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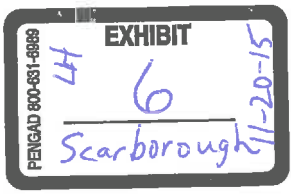

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November 19, 2015

BY HAND

Judicial Merit Selection Committee
P. O. Box 142
Columbia, SC 29202

Re: Candidate: Mikell R. Scarborough
Judicial Position: Master-In-Equity, Charleston County
Our File No.: 6995-003

Dear Chairman Clemmons and Committee Members:

I am writing to provide an explanation of the litigation Judge Scarborough disclosed to the Committee brought by PCS Nitrogen, Inc. ("PCS").[1] I and my firm have been representing Judge Scarborough and approximately twenty other defendants in the case since early 2007. It is important that the Committee have an understanding of the facts of the case and critical that the Committee understand the claim that was asserted against him and the other defendants as well as the specific basis for the court's ruling that is now subject to an appeal to the United States Court of Appeals for the Fourth Circuit as explained in more detail below.

I should start by pointing out that I am chair of the Lowcountry Citizens Committee. I disclosed to the Committee that I represented Judge Scarborough and excused myself and left the room before the Committee met with Judge Scarborough. I had no involvement at all in the Committee's report on Judge Scarborough. This letter is written in my capacity solely as attorney for Judge Scarborough.

Judge Scarborough was a shareholder in Ross Development Corporation ("RDC"), a South Carolina entity with approximately 70 shareholders. The corporation was founded in 1906 by his great grandfather, J. Ross Hanahan, and was dissolved in September 2006. Judge Scarborough served as president from 1993 until 2001. He continued as a director up to the company's dissolution. The board was comprised of five other members who all were relatives of Judge Scarborough with one exception, G.L. Buist Rivers, Jr. There were three other lawyers on the board throughout this time – T. Heyward Carter, William Hanahan, and Mr. Rivers.

[1] PCS is a subsidiary of Potash Corporation of Saskatchewan, a publically traded corporation that is one of the largest, if not the largest, fertilizer company in the world.

The litigation against Judge Scarborough and the other former shareholders and directors of RDC centered on distributions that were approved by the board of RDC from 1992 through its dissolution in 2006.

Since the company no longer had employees or was actively engaged in business, in 1982 the shareholders of RDC approved a plan of liquidation that was amended by the shareholders the following year. The plan of liquidation called for the company to sell its remaining assets, pay the debts of the corporation, and distribute the remaining amounts to the shareholders. The primary asset of the company was a very large acreage parcel of land, called the Dotterer tract, in the West Ashley area of Charleston. The board turned over the marketing and limited site development of the property to Jimmy Bailey. Mr. Bailey proceeded over many years to obtain the necessary approvals for the subdivision and sale of the property in development parcels. Due to a lack of access and other variables, the sale of these parcels did not begin to take off until the completion of the Glenn McConnell Parkway around 1996 that finally provided good access to the large acreage parcel.

The RDC board of directors followed the book. They met on a periodic basis and kept detailed minutes that documented the status of the limited development and marketing of the property as well as other matters. The board approved distributions to shareholders after sales occurred, always holding back an amount to take care of existing and known future obligations of the corporation, as well as an additional $200,000 for any unknown contingencies. This practice, fully documented in the board minutes, continued through the final board meeting on July 12, 2006, when the board approved the final distribution and final dissolution of the corporation.

From 1906 to 1966 RDC, then known as Planters Fertilizer and Phosphate Company, owned a fertilizer plant in the Charleston neck adjacent to the Ashley River. In 1966 Planters sold the fertilizer plant and associated land to Columbia Nitrogen Corporation. None of the board members overseeing the liquidation of RDC that were defendants in the case brought by PCS were on the board of Planters then or had any familiarity with the operation of the fertilizer plant. Within ten years of the acquisition of the fertilizer plant, Columbia Nitrogen Corporation ceased production of fertilizer and demolished the buildings. Columbia Nitrogen sold the land to James Holcombe and Henry Fair in 1985.

