

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4201569

Blh Kenneth Hensley

South Carolina
Department Of Social
Services

RECEIVED

JUN 08 2015

Angela Hensley

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ 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. Voluntary appeal in abeyance.

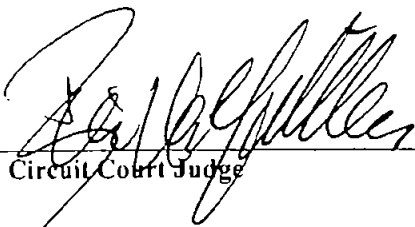
INFORMATION FOR THE JUDGMENT INDEX

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)
		011
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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 - 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.

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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.

CA NO. 13-CP-42-1569

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 motion and related issues. Based on these briefs and arguments, the Court makes the following findings of fact and conclusions of law:

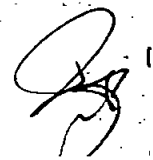
Defendant entered agreements with approximately 4000 South Carolina families for the provision of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to benefit the adopted children. In 2002, Defendant cut the payment to these adopted children across the board by \$20 per month. At the same 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.

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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

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).

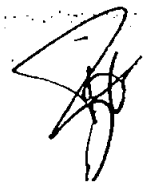
³ Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).

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 Sheriff'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).

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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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3 BY MR. LANGLEY:

4 Well, on the grounds of res judicata or
5 collateral estoppel by virtue of some dismissal with
6 prejudice ---

7 BY MR. LINDEMANN:

8 If it's without prejudice, there would be no
9 such argument.

10 BY FEMALE SPEAKER:

11 Right.

12 BY MR. LINDEMANN:

13 And that wasn't my intent to try to make that
14 argument, I can represent to the Court.

15 BY FEMALE SPEAKER:

16 Okay. Thank you very much.

⁸ *Kunst v. Loree*, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Cl.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

⁹ Transcript of 4th Circuit Oral Argument.

¹⁰ Cheserfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Cheserfield 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

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 Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008).

¹⁷ S.C.R.Gv.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

¹⁸ S.C. R. Civ. P. 23.

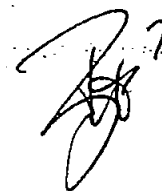
¹⁹ Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).

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

²⁴ 1 H. Newberg & A. Conte, Newberg on Class Actions ¶13.05, 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. US LIFE 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

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, 104, 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.

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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

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)).

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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 SCRCF 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.

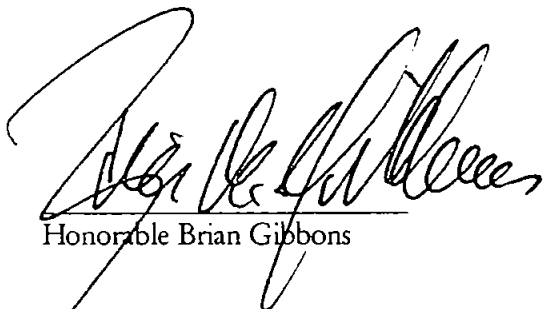
IT IS FURTHER ORDERED that Plaintiff's Motion for Class Certification is GRANTED.

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 Salmonsens 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.

May 21, 2014


Honorable Brian Gibbons

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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.

CA NO. 13-CP-42-1569

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. 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.

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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.



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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. 535, 538 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 Sheriff'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).

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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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3 BY MR. LANGLEY:

4 Well, on the grounds of res judicata or
5 collateral estoppel by virtue of some dismissal with
6 prejudice ---

7 BY MR. LINDEMANN:

8 If it's without prejudice, there would be no
9 such argument.

10 BY FEMALE SPEAKER:

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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).

11 Right.
12 BY MR. LINDEMANN:
13 And that wasn't my intent to try to make that
14 argument, I can represent to the Court.
15 BY FEMALE SPEAKER:
16 Okay. Thank you very much.
17 BY MR. LINDEMANN:
18 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

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.I. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).

¹⁸ Shiflet 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).

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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 Salmonsens 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).

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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).

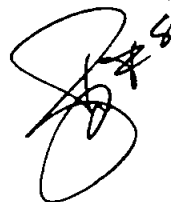
²⁹ SCRCP 23(a)(2).

