funds "must be expended only as prescribed by law" should be read in conjunction with Section 1-7-150(B) and not as an exception to Section 1-7-150(B)'s requirements. Accordingly, Proviso 59.8 is immaterial.

When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

V. This Court Should Grant Certification to Clarify the Law of the Case Doctrine.

Judge Lee's factual findings and legal rulings when denying Appellants' motion for a preliminary injunction are not binding on the merits of Appellants' claims. In *University of Texas v. Camenish*, 451 U.S. 390 (1981), the United States Supreme Court explained that "given the haste that is often necessary" when addressing a motion for preliminary injunction, "the findings of fact and conclusions of law made by a court . . . are not binding at trial on the merits."

In *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013), the Supreme Court explained that the law of the case doctrine does not apply to

interlocutory rulings and that do not finally determine a substantive right. The issue on appeal in *Shirley's Iron Works* was whether plaintiff had a third-party beneficiary claim against a municipality for not requiring a general contractor to be bonded, as required by statute. The circuit court had previously stricken plaintiff's claim for pre-judgment interest and attorneys' fees, concluding that plaintiff's claim sounded in tort only, and that pre-judgment interest and attorneys' fees are not available under the South Carolina Tort Claims Act (the "TCA"). Subsequently, another circuit court judge granted the City of Union summary judgment on all causes of action, concluding that plaintiff's claims sounded in tort and were barred by the TCA.

The Court of Appeals reversed, concluding that the plaintiff has an implied statutory cause of action that sounds in contract, not tort, and is therefore not barred by the TCA. The Supreme Court granted certiorari and affirmed the Court of Appeals. The Supreme Court rejected the City of Union's argument that the law of the case doctrine foreclosed a third-party beneficiary claim. In so holding, the South Carolina Supreme Court stated as follows:

The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right Ordinarily an interlocutory ruling which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

Shirley's Iron Works, Inc. v. City of Union, 430 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). The Supreme Court further explained that the order "merely granted the City's motion to strike with regard to attorneys' fees and prejudgment interest pursuant to Section 15-7-300 and should not be viewed beyond their intended and limited purpose. *Id.* at n.11.

Moreover, Rule 54(b), SCRCP provides "[i]n the absence of [the court directing entry of a final judgment as to one or more but fewer than all the claims], any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . , and *the order or other form of decision is subject to revision at any*

time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Rule 54(b), SCRCP (emphasis added).

Here, Judge Lee did not direct entry of a final judgment on the merits of Appellants’ claims. In fact, Respondents filed their motions to dismiss after Judge Lee issued the order denying preliminary injunctive relief and requested that she rule upon the same. Judge Lee refused. (Griffin Aff., Ex. 34 Judge Lee email to Counsel, Oct. 28, 2020). Thus, the preliminary factual findings and legal rulings contained in the order denying Appellants’ motion for preliminary injunction are non-binding and subject to revision at any time prior to the entry of a final judgment. Judge Lee’s Order should not be viewed beyond its intended and limited purpose.

Finally, the standard for granting a motion to dismiss is significantly different from the standard on motion for preliminary injunction. At the motion to dismiss stage, the Court is required to accept all facts alleged in the Complaint as true. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007). By contrast, in evaluating whether a plaintiff is entitled to a preliminary injunction, the Court must examine the merits of the underlying case to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. South Carolina Dep’t of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

CONCLUSION

Appellants respectfully request that this Court certify this case for review because of the significant public interest and legal principles of major importance involved, as well as the need for a speedy and prompt resolution of this dispute over \$75 million of settlement funds paid directly to the State of South Carolina on behalf of the DOE.

Respectfully submitted,

s/ James M. Griffin

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May 17, 2021

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

May 17 2021

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

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.

**APPELLANTS' RESPONSE TO
RESPONDENTS' MOTION FOR CERTIFICATION**

In response to Respondents' Motion for Certification, Appellants South Carolina Public Interest Foundation ("SCPIF") and John Crangle ("Crangle") hereby incorporate their Memorandum in Support of Appellants' Motion to Certify Case for Review.

For the reasons stated therein, certification is appropriate because the case involves issues of significant public interest and legal principles of major importance.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

s/ James M. Griffin

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May 17, 2021

Attorneys for Appellants

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.

**REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR CERTIFICATION AND
RETURN TO APPELLANTS' MOTION TO CERTIFY CASE FOR REVIEW**

Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A.
(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, submit this joint Reply in Support of Respondents'
Motion for Certification and Return to Appellants' Motion to Certify Case for Review.

On May 5, 2021, Respondent Law Firms filed their Motion for Certification and
Memorandum in Support requesting certification of the above-captioned appeal for review by this
Honorable Court. On May 13, 2021, Respondent Alan Wilson, Attorney General for the State of
South Carolina, filed his Return to Respondent Law Firms' Motion for Certification, concurring
with the requested certification. For the reasons set forth in these prior filings with this Court,
Respondent Law Firms submit that certification of this appeal is appropriate.

On May 17, 2021, Appellants filed their own Motion to Certify Case for Review and Memorandum in Support as well as their Response to Respondent Law Firms' Motion for Certification. By this Return, Respondent Law Firms agree that certification of this appeal is appropriate, but this is the absolute extent of Respondent Law Firms' agreement with Appellants. Indeed, Appellants' Memorandum in Support of Motion to Certify Case for Review is notable in its failure to address the legitimate reasons for which certification is appropriate in this case. Appellants simply repeat arguments on the merits of their claims made before—and rejected by—the circuit court and also republish false (if not defamatory) allegations against Respondents.¹ These arguments are, of course, improper and irrelevant to this Court's consideration of the standard under Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b). Moreover, Appellants' Motion to Certify Case for Review and Memorandum in Support is inappropriate, procedurally defective, and duplicative given that Respondent Law Firms have already moved for certification, which Appellants do not oppose; therefore, it should be disregarded.

