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IN THE
SOUTH CAROLINA SUPREME COURT,
THE SOUTH CAROLINA COURT OF APPEALS,
THE RICHLAND COUNTY COURT OF COMMON PLEAS,
THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT,
AND THE OFFICE OF HEARINGS AND APPEALS OF THE
SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

Richard Stogsdill, Appellant, v. South Carolina Department of Health and Human Services, Respondent.	**PLAINTIFF'S PETITION FOR ATTORNEY'S FEES, COSTS, AND EXPENSES**

I. Introduction

Appellant petitions to recover attorneys' fees, costs and expenses pursuant to S.C. Code Ann. § 15-77-300 (2005) ("the state action statute") and the Americans with Disabilities Act (ADA) at 42 U.S.C. § 12205. Because it is unclear which court has jurisdiction to rule on this petition, to preserve its right to an award of attorney fees by the appropriate court, the petition is being filed contemporaneously, within 30 days of the final disposition of the case by the United States Supreme Court, in (1) the South Carolina Supreme Court, (2)

the South Carolina Court of Appeals, (3) the Richland County Court of Common Pleas, (4) the South Carolina Administrative Law Court, and (5) the South Carolina Department of Health and Human Services (DHHS) Office of Appeals and Hearings. Copies of this petition are also being served upon DHHS counsel, the South Carolina Attorney General, the Office of the Treasurer, and Governor Nikki Haley, who is responsible for oversight of the Department of Administration.[1]

II. JURISDICTION

It is unclear which court has jurisdiction to decide the issues raised in this petition. Article XVII, Section 2 of the Constitution provides that: "The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." But, the General Assembly does not appear to have granted authority to DHHS, DDSN or the Administrative Law Court to award fees pursuant to S.C. Code Ann. § 15-77-300 (2005) ("the state action statute") or under the federal statute authorizing fees to a prevailing party pursuant to the Americans with Disabilities Act (ADA) at 42 U.S.C. §

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[1] The Budget and Control Board was abolished on July 1, 2015. 2014 S.C. Act No. 121 (S.22), Part VII, § 19.C. The Department of Administration, under the authority of the Governor, was established in accordance with the South Carolina Restructuring Act of 2014 (Act 121) as the central administrative agency for state government.

12205.

In *McDowell v. South Carolina Dep't of Social Services*, the South Carolina Supreme Court ruled that the plaintiff was entitled to an award of legal fees pursuant to S.C. Code Ann. § 15-77-300 for court review of an agency decision, in addition to fees incurred in the proceedings to collect fees, but was not entitled to fees for the initial proceedings before the agency. 304 S.C. 539, 405 S.E.2d 830 (1991). In that case, the South Carolina Court of Appeals ruled in an earlier decision that an improper caption did not "doom" a petition for attorney fees, so long as the petition was filed with the appropriate tribunal within 30 days of the final dispensation of the case. 300 S.C. 24, 27, 386 S.E.2d 280 (S.C. App. 1989) (failure to caption a notice properly to indicate it was being filed in the circuit court held, in the absence of a showing of prejudice, not fatal where a declaration and a copy of the notice were filed simultaneously with the circuit court); citing *Tobia v. Town of Rockland*, 106 A.D. (2d) 827, 829-30, 484 N.Y.S. (2d) 226, 229 (1984) (the failure to name the court in the original caption of the summons and complaint held to be "merely a defect in form which may be disregarded, absent a showing of prejudice."). And, of course, S.C. Rule of Civil Procedure 82(b) provides that "When an action is brought in the wrong . . . court, the court shall

not dismiss the action but shall transfer it to . . . [the] court in which it could have been brought."

As the Court of Appeals held in *McDowell v. DSS*, a petition filed pursuant to §§ 15-77-300 et seq. requires no summons, as it "is not a separate action but is incidental to the original action." 300 S.C. at 28. See 20 C.J.S. Costs Sec. 271 at 505 (1940) (a taxation proceeding involves a matter which grows out of and is collateral or ancillary to the judgment in the main action or proceeding and is incidental thereto); *Maria P. v. Riles*, 43 Cal. (3d) 1281, 240 Cal. Rptr. 872, 743 P. (2d) 932 (1987) (a motion for attorney fees under an attorney fees statute held ancillary to the main cause). However, as a precaution, a summons is being filed and served by United States Mail upon the defendants, the Attorney General, the Office of the State Treasurer and Office of Governor Nikki Haley, so there can be no time lost addressing this issue.

A. Jurisdiction of South Carolina Supreme Court. The South Carolina Constitution provides in Article V, § 5 that "The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. Code Ann. § 14-3-310 also grants the Supreme Court the authority to

issue original writs. But, Rule 245(a), SCACR provides that "The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties."

However, where the public interest is involved, or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the Supreme Court may hear a matter in its original jurisdiction where the facts showing the reasons are stated in the petition with supporting affidavits. Id.

In *Pascoe v. Wilson,* 416 S.C. 628, fn. 21 (2016), the South Carolina Supreme Court recently noted that it has the authority to find facts in its original jurisdiction, as it did in *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 497, 685 S.E.2d 600, 607, opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (2009). When fact-finding has been necessary to determine the law, the Supreme Court has assigned the responsibility to find facts to a circuit court judge. See S.C. Code Ann. § 14-3-340 (1977) ("Whenever in the course of any action or proceeding in the Supreme Court arising in the exercise of the original jurisdiction . . . an issue of fact shall arise . . . , or whenever the determination of any question of fact shall be necessary to the exercise of the jurisdiction conferred upon the Supreme Court, the court may frame an issue

therein and certify the same to the circuit court . . . ."). In *Ex parte Smith*, 407 S.C. 422, 422, 756 S.E.2d 386, 386 (2014) the Supreme Court granted the petition for original jurisdiction and appointed the Honorable Clifton Newman to serve as special referee. In *Roberts v. LaConey*, 375 S.C. 97, 100, 650 S.E.2d 474, 475 (2007) the Supreme Court granted review in its original jurisdiction and referred the matter to a Special Referee "to take evidence and issue a report containing proposed findings of fact." This practice has long been authorized by the Supreme Court, as in *City of Columbia v. Tindal*, 43 S.C. 547, 554, 22 S.E. 341, 344 (1895) where the civil action was accepted in its original jurisdiction, stating, "There being a necessity for some testimony, [the action] was referred, under an order from this court, to [a] special referee."

B. Jurisdiction of South Carolina Court of Appeals. Stogsdill would not object to this petition being decided by the South Carolina Court of Appeals. Pursuant to S.C. Code § 14-8-200(a), the Court of Appeals has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency or a final decision of an administrative law judge. S.C.Code § 14-8-280 grants that Court authority to refer matters to a referee for fact finding as follows:

Whenever in the course of any action or proceeding in the Court arising

> in the exercise of the original jurisdiction conferred by law upon the court, an issue of fact shall arise upon the pleadings or when an issue of fact shall arise upon a traverse to return in mandamus, prohibition or certiorari, or whenever the determination of any question of fact shall be necessary to the exercise of the jurisdiction conferred upon the Court of Appeals, the court may frame an issue therein and certify such issue to the circuit court for the county in which the cause originated or in case of original jurisdiction to the circuit court of the county in which the cause of action has arisen. *The Court shall also have the same powers as are now possessed by the circuit courts of the State for the appointment of referees to take testimony and report thereon, under such instructions as may be prescribed by the court, in any cases arising in the Court where issues of fact shall arise.* (Emphasis added).

On September 10, 2014, the South Carolina Court of Appeals reversed the finding of the South Carolina Administrative Law Court, which had ruled "that providing the requested services to Stogsdill would result in a fundamental alteration of the Waiver program." 410 S.C. at 285. That Court then remanded Stogsdill's case "to DDSN for an assessment of required hours and services without reference to the caps in the Waiver." Id. Pursuant to federal law, DHHS was then obligated to assess Stogsdill's needs promptly and to issue a final written decision within 90 days of the remand order.[2] For two

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[2] DDSN and DHHS were instructed in *Doe v. Kidd I* that 42 U.S.C. 1396a(a)(8) "uses mandatory rather than precatory terms: it states that plans 'must' provide for assistance that 'shall' be delivered with reasonable promptness." 501 F.3d at 356. CMS approval of a waiver document does not relieve Respondents of its obligations under that statute, nor does the waiver document contradict that statute or provide any relief for violations of the reasonable promptness mandate.

years, DHHS failed to assess Stogsdill's needs for services, refusing to provide an independent assessment, or to provide the standards DHHS and DDSN apply to determine the need for services (which are not contained in the waiver application approved by CMS in 2009), or the qualifications of the persons making the decisions to award or deny requests for services.[3] Exhibit 2. Stogsdill was finally notified by his DDSN service coordinator that his personal care hours were increased to 148 hours a week on October 28, 2016 and that he will continue to receive 240 hours a month of respite hours, but, more than two years after the Court of Appeals' remand, DHHS still has not issued the required written order after remand. Exhibit 2.

It is well established law that the power of a court to enforce its own orders is inherent in all courts. *Curlee v. Howle,* 277 S.C. 377, 382 (1982). Existence of this authority is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. *McLeod v. Hite,* 272 S.C. 303, 251 S.E. (2d) 746 (1979); *State v. Goff,* 228 S.C. 17, 88 S.E. (2d)

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[3] Defendants also refused to provide information related to conflicts of interest of the medical director of DHHS, Dr. Tan Platt, or the DDSN social worker who signed the "Stogsdill Assessment," which did not assess his need for personal care attendant services. Exhibit 2.

788 (1955). Here, DHHS and DDSN have willfully disregarded a previous order of the Court of Appeals, imposing caps on Stogsdill's personal care services until October 27, 2016, when those hours were increased to 148 hours a week.[4] Exhibit 2. DHHS has continued to impose the caps established in 2010, based on fraudulent claims of "budget reductions," on other waiver participants, without offering any justifiable explanation for their failure to issue a written order in Stogsdill's administrative civil action, as required by federal regulation and policy. Exhibits 2 and 9.

The State Medicaid Manual (SMM) "serves as the official [U.S. Health and Human Services Department ("HHS") interpretation of the [Medicaid] law and regulations[.]" *Pa.Dep't of Pub. Welfare v. HHS,* 647 F.3d 506, 509 (3d Cir.2011). It constitutes CMS' "official interpretation of the law and regulations, and, as such are binding on Medicaid State agencies." See Foreward, State Medicaid Manual at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html.

The State Medicaid Manual clearly states in § 2903.2 that an order of

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[4] Stogsdill intends to show through evidence obtained during discovery that DHHS counsel intentionally delayed compliance with the Court of Appeals' 2014 order in an attempt to avoid legal fees. Exhibit 2.

remand cannot be substituted for a final order. That Section of the State Medicaid Manual is titled "Hearing Decision and Notification to Claimant (42 CFR 431.232, 233, 244(b)and(d) and 431.245)." The Manual provides:

> A. General.--A conclusive decision in the name of the State agency *shall* be made by the hearing authority. ...
> The officially designated hearing authority may adopt the recommendations of the hearing officer, or reject them and reach a different conclusion on the basis of the evidence, or refer the matter back to the hearing officer for a resumption of the hearing if the materials submitted are insufficient to serve as basis for a decision ... *Remanding the case to the local unit for further consideration is not a substitute for "definitive and final administrative action."* (Emphasis added.)

Paragraph B. of that Section provides that "All hearing recommendations or decisions must be based *exclusively* on evidence introduced at the hearing." (Emphasis added.)

The Court of Appeals' September, 2014 order remanding Stogsdill's case to DDSN did not have the effect of relieving the agencies from their obligation to comply with 42 C.F.R. 431.205, which required them to provide Stogsdill all due process rights established by the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Those rights included the right to receive a final written decision, issued with reasonable promptness, which was based "exclusively upon evidence presented at an evidentiary hearing." 42

U.S.C. 1396a(a)(8) and 42 C.F.R. 431.244(a).[5] Once again, DHHS ignored those fundamental due process rights when it failed to issue a final order upon receipt of the South Carolina Court of Appeals' September 10, 2014 order, after the record was closed in this case.