In 1998 Charleston County Park and Recreation Commission considered the purchase of the property from Holcomb and Fair to construct a public boat landing. At that time both the EPA and SCDHEC had determined that the property was contaminated. In November 1998 an article appeared in the local newspaper discussing PRC's potential acquisition of the property and its contamination. According to the article EPA was then in the process of deciding which prior owners it would pursue for the cleanup costs that it estimated could run from the tens of thousands of dollars to millions of dollars.

Not long after the article appeared, Judge Scarborough informally met with Ben Hagood, a friend and environmental attorney. Mr. Hagood informed Judge Scarborough that there was nothing for the corporation to do at that point and that if the EPA decided to pursue RDC, it would know how to find them. Judge Scarborough and Mr. Hagood did not discuss CERCLA (the federal Superfund law) nor delve into the details of a prior owners' potential liability.

Even though the 1998 article stated the EPA would be pursuing some of the prior owners, neither the EPA, DHEC, nor any former owner of the property contacted RDC or any of its directors about the contamination of the site before its dissolution more than seven years later. During this time the board continued to oversee the sales and approve distributions to the shareholders in conformance with their fiduciary obligation to them as it had always done since the adoption of the plan of liquidation. Mr. Bailey continued to market development parcels for the highest price and sell them in an orderly manner.

On November 30, 2006, more than two months after the company dissolved, PCS filed a motion to add RDC as a third-party defendant in a lawsuit brought against it in September 2005 by Ashley II of Charleston, LLC ("Ashley II"). Ashley II was (and is) the current owner of the property. It sought to be reimbursed for the estimated cleanup costs from PCS. Even though PCS had never owned the property, Ashley II asserted PCS was the legal successor to Columbia Nitrogen through a corporate merger PCS accomplished in 1989 with a company known as Arcadian Corporation. In this CERCLA litigation PCS adamantly denied that it was the successor to Columbia Nitrogen.

PCS nonetheless brought third-party complaints against all the prior owners, including RDC, and counterclaimed against Ashley II, asserting it was entitled to contribution from these various entities if the court ultimately found that it was successor to Columbia Nitrogen and liable to Ashley II. In September 2007 the United States District Court ruled that PCS was the legal successor.

In December 2009 PCS brought a separate lawsuit in the United States District Court against approximately twenty persons who were former shareholders, some of whom were also former directors, including Judge Scarborough. PCS alleged that the distributions from 1999 through 2006 were voidable conveyances under the Statute of Elizabeth. PCS claimed that even though RDC had plenty of money in the bank and was paying all its debts at the time, RDC was hypothetically insolvent when the distributions were made as a result of the company's alleged contingent environmental liability for its share of the cost to clean up of the site of the former fertilizer plant. PCS also alleged that the former directors owed their legal duties to PCS, rather than the shareholders, once the company became hypothetically insolvent, and that the directors breached that duty by making the periodic distributions to the shareholders in

accordance with the amended plan of liquidation. PCS sought to hold each of the former directors, including Judge Scarborough, jointly and severally liable for the total amount of all distributions made to all shareholders after 1992.

The former shareholders and former directors vigorously dispute the allegations against them and assert numerous defenses. These defenses include the fact that PCS was not an existing creditor of RDC at the time of any of the distributions. In fact, PCS did not disclose itself or directly communicate with RDC's directors until months after the dissolution of the company. The former shareholders and former directors assert that the former directors could not have owed a legal duty to PCS at the time of the distributions since they had never heard of PCS and the company owed nothing to PCS at the time of the distributions. Other defenses include the statute of limitations since PCS brought the suit more than three years after it first alleged, in November 2006, that the company had been dissolved for purposes of avoiding its potential environmental liability associated with the Columbia Nitrogen property. The defendants also assert that PCS has not sustained any damages since up to the time of trial it had not spent a nickel on cleanup costs nor was able to prove the amount of the cleanup costs or RDC's share of them.