For the reasons discussed above and in Respondent Law Firms' Motion for Certification and Memorandum in Support, Respondent Law Firms respectfully request that this Court exercise its discretion 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' pending Motion to Dismiss; and that the Respondent Law Firms be granted such other and further relief as is just and proper.

¹ Respondent Law Firms will not address the litany of misstatements of fact and law set forth in Appellants' Memorandum in Support of Motion to Certify Case for Review as they have no bearing on the issue of certification now before this Court, are therefore irrelevant at this stage, and will be explained at the appropriate time if it becomes relevant to do so. Suffice it to say, however, the majority of Appellants' factual allegations are false—and were in fact discredited in the proceedings below—and their legal conclusions are wrong.

Respectfully submitted,

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AND

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DeMasters, P.A.**

May 24, 2021
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
R. Kirk Griffin, Circuit Court Judge
Circuit Court Case 2020CP4004603

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,

**RETURN OF ATTORNEY GENERAL TO
APPELLANTS' MOTION FOR CERTIFICATION**

Alan Wilson, Attorney General for the State of South Carolina, concurs only that Certification is appropriate; however, he disagrees with many of the factual allegations and legal arguments in Appellants' Motion and Memorandum and will not address them now as they have no bearing on whether certification should be granted.

Respectfully submitted,

/s J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

[Signature block continues next page]

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May 24, 2021

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
S.C. PUBLIC INTEREST	)	
FOUNDATION, et al.,	)	Case No.: 20-CP-40-4603
	)	
Plaintiffs,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	(VIA WEBEX)
ALAN WILSON, et al.,	)	
	)	
Defendants.)	)	

January 26, 2021
Columbia, South Carolina

BEFORE:

HONORABLE R. Kirk Griffin, Judge

A P P E A R A N C E S:

James G. Carpenter, Esq.
James M. Griffin, Esq.
Badge Humphries, Esq.
Attorney for the Plaintiffs

J. Emory Smith, Jr., Esq.
Jeff Young, Esq.
Robert D. Cook, Esq.
Attorneys for Alan Wilson, Attorney General

J. Todd Rutherford, Esq.
John S. Simmons, Esq.
Gerald Malloy, Esq.
John S. Simmons, Esq.
Attorneys for Willoughby & Hoefer, P.A.

Kenneth Woodington, Esq.
William H. Davidson, Esq.
Attorneys for Davidson, Wren & DeMasters, P.A.

T. Dayton Grainger, Jr.
Court Reporter

I N D E X

WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

Certificate p. 29

E X H I B I T S

NO.

DESCRIPTION

ID.

EV.

(There were no exhibits marked.)

1 THE COURT: It is my plan, upon the request of our members of the
2 Legislature to handle the matters relating to case number 2020-CP-40-
3 04603, South Carolina Public Interest Foundation versus Alan Wilson, et al.

4 There are multiple motions with regard to this case, motions to
5 dismiss and then, motions to intervene, and folks, I'll be happy to take these
6 motions in any order which y'all see fit, but before we get started I do want
7 to make something known to all of the parties who are involved with that
8 case.

9 One of the partners in Davidson, Wren & DeMasters, Michael Wren,
10 was a college classmate of mine. We were in the same fraternity, and we are
11 participants in a fantasy football league together.

12 I certainly don't feel like that has any bearing on my ability to be fair
13 and impartial, but I do feel like it is the kind of thing that litigants need to
14 be made aware of.

15 Mr. Wren and I are friends, but we don't see each other routinely. So,
16 I just wanted to make that aware to everybody who is involved in that case,
17 and if anybody has any issues I just felt like that would be the type of thing
18 that the canons require me to disclose

19 MR. CARPENTER: Can you tell us again your relation -- which person
20 this is?

21 THE COURT: Michael Wren, who is a partner in Davidson, Wren &
22 LeMasters (sic) -- DeMasters, excuse me. So, he is a partner in that law
23 firm, and ---

24 MR. CARPENTER: He's not participating in this hearing?

25 THE COURT: No, but he is -- I believe he's a member of one of the

1 Defendants in the lawsuit. He's not an active participant as a lawyer, but
2 he is a partner in one of the law firms who is a party to the case.

3 MR. GRIFFIN: Judge Griffin, it looks like we have lost Jim Carpenter
4 for a minute.

5 THE COURT: I see him. He's on.

6 MR. RUTHERFORD: Is that mine?

7 THE COURT: To be clear for the record, did everybody hear the
8 disclosure I made with regard to my knowledge and being a college
9 classmate of a lawyer who is a member of one of these law firms that are the
10 Defendants in this matter?

11 (No response.)

12 THE COURT: Folks, with that disclosure being made, are there issues
13 that anyone feels necessary to be heard on?

14 MR. RUTHERFORD: None from us, Your Honor.

15 MR. SMITH: Your Honor, Emory Smith for the Attorney General's
16 Office. I believe that the motion for protective order that I made is the first
17 one on the list, but the reason for making it was because of the pendency of
18 motions to dismiss, and so, I would suggest that it be at the end of the
19 motions, and we would respectfully let Willoughby & Hoefer and Davidson
20 firms go first in their arguments concerning the motion, and we would
21 follow them.

22 THE COURT: All right.

23 MR. SMITH: If there's no objection to that procedure.

24 THE COURT: All right, and any objections whatsoever to me hearing
25 this matter? I certainly believe I can be fair and impartial, but I did want to

1 – I thought it was incumbent upon me based on the judicial canons to
2 disclose my attending college and being friends with Michael Wren, who is a
3 member of one of the Defendant law firms.

4 MR. SMITH: None from the Attorney General's Office, Your Honor.

5 MR. GRIFFIN: Your Honor, this is Jim Griffin. Jim Carpenter, I'll
6 defer to you. You know it's kind of – Judge, I will say it's put us in a tough
7 spot since we can't consult with our clients in this sort of fractured
8 environment, and – but anyway, that's all. Jim, can you hear us, Jim
9 Carpenter?

10 MR. CARPENTER: The sound is going in and out some, but I hear
11 nearly all of it. I'm not going to make any objection.