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.").

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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).

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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.

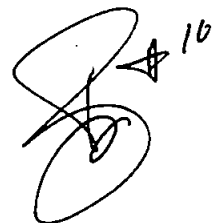
The remaining purported defenses are applicable to the class as a whole except the question of the exact damages each member has suffered. The Court considered Defendant's reliance on Gardner v. South Carolina Department of Revenue. 353 S.C. 1, 577 S.E.2d 190 (2003) on the issue of damages. While Gardner 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 predominant issues in the case."³⁵

³⁵ Id. at 22.

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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.

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.

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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.

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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).

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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

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 SCRCR Rule 23(a)(5) are met.

II.B.6 Notice

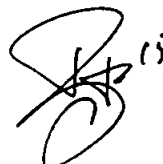
As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an “opt-out” notice procedure. Given that Defendant regularly corresponds or has previously corresponded with all class members, Defendant shall serve on each class member a Notice of Class Action which shall advise them 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).

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to Compel if these matters are not resolved.

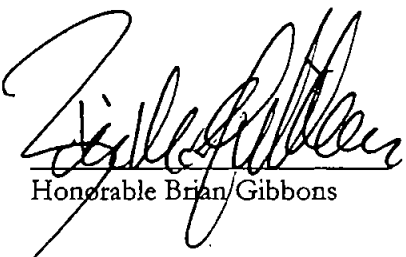
IT IS ORDERED that Defendants' Motion for Summary Judgment IS DENIED.

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 Salmons 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

 9/12, 2014

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE 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,)

Civil Action No. 2013-CP-42-1569

Plaintiff,)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS
FOR RECONSIDERATION**

v.)

South Carolina Department)
of Social Services,)

Defendant.)
_____)

This matter is before the Court on the Motions to Alter or Amend Order and/or Motions for Reconsideration filed August 5, 2014 and September 30, 2014, by the Defendant South Carolina Department of Social Services ("DSS"). With these motions, the Defendant DSS seeks reconsideration with respect to the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, as filed September 16, 2014 (hereafter referred to as the "September 16, 2014 Order").

A hearing was held on February 27, 2015, in Chester County. The hearing was held outside of the Seventh Circuit with the consent of the parties. The Plaintiff was represented at the hearing by T. Ryan Langley and James F. Thompson. The Defendant was represented by Andrew F. Lindemann and Joel S. Hughes. After a review of the pleadings, prior orders, written submissions by the parties, and the oral arguments of counsel, the Court grants the Defendant's

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motions in part and denies them in part, as well as further discusses the rationale for the orders issued.

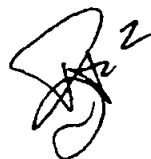
The following fundamental facts have been stipulated or agreed to by the parties through the pleadings and/or the course of the hearings on April 8th and February 27th:

- Defense counsel admitted that there is "no doubt there is a common issue of fact" that the class members signed a contract with Defendant;
- Defense counsel admitted that there is "no doubt there was \$20 across the board deduction in the adoption subsidy payments";
- Defense counsel admitted that "whats implicated in this case is multiple millions of dollars . . . so this is not a minor case."
- The 4th Circuit noted and the parties do not dispute that in 2004 Defendant reinstated the full payments to the foster families but did not reinstate the full payment to the adoption assistance families.

Plaintiffs allege the continued cut of the foster care payments after 2004 breaches the written agreement they have with Defendant. Defendant denies liability and has plead various defenses.

SUMMARY JUDGEMENT ISSUE

The portion of the September 16, 2014 Order addressing the Defendant's Motion for Summary Judgment is hereby vacated. In *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014), the Court of Appeals counseled that "it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment" and that findings of fact and conclusions of law that are made do not establish the law of the case, are not binding on the parties, and are not binding on the next judge to hear the same issues when renewed in a



subsequent motion or at trial. 756 S.E.2d at 162-163. Therefore, in denying the Defendant's Motion for Summary Judgment, the Court will only be issuing a Form 4 Order that denies that motion. Any findings of fact and conclusions of law as set forth in the September 16, 2014 Order and pertaining solely to the Motion for Summary Judgment are vacated.

