

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JUDY MESIROV, Derivatively on  
Behalf of THE SOUTHERN  
COMPANY,

Plaintiff,

v.

THOMAS A. FANNING, ART P.  
BEATTIE, DONALD M. JAMES,  
JUANITA POWELL BARANCO,  
WILLIAM G. SMITH, JR., JOHN A.  
BOSCIA, WARREN A. HOOD, JR.,  
VERONICA M. HAGEN, HENRY A.  
CLARK, III, STEVEN R. SPECKER,  
LARRY D. THOMPSON, DALE E.  
KLEIN, E. JENNER WOOD, III,  
DAVID J. GRAIN, LINDA P.  
HUDSON, JOHN D. JOHNS,  
EDWARD DAY, VI, G. EDISON  
HOLLAND, JR., and H. WILLIAM  
HABERMEYER, JR.,

Defendants,

-and-

THE SOUTHERN COMPANY, a  
Delaware corporation,

Nominal Defendant.

) Case No.

)

)

) VERIFIED STOCKHOLDER

) DERIVATIVE COMPLAINT FOR

) VIOLATION OF SECURITIES LAW,

) BREACH OF FIDUCIARY DUTY,

) WASTE OF CORPORATE ASSETS,

) AND UNJUST ENRICHMENT

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) DEMAND FOR JURY TRIAL

Plaintiff, by her attorneys, submits this Verified Stockholder Derivative Complaint for Violation of Securities Law, Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment. Plaintiff alleges the following on information and belief, except as to the allegations specifically pertaining to plaintiff, which are based on personal knowledge. This complaint is also based on the investigation of plaintiff's counsel, which included, among other things, a review of public filings with the U.S. Securities and Exchange Commission ("SEC") and a review of news reports, press releases, and other publicly available sources.

### **NATURE AND SUMMARY OF THE ACTION**

1. This is a stockholder derivative action brought by plaintiff on behalf of nominal defendant The Southern Company ("Southern Company" or the "Company") against certain of its officers and directors for violation of securities law, breach of fiduciary duty, waste of corporate assets, and unjust enrichment. These wrongs resulted in hundreds of millions of dollars in damages to Southern Company's reputation, goodwill, and standing in the business community. Moreover, these actions have exposed the Company to hundreds of millions of dollars in potential liability for violations of state and federal law.

2. Southern Company is a gas and electric utility holding company based in Atlanta, Georgia. The Company operates through its subsidiaries, which include public utility companies located throughout the Southeastern United States.

3. The Company's wholly owned subsidiary, Mississippi Power Company ("Mississippi Power"), provides power to retail customers in the state of Mississippi and to wholesale customers in the Southeastern United States. In 2006, Southern Company announced that Mississippi Power would build a "clean coal" energy facility and an integrated gasification combined cycle ("IGCC") plant in Kemper County, Mississippi (the "Kemper Plant" or the "Plant"). Southern Company stated that the Kemper Plant would cost about \$1.8 billion and would be completed by 2013.

4. The Kemper Plant was of paramount importance to the Company. The Plant attracted national media attention as it was set to become the first "clean coal" power plant capable of capturing and storing carbon dioxide emissions. The Mississippi Public Service Commission ("PSC") approved the Kemper Plant on April 29, 2010, but imposed certain restrictions, including a cap of \$2.4 billion (subsequently increased to \$2.88 billion), on the amount of construction costs that Mississippi Power could charge to ratepayers. In essence, this meant that the

Company would be responsible for all the costs of the Kemper Plant in excess of the \$2.88 billion cap.

5. Under the terms of the agreement with the PSC, the Kemper Plant would qualify for nearly \$700 million in federal incentives, including \$412 million in investment tax credits and \$270 million in clean coal power initiative funds if the Company completed building it by May 2014. Shortly after the Kemper Plant was approved, the Individual Defendants (as defined herein) repeatedly assured investors and the public that the Kemper Plant would be completed by May 2014 and be within the authorized budget.

6. After three years of routinely promising that the Kemper Plant would be completed by May 2014, the Company admitted on October 2, 2013, that Southern Company could no longer finish the Kemper Plant by that date. Even worse, the Company disclosed that the price of the project increased to approximately \$3.87 billion and that it would now be forced to repay \$133 million in federal tax credits as a result of the Company's failure to meet the deadline.

7. Defendants' belated announcement that they would not finish the Kemper Plant on time or within budget did not stop the breaches of fiduciary duty. Even after the Company made the disclosure, the Individual Defendants continued to make numerous improper statements about the Kemper Plant. Specifically, they

continually claimed the Company would complete the Kemper Plant well before it could and that Southern Company would still be eligible to receive approximately \$150 million of additional tax credit. However, despite the Individual Defendants' continued assurances to the investing public, the Kemper Plant remains unfinished to this day. As a result, the Company never received the \$150 million of additional tax credit and the cost of the project has skyrocketed. As a result, the Kemper Plant has become the most expensive power plant ever built for the amount of energy that it can generate.

8. The Individual Defendants also caused the Company to issue misleading proxy statements urging stockholders to vote to re-elect the directors. The Company's 2015 and 2016 proxy statements were misleading because the Individual Defendants repeatedly stated that the directors would be in charge of "broad responsibility to provide oversight of significant risks" when no such oversight occurred. In fact, the Individual Defendants consistently allowed the Company to publish misleading statements about the Kemper Plant despite considerable evidence showing that those statements about the Kemper Plant's deadline and cost were false.

9. To make matters worse, in May 2016, the Company announced that both Southern Company and Mississippi Power were being investigated by the

SEC regarding “accounting matters, disclosure controls and procedures, and internal controls over financial reporting” associated with the Kemper Plant. Further, by this point, the anticipated cost of the Kemper Plant increased to a staggering \$6.58 billion.

10. In July 2016, shortly after a lawsuit was filed by one of the Kemper Plant project partners alleging intentional misrepresentations regarding the project’s construction and costs, *The New York Times* published a detailed investigative report based on its review of thousands of previously undisclosed internal documents and secret recordings about the delays and cost overruns of the Kemper Plant.

11. The documents and recordings were provided to *The New York Times* by Brett Wingo (“Wingo”), a former Southern Company engineer project manager turned whistleblower, who for eight years supervised the design and construction on the Kemper Plant. These documents and recordings demonstrate that certain individuals knowingly caused the Company to promulgate false and misleading information regarding Kemper Plant's construction. According to Wingo, Southern Company supervisors and executives intentionally concealed construction delays and issued misleading statements so that Southern Company could remain eligible

for tax credits and not have to disclose to investors that the Company would lose federal subsidies.

12. In addition to the unrecoverable costs from going over budget and the litigation and investigative expenses from misleading the public, the Company has lost nearly \$16 billion in market capitalization, or 31.1%, from the date of the first improper statement by Individual Defendants (April 25, 2012) to the present. As a direct result of this unlawful course of conduct, the Company is now the subject of a federal securities class action lawsuit filed in the United States District Court for the Northern District of Georgia on behalf of investors who purchased the Company's shares.

### **JURISDICTION AND VENUE**

13. Pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. §1331 of the Securities Exchange Act of 1934 (the “Exchange Act”), this Court has jurisdiction over the claims asserted herein for violations of Section 14(a) of the Exchange Act. This Court has supplemental jurisdiction over the remaining claims under 28 U.S.C. §1367. The other claims in this action are so related to the Section 14(a) claims that fall within this Court’s original jurisdiction that they form part of the same case or controversy under Article III, Section 2 of the United States Constitution.

14. This Court has jurisdiction over each defendant named herein because each defendant is either a corporation that conducts business in and maintains operations in this District, or is an individual who has sufficient minimum contacts with this District to render the exercise of jurisdiction by the District courts permissible under traditional notions of fair play and substantial justice.

15. Venue is proper in this Court in accordance with 28 U.S.C. §1391(a) because: (i) Southern Company maintains its principal place of business in this District; (ii) one or more of the defendants either resides in or maintains executive offices in this District; (iii) a substantial portion of the transactions and wrongs complained of herein, including the defendants' primary participation in the wrongful acts detailed herein, and aiding and abetting and conspiracy in violation of fiduciary duties owed to Southern Company, occurred in this District; and (iv) defendants have received substantial compensation in this District by doing business here and engaging in numerous activities that had an effect in this District.



## **THE PARTIES**

### **Plaintiff**

16. Plaintiff Judy Mesirov was a stockholder of Southern Company at the time of the wrongdoing complained of, has continuously been a stockholder since 2008, and is a current Southern Company stockholder.

### **Nominal Defendant**

17. Nominal defendant Southern Company is a Delaware corporation with principal executive offices located at 30 Ivan Allen Jr. Boulevard, N.W., Atlanta, Georgia 30308. Southern Company is an energy services holding company that owns all of the outstanding common stock of Alabama Power Company (“Alabama Power”), Georgia Power Company (“Georgia Power”), Gulf Power Company (“Gulf Power”), Mississippi Power, and Southern Power Company (“Southern Power”), each of which is an operating public utility company. Through its subsidiaries, Southern Company serves nine million electric and gas utility customers. As of December 31, 2016, Southern Company and its subsidiaries and affiliates had 32,015 employees.

### **Defendants**

18. Defendant Thomas A. Fanning (“Fanning”) is Southern Company's President and has been since August 2010, and Chairman of the Board of Directors

(the “Board”), Chief Executive Officer (“CEO”), and a director and has been since December 2010. Defendant Fanning was also Southern Company’s Executive Vice President from April 2003 to July 2010; Chief Operating Officer from February 2008 to July 2010; Chief Financial Officer (“CFO”) from April 2003 to January 2008; and Treasurer from April 2003 to May 2007. Defendant Fanning was Gulf Power’s President and CEO from May 2002 to April 2003. Defendant Fanning is currently a director at Vulcan Materials Company and has been since February 2015. Defendant Fanning was also a director of Alabama Power and Georgia Power from 2010 to February 2015, and has served as a director at a number of other Southern Company subsidiaries. Defendant Fanning is named as a defendant in a related securities class action complaint that alleges he violated Sections 10(b) and 20(a) of the Exchange Act. Defendant Fanning knowingly, recklessly, or with gross negligence made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project. Southern Company paid defendant Fanning the following compensation as an executive:

Year	Salary	Stock Awards	Option Awards	Non-Equity Incentive Plan Compensation	Change in Pension Value	All Other Compensation	Total
2016	\$1,290,192	\$7,800,022	-	\$2,725,125	\$3,894,646	\$119,667	\$15,829,652
2015	\$1,240,385	\$7,187,441	-	\$2,499,125	\$840,198	\$78,002	\$11,845,151
2014	\$1,192,067	\$3,383,968	\$2,255,999	\$1,713,600	\$2,899,537	\$70,822	\$11,515,993
2013	\$1,152,389	\$3,128,625	\$2,085,747	\$1,199,307	\$805,738	\$66,485	\$8,438,291
2012	\$1,114,846	\$3,037,473	\$2,025,000	\$2,078,158	\$4,712,413	\$67,458	\$13,035,348

19. Defendant Art P. Beattie (“Beattie”) is Southern Company’s Executive Vice President and CFO and has been since August 2010. Defendant Beattie was also Alabama Power’s Executive Vice President, CFO, and Treasurer from February 2005 to August 2010, and Vice President and Comptroller from 1998 to January 2005. Defendant Beattie is named as a defendant in a related securities class action complaint that alleges he violated Sections 10(b) and 20(a) of the Exchange Act. Southern Company paid defendant Beattie the following compensation as an executive:

