FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4201569

PLAINTIFF(S)	DEFENDANT(S)
Blh Kenneth Hensley Angela Hensley	South Carolina Department Of Social Services
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: Defendant's motion for summary judgment is DENIED. Plaintiff's motion for class certification is GRANTED. Motion to appoint guardian ad

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge — 2168 Judge Code — 4/8/14 Date

For Clerk of Court Office Use Only

This judgment was entered on 8 of April, and a copy mailed first class or placed in the appropriate attorney's box on 8 of April, to attorneys of record or to parties (when appearing pro se) as follows:

Timothy Ryan Langley PO Box 2765 Spartanburg, SC 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joel Steve Hughes 1611 Devonshire Dr. 2Nd Flr Columbia, SC 29202-8568

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

M. Hope Blackley DC

M Hope Blackley - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

2014 APR -8 PM 3:41

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	COURT OF COMMON PLEAS
BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated Plaintiff, vs. South Carolina Department of Social Services Defendant.	)	CA NO. 13-CP-42-1569 ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION, PLAINTIFF'S MOTION TO COMPEL AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction/Factual and Procedural History

This matter came before me for hearing on April 8, 2014. The Court heard arguments and reviewed written briefs from counsel for both parties on all above-referenced motions and related issues. Based on these briefs and arguments, the Court makes the following findings of fact and conclusions of law:

Defendant entered agreements with approximately 4000 South Carolina families for the provision of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to benefit the adopted children. In 2002, Defendant cut the payment to these adopted children across the board by $20 per month. At the same time, Defendant cut the payments to foster families. In 2004, Defendant reinstated the payments to the foster families but did not reinstate the payment to the adoption families. Plaintiffs allege the cut of these payments breaches the written agreement they have with Defendant. Initially a similar action was brought as a 42 U.S.C. Section 1983 action

against individual employees of the South Carolina Department of Social Services (hereinafter "SCDSS") in this same state court on September 16, 2011. Counsel for those individual employees, who is the same counsel for the Defendant in the case at bar, removed the case to federal court. The federal district court certified the class under Federal Rule 23 and denied cross motions for summary judgment. Defendant appealed the denial of summary judgment to the U.S. Court of Appeals for the Fourth Circuit. On March 28, 2013 Plaintiff's withdrew their federal contract clause allegations and then filed the current breach of contract action against Defendant SCDSS on April 1, 2013.

The 1983 claims ultimately were decided by the 4th Circuit Court of Appeals on July 3, 2013. The Fourth Circuit Court of Appeals held that there was not a violation of federal law by the individual directors of DSS. The Fourth Circuit opinion made no reference to any preclusive effect of its ruling on the pending state court action based on South Carolina state law. Indeed, the transcript of the hearing from the 4th Circuit reflects that the parties discussed (if not stipulated) that the 4th Circuit Order would have no preclusive effect on the already pending state law contract cause of action brought against SCDSS.

Discovery in the state court action was served by Plaintiff on Defendant on July 26, 2013. Plaintiff's counsel fulfilled its duty to consult with counsel for Defendant but no responses were provided. Plaintiff therefore filed a motion to compel in October of 2013. Plaintiff filed a Motion for Class Certification. On March 10, 2014 Defendant filed its motion for summary judgment. This hearing was set for April 8th. On April 3rd, Defendant emailed discovery responses to Plaintiff. No depositions have been taken due to the delay in Defendant's discovery responses.

II. Analysis and Citation of Authority

II.A. Defendant's Motion for Summary Judgment

Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[1]

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.[2] "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party."[3] "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."[4]

It is only necessary for the nonmoving party to submit "a mere scintilla of evidence in order to withstand a motion for summary judgment."[5] "Summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues."[6] Finally, because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery."[7]

Given that Defendant served its discovery responses nine months after they were due and only days prior to the summary judgment hearing, Plaintiff has clearly had no full and fair

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[1] Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRCP.
[2] Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).
[3] Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).
[4] Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999).
[5] Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sherriff's Dep't. 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).
[6] Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).
[7] Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).

opportunity to complete discovery. For that reason alone, summary judgment is improper.

Assuming arguendo, Defendant's discovery responses had somehow provided Plaintiff a full and fair opportunity to complete discovery, Defendant is not entitled to summary judgment on the issue of collateral estoppel. "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."[8]

As noted, the case at bar had been filed prior to the oral argument before the 4th Circuit Court of Appeals. At the oral argument before the 4th Circuit the issue of collateral estoppel was raised by counsel for Plaintiff. The same Defense counsel who made the argument for collateral estoppel in this case represented to the 4th Circuit oral argument that he would not seek to bar this action on the basis of collateral estoppel as no basis for collateral estoppel would be present on a dismissal without prejudice.