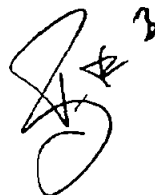
CLASS CERTIFICATION ISSUE

The Circuit court has wide discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d). 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. 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.

Based on the stipulations of counsel at the hearings, the affidavits produced to the Court, the pleadings of record, and the statutory and case law authority, the Court finds the five elements are met.

Defendant has argued that the affidavits of DSS employees Caldwell and Hanak-Coulter were not proper for consideration because they were not served with the motion for class certification. S.C.R.Civ.P 6(d) allows the Court discretion to permit service of affidavits at any time. However, presuming *arguendo* the rule required service of the affidavits with the motion, there was no prejudice to Defendant for the following reasons:

- 1) the affidavits submitted were in the Defendants possession for years prior to the motion for class certification;

A handwritten signature in black ink, appearing to be 'J. B.' with a stylized flourish.

2) the affidavits submitted were procured by Defendants, from agents of Defendants acting within the course and scope of their employment and thus are admissions of a party opponent;

3) Defendants have had notice that the Plaintiffs intended to rely on the affidavits since September 16, 2014 (164 days prior to the last hearing on this issue) and have failed to file any affidavits in opposition; and

4) Defendants have had a full and meaningful opportunity to argue about the contents of the affidavits, which Defendant conceded at the hearing included only basic facts over which there was no disagreement.

Further, the affidavits include basic documents important in this case that the Court takes notice of from the court record, including: the contract with Plaintiff (see Exhibit G to the affidavit), the 2002 letter that went to all families with foster and adopted children (see paragraph 12 of the affidavit and Exhibit H to the affidavit), as well as a supplement to the contract that states: "based on negotiations with Mr. and Mrs. Hensley, adoption subsidies are authorized as follows: Supplemental Benefits \$675 per month." (see Exhibit F to the affidavit).

The Hanak-Coulter affidavit has been in the possession of Defendants for a while as it was filed in the federal litigation. Paragraph 9 of the affidavit admits that the foster care rates were reinstated to the pre-existing levels in 2004. This affidavit supports the argument by Plaintiff and the Class that there was no justification for any sustained decrease in the adoption subsidy following the foster care reinstatement in 2004.

These documents support Plaintiff's argument for class certification and the specific justification for each of the five elements is as follows:

A handwritten signature in black ink, appearing to be "J. Hensley" or similar, with a stylized flourish at the end.

Numerosity

The class is sufficiently numerous. Counsel for Defendant admitted at the February 27th hearing that this is “a case that’s quite significant” involving “multiple millions of dollars” because “even though we’re talking about \$20 a month, we’re talking about \$20 a month over multiple months with multiple different potential class members.” Further, Paragraph 5 of Defendant’s Amended Answer concedes that the cut was made across the board. The class is sufficiently numerous.

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.” Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue. “Not every issue in the case must be common to all class members.” “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.”

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 adopted children breached the contract and/or violated the implied duty of good faith and fair dealing;

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

Defendant's counsel stipulated at the hearings that there is "no doubt there is a common issue of fact that each of these parties signed a contract" and "no doubt there was \$20 across the board deduction in the adoption subsidy payments." These are the determinative issues.

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.

Typicality

The alleged 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. 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 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.

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. 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 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. 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. 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.

Amount of 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. Plaintiff concedes that the class is narrowed to those who have lost at least five months of benefits. Accordingly, the requirements of SCRCP Rule 23(a)(5) are met.

Notice

As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an "opt-out" notice procedure. Rule 23(d)(2) states: "In the conduct of actions to which this rule applies, the court may make appropriate orders: ... 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 or defended." The South Carolina Supreme Court has repeatedly stated: "South Carolina Rule of Civil Procedure 23(d)(2) gives the circuit court the broad power to 'impose such terms as shall

fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.'”

Initially, it was alleged that the Defendant refused to provide the names and contact information for any potential class members. Accordingly, the Court exercised its broad discretion to protect the members of the Class by requiring Defendant to provide notice.

