

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Brian M. Gibbons, Circuit Court Judge

Case No. 2013-CP-42-1569

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SC Court of Appeals

BLH by parents/general guardians Kenneth and
Angela Hensley, and on behalf of all others similarly
situated, ... Respondent,

v.

South Carolina Department of Social Services, ... Appellant.

BRIEF OF APPELLANT

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SC Court of Appeals

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After several pleading amendments, BLH pursued two federal causes of action: (1) a claim for alleged violation of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") and (2) a claim for a violation of the Contracts Clause of the United States Constitution. BLH alleged a prayer for declaratory, injunctive, and monetary relief. BLH sought monetary relief in the nature of "past due adoption assistance benefits and prospective adoption assistance benefits."

The parties filed cross-motions for summary judgment which were heard by United States Senior District Judge G. Ross Anderson, Jr. On August 17, 2012, Judge Anderson issued an order granting BLH's motion for class certification and denying the cross-motions for summary judgment. The DSS Directors filed an immediate appeal to the Fourth Circuit Court of Appeals, which exercised appellate jurisdiction. By a published decision issued on July 3, 2013, the Fourth Circuit reversed Judge Anderson's order and remanded for entry of judgment on all federal claims. *See, Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). Thereafter, Judge Anderson entered judgment in favor of the DSS Directors by order filed October 11, 2013.

On April 1, 2013, while the appeal was pending in the Fourth Circuit, BLH filed the present action in the Court of Common Pleas for Spartanburg County. This action, which is asserted against DSS only, alleges a state law breach of contract cause of action based upon a third-party beneficiary theory. (R. 51-52).

On October 4, 2013, BLH filed an unsupported motion for class certification. The motion itself consists of two sentences. (R. 70). It was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five class certification requirements on which BLH had the burden of proof. BLH requested merely that "the class identified in the Complaint be certified by this Court." (R. 70). In her Complaint, BLH sought to certify the following class: "All children, age 19 or younger on the date of the Motion for Class Certification (January 6, 2012), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002." (R. 48).¹

The motion for class certification was heard by Circuit Judge Brian Gibbons on April 7, 2014. In a Form 4 Order filed April 8, 2014, Judge Gibbons granted BLH's motion for class certification. The Form 4 Order did not state that a formal order would follow, and included no analysis. The Form 4 Order did not even identify the purported class. (R. 1).

Before ten days elapsed, DSS filed a Rule 59(e) motion asking that a formal order be issued. (R. 98-100). In response, Judge Gibbons issued a formal order, that being the Order on Plaintiff's Motion for Class Certification, filed May 29,

¹ Note that the date of the motion for class certification is incorrectly stated. The motion was filed on October 4, 2013.

2014. (R. 3-18). DSS then filed a Rule 59(e) motion as to the formal order and requested oral argument, which was not allowed. (R. 101-110). Instead, Judge Gibbons asked for a written response from BLH's counsel, who submitted a proposed Amended Order, together with affidavits. On September 9, 2014, the parties received an email from Judge Gibbons stating that he was denying DSS's Rule 59(e) motion and that he would be signing the Amended Order received from BLH's counsel. No formal order or formal order, however, was issued as to the Rule 59(e) motion – just the email. Judge Gibbons did issue the Amended Order on Plaintiff's Motion for Class Certification, but that Amended Order does not mention the Defendant's Rule 59(e) Motion to Reconsider nor set forth any rulings on that motion. Judge Gibbons' September 9, 2014 email was not filed nor is it a proper court order per the South Carolina Rules of Civil Procedure or the South Carolina Uniform Electronic Transactions Act, which governs the use of electronic documents. DSS therefore filed another Rule 59(e) motion to specifically request that a formal order adjudicating the prior Rule 59(e) motion be issued. (R. 121-125).

When no such order was received, and given the thirty day deadline for filing a Notice of Appeal from the Amended Order, DSS filed its Notice of Appeal on October 16, 2014. DSS did not want to take the chance that this Court would consider the filing of the final Rule 59(e) motion as a successive motion, thereby impacting on the timeliness of the appeal. On December 2, 2014, this Court issued

an Order staying the appeal and remanding for consideration of the pending Rule 59(e) motion.

On February 27, 2015, Judge Gibbons held an additional hearing. As a result, he issued an Order Granting in Part and Denying in Part Motions for Reconsideration which was filed on April 30, 2015. (R. 35-46). In that Order, Judge Gibbons again granted the motion for class certification. He included a different analysis of the five requirements for class certification and modified his previous rulings setting forth the process for notification of the class members. In particular, Judge Gibbons concluded that "good cause" existed under Section 63-9-780(C) for the disclosure of the names and addresses of the adopted children who comprise the class. (R. 43). Further, he directed class counsel "to prepare and serve a Notice of Class Action advising class members of the facts of this case and their right to opt out within thirty (30) days if they choose not to participate." (R. 44).

The Appellant DSS then filed a timely Amended Notice of Appeal.

ARGUMENTS

- I. The certification of the class and the notification process put into place by the Circuit Court violates the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.**

In certifying the class action, Circuit Judge Brian Gibbons identified the class as follows:

All children, age 19 or younger on the date of the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004.

(R. 41). Consequently, the class members consist of the adoptive children, many of whom (if not most of whom) have reached the age of majority by the present time.² Importantly, the class members are *not the adoptive parents*; they are the adoptive children themselves. This was the Respondent's requested class definition which represents an attempt to avoid the bar of the statute of limitations for the adoptive parents, i.e., the actual contracting parties, who made no claim within three years of

² The class action applies only to adoptive children who had been adopted by June 20, 2002, which is more than thirteen years ago, meaning that only those children that were less than five years of age at that time could even still be minors.

the decrease in the adoption subsidies in 2002 or the increase in the foster care board rate in 2004.

Because the class members are the adoptive children, Judge Gibbons ordered that they be given notice of the class action and of their rights to opt-out. He ordered "the Plaintiff class counsel to prepare and serve a Notice of Class Action advising class members of the facts of this case and their right to opt out within thirty (30) days if they choose not to participate." (R. 44). The Notice of Class Action is required to include the "facts of this case." The facts of this case will require class counsel to advise the class members that they are adopted children. That is a fact that cannot possibly be excluded or hidden from them. The class members are adoptive children, and it is not possible to explain to the class members that they are a member of the class of adoptive children without also conveying to them that they were adopted. It is unknown how many of the class members will be learning that information for the first time from the Notice of Class Action, but it is reasonable to conclude that there are a fair number of class members who will not know of their adoptive status prior to being informed of that very personal and private information by receipt of the Notice of Class Action. The Appellant DSS, therefore, submits that the certification of this class and the notification process put into place by Judge Gibbons violate the statutory and constitutional rights not only of the adoptive children but also the adoptive parents and even possibly the biological parents for the reasons discussed in more detail below.