12 THE COURT: All right. Thank you, folks, and like I said, I don't feel
13 that there's any issue with my ability to be fair and impartial, but out of an
14 abundance of caution I did feel that the canons would require this
15 disclosure. With that issue being covered, I will be glad to hear the motions
16 to dismiss and be glad to hear from ---

17 MR. CARPENTER: Judge, I'm still getting about ---

18 THE COURT: All right. I'm going – is anybody else having any trouble
19 hearing me?

20 MR. RUTHERFORD: Not at the moment, Judge. I can hear you.

21 MR. CARPENTER: Yes, I am. I'm having trouble. I lose the pictures.
22 I sometimes see a spinning circle where your picture should be, and
23 sometimes when I hit audio I hear every other syllable. Sometimes I don't
24 hear anything.

25 THE COURT: Mr. Carpenter, I think that may be an issue on your

1 end, because I'm seeing what you're seeing. Sometimes your picture is
2 fading in and out, and I don't believe I'm losing anyone else. Are you
3 hearing what I'm saying now?

4 MR. CARPENTER: Yes, right now I am, and your picture just popped
5 up.

6 THE COURT: Okay. Well, we're going to move forward, and if you are
7 having trouble hearing me just gesture or let me know. I just don't know
8 that there's any way that I can -- I don't know of a way to repair the issue
9 that we're having with these technical matters. So, we're just going to have
10 to do the best we can with the technology that we have been provided.

11 MR. GRIFFIN: Jim, -- Your Honor, may I offer Jim a suggestion?
12 Maybe if you dial in with a landline and just keep your video on your device
13 and mute the sound you may be able to hear better, if you have got a
14 landline there, but there is a landline number associated with this call, with
15 this hearing.

16 MR. CARPENTER: Okay. I'll try it that way.

17 MR. WOODINGTON: Your Honor, while that's going on -- this is Ken
18 Woodington. My name is showing up as Will Davidson, but I'm Ken
19 Woodington at the Davidson law firm. We finally managed to get one of us
20 in as a participant.

21 THE COURT: All right. Well, we're going to give Mr. Carpenter a
22 moment to try and call in, and folks, again, I'm sorry that this -- we haven't
23 been able to get started in a manner that we hoped to. You know these
24 technical issues have popped up from here and there, but as soon as Mr.
25 Carpenter calls in we will get started with the motions. We will be at ease

1 until we hear from Mr. Carpenter.

2 MR. GRIFFIN: Judge, he's calling in now. I looked the number up.
3 Hopefully we'll hear from him momentarily.

4 THE COURT: All right. I think he has just come in as a call-in user.

5 MR. CARPENTER: Judge, I'm on my phone. I changed the settings
6 on my phone. Let's try it like this. It seems to be working better.

7 THE COURT: Okay. Can you hear me better now?

8 MR. CARPENTER: Yes, much better. Thank you.

9 THE COURT: All right. Thankfully, we appear to have the technical --
10 well, we seem to have lost Mr. Malloy and Rutherford. Gentlemen, I
11 apologize for these problems. It seems now that we have totally lost Mr.
12 Rutherford and Mr. Malloy. Let's see if we can rectify the situation, and I'll
13 be back with you in a few moments.

14 (There was a short recess.)

15 MR. RUTHERFORD: This is Todd. Can you hear me?

16 THE COURT: Yes, sir, I can hear you.

17 MR. RUTHERFORD: Okay. Can everybody else hear me?

18 THE COURT: Can everybody else hear?

19 THE COURT: All right, and Senator Malloy is there with you?

20 MR. RUTHERFORD: Senator Malloy had to walk back into the
21 chamber, but he's here in spirit. So, we're good.

22 THE COURT: Okay. We are able to proceed without him?

23 MR. RUTHERFORD: Yes.

24 THE COURT: All right. Let's take up the motions to dismiss first, and
25 Mr. Rutherford, I'll be glad to hear from you or any of the other defense

1 attorneys. It makes no difference to me which order we go.

2 MR. RUTHERFORD: Thank you, Your Honor. May it please the
3 Court?

4 THE COURT: Yes, sir.

5 MR. RUTHERFORD: We make a motion to dismiss based on the fact
6 that the Honorable Judge Alison Lee on more than one occasion – in fact, on
7 October 14, 2020, when she denied the Plaintiffs’ motion for a preliminary
8 injunction and then, again, on December 17, 2020 when she denied the
9 Plaintiffs’ motion to alter or amend, she stated on both occasions that the
10 Plaintiffs lacked standing in this case, and that motion and her decision was
11 wide-ranging based on everything they had presented. They have no
12 standing in this case, and this question at this point is moot in our opinion,
13 because Judge Alison Lee is a circuit court judge. She has ruled on this,
14 and that should be the end of it.

15 We respectfully request that you dismiss this case with prejudice
16 based on Judge Lee’s findings and the fact that the Plaintiffs lack standing
17 to bring any claims at this point.

18 THE COURT: Thank you, Mr. Rutherford. Mr. Griffin or Mr.
19 Humphries, response to Mr. Rutherford’s argument?

20 MR. GRIFFIN: Your Honor, Mr. Carpenter’s going to argue the
21 standing issue. I would address the law of the case issue on the front end,
22 and Your Honor, as we had briefed in our memorandum, the rulings – the
23 only ruling that is law of the case is her ruling denying our motion for
24 preliminary injunction.

25 The case law that we have cited, both the U.S. Supreme Court and the

1 South Carolina Supreme Court, stand for the proposition that collateral
2 findings or findings made in connection with a ruling in a motion for
3 preliminary injunction are not binding on the merits of the case, and then,
4 Your Honor, I would specifically bring your attention to the Shirley Iron
5 Works v. City of Union, which was cited in our brief. It's at 403 S.C. 560,
6 and in our view, Your Honor, the Supreme Court decision issued in 2013
7 controls the question of whether the law of the case doctrine bars us from
8 arguing against their motion to dismiss.