During the time of the distributions in question, the company was represented by attorney John H. Warren, III, who often attended board meetings. Mr. Warren also handled the dissolution of the corporation. While Mr. Warren advised the board at the time of the last distribution in 2006 that the law of South Carolina may require a shareholder to return a distribution under some circumstances, he never advised the board against making the distributions at the various times they were being made over the years.

PCS's claims against the former directors and shareholders went to trial in July 2014 before Margaret B. Seymour, United States District Court Judge, who also handled the CERCLA case brought by Ashley II. The centerpiece of PCS's case was a transcribed phone message in January 1999 from Kathy Rike, one of the former directors, that she left with the secretary for Mr. Carter. The transcribed message said that because of a possible environmental claim she thought the company should drain its accounts. At trial she testified that the message was tongue-in-cheek. This transcribed telephone message for Mr. Carter was never communicated to Judge Scarborough.

The board met at its annual meeting less than a month after Ms. Rike left her telephone message for Mr. Carter. Because of several sales that had recently closed, the board approved a distribution to the shareholders. Far from draining the accounts, the board left around $800,000 in the company's accounts. Up to its dissolution more than seven years later, the company never drained any of its accounts. The board never changed its methodical process of having Mr. Bailey market and sell the property and distributing

a portion of the net proceeds to the shareholders while holding back hundreds of thousands of dollars to be prudent. The company never conducted a fire sale of any of the development parcels.

Even though as counsel for the defendants we believe there were several legal reasons for the court to rule in favor of the defendants and not allow the claim against the directors to go to the jury, the court denied our motions and allowed the jury to decide the breach of duty claim against the former directors. The jury returned a verdict against the former directors for $5,555,158 which was the total amount, to the penny, of *all* distributions to *all* shareholders from 1999 through the dissolution of the company.

The decision on PCS's claim to set aside the same distributions rested with the trial judge, rather than the jury. On February 12, 2015, the court entered an order finding that PCS, which was not a creditor at the time of any of the distributions, was entitled to set aside the distributions to all the shareholder defendants from 1998 through 2006. The court ordered each shareholder defendant to repay only the amount of the distribution received by that shareholder. The liability was not joint and several. At the same time as the court decided the fraudulent conveyance action, it entered judgment on the jury verdict against the former directors and on her order against the former shareholders.

Once these judgments were entered, our firm filed the motions to set aside both of them on numerous legal grounds. On August 21, 2015, the court ruled on those motions and *granted the motion to vacate the joint and several verdict against the former directors, including Judge Scarborough*. The court denied the motion to set aside her order requiring the return of the distributions to the shareholders.

Because she vacated the jury verdict against the former directors, the court included the former directors who were also shareholders in her award on the fraudulent conveyance claim requiring them to repay their respective distributions too. Her order of August 21, 2015, incorrectly showed that Judge Scarborough received distributions totaling $152,715.22. On September 23, 2015, the court entered an order correcting the clerical error and revising the amount of the distributions made to Judge Scarborough to the correct amount of $64,117.02.

Judge Scarborough and the other defendant shareholders have filed an appeal to the Fourth Circuit of the court's orders on the fraudulent conveyance claim. PCS has filed a motion to have the court to reconsider her order setting aside the verdict against the former directors. The appeal to the Fourth Circuit is now on hold until the district court issues her decision on PCS's motion.

It is critical to appreciate that in the context of "fraudulent conveyance" in this case, "fraud" does not mean that there was actual fraud or moral fraud. The legal basis for setting aside a transfer can be as simple as a corporation making transfers knowing of an existing debt and not reserving sufficient assets to pay the debt.

In this case the court discussed the test it applied in determining whether the distributions to the former shareholders were fraudulent conveyances: "...for the reasons below, the Court concludes that Ross [RDC] bears the burden of proving by clear and convincing evidence that the distributions to the Ross Directors and Shareholders were made for valuable consideration and that the transactions were bona fide." Amended Order, p. 40, Entry 375. As indicated, the test the judge used for determining whether the distributions were "fraudulent conveyances" had nothing to do with true fraud.