Year	Salary	Stock Awards	Option Awards	Non-Equity Incentive Plan Compensation	Change in Pension Value	All Other Compensation	Total
2016	\$717,329	\$1,984,033	-	\$1,065,186	\$1,624,332	\$42,028	\$5,432,908
2015	\$695,257	\$1,611,062	-	\$741,398	\$881,172	\$41,640	\$3,970,529
2014	\$668,516	\$929,415	\$619,617	\$772,839	\$1,396,842	\$37,293	\$4,424,522
2013	\$644,039	\$796,514	\$531,025	\$437,126	\$402,101	\$122,037	\$2,932,842
2012	\$615,378	\$773,330	\$515,558	\$737,382	\$2,747,374	\$34,352	\$5,423,374

20. Defendant Donald M. James (“James”) is a Southern Company director and has been since December 1999. Defendant James was also Southern Company’s Presiding Director from January 2010 to May 2012. Defendant James is a member of Southern Company’s Finance Committee and has been since at

least April 2012. Defendant James was also the Chairman of Southern Company's Governance Committee from at least April 2015 to April 2016, and a member of that committee from at least April 2013 to April 2016. Defendant James also served as director at Vulcan Material Company, alongside defendant Fanning, from January 2015 to December 2015. Defendant James knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant James the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$118,334	\$140,000	-	\$258,334
2015	\$124,168	\$128,334	\$1,574	\$254,076
2014	\$111,667	\$120,000	\$1,647	\$233,314
2013	\$102,500	\$105,000	\$995	\$208,495
2012	\$105,209	\$105,000	\$896	\$211,105

21. Defendant Juanita Powell Baranco ("Baranco") is a Southern Company director and has been since February 2006. Defendant Baranco was also a Georgia Power director from 1997 to February 2006. Defendant Baranco is a member of Southern Company's Audit Committee and has been since December 2014. Defendant Baranco was also the Chairman of Southern Company's Governance Committee and a member of that committee, and a member of the Nuclear/Operations Committee from at least April 2012 to at least April 2014. Defendant Baranco knowingly or recklessly made improper

statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Baranco the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$110,000	\$140,000	-	\$250,000
2015	\$104,168	\$128,334	\$1,765	\$234,267
2014	\$116,667	\$120,000	\$1,502	\$238,169
2013	\$115,000	\$105,000	\$1,025	\$221,025
2012	\$112,500	\$105,000	\$892	\$218,392

22. Defendant William G. Smith, Jr. ("Smith") is a Southern Company director and has been since February 2006. Defendant Smith was also Southern Company's Presiding Director from May 2012 to May 2014. Defendant Smith is a member of Southern Company's Governance Committee and has been since at least April 2017, and a member of the Finance Committee and has been since at least April 2013. Defendant Smith was also the Chairman of Southern Company's Finance Committee from at least April 2015 to at least April 2016, and the Chairman of the Audit Committee in at least April 2012. Defendant Smith knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Smith the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$118,334	\$140,000	-	\$258,334
2015	\$124,168	\$128,334	\$1,282	\$253,784

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2014	\$120,000	\$120,000	\$1,175	\$241,175
2013	\$115,000	\$105,000	\$810	\$220,810
2012	\$112,500	\$105,000	\$724	\$218,224

23. Defendant Jon A. Boscia (“Boscia”) is a Southern Company director and has been since December 2007. Defendant Boscia is also a member of Southern Company’s Audit Committee and has been since at least April 2012. Defendant Boscia was the Chairman of Southern Company’s Audit Committee from at least April 2013 to at least April 2016. Defendant Boscia knowingly or recklessly made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project. Southern Company paid defendant Boscia the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$118,334	\$140,000	-	\$258,334
2015	\$124,168	\$128,334	\$1,456	\$253,958
2014	\$120,000	\$120,000	\$1,499	\$241,499
2013	\$115,000	\$105,000	\$920	\$220,920
2012	\$107,291	\$105,000	\$962	\$213,253

24. Defendant Warren A. Hood, Jr. (“Hood”) is a Southern Company director and has been since December 2007. Defendant Hood was also a Mississippi Power director from August 2004 to December 2007. Defendant Hood is a member of Southern Company’s Audit Committee and has been since at least April 2012. Defendant Hood knowingly or recklessly made improper statements

in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Hood the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$110,000	\$140,000	-	\$250,000
2015	\$104,168	\$128,334	\$1,574	\$234,076
2014	\$100,001	\$120,000	\$1,443	\$221,444
2013	\$100,000	\$105,000	\$879	\$205,879
2012	\$100,000	\$105,000	\$896	\$205,896

25. Defendant Veronica M. Hagen ("Hagen") is a Southern Company director and has been since December 2008. Defendant Hagen was also Southern Company's Lead Independent Director from May 2014 to May 2016. Defendant Hagen is the Chairman of Southern Company's Governance Committee and a member of that committee and has been since at least April 2017, and a member of the Nuclear/Operations Committee and has been since at least April 2012. Defendant Hagen was also a member of Southern Company's Governance Committee in at least April 2012. Defendant Hagen knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Hagen the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$132,500	\$140,000	-	\$272,500
2015	\$128,334	\$128,334	\$2,091	\$258,759

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2014	\$120,000	\$120,000	\$1,453	\$241,453
2013	\$115,000	\$105,000	\$1,099	\$221,099
2012	\$107,291	\$105,000	\$959	\$213,250

26. Defendant Henry A. Clark, III (“Clark”) is a Southern Company director and has been since October 2009. Defendant Clark is also a member of Southern Company’s Finance Committee and has been since at least April 2012. Defendant Clark was the Chairman of Southern Company’s Finance Committee from at least April 2012 to at least April 2014. Defendant Clark knowingly or recklessly made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project. Southern Company paid defendant Clark the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$130,000	\$140,000	-	\$270,000
2015	\$124,168	\$128,334	\$1,686	\$254,188
2014	\$111,667	\$120,000	\$1,723	\$233,390
2013	\$112,500	\$105,000	\$1,065	\$218,565
2012	\$112,500	\$105,000	\$826	\$218,326

27. Defendant Steven R. Specker (“Specker”) is a Southern Company director and has been since October 2010. Defendant Specker is also the Chairman of Southern Company’s Nuclear/Operations Committee and has been since at least April 2015 and a member of that committee and has been since at least April 2012. Defendant Specker was a member of Southern Company’s Governance Committee



from at least April 2012 to at least April 2014. Defendant Specker knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Specker the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$130,000	\$140,000	-	\$270,000
2015	\$124,168	\$128,334	\$1,545	\$254,047
2014	\$111,667	\$120,000	\$1,559	\$233,226
2013	\$102,500	\$105,000	\$999	\$208,499
2012	\$100,000	\$105,000	\$879	\$205,879

28. Defendant Larry D. Thompson ("Thompson") is Southern Company's Lead Independent Director and has been since May 2016, and a director and has been since December 2014. Defendant Thompson was also a Southern Company director from May 2010 to December 2012. Defendant Thompson is a member of Southern Company's Finance Committee and Governance Committee and has been since May 2015. Defendant Thompson was also a member of Southern Company's Audit Committee in at least April 2012, and from December 2014 to at least April 2015. Defendant Thompson knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Thompson the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$127,500	\$140,000	-	\$267,500
2015	\$104,168	\$128,334	\$1,639	\$234,141
2014	\$8,333	\$10,000	\$1,077	\$19,410
2012	\$100,000	\$105,000	\$797	\$205,797

29. Defendant Dale E. Klein (“Klein”) is a Southern Company director and has been since July 2010. Defendant Klein is also a member of Southern Company’s Nuclear/Operations Committee and has been since at least April 2012. Defendant Klein was a member of Southern Company’s Governance Committee from at least April 2012 to at least April 2016. Defendant Klein knowingly or recklessly made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project. Southern Company paid defendant Klein the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$122,500	\$140,000	-	\$262,500
2015	\$117,474	\$128,334	\$1,282	\$247,090
2014	\$100,001	\$120,000	\$1,175	\$221,176
2013	\$100,000	\$105,000	\$810	\$205,810
2012	\$100,000	\$105,000	\$724	\$205,724

30. Defendant E. Jenner Wood, III (“Wood”) is a Southern Company director and has been since May 2012. Defendant Wood is also a member of Southern Company’s Governance Committee and Nuclear/Operations Committee and has been since at least April 2013. Defendant Wood knowingly or recklessly made improper statements in the Company’s press releases and public filings

concerning the Company's Kemper Plant project. Southern Company paid defendant Wood the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$110,000	\$140,000	-	\$250,000
2015	\$104,168	\$128,334	\$1,639	\$234,141
2014	\$100,001	\$120,000	\$1,675	\$221,676
2013	\$102,500	\$105,000	\$1,025	\$208,525
2012	\$63,263	\$61,250	\$1,435	\$125,948

31. Defendant David J. Grain ("Grain") is a Southern Company director and has been since December 2012. Defendant Grain is also the Chairman of Southern Company's Finance Committee and has been since at least April 2017 and a member of that committee and has been since December 2014. Defendant Grain was also a member of Southern Company's Audit Committee from December 2012 to at least April 2014. Defendant Grain knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Grain the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$121,666	\$140,000	-	\$261,666
2015	\$104,168	\$128,334	\$803	\$233,305
2014	\$100,001	\$120,000	\$1,310	\$221,311
2013	\$102,500	\$105,000	\$810	\$208,310
2012	\$5,914	\$6,210	\$227	\$12,351

32. Defendant Linda P. Hudson (“Hudson”) is a Southern Company director and has been since March 2014. Defendant Hudson is also a member of Southern Company’s Governance Committee and Nuclear/Operations Committee and has been since December 2014. Defendant Hudson was also a member of Southern Company’s Audit Committee from March 2014 to at least April 2014. Defendant Hudson knowingly or recklessly made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project. Southern Company paid defendant Hudson the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$122,500	\$140,000	-	\$262,500
2015	\$117,474	\$128,334	\$1,141	\$246,949
2014	\$75,001	\$90,000	\$1,301	\$166,302

33. Defendant John D. Johns (“Johns”) is a Southern Company director and has been since March 2015. Defendant Johns is also the Chairman of Southern Company’s Audit Committee and has been since at least April 2017 and a member of that committee and has been since March 2015. Defendant Johns knowingly or recklessly made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project. Southern Company paid defendant Johns the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2016	\$121,666	\$140,000	-	\$261,666
2015	\$93,453	\$108,334	\$987	\$202,774

34. Defendant Edward Day, VI (“Day”) was Mississippi Power’s President, CEO, and Chairman of the Board of Directors from August 2010 to May 2013. Defendant Day was also Executive Vice President for Engineering and Construction Services at Southern Company Generation, a business unit of Southern Company, from May 2003 to August 2010. Defendant Day has held other various positions at Southern Company’s subsidiaries and affiliates beginning in 1983, when he was an Engineer at Georgia Power. Defendant Day is named as a defendant in a related securities class action complaint that alleges he violated Sections 10(b) and 20(a) of the Exchange Act. Defendant Day knowingly, recklessly, or with gross negligence made improper statements in the Company’s press releases and public filings concerning the Company’s Kemper Plant project.