South Carolina has been at the forefront of protecting the privacy rights of adopted children, the adoptive parents, and the biological parents. As early as 1964, the South Carolina Supreme Court addressed these interests in the case of *McDonald v. Berry*, 243 S.C. 453, 134 S.E.2d 392 (1964), wherein biological parents filed suit to obtain the names and address of the adoptive parents of their biological child. In reversing the Circuit Court which had required disclosure of that information, the Supreme Court explained that "[t]he courts and public agencies of this state have customarily and diligently endeavored to protect not only the identity of an adopted child, but to protect both the child and the adoptive parents from any undue harassment by natural parents or other persons." 134 S.E.2d at 393. The Supreme Court recognized that the confidential information could be used "for the purpose of interfering with and harassing both the child and the adoptive parents." *Id.* The Supreme Court further recognized the significant harm that could result:

The obvious problems, emotional and otherwise, which would likely result from such interference to the detriment of the child, and efforts of the adoptive parents to properly rear the same, are too basic and numerous to here require any elucidation or enumeration. Should the court, without any showing of good cause, order the invasion of the privacy of the adopted child and adoptive parents, such judicial conduct could well have a most damaging effect in making prospective adoptive parents reluctant to proceed with adoptions. Hundreds of married couples every year adopt unwarranted [sic] children and give them the finest homes, rearing and education, and these adoptive parents, as well as the adopted children, are entitled to the cooperation of the court in the fine work being accomplished, and they are

certainly entitled to the protection of their privacy in the absence of good cause for invading the same being fully and clearly shown.

Id.

Later, in 1981, the Supreme Court decided the seminal case of *Bradley v. Children's Bureau of South Carolina*, 275 S.C. 622, 274 S.E.2d 418 (1981), wherein an adopted child commenced an action to compel the identification of his biological parents. In a thorough and well-reasoned opinion, the Supreme Court initially addressed the importance of the adoption process:

Adoption is a creation of statutory law in this State. Recognizing that children are at times born into circumstances wherein their natural parents cannot or will not care for them, the State in its role as *parens patriae* developed the adoption process to assure stable homes for these children.

274 S.E.2d at 420. (Citation omitted). The Supreme Court then explained that the adoption statutes, including the confidentiality statute which is the predecessor to Section 63-9-780(C), "are designed to promote policies and procedures necessary for the protection of all parties involved in the adoption." *Id.*³ More specifically, the Court cited the confidentiality statute as "serv[ing] all the parties in the adoption process: the adoptee, the adoptive parents, the natural parents and society

³ The current confidentiality statute as applied by Judge Gibbons is codified as Section 63-9-780(C) which provides as follows: "All files and records pertaining to the adoption proceedings in the State Department of Social Services, or in any authorized agency, or maintained by any person certified by the department under the provisions of Section 63-9-360, are confidential and must be withheld from inspection except upon court order for good cause shown." S.C. Code Ann. § 63-9-780(C).

at large." *Id.* Further, the Court stressed that, in contemplating any release of confidential information in the adoption process, "due consideration must be given to the impact that each case may have on the viability of the adoption process." 274 S.E.2d at 421. In addressing the "rationale for confidentiality in the adoption process," the Supreme Court explained that an "expectation of confidentiality arising from the statute is constitutionally protected as a right of privacy." *Id.*⁴ The Supreme Court thus concluded that "the State's primary concern is in maintaining an effective adoption procedure which serves the best interests of adoptees generally" and that disclosure of confidential information should occur only "in extraordinary circumstances." 274 S.E.2d at 421-422.

In 1986, the Supreme Court decided the case of *Gardner v. Baby Edward*, 288 S.C. 332, 342 S.E.2d 601 (1986), where the Court explained that it "has jealously guarded the sanctity of the adoption process." 342 S.E.2d at 603. More specifically, the Supreme Court described confidentiality as "imperative to the adoption process." *Id.*

Then, in 2000, this Court addressed these issues of confidentiality in the adoption process in the case of *South Carolina Department of Social Services v.*

⁴ The United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment provides substantive protections in "matters relating to marriage, procreation, contraception, family relationships and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). The Supreme Court has also recognized that persons enjoy a constitutionally protected privacy right in "avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

Doe, 338 S.C. 618, 527 S.E.2d 771 (Ct. App. 2000). This Court reaffirmed that "a party must demonstrate a compelling need for the identifying information which outweighs the need for confidentiality" and "[d]isclosure follows in extraordinary cases." 527 S.E.2d at 773. This Court recognized "the expectation that confidentiality will be maintained in adoption proceedings except under the most extraordinary circumstances." *Id.* Consistent with earlier authority, this Court also stressed the requirement that courts "weigh[] the respective interests of the parties to the adoption action, including those of the adoptee, the adoptive parents, and the biological parents." *Id.* Citing *Bradley*, this Court also explained that "the court must give due consideration to the impact that each case may have on the viability of the adoption process." *Id.* See also, *Jones v. South Carolina Department of Social Services*, 341 S.C. 550, 534 S.E.2d 713 (Ct. App. 2000).

Finally, in 2003, the Supreme Court decided the case of *Doe v. Ward Law Firm*, 353 S.C. 509, 579 S.E.2d 303 (2003), wherein the Court addressed whether the adoptive parents should be able to access the adoption records to learn the biological parents' medical history to assist with the provision of medical and psychiatric care to the adoptive child. The Supreme Court noted that the adoption law had changed but the rationale supporting confidentiality, as discussed in *Bradley*, remained good law and that "confidentiality should be maintained absent an extraordinary, compelling need." 579 S.E.2d at 305. However, based upon statutory changes, the Supreme Court explained that "when balancing the privacy

rights of each party with the interests of the child ... the Legislature has determined the best interests of the child should prevail." *Id.* The Supreme Court did conclude in the *Ward Law Firm* case that the adoptive parents were entitled to obtain the confidential records because they "demonstrated the need to obtain the information for Child's mental health." 579 S.E.2d at 306. The *Ward Law Firm* case provides a standard of what is required to overcome the strict confidentiality that has been the hallmark of South Carolina jurisprudence on this issue since 1964.

That standard has not been met in the present case. Admittedly, this case presents a unique circumstance. The person who seeks the confidential information -- consisting of the identities of all adopted children who meet the class definition -- is not the adoptive child, the adoptive parents or the biological parents. It is a purported class representative seeking to bring the claims for all other similarly situated adoptive children. The concern, however, for the Appellant DSS and one that was not adequately considered by Judge Gibbons is the likely breach of confidentiality and privacy rights for the adoptive children, the adoptive parents and even perhaps the biological parents.