9 The significance of the Shirley Iron Works case, Your Honor, is – and
10 it takes a little bit of explanation, but the issue in that case was whether a
11 subcontractor, who did not get paid by his general contractor on a job
12 bid out by the City of Union, where the subcontractor had a lawsuit
13 against the City of Union for failing to comply with the Subcontractors' and
14 Supplier Payments Protection Act. That's a mouthful, but basically what
15 happened, there was intermediate rulings by two judges, one Judge Steven
16 John and one Judge Paul Short striking the Plaintiff's complaint seeking
17 attorney's fees and prejudgment interest.

18 Both Judge Short and Judge Steven John ruled that the case
19 sounded in tort, and therefore, because it was a tort claim they could not
20 get attorney's fees or prejudgment interest.

21 The South Carolina Supreme Court ruled that Plaintiff's claim was a
22 third-party beneficiary claim and that – and that they pled a third-party
23 beneficiary case.

24 The City of Union argued, oh, but Judge Short and Judge Steven (sic)
25 said it was a tort case, and therefore, they were denied attorney's fees, and

1 what the Supreme Court said we cited in the quote of the Supreme Court in
2 our brief, but what's interesting is that what the Supreme Court ultimately
3 ruled was that Judge Short and Judge Steven John, the only issue before
4 them was a motion to strike, and the only ruling that they made as law in
5 the case is striking attorney's fees.

6 The fact that they concluded that there was only a tort claim and no
7 third-party beneficiary claim was immaterial to the ultimate outcome in the
8 case, and the same situation arises here. The only issue before Judge
9 Alison Lee was whether she was going to grant or deny our motion for
10 preliminary injunction. She denied our motion for preliminary injunction.
11 That's the law of the case. We're not asking you to revisit that ruling. What
12 we're asking you to do is to deny the Defendant's motion to dismiss on the
13 merits, and I'll pass it back to Mr. Carpenter on the argument to address
14 standing.

15 THE COURT: Thank you, Mr. Griffin.

16 MR. CARPENTER: Thank you, Your Honor. I'm Jim Carpenter. I also
17 represent the Plaintiffs. I'd like to address the issue of public important
18 standing. We referenced this and addressed it in pages 24 to 26 of our
19 memorandum.

20 The current statement of the test for public important standing has
21 been set out in two recent cases. The Defendants in their motion cite a lot
22 of other cases, and the way this test has been articulated over the last 15 to
23 20 years has changed in the way it's articulated, but in the two most recent
24 cases there seems to have developed a three-part test for public important
25 standing.

1 The two cases are Adams v. McMaster, which is the recent case
2 finalized last month in which people challenged the Governor's use of
3 federal funds to make scholarships for students at private schools, and the
4 three element test is, number one, does the issue involve the expenditure of
5 public funds, and number two, is this addressing action by a government
6 entity, and number three, is it likely to recur, and in that case the Supreme
7 Court ruled unanimously that the Plaintiff should be granted public
8 importance standing and had to do with about 32 to \$40 million that the
9 Governor was going to put into a fund to give to students, ultimately to the
10 schools themselves at the choosing of individual students for scholarship
11 money from federal funds related to COVID.

12 This case relied – the Adams case relied heavily on the other case I'm
13 going to cite to you, which is a 2017 case called South Carolina Public
14 Interest Foundation v. South Carolina Department of Transportation, and
15 that's found at 421 S.C. 110, and in that case the South Carolina Public
16 Interest Foundation challenged some actions by the Department of
17 Transportation when they went out and used public funds to inspect
18 bridges on private property.

19 The foundation contended that was an unlawful use of public funds
20 because it was spent on private property, and public funds have to be spent
21 for public purposes and not private purposes.

22 That case used the same three factor test. That was from 2017, and
23 then, the paragraph reads as follows: "The issue of whether the SCDOT
24 may inspect bridges within private gated communities is one of public
25 importance, as it involves, one, both the conduct of a government entity and

1 two, the expenditure of public funds.” Then, later in the paragraph the
2 Court said, “Additionally, future guidance is needed since there’s no judicial
3 guidance addressing the issue, and there is evidence that the SCDOT will
4 inspect this type of property in the future.”

5 So, the three-element test that comes with the two most recent cases
6 from the Supreme Court addressing public importance standing is, does it
7 involve public funds? Does it involve the actions of a government entity,
8 and is it likely to recur?

9 In this case I think we meet all three elements of the three-part test.
10 This obviously involves the conduct of a government entity, the Attorney
11 General. It involves \$75 million that was obtained from the federal
12 government for the State of South Carolina. So, there’s public funds, and
13 three, it’s likely to recur.

14 In our memorandum we cited to a website showing that the Attorney
15 General plans to continue to do these kind of cases where he hires outside
16 counsel on a contingency fee basis, apparently with the intent of paying
17 them out of the proceeds of whatever they recoup in the case.

18 So, the Defendants have cited a lot of older cases and a lot of cases
19 that are distinguishable because they don’t involve these three elements,
20 but when you look at these three elements I think this is an issue of great
21 public importance. The statutes require that all public funds received from
22 the federal government be paid into the State Treasurer and that you have
23 got in effect the Attorney General appropriating \$75 million without a Court
24 Order and without the actions of the General Assembly. We contend that’s
25 an unlawful act on the part of the Attorney General.

1 Now, one thing I noticed was that the Attorney General in his brief
2 cites a case from a few years ago decided by Judge G. Thomas Cooper called
3 Cephalon v. McMaster, who was the Attorney General at the time. One
4 thing I note from that case is that Judge Cooper says over and over again
5 that this – that the contingency fee agreement there was permissible, but
6 one element that was present in the Cephalon case that is not present here
7 is that the Court was wanting to review the award of attorneys' fees, and I
8 think that makes a difference, and that's an element we don't have here.
9 Nobody – neither a Court nor the General Assembly had reviewed the
10 appropriateness of a \$75 million payment of attorneys' fees in the case, and
11 I think Mr. Griffin will address this more thoroughly as he addresses the
12 merits of the case, but as far as standing, we meet the three-element test. It
13 involves the conduct of a public official. It involves the expenditure of public
14 funds, and it is likely to recur, because the Attorney General has several
15 other of these kind of contracts outstanding. So, for that reason we think
16 that the Plaintiffs have made a good case for public importance standing.