He said specifically:

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BY MR. LANGLEY:
Well, on the grounds of res judicata or collateral estoppel by virtue of some dismissal with prejudice ---
BY MR. LINDEMANN:
If it's without prejudice, there would be no such argument.
BY FEMALE SPEAKER:
Right.
BY MR. LINDEMANN:
And that wasn't my intent to try to make that argument, I can represent to the Court.
BY FEMALE SPEAKER:
Okay. Thank you very much.

[8] Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct.App.,2013).

17 BY MR. LINDEMANN:
18 Thank you.[9]

Defendant's motion for summary judgment seeks the same relief its counsel represented to three federal appellate judges was unavailable under these circumstances. The reason counsel admitted previously that there would be no such argument for collateral estoppel is that his client cannot meet its burden of proving that the elements of collateral estoppel are met. Specifically, 4th Circuit dealt with federal law and the issue at bar is whether Defendant breached South Carolina state law breach of contract principles.

Among these principles are the following:

1. The South Carolina General Assembly requires the Department of Social Services to execute a written agreement with adoptive parents whenever it determines that a child is eligible for supplemental benefits. S.C. Code Ann. § 63-9-1770 (A)(formerly § 20-7-1950).
2. When a state agency or commission is statutorily required or authorized to contract, the contract, by necessary implication, carries with it the authority to enforce the contract by an action at law.[10]
3. When there are conflicts in a contract's interpretation "a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."[11] This is especially so for adhesion contracts.[12]

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[9] Transcript of 4th Circuit Oral Argument.
[10] Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Chesterfield noted that a contract would otherwise be one-sided, where the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).
[11] Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).
[12] Southern Atlantic Fin. Serv., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App. 2002)("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.").

4. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.[13] This covenant requires that neither party will do anything which will injure right of the other to receive benefits of the agreement.[14]

The issue decided by the 4th Circuit was solely based on federal law and made no reference to any of the aforementioned South Carolina principles of contract law. Likewise, Defendant's arguments in its brief and at the hearing before this Court focused entirely on federal law. On the contrary, counsel for Plaintiff explained that this litigation was not an attempt to relitigate the question of whether Defendant's employees violated the Adoption Assistance and Child Welfare Act, but rather whether Defendant had violated the South Carolina contract principles outlined above. Accordingly, Defendant cannot meet the burden of showing that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.

II.B. Plaintiff's Motion for Class Certification

Circuit courts enjoy discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d)[15] and the decision is therefore not normally immediately appealable.[16] Rule 23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action.[17] The circuit court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23, but the class must comply with the following five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality

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[13] Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).
[14] Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).
[15] Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998); Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (Finding that South Carolina Appellate Courts generally defer to the trial court's discretion in granting class certification absent an error of law).
[16] Salmonsen v. CGD, Inc. 377 S.C. 442, 661 S.E.2d 81 (2008).
[17] S.C.R.Civ.P. 23(d).

of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy.[18] The South Carolina Supreme Court has found in a case analogous to the case at bar that class certification is especially appropriate where the number of potential plaintiffs was large, there was one main issue of law identical for all plaintiffs, all injuries resulted from the same act, and calculation of damages would not be difficult.[19]

Though Defendant has argued an affidavit is required from Plaintiff in order to certify the class there is no such requirement in the statute or in any South Carolina case law. Defendant directs the Court to federal authority but it is well-settled that South Carolina's Rule 23 "endorses a more expansive view of class action availability than its federal counterpart."[20] For example, contrary to the federal rule South Carolina has no predominance or superiority requirement,[21] which was intentionally omitted by the drafters.[22] Actually, the South Carolina Rule requires only that the "court find" that the above five elements are met.[23] Based on the arguments of counsel at the hearing April 8, 2014, the pleadings of record, and the statutory and case law authority the Court finds the five elements are met for the following reasons.

II.B.1 Numerosity

The class is sufficiently numerous. In light of prevailing precedent, the difficulty inherent in joining as few as forty class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the task of Rule 23(a)(1) on that fact

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[18] S.C. R. Civ. P. 23.
[19] Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).
[20] See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (citing Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999)).
[21] Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing S.C. R. Civ. P. 23).
[22] Littlefield, 337 S.C. at 355, 523 S.E.2d at 784.
[23] S.C. R. Civ. P. 23(a).

alone.[24] As of June 20, 2002, approximately 4,000 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. Counsel for Defendant did not dispute this assertion at the hearing and Paragraph 5 of Defendant's Amended Answer concedes that the cut was made across the board. A class of 4,000 is sufficiently numerous.