As discussed above, many of the adoptive children who qualify as class members are likely not aware that they were adopted. The children could have been adopted as infants or very young children and have no memory of being part of prior families or being in foster care. Their adoptive parents may have made a conscious, family-based and constitutionally-protected child-rearing decision not

to advise the child that he/she was adopted. The disclosure of their status as adopted children could result in the types of problems, emotional and otherwise, that the Supreme Court recognized in *McDonald*. That disclosure could result in the adoptive children questioning their identities or even perhaps learning of pre-adoption instances of abuse which the adoptive parents had chosen to shield from them. Similarly, the disclosure could cause the adoptive children to question their rejection by their biological parents, thereby causing or exacerbating emotional issues. Most certainly, the disclosure could impair the relationships between the children and their adoptive parents in a myriad of ways. For instance, the children may question and even resent that their adoptive parents kept such information from them, thereby causing irreparable harm to those relationships which could be impactful for years or more. The children may also attempt to seek out the biological parents, thereby infringing on the biological parents' expectations of confidentiality, which should only be breached in the most compelling and extraordinary circumstances such as what was described in the *Ward Law Firm* case.

Importantly, what makes this case so different and so troublesome is that *none of the participants in the adoption process are seeking this confidential information*. It is a single class representative – BLH – who presumably is aware of her adopted status and the Plaintiff class counsel who seek this information. It is also critical that this Court consider what is truly at stake for the class members

in this class action litigation. The confidential information is not sought because of any extraordinary or compelling need as was the case in the *Ward Law Firm* case. There is no need for confidential information to address any significant medical or emotional issue. Indeed, this litigation is purely economic in nature, and the damages at issue for each class member are minimal.⁵ Based upon BLH's theory, the maximum that any class member may recover is \$240 per year for the number of years since 2004 that the adoptive parents were receiving an adoption assistance subsidy from DSS. So, at this point, the maximum recovery for any one class member is less than \$3,000. Significantly, the adoptive parents have had the ability to pursue a claim since 2004; yet, no one other than the adoptive parents of BLH have. Nonetheless, BLH has asked the courts to find that "good cause" exists for the discovery of this confidential information so that class action litigation could be pursued for adoptive children who have never sought to make the claim themselves and whose parents never sought to make the claim themselves. DSS submits that the risk is too great that the revelation by the courts and class counsel will breach the statutory and constitutional rights of confidentiality, privacy, and due process of adoptive children who have no knowledge that they were adopted. Such a revelation to persons who are entirely disassociated with this litigation – other than the fact that they meet the class definition – has the likelihood of

⁵ While the potential recovery for each class member is minimal, given the number of class members, the potential liability for DSS is significant.

creating great harm. It is that likelihood of harm – particularly when weighed against the minimal economic gain at issue for each class member – that should convince this Court that "good cause" does not exist for the disclosure of the adoptive children's identities and for this case to proceed as a class action.

In sum, the Appellant DSS has grave concerns that the class action process is being applied in this case to violate the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents. It is not those participants in the adoption process that are seeking confidential information for their own purposes or to disclose that information to adopted children who may currently be unaware of their status as such. It is the class representative and class counsel that seek that information, and for reasons that are not compelling nor extraordinary under current precedent in South Carolina. The Circuit Court's class certification order and its notification process should be reversed.⁶

⁶ The Appellant DSS has filed this interlocutory appeal because the disclosure of the adoptive status of many of the class members will violate their statutory and constitutional rights of confidentiality, privacy and due process and may cause real harm. DSS is cognizant that, once such disclosures are made, that cannot be undone. Thus, at a minimum, DSS wishes to demonstrate that it took all available steps to try to prevent any breach of those rights so that -- if DSS's efforts are unsuccessful -- any liability for the resulting harm will ultimately rest on BLH's parents and the Plaintiff class counsel, and not on DSS.

II. The critical issues of confidentiality, privacy and due process as discussed herein are immediately appealable under existing precedent.

To the extent the Court questions whether the foregoing issue is proper for an interlocutory appeal, the Appellant DSS relies specifically on the cases of *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006).

In *Howe*, the South Carolina Supreme Court allowed for an interlocutory appeal to be pursued by a sexual abuse victim whose motion to proceed anonymously had been denied by the Circuit Court. The Supreme Court applied a three-factor test adopted from the federal courts that required a showing that the order on appeal "(1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." *Howe*, 362 S.E.2d at 216. The Supreme Court determined that "the denial of Doe's motion to proceed anonymously meets the criteria for appellate review [because] [t]he decision conclusively determines the question, is a question independent of the merits of the litigation and would be effectively unreviewable on final appeal once Doe's true identity was revealed." 362 S.E.2d at 217. In ruling that the order was immediately appealable, the Supreme Court further recognized that "[t]he order denying Doe's motion to proceed anonymously prior to trial has the effect of revealing his identity, the very thing he was seeking to keep confidential." *Id.*

Similarly, in *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), the Supreme Court addressed whether an order unsealing court records in a divorce proceeding was immediately appealable. In allowing that interlocutory appeal to proceed, the Supreme Court noted its agreement "with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." 630 S.E.2d at 468. As the Supreme Court further recognized, "[c]ompelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." *Id.*

The same is true in the present case where the proverbial "cat will be out of bag" if class counsel does as directed by the Circuit Court and informs the class of adoptive children that they were indeed adopted. The resulting harm and violation of privacy rights cannot be corrected or undone after final judgment. That ruling would become essentially unreviewable after final judgment consistent with the decisions in *Howe* and *Ex Parte Capital U-Drive-It*.

On the issue of appealability, the Appellant DSS also relies on the case of *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). Admittedly, in *Salmonsens*, the Supreme Court reiterated the general rule that class certification orders are typically not immediately appealable. However, the Supreme Court also

cited to the case of *Eldridge v. City of Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992), where the Court explained that "[o]rders under Rule 23, SCRCP are interlocutory and thus, immediately appealable *only in certain circumstances*." 417 S.E.2d at 534. (Emphasis added). Likewise, the Supreme Court cited to the case of *Knowles v. Standard Savings & Loan Association*, 274 S.C. 58, 261 S.E.2d 49 (1979), where a class certification order was dismissed as interlocutory on the grounds that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment." 261 S.E.2d at 49. Yet, where there are "substantial or essential legal rights" at issue, an immediate appeal is authorized. In the case at bar, the class certification order on appeal, for the reasons discussed above, involves substantial and essential legal rights, namely the rights to confidentiality, privacy and due process enjoyed by all of the participants in the adoption process. Moreover, in *Salmonsens*, the Supreme Court agreed to review the aspect of the class certification order which established the "opt-in" notification procedure. Here, DSS is also appealing an aspect of the notification process as ordered by the Circuit Court.