35. Defendant G. Edison Holland, Jr. (“Holland”) is Southern Company Holdings, Inc.’s President and CEO, and Southern Company Services, Inc.’s Executive Vice President and has been since January 2016. Defendant Holland was also Southern Company’s Executive Vice President, General Counsel, and Corporate Secretary from April 2001 to May 2013. Defendant Holland was Mississippi Power’s Chairman of the Board of Directors from May 2013 to

August 2016; CEO from May 2013 to December 2015; and President from May 2013 to October 2015. Defendant Holland has also held various positions at Southern Company's subsidiaries and affiliates beginning in 1992, including Vice President and Corporate Counsel of Gulf Power, Vice President of Power Generation and Transmission of Gulf Power, and President and CEO of Savannah Electric and Power Company. Defendant Holland is named as a defendant in a related securities class action complaint that alleges he violated Sections 10(b) and 20(a) of the Exchange Act. Defendant Holland knowingly, recklessly, or with gross negligence made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project.

36. Defendant H. William Habermeyer, Jr. ("Habermeyer") was a Southern Company director from March 2007 to May 2014. Defendant Habermeyer was also the Chairman of Southern Company's Nuclear/Operations Committee and a member of that committee from at least April 2012 to May 2014. Defendant Habermeyer knowingly or recklessly made improper statements in the Company's press releases and public filings concerning the Company's Kemper Plant project. Southern Company paid defendant Habermeyer the following compensation as a director:

<b>Fiscal Year</b>	<b>Fees Paid in Cash</b>	<b>Stock Awards</b>	<b>All Other Compensation</b>	<b>Total</b>
2014	\$50,000	\$50,000	\$280	\$100,280
2013	\$112,500	\$105,000	\$810	\$218,310
2012	\$112,500	\$105,000	\$724	\$218,224

37. The defendants identified in ¶¶18-19, 34-35 are referred to herein as the “Officer Defendants.” The defendants identified in ¶¶18, 20-33, 36 are referred to herein as the “Director Defendants.” The defendants identified in ¶¶21, 23-24, 33 are referred to herein as the “Audit Committee Defendants.” Collectively, the defendants identified in ¶¶18-36 are referred to herein as the “Individual Defendants.”

### **DUTIES OF THE INDIVIDUAL DEFENDANTS**

#### **Fiduciary Duties**

38. By reason of their positions as officers and directors of the Company, each of the Individual Defendants owed and owe Southern Company and its stockholders fiduciary obligations of trust, loyalty, good faith, and due care, and were and are required to use their utmost ability to control and manage Southern Company in a fair, just, honest, and equitable manner. The Individual Defendants were and are required to act in furtherance of the best interests of Southern Company and not in furtherance of their personal interest or benefit.

39. To discharge their duties, the officers and directors of Southern Company were required to exercise reasonable and prudent supervision over the

management, policies, practices, and controls of the financial affairs of the Company. By virtue of such duties, the officers and directors of Southern Company were required to, among other things:

(a) accurately guide the Company's stockholders and the public when speaking about the Company's financial and business prospects, including the true cost and completion date of one of the Company's most significant projects, the Kemper Plant;

(b) conduct the affairs of the Company in an efficient, business-like manner in compliance with all applicable laws, rules, and regulations so as to make it possible to provide the highest quality performance of its business, to avoid wasting the Company's assets, and to maximize the value of the Company's stock; and

(c) remain informed as to how Southern Company conducted its operations, and, upon receipt of notice or information of imprudent or unsound conditions or practices, make reasonable inquiry in connection therewith, and take steps to correct such conditions or practices and make such disclosures as necessary to comply with applicable laws.



## **Breaches of Duties**

40. The conduct of the Individual Defendants complained of herein involves a knowing and culpable violation of their obligations as officers and directors of Southern Company, the absence of good faith on their part, and a reckless disregard for their duties to the Company that the Individual Defendants were aware or reckless in not being aware posed a risk of serious injury to the Company.

41. The Individual Defendants breached their duty of loyalty and good faith by allowing defendants to cause, or by themselves causing, the Company to engage in making improper statements to the public and Southern Company's stockholders and thus causing the Company to incur substantial damage.

42. The Individual Defendants, because of their positions of control and authority as officers and/or directors of Southern Company, were able to, and did, directly or indirectly, exercise control over the wrongful acts complained of herein. The Individual Defendants also failed to prevent the other Individual Defendants from taking such illegal actions. As a result, and in addition to the damage the Company has already incurred, Southern Company has expended, and will continue to expend, significant sums of money.

### **Additional Duties of the Audit Committee Defendants**

43. In addition to these duties, the Audit Committee Defendants, defendants Baranco, Boscia, Hood, and Johns, owed specific duties to Southern Company to conduct a “review of and discussion with management regarding the quarterly and annual consolidated earnings announcements and corporate practices with respect to earnings announcements and earnings guidance and other financial information provided to analysts and rating agencies.” Further, the Audit Committee Charter states that the Committee has the following oversight responsibilities:

To oversee preparation of the Committee’s report required to be included in the appropriate Company disclosure documents and assist the Board in fulfilling its oversight responsibilities for the following:

- The quality and integrity of the financial reporting process and the financial statements and reports of the Company.
- The system of internal control.
- The qualifications, independence and performance of the independent auditor.
- The quality and performance of the Company’s Internal Auditing function.
- The Company’s process for monitoring adherence with the Company’s Code of Ethics and compliance with legal and regulatory requirements.

- Assistance to Executive Management and the Chief Executive Officer in setting an appropriate “Tone at the Top” that encourages the highest levels of ethical behavior and integrity in all matters.
- The Company's processes for monitoring enterprise risks.

\* \* \*

### Internal Control

The responsibility of the Committee in the area of internal control, in addition to the actions described above under the headings “Review of Documents/Reports and Financial Reporting Matters” and “Independent Audit Process”, is to:

\* \* \*

- Provide oversight of the Company’s Legal and Regulatory Compliance and Ethics Programs, including:
  - Creation and oversight of procedures for:
    - Receipt, retention and treatment of complaints received by management regarding accounting, internal accounting controls, auditing and federal securities law matters.
    - Confidential, anonymous submission by employees of concerns regarding questionable accounting, auditing and federal securities law matters.
  - At least annually, review with the Chief Compliance Officer management’s assessment of the implementation and effectiveness of the Company’s compliance program, including a review of the results of any auditing or other monitoring programs designed to prevent or detect violations of laws or regulations and any reported cases of employee fraud, conflict of interest or unethical or illegal conduct. The Chief Compliance Officer will have the authority to communicate directly to the Committee, promptly, about actual and alleged

violations of law or the Company's Code of Ethics, including any matters involving criminal or potential criminal conduct.

- Periodically discuss with management the Company's policies relating to compliance with laws and regulations, ethics, conflicts of interest and the investigation of misconduct or fraud.
- Review with the Company's General Counsel significant legal matters that may have a material impact on the financial statements and any material reports, notices or inquiries received from regulators or governmental agencies.

#### **CONSPIRACY, AIDING AND ABETTING, AND CONCERTED ACTION**

44. In committing the wrongful acts alleged herein, the Individual Defendants have pursued, or joined in the pursuit of, a common course of conduct, and have acted in concert with, and conspired with, one another in furtherance of their common plan or design. In addition to the wrongful conduct herein alleged as giving rise to primary liability, the Individual Defendants further aided and abetted and/or assisted each other in breaching their respective duties.

45. During all times relevant hereto, the Individual Defendants, collectively and individually, initiated a course of conduct that was designed to and did: (i) deceive the investing public, including stockholders of Southern Company, regarding the Individual Defendants' management of Southern Company's operations and the Kemper's Plant estimated cost and timeline; and (ii) enhance the Individual Defendants' executive and directorial positions at Southern

Company and the profits, power, and prestige that the Individual Defendants enjoyed as a result of holding these positions. In furtherance of this plan, conspiracy, and course of conduct, the Individual Defendants, collectively and individually, took the actions set forth herein.

46. The Individual Defendants engaged in a conspiracy, common enterprise, and/or common course of conduct. During this time, the Individual Defendants caused the Company to issue improper financial statements.

47. The purpose and effect of the Individual Defendants' conspiracy, common enterprise, and/or common course of conduct was, among other things, to disguise the Individual Defendants' violations of law, breaches of fiduciary duty, waste of corporate assets, and unjust enrichment; and to conceal adverse information concerning the Company's operations, financial condition, and future business prospects.

48. The Individual Defendants accomplished their conspiracy, common enterprise, and/or common course of conduct by causing the Company to purposefully or recklessly release improper statements. Because the actions described herein occurred under the authority of the Board, each of the Individual Defendants was a direct, necessary, and substantial participant in the conspiracy, common enterprise, and/or common course of conduct complained of herein.

49. Each of the Individual Defendants aided and abetted and rendered substantial assistance in the wrongs complained of herein. In taking such actions to substantially assist the commission of the wrongdoing complained of herein, each Individual Defendant acted with knowledge of the primary wrongdoing, substantially assisted in the accomplishment of that wrongdoing, and was aware of his or her overall contribution to and furtherance of the wrongdoing.

### **FACTUAL BACKGROUND**

50. Southern Company is a gas and electric utility holding company based in Atlanta, Georgia. Southern Company's subsidiaries include public utility companies located throughout the Southeastern United States, including Mississippi Power, Alabama Power, Georgia Power, Gulf Power, and Southern Power. The Company serves over nine million gas and electric utility customers in nineteen states through all of its subsidiaries.

51. Mississippi Power, a wholly owned subsidiary of the Company, operates as a utility company which provides power to retail customers in the state of Mississippi and to wholesale customers in the Southeastern United States.

52. On December 13, 2006, Southern Company announced that Mississippi Power planned to build the Kemper Plant in Kemper County, Mississippi. The Company issued a press release stating that the Kemper Plant and

accompanying IGCC coal plant “would require an approximate investment of \$1.8 billion and would create approximately 540 new construction jobs and 260 permanent jobs. The plant would be completed in 2013.”

53. On August 1, 2007, Wingo, an engineer project manager for the Kemper Plant (who would eventually become a whistleblower), began working for the Company as a subcontractor. Wingo’s duties included assisting with scheduling and design decisions on the Kemper Plant project.

54. In 2009, Mississippi Power applied to the PSC for approval to build the Kemper Plant. Mississippi Power received notification from the Internal Revenue Service (“IRS”) that the IRS had allocated \$133 million of Phase I credits to the Kemper Plant project, if certification requirements were met and the Kemper Plant was in service no later than May 11, 2014.

55. On December 7, 2009, Craig Roach, an independent evaluator hired by the PSC, submitted testimony to the commission noting uncertainties and assumptions in Southern Company’s Kemper Plant proposal. Specifically, Mr. Roach was concerned because of the substantial capital costs Mississippi ratepayers would be asked to pay and because the technology the Kemper Plant was going to use was not fully commercialized. Mr. Roach questioned whether the

costs to Mississippi ratepayers of the Kemper Plant were worth the benefits, particularly compared to a natural gas plant.

56. Despite the concerns, on April 29, 2010, the PSC approved the Kemper Plant, but imposed certain restrictions, including a cost cap, limiting the construction costs Mississippi Power could charge to ratepayers to \$2.4 billion. Then, on May 26, 2010, after extensive negotiations with state and federal officials, the PSC was convinced by Southern Company officials to raise the cost cap of the project from \$2.4 billion to \$2.88 billion. Southern Company's insistence on raising the cost cap demonstrated that the Individual Defendants knew that the previously announced cost of \$1.8 billion (and eventually \$2.4 billion) was not realistic.

57. On July 28, 2010, in an earnings call with analysts, Southern Company announced that the Kemper Plant had been approved by the PSC. Southern Company officials stated that plant was "scheduled to be placed in-service in May 2014" and that it had a construction cost estimate of \$2.4 billion. Southern Company also stated that Mississippi ratepayers would start to pay for the Kemper Plant before it was completed.