II.B.2 Commonality

There is commonality of factual and legal issues in this case. Rule 23(a)(2) of the South Carolina Rules of Civil Procedure requires that there be "questions of law or fact common to the class."[25] Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue.[26] "Critically, [n]ot every issue in the case must be common to all class members."[27] "It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status."[28]

Furthermore, "claims arising out of form contracts are particularly appropriate for class action treatment."[29] As the California Supreme Court aptly noted in La Sala v. American Sav. & Loan Ass'n., a case involving standard form trust deeds, "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication: the contracts are uniform, the same

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[24] 1 H. Newberg & A. Conte, Newberg on Class Actions ¶3.05, 3-25 (3rd Ed. 1992).
[25] SCRCP 23(a)(2).
[26] Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 21-22, 577 S.E.2d 190, 200-01 (2003).
[27] Id.
[28] McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.").
[29] Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995).

principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."[30]

In the case at bar, each named Plaintiff and each putative class member is subject to the same action by Defendants. The two critical common questions of law and fact alleged in the Complaint, as amended, are as follows:

1. whether the cut of benefits to families of adopted children breached the contract or violated the implied duty of good faith and fair dealing;

2. whether the failure to reinstate the benefits to the families of the adopted children after reinstating the benefits to the families of the foster care children breached the contract or violated the implied duty of good faith and fair dealing;

Class actions are intended to achieve economies of time, effort, and expense and to promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness, which will all be accomplished in this instance where Defendants have used common practices with regard to all members of the Class. Specific to this case, a decision on the lawfulness of Defendants' simultaneous, unilateral cut of benefits allegedly in violation of its contractual obligations to the class members. All putative class members share a united interest in the fair, just, and consistent determination of these questions of law and fact necessary to the adjudication of Defendants' liability. Thus, this Court can resolve the issue that is central to the validity of each one of the claims in one stroke. Accordingly, the element of commonality is met.

[30] La Sala v. American Sav. & Loan Ass'n., 5 Cal. 3d 864, 877, 489 P.2d 1113, 1121 (1971).

Defendants arguments against commonality essentially ask the court to accept the merit of the various defenses Defendant has plead such as implied consent, novation, exhaustion of administrative remedy, and damages; which is generally inappropriate at this stage. Additionally, were the court to accept Defendants arguments as to the implied consent defense then any defendant could avoid class certification of a breach of contract action by pleading a defense of implied consent then arguing this defense required individual analysis. Such an argument fails to comport with the case law on the issue of commonality.

The remaining purported defenses are applicable to the class as a whole except the question of the exact damages each member has suffered. The Court considered Defendant's reliance on Gardner v. South Carolina Department of Revenue. 353 S.C. 1, 577 S.E.2d 190 (2003) on the issue of damages. While Gardner does provide that individualized examination negates the benefit of a class action lawsuit, such named differences among proposed class members in that case were addressed regarding a legal issue:

> "[T]he factual differences (whether prejudice exists) [among plaintiffs] are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case."[31]

Conversely, members of the Proposed Class in the case at bar each allege the same cause of action, set forth the same ensuing legal issues and each anticipates the same contract defenses. Any

[31] Id. at 22.

differences in the variance in damages are of "a typical class action where minor factual differences [damage amounts] exist among the individualized cases of class members."[32]

Importantly, there is no requirement under South Carolina law that each class member have suffered the exact same amount of damages. South Carolina courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member.[33] In McGann v Mungo, hundreds of residents and owners of improved residential properties in Cold Stream, a subdivision near Columbia, filed a class action concerning negligent design and construction of streets and drainage systems. The defendants argued that each class member's individualized damages prevented the Court from certifying the case as a class action. In rendering its decision, the South Carolina Court of Appeals attached no significance to the undisputed fact that each class member had different damages:

> The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.[34]

McGann has been cited consistently by the Courts of this state and no less than eleven times by the South Carolina Supreme Court in ruling on class certification cases, which makes sense as its holding is in line with the historical "purpose of a class action [which] is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."[35]

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[32] Id.
[33] Littlefield, 337 S.C. at 355, 523 S.E.2d at 784; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the typicality of the proposed representatives' claims).
[34] McGann, 340 S.E.2d at 158.
[35] O'Quinn v. Beach Associates, 272 S.C. 95, 1 04, 249 S.E.2d 734, 738 (1978) (emphasis added).

Furthermore, the question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Defendant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Defendant's actions are determined to violate the law. Given the abundance of common issues, ease of Defendant's access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar.

II.B.3 Typicality

The legal violations against the Plaintiffs are typical of those against each member of the putative class under Rule (23)(a)(3) of the South Carolina Rules of Civil Procedure. This requirement is satisfied if the representative plaintiffs' claim "arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories."[36] When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.[37] This is applicable to the case at bar, where Plaintiffs allege that Defendant's unilateral, simultaneous cut of benefits, similarly applied to all Class Members, gives rise to the claims at issue.

