THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Heath P. Taylor, Circuit Court Judge

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Appellate Case No. 2024-001727
Case No. 2017-CP-18-1125

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Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ..... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ..... Appellants.

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**APPELLANTS' RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL**

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The South Carolina Department of Corrections ("SCDC") and the South Carolina Department of Juvenile Justice ("SCDJJ") submit this return in opposition to the Respondents' Motion to Dismiss Appeal.

## BACKGROUND

The Respondents Calvin Henson, Daniel James Collins, and Jason Robinson allege that they were SCDC inmates who were sexually assaulted, and the Respondent Russell Taylor alleges that he was sexually assaulted while in the custody of SCDJJ. The Respondents,

individually and as representatives of putative classes, have brought a claim for negligence/gross negligence alleging that SCDC and SCDJJ "fail[ed] properly to implement and enforce their policies and procedures, including but not limited to classification of inmates, monitoring of inmates by employees, allowing gross overcrowding, and by failing to provide appropriate employees and staff at the various locations in Defendants' facilities which would have prevented the sexual assaults suffered by Plaintiffs." *See*, Amended Complaint, ¶ 76. The Respondents seek monetary relief for themselves and for all putative class members. The Respondents also seek declaratory and injunctive relief.

## LEGAL ANALYSIS

The Respondents request that this Court dismiss the Appellants' appeal of the Amended Order Granting Plaintiffs' Motion to Certify because the order does not impact the mode of trial, and as a result, is not immediately appealable. The Appellants strongly disagree.

As stated in the Notice of Appeal, the Appellants submit that the Amended Order Granting Plaintiffs' Motion to Certify affects the mode of trial and therefore is immediately appealable. South Carolina law is clear that "[o]rders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately." *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). In fact, "the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Id. See also*, *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) (holding that an order denying a compulsory reference affects the mode of trial and is immediately appealable); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) ("[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity,

and the order of the trial judge is immediately appealable"). Thus, the Appellants will arguably waive their mode of trial-related issues if those are not immediately appealed.

Importantly, in the leading case of *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), the South Carolina Supreme Court ruled that an order adopting an "opt-in" rather than an "opt-out" notification procedure in a class action affects the mode of trial. The Supreme Court recognized that the "traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case." 661 S.E.2d at 87. The Supreme Court further explained that "the mode of trial analysis indubitably includes the consideration of the availability of trial" and hence "[t]he question of the denial of an actual trial is intrinsic." *Id*. The *Salmonsen* Court also reiterated that South Carolina law requires that a litigant seek an immediate appeal on a mode of trial issue, or otherwise the right to appeal is deemed waived. *Id*.

In its Amended Order Granting Plaintiffs' Motion to Certify, the trial court adopted two class definitions, one for each Defendant. In their current motion, the Respondents argue with no basis that the trial court certified two classes: "a damages class and an injunctive class." *See*, Motion to Dismiss Appeal, p. 2. Not surprisingly, they fail to cite any such language in the Amended Order. The trial court, in fact, rejected the Respondents' request to certify a "damages class" and an "injunctive class." The trial court expressly cited the court's discretion in "defining the scope of the class" and further explained that it "is not bound by the class definition proposed in the complaint." *See*, Amended Order, pp. 13-14. The trial court then stated that it "will modify the proposed class definition to fit the procedural posture of the current case." *See*, Amended Order, p. 14.

With that said, the trial court identified a *single* class against the Defendant SCDC and a

*single* class against the Defendant SCDJJ. For SCDC, the class definition is "[a]ll individuals that have been under the custody and care of the South Carolina Department of Corrections ("SCDC") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery." *See*, Amended Order, p. 14. Similarly, for SCDJJ, the class definition is "[a]ll individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice ("SCDJJ") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery." *See*, Amended Order, p. 14.

Notably, as to both classes, the trial court adopted class definitions that use the language "who were victims of a nonconsensual sexual battery," which in turn incorporates the statutory definition of "sexual battery" from S.C. Code Ann. § 16-3-651(h). Critically, before being deemed a member of either class, each putative class member will need to prove both (1) that he/she was a victim of a "sexual battery" based on that statutory definition and (2) that the sexual battery was nonconsensual. In effect, in order to determine whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the trial court will be required to engage in hundreds of mini-trials or evidentiary hearings. These class definitions consequently raise significant mode of trial issues from the outset.