Based on the foregoing authorities, the Court is respectfully requested to determine that this important issue is immediately reviewable by interlocutory appeal.⁷

⁷ In footnote five of the *Salmonsens* opinion, the Supreme Court noted that it remains possible to challenge class certification issues by means of a discretionary writ of

III. The Circuit Court erred in certifying the class when the class representative failed to prove the necessary element of commonality.

As discussed above, the Supreme Court explained in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), that the Court "has reviewed interlocutory orders involving class certification when they contain other appealable issues." 661 S.E.2d at 85. That rule is not unique to class certification orders. For instance, this Court has recognized that it "may review an interlocutory order when the order is coupled with an appealable issue." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680, 688, n.14 (Ct. App. 2008). The Supreme Court has likewise agreed in other contexts. In *Edge v. State Farm Mut. Automobile Ins. Co.*, 366 S.C. 511, 623 S.E.2d 387 (2005), the trial court granted in part and denied in part Rule 12(b) motions to dismiss. The plaintiff appealed the partial grant of those motions, and the defendant then cross-appealed seeking review of the portions of the order denying its motion to dismiss. The Supreme Court unanimously allowed the defendant's appeal of the denial of its motion to dismiss to proceed "because of judicial economy." 623 S.E.2d at 390. The Supreme Court acknowledged that "[a]n order that is not directly appealable may be considered if

certiorari where a direct appeal is not available. Because DSS believes that a direct appeal is available for the reasons already discussed, it has not petitioned for a writ of certiorari. However, in the event this Court were to conclude that an interlocutory appeal is unavailable, DSS reserves its right to pursue these critical issues of confidentiality, privacy and due process by means of a petition for writ of certiorari filed in the Supreme Court's original jurisdiction.

there is an appealable issue before the court." *Id.*, citing *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of Word Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001). The Supreme Court explained:

Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal.

Id. Thus, the Supreme Court in *Salmonsens* and *Edge* and this Court in *Southeastern Housing Foundation* (in addition to other cases) recognize that where judicial economy is best served the Court may exercise appellate jurisdiction over an interlocutory order that would not otherwise be immediately appealable.

In the preceding section, DSS has demonstrated that the issues of confidentiality, privacy and due process raised by the notification process ordered by Judge Gibbons are immediately appealable. Thus, there is an appealable issue before the Court. Accordingly, the Appellant DSS also requests that this Court review the class certification order on one limited and distinct issue of law, that is, whether the Respondent BLH has satisfied the element of commonality. Judge Gibbons erred in his analysis of the commonality element and specifically disregarded the binding precedent established by the Supreme Court's decision in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

By way of background, Rule 23, SCRCF, is modeled on but is slightly different from Rule 23 of the Federal Rules of Civil Procedure. As under the

Federal Rule, class certification under South Carolina law requires a showing of numerosity, commonality, typicality, and adequacy of representation. Rule 23(a), SCRCP. In addition, South Carolina has the unique requirement that for a class to be certified, the amount in controversy must exceed \$100.00 for each member of the class. Rule 23(a)(5), SCRCP.

The plaintiff bears the burden of establishing that each of the elements of Rule 23(a) has been met in this case. *Waller v. Seabrook Island Property Owners Assoc.*, 300 S.C. 465, 388 S.E.2d 799 (1990). In assessing whether the plaintiff has met its burden, a court is required to apply a rigorous analysis to assure that the prerequisites of Rule 23(a) have been satisfied. *Waller*, 388 S.E.2d at 801, *citing General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

The Appellant DSS submits that the Respondent cannot and has not satisfied the requirement of commonality. The South Carolina Supreme Court has explained that "[t]o establish commonality, a party must show that there are questions of law or fact common to the class. In practical terms this means the party must articulate the existence of *significant* common, legal, or factual issues that bind the proposed class together." *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190, 200 (2003). (Emphasis added). Importantly, "[c]ommonality is met only where the class shares a *determinative* issue." 577 S.E.2d at 200-201. (Emphasis added). Relying on federal jurisprudence, the Supreme Court in *Gardner* explained that "questions that are in no way dispositive

and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality." 577 S.E.2d at 201. Likewise, the Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*

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

The same individualized inquiry is necessary in the present case. Admittedly, there are common factual questions including the decision in June 2002 by then DSS Director Elizabeth Patterson to reduce by \$20.00 monthly foster care maintenance payments and adoption assistance subsidies because of the

significant budgetary cuts faced by DSS at the time. However, there is not a common legal question as to whether the \$20.00 reduction constitutes a breach of contract. Likewise, there is not a common factual or legal question as to the calculation of damages because of varying factual circumstances.⁸

Whether the \$20.00 reduction constitutes an actionable breach of the Adoption Subsidy Agreements entered by DSS with adoptive parents other than the Hensleys will require an individualized factual inquiry in several particulars, all of which were argued to Judge Gibbons, but he failed to consider them despite several attempts at reconsideration.

First, South Carolina law will require an individualized determination as to whether the adoptive parents accepted or acquiesced and impliedly consented to the \$20.00 reduction in subsidy payments. *See, Facelli v. Southeast Marketing Co.*, 284 S.C. 449, 327 S.E.2d 338 (1985) (plaintiff estopped to seek damages for change in commission rate for which plaintiff was given notice and impliedly

⁸ In his latest Order, Judge Gibbons writes as follows: "Defendant's counsel stipulated at the hearings that there is 'no doubt there is a common issue of fact that each of these parties signed a contract' and 'no doubt there was \$20 across the board deduction in the adoption subsidy payments.' These are the determinative issues." (R. 40). Those are statements made by DSS's counsel at the February 27, 2015 hearing. (R. 216). However, contrary to Judge Gibbons' understanding, DSS was pointing out that while there are common issues of fact, none of those issues is "determinative" as required under *Gardner* because quite frankly they are not disputed facts. That was the very point made by DSS's counsel when he stated: "What's interesting in this case, that's why class certification in my opinion is totally inappropriate, the only common issues in this case are issues that are agreed upon." (R. 216). In essence, insignificant factual issues that are not in dispute are hardly the type of "determinative" or "dispositive" issue that is required to meet the commonality element. Judge Gibbons erred as a matter of law in ruling otherwise.

consented to); *Cooksey v. Beaumont Mfg. Co.*, 194 S.C. 395, 9 S.E.2d 790 (1940) (reduction in wages from 34¢ to 32¢ per hour was change in contract of employment that was impliedly consented to). This will require an individualized inquiry of each potential class member's claim.