Because Plaintiffs allege the written agreements they signed have been breached applies uniformly to all Class Members, Plaintiffs have satisfied the typicality requirement. Like the members of the Class, the Plaintiff through her parents is the third party beneficiary of a contract who had its contractually owed benefits cut. In addition, the claims of Plaintiff and the Class

[36] Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628, 637 (D.S.C. 1992), aff'd, 6 F. 3d 177 (4th Cir. 1993).
[37] Newberg ¶ 3.13 at 3-77.

Members arise under the same legal theories that the written contract has been breached. The harms suffered by the Plaintiff are typical of the harms suffered by all children in the putative class because they arise from the same cut of benefits and are based on the same legal theories. Defendant's brief and arguments at the hearing made no meaningful arguments to the contrary.

II.B.4 Adequacy and Class Definition

The Plaintiffs will fairly and adequately represent and protect the interest of the members of the putative class under Rule 23(a)(4) of the South Carolina Rules of Civil Procedure. This rule has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the action; and (2) that the interests of the class representatives are not adverse to those of the class members.[38] Class representatives need not master the intricacies of the case. It must appear to the Court, however, they are willing and able to represent the interests of the class. Plaintiffs in this case are willing to appear for their depositions, will cooperate with counsel, and are not disqualified from service as class representatives for any reason.

The Class the Plaintiffs seek to represent is as follows:

> All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement.

[38] Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

A proper class definition describes the class in objective terms, capable of membership ascertainment without regard to the merits of the proposed class members' claims or the particular relief they seek.[39] The Plaintiffs have no interest in the subject matter of the lawsuit that would render them antagonistic to other class members. Accordingly, Plaintiffs truly are representative of the class and the class is defined as outlined above.

With regard to the second prong, the adequacy of Plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary.[40] Plaintiffs' have engaged experienced and capable attorneys. Accordingly, the adequacy requirements are satisfied in this case.

Defendant's argument against adequacy on the issue of Plaintiff's position as a Third-Party beneficiary is without merit because third party beneficiaries (BLH and the putative class members) have the right to enforce the terms of the contract under South Carolina law.[41]

II.B.5 Amount in Controversy

Rule 23(a)(5) of the South Carolina Rules of Civil Procedure requires an amount in controversy for each class member to be at least one hundred ($100.00) dollars to certify a class in cases where the relief sought is not primarily injunctive relief. In interpreting the phrase "amount in

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[39] See H. Newberg & A. Conte, Newberg on Class Actions, Fourth, § 6.14 (1994).
[40] South Carolina National Bank v. Stone, 139 F.R.D. 325, 330 (D.S.C. 1991).
[41] 30 S.C. Jur. Contracts § 68 (citing Svenningsen v. Knight, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985); see also, R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n., 384 F.3d 157 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person)).

controversy," the South Carolina Supreme Court held "the sum claimed by the plaintiff controls if the claim is apparently made in good faith."[42]

In this case, the Plaintiff conceded at the hearing a modification to the requested class narrowing it to only those children who have lost at least 5 months in benefits due to the cut made by Defendants. Because the monthly cut in benefits was twenty ($20) dollars the amount in controversy is equal to or exceeds $100 for each member of the Class. These funds were lost to the class members and Defendants argument that perhaps they received the same care anyway is without merit as the loss is tangible, identifiable, and real. Accordingly, the requirements of SCRCP Rule 23(a)(5) are met.

II.B.6 Notice

As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an "opt-out" notice procedure. Given that Defendant regularly corresponds or has previously corresponded with all class members, Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate.

II.C. Plaintiff's Motion to Compel

The Plaintiff agreed to hold this Motion in abeyance pending the Court's ruling on the Motion for Class Certification and Motion for Summary Judgment. Now that the class has been certified for the reasons outlined herein, counsel are directed by the Court to confer regarding the discovery requests that relate to all class members. Plaintiff reserves the right to reinstate its Motion to Compel if these matters are not resolved.

[42] Gardner v. Newsome Chevrolet-Buick Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 201-02 (1991)(emphasis in original).

IT IS ORDERED that Defendants' Motion for Summary Judgment IS DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Class Certification is GRANTED.

IT IS FURTHER ORDERED that Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate pursuant to Salmonsen v. CGD 377 S.C. 442, 661 S.E. 2d 81 (2008) (holding that in South Carolina all class members shall have the right to opt out of a class action). Defense counsel shall prepare a Notice and email to the court (copying counsel for the Plaintiff) for review within ten (10) days and shall thereafter be mailed to all class members within ten (10) days. The notice shall include instructions for the class members to communicate any decision to opt out by written notice to Plaintiff's counsel: T. Ryan Langley at P.O. Box 2765; Spartanburg, SC 29304.