Although the trial court declined to address procedures for notification of the defined classes in its Amended Order Granting Plaintiffs' Motion to Certify, it is well established in *Salmonsen* that South Carolina law recognizes only one type of class action in a monetary relief case – a class action with "opt-out" procedures.[1] As the Supreme Court held in *Salmonsen*, "an 'opt-out'

[1] The Respondents cannot dispute the requirement of an "opt-out" procedure. In addition to being mandated in *Salmonsen*, the Respondents themselves pled in their Amended Complaint that "[e]xcluded from the class are all persons who timely exercise their rights under

notification procedure is the proper method to be offered to putative class members in the instant case and *future class action cases*." *Salmonsen*, 661 S.E.2d at 91. (Emphasis added). It goes without saying that in order to comply with "opt-out" procedures, the members of the class must be identified before notification of the class can be made. Hence, before class notices are prepared and mailed, the trial court will be required to determine which SCDC inmates and which SCDJJ juveniles meet the class definitions. Only once those class members are identified may notification of the classes even commence.

To the extent that the Respondents try to argue that mode of trial is unaffected, they are actually arguing the merits of the Appellants' appeal. In fairness and to be procedurally correct, the appealability issue should not be decided in a preliminary motion requiring the Court to make a final decision *on the merits* before the merits are even briefed, subject to oral argument, and decided by the panel of three judges. Yet, that is what the Respondents are asking this Court to do -- prematurely decide the merits. The proper route should be to allow for full briefing and argument, and *only then* does the Court make a ruling on the merits.

Nonetheless, to the extent deemed relevant at this juncture, it should be pointed out that the Respondents are simply wrong on the merits. They assert that "[t]he trial court does not need to make a judicial determination as to the identity of all class members for notice." *See*, Motion to Dismiss Appeal, p. 4. They cite no South Carolina law for that unsubstantiated and frankly illogical premise. They do not even cite any favorable law from any other jurisdiction. Instead, they attempt to re-characterize the issue as one of "standing" and then provide a string-cite of federal cases addressing standing, which, of course, has nothing to do with the court being able to identify the

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South Carolina Rule of Civil Procedure 23 to opt out of the defined Class." *See*, Amended Complaint, ¶ 70.

putative class members so that they may be given proper notice *and most importantly* the opportunity to "opt-out" as is mandated by South Carolina law per *Salmonsen*. Again, common sense should prevail here – a court cannot give notice of the right to "opt-out" to a putative class member who has not been identified. The rights of the class members are at stake, and it is the court's duty and function to protect those rights. *See*, Rule 23(d)(2), SCRCP ("The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought").[2]

As the Appellants argued in the trial court, the question thus arises as to how the trial court will make a judicial determination as to the class membership. To reiterate, for both the SCDC and the SCDJJ classes, using the class definitions as adopted, the trial court will need to determine (1) whether each putative class member was a victim of a "sexual battery" using the statutory definition of "sexual battery" from S.C. Code Ann. § 16-3-651(h), and (2) whether any sexual battery as found was nonconsensual. As indicated, both the Plaintiffs and the Defendants have requested a jury trial. Notably, the Supreme Court has held that there is no constitutional or statutory right to a jury trial for a shareholder's derivative action in *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978), which is one form of a class action in equity. Yet, the Supreme Court has never ruled definitively whether or not there is a right to a jury trial in a class action brought pursuant to Rule 23, SCRCP, particularly a class action which is an action at law, as is the case at bar, in which monetary relief is sought for each class member. One commentator has discussed the mode of trial

[2] The Respondents also miss the point (perhaps deliberately) when they write: "this damages class is an opt-out class and none of the absent class members claims would be barred following the notification process." *See*, Motion to Dismiss Appeal, p. 5. The issue at stake is not the "dismissal" of the claims of class members who do not receive notice, but rather it is each class member's right to "opt-out," and it is that right that will be jeopardized if each class member does not receive the class notice with an explanation of the right to "opt-out" which our Supreme Court found in *Salmonsen* to be mandated by South Carolina law.

for a class action under South Carolina precedent as follows:

> As for class actions, no clear precedent was found, but two cases offer weak support for a jury trial right. In *Salmonsen v. CGD, Inc.*, the South Carolina Supreme Court rejected opt-in class actions finding an opt-in provision "effectively denies [putative class members] a trial by jury." In *The Gates at Williams-Brice Condominium Ass'n v. DDC Construction, Inc.*, the South Carolina Court of Appeals reversed the trial court's denial of defendants' motion for a nonjury trial based on a waiver in a master deed but did not hold that class actions are never entitled to a jury trial.

Scarlett, *Jury Trial Disparities Between Class Actions and Shareholder Derivative Actions in State Court*, 72 Okla. L. Rev. 283, 331 (2020).