Second, the Adoption Subsidy Agreement may have been the subject of a novation which requires a showing that the parties intended a new obligation to replace the existing one. *See, Wellman, Inc. v. Square D. Company*, 366 S.C. 61, 620 S.E.2d 86 (Ct. App. 2005). Thus, an individualized inquiry must be made regarding each class member's adoptive parents' intentions in continuing to accept the adoption subsidy amount after the \$20.00 reduction and whether that was done under objection or with the intent to create a novation.

Third, the Adoption Subsidy Agreement provides a process for the entry of renewal agreements. Thus, an individualized inquiry must be made regarding whether each class member's adoptive parents entered into a renewal agreement since 2004 containing an agreed upon monthly subsidy amount or other new or different terms or benefits.

Fourth, the Adoption Subsidy Agreement provides that "adoptive parent(s) may appeal DSS's decision to reduce, change or terminate any adoption subsidy in accordance with rules and procedures of the state's fair hearing and appeal process." (R. 133). Thus, an individualized inquiry must be made whether each class member's adoptive parents appealed the \$20.00 reduction at any point from

2002 to present and, if so, what was the result of that appeal, whether the decision was appealed, and whether the administrative process is dispositive of any breach of contract claim.

Fifth, the Adoption Subsidy Agreement provides that "[a]djustments in monthly cash payments may be made ... based upon changes in the needs of [the child] [or] changes in circumstances of the adoptive family." (R. 131). Thus, an individualized inquiry must be made whether each class member's adoptive parents received any adjustment, upward or downward, from 2004 to present because of changed circumstances in the child's needs or in the family's ability to provide that would affect or even moot any claim for the \$20.00 reduction since 2004.

Sixth, the Adoption Subsidy Agreement includes a "termination" provision which includes eight different bases for termination. (R. 133). One such basis is termination of the subsidy payments when the adoptive child reaches the age of eighteen. BLH has attempted to address that specific termination possibility in the proposed class definition. However, there are seven other ways that the Adoption Subsidy Agreement could have been terminated prior to age eighteen, including the death of the adoptive parents, where the adoptive parents are no longer legally responsible for the child, and where the adoptive parents requested termination of the benefits. (R. 133). Thus, an individualized inquiry must be made whether the agreement with each class member's adoptive parents was terminated by DSS or by the adoptive parents prior to age eighteen.

Seventh, and finally, the named Plaintiff and proposed class representative is BLH, who is the adoptive child and a minor. The contracting parties to the Adoption Subsidy Agreement, however, are DSS and the adoptive parents, namely Kenneth Hensley and Angela Hensley. (R. 131). BLH is not a contracting party but is attempting to assert her claim as a third-party beneficiary. As mentioned, this was done in an attempt to avoid a dispositive statute of limitations defense on the parents' claims in the prior action. DSS disputes that the minor adoptive child may sue under a third-party beneficiary theory. Nonetheless, a breach of contract claim by the adoptive child raises significant damages issues which will need to be addressed and resolved by the trial court on an individualized basis. The adoption subsidy was paid to the adoptive parents and not to the child. Per the contract language, the payments were to be used "to aid the adoptive parent(s) in providing proper care for [the] child." (R. 131). The proper measure of damages for BLH and the proposed class members consisting of other adoptive children is not the reduction of \$20.00 per month but the impact that that reduction had on the child, which in most cases was likely negligible or non-existent. Each adoptive child will need to show how he or she was harmed by the reduction in subsidy – presumably the change in his/her care or support – rather than the monetary figure due to his/her parents. A third-party beneficiary is not an assignee and may claim his/her damages proximately caused by the breach, but a third-party beneficiary cannot claim the damages sustained by the contracting party. The adoptive parents lost

the \$20.00 per month, but that does not necessarily mean there were damages caused thereby to the adoptive child. That child may have received the exact same care from his/her parents. Thus, the damages sustained by the adoptive children, who are the proposed class members, will differ from person to person and will require an individualized inquiry. *See, Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) ("[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury").

As in *Gardner*, the trial court will be required to make individualized inquiries into each potential class member's particular claim before being able to rule that DSS breached an Adoption Subsidy Agreement with that child's adoptive parents and before any award of damages may be made. While there may be common issues of fact, particularly given the across-the-board cut in benefits in 2002, there are numerous *determinative* facts and issues that are not common to all proposed class members. The breach of the Adoption Subsidy Agreement is contingent on numerous factual inquiries as noted above, and those factual inquiries must be examined on an individualized basis. Likewise, an award of damages to the proposed class members will need to be determined on a class-by-class basis. Thus, as was the case in *Gardner*, BLH has not demonstrated the requirement of commonality because, quite simply, BLH has not shown that there is a "determinative issue" common to all proposed class members. As the Supreme

Court recognized in *Gardner*, the necessity of individualized examination "negates the benefits of a class action suit." *Gardner*, 577 S.E.2d at 201.

On this additional basis, the Appellant DSS contends that the class certification order was issued in error and should be reversed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully requests that this Court reverse the class certification orders issued by Judge Brian Gibbons, including the notification process which will necessarily inform class members that they are adopted children and which is in violation of the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

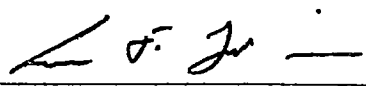
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SC Court of Appeals

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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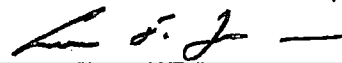
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SC Court of Appeals

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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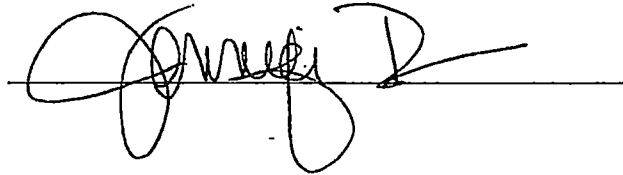
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The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, South Carolina Department of Social Services does hereby certify that service of the final **Brief of Appellant** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of June 2016:

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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Judge

Appellate Case No. 2014-002254

BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of
all others similarly situated, Respondent,

v.

South Carolina Department of Social Services, Appellant.