IT IS FURTHER ORDERED that T. Ryan Langley, Charles J. Hodge, and James Fletcher Thompson are appointed class counsel and shall file any opt outs with the Clerk of Court within ten (10) days of receipt.

IT IS SO ORDERED.

Honorable Brian Gibbons

May 21, 2014

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 MAY 29 PM 2:41
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	
South Carolina Department of Social Services	)	ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION, PLAINTIFF'S MOTION TO COMPEL AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
	)	
Defendant.	)	

I. Introduction/Factual and Procedural History

This matter came before me for hearing on April 8, 2014. The Court heard arguments and reviewed written briefs from counsel for both parties on all above-referenced motions and related issues.

Defendant entered agreements with approximately 4000 South Carolina families for the provision of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to benefit the adopted children.[1] In 2002, Defendant cut the payment to these adopted children across the board by $20 per month.[2] At the same time, Defendant cut the payments to foster families.[3] In 2004, Defendant reinstated the payments to the foster families but did not reinstate the payment to the

[1] Complaint, para. 9. Defendant's Amended Answer does not dispute this allegation. See also, Affidavit of Caldwell, Exhibit G: contract with Plaintiff.
[2] Affidavit of Judy Caldwell, para. 12; Exhibit H to affidavit of Judy Caldwell.
[3] Id.

adoption families. Plaintiffs allege the cut of these payments breaches the written agreement they have with Defendant. Initially a similar action was brought as a 42 U.S.C. Section 1983 action against individual employees of the South Carolina Department of Social Services (hereinafter "SCDSS") in this same state court on September 16, 2011. Counsel for those individual employees, who is the same counsel for the Defendant in the case at bar, removed the case to federal court. The federal district court certified the class under Federal Rule 23 and denied cross motions for summary judgment. Defendant appealed the denial of summary judgment to the U.S. Court of Appeals for the Fourth Circuit. On March 28, 2013 Plaintiff's withdrew their federal contract clause allegations and then filed the current breach of contract action against Defendant SCDSS on April 1, 2013.

The 1983 claims ultimately were decided by the 4th Circuit Court of Appeals on July 3, 2013. The Fourth Circuit Court of Appeals held that there was not a violation of federal law by the individual directors of DSS.[4] The Fourth Circuit opinion made no reference to any preclusive effect of its ruling on the pending state court action based on South Carolina state law. Indeed, the transcript of the hearing from the 4th Circuit reflects that the parties discussed (if not stipulated) that the 4th Circuit Order would have no preclusive effect on the already pending state law contract cause of action brought against SCDSS.

Discovery in the state court action was served by Plaintiff on Defendant on July 26, 2013. Plaintiff's counsel fulfilled its duty to consult with counsel for Defendant but no responses were provided. Plaintiff therefore filed a motion to compel in October of 2013. Plaintiff filed a Motion for Class Certification. On March 10, 2014 Defendant filed its motion for summary judgment. This hearing was set for April 8th. On April 3rd, Defendant emailed discovery responses to Plaintiff. No

[4] Order of the 4th Circuit Court of Appeals in Hensley v. Koller, et al.

depositions have been taken due to the delay in Defendant's discovery responses.

II. Analysis and Citation of Authority

II.A. Defendant's Motion for Summary Judgment

Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[5]

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.[6] "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party."[7] "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."[8]

It is only necessary for the nonmoving party to submit "a mere scintilla of evidence in order to withstand a motion for summary judgment."[9] "Summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues."[10] Finally, because summary judgment is a drastic remedy, it must not be granted until

[5] Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRCP.
[6] Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).
[7] Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).
[8] Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999).
[9] Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sherriff's Dep't. 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).
[10] Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

the opposing party has had a "full and fair opportunity to complete discovery."[11]

Given that Defendant served its discovery responses nine months after they were due and only days prior to the summary judgment hearing, Plaintiff has clearly had no full and fair opportunity to complete discovery. For that reason alone, summary judgment is improper.

Assuming arguendo, Defendant's discovery responses had somehow provided Plaintiff a full and fair opportunity to complete discovery, Defendant is not entitled to summary judgment on the issue of collateral estoppel. "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."[12]

As noted, the case at bar had been filed prior to the oral argument before the 4th Circuit Court of Appeals. At the oral argument before the 4th Circuit the issue of collateral estoppel was raised by counsel for Plaintiff. By way of background, the same Defense counsel who made the argument for collateral estoppel in this case represented to the 4th Circuit oral argument that he would not seek to bar this action on the basis of collateral estoppel as no basis for collateral estoppel would be present on a dismissal without prejudice.

He said specifically:

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BY MR. LANGLEY:
Well, on the grounds of res judicata or collateral estoppel by virtue of some dismissal with prejudice ---
BY MR. LINDEMANN:
If it's without prejudice, there would be no such argument.
BY FEMALE SPEAKER:

[11] Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).
[12] Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct.App.,2013).