58. On August 12, 2010, the U.S. Department of Energy ("DOE") authorized \$270 million in federal funds to go to the Kemper Plant project. The



groundbreaking ceremony for the project was held at the Kemper Plant site on December 16, 2010.

### **IMPROPER STATEMENTS**

#### **Defendants' Initial Improper Statements Concerning the Completion and Cost of the Kemper Plant**

59. The Individual Defendants first began to disseminate improper statements regarding the Kemper Plant on April 25, 2012. On this date, Southern Company issued a press release announcing first quarter earnings for the period ended March 31, 2012, and held a conference call with investors, analysts, and media representatives. During this call, defendant Fanning stated that the Kemper Plant would be finished, on schedule, which called for completion by May 2014.

Defendant Fanning stated:

[O]n April 24, the Mississippi Public Service Commission finalized a new certificate of public convenience and necessity for the Plant Ratcliffe in Kemper County, Mississippi. This became necessary after the Mississippi Supreme Court's recent reversal of the commission's previous order. In the interim, construction continued on the Kemper County site under a temporary authorization granted by the PSC on March 30 and will now proceed under the authority of the new permanent order. ***Initial startup and testing are now only 14 months away***, and we remain confident that this project will provide the best value to customers over the long term. ***Targets remain achievable for both the Vogtle and Kemper County projects with regard to construction schedule and cost to customers.***

60. On May 7, 2012, the Company filed its Quarterly Report on Form 10-Q for the first quarter ended March 31, 2012, with the SEC. The Individual Defendants again caused the Company to make overly optimistic statements regarding the estimated cost and timeline of the Kemper Plant. Specifically, the Company claimed that the total cost of the Kemper Plant would be less than the cost cap of \$2.88 billion and that the project would be completed by May 2014.

The Form 10-Q stated:

The certificated cost estimate of the Kemper IGCC is \$2.4 billion, net of \$245.3 million of grants awarded to the project by the DOE under the Clean Coal Power Initiative Round 2 (CCPI2) and excluding the cost of the lignite mine and equipment and the carbon dioxide (CO<sub>2</sub>) pipeline facilities. The 2012 MPSC Order, like the 2010 MPSC Order, (1) approved a construction cost cap of up to \$2.88 billion (exemptions from the cost cap include the cost of the lignite mine and equipment and the CO<sub>2</sub> pipeline facilities), (2) provided for the establishment of operational cost and revenue parameters based upon assumptions in Mississippi Power's proposal, and (3) approved financing cost recovery on CWIP balances not to exceed the certificated cost estimate, which provided for the accrual of AFUDC in 2010 and 2011 and provides for the current recovery of financing costs on 100% of CWIP in 2012, 2013, and through May 1, 2014, (provided that the amount of CWIP allowed is (i) reduced by the amount of state and federal government construction cost incentives received by Mississippi Power in excess of \$296 million to the extent that such amount increases cash flow for the pertinent regulatory period and (ii) justified by a showing that such CWIP allowance will benefit customers over the life of the plant). As of March 31, 2012, *Mississippi Power had utilized substantially all of its contingency contained in the certificated cost estimate. Mississippi Power anticipates that the costs to complete construction of the portion of*

***the Kemper IGCC subject to the construction cost cap will be less than the cost cap but will likely exceed the certificated cost estimate.***

\* \* \*

***The Kemper IGCC plant, expected to begin commercial operation in May 2014,*** will use locally mined lignite (an abundant, lower heating value coal) from a mine adjacent to the plant as fuel. The mine is scheduled to be placed into service in June 2013.

61. The Form 10-Q also contained signed certifications pursuant to the Sarbanes-Oxley Act of 2002 (“SOX”) by both defendants Fanning and Beattie as follows:

I [Thomas A. Fanning/Art P. Beattie] certify that:

1. I have reviewed this quarterly report on Form 10-Q of The Southern Company;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

(b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

(c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

(d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the

registrant's ability to record, process, summarize and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

62. On July 25, 2012, Southern Company issued a press release and held a conference call discussing second quarter financial results ended June 30, 2012, providing updates on the Kemper Plant. During the call with investors, analysts, and media representatives, defendant Fanning again claimed that the Company was on target to complete the Kemper Plant by May 2014. However, defendant Fanning altered his position as he was no longer stating that the Kemper Plant would cost less than the cost cap (\$2.88 billion). Instead, defendant Fanning now declared that the Kemper Plant would cost approximately \$2.88 billion. Defendant Fanning stated:

Construction continues at the Ratcliffe site, as we move toward our target completion date of May 2014. Our most recently filed status report reflects an estimated cost for the project of \$2.88 billion, including a \$62 million contingency.

\* \* \*

In the meantime, our current analysis indicates that the overall cost to customers for Plant Ratcliffe will be less than projected in the original certification, due primarily to the lower cost of debt financing and the proceeds from the by-product sales mentioned earlier. In the end, our intent is to provide customers in Mississippi with the benefit of a cost-effective, cutting-edge technology that exceeds even the EPA's proposed new source CO2 standards.

63. On August 6, 2012, the Company filed its Quarterly Report on Form 10-Q for the second quarter ended June 30, 2012, with the SEC. The Form 10-Q, signed by defendants Fanning and Beattie again stated that the Kemper Plant is “expected to begin commercial operation in May 2014.” The Form 10-Q stated:

The Kemper IGCC, *expected to begin commercial operation in May 2014*, will use locally mined lignite (an abundant, lower heating value coal) from a mine adjacent to the Kemper IGCC as fuel. The mine is scheduled to be placed into service in June 2013. In conjunction with the Kemper IGCC, Mississippi Power will own the lignite mine and equipment and has acquired and will continue to acquire mineral reserves located around the Kemper IGCC site in Kemper County. The estimated capital cost of the mine is approximately \$245 million, of which \$99.9 million has been incurred through June 30, 2012.

64. On August 9, 2012, the Individual Defendants caused the Company’s subsidiary, Mississippi Power, to begin making positive public statements about the Kemper Plant. In a press release, Mississippi Power announced that the Kemper Plant was “nearing peak construction, creating jobs.” The press release stated:

...With commercial operation of its Kemper County integrated gasification combined cycle plant less than two years away, Mississippi Power is well-positioned to execute the most critical next steps in the peak construction phase beginning later this year.

“Our partnership with our construction contractors is stronger than ever,” said Mississippi Power President and CEO Ed Day. “Together, for the benefit of Mississippi Power customers and Mississippians,

we're safely executing on a 21st century coal plant that will deliver clean, safe, reliable and affordable energy."

Day further remarked that the company recently realigned the project work of onsite contractors so that each company can focus on its key competencies and ***bring the project online by May 2014***.

65. On October 19, 2012, Mississippi Power issued another press release which provided a status update on the Kemper Plant. The press release reiterated that the Kemper Plant was on schedule to begin operations in May 2014.

66. On November 5, 2012, Southern Company issued a press release announcing its financial and operating results for the third quarter ended September 30, 2012. On the same day, Southern Company held a conference call regarding the quarterly financial results, during which investors, analysts, and media representatives were yet again reassured that the Kemper Plant remained on schedule, and that the project cost would be below the \$2.88 billion cost cap. During the call, defendant Fanning continued to make improper and overly optimistic statements about the Kemper Plant's timeline and projected cost stating:

At Plant Ratcliffe in Kemper County, Mississippi, ***construction remains on schedule to begin commercial operation in May of 2014. Cost projections remain on target to finish at or below \$2.88 billion.*** We continue to actively manage ongoing pressures on costs and schedule, which are typical for a project of this scale. Installation of the gasifiers and assembly is proceeding exceptionally well, and the carbon dioxide absorbers are all in place.

Natural gas and effluent water pipelines, as well as critical transmission upgrades, ***have all been completed on time or ahead of schedule***. Contracts for the sale of final byproducts of the gasification process have been finalized, which, combined with the expected savings from financing and factoring in current capital estimates, are projected to provide approximately \$500 million more in value to Mississippi Power customers than was originally projected.

Over the next few months and early into 2013, the remaining gasifier list will be completed. Other major elements, such as the water plant and air compressor are scheduled to be completed in the spring. ***Start-up activity begins next year as well***, with the first fire of the gas turbines scheduled for the second quarter of 2013.

Heat-up of the gasifiers is scheduled for late '13 and ***reliable flows of syngas are expected to begin in early 2014***. Once the plant is finished and operational, customers in Mississippi will enjoy the benefits of a clean, cost-effective, cutting-edge energy for decades to come.

67. Further, during this conference call, analysts specifically asked defendant Fanning about the possibility of cost overruns and the eventual performance of the Kemper Plant. Defendant Fanning dismissed those concerns, claiming that the Company had “enormous experience” with the technology that powers the Kemper Plant and thus its guidance was accurate. Defendant Fanning had the following exchange with an analyst:

[Analyst]: Okay. And secondly, about your IGCC. We're watching another IGCC project with some cost overruns and some issues with the gasifier. You mentioned that your gasifier is going to be installed or heated up only in late 2013. How can you be comfortable with the performance of the gasifier before it's actually been installed?



[Defendant Fanning]: Perfect. You know, it's funny, we love our earnings call and we love preparing for them. I remember Jim von Riesemann asked me a question about why we were different than Edwardsport, and I went off on a soliloquy for 20 minutes. I'll resist the temptation to do that. Let me give you some headlines as to why we're different. Number one, this is our technology. We're not buying from a third party. Number two, you know that we are the only one in the industry with an engineering and construction services group of 1,600 people. We're able to self-build this effort, along with other main subcontractors, but this is our effort. And when you look at the fact that we've deployed, I guess by the end of '13, \$13 billion of environmental equipment, *we know how to build stuff. We think we're going to do likewise a great job here.* Thirdly, remember that we're the only company engaged in proprietary research and development in a robust way in the industry, and the heartbeat of that effort is in our Wilsonville facility. We call it the PSDF, Power Systems Development Facility. We grew this technology and really it evolved into some R&D that we started way back in the '60s with liquefaction. It is now gasification. We've run that thing for like—I forget how many man hours—50,000 man hours or some enormous—*we have enormous experience running this technology with this fuel at that*—we actually imported fuel from that site to run through our PSDF facility.

68. On November 7, 2012, the Company filed its Quarterly Report on Form 10-Q for the third quarter ended September 30, 2012, with the SEC. The Form 10-Q, signed by defendants Fanning and Beattie, reiterated that the Kemper Plant was “expected to be in service in May 2014,” and also stated that “Mississippi Power continues to believe its cost estimate and schedule projection remain appropriate based on the current status of the project.”

69. On January 30, 2013, defendant Fanning stated in an earnings conference call that the Kemper Plant was still “on track for its May 2014 commercial operation date.” Defendant Fanning stated:

The second priority is achieving success with our major construction projects, specifically Plant Vogtle Units 3 and 4, and *the Kemper Project, both of which are continuing to progress in an outstanding manner.* While projects of this scale and magnitude always face unforeseen challenges, *we continue to demonstrate our ability to constructively manage those issues and achieve a favorable outcome.*

\* \* \*

*Meanwhile, the Kemper Project is now 35% complete and remains on track for its May 2014 commercial operation date.* To date, approximately \$2.5 billion has been spent on the project. The plant is scheduled to begin startup activities this summer with first fire going to the CTs in June, and the first gasifier heat-up taking place in December. Reliable syngas is expected to begin flowing to the CTs in February 2014.