17 THE COURT: Thank you, Mr. Carpenter. Mr. Rutherford, any
18 response to the defense's argument?

19 MR. RUTHERFORD: Yes, Your Honor, several, and I apologize for not
20 objecting when they initially started talking, but I don't feel it's appropriate
21 to object over WebEx. It's a little bit difficult to do so. So, I did let them
22 continue despite the fact that, Your Honor, unfortunately, these are all
23 arguments that were heard before, and Mr. Carpenter stated that we are
24 referencing older cases, but I will cite for you a more recent case, and it is
25 South Carolina Public Interest Foundation, et al. v. Wilson, et al, and it is

1 this case we are talking about, because they argued these same facts in
2 front of Circuit Judge Lee, and she stated they did not have standing, and
3 as you listen to everything they have said thus far it is the same thing that
4 she listened to, and so, they're taking two bites at the apple, and it's well
5 settled law in South Carolina that you don't appeal from one circuit court
6 judge to another, and that is what they are attempting to do, but getting to
7 the merits of the motion to dismiss, she dismissed this case, Your Honor,
8 because they lack standing, public interest standing, as they state, standing
9 overall; she denied everything and said that they lack standing, and that's
10 what we're asking Your Honor to do and to again dismiss it with prejudice,
11 because how many times are we going to go in front of another circuit court
12 judge arguing the exact same thing? If Your Honor were to pull the
13 transcript it would be the exact same arguments over and over again, and
14 so, again, I apologize for not objecting. That would probably be the proper
15 way to handle it, but I didn't want to be rude to anyone, but suffice it to say
16 that we stand on our motion to dismiss and believe it is well settled law.

17 THE COURT: Thank you, Mr. Rutherford. Based on what I have read
18 so far it seems that these motions are all founded on the same legal
19 principles in terms of why the Defendants are requesting this suit to be
20 dismissed, but we do have three motions. So, I'll be happy to hear from the
21 remaining lawyers for the other Defendants with regard to their motions if
22 they feel that necessary.

23 MR. WOODINGTON: Your Honor for the Davidson Law Firm we don't
24 have anything to add. We're basically a me too Defendant in this case.

25 THE COURT: All right, and let's see, Mr. Simmons, anything you'd

1 like to add?

2 MR. SIMMONS: Nothing, Your Honor, and I also represent
3 Willoughby & Hoefer with Mr. Rutherford and Mr. Malloy. Thank you.

4 THE COURT: All right. Folks, there also are motions for – motion to
5 intervene on my roster, but I don't see any representatives from Bamberg or
6 Colleton County who made the motion. Can anybody shed some light on
7 whether those motions are ripe to be heard this afternoon?

8 MR. RUTHERFORD: Your Honor, again, this is Todd Rutherford, and
9 my computer had frozen. So, I'm going through the phone now. Can
10 everybody hear me?

11 THE COURT: We can hear you, Mr. Rutherford.

12 MR. RUTHERFORD: Our contention would be that their motions to
13 intervene hinge on our motion to dismiss, and we believe that if you would
14 grant the motion to dismiss that the motions to intervene would be moot.

15 THE COURT: I understand that, and Mr. Smith, the motion that you
16 have with regard to protection from discovery, is that in the same posture in
17 terms of the motions to dismiss?

18 MR. SMITH: Your Honor, Emory Smith here, and I want to note that
19 Chief Deputy Attorney General Jeff Young is with me.

20 MR. YOUNG: Hello, Your Honor.

21 MR. SMITH: And Solicitor General Bob Cook is listening in my phone.
22 On that protection order, it's based upon the fact that the motions to
23 dismiss are pending, and so, we have asked that discovery be stayed
24 including in particular responding to requests for production until this
25 Court rules on the pending motions to dismiss.

1 I would note, too, Your Honor, that we do have a motion to dismiss for
2 the Attorney General's Office, and I wasn't sure exactly with the order of
3 things whether there was going to be an additional response or argument
4 regarding the Willoughby/Hoefer motion to dismiss, but I would like an
5 opportunity to argue mine when you're ready to hear it.

6 THE COURT: Well, -- and this is one of the particular challenges of
7 conducting court via WebEx with multiple lawyers and multiple motions.
8 So, if I have gotten ahead of myself I apologize. Mr. Smith, I'll be happy to
9 hear your motion with regard to the motion to dismiss.

10 MR. SMITH: Your Honor, I'm going to refer to our brief and also the
11 Willoughby/Hoefer brief, and we concur with the legal argument in it,
12 unless you would like for me to go through, I'm not going to go through
13 everything in detail.

14 Our position is -- well, first of all, let me say, they have set forth a
15 lengthy chronology in the memorandum in opposition submitted by the
16 Plaintiffs in this case. We believe that that's irrelevant, that the statutes in
17 this case authorize the Attorney General to pay the money, which he did do.

18 We're also concerned that the chronology in the Plaintiffs'
19 memorandum is presented in such a way to suggest that this was
20 inappropriately handled. It was not, and they have mischaracterized things.

21 As a more minor example here, Your Honor, they have said repeatedly
22 in filings in this court and of the Supreme Court that we objected to a
23 hearing in this case on the temporary injunction motion on Tuesday. That
24 is not correct. We agreed to the hearing on Tuesday.

25 When this matter first came up for scheduling I suggested that it be

1 heard that week on a Wednesday by Judge Newman, who was hearing
2 something in another case about a different aspect of the settlement funds,
3 and not Thursday afternoon because I had a conflict.