Right.
BY MR. LINDEMANN:
And that wasn't my intent to try to make that argument, I can represent to the Court.
BY FEMALE SPEAKER:
Okay. Thank you very much.
BY MR. LINDEMANN:
Thank you.[13]

Defendant's motion for summary judgment seeks the same relief its counsel represented to three federal appellate judges was unavailable under these circumstances. The reason counsel admitted previously that there would be no such argument for collateral estoppel is that his client cannot meet its burden of proving that the elements of collateral estoppel are met. Specifically, 4th Circuit dealt with federal law and the issue at bar is whether Defendant breached South Carolina state law breach of contract principles.

Among these principles are the following:

1. The South Carolina General Assembly requires the Department of Social Services to execute a written agreement with adoptive parents whenever it determines that a child is eligible for supplemental benefits. S.C. Code Ann. § 63-9-1770 (A)(formerly § 20-7-1950).
2. When a state agency or commission is statutorily required or authorized to contract, the contract, by necessary implication, carries with it the authority to enforce the contract by an action at law.[14]

[13] Transcript of 4th Circuit Oral Argument.
[14] Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Chesterfield noted that a contract would otherwise be one-sided, where the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).

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3. When there are conflicts in a contract's interpretation "a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."[15] This is especially so for adhesion contracts.[16]

4. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.[17] This covenant requires that neither party will do anything which will injure right of the other to receive benefits of the agreement.[18]

The issue decided by the 4th Circuit was solely based on federal law and made no reference to any of the aforementioned South Carolina principles of contract law. Likewise, Defendant's arguments in its brief and at the hearing before this Court focused entirely on federal law. On the contrary, counsel for Plaintiff explained that this litigation was not an attempt to relitigate the question of whether Defendant's employees violated the Adoption Assistance and Child Welfare Act, but rather whether Defendant had violated the South Carolina contract principles outlined above. Accordingly, Defendant cannot meet the burden of showing that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.

II.B. Plaintiff's Motion for Class Certification

Circuit courts enjoy discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d)[19] and the decision is therefore not normally immediately appealable.[20] Rule

[15] Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).
[16] Southern Atlantic Fin. Serv., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App. 2002)("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.").
[17] Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).
[18] Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).
[19] Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998); Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (Finding that South Carolina Appellate Courts generally defer to the trial court's discretion in granting class certification absent an error of law).

23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action.[21] The circuit court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23, but the class must comply with the following five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy.[22] The South Carolina Supreme Court has found in a case analogous to the case at bar that class certification is especially appropriate where the number of potential plaintiffs was large, there was one main issue of law identical for all plaintiffs, all injuries resulted from the same act, and calculation of damages would not be difficult.[23]

Though Defendant has argued an affidavit is required from Plaintiff in order to certify the class there is no such requirement in the statute or in any South Carolina case law. Defendant directs the Court to federal authority but it is well-settled that South Carolina's Rule 23 "endorses a more expansive view of class action availability than its federal counterpart."[24] For example, contrary to the federal rule South Carolina has no predominance or superiority requirement,[25] which was intentionally omitted by the drafters.[26] Actually, the South Carolina Rule requires only that the "court find" that the above five elements are met.[27] Based on the affidavits cited herein and attached hereto,the pleadings of record and the statutory and case law authority, the Court finds the five elements are met for the following reasons.

[20] Salmonsen v. CGD, Inc. 377 S.C. 442, 661 S.E.2d 81 (2008).
[21] S.C.R.Civ.P. 23(d).
[22] S.C. R. Civ. P. 23.
[23] Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).
[24] See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (citing Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999)).
[25] Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing S.C. R. Civ. P. 23).
[26] Littlefield, 337 S.C. at 355, 523 S.E.2d at 784.
[27] S.C. R. Civ. P. 23(a).

II.B.1 Numerosity

The class is sufficiently numerous. In light of prevailing precedent, the difficulty inherent in joining as few as forty class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the task of Rule 23(a)(1) on that fact alone.[28] As of June 20, 2002, approximately 4,000 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. Counsel for Defendant did not dispute this assertion at the hearing and Paragraph 5 of Defendant's Amended Answer concedes that the cut was made across the board. A class of 4,000 is sufficiently numerous.

II.B.2 Commonality

There is commonality of factual and legal issues in this case. Rule 23(a)(2) of the South Carolina Rules of Civil Procedure requires that there be "questions of law or fact common to the class."[29] Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue.[30] "Critically, [n]ot every issue in the case must be common to all class members."[31] "It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status."[32]

[28] 1 H. Newberg & A. Conte, Newberg on Class Actions ¶3.05, 3-25 (3rd Ed. 1992).
[29] SCRCP 23(a)(2).
[30] Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 21-22, 577 S.E.2d 190, 200-01 (2003).
[31] Id.
[32] McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.").