Assuming that the parties are entitled to a jury trial as they all have demanded in their operative pleadings, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. The two-part findings that will need to be made by the factfinder to determine class membership are also a significant part of the merits of each putative class member's cause of action, and those findings will need to be determined before class notification even occurs. As indicated, that determination will need to be made by a jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by a jury – the qualifying class members would need to be notified and given the opportunity to "opt-out" per *Salmonsen*. Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be bifurcated, with the second phase of the trial on liability issues held months later after the "opt-out" period has expired.

To further complicate the process, the same jury will be required to decide whether each SCDC inmate and SCDJJ juvenile meets the class definitions and then later determine liability and, if necessary, damages As federal courts have recognized, "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues

determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial) and not reexamined by another finder of fact." *Matter of Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293, 3003 (7th Cir. 1995) (collecting cases). The same would be true under state law. That extended process will create a tremendous burden and hardship of time and inconvenience on that jury (as well as the court), and more significantly, it will also not be reasonably feasible for the jury to hear the evidence relevant to determining whether each putative class member qualifies as a class member and then months later be called upon to determine liability and, if necessary, damages, both of which determinations will rely on or at least be extensions of the fact-finding performed in the "class definition" phase of the trial held months earlier.

In effect, as the foregoing discussion reflects, the class definitions adopted by the trial court create what are commonly referred to as "fail-safe" classes. A fail-safe class is one that "is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim." *EQT Production Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014), *citing Messner v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). Fail-safe classes are considered improper for two principal reasons. First, in a fail-safe class, "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. Second, fail-safe classes do not comply with Rule 23. As discussed in more detail below, Rule 23 requires that members of a proposed class be readily identifiable, which is a principle called "ascertainability." *See*, *EQT*, 764 F.3d at 358 ("Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable"). Under this so-called "ascertainability" requirement, "[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id*. In other words, a class action should not proceed "if class members are impossible

to identify without extensive and individualized fact-finding or mini-trials." *Id*. Therefore, because a fail-safe class requires a court to engage in individualized fact-finding or mini-trials to identify the members of the class, fail-safe class definitions violate these principles.

In sum, if those fail-safe class definitions are allowed to proceed, there will be a significant impact on issues related to mode of trial – issues which are unavoidable in order to comply with the requirements of an "opt-out" notification process as mandated by the Supreme Court in *Salmonsen*. Therefore, the appeal should be permitted to proceed as a direct appeal.

In addition, in examining these class definitions and the resulting mode of trial issues, the trial court failed to consider or at least address instructive case law from the South Carolina Supreme Court. For instance, the trial court failed to consider the Supreme Court's latest decision in *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explains that "there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court "to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common." *Id*. The Supreme Court also cited a well-respected treatise on South Carolina civil procedure for the following:

> The commonality requirement [of Rule 23(a), SCRCP] is a condition of class action status, but the existence of common questions alone is not sufficient .... *[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation.* Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the

> existence of common questions, and then whether they are sufficient[ly] central to justify the class action.

*Id*., citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985). (Emphasis added).

As indicated, the reason *Hensley* is so critical here is that, based on the class definitions adopted by the trial court, it will be required to conduct mini-trials or evidentiary hearings *just to determine who qualifies as a class member* and that must occur before the "opt-out" notification procedure can begin. That is not typical of proper class actions where the class membership may be determined by objective criteria which do not require individualized fact-finding. That alone demonstrates why these cases are not appropriate for class certification.[3]

Similarly, the trial court gave no consideration to the importance and impact of *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). While the trial court mentions *Gardner*, it never distinguishes *Gardner* nor explains why it is not controlling. In *Gardner*, the Supreme Court explained that "[t]o establish commonality, a party must show that there are questions of law or fact common to the class. In practical terms this means the party must articulate the existence of *significant* common, legal, or factual issues that bind the proposed class together." 577 S.E.2d at 200. (Emphasis added). Importantly, "[c]ommonality is met only where the class shares a *determinative* issue." 577 S.E.2d at 200-201. (Emphasis

[3] Of note, one of the foremost experts on class actions, Professor Newberg cautions that "[i]n a money-damages class action, common issues must predominate over individual ones so as make a class trial 'manageable,' thereby rendering it a superior form of adjudication. If a case is likely to devolve into thousands of individual mini-trials concerning each class member's damages, that process may threaten the efficiency gains of class treatment and render a class action unhelpful." 4 *Newberg on Class Actions* § 12:6 (5th ed.). *See also*, *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978), *as cited in Gardner*, 577 S.E.2d at 201 ("[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action").

added). Relying on federal jurisprudence, the Supreme Court in *Gardner* explained that "questions that are in no way dispositive and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality." 577 S.E.2d at 201. Most importantly, the Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*[4]