The United States Court of Appeals for the Fourth Circuit has now three times ruled in *Doe v. Kidd* that 42 U.S.C. 1396a(a)(8) requires Respondents to determine eligibility for services and to provide those services with "reasonable promptness." *Doe v. Kidd I*, 501 F.3d 348, 354 (4th Cir. 2007), *Doe v. Kidd II*, 419 Fed. Appx. 411 (4th Cir. 2011) and *Doe v. Kidd III*, 2016 U.S. App. LEXIS 14609 (4th Cir. August 9, 2016). That court and others have interpreted 42 U.S.C. 1396a(a)(8) as requiring services to be provided within 45 or 90 days. *Doe v. Kidd I*, 501 F.3d 348, 354 (4th Cir. 2007) and *Doe v.*

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[5] Section 431.244 of Title 42 of the Code of Federal Regulations—entitled "Hearing decisions"— requires the State to "take final administrative action . . . [o]rdinarily, within 90 days" of the date a fair hearing is requested. See 42 C.F.R. § 431.244(f)(1)(ii) ("regulation"). The term "final administrative action" is not defined in the regulation or in the Medicaid Act. But, CMS commentary issued in 2002 referred to the 90-day requirement in § 431.244 as a deadline for the issuance of hearing decisions. See, e.g., Medicaid Program; Medicaid Managed Care: New Provisions, 67 Fed. Reg. 41,989, 41,060 (June 14, 2002) (referencing "the 90-day clock for a fair hearing decision" (emphasis added)); id. ("[T]he State is required to resolve the State fair hearing within 90 days." (emphasis added)); id. at 41,064 (referencing "the overall 90-day timeframe for a final fair hearing decision" (emphasis added)); id. at 41,076 (referencing "the 90-day timeframe for resolution of the State fair hearing" (emphasis added)).

Chiles, 136 F.3d 709, 723 (11th Cir. 1998) ("This mandatory language in both the Act and its regulations puts States on notice that their provision of assistance must be reasonably prompt.")

DHHS and DDSN, who have been defendants in that litigation since 2003, should be quite familiar with those rulings. In *Doe v. Kidd I,* the Fourth Circuit ruled that:

> Section 1396a(a)(8) of the Act requires that state "medical assistance . . . be furnished with reasonable promptness to all eligible individuals." Federal regulations direct state agencies to determine an applicant's eligibility for Medicaid within ninety days of the date of application and to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. §§ 435.911, 435.930 (2002).

501 F.3d at 354. That Court ruled that "...the provision is clear that the standard for informing applicants of their eligibility for Medicaid services is 'reasonable promptness' and the relevant federal and state regulations and manuals define reasonable promptness as forty-five days or ninety days, depending on the applicant." Id. See, e.g., 42 C.F.R. § 435.911; South Carolina Medicaid Manual, cited at J.A. 242; United States Department of Health & Human Services Center for Medicaid and State Operations, Olmstead Update No: 4, at J.A. 290.

The Fourth Circuit ruled in *Doe II* that despite the "unambiguous legal

mandates" that require Respondents to promptly provide services, Defendants admitted that they "abdicated their responsibility to furnish Doe with the necessary services in the least restrictive environment..." Id. at 418. Despite this stern warning, on remand to the district court in 2011, DHHS and DDSN continued to stubbornly refuse to provide Doe the services that court ordered them to provide, just as they refused to provide Stogsdill the services he needed without regard to the waiver caps. The Fourth Circuit ruled in 2016 in *Doe III* that DDSN and DHHS continued to violate the reasonable promptness mandate for more than two years, after it ordered Respondent to provide services in 2011. *Doe III* at *9-10.

It is expected that DHHS will trot out its argument that Stogsdill himself, or his counsel prevented DHHS and DDSN from performing the assessment ordered by the South Carolina Court of Appeals. Exhibit 2. But, 42 C.F.R. § 431.220 requires a hearing when the applicant "requests it because his claim for services is denied or is not acted upon with reasonable promptness" and when the participant "requests it because he or she believes the agency has taken an action erroneously." If that were true, DHHS had an obligation to provide a written notice containing all information described in 42 C.F.R. 431.210, advising Stogsdill of the reason for the delay and the statute or

regulation DHHS relied upon to delay services.

Nothing in the waiver application for the years 2010-2014 approved by CMS in 2009 superceded this federal mandate to issue a written order (and a written notice pursuant to 42 C.F.R. 431.210 when services were not provided within 90 days). Indeed, Stogsdill will show that CMS has at least eight times since 2014 denied DHHS' waiver application DHHS for the years 2015-2020.[6]

Although Stogsdill's appeal to the South Carolina Supreme Court and subsequently to the United States Supreme Court divested the South Carolina Court of Appeals of jurisdiction, because DHHS has not issued a written order, pursuant to the authorities cited above, the South Carolina Court of Appeals may have jurisdiction to enforce its own order and to review Stogsdill's petition for legal fees resulting from DHHS' violation of the ADA. Exhibit 2. The "final disposition" of Stogsdill's case by the United States Supreme Court occurred on November 28, 2016 when that Court denied his motion for reconsideration. The agencies' decision to ignore federal laws requiring a

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[6] At a recent budget hearing before a Senate Sub-Committee, the director of DDSN admitted that the waiver document for the years 2015-2020 has not been approved by CMS and that CMS has eight times refused to approve DHHS' application, because the agencies are not in compliance with CMS' "Final Rule." Discovery is needed to obtain the all of the reasons for CMS' denial of the waiver application.

written decision on remand does not change Stogsdill's status as the "prevailing party" entitled to legal fees pursuant to S.C. Code § 15-77-300 et. seq. and the legal fee provision of the ADA. State Medicaid Manual § 2903.2.[7]

C. Jurisdiction of the Circuit Court. Article V, Section 11 provides that: "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." (1972 (57) 3176; 1973 (58) 161; 1985 Act No. 9.) S.C.Code § 15-77-50 states:

> The circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise.

Nevertheless, it is unclear whether that section would apply to grant jurisdiction to the circuit court to hear a petition on fees in a case where the South Carolina Court of Appeals reversed the decision of the South Carolina

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[7] Without a written court order, DHHS and DDSN may attempt to reduce or terminate the 148 hours of services Stogsdill was awarded on October 27, 2016.

Administrative Law Court in a case where the fact finder was not a "court," but was an agency without express authority to award fees pursuant to the state fee statute or the Americans with Disabilities Act fee statute at 42 U.S.C. § 12205.

D. Jurisdiction Summary and Arguments Regarding Jurisdiction.

Because it is unclear which court has jurisdiction to review Stogsdill's petition for legal fees in this matter, as a precaution, this petition is being filed in the courts identified above, as well as with any agency believed to have a potential interest in these proceedings. Stogsdill prays that the South Carolina Supreme Court or the South Carolina Court of Appeals will hear this matter, as it is a matter of tremendous public concern. Thousands of waiver participants are affected by DHHS and DDSN continuing to apply caps to services, without informing them that the Court of Appeals ruling in *Stogsdill* prohibits the imposition of caps on services of persons at risk of institutionalization. Taxpayers are burdened, because the imposition of caps on home-based services increased the cost of the ID/RD waiver program (formerly MR/RD) by more than $50 million in the first year alone.

The General Assembly intended that prevailing parties harmed by agency action requiring a civil action to enforce their rights receive attorney fees and costs when it enacted S.C. Code § 15-77-300 et. seq. and did not

include actions by DHHS in the list of those civil actions that are specifically exempt from the state fee statute. Had the General Assembly intended that fees not be awarded to prevailing parties in civil actions to enforce rights under the ADA, the General Assembly would have said so in that statute.

As discussed above, Congress has also clearly and unambiguously expressed its intention to encourage enforcement of the ADA through private civil actions by awarding legal fees and costs to prevailing parties. Nothing in the ADA fee statute indicates any intention to limit these fee awards to civil actions brought in the federal courts.

Historically, DDSN and DHHS have not been forced to pay legal fees when they have arbitrarily and capriciously reduced, denied, or terminated Medicaid services, or when they have been allowed to illegally delay determinations of eligibility for services without providing any explanation for the delay. With no consequences for their violations of the ADA, these agencies have again abdicated their responsibilities to administer Medicaid programs fairly and in the best interest of Medicaid waiver participants. *Doe v. Kidd I, II and III, supra*, 42 U.S.C.S. §§ 1396a(a)(19), and *Moore v. Cook*, 2012 U.S. Dist. LEXIS 55865 (N.D. Ga. Apr. 19, 2012).

It was by design, that the South Carolina Constitution established three

branches of government and required that they be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. Art. I, § 8. This mandate to separate powers of the three branches of government stems from "the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis,* 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

These agencies have ignored legislative mandates which were properly enacted by state and federal lawmakers and they have ignored orders of both state and federal courts, including the order of the Court of Appeals in this case, with impunity, thereby creating administrative tyranny in South Carolina and destroying the balance of power required by the South Carolina Constitution.

If attorneys can have no expectation of payment for representing prevailing Medicaid waiver participants in civil actions brought in state or federal court, it should be no surprise that there will continue to be no other private attorneys in South Carolina accepting cases challenging these agencies' violations of the ADA, and the balance of powers between the executive

branch, the legislative branch and the judicial branch will not exist.

DHHS has violated the separation of powers mandate of S.C. Const. Art. I, § 8, by substituting the unwritten policies of DHHS and DDSN for those mandates legally enacted by the General Assembly and Congress. Without enforcement of the state fee statute and the attorney fee provision of the ADA, DDSN and DHHS will be able to continue to use funds appropriated by the General Assembly for the intended purpose of providing services necessary to allow waiver participants to live in the least restrictive settings for other purposes not authorized in the State Budget. *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258 (2013).

If fees are not awarded in this case, the most vulnerable citizens in our State will be forced to either suffer in silence, along with their families struggling to take care of them at home, or be forced into unsafe DDSN funded institutional settings, where they are too often subjected to abuse, neglect and exploitation - because they will be unable to find attorneys willing to enforce the ADA and the decision of the Court of Appeals in *Stogsdill v. DHHS*, 410 S.C. 273, 763 S.E.2d 638 (S.C.Ct.Ap. 2014).

An award of reasonable attorney fees will encourage other lawyers to accept these complicated and arduous cases and will result in the intended

effect of forcing DHHS and DDSN to comply with the ADA.

This is a matter of great public interest, because persons who qualify for Medicaid waiver programs operated by DDSN are the most disabled of the disabled and they must be impoverished to participate. They do not have funds to hire lawyers. Stogsdill has demonstrated that these agencies have falsely informed the public and the courts since 2009 that caps and other limitations on services were unavoidable due to budget reductions. While drastically reducing services provided to the most disabled persons served in waiver programs, DDSN has increased the annual per capita cost by thousands of dollars a year and the total cost of the program by more than $50 million, thereby costing state taxpayers hundreds of millions of dollars since 2010.

Since the Court of Appeals issued its order in this case in 2014, DHHS has not amended its waiver application to provide an exemption for persons at risk of institutionalization. Currently, the waiver application DHHS submitted in the fall of 2014 has not been approved by CMS. DHHS nor DDSN have not requested funding from the General Assembly to comply with the Court of Appeals' order issued in 2014, suggesting that they have no intention of changing their illegal practices.

According to sworn testimony of the Director of DDSN, Beverly

Buscemi, before a Senate Sub-Committee, CMS has at least eight times since 2014 refused to approve the ID/RD waiver applications that DHHS has submitted to CMS for the years 2015 to 2020, since the Court of Appeals issued its order in *Stogsdill v. DHHS.*

DHHS has argued in the federal courts that Stogsdill's state and federal claims are "parallel," even "identical." The agency should be estopped from taking the position that Stogsdill cannot obtain relief in the federal courts, where legal fees are available under § 42 U.S.C. 1988 and the ADA, while challenging his right to secure fees in the state courts.

Stogsdill requests that the South Carolina Supreme Court will accept this civil action in its original jurisdiction, or that the South Carolina Court of Appeals will use its inherent authority to enforce its own order and that Stogsdill's petition for fees and costs will be referred to a referee authorized to order discovery,[8] to take testimony and to issue a report of proposed findings of facts after the parties have briefed the issues raised in this petition. Alternatively, Stogsdill requests that the Supreme Court will refer the petition to the appropriate court, with clear directions to that Court to rule upon his

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[8] The record in this case was closed in 2010 and evidence post-dating that time is relevant and necessary to demonstrate the bad faith of DHHS and to support Stogsdill's request for a multiplier.

petition for fees.

