

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Appellate Case No.: 2013-000754

South Carolina Retirement System Investment Commission.....Petitioner,

v.

Curtis M. Loftis, Jr., as custodian of the South Carolina Retirement
Systems Group Trust.....Respondent.

REPLY OF PETITIONER

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REPLY OF PETITIONER

Pursuant to this Court's Order of April 12, 2013, the South Carolina Retirement System Investment Commission (the "RSIC" or "Commission"), files this Reply. Petitioner seeks a Writ of Mandamus, directing Curtis M. Loftis, as custodian and the Treasurer of the State of South Carolina ("Treasurer"), to comply with mandatory requirements of the South Carolina Code of Laws regarding his role as a ministerial officer so that the RSIC can fulfill its legal and fiduciary duties and continue to exercise its exclusive authority to invest and manage the assets of the South Carolina Retirement Systems Group Trust ("Trust" or "Retirement System") as provided by the South Carolina Code.

While the Treasurer has finally agreed to fund the obligation, this case is by no means moot in its entirety. The underlying confusion between the Treasurer's role, as fund custodian, and RSIC as the properly delegated agency to make investment decisions for the Trust, remain.¹ Although the Treasurer has, at the eleventh hour, finally relented and agreed to properly fund the obligation based upon information which has been in his possession for many months, the prospect of this unlawful conduct remains without clarification and determination from this Court that the Treasurer must fund lawful investment decisions as custodian, unless able to come forward with evidence that the approved investment is palpably illegal.

¹ The best evidence of this misunderstanding of roles in the process is the Treasurer's own letter dated March 21, 2013 (Exhibit 11 to Affidavit of Darry Oliver), in which he states: "I would be remiss if I did not repeat that the Commission's improper application of statutory and contractual confidentiality provisions, which imposes the burden on me personally to review and interpret complex financial and legal documents and make fiduciary-level decisions without the assistance of my staff, contribute to the problems that we are encountering in timely approving agreements and in gaining comfort with the safekeeping of SCRS' funds.". Clearly the Treasurer is belaboring under the false understanding that he, and he alone, is the final arbiter of retirement investments. He no longer occupies this authority, it was removed from his office in 2005. See also Exhibit 11 to Affidavit of Dori Ditty, where the treasurer refers to the prospect of litigation in the context of routine transactions based upon this continuing misunderstanding.

The affidavits on file establish the inclinations and conduct of this Treasurer to continuously avoid, delay, obstruct and obfuscate simple, straightforward investment transactions to the detriment of the Trust. The RSIC cannot retain legal counsel to bring a declaratory action each time it approves a routine transaction, in order to respond to the Treasurer's subjective, personal views and ever-changing agenda. As a member of the Commission the Treasurer is, and has been, a voice of dissent and an advocate for peculiar views. The RSIC does not wish to stifle any voice or vote on the Commission. However, as the custodian, the Treasurer may not abuse or misuse his ministerial office to elevate his position as fund custodian to a position of ombudsman or de-facto arbiter through the veto power of the checkbook. The Treasurer has shown a propensity for this kind of conduct in the past, and it is quite likely that it will be repeated in the future (see affidavits in support of the Petition). The Petition requested this specific relief: "...the Court should issue a writ of mandamus directing Mr. Loftis to take any and all necessary steps to fund the investment in Warburg Pincus Private Equity XI, L.P., and to permanently enjoin him to perform and comply with his ministerial duties as the custodian of the funds of the Retirement System." The late game-change from Mr. Loftis does not render the entire case moot under South Carolina Law, and Petitioner requests this Court to retain jurisdiction over this matter in its original jurisdiction so that the underlying issues may be fully and finally adjudicated though not in the context of an emergency hearing on Tuesday morning.

This Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *E.g.*, Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001); Sloan v. Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349

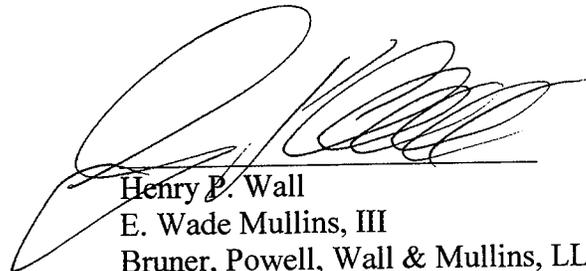
(Ct.App.2003) (Greenville County I) (“cases or issues which have become moot or academic in nature are not a proper subject of review”). There are, however, three exceptions to the mootness doctrine. Curtis v. State, 345 S.C. at 568, 549 S.E.2d at 596. First, if the issue raised is capable of repetition 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.

The first exception to the mootness doctrine is that the issues raised are capable of repetition but generally will evade review. In Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996), the Court addressed the first exception and noted that South Carolina appellate decisions have not been entirely consistent in defining this principle. The Court noted that some cases have held that under the exception, a court can take jurisdiction only if (1) the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the action again. *Id.*; See also Treasured Arts, Inc. v. Watson, 319 S.C. 560, 463 S.E.2d 90 (1995). Other cases have taken a less restrictive approach in defining the exception, holding that a court can take jurisdiction, despite mootness, if “the issue raised is ‘capable of repetition but evading review.’” In Re Darlene C., 278 S.C. 664, 301 S.E.2d 136 (1983). The

Court, in Byrd, clarified that the less restrictive approach is the appropriate standard in determining the applicability of the evading review exception of the mootness doctrine. See also, Nelson v. Ozmint, 390 S.C. 432 , 702 S.E. 2d 369 (2010) (Even though a remedy may render case ostensibly moot, if an otherwise moot question is capable of repetition but generally will evade review, the appellate court can address the issue).

Where the Trust has already incurred unnecessary expenses from the Treasurer's delay, and the Treasurer's decision to fund the obligation has alleviated the emergency, confusion over his role and statutory obligations linger. This case is far from moot and satisfies the three exceptions to the mootness doctrine of this court. Petitioner therefore requests that this Court retain jurisdiction over this matter to consider injunctive relief and direct and clarify the custodian to follow directives to fund future investments except those which he contends are palpably illegal or have no basis in law.

April 15, 2013



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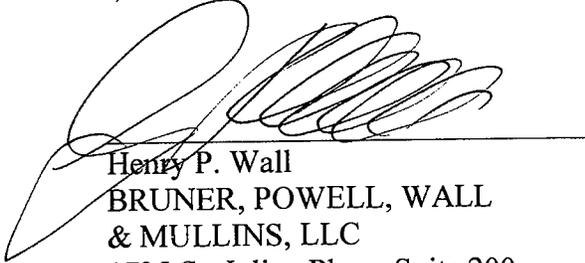
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PROOF OF SERVICE

I, Henry P. Wall, of Bruner, Powell, Wall & Mullins, LLC, attorneys for
Petitioner do hereby certify that on the 15th day of April 2013, I caused to be served the
Reply of Petitioner upon Respondent by causing those documents to be hand-delivered
to Mr. Dowling and sent electronically to Mr. Coates to the following offices :

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