FINAL BRIEF OF RESPONDENT

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APPX0301

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STATEMENT OF THE CASE

This class action case involves Appellant's across-the-board, \$20-per month cut of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to approximately sixteen hundred (1,600) South Carolina families and the adopted children beneficiaries. This cut was implemented in 2002 to both the AAS and to Foster Care Board Maintenance Payments (hereinafter "Foster Payments"). In 2004, the Foster Payment was reinstated by that \$20. The Adoption Assistance payment has proceeded after that cut untouched through the present time. The stated purpose of the contractual AAS agreements is to benefit the adopted children of South Carolina, such as Respondent BLH. Respondent and the members of the certified class allege Appellant's action constitutes a breach of contract for which there is no defense and accordingly the adopted children are entitled to recovery.

Initially brought in state court and removed by DSS to federal court, this case was brought in 2011 as a 42 U.S.C. Section 1983 action against the SCDSS Directors: Elizabeth Patterson, Kim Aydlette, Kathleen Hayes, and Lillian Koller. The Plaintiffs were initially listed as "Kenneth and Angela Hensley, as adoptive parents of BLH (dob [REDACTED])" (Case No. 2011-CP-42-3992) (Federal Case No. after removal - 7:11-cv-02827-GRA). The Defendants at the time moved to dismiss on the basis of the statute of limitations and Plaintiffs corrected the caption and amended the complaint to clarify that the intended true party in interest was the child BLH. Once the class certification was sought, again the caption was modified to reflect the class nature of the suit. At that time it was changed to "BLH (dob [REDACTED]) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated."

Defendants filed a motion for summary judgment based on qualified immunity,

including various exhibits. Plaintiffs filed a cross motion for summary judgment and included exhibits. Included in the exhibits were documents reflecting the cut of benefits and affidavits from both sides. After a hearing on August 9, 2012, United States Federal District Court Judge G. Ross Anderson certified the class under FRCP 23 and denied Defendant's motion for summary judgment by order dated August 17, 2012. Defendants filed an appeal to 4th Circuit Court of Appeals.

On April 1, 2013, Plaintiff filed a breach of contract claim against the South Carolina Department of Social Services, which was not a defendant in the federal case. (R. pp. 46-53). The claims were based on state law only and were filed prior to any adjudication on the federal claims. On April 2, Plaintiffs withdrew the federal contracts clause cause of action in the federal case.

The remaining issue before the 4th Circuit was therefore only the claim under Section 673 (a)(3) of the Federal Adoption Assistance and Child Welfare Act ("AACWA"). On July 3, 2013, the Court issued an Order holding as a matter of law that Section 673 (a)(3) of the AACWA did give rise to a privately enforceable federal right. However, the Court granted Defendants qualified immunity on the basis of a limited federal exception in 673(a)(3), requiring adoption assistance subsidies to be less than foster care maintenance rates. As noted above, this limited exception was eliminated in 2004 when the foster care maintenance rate was reinstated.¹ The Fourth Circuit did not address any of the class certification issues as those were not part of Defendant's appeal.

Respondent served discovery requests on Appellant in the state court case (Case No.

¹ The Fourth Circuit held that the reinstatement of the foster care rate did not constitute a "readjustment" of the adoption rate under federal law but did not address any element of the state law claim for breach of contract that was pending in state court at the time.

2013-CP-42-1569) on July 26, 2013. (R. pp. 240-248). Respondent sent multiple emails and other correspondence but still no discovery responses were provided. (R. pp. 248-250). Respondent filed a motion to compel in October of 2013. (R. pp. 60-69). At the same time, Respondent filed its motion for class certification. (R. p. 70). Still DSS provided no responses. On March 10, 2014 Appellant filed its motion for summary judgment. (R. pp. 126-149). Still no discovery responses were provided. Near the end of March, a hearing on the motion for summary judgment was set for April 8th. Finally, late in the afternoon on April 3, 2014, just days before the hearing on April 7, 2014, DSS emailed its discovery responses to Respondent. No depositions had been taken due to the delay in Defendant's discovery responses.

On April 7, 2014 Respondent submitted its memorandum in support of the motion for class certification with exhibits. (R. pp. 71-84). Appellant submitted its memorandum in opposition to motion for class certification and a memorandum in support of summary judgment. (R. pp. 85-97). On April 8, 2014 Judge Gibbons issued a Form 4 Order granting the motion for class certification and denying the motion for summary judgment. (R. pp. 1-2).

On April 28, 2014 Appellant filed a 59(e) Motion requesting a formal order. (R. pp. 98-100). On April 29, 2014 Judge Gibbons requested that Respondent submit a proposed order. Respondent submitted the order on May 10, 2014. On May 12, 2014, counsel for Appellant requested "a few days to review it more thoroughly and get you my comments." The Court indicated this would be no problem. After more than two weeks without any correspondence from Appellant, the Court issued a formal order on May 29, 2014. (R. pp. 3-18). Plaintiff's counsel received written notice of the Order on or about June 7, 2014. On

July 31, 2014, over sixty (60) days after the entry of the Order, Defendant filed a Rule 59(e) Motion for Reconsideration. (R. pp. 101-120). In response to the 59(e) Motion, the lower court accepted Respondent's suggestion of amendments to the Order. The revised Order was filed September 16, 2014. (R. pp. 19-34).

On September 26, 2014, DSS again filed a Rule 59(e) motion. (R. pp. 121-125). On October 16, 2014, DSS filed a Notice of Appeal. On November 4, 2014, Respondent moved to dismiss the appeal on two grounds: 1) orders denying summary judgment and orders granting class certification are not immediately appealable; and 2) it was improper for DSS to appeal with the 59(e) motion still pending before the circuit court. This Court stayed the appeal until DSS's 59(e) Motion had been resolved.

On February 27, 2015 the Court held another hearing on the most-recent 59(e) Motion filed by DSS. DSS re-argued all class certification issues. The lower court found that the Respondent could not prepare the class notice without the information for the class members. DSS agreed to provide the information on the class members within 90 days of the date of the order. Counsel for Respondent's noted that the lower court may wish to consider a confidentiality order and counsel for DSS agreed that the parties could craft sufficient language for a confidentiality order at the appropriate time. (R. pp. 194-239).

On April 1, 2015, more than a month after the February 27, 2015 court hearing on this most recent 59(e) motion, counsel for DSS wrote the circuit court judge inquiring whether the trial court wished for him to submit an alternative proposed order. (R. p. 253). Later that same day, the trial court consented to Mr. Lindemann providing such an order. (R. p. 253). The cover letter to this proposed order, also sent on April 1, 2015, raised for the first time the issue that "many of those children may have no idea that they were adopted . . ."