In the event that the Supreme Court declines Stogsdill's request to hear this case in its original jurisdiction and the South Carolina Court of Appeals does not assume jurisdiction to enforce its order, the petition should be acted upon by the appropriate court with jurisdiction, which should order the parties to participate in discovery, establish a briefing schedule and schedule a hearing, then rule upon the petition for legal fees with reasonable promptness pursuant to S.C. Code § 15-77-300 and the ADA fee statute.

III. Applicable Legal Fee Statutes

A. The state legal fee statute at S.C. Code § 15-77-300. S.C. Code § 15-77-300(A) provides that the court may allow any party in any civil action who is contesting state action, unless the prevailing party is the State, to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency. In order to avoid paying fees under this statute, the burden is on the State to prove that it acted with substantial justification in pressing its claim against the party. Id. The agency may meet this burden by proving that it followed a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction. Id.

The state fee statute provides at § 15-77-300(B) that the court must

consider the following factors: (1) the nature, extent, and difficulty of the case; (2) the time devoted; (3) the professional standing of counsel; (4) the beneficial results obtained; and (5) the customary legal fees for similar services.

S.C. Code Ann. § 15-77-300 establishes three prerequisites to award legal fees in civil actions: (1) the contesting party must be the prevailing party, (2) the court must find that the agency acted without substantial justification in pressing its claim against the party and (3) the court must find that there are no special circumstances that would make an award of attorney's fees unjust. *Heath v. County of Aiken,* 302 S.C. 178, 394 S.E.2d 709 (1990).

The only state actions exempt from the state fee statute are civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, and child abuse and neglect actions, none of which are involved in this civil action. S.C. Code § 15-77-300(C).

Pursuant to S.C. Code § 15-77-310, a party must petition for the attorney's fees within thirty days following final disposition of the case, supporting the petition with an affidavit setting forth the basis for the request, as Stogsdill has done in this case.

An action for judicial review of an agency decision under S. C. Code Ann. § 1-23-380 is a "civil action" within the terms of S. C. Code § 15-77-300, and fees incurred in collecting fees are also recoverable under the state fee statute. *McDowell v. S.C. Dep't of Social Services*, 304 S.C. 539, 543-544 (1991).

After calculating the lodestar, the court may "consider other factors justifying an enhancement of the lodestar figure with a 'multiplier' before arriving at a final amount. *Layman v. State*, 376 S.C. 434, 459 (2008). It is not necessary for a party to be successful as to all issues in order to be found to be a prevailing party for purposes of awarding attorneys' fees under the state action statute. Id, citing *Heath*, 302 S.C. at 182, 394 S.E.2d at 711.

In *Heath v. County of Aiken,* 295 S.C. 416, 394 S.E.2d 709 (1990), the Supreme Court held that "substantial justification" for the purposes of this statute means justified to a degree that could satisfy a reasonable person. To prove that its action was supported by substantial justification, the agency must prove that the action had "a reasonable basis" in both law and fact. See *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). The reviewing court must look to the agency's position in litigating the civil actions throughout the proceedings to determine whether DHHS had a reasonable basis

in both law and fact, taking into consideration "the outcome of the matter eventually litigated." *McNaughton v. Charleston School for Math and Science, Inc.*, 411 S.C. 249, 267, 768 S.E.2d 389 (2015), citing *Layman,* 376 S.C. at 448, 658 S.E.2d at 327; *Heath,* 302 S.C. at 184, 394 S.E.2d at 712. It must also consider "the testimony presented during the case, the arguments of counsel, [and] the evidence presented..." to determine whether the State was substantially justified in pressing its claims for years to deny Stogsdill the personal care attendant services his physician ordered, most of which were improperly withheld until October 27, 2016 when his personal care attendant hours were increased to 148 hours a week in an attempt to moot Stogsdill's lawsuits. *McNaughton* 411 S.C. at 267.

Then, the court must determine whether special circumstances would make an award of attorney's fees unjust. *Heath,* supra CITE. (standard of review).

B. ADA Attorney Fee Statute

The Americans with Disabilities Act was passed in 1990 to remedy discrimination against persons with disabilities. 42 U.S.C. § 12101 et seq. The ADA fee shifting statute provides authority for the court to award a reasonable attorney fee to a successful plaintiff in ADA actions. 42 U.S.C. § 12205 provides that:

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs. . . .

42 U.S.C. § 12205. This federal legal fee statute contained in the ADA clearly applies to civil administrative actions which may not be compensable under S.C. Code § 15-77-300, including proceedings for review by agencies, because it authorizes not just courts, but also agencies to award legal fees. That fee statute is intended to encourage individuals injured by discriminatory practices to seek judicial redress, and "to ensure that the costs of violating civil rights laws [are] more fully borne by the violators, not the victims." *Newman v. Piggie Park Enter. Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

IV. ARGUMENTS

The U.S. Supreme Court established in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), that the initial estimate of a reasonable attorney fee should be calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate, known as the "lodestar method." A "reasonable hourly rate" must take into account the prevailing market rates in the relevant community. *Blum v.*

Stenson, 465 U.S. 886, 895, 104 S.Ct. 1541 1547, 79 L.Ed.2d 891 (1984). As the Supreme Court ruled in *Hensley v. Eckerhart:* "The amount of the fee, of course, must be determined on the facts of each case." 461 U.S. 424, 429 (1983).

Pursuant to the state fee statute, the court must take the following circumstances into consideration in awarding legal fees.

A. Stogsdill is the prevailing party. There can be no question here but that Stogsdill is the prevailing party in this civil action to increase his personal care and respite hours over the number of hours being provided in February, 2009 and to prevent DHHS from further reducing those hours. For years, DHHS pressed its claim, both in administrative agency proceedings, then in the state courts, attempting to limit his personal care attendant and respite hours. It is undisputed that since October 27, 2016 he has received 148 hours a week of personal care attendant services from defendant - 120 more hours each week that he would have received without these civil actions. DHHS pressed its claim to reduce his respite services to 68 hours a week when caps were imposed on January 1, 2010, but during the course of this litigation, Stogsdill has prevailed by requiring DHHS to increase those respite hours more than three fold, to 240 hours a month.

The United States Supreme Court has determined that the term "prevailing party" in civil actions brought under the Americans with Disabilities Act; 42 U.S.C. § 12205 is a "legal term of art ... [referring to] one who has been awarded some relief by the court...." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). That Court has ruled under various federal fee shifting statutes that the term "prevailing party" includes a plaintiff who has secured "actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff; *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). including a consent decree.

There can be no question, but that the legal relationship of the parties has been altered since January 1, 2010 because Stogsdill prevented DHHS from reducing his hours, and that this relationship was altered on October 27, 2016, when he was awarded 148 hours a month of personal care attendant hours - more than five times the number of personal care attendant hours he would be receiving had he not pursued enforcement of his rights under the ADA in the civil actions at issue in this petition.

B. DHHS acted without substantial justification in reducing Stogsdill's hours. Each year, DHHS has certified to CMS that Stogsdill meets "institutional level of care," such that he would require institutionalization but for receipt of waiver services. Yet, remarkably, DHHS argued to the agency tribunals and the courts for nearly five years that he was not "at risk of institutionalization," in clear contradiction of the agency's certifications to the federal government.

During the nearly seven years since Stogsdill filed his first administrative appeal, he supported his claims with affidavits from his treating physicians and psychological services providers, but DHHS failed to present any evidence from a medical source to support its claims that he is not at risk of institutionalization. The Court of Appeals ruled that he is at such risk and DHHS failed to appeal that order.

Likewise, Stogsdill presented evidence at the fair hearing showing that it would not fundamentally alter the State's programs to provide the services his physicians have ordered and DHHS again failed to present any evidence at the evidentiary hearing to support its fundamental alteration defense.

Stogsdill filed his first request for a fair hearing in February, 2009 and DHHS failed to issue any administrative order until November, 2009, more

than 90 days after he requested additional hours. Exhibit 2. DHHS refused to assess Stogsdill's needs by taking into consideration the opinions of his treating physicians, as required by *Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) and ordered by its own hearing officer in November, 2009. Exhibit 2.

A final order on the second fair hearing request Stogsdill made in December, 2009 was not issued by the DHHS hearing officer until September 14, 2010, more than 240 days after he requested a fair hearing. Then, DHHS attempted to reduce his personal care attendant hours on January 1, 2010 by approximately one-half, without considering the risk of institutionalization or conducting an individual assessment, or even a cost study to determine whether any money would be saved by imposing caps on his home-based services. The agency pressed its claim to reduce his respite hours in 2010 to 68 hours a week without justification. Without providing a single opinion from a qualified medical source, for nearly five years, DHHS pressed its claim to cap Stogsdill's services at the inadequate level he was receiving in 2009 when he filed his first fair hearing request for additional hours. Exhibit 2.

DHHS failed to produce <u>any</u> evidence at any evidentiary hearing to support its claims it was forced by "budget reductions" to reduce home based services. However, Stogsdill presented evidence from CMS documenting that

the cost of the ID/RD waiver program increased significantly when home-based services were capped. Exhibit 8.

As the South Carolina Supreme Court ruled in *Heath v. County of Aiken*, the definition of "substantial justification" in the context of attorney's fees requires the agency to prove that its action was "justified in substance or in the main" so as to "satisfy a reasonable person." 302 S.C. 178, 183 (1990). No reasonable person, reviewing the evidence presented at the evidentiary hearing, would be satisfied that service reductions were necessary to save money. Nor could a reasonable person determine that DHHS satisfied its burden, based exclusively on evidence presented at the hearing, to show that Stogsill was not at risk of institutionalization, or that it would fundamentally alter the State's programs to provide the services he needs.

B. No special circumstances make an award of legal fees unjust. As in *Heath,* the litigation "enured to the benefit of" all Medicaid waiver participants. 302 S.C. at 184. Thus, it would be unfair for Stogsdill to "bear the costs of litigation" which benefitted all Medicaid waiver participants. Id. As the South Carolina Supreme Court recently held in *Hueble v. S.C. Dep't of Natural Res.*:

"Courts have universally recognized that [the] special circumstances

> exception is very narrowly limited." *Doe v. Bd. of Educ. of Balt. Cty.*, 165 F.3d 260, 264 (4th Cir. 1998) (citations omitted) (internal quotation marks omitted). As such, it is only in rare occasions that a case presents circumstances unique enough to justify denying a prevailing party attorneys' fees. Lefemine, 758 F.3d at 555; see also, e.g., *De Jesus Nazario v. Rodriguez,* 554 F.3d 196, 200 (1st Cir. 2009) (stating that the special circumstances justifying denial of attorneys' fees are "few and far between").

416 S.C. 220, 232 (2016).

In *Hueble*, the state supreme Court recognized that it would be unjust to award fees if the plaintiff failed to prove an essential element of his claim. Id. at 234. Recognizing that "the award of attorneys' fees encourages the pursuit of cases involving the infringement of civil rights because we hold those rights to be sacrosanct; awarding fees for pyrrhic victories does nothing to further that purpose." Id. But, the benefits Stogsdill obtained through these civil actions were neither "technical nor *de minimis*." Id.

Stogsdill filed a request for a fair hearing in February, 2009, seeking additional personal care hours when he lost seven hours a day of services upon graduation from high school. Exhibit 2. DHHS aggressively pressed its claim, not only to deny his request for additional hours, but the agency even attempted, as it had done in *Brook Waddle v. DHHS*, (Case No. 07-MISC-028, November 19, 2013) while his first administrative appeal was still pending, to

drastically reduce his personal care hours to 28 hours a week. As a result of Stogsdill's civil actions, he now receives 148 hours a week of personal care attendant services. Exhibit 2.

Stogsdill also established that DHHS violated the ADA by imposing caps on services needed by waiver participants who are at risk of institutionalization. That is a seismic victory that justifies an award of fees not only under the state fee statute, but also under the ADA fee statute.[9]

C. Application of S.C. Code § 15-77-300(B) factors. S.C. Code § 15-77-300(B) requires the court to consider (1) the nature, extent, and difficulty of the case; (2) the time devoted; (3) the professional standing of counsel; (4) the beneficial results obtained; and, finally, (5) the customary legal fees for similar services.