70. On February 28, 2013, Southern Company filed its Annual Report on Form 10-K for the fiscal year ended December 31, 2012, with the SEC. The Form 10-K, which was signed by defendants Fanning, Beattie, Baranco, Boscia, Clark, Grain, Habermeyer, Hagen, Hood, James, Klein, Smith, Specker, and Wood, reiterated that the Kemper Plant would cost approximately \$2.88 billion and would be completed by May 2014. The report stated:

The Company is constructing the Kemper IGCC which will utilize an IGCC technology with an output capacity of 582 MWs. The Kemper

IGCC will use as fuel locally mined lignite (an abundant, lower heating value coal) from a mine owned by the Company and situated adjacent to the Kemper IGCC. In connection with the Kemper IGCC, the Company also plans to construct and operate approximately 61 miles of carbon dioxide (CO<sub>2</sub>) pipeline infrastructure. ***The Kemper IGCC is scheduled to be placed in-service in May 2014.***

\* \* \*

***The Company's current cost estimate for the Kemper IGCC*** (net of the \$245.3 million CCPI2 grant, and excluding the cost of the lignite mine and equipment, the cost of the CO<sub>2</sub> pipeline facilities, financing costs, and certain general exceptions as contemplated in the 2012 MPSC Order and the settlement agreement between the Company and the Mississippi PSC entered into on January 24, 2013 (Settlement Agreement) that must be specifically approved by the Mississippi PSC) ***is approximately \$2.88 billion.***

### **Defendants Make a Series of Improper Statements to Downplay and Conceal the Issues Affecting the Kemper Plant**

71. After years of promising that the Kemper Plant would be completed for approximately \$2.88 billion, the Company drastically changed its position on April 23, 2013, when it filed a combined Current Report (with Mississippi Power) on Form 8-K with the SEC. The Form 8-K disclosed that the Kemper Plant project would now cost \$3.42 billion—a \$540 million increase from its last estimate—blaming additional labor, engineering, and materials costs. The Form 8-K included the following statements:

Mississippi Power is constructing the Kemper IGCC which will utilize an integrated coal gasification combined cycle technology with an output capacity of 582 megawatts. The certificated cost estimate of the Kemper IGCC included in the order issued by the Mississippi

Public Service Commission (the “Mississippi PSC”) in April 2012 confirming the issuance of the Certificate of Public Convenience and Necessity (the “CPCN”) for the Kemper IGCC (the “2012 MPSC Order”) was \$2.4 billion, net of \$245 million of Department of Energy (“DOE”) grants and the cost of the lignite mine and equipment, the cost of the carbon dioxide (“CO<sub>2</sub>”) pipeline facilities, and allowance for funds used during construction (“AFUDC”) related to the Kemper IGCC. The 2012 MPSC Order approved a construction cost cap of up to \$2.88 billion, with recovery of prudently-incurred costs subject to approval by the Mississippi PSC. Exceptions from the cost cap included in the 2012 MPSC Order include the cost of the lignite mine and equipment, the cost of the CO<sub>2</sub> pipeline facilities, AFUDC, and certain general exceptions, including change of law, force majeure, and beneficial capital (which exists when Mississippi Power demonstrates that the purpose and effect of the construction cost increase is to produce efficiencies that will result in a neutral or favorable effect on the ratepayers, relative to the provisions of the CPCN) (the “Cost Cap Exceptions”). Recovery of the Cost Cap Exception amounts remains subject to review and approval by the Mississippi PSC.

On January 24, 2013, Mississippi Power entered into a settlement agreement (the “Settlement Agreement”) with the Mississippi PSC that, among other things, establishes the process for resolving matters regarding cost recovery related to the Kemper IGCC. Under the Settlement Agreement, Mississippi Power agreed to limit the portion of prudently-incurred Kemper IGCC costs to be included in retail rate base to the \$2.4 billion certificated cost estimate, plus the Cost Cap Exceptions as well as any other costs permitted or determined to be excluded from the cost cap by the Mississippi PSC. As contemplated by the Settlement Agreement, Mississippi Power intends to finance (1) prudently-incurred costs in excess of the certificated cost estimate and up to the \$2.88 billion cost cap and (2) the accrued AFUDC through securitization as provided in State of Mississippi legislation.

***On April 23, 2013, Mississippi Power revised its cost estimate for the Kemper IGCC from approximately \$2.88 billion, net of DOE grants and the Cost Cap Exceptions, to approximately \$3.42 billion, net of***

***DOE grants and the Cost Cap Exceptions.*** The revised cost estimate reflects additional cost pressures, including labor costs, piping and other material costs, engineering and support costs, and productivity decreases. Mississippi Power does not intend to seek any joint owner contributions or rate recovery for any costs of the Kemper IGCC that exceed the \$2.88 billion cost cap, except for amounts subject to the Cost Cap Exceptions. Accordingly, Mississippi Power and Southern Company will reflect a pre-tax charge to income for this estimated probable loss of \$540 million (\$333 million after tax) in their first quarter 2013 financial statements.

72. On April 24, 2013, Southern Company held a conference call regarding its quarterly financial results, during which it acknowledged the \$540 million (\$333 million after-tax) charge related to cost overruns at the Kemper Plant. During this call, however, defendant Fanning reassured the public that the Kemper Plant remained on schedule and would meet the May 2014 deadline. Defendant Fanning provided details regarding the successful completion of the project stating:

***Meanwhile, progress continued at the Kemper project in Mississippi as we continue with start-up activities.*** Last month, consistent with the settlement agreement we reached in January, the Mississippi Public Service Commission approved a 2-step rate increase associated with the Kemper project. The settlement agreement contemplated a 7-year plan with no further changes to base rates for Kemper project through 2020. And Mississippi Power recently made its necessities filings with the commission. This rate mitigation plan is expected to be addressed by the commission this fall.

***We continue to make tremendous progress at the Kemper site. With most of the major components in place,*** the combined cycles, gasifiers, massive gas absorbers, and lignite dome, as well as a 75-

acre reservoir, the facility's appearance reflects ***our progress start-up activities, which are now 40% complete.*** With the final engineering almost complete, the activities leading up to commercial operation includes a very meticulous work of bringing the installed components together through sophisticated piping, cabling, and control equipment.

***Our current cost estimate for the project has increased based primarily on matters related to piping.*** We've improved the quality and increased the quantity of the pipe and increased the amount of labor needed to achieve our in-service date. Art [Beattie] will speak to the financial implications of the current estimate in a few minutes.

While disappointed with the estimated cost increases, we remain accountable to customers. In light of our agreements with the Mississippi Public Service Commission, ***we will not seek recovery of these increased costs, which exceed the \$2.88 billion cost cap established in the commission's 2012 certification order, net of DOE grants and cost cap exceptions included in that order.*** Our current plan is only to seek recovery of the capital and variable cost components already reflected in the 7-year rate plan recently filed with the PSC. ***The revised construction cost estimate reflects the company's current analysis of the cost to complete the Kemper project.***

***We continue to believe that the scheduled in-service date is achievable.*** As with any project of this magnitude and complexity, we will continue to evaluate the estimated project cost and schedule ***as we proceed towards completion over the next year.***

73. On May 10, 2013, Mississippi Power acknowledged that its accounting for the project cost of the Kemper Plant in previous financial statements was incorrect. In Amendment No. 1 on Form 10-K/A, Mississippi Power restated its financial statements for the year ended December 31, 2012, to recognize a pretax charge for an estimated probable loss for the Kemper Plant of

\$78 million (\$48.2 million after tax). On the same day, in its Quarterly Report on Form 10-Q for the first quarter ended March 31, 2013, filed with the SEC, Southern Company disclosed that there was a material weakness in its internal control over financial reporting due to Mississippi Power's failure to keep and publicly report certain information about schedule delays and cost overruns. The Company stated:

Management believes Mississippi Power's failure to maintain sufficient evidence supporting certain estimated amounts included in the Kemper IGCC cost estimate and to fully communicate the related effects in the development of the Kemper IGCC cost estimate would constitute a material weakness in internal control over financial reporting under standards adopted by the Public Company Accounting Oversight Board and concluded ***Mississippi Power's internal control over financial reporting was not effective as of December 31, 2012.***

As of the end of the period covered by this quarterly report, Mississippi Power conducted an evaluation under the supervision and with the participation of management, including the Chief Executive Officer and the Chief Financial Officer, of the effectiveness of the design and operation of the disclosure controls and procedures (as defined in Sections 13a-15(e) and 15d-15(e) of the Securities Exchange Act of 1934). ***Based upon this evaluation, which considered the material weakness described above, the Chief Executive Officer and the Chief Financial Officer concluded that the disclosure controls and procedures were not effective.***

Management has initiated appropriate actions to remediate the material weakness in internal control over financial reporting. Such actions include, but are not limited to, the following:

- ***establishing a new governance team focused on accounting, legal, and regulatory affairs that will meet regularly with the***



***Kemper IGCC project and construction teams and will provide further oversight of the Kemper IGCC cost estimation process;***

- reemphasizing and enhancing communication across functional areas and departments; and
- applying appropriate performance management actions.

***Remediation of the material weakness is expected to be completed during the second quarter 2013.***

74. The pretax loss of \$78 million, however, drastically understated the loss caused by the Kemper Plant.

75. Just two months later, Mississippi Power and Southern Company continued making improper statements about the Kemper Plant's projected cost and in-service date. In particular, on July 30, 2013, Southern Company and Mississippi Power filed a combined Current Report on Form 8-K with the SEC. In the Form 8-K, the Company announced that it would once again increase the estimated price of the Kemper Plant project. The project would now cost approximately \$3.87 billion. Although the companies admitted that the projected cost of the Kemper Plant increased, the Company did not alter its public timeline for the projected in-service date of the plant. Furthermore, the Company's projected cost of \$3.87 billion for the Kemper Plant drastically understated the



price of the plant and was based on the assumption that it would be completed by May 2014. The Form 8-K stated:

In July 2013, Mississippi Power's management completed its review of additional cost pressures related to the Kemper IGCC associated with ongoing construction activities, inventory necessary to mitigate startup risk, startup energy costs, and other startup activities, as well as productivity. ***As a result of this review, on July 29, 2013, Mississippi Power further revised its cost estimate for the Kemper IGCC to approximately \$3.87 billion***, net of \$245 million of grants awarded to the project by the U.S. Department of Energy under the Clean Coal Power Initiative Round 2 ("DOE Grants") and the cost of the lignite mine and equipment, the cost of the carbon dioxide pipeline facilities, allowance for funds used during construction related to the Kemper IGCC, and certain general exceptions, including change of law, force majeure, and beneficial capital (which exists when Mississippi Power demonstrates that the purpose and effect of the construction cost increase is to produce efficiencies that will result in a neutral or favorable effect on customers relative to the original proposal for the Certificate of Public Convenience and Necessity) (the "Cost Cap Exceptions"). The revised cost estimate reflects additional cost pressures, including labor costs, piping and other material costs, engineering and support costs, start-up costs, and decreases in construction labor productivity. Mississippi Power does not intend to seek any joint owner contributions or rate recovery for any costs related to the construction of the Kemper IGCC that exceed the \$2.88 billion cost cap, except for amounts subject to the Cost Cap Exceptions and net of the DOE Grants. ***As a result of the revised cost estimate, Southern Company and Mississippi Power will record a pre-tax charge to income for this estimated probable loss of \$450 million (\$278 million after tax) in their second quarter 2013 financial statements in addition to the \$540 million (\$333 million after tax) that has been previously recognized.***

76. On July 31, 2013, Southern Company issued a press release announcing the Company's financial and operating results for the second quarter of

2013, ended June 30, 2013. On the same day, Southern Company held a conference call with investors, analysts, and media representatives, regarding its financial results. During the call, which defendants Fanning and Beattie participated in, defendant Fanning indicated that May 2014 was still the “*targeted in-service date.*”

77. On August 6, 2013, Southern Company filed its Quarterly Report on Form 10-Q for the second quarter ended June 30, 2013, with the SEC. The Form 10-Q was signed by defendants Fanning and Beattie. Despite the fact that the promised completion date of May 2014 was less than one year away, the Company was still releasing statements to the public claiming that the project would be completed on time. Specifically, the Form 10-Q indicated that the Kemper Plant was “scheduled to be placed in-service in May 2014.”