The *Gardner* case is instructive in addressing not only the commonality prong, but in the present case, it is instructive on the propriety and utility of the class definitions as well. In *Gardner*, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous governmental entities who attempted to use the Setoff Debt Collection Act to recover monies owed by taxpayers from their tax refunds. The Supreme Court reversed the certification of a plaintiff class for a lack of commonality. The Supreme Court found that, in addition to showing that the notice required by statute was deficient, a showing of prejudice was also required and that an individualized examination of each class member's claim was necessary before a class member could prevail. The Supreme Court explained that "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim ... Requiring such individualized examination negates the benefits of a class action suit." *Gardner*, 577 S.E.2d at 201.

[4] The trial court also gave no consideration to the recent decision of the Court of Appeals in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024). In that case, the Court of Appeals reversed all orders on appeal, including the Circuit Court's orders certifying a class action. The Court of Appeals specifically ruled that "the circuit court erred by finding Claimants were not required to exhaust their administrative remedies." 902 S.E.2d at 50. *Robinson* demonstrates that class certification is not appropriate based upon the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member.

That same level of individualized inquiry, if not a much greater level of such inquiry, is necessary in the present case – particularly just to identify the putative class members. Similar to the individualized issue of prejudice in *Gardner*, the present action turns on the individualized issue of consent, among others. As discussed at length, the putative class members in the case at bar cannot even qualify as a class member until they can show they are a victim of a "nonconsensual sexual battery." By its very nature, consent – like prejudice – requires individualized inquiry.

In closing, the Court should reject the Respondents' attempt to re-characterize the nature of the appeal and the appealable issues that affect the mode of trial, as in *Salmonsen*. The Respondents provide a string-cite of cases holding that "class certification orders are *ordinarily* not immediately appealable." *Hensley*, 838 S.E.2d at 512. (Emphasis added). They choose to ignore the term "ordinarily." Indeed, South Carolina jurisprudence is clear that a trial court order on class certification *which affects the mode of trial* not only is immediately appealable, but must be immediately appealed or the challenge to mode of trial is waived and cannot be asserted after final judgment.[5]

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[5] The Respondents also appear to suggest that the Appellants -- in filing this appeal -- are relying on Rule 23(f), FRCP, which grants discretionary power to the *federal* courts of appeal to hear an immediate appeal of an order granting or denying class action certification. The Respondents point out that Rule 23(f) has not been adopted in South Carolina. To be clear, the Appellants are not relying on Rule 23(f) of the Federal Rules, nor are the Appellants citing a host of federal cases, unlike what the Respondents have done in their Motion to Dismiss Appeal. Nonetheless, the Appellants are also compelled to point out that the Respondents are misinformed. Rule 23(f) was not even part of the Federal Rule 23 when the South Carolina Rules of Civil Procedure were first adopted in 1985. Rule 23(f) was added to Federal Rule 23 in 1998. Thus, it is incorrect to argue that the original drafters of the State Rule 23 intentionally omitted Rule 23(f) in 1985 because quite simply it did not exist at that time. Moreover, the case of *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1999), which the Respondents cite as a basis for its position, never addressed Rule 23(f), FRCP. Instead, the Supreme Court referred only to Rule 23(b), FRCP, in writing: "The drafters of Rule

## CONCLUSION

Based on the foregoing discussion and analysis, the Appellants urge the Court to find that the order on appeal impacts the mode of trial, as was the case in *Salmonsen*, and a direct appeal should be permitted to proceed. Accordingly, the Respondents' Motion to Dismiss Appeal should be denied, and this appeal should be heard on its merits.

Respectfully submitted,

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23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP)." 523 S.E.2d at 784.

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November 7, 2024

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APPEAL FROM DORCHESTER COUNTY
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**CERTIFICATE OF SERVICE**

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Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellants, does hereby certify that service of **Appellants' Return in Opposition to Motion to Dismiss Appeal** in the above-captioned matter was made upon all counsel of record by email only this the 7th day of November 2024, as follows:

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**Also Admitted in North Carolina*

November 7, 2024

***Via Email Only***
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Calvin Henson, Daniel James Collins, Jason Robinson, Russell Taylor, and All Those Similarly Situated v. South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice
Appellate Case Number: 2024-001727
Civil Action Number: 2017-CP-18-1125
Claim Number: B0927
Our File Number: 106.20706

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended April 24, 2024), please find enclosed for filing **Appellants' Return in Opposition to Motion to Dismiss Appeal** with regard to the above referenced matter. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Andrew W. Kunz, Esquire *(w/ Enclosure, Via Email Only)*
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