(1) Nature, extent, and difficulty of the case. Challenging a state agency's administration of a Medicaid program and its violation of the ADA is an awesome task of tremendous complexity. The labyrinthine contours of the Medicaid Act, its interrelationship with the ADA, and the tangled jurisdictional

---

[9] The significance of this victory is in no way lessened by the agencies' decision to ignore the order of the South Carolina Court of Appeals and the reasonable promptness mandate at 42 U.S.C. 1396a(a)(8).

issues governing state versus federal jurisdiction mean that lawyers who could handle the case skillfully are rarer than hens' teeth. Stogsdill's counsel is uniquely qualified and able to deal with a case of this complex character, given counsel's wide experience which was required to confront the ever-changing substantive and jurisdictional challenges posed by DHHS. Likewise, Defendants' blatant refusal to promptly comply with this Court's order required special skills and exceptional endurance.

Affidavits from practicing attorneys eloquently testify to the complexity of Medicaid litigation, and counsel intends to present additional affidavits. Exhibits 2, 3, 4, 5, and 6. These affidavits were presented to the district court, then to the Fourth Circuit, which directed DHHS on August 9, 2016 to pay $669,077.20 in legal fees, in addition to guardian ad litem fees of $39,173.75 in *Doe v. Kidd III*, 2016 U.S. App. LEXIS 14609 (August 9, 2016). The Fourth Circuit also ruled that "because Doe successfully challenged the defendants' determination in state proceedings, she received the relief she desperately sought," a Fourth Circuit order requiring DHHS and DDSN to provide services ordered by her physician "in a reasonably prompt manner." Id. Because the Fourth Circuit found Doe's state court proceedings to be "both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it

reached," it remanded Doe's case to the district court for "appropriate consideration of Doe's request for fees in the state administrative proceedings." Id.

DHHS and DDSN then filed a petition in the United States Supreme Court for certiorari (scheduled for conference on or about January 9, 2017) and filed a motion with the Fourth Circuit requesting a stay of its order requiring payment of fees. The Fourth Circuit denied the agencies' motion for a stay, but, as of December 27, 2016, DHHS and DDSN still refused to pay the fees ordered and they are in default of the Fourth Circuit's order.

The issue of whether the caps imposed on Medicaid waiver services violate the ADA was an especially difficult and novel issue, as was the establishment of standards to determine whether a litigant is "at risk of institutionalization." The Court of Appeals' landmark ruling in this case makes it a crucially important one for all Medicaid recipients, not just plaintiff.

To get to this point, Stogsdill has been dragged by the unrelenting defendants through nearly eight years of scorched-earth litigation, twice through proceedings before the agency, to the South Carolina Administrative Law Court, to this Court and then the South Carolina Supreme Court, where defendants' counsel falsely informed that Court that Stogsdill failed to

cooperate in its efforts to assess his needs. Exhibit 2. Because DHHS still refused to perform an assessment after that court dismissed his appeal, or even to reveal the standards it intended to apply to assess his need for services or the qualifications of persons who would assess his needs, he was forced to file a petition for certiorari in the United States Supreme Court. Exhibit 2. In order to prevent DHHS from imposing caps on his services when the Administrative Law Court upheld the agency's decision, Stogsdill was then forced to file a civil action in federal court.[10] Exhibit 2.

It was not until the United States Supreme Court denied Stogsdill's petition for certiorari that DHHS finally agreed to provide 148 hours a week of personal care services - 120 more hours a week than waiver participants who did not file lawsuits in federal court, in addition to 240 hours a month of respite services. Exhibit 2. The success of Stogsdill's civil actions is demonstrated by the fact that, at the start of Stogsdill's second administrative

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[10] The significance of the federal proceedings, which DHHS claims to be "parallel," is demonstrated by the fact that Brook Waddle's 2007 "fair hearing" appeal remains log jammed in the Administrative Law Court and DHHS continues to refuse to provide services its own hearing officer ordered the agency to provide in 2013. *Brook Waddle v. DHHS, supra,* DHHS decision dated November 19, 2013. Al Myers did not file a civil action in federal court and DHHS imposed caps on his services, in violation of the ADA, in 2012, forcing him into a nursing home. *Myers v. DHHS,* 2016 S.C. App. LEXIS 159 (S.C.App. December 21, 2016).

appeal, DHHS attempted to reduce his respite hours to 68 hours a month. Stogsdill will show upon taking discovery that this delay was an intentional effort concocted by the State's legal counsel, without authorization from officials responsible for making litigation decisions, to avoid payment of legal fees legitimately due.

A very simple but clear-cut measure of this grueling litigation, and the tenacious effort demanded of plaintiff's counsel, is the number of briefs and arguments required since 2009 to obtain the increases in hours that have now been awarded.

(2) The time devoted. The time required to litigate cases involving Medicaid appeals is discussed in the attached affidavits of two lawyers with extensive experience in litigating these cases, Sarah St. Onge and Lynn Carman. Exhibits 3 and 4. Attorney St. Onge states in her affidavit that she spent more than 700 hours in two years preventing DHHS from imposing caps on services before that case was settled in 2012. Exhibit 4. Ms. St. Onge informed the court that "In my experience, Medicaid related cases are very time consuming and require intense study and preparation." Id.

Stogsdill's counsel has been required to spend significantly in excess of 1,000 hours in these civil actions to prevent DHHS from reducing his hours

and to obtain a dramatic increase in personal care attendant and respite hours. He obtained a ruling from the South Carolina Court of Appeals that DHHS violated the ADA when it imposed caps on home-based services which will benefit all Medicaid waiver participants if the agencies are required by the Judicial Branch to pay legal fees when they violate that order.

Additional time is needed to review and allocate these hours between the different phases of the state and federal proceedings, which are both compensable under the relevant legal fee statutes. Compensation will also be sought for hours spent litigating Stogsdill's legal fee claims.

Most of the time spent in these civil actions was required because DHHS has continued to ignore the federal statute and regulation requiring the State to issue a final administrative order within 90 days. *42 U.S.C. 1396a(a)(8) and Doe v. Kidd I, supra.* Many hours were spent in this case, as in *Doe v. Kidd III,* attempting to force recalcitrant DHHS to comply with the 2014 order of the South Carolina Court of Appeals. *Supra.*

(3) The professional standing of counsel. Stogsdill's counsel was admitted to the Bar in 1988, and she has been recognized nationwide as a leader in disability rights cases. Ms. Harrison has been peer rated by Martindale Hubbell for "the highest rating of professional excellence" as "Preeminent," with a

rating of 5.0 on a *scale* of 5.0. She has been listed for years as a "Super Lawyer" and has received awards from advocacy groups for her work protecting the rights of persons who have disabilities.

Stogsdill's counsel has three times obtained reversals of the district court in *Doe v. Kidd I, II and III, supra*, a case brought in federal court to enforce the reasonable promptness mandate of the Medicaid Act. For more than a decade, Stogsdill's counsel has argued cases in the South Carolina Supreme Court involving plaintiffs, like Stogsdill, challenging decisions of DHHS and/or DDSN related to Medicaid waiver programs: *Doe v. S.C. HHS*, 398 S.C. 62 (2011); *Mims v. Babcock Ctr., Inc.*, 399 S.C. 341 (2012); *SC Dep't of Health and Human Servs. v. Jackson,* 2004 S.C. LEXIS 269 (S.C., Nov. 4, 2004), opinion withdrawn by, substituted opinion at *Ex parte S.C. HHS,* 2005 S.C. LEXIS 158 (S.C. June 6, 2005). In *Myers v. DHHS,* Harrison recently obtained an order reversing the decision of DHHS to impose caps on Medicaid services, finding that those caps violate the ADA. 2016 S.C. App. LEXIS 159 (S.C.Ct.Ap. December 21, 2016).

Just this month, Harrison also obtained a reversal and remand in the Fourth Circuit related to the Medicaid Act and the ADA in *Kobe v. Haley,* 2016 U.S. App. LEXIS 22283 (4th Cir. S.C., Dec. 15, 2016). That decision

reversed the lower court's ruling dismissing Governor Nikki Haley as a defendant for claims alleging violations of the ADA. Id.

Attorney Carman, who has more than 30 years of experience litigating Medicaid cases, opined that "Ms. Harrison is well respected nationally as a result of her work in Medicaid litigation cases and she has been of tremendous assistance to me in editing briefs, discussions of litigation strategy and in sharing information on Medicaid cases from other parts of the country." Exhibit 3. He stated in his affidavit that "Medicaid litigation is the most complex of the litigation I have done during my 54 year career as a lawyer and there are extremely few lawyers in the country, like Ms. Harrison, who are intellectually capable of taking on these cases and willing and courageous enough to persist through years of appeals." Id.

(4) The beneficial results obtained. Stogsdill obtained a judgment in this case finding that the imposition of caps on services provided to Medicaid waiver participants at risk of institutionalization violates the ADA. When the December, 2009 request for a fair hearing was filed, DHHS was pressing its claim to reduce Stogsdill's personal care hours to 28 hours a week and his respite hours to 68 hours a month. As a direct result of his civil actions, DHHS is now providing 148 hours a week of personal care services and 240 hours a

month of respite services. Exhibit 2.

(5) The customary legal fees for similar services. In 2016, in *Doe v. Kidd III*, the Fourth Circuit ruled, based on affidavits submitted in 2012 and 2013, that a reasonable rate for Stogsdill's counsel in this case was, at that time, $425 an hour. 656 Fed. Appx. 643 (4th Cir. 2016). ("Based on the record before the district court, Doe has more than met her burden of establishing the reasonable hourly rate for Harrison.") Two well respected attorneys in South Carolina, Terry Richardson and Mike Kelly, opined in 2012 that $425 was, at that time, a reasonable rate for Harrison based on her experience five years ago. Exhibits 5 and 7.

Counsel intends to supplement these affidavits with affidavits supporting a higher hourly rate based on her current experience and more recent market conditions.

D. A fee enhancement is appropriate in this case. Stogsdill intends to request an enhancement due to the exceptional results, difficulty and complexity of this case and contingent nature of payment. In determining whether an enhancement should be awarded, the Supreme Court has held that courts should give "enhanced consideration" to three of these factors, specifically, "the actual amount of work performed, expenses incurred, and the

benefit obtained." In *Layman v. State*, the South Carolina Supreme Court awarded fees to plaintiffs' lead counsel eight years ago of $500 and $600 an hour, but those rates were increased by a multiplier of 1.25. 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008).

Our Supreme Court recently ruled that a multiplier of 1.5 was appropriate, where, as here, counsel obtained "exceptional success" in a complex case. *Maybank v. BB&T*, 416 S.C. 541, 581 (2016). In *Berry v. Schulman*, the Fourth Circuit recently applied the lodestar analysis and upheld the South Carolina district court's award of $3,349,379.95 in legal fees in a class action lawsuit, applying a multiplier of 1.99 to increase the award to $5,333,188.21.

E. Stogsdill is entitled to reimbursement for costs and expenses. Stogsdill intends to submit claims for reimbursement of costs and expenses, most of which were incurred as a result of DHHS' failure to comply with the Medicaid Act's standard of promptness. Exhibit 2. Additional time is needed to prepare these reports and allocate the costs to various phases of work in the state and federal civil actions.

V. Conclusion and Prayer for Relief.

Stogsdill has fought now for more than six years now in Stogsdill's civil actions to challenge powerful state agencies which have aggressively resisted compliance with state and federal law, and the orders of state and federal courts. The agencies' complete disregard for court orders is demonstrated by its recent default, instead of complying with the order of the United States Court of Appeals for the Fourth Circuit to pay legal fees ordered in *Doe v. Kidd.*

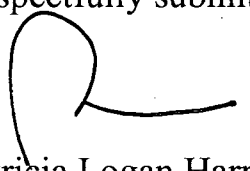
As the attached affidavits show, the reality is that cases like this will never be popular, and even the prospect of a substantial fee will not induce many lawyers to take them. But if there is not a substantial fee in this case, no rational lawyer will ever take such a case, and the purpose of the attorney's fee statutes at issue in this case, to promote enforcement of the law by state agencies, will utterly fail.