78. On October 2, 2013, Southern Company and Mississippi Power filed a combined Current Report on Form 8-K with the SEC. In the Form 8-K, the Company disclosed for the first time that it would not meet the May 2014 deadline for completion of the Kemper Plant and that the IRS would recapture the \$133 million in tax credits that the Company had taken. Defendants still, however, did not reveal to investors and the public at large the true extent of the delays and cost overruns at the Kemper Plant. Instead, Defendants continued making

improper positive statements about the Kemper Plant, including that it would still be completed in 2014 and would be eligible to receive approximately \$150 million of additional tax credits.

79. On October 30, 2013, Southern Company issued a press release announcing the Company's financial and operating results for the third quarter of fiscal year 2013, ended September 30, 2013. That same day, Southern Company held a conference call for investors, analysts, and media representatives. During the call, defendant Fanning tried to explain away the Kemper Plant delays as a result of "wet weather." Further, defendant Fanning claimed that "the construction of Kemper has gone very well." Defendant Fanning stated:

Now for an update on the Kemper County project. ***Earlier this month we announced that we did not expect to meet the original May 2014 in-service date for the Kemper project, largely as a result of lower-than-expected production rates and delays from wet weather.*** After recalibrating our assumptions on the rate of pipe installation, we have revised the in-service date to the fourth quarter of 2014.

In conjunction with the schedule change, we have recorded an additional pretax estimated loss of \$150 million. As a reminder, we estimated the incremental cost for a delay to be approximately \$15 million to \$25 million per month. Our new estimate is consistent with that projection and also retains a \$100 million contingency.

Tremendous progress continues to be made at the site. We are now nearly halfway complete with pipe installation, have fired both combustion turbines and have synced the entire two-on-one combustion cycle to the grid.

\* \* \*

And I'll just tell you some. We believe the problem at Kemper was essentially at the time that we made a fixed price commitment with 10% engineering done at 6.7% contingency. In other words, the problem has been one more of a lack of engineering that was completed, rather than construction. ***By all accounts, the construction of Kemper has gone very well.***

80. As the months went on, the Company continued to announce delays in the completion date for the Kemper Plant and increased costs. Each of these statements, though, was improper because they failed to accurately reflect the delays occurring at the Kemper Plant or the repercussions those delays were having on the project's costs.

81. On January 28, 2014, Southern Company and Mississippi Power filed a combined Current Report on Form 8-K with the SEC announcing a revised cost estimate of \$4.06 billion for the Kemper Plant project. This cost estimate was still misleading because it assumed a 2014 completion date, which the Individual Defendants knew, or were reckless in not knowing, was an impossible deadline to meet.

82. On April 2, 2014, Southern Company and Mississippi Power filed a Current Report on Form 8-K. Even with just eight months left in the year, defendants continued to claim that the Company would finish the Kemper Plant in the fourth quarter of 2014.

83. Southern Company did not finish the Kemper Plant in 2014 (and the plant is still not operational to this day). Instead, defendants continued to move back the date of completion, while at the same time publishing optimistic news about the Company's progress and expected costs of the Kemper Plant. On March 9, 2015, Mississippi Power announced in a press release that the Kemper Plant had reached "one of its most significant milestones to date," the "first fire" of the plant's gasifiers. Based on public reports, the "first fire" term has a very specific engineering definition, and should have involved the "controlled circulation of sand and/or ash inside the various parts of the gasifier." A "first fire" should also involve, among other steps, heating the gasifier to temperatures suitable for gasification of coal, which is about 1,800 degrees Fahrenheit. These steps did not actually occur even though the Company said publicly that they did, according to comments from gasifier engineers from the Kemper Plant during recorded calls with Wingo.

84. On April 28, 2015, the Company again made improper statements about the Kemper Plant's completion date. The Company issued promotional materials stating, in part, that "Mississippi Power has announced that the Kemper project is expected to begin operation in the first half of 2016."

85. On July 29, 2015, during an earnings call discussing the Company's second quarter 2015 results, defendant Fanning stated, "[t]o a large extent, contingencies for cost and schedule have been sufficient to absorb these activities and the focus remains on the expected in-service phase in the first half of 2016."

86. In a Current Report on Form 8-K filed with the SEC on September 29, 2015, the Company announced that "Mississippi Power now anticipates the in-service date to occur subsequent to April 19, 2016," and that this extension would require Mississippi Power to recapture \$234 million in tax credits.

**THE INDIVIDUAL DEFENDANTS CAUSE SOUTHERN COMPANY TO  
FILE MATERIALLY MISLEADING PROXY STATEMENTS**

**The Materially Misleading 2015 Proxy**

87. On April 10, 2015, defendants Baranco, Boscia, Clark, Fanning, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood issued a Proxy Statement in connection with the 2015 Annual Stockholders meeting, held on May 27, 2015 (the "2015 Proxy"). Plaintiff's allegations with respect to the misleading statements in the 2015 Proxy are based solely on negligence; they are not based on any allegation of reckless or knowing conduct by or on behalf of these defendants, and they do not allege and do not sound in fraud. Plaintiff specifically disclaims any allegations of, reliance upon

any allegation of, or reference to any allegation of fraud, scienter, or recklessness with regard to these allegations and related claim.

88. In the 2015 Proxy, defendants solicited stockholder votes to re-elect themselves to the Board. The 2015 Proxy contained materially misleading statements with respect to this vote. The 2015 Proxy stated:

Each nominee holds or has held senior executive positions, ***maintains the highest degree of integrity and ethical standards***, and complements the needs of the Company. Through their positions, responsibilities, skills, and perspectives, which span various industries and organizations, these nominees represent a Board that is diverse and possesses appropriate collective knowledge and experience in accounting, finance, leadership, business operations, risk management, corporate governance, and the Company's industry and subsidiaries' service territories, as detailed below.

89. Defendants Baranco, Boscia, Clark, Fanning, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood also stated in the 2015 Proxy that "Southern Company already has significant corporate governance practices that protect stockholder rights and interests."

90. The statements above are misleading because the directors have consistently shown either incompetence or inability to effectively provide proper corporate governance throughout their tenure as evidenced by the rampant culture of deception that occurred under their leadership at the Company. Accordingly, the Company did not have significant corporate governance practices that

protected stockholder rights and interest. Further, defendants Baranco, Boscia, Clark, Fanning, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood's improper statements and failure to actively and appropriately monitor the Company shows that they did not maintain the highest degree of integrity and ethical standards.

### **The Materially Misleading 2016 Proxy**

91. On April 8, 2016, defendants Baranco, Boscia, Clark, Fanning, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood issued a Proxy Statement in connection with the 2016 Annual Stockholders meeting, held on May 25, 2016 (the "2016 Proxy"). In the 2016 Proxy, defendants Baranco, Boscia, Clark, Fanning, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood solicited stockholder votes to re-elect themselves to the Board. In support of that goal, defendants issued materially misleading statements in the 2016 Proxy. The 2016 Proxy stated:

#### ***NOMINEES FOR ELECTION AS DIRECTORS***

- Each nominee holds or has held senior executive positions, maintains the highest degree of integrity and ethical standards, and complements the needs of the Company.
- Through their positions, responsibilities, skills, and perspectives, which span various industries and organizations, these nominees represent a Board that is diverse and possesses appropriate collective knowledge and experience in accounting,



finance, leadership, business operations, risk management, corporate governance, and [the Company's] industry and subsidiaries' service territories.

\* \* \*

## **BOARD RISK OVERSIGHT**

The Board and its committees have both general and specific risk oversight responsibilities. The Board has broad responsibility to provide oversight of significant risks we face primarily through direct engagement with our management and through delegation of ongoing risk oversight responsibilities to the committees. The charters of the committees and the checklist of agenda items for each committee define the areas of risk for which each committee is responsible for providing ongoing oversight.

92. The statements above from the 2016 Proxy repeat the 2015 Proxy statements and are misleading for the same reasons. The misleading statements in the 2015 Proxy and 2016 Proxy (collectively the "Proxies") were the essential link to the directors getting re-elected.

## **THE INDIVIDUAL DEFENDANTS' KNOWLEDGE AND CONCEALMENT OF THE TRUTH**

93. The Individual Defendants knew or were reckless in not knowing about the problems associated with the Kemper Plant, but still allowed the Company and others to issue the improper statements. As the 2016 Proxy explained, the Board is responsible for providing "oversight of significant risks" to Southern Company. The Kemper Plant, and the billions of dollars the Company poured into it, was a significant risk to Southern Company. Further, because the

costs and tax credits associated with the Kemper Plant were tied to when it became operational, the schedule for completing the Kemper Plant and matters affecting that schedule were likewise “significant risks” to the Company.

94. Another “significant risk” to the Company was its compliance with applicable rules and regulations. The Audit Committee in particular, was charged with “oversight of the Company’s Legal and Regulatory Compliance and Ethics Programs.” As part of that responsibility, the Audit Committee was charged with overseeing programs concerning the receipt and treatment of complaints that the Company may not be acting in accordance with its own internal accounting controls or federal securities laws.

95. The matters discussed below were all red flags that the schedule for building the Kemper Plant was impossible to meet, that the projected costs associated with the plant were unrealistic, and that Southern Company was not complying with applicable laws. These warnings went to the highest level of management, including the Company’s CEO, defendant Fanning, and Southern Company’s outside auditor, PricewaterhouseCoopers. The members of the Board either knew about the following red flags and failed to act or consciously failed to take appropriate steps to learn about them. Under either scenario, the members of the Board breached their fiduciary duty of loyalty to the Company.

96. First, on February 12, 2014, Wingo e-mailed Charles Powell, a Kemper Plant planning and development manager, and stated that PM Alliance, Inc. (“PM Alliance”), the scheduling contractor for the Kemper Plant, could not “in good conscience” participate in making the project schedule that Southern Company officials were creating. Wingo said the schedule that Southern Company officials were creating was misleading as it was not “reasonabl[y] or realistically achievable.”

97. Two days later, on February 14, 2014, Joshua Keller, a PM Alliance employee, e-mailed multiple Southern Company employees explaining that PM Alliance could not support the hypothetical and misleading schedule that the Southern Company management wanted to create.

98. On February 26, 2014, Wingo e-mailed Babar Suleman, a Southern Company contract scheduler responsible for controlling access to the database, and Charles Powell, a project manager at Southern Company. Wingo brought to Mr. Suleman and Mr. Powell’s attention suspicious activity surrounding the official Kemper Plant project scheduling database. In response, Mr. Suleman cautioned Wingo against further discussions of the suspicious scheduling issues. Wingo, however, continued to alert executives to the wrongdoing surrounding the Kemper Plant. Eventually, as explained in more detail below, the Company

retaliated against Wingo for his whistleblowing activities, placing him on leave and then firing him.