4 The conflict was, I had to put my dog into the veterinarian's office for
5 surgery that morning, but when Judge McCaslin said she preferred
6 Tuesday, she wasn't sure about Judge Newman's ability to take this matter
7 up, we agreed to that. There has never been an objection, but they keep
8 saying there was. There wasn't, but as for the merits, we – three judges,
9 three circuit court judges, have upheld the authority of the Attorney General
10 to pay fees from settlement proceeds, the Cepholan case, the Lilly case by
11 Judges G. Thomas Cooper and Judge Couch, and most importantly in this
12 case twice by Judge Lee in her order denying the temporary injunction and
13 in her order denying the motion to alter or amend.

14 Those orders were regarding a motion for a temporary injunction, but
15 she essentially addressed the merits in there. In a very firm way she found
16 that the Attorney General had the authority to make these payments citing
17 the various statutes that have been presented in these memoranda, and
18 there's no way we believe, Your Honor, to depart from her rulings and
19 depart from the rulings of the judges in the Cephalon and the Lilly cases,
20 and the Attorney's General's payment of these fees should be upheld.

21 We also believe, Your Honor, that the Plaintiffs lack standing. They
22 clearly lack constitutional standing, including taxpayer standing. Mr.
23 Carpenter refers to the need for future guidance, which is a criteria for
24 public importance standing, but on public importance standing, Your
25 Honor, there has to be need for future guidance, and there is no need here.

1 He says, well, maybe they'll be other agreements, other settlement
2 proceeds to pay from. That's already been decided by the Courts in
3 Cephalon and the Eli Lilly and in this case by Judge Lee, and so, we believe
4 that with these orders and the clear language of these statutes, Your Honor,
5 that there is no need for further guidance and that this Court should
6 dismiss this case for these reasons.

7 If I may, Your Honor, I'm going to – I'd like to put myself on mute for a
8 moment and consult with the other counsel here, and I may be at the end of
9 my argument.

10 THE COURT: Yes, sir, Mr. Smith. Take all of the time you need.

11 MR. SMITH: Your Honor, just very briefly. Standing -- the failure of
12 standing causes this lawsuit to fail at the outset and deprives this Court of
13 subject matter jurisdiction. Not only do they fail as a constitutional
14 standing and public interest standing, they also fail because they don't have
15 derivative standing, which was a somewhat peculiar argument they made.
16 They based it upon cases involving counties, not involving the State.

17 The Attorney General has been recognized over and over by the
18 Supreme Court as being the State's chief legal officer. He had authority to
19 act for the State with respect to these attorneys' fees. The Plaintiffs are not
20 – were not a party to the case which resulted in these fees, nor were they a
21 party for the settlement agreement. The Attorney General had authority to
22 act as he did.

23 They have no authority to step into his shoes, the shoes of the State
24 legal officer, and act here. So, for these reasons, this failure of standing,
25 which deprives this Court of a case of controversy and subject matter

1 jurisdiction, we believe that it should be dismissed, but if this Court believes
2 that it should go to the merits of the legal issues, we believe we win there for
3 all of the reasons set forth in our memoranda, and Willoughby & Hoefer has
4 covered it thoroughly in theirs as well, Your Honor.

5 If you have any questions I'll be glad to answer them; otherwise, that's
6 the conclusion of my argument right now subject to any right of reply.

7 THE COURT: Thank you, Mr. Smith. Mr. Griffin or Mr. Carpenter, I'll
8 be happy to hear from either or both of you.

9 MR. GRIFFIN: Thank you, Your Honor. I'll address all of the standing
10 and Mr. Carpenter will address the standing (sic), but back to the law of the
11 case doctrine which Mr. Rutherford repeated in argument previously, and
12 we have heard the same from Mr. Smith, in our brief in page seven and
13 eight we address this issue; that would direct the Court's attention to the
14 University of Texas v. Camenisch decision, a 1981 decision from the U.S.
15 Supreme Court, which -- which explained that given the haste that is often
16 necessary when addressing a motion for preliminary injunction the findings
17 of fact and conclusions of law made by a Court are not binding at trial on
18 the merits. I mean, we're not even at the trial on the merits, but we are at
19 that merits state on a motion to dismiss, and the U.S. Supreme Court, in
20 applying the federal rules, -- we have adopted the -- our State rules are
21 patterned after the federal rules and is persuasive authority. I explained the
22 Shirley Iron Works, which is really on all fours there. Both -- two judges had
23 ruled -- one said it was the law of the case -- that there's no claim for
24 attorneys' fees or interest because it's a tort case.

25 Judge Few at the trial court level, when he was a trial court judge, he

1 likewise ruled it was a tort case. It goes up to the Supreme Court, and the
2 City argues, well, there's been rulings it's a tort case, and the Supreme
3 Court said, no, the only ruling was a motion to strike attorneys' fees, and it
4 was granted. That's not the ruling the – the ruling that was premised upon
5 is not law of the case. It's exactly what they're doing here. Oh, Judge Lee
6 ruled that there's no standing and there's no claim, and therefore, that's the
7 law of the case. No, Judge Lee ruled that the Plaintiffs are not entitled to
8 preliminary injunction. That's the law of the case, no more, no less.

9 We also cited Rule 54 of the South Carolina Rules of Civil Procedure,
10 which says, In the absence of the Court directing entry of a final judgment
11 as to one or more but fewer than all claims, any order or other form of
12 decision, however adjudicated, however designated, which adjudicates fewer
13 than all claims shall not terminate the action as to any of the claims. The
14 order or other form of decision is subject to revision at any time before the
15 entry of judgment adjudicating all of the claims and rights and liabilities of
16 all of the parties. That's Rule 54(b), which we cite on page seven.

17 We also point out that this motion that Your Honor is hearing, Judge
18 Griffin, which – Judge Griffin, I enjoy staying that. I'll never be able to say it
19 to myself, but the motion that – that is pending before Your Honor, they
20 filed it right on the heels of Judge Lee's ruling. They sent it to Judge Lee,
21 and they asked her to rule on it, and we have attached her reply in our
22 response where she refused.