For the reasons set forth above, Stogsdill is entitled to legal fees, costs and expenses to be awarded by "the court," pursuant to S.C. Code § 15-77-300 et. seq., as well as the legal fee statute enacted by Congress to enforce the ADA at 42 U.S.C. § 12205. Stogsdill prays that the Supreme Court will grant his petition to consider this petition in its original jurisdiction or will issue a ruling

determining the appropriate court with jurisdiction to order discovery, to issue a briefing schedule and hold a hearing, then rule upon his request for legal fees, costs and expenses. Stogsdill intends to supplement this petition with evidence not contained in the record, which was closed in May, 2010, before DHHS increased Stogsdill's hours, including evidence obtained through discovery.

Stogsdill prays that the appropriate court will order such other relief as might be just and proper under the exceptional circumstances of this case.

Respectfully submitted,



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803 360 5555

December 28, 2016

LIST OF EXHIBITS

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Exhibit 1 Certificate of Service and Summons

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT
)
) **CERTIFICATE OF SERVICE**
Richard Stogsdill)
Plaintiff,)
vs.)
) Case No.:
South Carolina Department of Health and Human Services and its Agent, the South Carolina Department of Disabilities and Special Needs)
Defendant.)

I certify that on this date, I served a copy of Summons and Petition in this action, dated December 28, 2016, on the South Carolina Department of Health and Human Services, the South Carolina Department of Disabilities and Special Needs, the South Carolina Attorney General, the Office of the South Carolina State Treasurer, South Carolina Governor Nikki R. Haley and Damon C. Wlodarczyk, Esq., Counsel for SCDHHS by

☐ Delivering it to him/her personally;

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

SC Depart. of Health and Human Services, c/o Christian Soura, PO Box 8206, Columbia, SC 29202-8206
SC Depart. of Disabilities and Special Needs, c/o Beverly Buscemi, PO Box 4706, Columbia, SC 29240
The South Carolina Attorney General, PO Box 11549, Columbia, SC 29211
The Office of South Carolina State Treasurer, PO Box 11778, Columbia, SC 29211
Tthe Honorable Nikki R. Haley, Office of the Governor, 1205 Pendleton Street, Columbia, SC 29201
Damon C. Wlodarczyk, Esq., Riley Pope & Laney, PO Box 11412, Columbia, SC 29211

☐ Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRCP, addressed as follows: ; or,

☐ Other:

Dec 28, 2016
Date

Signature

SCCA 255 (05/2013)

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Richard Stogsdill,	)	SUMMONS
Plaintiff,	)	
	)	
vs.	)	FILE NO.
	)	
The South Carolina Department of Health and Human Services and its Agent, the South Carolina Department of Disabilities and Special Needs,	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Petition upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Petition.

This Petition is also being filed in the South Carolina Supreme Court, the South Carolina Court of Appeals, the South Carolina Administrative Law Court and the Department of Health and Human Services Office of Appeals and Hearings, and is being served upon the agencies named above, the Office of the Attorney General and the Office of Governor Nikki Haley.

Columbia, South Carolina

Patricia Logan Harrison
Attorney for Richard Stogsdill

Dated: December 28, 2016

Address: 611 Holly Street
Columbia, South Carolina 29205
pharrison@loganharrisonlaw.com

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA,	)	
	)	IN THE SUPREME COURT OF THE
COUNTY OF RICHLAND	)	STATE OF SOUTH CAROLINA
	)	
Richard Stogsdill,	)	SUMMONS
Plaintiff,	)	
	)	
vs.	)	FILE NO.
	)	
The South Carolina Department of Health and Human Services and its Agent, the South Carolina Department of Disabilities and Special Needs,	)	
Defendants.	)	

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Columbia, South Carolina

Patricia Logan Harrison
Attorney for Richard Stogsdill

Dated: December 28, 2016

Address: 611 Holly Street
Columbia, South Carolina 29205
pharrison@loganharrisonlaw.com

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA,	)	
	)	IN THE SOUTH CAROLINA
COUNTY OF RICHLAND	)	COURT OF APPEALS
	)	
Richard Stogsdill,	)	SUMMONS
Plaintiff,	)	
	)	
vs.	)	FILE NO.
	)	
The South Carolina Department of Health and Human Services and its Agent, the South Carolina Department of Disabilities and Special Needs,	)	
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Columbia, South Carolina

Dated: December 28, 2016

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Attorney for Richard Stogsdill

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Columbia, South Carolina 29205
pharrison@loganharrisonlaw.com

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA,	)	
	)	IN THE SOUTH CAROLINA
COUNTY OF RICHLAND	)	ADMINISTRATIVE LAW COURT
	)	
Richard Stogsdill,	)	SUMMONS
Plaintiff,	)	
	)	
vs.	)	FILE NO.
	)	
The South Carolina Department of Health and Human Services and its Agent, the South Carolina Department of Disabilities and Special Needs,	)	
Defendants.	)	

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Petition upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Petition.

This Petition is also being filed in the South Carolina Supreme Court, the South Carolina Court of Appeals, the South Carolina Administrative Law Court and the Department of Health and Human Services Office of Appeals and Hearings, and is being served upon the agencies named above, the Office of the Attorney General and the Office of Governor Nikki Haley.

Columbia, South Carolina

Dated: December 28, 2016

Patricia Logan Harrison
Attorney for Richard Stogsdill

Address: 611 Holly Street
Columbia, South Carolina 29205
pharrison@loganharrisonlaw.com

SCCA 401 (5/02)

Exhibit 2 Affidavit of Nancy Stogsdill

AFFIDAVIT/VERIFIED STATEMENT OF NANCY STOGSDILL

Now comes Nancy G. Stogsdill, who swears and affirms under oath the following:

1. I am the mother of Richard S., who has lived in our family home since he was born.

2. Until October 27, 2016, DDSN did not assess Richard's needs for additional personal care attendant hours, even after the Court of Appeals ordered them to do so in 2014.

3. The agencies waited until the United States Supreme Court denied his petition for certiorari in October, 2016 to determine Richard's need for personal care attendant services.

4. On October 27, 2016, DDSN awarded Richard 148 hours a week of personal care attendant services, but they never provided a written notice informing him of the reasons for not providing all of the hours his physician ordered, nor did they provide the statute or regulation relied upon when they awarded those hours.

5. The chart below shows the hours Richard received in 2009, the hours he would have received if he had not filed civil actions in state and federal courts and the hours he has received since the United States Supreme Court denied his petition for certiorari (before that Court ruled on his petition for a rehearing):

	2009[1]	2010 caps	Since Oct. 27, 2016
Personal care	54 wk	28 wk	148 wk
Respite	36 wk	17 wk	60 wk

6. Richard filed a fair hearing appeal in February, 2009, asking for additional hours after we lost 7 hours a day that had been provided by the school system and I had to quit my full time job.

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1 According to DDSN official, Jacob Chorey. Order of September 14, 2010 of DHHS hearing officer.

7. In November, 2009, the DHHS hearing officer sent Richard's case back to DDSN, ordering the agency to reassess his needs, taking into consideration his physician's order, but they ignored that order, just as they ignored this Court's order, and DDSN never conducted that assessment and then DHHS and DDSN attempted to cut his personal care hours to 28 hours a week and his respite hours to 68 hours a month a month later.

8. The only written notice we received when DDSN tried to reduce Richard's hours in 2010 was the one DDSN sent to his providers of personal care services in February, 2010 notifying them that authorization for those services was being terminated saying that Richard moved out of state.

9. Richard was one of the plaintiffs in the lawsuit filed in December, 2009 in the original jurisdiction of the South Carolina Supreme Court, trying to prevent DHHS from imposing caps on services and eliminating therapies that are critical to keep waiver participants at home.

10. Only about 200 waiver participants out of approximately 6,000 were like Richard, having conditions severe enough to require more hours than allowed by the caps imposed in 2010.

11. DDSN told families that physical therapy, occupational therapy and speech therapy was being terminated as a waiver service because those services could be obtained through "regular" (State Plan) Medicaid, but after 2010, those services were only provided to "restore" functional status, not to people like Richard who need those therapies to prevent further deterioration.

12. The petition filed in the Supreme Court in 2009 was denied when the agencies told that court that the waiver amendments could not be avoided, because of budget reductions, but now we know that the claims of budget reductions were not true, because the average cost per participant actually increased in 2010 from approximately $37,000 a year (the cost of Richard's services that year), to more than $51,000, and that the cost of Richard's waiver program increased in 2010 by more than $50 million.

13. Since that time, DDSN has received tens of millions of additional dollars, but they still have not established any procedure for persons like Richard, who have the most severe disabilities, to exceed the arbitrary caps imposed in 2010, nor have agency officials requested funds from the General Assembly to restore those services.

14. The waiver application that was approved by the CMS Regional Office in 2009 was only for the years 2010-2014 and a new waiver application was submitted to CMS in 2014, but it is my understanding that the waiver application covering years 2015-2020 <u>still</u> has not been approved by CMS and that CMS has denied DHHS' requests to approve the waiver application eight times.

15. The waiver application DHHS submitted to CMS does not contain any procedure for allowing persons who are at risk of institutionalization to exceed the caps and neither DDSN nor DHHS have established any written policy to determine how services will be awarded to exceed the caps and CMS has told the federal court that they do not monitor the state's compliance with federal laws.

16. DDSN service coordinators continue to tell waiver participants that there are no exceptions to the caps, thereby ignoring this Court's order in *Stogsdill v. DHHS*, except that a few people who filed lawsuits in federal court have been allowed to keep the hours they were receiving in 2009.

17. Nearly three years after Richard filed his first administrative appeal, we filed a lawsuit in federal court, because a final administrative decision still had not been issued and the agencies, as now, paid no attention to the federal standard of promptness for determining eligibility for services or for issuing a final decision.

18. We repeatedly requested an independent assessment of Richard's needs by a qualified medical professional, but DHHS and DDSN refused our requests and never provided an independent assessment, nor would they respond to our repeated requests to see the standards being used to allocate hours or the qualifications of the persons making those decisions.

19. Right after the South Carolina Court of Appeals issued its decision, the federal court dismissed Richard's lawsuit saying that he could obtain relief in the state courts, but the State agencies continued to refuse to assess Richard's needs for personal care services until October, 2016, soon after the United States Supreme Court denied his petition for certiorari.

20. Richard filed a petition requesting a rehearing in the United States Supreme Court which issued a final order disposing of Richard's state administrative appeal on November 28, 2016, after Respondent increased his personal care hours to 148 hours a week.

21. Richard appealed the dismissal of his federal lawsuit and oral arguments were heard on December 9, 2016 in the United States Court of Appeals for the Fourth Circuit, but a decision has not been rendered by that court.

22. As Dr. Joseph predicted, when Richard's therapy services were eliminated and the services he ordered in 2009, and again in 2010 were not provided, his mental and physical condition deteriorated.

23. When we tried to make DDSN and DHHS aware of our requests for additional hours, counsel for DHHS instructed us that the only way we could obtain additional hours was

to go through the "regular" procedure of requesting those hours through Richard's service coordinator and he threatened to ask the federal court for a protective order if we made requests for services any other way.

24. When that threat was made, we had provided the lawyers for DDSN and DHHS the statements Dr. Munn signed explaining why he needs the hours she ordered and provided agency counsel the motions we filed in the federal court asking that court to enforce her orders, but DHHS' attorney responded by instructing us that:

> Any future attempt to request services through my office rather than communicating with the service coordinator and making the request through the proper procedure will necessitate the filing of a motion for protective order addressing the same.

25. At each plan meeting, we asked Richard's service coordinator to provide the hours ordered by his treating physician, Dr. Munn, but the DDSN computer program used by service coordinators will not allow them to increase hours over the limits imposed in 2010.

26. Each year, the service coordinator simply wrote on Richard's plan that the number of hours "ordered by the HHS hearing officer in 2009 appeal must continue," as if the Court of Appeals never ordered DDSN to reassess his needs.

27. According to testimony of DDSN officials, service coordinators are the only persons who can authorize waiver services and they are trained not to give any deference to the opinions of treating physicians.

28. But, Richard's service coordinator repeatedly informed us that service coordinators have no authority to exceed the caps.

29. After that, even though we provided the agencies with notice of Richards' needs by filings made in the courts and we sent emails to agency lawyers requesting the reassessment ordered by this Court, as we had been instructed by the DHHS attorney, we made our requests for services through his service coordinator.

30. I provided Richard's service coordinator with all medical records she requested after this Court ordered DDSN to assess Richard's needs without regard to the caps, and we allowed the DDSN service coordinator to communicate directly with his physician, who provided all of the information requested.