99. On February 27, 2014, the president of PM Alliance, Thomas Stevens, e-mailed Wingo to inform him that PM Alliance was resigning from the Kemper Plant because he did not want to be “associated” with the misleading schedule which did not “fairly and accurately” represent the remaining work to be done. Despite that an important contractor was withdrawing from working on the Kemper Plant, John Huggins (Vice President of Mississippi Power) presented and published the misleading schedule at a production meeting. The misleading schedule manipulated scheduling data to claim that there was an 80% chance that the Kemper Plant project would be completed by December 1, 2014.<sup>1</sup>

100. Later on the night of February 27, 2014, Wingo e-mailed Mr. Huggins warning him that the Company had provided the public with misleading scheduling information. Wingo also stated that the Company’s “lack of rigor in [it’s] project controls are also likely to be in clear and obvious violation of industry standards, best practices and generally accepted principles which, if [Wingo is] right, puts [the Company] in clear jeopardy with regards to Sarbanes Oxley Compliance.”

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<sup>1</sup> Wingo uploaded the schedule to the website, *thehistoryproject.com*, and provided it to *The New York Times*.

Wingo further warned, “[i]f we continue down the path we’re on, the project will admit schedule slips only at the last minute, when things can’t be hidden, glossed over or blamed away.”

101. The following day, Wingo contacted PricewaterhouseCoopers, the auditing firm who was working on the Kemper Plant project. Wingo warned PricewaterhouseCoopers that the Company had published a misleading, unvetted schedule, that PM Alliance had withdrawn as a result, and that “[PM Alliance] feels this obvious lack of rigor in our project controls and the cavalier nature of our projections will unfairly harm their brand as well.”

102. On March 10, 2014, at 12:03 p.m., Wingo called defendant Fanning and warned him that there was no way that the Kemper Plant project would be completed by the fourth quarter of 2014. During a twenty-one-minute call, Wingo warned defendant Fanning against signing any financial reports to the SEC showing a projected completion of the Kemper Plant project by the end of 2014. Wingo explained that there was no way the Kemper Plant project would be completed by then and that there was “a fraud being perpetrated on the [Kemper Plant] project, that they hijacked the schedule to make it look like 2014 was achievable.” Defendant Fanning, as CEO and a member of the Board, was required to inform the other Board members about Wingo’s concerns.

103. On March 13, 2014, a meeting was held between high-level officials at Mississippi Power and Southern Company to discuss the fallout of PM Alliance's departure. Southern Company wished to reengage PM Alliance and thus Joshua Keller attended the meeting. Mr. Keller kept contemporaneous notes of the meeting. According to Mr. Keller's notes, Bill Boyd, the Company's general manager in charge of Project Planning and Services, stated during this meeting that the schedule was intentionally altered in the past to "protect ourselves."

104. During a PSC hearing on July 24, 2014, Greg Zoll, the independent monitor hired by PSC, testified about the Kemper Plant's troubles. Mr. Zoll explained that: (i) the management of the project was incompetent; (ii) the Company delayed acknowledging major cost increases and delays long after the Company knew or should have known of those changes; (iii) as early as November 2012, Mr. Zoll was able to determine that the May 2014 completion date was unachievable; (iv) a projected cost overrun was apparent as early as September 2011, but was not acknowledged by the Company until May 2012; and (v) the Company reported "no impacts" to the PSC even though the Company had missed deadlines and slipped behind schedule.

105. Mr. Zoll's testimony did not force the Individual Defendants to curtail the wrongdoing at the Company. On May 30, 2014, Wingo met with Helen Nalley, the Operations Compliance Director at Southern Company. At this meeting (which he described in an e-mail on June 10, 2014), Wingo raised his concerns about the management at Southern Company and how the same management that was "proven to be either willful, complicit or ignorant in the fraud" was still in charge and acting incompetently in overseeing safety and fiscal (prudence) issues. In response Wingo was told to "let it go" and that this was not the first time the Company had to "let things go." Wingo was told that even if the current Kemper Plant project leadership had violated rules and potentially led executives into breaking federal laws, the leadership could not be replaced.

106. In a follow up e-mail on June 27, 2014, Wingo again warned that a change of the culture of Southern Company is needed and that there was a "lack of management and accountability" at the Company. Wingo also claimed that Company officials were retroactively filing inspection reports so that the Kemper Plant could be placed into operation.

107. Wingo's repeated concerns about the Kemper Plant were supported by the testimony of Mr. Zoll and the resignation of PM Alliance. In addition, Wingo had a sterling reputation within the Company. In 2014, Wingo won the \$2,000

“Southern Excellence” prize, for exceeding Company expectations, every year since 2008. Nevertheless, in August 2014, the Company placed Wingo on administrative leave.

108. On September 23, 2014, Wingo’s counsel sent a letter directly to Southern Company’s Chief Operating Officer, Kimberly Greene. The September 23, 2014 letter detailed how Wingo blew the whistle beginning in February 2014 by “loudly and consistently point[ing] out the schedule fraud.” The letter also detailed how the Individual Defendants were again deceiving the public because as he explained, “[e]veryone involved with the Kemper construction knows, or should know, that Commercial Operation Date (‘COD’) of May 31, 2015 is not realistic.” Finally, the letter explained that Wingo had a strong claim for retaliation for his whistleblowing activities and offered to engage in a settlement with the Company.

109. On February 14, 2015, Wingo filed a retaliation claim with the Occupational Safety and Health Administration (“OSHA”) under the whistleblower provisions of SOX. In the filing, Wingo alleged “willful deception” at the Kemper Plant, including “decisions being made, shortcuts being taken, concessions being granted, issues being ignored (some that might classify as safety related-like the measly time allotted for operator training), too many to list, all in



support of a schedule that many of us know to be a sham.” Wingo further alleged in the filing that the Company paid millions of dollars in unnecessary expediting fees and that the Company published incorrect information regarding the Kemper Plant schedule.

110. After refusing the Company’s offer for \$975,000 to keep quiet, the Company sued Wingo in the Circuit Court of Jefferson County, Alabama, alleging he had agreed to a settlement that required him to not make public statements about the Kemper Plant. Wingo denied any such agreement, and the Company eventually dropped its suit in March 2015.

111. On March 18, 2016, OSHA made a preliminary determination that the Company violated SOX when firing whistleblower Wingo in February 2016. In the March 18, 2016 preliminary determination letter sent to Southern Company, OSHA found “[t]here is evidence that [Wingo] engaged in activity protected by SOX. [Wingo] reported improper financial reporting and scheduling improprieties beginning February 27, 2014.” In the months to follow, the OSHA letter stated, Wingo “continued to seek redress of his concerns through the appropriate chain of command and contends his concerns were not addressed in a timely manner.” Regarding Wingo’s termination, OSHA stated the Company “has not offered credible evidence” that justified Wingo’s dismissal, and thus found it “reasonable

to believe that [Wingo's] engagement in protective activity was a contributing factor to the adverse action taken by [the Company], namely, not allowing [Wingo] to return to work."

### **THE TRUTH IS SLOWLY STILL EMERGING**

112. On July 5, 2016, the truth behind the culture of deception at Southern Company finally, but slowly, began emerging when *The New York Times* published a detailed investigative report entitled "Piles of Dirty Secrets Behind a Model 'Clean Coal' Project." The report exposed the illegal activities and fraud that occurred at the Company and "show[ed] that the plant's owners drastically understated the project's cost and timetable, and repeatedly tried to conceal problems as they emerged." The article provided evidence for Wingo's accusations by publishing for the first time, excerpts from the aforementioned e-mails between Wingo and superiors at the Company. *The New York Times* reviewed "thousands of pages of public records, previously undisclosed internal documents and e-mails, and 200 hours of secretly though legally recorded conversations among more than a dozen colleagues at the plant," in order to write the report. The documents and recordings were provided to *The New York Times* by Wingo and included interviews with more than thirty current or former

regulators, contractors, consultants, or engineers who worked on the Kemper Plant project.

113. On August 8, 2016, Southern Company filed its Quarterly Report on Form 10-Q for the second quarter ended June 30, 2016, with the SEC. The Form 10-Q, signed by defendants Fanning and Beattie, indicated that the Kemper Plant completion date would be pushed yet again. The Company announced that the Kemper Plant would not be in service until October 31, 2016, a one month delay from the prior projection.

114. On January 6, 2017, almost three years after the original 2014 anticipated completion date, Southern Company and Mississippi Power filed a combined Current Report on Form 8-K with the SEC. In the Form 8-K, the Company announced that it expected the Kemper Plant to begin operations by the end of January 2017. *The cost of the project has ballooned to approximately \$6.99 billion, more than double the cost estimate at the time that construction began.* Further, the negative national attention this project has received has severely damaged the Company's reputation and standing. According to the Sierra Club, the Kemper Plant is the most expensive power plant ever built for the amount of electricity that it will generate.

115. On January 31, 2017, Mississippi Power announced that the Kemper Plant was finally making electricity from gasified lignite coal, but that the target date for full operations was being pushed back once again to late February 2017. Six months earlier, on the investor conference call for the second quarter of 2016, defendant Fanning, after years of already pushing back the deadline, had assured investors that “both units A and B of the [Kemper Plant] facility are expected to be fully integrated and in-service *by the end of September [2016].*”

116. On a February 22, 2017 conference call with analysts discussing the Company’s fourth quarter 2016 results, defendant Fanning announced that the Kemper Plant would not be in full operation until the “middle of March” 2017. Defendant Fanning also stated during the call that Mississippi Power expected to file for cost recovery with the PSC within the next several months, noting, “[o]ur goal is to achieve an outcome that balances the interests of customers and investors alike, an objective which often presents challenges.”

117. As of the date of this filing, more than three years after the initial scheduled deadline, the Kemper Plant *has still not been completed and put into service, and estimated costs for the project are now more than \$6.99 billion and rising, accumulating at a rate of approximately \$25 million to \$35 million each month.*

**REASONS THE STATEMENTS WERE IMPROPER**

118. The statements referenced above were each improper when made because they failed to disclose and misrepresented the following material, adverse facts, which the Individual Defendants knew, consciously disregarded, or were reckless in not knowing:

(a) that the Kemper Plant would not be completed by the May 2014 deadline;

(b) that the Kemper Plant would cost far more than the \$2.88 billion cap set by the PSC;

(c) that Company officials were actively preventing accurate information about the Kemper Plant from being disclosed to the investing public; and

(d) as a result of the foregoing, Southern Company's representations, for years, concerning the Kemper Plant were improper.

**DAMAGES TO SOUTHERN COMPANY**

119. As a result of the Individual Defendants' improprieties, Southern Company disseminated improper and misleading public statements concerning the Kemper Plant. These improper statements have devastated Southern Company's credibility as reflected by the Company's almost \$16 billion loss in market

capitalization, or 31.1%, from the date of the first improper statements (April 25, 2012) to the present.

120. Southern Company's performance issues also damaged its reputation within the business community, governmental agencies, and in the capital markets. In addition to price, Southern Company's current and potential customers consider a company's ability to accurately value its potential business and financial prospects. Southern Company's ability to raise equity capital or debt on favorable terms in the future is now impaired. In addition, the Company stands to incur higher marginal costs of capital and debt because the improper statements and misleading projections disseminated by the Individual Defendants have materially increased the perceived risks of investing in and lending money to the Company.

121. Further, as a direct and proximate result of the Individual Defendants' actions, Southern Company has expended, and will continue to expend, significant sums of money. Such expenditures include, but are not limited to:

- (a) costs incurred from defending and paying any settlement in the class action for violations of federal securities laws;

- (b) costs incurred from defending and paying any settlement in various pending litigation filed by Treetop Midstream Services, LLC, Biloxi

Freezing & Processing, Inc., and others alleging claims such as breach of contract, conspiracy, and fraud in connection with the Kemper Plant project;

(c) costs incurred in bring the baseless lawsuit against Wingo;

(d) costs incurred for illegally firing Wingo in retaliation for his whistleblowing activities, including defending the OSHA action;

(e) costs and potential fines incurred from the SEC investigation;

and

(f) costs incurred from compensation and benefits paid to the defendants who have breached their duties to Southern Company.