Furthermore, "claims arising out of form contracts are particularly appropriate for class action treatment."[33] As the California Supreme Court aptly noted in La Sala v. American Sav. & Loan Ass'n., a case involving standard form trust deeds, "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication: the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."[34]

In the case at bar, each named Plaintiff and each putative class member is subject to the same action by Defendants. The two critical common questions of law and fact alleged in the Complaint, as amended, are as follows:

1. whether the cut of benefits to families of adopted children breached the contract or violated the implied duty of good faith and fair dealing;

2. whether the failure to reinstate the benefits to the families of the adopted children after reinstating the benefits to the families of the foster care children breached the contract or violated the implied duty of good faith and fair dealing;

Class actions are intended to achieve economies of time, effort, and expense and to promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness, which will all be accomplished in this instance where Defendants have used common practices with regard to all members of the Class. Specific to this case, a decision on the lawfulness of Defendants' simultaneous, unilateral cut of benefits allegedly in violation of its contractual obligations to the class members. All putative class members share a united interest in the fair, just, and consistent

[33] Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995).
[34] La Sala v. American Sav. & Loan Ass'n., 5 Cal. 3d 864, 877, 489 P.2d 1113, 1121 (1971).

determination of these questions of law and fact necessary to the adjudication of Defendants' liability. Thus, this Court can resolve the issue that is central to the validity of each one of the claims in one stroke. Accordingly, the element of commonality is met.

Defendants arguments against commonality essentially ask the court to accept the merit of the various defenses Defendant has plead such as implied consent, novation, exhaustion of administrative remedy, and damages; which is generally inappropriate at this stage. Additionally, were the court to accept Defendants arguments as to the implied consent defense then any defendant could avoid class certification of a breach of contract action by pleading a defense of implied consent then arguing this defense required individual analysis. Such an argument fails to comport with the case law on the issue of commonality.

The remaining purported defenses are applicable to the class as a whole except the question of the exact damages each member has suffered. The Court considered Defendant's reliance on Gardner v. South Carolina Department of Revenue. 353 S.C. 1, 577 S.E.2d 190 (2003) on the issue of damages. While Gardner does provide that individualized examination negates the benefit of a class action lawsuit, such named differences among proposed class members in that case were addressed regarding a legal issue:

> "[T]he factual differences (whether prejudice exists) [among plaintiffs] are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case."[35]

[35] Id. at 22.

Conversely, members of the Proposed Class in the case at bar each allege the same cause of action, set forth the same ensuing legal issues and each anticipates the same contract defenses. Any differences in the variance in damages are of "a typical class action where minor factual differences [damage amounts] exist among the individualized cases of class members."[36]

Importantly, there is no requirement under South Carolina law that each class member have suffered the exact same amount of damages. South Carolina courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member.[37] In McGann v Mungo, hundreds of residents and owners of improved residential properties in Cold Stream, a subdivision near Columbia, filed a class action concerning negligent design and construction of streets and drainage systems. The defendants argued that each class member's individualized damages prevented the Court from certifying the case as a class action. In rendering its decision, the South Carolina Court of Appeals attached no significance to the undisputed fact that each class member had different damages:

> The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.[38]

McGann has been cited consistently by the Courts of this state and no less than eleven times by the South Carolina Supreme Court in ruling on class certification cases, which makes sense as its

[36] Id.
[37] Littlefield, 337 S.C. at 355, 523 S.E.2d at 784; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the typicality of the proposed representatives' claims).
[38] McGann, 340 S.E.2d at 158.

holding is in line with the historical "purpose of a class action [which] is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."[39]

Furthermore, the question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Defendant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Defendant's actions are determined to violate the law. Given the abundance of common issues, ease of Defendant's access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar.

II.B.3 Typicality

The legal violations against the Plaintiffs are typical of those against each member of the putative class under Rule (23)(a)(3) of the South Carolina Rules of Civil Procedure. This requirement is satisfied if the representative plaintiffs' claim "arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories."[40] When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.[41] This is applicable to the case at bar where Plaintiffs allege that Defendant's unilateral, simultaneous cut of benefits, similarly applied to all Class Members, gives rise to the claims at issue.

[39] O'Quinn v. Beach Associates, 272 S.C. 95, 1 04, 249 S.E.2d 734, 738 (1978) (emphasis added).
[40] Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628, 637 (D.S.C. 1992), aff'd, 6 F. 3d 177 (4th Cir. 1993).
[41] Newberg ¶ 3.13 at 3-77.