31. In addition, we provided the service coordinator with access to Richard and our home any time she requested a visit.

32. DDSN and DHHS either ignored or refused our requests to conduct the assessment this Court ordered until DHHS' lawyer sent a letter on May 20, 2015 - eight months after this

Court issued its order - saying that some unidentified physician and service coordinator had been selected to conduct an assessment.

33. We offered to arrange for the agency examiners to meet with Dr. Munn with counsel present and to make Dr. Munn available for a deposition, but Respondents never took advantage of those repeated offers.

34. We repeatedly asked agency counsel to provide us with the standards the agencies intended to use to evaluate Richard's need for services, the qualifications of the examiners and whether their chosen examiners had conflicts of interest, but our requests were either ignored or denied by DDSN and DHHS.

35. After sending the May 20, 2015 letter, DHHS counsel demanded that we allow the medical director of DHHS and a DDSN state office social worker to come to our house to examine Richard personally without his attorney being present.

36. Dr. Munn and Richard's psychological services provider, Lennie Mullis, agreed that it would be traumatizing to Richard for Dr. Platt and a DDSN social worker to come into our home to "examine" him and that his emotional state has been fragile knowing how difficult it has been for me to keep him at home without the services he needs being provided.

37. We repeatedly asked for an assessment to be performed by an independent physician, but DHHS has consistently refused to agree to that request, instead insisting that only DHHS' medical director, Dr. Tan Platt, can determine how many hours he should receive and that he wanted to meet with Richard without his attorney being present.

38. We believe that Dr. Platt has an impermissible conflict of interest, because not only is he paid for serving as the medical director of DHHS, but he has financial interests in contracts to perform services with USC School of Medicine, the Babcock Center and Aldersgate, which all receive funding from DHHS.

39. When DHHS and DDSN continued to deny our requests for an independent assessment, we reluctantly agreed to allow Dr. Platt and Ms. Jaques to examine Richard in the presence of his godfather, Moultrie Burns, but when we offered to make Richard available for that examination, the agencies quit demanding that Richard submit to such an examination and they increased his personal care attendant hours to 148 hours a week on October 27, 2016, without contacting his physician or examining him.

40. Richard's former service coordinator asked me to break down into minutes each task that has to be performed for Richard by a personal care attendant, which I provided in early 2015 for the purpose of assessing his need for personal care attendant hours.

41. I do not know where the information described in the "assessment" provided by Dr. Platt and the DDSN social worker came from, because it does not appear that they even looked at the information and medical records I provided to the DDSN service coordinator.

42. In November, 2015, after the Platt "assessment" was done, DDSN quit providing the 15 hours a week of adult companion hours that were awarded in 2009.

43. Finally, in the fall of 2016, DDSN allowed us to replace just those 15 adult companion hours with personal care attendant hours, but that did not increase the total number of hours Richard was receiving when this Court issued its decision in September, 2014.

44. I was flabbergasted when DHHS' attorney told the Supreme Court in November, 2015 that we would not allow the agency to perform an assessment of Richard, because that was just not true.

45. We cooperated in every way possible, following the directions of DHHS counsel to go through the "proper procedure" of requesting services through the service coordinator.

46. After oral arguments in the Supreme Court, DHHS presented that Court with a document signed by Dr. Platt and Ms. Jaques dated June 25, 2015 titled "Stogsdill Assessment."

47. Dr. Platt and Ms. Jaques did not determine in that "assessment" how many hours of personal care attendant and respite hours Richard needs, as the Court of Appeals had ordered DDSN to do in September, 2014.

48. Dr. Platt and Ms. Jaques state that they "did not have the benefit of physician's notes" and that they reviewed the records of the service coordinator, but that was not true, because we provided that information to the DDSN service coordinator, and that information was in her file, in addition to the physician notes the service coordinator obtained directly from Richard's physician.

49. The "Stogsdill Assessment" stated that the transcript from Richard's first fair hearing was "available to the team," but that could not be true, because that hearing was never transcribed and it took a long time for DHHS to comply with our request to obtain a copy of the tape of that proceeding after the assessment was complete, because the tape was in archives.

50. The "assessment" stated that they were "unable to verify" Richard's drug regimen, but that was also not true, because hospital records and doctors' notes in the service coordinator's file were contained in the service coordinator's file which was available to them.

51. The "assessment" referenced of "unspecified kidney complaints," but the medical records containing specifics of Richard's complaints, laboratory tests and diagnostic reports were available to them in the service coordinator's file.

52. The "assessment" stated that Richard receives 2 hours a week of psychological service, but the service coordinator's file documents that he has received less than 2 hours a month of this service.

53. We still have not been provided with the standards DHHS has used to deny services, or the standards they use to allocate personal care hours, or the qualifications of Dr. Platt and Ms. Jaques.

54. During the years of this civil action, when services ordered by Richard's doctors have not been provided, his body has become more contorted and gas gets trapped in his abdomen, causing him to wake up during the night screaming and crying.

55. DHHS and DDSN continued to apply the 240 hour cap on respite services and they refused to increase his personal care hours until October 27, 2016, offering no relief except repeatedly offering to place Richard in a congregate facility.

56. My own health deteriorated while this civil action was pending, because of the lack of sleep and exhaustion and stress of providing care for Richard.

57. Like many parents who provide care for an adult child who has to be lifted, I am receiving treatment for injury to my back, hips and knees and can easily be taken out of commission for weeks if I pull a muscle trying to transfer Richard.

58. When I was out of commission for medical tests in 2016, instead of exceeding the number of hours Richard received at home, the only offer DDSN made was to again suggest that Richard be placed in an institutional setting and they never provided service coordinators with any policy that allows them to exceed the caps.

59. Richard's needs are not static and he will continue to have additional needs, but he cannot afford years of litigation each time DDSN and DHHS refuse to provide the services his physician orders.

60. We have spent tens of thousands of dollars on copying costs and legal fees most of which would have been unnecessary if DDSN and DHHS would comply with the Medicaid Act standard of promptness, provide published standards used to assess the need for services and provide independent assessments by qualified persons who do not have conflicts of interest.

61. Richard has suffered tremendous pain, anxiety and his condition has deteriorated because

DDSN and DHHS failed to properly assess his needs in 2009 when ordered to do so - and continued to refuse to do so after 2009 - and to provide medically necessary services with reasonable promptness.

62. If we had not filed the state civil action in December, 2009, DDSN and DHHS would have reduced Richard's personal care attendant and adult companion hours (combined) to 28 hours a week and they would have reduced his respite hours to 68 hours a month, like they did to all waiver participants who did not file an administrative appeal.

63. If we had not filed the federal civil action in 2012, DDSN and DHHS would have imposed the caps on Richard's services, as they have done with other consumers when they have lost at the Administrative Law Court, and I would not have been able to keep Richard at home with those hours.

I have read this verified statement/affidavit on December 27, 2016, and I swear under penalties of perjury and verify that it is true and correct to the best of my knowledge and information.

Nancy Stogsdill

Sworn to before me on this 27th day of December, 2016.

Notary Public for South Carolina
6.14.2017

Exhibit 3 Affidavit of Attorney Lynn Carman

STATE OF CALIFORNIA

COUNTY OF MARIN

DECLARATION OF LYNN S. CARMAN

Now comes Lynn S. Carman, who swears and affirms:

1. I have been a member of the State Bar in the State of California for 54 years and I am admitted to practice in all state and federal courts in California, the Ninth Circuit Court of Appeals and the United States Supreme Court.

2. I graduated from Stanford in 1950 and from Golden Gate University School of Law in 1959..

3. I formerly served as the Deputy District Attorney for El Dorado County, as the Public Defender in El Dorado County and as the President of the El Dorado County Bar Association.

4. I have more than 31 years of experience litigating Medicaid cases in the state and federal courts.

5. In 2004, I founded the Medicaid Defense Fund, as an organization to assure that the State Medicaid programs follow federal law, in particular that the reimbursements to providers are sufficient to ensure that quality care is furnished.

6. For many years, I have successfully litigated Medicaid budget cuts to providers which violate the Medicaid Act, on the basis that rates which have been set for purely budgetary reasons preclude quality care being furnished.

7. Some of the non-Medicaid cases I have litigated include:

Mallick v. Superior Court, 89 Cal.App.3d 434 (1979): In this case, the Golden Gate

Bridge District was ordered to set aside the bridge toll increase of 25 cents from $1 to $1.25. This case settled, by reducing the toll to collect back the overcharge and an agreement to spend $2.2 million to purchase the Bay Area's first fleet of handicapped-equipped buses. I was awarded $40,000 attorneys' fees.

McGhee v. Bank of America, 60 Cal.App.3d 442 (1976), (tried as Wilson v. Bank of America, (unreported). I was lead counsel in obtaining $101 million judgement against Bank of America in 7-day court trial. This case settled for agreement to cease requiring impounds to be paid to the bank, and payment of approximately $35 million to the victim borrowers. I was awarded $1.4 million attorneys' fees. This and others in which I was lead counsel, established class action and trust law precedents for class actions against banks in California, (such as Wilson v. San Francisco Federal S&L Assn., 62 Cal.App,3d 1 (1976); Bodle v. Well Fargo (unreported); in each of which attorneys' fees were awarded.

8. Some of the Medicaid cases I have litigated include:

Cowan v. Myers, 187 Cal.App.3d 968 (1986): In this case, the Superior Court ruled that limiting Medicaid coverage only to care, which is medically necessary to prevent death or significant disability, violated the federal Medicaid Act. The legislature then amended the state Medicaid Act to increase Medicaid coverage as a result of this case.

10% Medicaid fee cut case: In 1987 the State Department of Health Services cut payments to all Medicaid providers by 10%. In this litigation, the U.S. District Court in Sacramento permanently enjoined the cut. I was awarded $90,000 attorneys fees.

Medicaid budget case: In 1990 I obtained an injunction in U.S. District Court in Sacramento requiring the State of California to pay all Medicaid providers whether there was a budget or no budget. As result of this case the legislature enacted a provision for a continuing appropriation to pay all Medicaid providers during these annual budget impasses.

5% Medicaid fee cut case: Clayworth v. Bonta, 295 F.Supp.2d 1100 (E.D.Cal.2003). In 2003 the legislature enacted a 5% cut in Medicaid reimbursement for all fee-for-services doctors and pharmacies. I obtained injunction to enjoin the 5% rate cut. (*Reversed, other grounds*).

10% Medicaid payment cuts of 2008: Independent Living Center ("ILC") v. Shewry, 543 F.3d 1047 (9th Cir. 2008); ILC v. Maxwell-Jolly, 572 F.3d 644 (9th Cir. 2009): In 2008 the legislature enacted a 10% across-the-board cut in Medicaid reimbursement for fee-for-service providers. I obtained two injunctions to stop the cut for doctors, pharmacies, dentists, adult care health centers, optometrists, home health providers, and non-emergency transporters. (Not overruled, though vacated, other grounds, Douglas v. Independent Living Center, 565 U.S. __, 132 S.Ct. 1204 (2012); currently, in court-ordered mediation).

10% Medicaid payment cut of 2009: In 2009 the legislature enacted a 5% rate cut to Medicaid pharmacies. Through the Medicaid Defense Fund, I obtained an injunction to

stop the cut. Affirmed, (Managed Pharmacy Care v. Maxwell-Jolly, unreported, 9th Cir. 2010; not overruled, though vacated, other grounds, Douglas, *supra*; currently, in court-ordered mediation).

10% Medicaid payment cut to pharmacies: The state legislature enacted a 10% reimbursement cut to providers to commence on June 1, 2011. As lead attorney for the Medicaid Defense Fund, I obtained injunction to stop this cut in the district court. This decision was reversed May 24, 2013, (Managed Pharmacy Care v. Douglas, __ F.3d __ 9th Cir. 2013; *certiorari petition pending*, No. 13-253).

9. The issue in the 2008-2009 cases was whether a person threatened with injury from continuous State action contrary to federal law, has standing to sue for injunctive relief under the Supremacy Clause. The new issue in the 2011 Medicaid rate cut, is whether courts must defer to decisions of the Secretary of the U.S. Dept. of Health and Human Services, without any findings but only conclusions that Medicaid provider payment cuts comply with the quality of care provision of the Medicaid rate statute, 42 U.S.C. § 1396a(a)(30)(A). This provision requires states to assure that its payments to Medicaid providers are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available to the general population in the geographic area.