23 Not only did she refuse to rule on the – on that motion to dismiss, but
24 she had the opportunity to direct entry of judgment for the Defendants,
25 which she did not do, and so, you are not – we are not appealing Judge

1 Lee's rulings to Your Honor. They were not law of the case.

2 We are not asking you to address her ruling with regard to denial of
3 our motion for preliminary injunction, end of story. That's as far as the law
4 of the case goes in this matter.

5 With regard to prior decisions, Your Honor, the issue that's pending
6 before the Court has never been addressed in a prior case. The Cephalon
7 case is – was – that's Judge Cooper's case, as Mr. Carpenter said before,
8 and I look at page 13 of – 13 and 14 of – well, maybe that's just how it's
9 printed out, but the – in the Cephalon case Judge Cooper says, with regard
10 – he concludes that it's appropriate for the Attorney General to hire outside
11 counsel on a contingency fee contingent agreement, but significantly he
12 says, the litigation retention agreement simply puts the Attorney General's
13 intention to seek those funds in writing, serves to notify outside counsel of
14 the manner in which the Attorney General will calculate the fees he will
15 ultimately see the Court approve and provides notice that any fee that is
16 approved by the Court will be paid from outside counsel's contingent fee
17 rather than the State's recovery, and so, -- and he also says that the
18 contingency fee agreement operates as a cap on the amount of fees that the
19 Attorney General may seek from the Defendant in the litigation. He does
20 not address the question of, does the Attorney General have unfettered
21 discretion to award an amount of attorneys' fees to outside counsel without
22 – without following the dictates of 150(b) that we rely upon.

23 The Eli Lilly decision is further afield than that. In the Eli Lilly case,
24 which was before Judge Crouch, the issue before Judge Crouch was, should
25 counsel – outside counsel be disqualified because it's unconstitutional; it

1 violates their due process rights and a host of other reasons, and basically
2 the holding from Eli Lilly is that their argument is speculative and not ripe
3 for adjudication, and Judge Crouch said, Section 1-7-150 gives the Attorney
4 General the right to withhold certain funds from the proceedings. There's
5 been no recovery at this time, and there's no showing that -- any
6 investigative costs, and therefore, -- and there's no showing that the
7 Defendants have shown any prejudice.

8 What Judge Crouch does not address, and you know, the issue in this
9 case, is, can the Attorney General take funds that were part of a settlement
10 to be paid to the State of South Carolina and have unfettered discretion to
11 pay attorneys of his choosing, percentage amounts of his choosing without
12 any supervision; 150 says specifically, "All funds received by judgment or
13 settlement shall be deposited in the State's general fund." Then, the
14 exception, "... exception for investigative costs and litigation costs awarded
15 by Court Order or settlement," and we pled that there's been no award of
16 fees by a Court, and the settlement agreement does not award any
17 attorneys' fees. Frankly, the settlement agreement says on its face, "Each
18 party shall be responsible for their own fees and costs," end of story.

19 There's a lot of other arguments made in the briefs that we have
20 addressed in our briefs, and I won't repeat them here, Your Honor, but I
21 would just want to be clear for the record that we're not abandoning any of
22 the arguments in our briefs, and we are incorporating them, and I'm sure
23 Your Honor has spent the time to read everything, and I won't -- but if you
24 have any questions about any of the arguments on the merits of the case I'll
25 be happy to answer them, and otherwise, I'll pass it off to Mr. Carpenter to

1 address their arguments on standing.

2 THE COURT: Thank you, Mr. Griffin, and certainly, I wouldn't take
3 your failure to argue any points raised in any brief or memorandum as
4 abandoning those arguments. So, don't worry about that. I'm going to
5 certainly reread all of the items which were submitted for my review before I
6 make a final decision.

7 So, just because it wasn't argued on the record doesn't mean the
8 argument has been abandoned. So, don't worry about that. Mr. Carpenter,
9 I would be happy to hear from you with regard to any other matters on this
10 issue.

11 MR. CARPENTER: Your Honor, I just reiterate the Adams v.
12 McMaster case sets out the three-part test, and we think we have -- for
13 reasons stated before we think we have met the three-part test for public
14 important standing.

15 This is an issue of great public importance, because it involves \$75
16 million that belongs to the State of South Carolina, if -- in effect
17 appropriated by the Attorney General and not by the General Assembly, and
18 we think this is an issue of great public importance.

19 Judge Cooper said in his order that's been cited so many times, there
20 is no appellate court ruling. Despite all of the claims by the representative
21 of the Attorney General and the other defense counsel, there is no appellate
22 court ruling in this state that addresses whether the Attorney General has
23 unfettered discretion in how much he pays on a contingency basis from
24 public funds.

25 The statute referenced by Mr. Griffin, 1-7-150, says that it has to be

1 awarded by Court Order. Judge Cooper's case talks about the Court
2 approving the attorneys' fees, and we also cited the Layman case, which
3 they had a contingency fee agreement. This was the case where several
4 prominent attorneys from Columbia represented retirees, and there was an
5 issue about how the retirees' benefits were calculated, and they had a
6 contingency – allegedly had a contingency fee agreement with the retirees
7 that would have gotten them several million dollars in attorneys' fees, and
8 the Supreme Court did not accept that contingency fee but made them
9 justify their work on an hourly basis, and it used the Lodestar analysis,
10 gave them a multiplier I think of 1.25 percent, but they made them justify it
11 on an hourly basis, and that is the appropriate methodology.

12 We referenced in our brief where the Supreme Court says, whether it
13 is on a statute that requires the payment of the fees from one side going to
14 the other or whether it's the common fund method, the essential factor is
15 that it must be a reasonable fees, and our contention here is that what the
16 Attorney General has awarded to these private attorneys is far, far in excess
17 of anything that would be reasonable under any Lodestar analysis, and we
18 think this is an issue of great public importance and needs to be addressed
19 by the Courts of this State; therefore, we believe that public importance
20 standing is appropriate for the Plaintiffs.