Because Plaintiffs allege the written agreements they signed have been breached applies uniformly to all Class Members, Plaintiffs have satisfied the typicality requirement. Like the members of the Class, the Plaintiff through her parents is the third party beneficiary of a contract who had its contractually owed benefits cut. In addition, the claims of Plaintiff and the Class Members arise under the same legal theories that the written contract has been breached. The harms suffered by the Plaintiff are typical of the harms suffered by all children in the putative class because they arise from the same cut of benefits and are based on the same legal theories. Defendant's brief and arguments at the hearing made no meaningful arguments to the contrary.

II.B.4 Adequacy and Class Definition

The Plaintiffs will fairly and adequately represent and protect the interest of the members of the putative class under Rule 23(a)(4) of the South Carolina Rules of Civil Procedure. This rule has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the action; and (2) that the interests of the class representatives are not adverse to those of the class members.[42] Class representatives need not master the intricacies of the case. It must appear to the Court, however, they are willing and able to represent the interests of the class. Plaintiffs in this case are willing to appear for their depositions, will cooperate with counsel, and are not disqualified from service as class representatives for any reason.

The Class the Plaintiffs seek to represent is as follows:

All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and

[42] Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004

A proper class definition describes the class in objective terms, capable of membership ascertainment without regard to the merits of the proposed class members' claims or the particular relief they seek.[43] The Plaintiffs have no interest in the subject matter of the lawsuit that would render them antagonistic to other class members. Accordingly, Plaintiffs truly are representative of the class and the class is defined as outlined above.

With regard to the second prong, the adequacy of Plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary.[44] Plaintiffs' have engaged experienced and capable attorneys. Accordingly, the adequacy requirements are satisfied in this case.

Defendant's argument against adequacy on the issue of Plaintiff's position as a Third-Party beneficiary is without merit because third party beneficiaries (BLH and the putative class members) have the right to enforce the terms of the contract under South Carolina law.[45]

II.B.5 Amount in Controversy

Rule 23(a)(5) of the South Carolina Rules of Civil Procedure requires an amount in controversy for each class member to be at least one hundred ($100.00) dollars to certify a class in

[43] See H. Newberg & A. Conte, Newberg on Class Actions, Fourth, § 6.14 (1994).
[44] South Carolina National Bank v. Stone, 139 F.R.D. 325, 330 (D.S.C. 1991).
[45] 30 S.C. Jur. Contracts § 68 (citing Svenningsen v. Knight, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985); see also, R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n., 384 F.3d 157 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person)).

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cases where the relief sought is not primarily injunctive relief. In interpreting the phrase "amount in controversy," the South Carolina Supreme Court held "the sum claimed by the plaintiff controls if the claim is apparently made in good faith."[46]

In this case, the Plaintiff conceded at the hearing a modification to the requested class narrowing it to only those children who have lost at least 5 months in benefits due to the cut made by Defendants. Because the monthly cut in benefits was twenty ($20) dollars the amount in controversy is equal to or exceeds $100 for each member of the Class. These funds were lost to the class members and Defendants argument that perhaps they received the same care anyway is without merit as the loss is tangible, identifiable, and real. Accordingly, the requirements of SCRCP Rule 23(a)(5) are met.

II.B.6 Notice

As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an "opt-out" notice procedure. Given that Defendant regularly corresponds or has previously corresponded with all class members, Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate.

II.C. Plaintiff's Motion to Compel

The Plaintiff agreed to hold this Motion in abeyance pending the Court's ruling on the Motion for Class Certification and Motion for Summary Judgment. Now that the class has been certified for the reasons outlined herein, counsel are directed by the Court to confer regarding the discovery requests that relate to all class members. Plaintiff reserves the right to reinstate its Motion

[46] Gardner v. Newsome Chevrolet-Buick Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 201-02 (1991)(emphasis in original).

to Compel if these matters are not resolved.

IT IS ORDERED that Defendants' Motion for Summary Judgment IS DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Class Certification is GRANTED.

IT IS FURTHER ORDERED that Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate pursuant to Salmonsen v. CGD 377 S.C. 442, 661 S.E. 2d 81 (2008) (holding that in South Carolina all class members shall have the right to opt out of a class action). Defense counsel shall prepare a Notice and email to the court (copying counsel for the Plaintiff) for review within ten (10) days and shall thereafter be mailed to all class members within ten (10) days. The notice shall include instructions for the class members to communicate any decision to opt out by written notice to Plaintiff's counsel: T. Ryan Langley at P.O. Box 2765; Spartanburg, SC 29304.

IT IS FURTHER ORDERED that T. Ryan Langley, Charles J. Hodge, and James Fletcher Thompson are appointed class counsel and shall file any opt outs with the Clerk of Court within ten (10) days of receipt.

IT IS SO ORDERED.

Honorable Brian Gibbons

~~May~~ 9/12, 2014

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 SEP 16 PM 3:35
M. HOPE BLACKLEY