10. Currently, the implementation of the 10% Medicaid pharmacy payment cuts, in the Managed Pharmacy Care case, has been temporarily postponed to January, 2014, because

even the Director of the state Department of Health Care Services has determined that the 10% cuts, if not delayed or rescinded, for some or all pharmaceuticals, will injure access of pharmacies to pharmacy services; and, the Director is possibly awaiting determination by the Supreme Court whether it will issue, or not issue, cetiorari at the confere nce presently scheduled for January 10, 2014.

11. I became acquainted with Patricia Logan Harrison as a result of her work in the *Doe v. Kidd* cases when I was preparing briefs to file in the United States Supreme Court in the 208-2009 rate reduction cases.

12. Ms. Harrison is well respected nationally as a result of her work in Medicaid litigation cases and she has been of tremendous assistance to me in editing briefs, discussions of litigation strategy and in sharing information on Medicaid cases from other parts of the country.

13. Medicaid litigation is the most complex of the litigation I have done during my 54 year career as a lawyer and there are extremely few lawyers in the country, like Ms. Harrison, who are intellectually capable of taking on these cases and willing and courageous enough to persist through years of appeals.

14. The *Doe v. Kidd* case was a landmark case in the field of Medicaid law, because it established the right to bring a private action to enforce the Medicaid Act in the Fourth Circuit. It is especially important, considering that circuits such as the Ninth Circuit have, now, indicated they may not continue to enforce the quality of care and equal access provisions of the Medicaid Act. Her achievement bodes that recipients may nevertheless continue to obtain adequate access to Medicaid services, by appropriate judicial

enforcement of the "prompt services" requirement of 42 U.S.C. § 1396a(a)(8).

15. *Doe v. Kidd* has been cited in briefs filed by the United States Department of Justice, by attorneys around the country and by other courts.

16. I have reviewed the docket sheet, the motion for fees (Entry 236), the summary of legal fees by category (Entry 245-5) and the timesheets of Patricia Logan Harrison (Entry 236-1) and I find them to be most reasonable and necessary to encourage the enforcement of the Medicaid Act. First: I have reviewed Ms. Harrison's total time requestsed and the breakdown of the time between the different phases and tasks in the case. I found the time she spent overall and in each category to be most reasonable and necessary, given the complicated nature of Medicaid appeals which were compounded by the defenses put up by the state agency. Second, the time MKs. Harrison has spent is not out of line compared with the time I spend in complicated Medicaid litigation. Third, specifically, as to the 489 hours spent on the first appeal to the Fourth Circuit, this amount of time is not out line with the appeals I have done and I, myself, have spent upwards to 500 hours in a single appeal to the Court of Appeals. Fourth, unless appropriate fees, with multipliers for the risk and length of these monstrous cases, particularly this one, are awarded by the courts pursuant to the intent of Congress in 42 U.S.C. § 1982/1988, the Act will simply not be enforced because attorneys will not take these cases, with their complexity and absorption of their capacities, unless they are paid appropriately.

17. It appears that Ms. Harrison spent slightly less than 500 hours preparing briefs and the joint appendix on the first appeal to the Fourth Circuit. First of all, this is one of the most

complicated Medicaid cases I have ever seen, on so many different levels of complexities. In my experience litigating complex class actions and complex Medicaid cases, this is a conservative amount of time for an appeal from a district court in a case like this, and I would have expected briefing and preparation of arguments in the Court of Appeals of such a complicated issue to require more time.

18. At the time this case was on appeal, there was a fear, and still is a fear of, a national trend toward restricting access to the federal courts in Medicaid cases after *Gonzaga*, but this trend has since been reversed, in part as a result of exceptional cases like *Doe v. Kidd*, where attorneys were willing and courageous enough to undertake litigation at great expense with no certainty of being paid for their work.

19. The fact that there was not a team of lawyers doing this briefing for the plaintiff is remarkable, especially considering the resources available to the State and the nearly insurmountable obstacle Doe faced in both the district court and the Court of Appeals of overcoming the presumption that the State acted lawfully.

20. Spending just 120 hours in preparing briefs and the joint appendix in *Doe v. Kidd II* is even more remarkable and only a well experienced Medicaid lawyer could prepare a joint appendix, a successful brief and reply brief in that amount of time.

21. Ms. Harrison frequently communicates with me to share recently decided Medicaid cases from the federal courts and I have found her to be a great resource in a field where few lawyers understand the "language," let alone the alphabet of Medicaid law.

22. The requested fee in federal proceedings of less than $1 million in a federal case like *Doe v. Kidd* that has gone on for more than a decade is reasonable and necessary to encourage

other private lawyers to defend the rights of disabled persons like Doe, who do not have funds to hire private counsel; and anything less will discourage them.

23. If costs of associated state actions were not recoverable under 42 U.S.C. 1988, the State could simply avoid compliance with the law by terminating eligibility.

24. In my experience, the federal Medicaid Agency, CMS, provides no oversight of federal Medicaid programs in respect to the minimum amount or minimum services furnished by a state. In its entire history CMS has never penalized a state for paying too little or not furnishing sufficient services in its Medicaid program. The manifest reason is, that every billions of dollars a state profits by skirting the minimum requirements of the Act for provider payments or services, is an equal billions of dollars saved by the federal government. Indeed, this conflict of interest was frankly reported to the Supreme Court in the *Douglas* cases by a host of former Secretaries of HHS, (Amicus Brief August 25, 2011, filed in *Douglas*, at page 25:

> Finally, it bears noting that there is no realistic financial incentive for CMS aggressively to enforce § (30)(A)-quite to the contrary. Because [Federal Financial Participation] is a function of the funds the state actually expends reimbursing providers, state non-compliance with § 30(A) necessarily results in lower reimbursement rates, *thereby saving the federal government money.* See Moncrief, Assault on Litigation, supra, at 2341. In that framework, CMS is unlikely to enforce something like the Equal Access Provision [of § 30(A)], which would, in its violation, save federal money.

(Emphasis supplied).

Accordingly, due to lack of oversight, or conflicted oversight, by the federal government, litigation like *Doe v. Kidd* is useful and necessary, and was envisioned by Congress in enacting § 1988, to prevent States from accepting federal funds and failing to use them

for the intended purpose.

I have read this statement and I swear under penalty of perjury that it is true to the best of my knowledge and information.

Lynn S. Carman
Medicaid Defense Fund

October 22, 2013

Exhibit 4 Affidavit of Attorney Sarah St. Onge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Sue Doe, Plaintiff, v. Linda Kidd, Stanley J. Butkus, Kathi Lacy, Michelle Ford, W. Robert Harrell, the South Carolina Dept. of Disabilities and Special Needs, Emma Forkner, the South Carolina Dept. of Health and Human Services, Phillip Massey, Fred Owens and the Newberry County Disabilities and Special Needs Board, Defendants.	)	C/A No.: 3:03-cv-1918-MBS

DECLARATION OF SARAH ST. ONGE

1. My name is Sarah St. Onge. I am an attorney licensed to practice in South Carolina since 1994. This Declaration, executed pursuant to 28 U.S.C. § 1746, is submitted in support of Plaintiff's application for attorneys' fees in this case.

2. I have been employed as an attorney by Protection and Advocacy for People with Disabilities, Inc. (P&A) since February 2008. I am an attorney on the Protection and Independence Team at P&A. The Protection and Independence Team focuses on conditions in facilities and enforcement of the integration mandate of the Americans with Disability Act (ADA).

3. P&A is the statewide non-profit corporation established by state and federal law to advocate on behalf of people with disabilities in South Carolina. Many of P&A's clients receive Medicaid services. In recent years, P&A has represented individuals,

whose Medicaid services have been threatened with reduction or termination, including clients who might have been forced to enter an institution because of cuts in home-based services. Because of P&A's limited resources, we are limited in our ability to represent clients in these importan, but expensive and time-consuming cases.

4. Prior to coming to P&A, I worked in private practice in the areas of estate planning, estate administration, trust administration, guardianships, conservatorships, and mental health law. Since coming to P&A, I spend a significant amount of my time working on cases involving Medicaid and the ADA's integration mandate. I am also a member of the Elder Law Committee of the Bar, which covers Medicaid related issues. I have also taught Continuing Legal Education courses on Medicaid topics, including Medicaid Fair Hearings and eligibility for Medicaid long term care programs.

5. In 2010, I represented a Medicaid beneficiary whose Medicaid services were reduced. The case began at the fair hearing level at the South Carolina Department of Health and Human Services (SCDHHS), but my client was denied a fair hearing, and we appealed the case to the Administrative Law Court (ALC). After the ALC ruled against my client, the SCDHHS was about to implement the reduction in her services. In order for her to maintain her services, we filed an action in federal court under the Americans with Disabilities Act, case number 0:11-cv-02154, J.K.E. v. Keck. We also appealed the decision of the ALC to the South Carolina Court of Appeals. With our client retaining her services, the case settled prior to significant discovery or trial.

6. J.K.E. v. Keck was a very time consuming case, both in federal court and with the administrative case and state appeal. As the primary attorney on the case, I spent over 700 hours between 2010, when the case was appealed to the ALC, and 2012, when the

case settled. The 700 hours does not include time spent on the preliminary injunction, on settlement, or at the fair hearing stage before the SCDHHS hearing officer. Others at P&A also spent time on the case: our paralegal spent over 80 hours of time on the case; senior attorneys spent approximately 14 hours on the case; and our law clerk spent about 40 hours on the case. These numbers were from P&A's time keeping system. I kept contemporaneous accounts of all the time spent on this case. In my experience, Medicaid related cases are very time consuming and require intense study and preparation.

I declare that the foregoing is true to the best of my knowledge, information and belief.

Executed at Columbia, South Carolina this 16th day of August, 2013.

Sarah St. Onge

Exhibit 5 Sworn Declaration of Attorney Mike Kelly

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CIVIL CASE NO. 3:03-cv-1918-MBS

Sue Doe,
Plaintiff

v.

Linda Kidd, et. al,
Defendants

DECLARATION OF D. MICHAEL KELLY

I, D. Michael Kelly, make this Declaration pursuant to 28 U.S.C. § 1746.

1. Patricia Logan Harrison has asked me to make this Declaration in connection with her petition in the federal district court for attorneys' fees in *Doe v. Kidd*.

2. I have no personal interest in this case nor in her petition for legal fees.

3. I have been a member of the South Carolina Bar for more than thirty years and I am the senior partner in the Mike Kelly Law Group, LLC.

4. I graduated from the University of South Carolina in 1974 and from the University of South Carolina School of Law in 1977.

5. I am acquainted with Ms. Harrison through activities of the South Carolina Bar and the Richland County Bar Association.

6. My firm handles complex state and federal litigation in the Courts in Columbia, South Carolina.

7. I am a former President of the South Carolina Bar and serve as a Permanent Member of the South Carolina Bar House of Delegates.

8. I know Ms. Harrison through her reputation in the Columbia Bar as an experienced lawyer in Medicaid litigation.

9. Based on my knowledge of hourly rates charged by attorneys with comparable experience in complex litigation in the Columbia area, it is my opinion that $425.00 is a reasonable

hourly rate for Ms. Harrison to be awarded in this matter.

10. A lesser rate would not attract private attorneys to represent persons who have disabilities in actions brought under § 1983 due to the contentiousness of the agencies, the length of time spent in these cases and the contingency of being paid due to the inability of Medicaid participants to pay legal fees.

I declare that the foregoing is true to the best of my knowledge, information and belief.

Executed in Columbia, South Carolina on this 8 day of August, 2012.

D. Michael Kelly

Sworn to before me this 8 day
Of August, 2012.

Notary Public for South Carolina
My Commission Expires: 4/30/17

Exhibit 6 Sworn Declaration of Attorney Nancy McCormick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Sue Doe, Plaintiff, v. Linda Kidd, Stanley J. Butkus, Kathi Lacy, Michelle Ford, W. Robert Harrell, the South Carolina Dept. of Disabilities and Special Needs, Emma Forkner, the South Carolina Dept. of Health and Human Services, Phillip Massey, Fred Owens and the Newberry County Disabilities and Special Needs Board, Defendants.	C/A No.: 3:03-cv-1918-MBS

DECLARATION OF NANCY MCCORMICK

1. My name is Nancy McCormick. I am an attorney licensed to practice in South Carolina since 1977. This Declaration, executed pursuant to 28 U.S.C. § 1746, is submitted in support of Plaintiff's application for attorneys' fees in this case.