Counsel for DSS posed the question: "I do not know whether the court wants to deal with these issues now or later when the notice of class action is subject to approval, but I do think that these issues will need to be addressed before a notice of class action is mailed to an adoptive child who may have no idea that he/she is adopted . . . but I want to make sure that neither DSS nor their counsel personally have any liability for sending these adopted children a class action notice that tells them that they were adopted." Counsel for DSS again raised the issue by email to Judge Gibbons on April 3, 2015. (R. p. 256).

On April 30, 2015 Judge Gibbons issued the formal order again granting the motion for class certification. (R. pp. 35-45). The Order notes that the court found "good cause" under S.C. Code 63-9-780© for production of the class member names to Plaintiff's counsel on a confidential basis. The Order did not address the particulars of the content of the class notice. It stated: "The Plaintiff class counsel shall submit the draft notice to the Court and opposing counsel for approval within thirty (30) days of receiving the class member contact information from Defendant." (April 30, 2015 Order, p. 11). The Court did not address the confidentiality questions raised post-hearing by DSS' counsel's emails to the Court.

Appellant filed an Amended Notice of Appeal with this Court on June 8, 2015. Subsequent to that date, the parties had a phone conference with the Chief Administrative Judge of the 7th Judicial Circuit (Judge Keith Kelly) at which time all agreed that the Amended Notice of Appeal stayed the circuit court action. Based on the stay, no arguments have been heard on the details of the class notice and no class notice has been approved by the lower court.

ARGUMENTS

I. The certification of the class and notification process does not violate the statutory or constitutional rights of confidentiality, privacy or due process.

With no evidentiary support, DSS makes the bald assertion that “many of the adoptive children who qualify as class members are likely not aware that they were adopted.”² DSS alleges that the notice of the class action will inevitably require class counsel to advise the class members that they are adopted children, and because it “is unknown how many of these class members will be learning that information for the first time . . .,” this information will “violate the statutory and constitutional rights not only of the adoptive children but also the adoptive parents and even possibly the biological parents . . .”³

To support this claim, DSS points to a long line of South Carolina appellate cases which, DSS correctly notes, has “been at the forefront of protecting the privacy rights of adopted children, adoptive parents, and biological parents.”⁴ What DSS misapprehends, however, is that none of the cases cited by DSS for this alleged right to privacy involves the right for a child’s adoptive status to be forever shrouded in secrecy. Instead, the cases cited by DSS protect the *identities* of the parties, especially the privacy of the birth parents.⁵ In

² Appellant Brief, p. 13.

³ Appellant Brief, p. 8.

⁴ Appellant Brief, p. 9.

⁵ See McDonald v. Berry, 243 S.C. 453, 134 S.E.2d 392 (1964) (involving the biological parents’ suit to obtain the names and addresses of the adoptive parents of their biological child); See also Bradey v. Children’s Bureau of South Carolina, 275 S.C. 622, 274 S.E.2d 418 (1981) (involving an adopted child’s action to compel the identification of his biological parents); See also Doe v. Ward Law Firm, 353 S.C. 509, 579 S.E.2d 303 (2013) (involving adoptive parents’ action to gain access to adoption records, potentially violating the biological parents’ privacy); See also Gardner v. Baby Edward, 288 S.C. 332, 342 S.E.2d 601 (1986) (reversing the family court order requiring the disclosure of the identity of the natural parents to determine voluntariness of consent); See also Jones v. South Carolina Department of Social Services, 341 S.C. 550, 534 S.E.2d 713 (Ct. App. 2000) (reversing a family court’s order requiring the disclosure of a biological mother’s name for the purposes of a notice of publication to putative fathers); See also Evans v. South Carolina Department of Social Services, 303 S.C. 108, 399

our present case, the class action will implicate only the adoptive parents and the child, and in no way threatens the confidentiality of the birth family. DSS seeks to extrapolate from an established constitutionally protected privacy right (protecting the identity of the parties), a never-before-known constitutional right (the right for an adult adoptee⁶ to be shielded from his/her adoptive status). As will be described below, there is no such right, either expressed or implied, by statute or common law. Further, the Appellant's impulse to hide that a child joined a family through adoption is contrary to DSS policy.

As to the South Carolina Adoption Act, the confidentiality protections afforded by the statute go to prohibitions on the disclosure of identity of the biological parents, adoptee and child, not to their status as having been adopted, or having adopted.⁷ The adoption statute requires the adoption hearing, and papers and records of the adoption, including DSS files, remain confidential from public inspection.⁸ While protecting the identities of the birth and adoptive family, the statute allows for non-identifying information of the adoption to be disseminated,⁹ and allows the identity of the parties to be given with the consent of all.¹⁰ There is no statutory or common law mandate for secrecy to follow the child and his adoptive family in perpetuity. In fact, the statute envisions the child to be an active and fully aware participant in the adoption process.¹¹

S.E.2d 156 (1990) (ordering that DSS could not be compelled to divulge the name and address of an unwed birth mother for purposes of ascertaining the identity of a natural father).

⁶ Presumably, adoptees who are minors will be served notice of the class action through the adopting parents.

⁷ See S.C. Code § 63-9-710(D) (allowing the petitioner to employ the use of fictitious names where necessary to avoid disclosure of identities of parties or persons); See S.C. Code § 63-9-520(A)(c) (requiring that background information investigation and report of this investigation may not disclose the identity of the biological parents of the adoptee).

⁸ See S.C. Code § 63-9-780(a), (b), (c).

⁹ See S.C. Code § 63-9-780(d)

¹⁰ See S.C. Code § 63-9-780(e)

¹¹ See S.C. Code § 63-9-520(A)(2)(a)(iii) (requiring any post-placement investigation and report to include whether the adoptee, if of appropriate age and mental capacity, desires to be

DSS seems to conflate the concepts of privacy and secrecy – two very different concepts in the adoption context. Privacy denotes appropriate boundaries being placed on one’s confidential adoption story. Conversely, secrecy implies one’s adoptive status is shameful, a concept and label eschewed by DSS policy (as will be described below) and by nearly all adoptive parents.¹² There are many important and justifiable reasons why the intimate details of one’s adoption story (such as child’s physical abuse or a birth parent’s substance abuse) should remain confidential within the adoptive family and protected from public scrutiny, and the stigma that may follow. And yet, DSS policy recognizes the pernicious impact of concealing a child’s adoption, or secreting away an adoptee’s family story. For decades now, best practice (which DSS has both followed and helped to establish) embraces and affirms a child’s adoptive status.¹³ For instance, the *Department of Social Services Human Services Policy and Procedural Manual for Adoption and Birth Parent Services* is replete with references to a “life book.” This life book is a collection of

adopted); *See also* S.C. Code § 63-9-720 and S.C. Code § 63-7-2560(B) (requiring that a Guardian ad Litem be appointed for the minor child.) *See South Carolina Bar, Guidelines for Guardians ad litem in Family Court*, at IV Process and Duties (describing the guardian’s duty to meet with the child and to describe the guardian’s role) <http://www.scbart.org/public/files/docs/galbrochure.pdf>; *See also Department of Social Services Human Services Policy and Procedures Manual* which is replete with requirements of face-to-face visits with the minor child throughout the foster care and adoption process.