At the February 27th hearing, however, Defendant agreed to provide the necessary class-member contact information to Plaintiff within 90 days. As such, the Court grants Defendant's motions to reconsider this portion of the September 16, 2014 order.

As a result, the Court orders that the "Notice of Class Action" shall be approved by the Court Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit and the expense and resources required to notify the class members shall be borne by the Plaintiff. The Defendant DSS will not be required to provide any notification to the class members or bear any expense therefor.

However, the Defendant shall be required to provide the Plaintiff class counsel within ninety (90) days of the filing date of this Order the names and available addresses of any potential class members. The Court fully recognizes that information related to adoptions and adoption proceedings is confidential under South Carolina law. Specifically, S.C. Code Ann. § 63-9-780(C) provides: "All files and records pertaining to the adoption proceedings in the State Department of Social Services, or in any authorized agency ... are confidential and must be withheld from inspection except upon court order for good cause shown." S.C. Code Ann. § 63-9-780(C). The Court specifically finds that good cause has been shown, and the Defendant is hereby ordered to produce as ordered the names and available addresses of any potential class members to the Plaintiff class counsel. The Court further orders, however, that the information

produced by the Defendant in response to this Order is and shall remain confidential. The information shall be redacted from any public filings with the Court, and to the extent that a name of a class member is identified in a public filing, the initials shall be substituted for the name. Furthermore, the Plaintiff and class counsel are hereby directed that the information produced by the Defendant in response to this Order may only be used for purposes of conducting this litigation and may not be disseminated to any third parties except by further order of this Court.

Pursuant to Rule 23(d), SCRCF, the Court hereby adopts an "opt-out" procedure. The Court hereby orders the Plaintiff class counsel to prepare and serve a Notice of Class Action advising class members of the facts of this case and their right to opt out within thirty (30) days if they choose not to participate. The Plaintiff class counsel shall submit the draft notice to the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit and opposing counsel for approval within thirty (30) days of receiving the class member contact information from the Defendant. The Notice of Class Action shall include instructions for the class members to communicate any decision to opt out by mailing written notice to the Plaintiff class counsel at the following address: Post Office Box 2765, Spartanburg, South Carolina 29304. All correspondence to the class shall be conspicuously marked "Confidential."

IT IS, THEREFORE ORDERED that Defendant's Motions for Reconsideration are granted in part and denied in part as set forth herein.

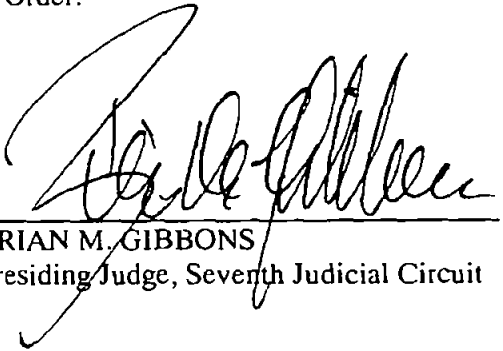
IT IS FURTHER ORDERED that the Defendant shall provide the Plaintiff class counsel within ninety (90) days of the filing date of this Order the names and available addresses of any potential class members. The Plaintiff class counsel shall then prepare a Notice of Class Action which shall advise the potential class members of the facts of this case and their right to opt out

within thirty (30) days if they choose not to participate in the class action. The Plaintiff class counsel shall submit the draft notice to the Court and opposing counsel for approval within thirty (30) days of receiving the class member contact information from the Defendant. The Notice of Class Action shall thereafter be mailed to all potential class members within ten (10) days of Court approval.

IT IS FURTHER ORDERED that the Plaintiff class counsel shall file any opt-outs with the Spartanburg County Clerk of Court within ten (10) days of receipt. The opt-outs, which will necessarily identify the potential class members, shall be maintained as confidential by the Clerk of Court and shall be filed only under seal.

IT IS FURTHER ORDERED that the parties and the Clerk of Court shall abide by all confidentiality requirements as set forth in this Order.

AND IT IS SO ORDERED.



BRIAN M. GIBBONS
Presiding Judge, Seventh Judicial Circuit

Chester, South Carolina

April 13, 2015

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