2. During several periods of time since 1989, I have been employed as an attorney by Protection and Advocacy for People with Disabilities, Inc. (P&A), most recently beginning in 2005. I now serve as Senior Attorney with responsibilities including training and oversight of other attorneys' work, liaison with the Bar and participation on committees affecting our clients' lives, including the South Carolina Bar Children's Committee and the Children's Justice Task Force.

3. P&A is the statewide non-profit corporation established by state and federal law to advocate on behalf of people with disabilities in South Carolina. Many of P&A's clients receive

Medicaid services. In recent years, P&A has represented many individuals whose Medicaid services have been threatened with reduction or termination, including clients who might have been forced to enter an institution because of cuts in home-based services.

4. I have also worked on Medicaid issues since my first job at the Atlanta Legal Aid Society in 1971, including work at Palmetto Legal Services (now South Carolina Legal Services) and the South Carolina Legal Services Association (now Appleseed Legal Justice Center). While at legal services, I was a member of the Southeast Regional Public Benefits Task Force, which included Medicaid issues.

5. Over the years, Medicaid has expanded and become increasingly more complex. Effective representation of Medicaid clients requires knowledge of federal Medicaid statutes, federal regulations, policies, and directives; the lengthy and detailed Medicaid state plan; state laws, regulations, policies and bulletins; and federal case law, including such issues such as private right of action, sovereign immunity, exhaustion, abstention, class actions, and injunctive relief.

6. The course of litigation in this case shows the skill required to advocate a Medicaid matter effectively. Ms. Harrison has successfully pursued her client's case through many levels of federal and state courts and administrative appeals, including two appeals to the United States Court of Appeals for the Fourth Circuit and including response to a petition for certiorari to the United States Supreme Court. Her first Fourth Circuit case, *Doe v. Kidd*, 510 F.3d 348 (4th Cir. 2007), has been cited nationally as a leading case in Medicaid law.

7. Very few attorneys in South Carolina, especially outside of P&A and legal services programs, have any expertise in Medicaid, because of the significant amount of time required to learn the field. While a small number of lawyers (probably fewer than twenty around the state)

represent individuals in matters involving Medicaid-related estate planning and transfers of assets, Ms. Harrison is one of an even smaller number of attorneys in the state willing and able to represent a client in the particular type of complex litigation involved in this case.

8. Medicaid recipients are poor or have a medical condition or disability which requires institutional level care, either at home or in a facility. There are strict limitations on the amount of assets they can have. As a practical matter, the only way that an attorney in private practice can represent someone in a contested Medicaid case is to be able to obtain attorneys' fees for a successful result.

9. Ms. Harrison has pursued these cases creatively, tenaciously, and effectively. From the beginning of this case, my colleagues and I knew it would be very difficult because of the many highly technical issues involved. Fortunately for her client, Ms. Harrison successfully persevered.

I declare that the foregoing is true to the best of my knowledge, information and belief.

Executed at Columbia, South Carolina this 3 day of June, 2013.

Nancy McCormick

Exhibit 7 Sworn Declaration of Attorney Terry Richardson

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CIVIL CASE NO. 3:03-cv-1918-MBS

Sue Doe,
Plaintiff

v.

Linda Kidd, et. al,
Defendants

DECLARATION OF TERRY E. RICHARDSON, JR.

I, Terry E. Richardson, Jr., make this Declaration pursuant to 28 U.S.C. § 1746.

1. I have been asked to make this Declaration by Patricia Logan Harrison in connection with her petition in the federal district court for attorneys' fees.

2. I have no personal interest in this case nor in her petition for legal fees.

3. I am a shareholder with the firm of Richardson Patrick Westbrook and Brickman in Barnwell, South Carolina.

4. I have been a member of the South Carolina Bar for approximately thirty-five years.

5. I graduated from Clemson University in 1967 and from the University of South Carolina School of Law in 1974, where I was the Editor-in-Chief of the Law Review.

6. My firm previously represented a relative of Ms. Harrison's husband in a matter in the Richland County Court of Common Pleas in which we charged our normal rates. I am satisfied that none of my statements in this Declaration have been influenced by this representation which ended in settlement a number of years ago.

7. I am acquainted with Ms. Harrison, who serves on the South Carolina Access to Justice Commission with me, through activities of the South Carolina Bar, including her participation as a speaker in CLE events.

8. I have experience in complex litigation in both the state and federal courts and this

Declaration is based on my firm's experiences with legal fees in matters brought in the federal district court in Columbia, South Carolina and the Fourth Circuit Court of Appeals.

9. I have been rated AV by Martindale Hubbell and have been listed in South Carolina Super Lawyers each year since 2008. I received the President's Award for Service from the S.C. Trial Lawyers Association in 1994, and the Compleat Lawyer Award from the South Carolina Bar in 2003

10. I know Ms.Harrison to be an attorney with exceptional skill in matters related to Medicaid litigation and enforcement of the civil rights of persons who have disabilities.

11. Based on my knowledge of hourly rates charged by attorneys with comparable experience in complex federal litigation, it is my opinion that $425.00 is a reasonable hourly rate for Ms. Harrison to receive in this matter.

12. Partners in my firm who have twenty-five years of experience charge at rates that are equivalent or higher in some cases for cases brought in Columbia, South Carolina, and I believe that the rate she is requesting is comparable to rates charged by other lawyers in the Columbia area who have similar experience in specialized areas of law in complicated federal litigation.

13. I am aware of the successful cases in appellate state and federal courts in which Ms. Harrison has succeeded in enforcing the rights of persons who have disabilities in protracted litigation.

14. I believe that an hourly rate of $425.00 is a reasonable rate for Ms. Harrison in this case.

I declare that the foregoing is true to the best of my knowledge, information and belief.

Executed in Barnwell, South Carolina on this 8 day of August, 2012.

Terry E. Richardson, Jr.

Exhibit 8 CMS Letters Approval Waiver Applications

Department of Health & Human Services
Centers for Medicare & Medicaid Services
61 Forsyth St., Suite 4T20
Atlanta, Georgia 30303-8909

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

November 9, 2009

Emma Forkner, Director
South Carolina Department of Health & Human Services
Department of Health & Human Services
1801 Main Street
Columbia, SC 29201

Dear Ms. Forkner:

I am pleased to inform you that your request to renew South Carolina's Home and Community-Based Waiver for Persons with Mental Retardation or Related Disabilities, as authorized under provisions of section 1915(c) of the Social Security Act, has been approved. This waiver renewal has been assigned control number 0237.R04, which should be used in future correspondence. The waiver renewal is effective January 1, 2010 through December 31, 2014.

Specifically, you submitted a renewal request on August 31, 2009 to continue to provide the following waiver services: Adult Day Health Care; Personal Care 1 & 2; Residential Habilitation; Respite; Extended State Plan Adult Dental; Adult Vision; Audiology Services; Extended State Plan Prescribed Drugs; Adult Attendant Care Nursing; Adult Companion Services; Adult Day Health Care Nursing; Adult Day Health Care Transportation; Behavior Support Services; Career Preparation Services; Community Services; Day Activity; Employment Services; Environmental Modifications; Nursing Services; Personal Emergency Response System (PERS); Private Vehicle Modifications; Psychological Services; Specialized Medical Equipment, Supplies & Assistive Technology and Support Center Services.

The following estimates of utilization and cost of waiver services have been approved:

	Unduplicated Recipients	Factor D	Total Waiver Costs
Year 1 (1/1/10 – 12/31/10)	6300	$51,869	$278,661,600
Year 2 (1/1/11 – 12/31/11)	6700	$52,350	$298,042,800
Year 3 (1/1/12 – 12/31/12)	7100	$53,607	$323,085,500
Year 4 (1/1/13 – 12/31/13)	7500	$56,320	$359,812,500
Year 5 (1/1/14 – 12/31/14)	7900	$59,078	$398,815,700

We appreciate the effort and cooperation provided by your staff during our review of this request. If you have any questions, please feel free to contact Kimberly Adkins-McCoy at (404) 562-7159.

Sincerely,

Mary Kaye Justis, RN, MBA
Acting Associate Regional Administrator
Division of Medicaid and Children's Health Operations

Department of Health & Human Services
Centers for Medicare & Medicaid Services
61 Forsyth Street, Suite 4T20
Atlanta, Georgia 30303-8909

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

November 14, 2008

Emma Forkner, Director
South Carolina Department of Health and Human Services
Attn: Kara Lewis
P.O. Box 8206
Columbia, South Carolina 29202-8206

Dear Ms. Forkner:

I am pleased to inform you that your request to amend South Carolina's Home and Community Based Waiver for Individuals with Mental Retardation and Related Disabilities, as authorized under the provisions of Section 1915(c) of the Social Security Act, has been approved. The amendment (Control Number 0237.R03.05) is effective January 1, 2009.

Specifically, you requested to: (1) add Career Preparation; (2) add Day Activity; (3) add Community Services; (4) add Support and Employment Services; (5) update the definition for Adult Day Health Care Nursing; (6) update provider qualifications chart; and (7) update cost utilization estimates. The revised pages have been incorporated into the approved waiver.

	Unduplicated Recipients	Community Costs	Institutional Costs	Waiver Costs
Year 1	5200	$34,713	$98,181	$180,507,600
Year 2	5400	$34,673	$100,144	$187,234,200
Year 3	5600	$35,330	$102,148	$197,848,000
Year 4	5800	$36,100	$104,190	$209,308,000
Year 5	6000	$37,526	$106,274	$225,153,158

If there are any questions, please contact Kimberly Adkins-McCoy at 404-562-7159.

Sincerely,

Cheryl L. Brumagen for

Mary Kaye Justis, RN, MBA
Acting Associate Regional Administrator
Division of Medicaid and Children's Health Operations

cc: David Reed, CMS-CO

Exhibit 9 Ex Parte Memo of Jacob Chorey

Beverly A. H. Buscemi, Ph.D.
State Director
David A. Goodell
Associate State Director Operations
Kathi K. Lacy, Ph.D.
Associate State Director Policy

SOUTH CAROLINA Department of Disabilities and Special Needs

3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
V/TTY: 803/898-9600
Toll Free: 888/DSN-INFO
Website: www.ddsn.sc.gov

RESPONDENT'S EXHIBIT

To: Mr. Vastine G. Crouch, Director
SCDHHS Division of Appeals

From: Jacob Chorey, MR/RD Waiver Program Coordinator
SCDDSN Mental Retardation Division

Date: 18 February 2010

Re: Richard Stogsdill

Prior to the renewal of the MR/RD Waiver on 1 January 2010, Richard Stogsdill was authorized to receive the following amounts:

- 15 [hourly] units per week of Companion
- 220 units (54 hours) per week of Personal Care 2
- 1872 units (annually – i.e. 36 per week) of Hourly Respite

When the waiver was renewed, it included service limits of 28 hours per week for both Companion (28 units) and Personal Care 2 (112 units), or for any combination of the two, and 68 [hourly] units of Respite per month. These changes were approved by the Centers for Medicare and Medicaid Services (CMS). Mr. Stogsdill's services were, consequently, to be reduced as follows to comply with the terms of the renewed waiver.

- Companion and Personal Care 2 reduced to a combined total of 28 hours per week. The actual number of units for each was never agreed upon by the family and the Service Coordinator. They were working that out when the request for reconsideration was made. They ceased those efforts because the choice was made to keep services at pre-renewal amounts during the reconsideration/appeal process. The family was informed that they would be responsible for the cost of services over the limit if they lose the appeal.
- 68 [hourly] units of Respite per month – Mr. Stogsdill has since been approved for an exception to the service limit for Respite. The exception grants him 104 additional units per month, for a total of 172.

DISTRICT I
P.O. Box 239
Clinton, SC 29325-5328
Phone: (864) 938-3497

Midlands Center - Phone: 803/935-7500
Whitten Center - Phone: 864/833-2733

DISTRICT II
9995 Miles Jamison Road
Summerville, SC 29485
Phone: 843/832-5576

Coastal Center - Phone: 843/873-5750
Pee Dee Center - Phone: 843/664-2600
Saleeby Center - Phone: 843/332-4104