The Judge ruled against the former shareholders relying, in part, on the jury's finding "that the shareholders were not entitled to the distributions at issue here," even though she vacated the verdict of the jury. Amended Order, p. 43. After finding that the distributions to the shareholders were without legal consideration, i.e., not in exchange for something of value, the court held that the former RDC directors and shareholders did not prove by clear and convincing evidence the "bona fides of the transaction," even though the distributions were made according to the amended plan of distribution. In saying the distributions were not bone fide, the Court relied heavily on the transcribed telephone message from Ms. Rike of January 1999 as well as testimony from the company's accountant that sometime in 2006 Ms. Rike, then president of the company, told him to hurry up and get the books closed because there was the possibility the company might be sued. Amended Order, p. 44-46.

There was no proof remotely suggesting that Judge Scarborough was aware of either of these events involving Ms. Rike. In her discussion of the reasons for finding the distributions from 1999 through 2006 were "fraudulent conveyances and void under the Statute of Elizabeth," the Court did not refer to a single action by Judge Scarborough in his former capacities as president and as a director as the basis for her ruling. Amended Order, p. 43-46. She found the distributions were "fraudulent conveyances" but never found that Judge Scarborough personally committed fraud.

In our appeal to the Fourth Circuit, we will be seeking to overturn the court's ruling against the shareholders, including Judge Scarborough, requiring them to return their respective distributions. PCS was not a creditor of Ross at the time of the distributions. Even at the time of trial, PCS failed to prove the amount of the alleged debt from RDC to PCS that RDC was unable to pay that would be the basis for recovering the distributions to the shareholders. To this day PCS has not recovered a judgment against RDC except in the amount of $87,404.82 to reimburse PCS for what it may pay

Ashley, II for liability in the CERCLA case. Both the District Court and the Fourth Circuit held that PCS cannot seek to collect that judgment until it had paid Ashley II, which it has not yet done. Absent proof of the specific amount of the debt owed by RDC to PCS, there was no factual basis at the time of the trial for requiring the shareholders to return a total of $4,582,163.90 of distributions (the revised total) to reimburse PCS.

Both the former directors, including Judge Scarborough, and the former shareholders intend to present these important legal issues to the Fourth Circuit. There is no legal precedent from the courts of South Carolina allowing an unidentified future creditor to whom no debt was owed at the time of a transfer to recover against the directors of the corporation for breach of duty to the unidentified contingent future creditor nor to set aside transfers made ten years before suit was brought. At the time each of the distributions was made from 1999 through 2006, the former directors were abiding by their fiduciary duty to the shareholders under South Carolina law and carrying out the plan of liquidation as they were obligated to do. RDC paid all of its known creditors with specific known obligations before dissolving.

As already explained, an action to set aside a conveyance as being "fraudulent" under the Statute of Elizabeth should not be confused with a claim that a defendant committed personal fraud in a transaction. In the typical fraud case where a defendant is accused of fraud in a direct transaction with the plaintiff, unlike this case, the plaintiff must prove the nine elements of fraud by clear and convincing evidence: "[I]n a case of actual fraud, based upon representation, there are nine elements essential to recovery, which are: (1) a representation; (2) its falsity (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Carter v. Boyd Constr Co., 255 S.C. 274, 280-281, 178 S.E.2d 536 (1971). PCS neither alleged nor proved any of these elements of actual fraud against any of the former directors.

I hope that this background and explanation put the disclosure in perspective and eliminate any suggestion that in carrying out his duties to the shareholders along with the other directors, Judge Scarborough was found liable for civil fraud. He was not.

Thank you for your patience and attention in reviewing this letter. The litigation has taken many twists and turns over the last eight years and is not over yet. We are looking to the Fourth Circuit to reverse the decision against the shareholders and uphold the district court's ruling in favor of the former directors including Judge Scarborough. With kind regard, I am,

Sincerely,

PRATT-THOMAS WALKER, P.A.

G. Trenholm Walker

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