21 THE COURT: Mr. Smith, any reply?

22 MR. SMITH: Yes, Your Honor. The Order of Judge Lee, regardless of
23 whether it's the law of the case, -- even assuming that it's not the law of the
24 case, it was certainly her ruling, her opinion, of the merits of this case and
25 the lack of standing.

1 It was a – she did not simply say, motion denied. She gave specific
2 reasons why, including the lack of standing and the lack of merit of the
3 case, the lack of likelihood of success on the merits of the case.

4 Standing doesn't change, standing during the suit. The failure to
5 have standing at the outset of this suit when she heard the motion is still
6 present today, and she ruled, Your Honor, in effect on the merits. She said,
7 the Attorney General is the State's chief legal officer, and he properly
8 exercised his authority to contract with the W and A law firm and to pay
9 them pursuant to that contract from the settlement proceeds.

10 She said, contrary to Plaintiff's assertion, the fees were awarded by
11 settlement under 1-7-50. She said, the settlement provided that each party
12 bears its own fees thereby allowing payment to be made from settlement
13 proceeds, and the understanding is ratified by the parties to the settlement
14 in the agreement to voluntarily dismiss the appeal filed with the federal
15 court, which states that the settlement agreement is inclusive of amounts
16 for interest and the State's attorneys' fees and other costs, which are
17 reimbursed and awarded from the payment of the settlement amount.

18 Plaintiffs apply a strained hypertechnical reading to these statutes.
19 Judge Lee did not see it that way. The ordinary rule of statutory
20 construction is you give statutes a reasonable construction consistent with
21 legislative intent. The legislature clearly authorized the Attorney General to
22 pay these fees from this settlement. He had a contingency fee contract to
23 pay it. The Cephalon case and the Lilly case support the Attorney General's
24 payment of settlement – attorneys' fees from settlement agreements.

25 I believe in one of those agreements it did require Court approval or

1 state that that would be done. It was not a requirement in this one. It's not
2 imposed by statute. There's no requirement that the Court review and pass
3 on the fees here. They were a contract. The Attorney General has the right
4 to honor that contract and for his office to make that payment pursuant to
5 it.

6 We – there is no reason for a hearing on the merits beyond what we're
7 hearing today. Judge Lee covered it all in her order. It's a statutory
8 question applied to this case, and we believe that the Court should dismiss
9 it.

10 If you would – oh, and one other brief point. They said that she
11 refused to rule on the motion to dismiss. They didn't tell you the whole
12 story there. The reason why she said she was not going to rule on the
13 motion to dismiss is because she had not yet ruled on the Rule 59 motion to
14 alter or amend. She later did that just before Christmas, and she denied
15 that motion affirming what she had previously ruled.

16 So, she has twice ruled against them on the standing and on the
17 merits, and we respectfully request that Your Honor do so also. If I may just
18 briefly consult with the – I think I'm done, Your Honor.

19 THE COURT: Yes, sir.

20 MR. SMITH: Thank you, Your Honor. That's all for now.

21 THE COURT: All right. Thank you, Mr. Smith. Now, folks, are there
22 any other matters with regard to this particular case that we need to take
23 up before we adjourn this hearing?

24 MR. SMITH: Your Honor, if – Emory Smith again. On that motion for
25 protective order, we would ask that Your Honor issue a protective order for

1 purposes of discovery until Your Honor rules on the motions to dismiss in
2 this case.

3 THE COURT: All right, and I was going to do that, Mr. Smith. I'm
4 going to take the matters under advisement. I'll have a decision by
5 February 12, which is a couple of Fridays from now, and while these
6 motions to dismiss are under advisement any pending motions and
7 discovery will be stayed until the Court makes a decision on the outstanding
8 motions to dismiss.

9 MR. GRIFFIN: Your Honor, may I ask one point of clarification,
10 please?

11 THE COURT: Yes, sir.

12 MR. GRIFFIN: The South Carolina Public Interest Foundation has
13 submitted a FOIA request to the Attorney General under FOIA. We paid --
14 we got a response. They said, send us \$70 so we can research. My
15 question to you is, we think that your order of protection is not intended to
16 preclude the South Carolina Public Interest Foundation from pursuing its
17 rights under FOIA; would I be fair in that assumption?

18 THE COURT: Yes, sir, Mr. Griffin. I think the FOIA request is
19 separate and apart from the motions and the discovery in the civil case. So,
20 any FOIA requests which were appropriately made can be responded to.
21 Certainly, if there's anything that the Attorney General's Office believes to be
22 not subject to FOIA they can certainly serve those defenses to the FOIA
23 requests, but my protection order just covers any further motion hearings
24 and the discovery while this matter is outstanding, and hopefully, I'll have a
25 decision before February 12. I'm just giving myself an absolute deadline, so

1 I don't let this matter sit and get stale. I try to get my rulings out quickly,
2 so I don't leave lawyers wondering whether I'm going to ever get to their
3 matter. So, that February 12 deadline is more for my calendaring purposes.
4 I hope to have it decided before then.

5 MR. SMITH: Thank you, Your Honor.

6 THE COURT: Yes, sir. Thank everyone. Thank y'all for being patient
7 as we deal with these technology issues. Sometimes they are a pretty high
8 hurdle to overcome. So, I appreciate everybody's patience and flexibility and
9 willingness to make this thing happen this afternoon. So, thank y'all very
10 much.

11 MR. MALLOY: Thank you, Your Honor.

12 THE COURT: Yes, sir. This matter is adjourned.

13 --- END OF TRANSCRIPT OF RECORD ---
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1 I, the undersigned, T. Dayton Grainger, Jr., Official Court Reporter for
2 the Fifth Judicial Circuit of the State of South Carolina, do hereby certify
3 that the foregoing is a true, accurate and complete Transcript of Record of
4 all the proceedings had and evidence introduced in the trial of the captioned
5 case via WebEx, on the 26th Day of January, 2021.

6 I do further certify that I am neither of kin, counsel or interest to any
7 party.

8
9
10 April 8, 2021

11 
12 _____

13 T. Dayton Grainger, Jr.