**THE STATUTE OF LIMITATIONS IS TOLLED**

122. While the red flags alerted the Individual Defendants to wrongdoing at the Company, outside stockholders remained unaware of the wrongdoing until *The New York Times* article on June 5, 2016, at the earliest. Most of the red flags were nonpublic. Further, the Company's stockholders had the right to rely on their fiduciaries, the Individual Defendants, truthfully dealing with them, such as when the defendants stated in the above Forms 10-Q that the Kemper Plant investigations would not have a material impact on Southern Company.

**DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS**

123. Plaintiff brings this action derivatively in the right and for the benefit of Southern Company to redress injuries suffered, and to be suffered, by Southern Company as a direct result of violation of securities law, breaches of fiduciary duty, waste of corporate assets, and unjust enrichment, as well as the aiding and abetting thereof, by the Individual Defendants. Southern Company is named as a nominal defendant solely in a derivative capacity. This is not a collusive action to confer jurisdiction on this Court that it would not otherwise have.

124. Plaintiff will adequately and fairly represent the interests of Southern Company in enforcing and prosecuting its rights.

125. Plaintiff was a stockholder of Southern Company at the time of the wrongdoing complained of, has continuously been a stockholder since 2008, and is a current Southern Company stockholder.

126. The current Board of Southern Company consists of the following fifteen individuals: defendants Fanning, Baranco, Boscia, Clark, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood. Plaintiff has not made any demand on the present Board to institute this action because such a demand would be a futile, wasteful, and useless act, as set forth below.



**Demand Is Excused Because Defendants Face a Substantial Likelihood of Liability for Their Misconduct**

127. As alleged above, defendants Fanning, Baranco, Boscia, Clark, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood violated Section 14(a) of the Exchange Act by negligently making the misstatements and omissions in the Proxies, as detailed above.

128. As alleged above, defendants Fanning, Baranco, Boscia, Clark, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood breached their fiduciary duties of loyalty by making improper statements in the Company's press releases and SEC filings regarding the Kemper Plant's cost and timeline for completion.

129. Defendants Fanning, Baranco, Boscia, Clark, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood approved or allowed Company employees and the other Individual Defendants to disseminate the improper statements about the Kemper Plant to the public. As directors, these defendants specifically claimed to exercise "oversight of [the Company's] significant risks." Further, pursuant to the Company's reporting structures, defendants Fanning, Baranco, Boscia, Clark, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood were alerted to the wrongdoing pursuant to the various red flags waived prominently and repeatedly in

their face. Nevertheless, in violation of defendants Fanning, Baranco, Boscia, Clark, Grain, Hagen, Hood, Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood's duty of loyalty, the illegal actions described herein continued.

130. Defendants Baranco, Boscia, Hood, and Johns, as members of the Audit Committee, reviewed and approved the improper statements and earnings guidance. The Audit Committee's Charter provides that it is responsible for the "review of and discussion with management regarding the quarterly and annual consolidated earnings announcements and corporate practices with respect to earnings announcements and earnings guidance and other financial information provided to analysts and rating agencies." Thus, the Audit Committee Defendants were responsible for knowingly or recklessly allowing the improper statements related to the Company's earnings guidance and financial and disclosure controls. Moreover, the Audit Committee Defendants reviewed and approved the improper press releases and earnings announcements made to the public.

131. The Audit Committee Defendants also had additional responsibilities relating to legal controls of the Company. These responsibilities included providing "oversight of the Company's Legal and Regulatory Compliance and Ethics Programs," including "[c]reation and oversight of procedures for [r]eceipt,

retention and treatment of complaints received by management regarding accounting, internal accounting controls, auditing and federal securities law matters.” The Audit Committee also had the responsibility for the creation of oversight of procedures for “[c]onfidential, anonymous submission by employees of concerns regarding questionable accounting, auditing and federal securities law matters.” Finally, under the Audit Committee's Charter, the Audit Committee Defendants must do the following:

At least annually, review with the Chief Compliance Officer management’s assessment of the implementation and effectiveness of the Company’s compliance program, including a review of the results of any auditing or other monitoring programs designed to prevent or detect violations of laws or regulations and any reported cases of employee fraud, conflict of interest or unethical or illegal conduct. The Chief Compliance Officer will have the authority to communicate directly to the Committee, promptly, about actual and alleged violations of law or the Company’s Code of Ethics, including any matters involving criminal or potential criminal conduct.

132. Due to their responsibilities under the Audit Committee Charter and the Company’s reporting structures, the Audit Committee Defendants must have known about the numerous complaints and warnings of fraud that Wingo, Joshua Keller, and others were making to Company employees and executives. The Audit Committee Defendants must also have known about the letter Wingo sent to Chief Compliance Officer Kimberly Greene (about the fraudulent practices that Company officials were engaging in) and the OSHA whistleblower retaliation

claim filed by Wingo. However instead of stopping the individuals who were committing the wrongful actions described herein, the Audit Committee Defendants approved the misleading statements and made misleading statements themselves, all in breach of their fiduciary duty of loyalty. Hence, the Audit Committee Defendants face a substantial likelihood of liability for their breach of fiduciary duties so any demand upon them is futile.

133. Despite the existence of the extensive wrongdoing that has taken place, all the Individual Defendants continue to deny any misconduct that occurred during the construction of one of its most important projects. They have failed to launch any effective investigation into the deliberate misrepresentation of scheduling deadlines, and continue to reward themselves with lavish compensation to the detriment of the Company and its stockholders.

134. Additionally, many of the directors are interested directors as they have close and personal relationships with fellow director and CEO, defendant Fanning. Defendant Fanning has control over Southern Company's Board and over the Boards of Directors of Southern Company's subsidiaries. Defendant Fanning's position thus enables him to doll out director positions to individuals who in turn are loyal and dependent on him. For instance, defendant Fanning served on the Board of Directors of Alabama Power with defendant Johns.

Defendant Fanning also served on the Board of Directors of Georgia Power with defendant Wood, and served on the Board of Directors of Vulcan Materials Company with defendant James. The close ties and interdependence between these three directors and defendant Fanning are problematic and shed doubt on the directors' independence.

135. Plaintiff has not made any demand on the other stockholders of Southern Company to institute this action since such demand would be a futile and useless act for at least the following reasons:

(a) Southern Company is a publicly held company with over 994 million shares outstanding and thousands of stockholders;

(b) making demand on such a number of stockholders would be impossible for plaintiff who has no way of finding out the names, addresses, or phone numbers of stockholders; and

(c) making demand on all stockholders would force plaintiff to incur excessive expenses, assuming all stockholders could be individually identified.

**COUNT I**

**Against defendants Baranco, Boscia, Clark, Fanning, Grain, Hagen, Hood,  
Hudson, James, Johns, Klein, Smith, Specker, Thompson, and Wood  
for Violation of Section 14(a) of the Exchange Act**

136. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

137. Plaintiff's allegations with respect to the misleading statements in the Proxies are based solely on negligence; they are not based on any allegation of reckless or knowing conduct by or on behalf of these defendants, and they do not allege and do not sound in fraud. Plaintiff specifically disclaims any allegations of, reliance upon any allegation of, or reference to any allegation of fraud, scienter, or recklessness with regard to these allegations and related claim.

138. The Director Defendants disseminated the misleading Proxies specified above that were materially misleading.

139. These materially misleading Proxies were the essential link to the Director Defendants' re-election.

140. By reason of the foregoing, the Director Defendants have violated Section 14(a) of the Exchange Act.

141. The Company was damaged as a result of the Director Defendants' material misrepresentations and omissions in the Proxies as described herein.

## **COUNT II**

### **Against the Individual Defendants for Breach of Fiduciary Duty**

142. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

143. The Individual Defendants owed and owe Southern Company fiduciary obligations. By reason of their fiduciary relationships, the Individual Defendants owed and owe Southern Company the highest obligation of good faith, fair dealing, loyalty, and due care.

144. The Individual Defendants and each of them, violated and breached their fiduciary duties of care and loyalty.

145. As a direct and proximate result of the Individual Defendants' breaches of their fiduciary obligations, Southern Company has sustained significant damages, as alleged herein. As a result of the misconduct alleged herein, these defendants are liable to the Company.

146. Plaintiff, on behalf of Southern Company has no adequate remedy at law.

### **COUNT III**

#### **Against the Individual Defendants for Waste of Corporate Assets**

147. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

148. As a result of the wrongful conduct regarding the issuance of false and misleading statements, the Individual Defendants have caused Southern Company to waste its assets by paying improper compensation and bonuses to certain of its executive officers and directors that breached their fiduciary duty.

149. As a result of the waste of corporate assets, the Individual Defendants are liable to the Company.

150. Plaintiff, on behalf of Southern Company, has no adequate remedy at law.

### **COUNT IV**

#### **Against the Individual Defendants for Unjust Enrichment**

151. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

152. By their wrongful acts and omissions, the Individual Defendants were unjustly enriched at the expense of and to the detriment of Southern Company. The Individual Defendants were unjustly enriched as a result of the compensation



and director remuneration they received while breaching fiduciary duties owed to Southern Company.

153. Plaintiff, as a stockholder and representative of Southern Company, seeks restitution from these defendants, and each of them, and seeks an order of this Court disgorging all profits, benefits, and other compensation obtained by these defendants, and each of them, from their wrongful conduct and fiduciary breaches.

154. Plaintiff, on behalf of Southern Company, has no adequate remedy at law.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff, on behalf of Southern Company, demands judgment as follows:

A. Against all of the defendants and in favor of the Company for the amount of damages sustained by the Company as a result of the defendants' violation of securities law, breaches of fiduciary duties, waste of corporate assets, and unjust enrichment;

B. Directing Southern Company to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect Southern Company and its stockholders from a

repeat of the damaging events described herein, including, but not limited to, putting forward for stockholder vote, resolutions for amendments to the Company's By-Laws or Articles of Incorporation and taking such other action as may be necessary to place before stockholders for a vote of the following Corporate Governance Policies:

1. a proposal to strengthen the Company's controls over financial reporting;
2. a proposal to strengthen the Board's supervision of operations and develop and implement procedures for greater stockholder input into the policies and guidelines of the Board;
3. a provision to permit the stockholders of Southern Company to nominate at least three candidates for election to the Board; and
4. a proposal to strengthen Southern Company's oversight of its disclosure procedures;

C. Extraordinary equitable and/or injunctive relief as permitted by law, equity, and state statutory provisions sued hereunder, including attaching, impounding, imposing a constructive trust on, or otherwise restricting the proceeds of defendants' trading activities or their other assets so as to assure that plaintiff on behalf of Southern Company has an effective remedy;

D. Awarding to Southern Company restitution from defendants, and each of them, and ordering disgorgement of all profits, benefits, and other compensation obtained by the defendants;

E. Awarding to plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: May 31, 2017

JOHNSON & WEAVER LLP

*/s/Michael I. Fistel, Jr.*

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Attorneys for Plaintiff

VERIFICATION

I, Judy Mesirov, hereby declare as follows:

I am the plaintiff in the within entitled action. I have read the Verified Stockholder Derivative Complaint for Violation of Securities Law, Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment. Based upon discussions with and reliance upon my counsel, and as to those facts of which I have personal knowledge, the Complaint is true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Signed and Accepted:

Dated: 5/16/17

Judy Mesirov  
JUDY MESIROV