¹² The United States Department of Health and Human Services reports that almost all adopted children ages five and older (97%) know they were adopted. This statistic is based on a nationally representative survey of adoptive families across all adoption types, private infant adoption as well as foster care adoption. The percentage of foster care children who know about their adoption is certainly higher than this 97%, given the fact that foster children are older at the time of their placement than children placed through private infant adoption. As is described in this section of the Respondent’s brief, DSS is fully committed in policy and procedure to providing foster care adoptees with their birth history. Adoption USA Chart Book on 2007 National Survey Adoptive Parents as found at aspe.hhs.gov, a report of the U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation (describing a 2007 National Survey of Adoptive Parents)

¹³ *See Talking with Kids About Adoption*, <https://creatingafamily.org/adoption/resources/talking-kids-adoption/>

mementos, such as photographs of the adoptee's birth family and foster parents. The life book seeks to answer for the child why he or she entered foster care, describe the out-of-home placements, including photographs and names of caregivers. The life book includes photographs of the child and his or her birth family, beginning as young as possible.¹⁴ DSS policy directs that adoption specialists, at a minimum, address a variety of issues during monthly meetings with the child, including the development of the child's life book.¹⁵ Even for infants, DSS policy directs that a life book be initiated for the child regarding the child's relationship to birth family and his/her stay in foster care.¹⁶

The preparation of this life book is a DSS policy directive, a policy that carries the weight of law¹⁷ and firmly embraces the right of children to know of their adoptive status and birth history. Collecting birth family information and documentation of the child's stay in foster care prior to adoption for inclusion in the child's life book is a central tenant of adoption practice, as reflected in DSS policies and procedures. This policy of openly discussing adoption with a child includes not only the adoption social workers as referenced above, but also foster care workers, from the time the child first comes into care.¹⁸

To sum up, at the time of a child's adoption, DSS not only contracts with the adoptive family, but they also entrusted them with the life of one of our state's most vulnerable citizens. Now, in this appeal, based on nothing more than conjecture, the Appellant espouses

¹⁴ See Chapter 4, Adoption and Birth Parent Services, 415.02, Life Book. See also 415(2).

¹⁵ See 415(6)(e)

¹⁶ See 416 Background Summary for Infant Birth to Twelve Months; See also 416(8) (requiring the child to be able to show his or her life book to the prospective adoptive family).

¹⁷ See S.C. Code § 63-7-900(D)

¹⁸ See *South Carolina Department of Social Services Human Services Policy and Procedure Manual*, Chapter 8, Foster Care, 810.01(13) Entry Into Foster Care (directing that a life book be begun prior to the removal hearing); See also 819.01.01(5) Permanency: Continuity of Relationship and Parent/Child Visitation (directing that a life book be created to help promote family connections.)

a paternalistic and anachronistic desire to protect the adoptive family from itself. The duplicity of the DSS position – usurping millions of dollars from the very families they claim to now protect – is readily apparent. Allowing DSS to unilaterally alter the terms of contracts involving these special-needs children undermines these families and the adoption process generally, and will, in turn, give DSS *carte blanche* in the future to slash benefits, protected all the while by the knowledge that the “confidentiality of the adoption process” will deprive these families of redress.

II. This appeal is premature.

DSS admits that the general rule is that class certification orders, like the one on appeal, are typically not immediately appealable.¹⁹ The Appellant acknowledges that “only in certain circumstances” are such orders appealable, unless there is a “substantial or essential legal right” involved.²⁰ In the previous section of this brief, Respondent argues that there is no such substantial or essential legal right. One must, however, peel back this appeal to understand the substantial or essential legal right DSS claims to have been violated. DSS is apparently not objecting to providing the names of the class members to class counsel. After all, confidentiality concerns are addressed by the protective order issued by the trial court. Rather, it is the notification of the class to which DSS objects, the content of which has yet to be ordered. The appealed-from order requires the notice of class action to be approved by the chief administrative judge for the Seventh Judicial Circuit²¹ and orders class counsel to submit a draft notice to the trial court and DSS counsel for approval. The

¹⁹ Appellant Brief, p. 18.

²⁰ Appellant Brief, p. 19, citing Knowles v. Standard Savings and Loan Association, 274 S.C. 58, 261 S.E.2d 49 (1979).

²¹ See Order, p. 9.

language of the notice and the procedure for the dissemination of this notice is yet to be resolved. For instance, for adoptees who are still minors, perhaps the trial court will order that the notices be sent to the adoptive parents, thereby alleviating DSS' confidentiality concerns. For adult adoptees, the Court has yet to consider DSS' confidentiality argument, appearing in full voice for the first time on this appeal. For these reasons, this appeal is premature.

DSS describes the "critical issues of confidentiality, privacy and due process."²² And yet, nowhere in their pleadings or various Rule 59 motions, did DSS raise these "critical issues." Instead, this confidentiality issue is but briefly mentioned in emails from DSS' counsel following the February 27, 2015 motion hearing. Whether or not this Court will deem the confidentiality issue having been raised by emails more than a month after the hearing, we leave to the Court. What is patently clear, however, is that the trial court never ruled on this confidentiality issue. For these reasons, this issue is not preserved for review.²³

In fact, as the following transcript excerpt demonstrates, DSS consented to the full listing of potential class members to be provided to class counsel. DSS further agreed for notification to be given to the potential class, so long as that notification was done at the expense of the class counsel, and not DSS.

THE COURT: All right. So you're saying that if I were to grant your motion, your Rule 59E motion -- and Mr. Langley, I'm going to let you talk in a second -- to require that they do the preparation of the notice, that they provide notification to the potential class, they bare that expense then since

²² Appellant Brief, p. 20, footnote 7.

²³ See *Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review").

this is a case dealing with adoptions and y'all have all that information, y'all will agree to an order giving them that stuff?

MR. LINDEMANN: That's correct, Your Honor.

THE COURT: Okay.

MR. LINDEMANN: And I think there probably would need to be some sort of confidentiality provisions with that.

THE COURT: Sure. I don't mind signing an order on that.

MR. LINDEMANN: And just for the record, obviously we very much disagree with that fact that this case -- that you certified it a class action --

THE COURT: I understand.

MR. LINDEMANN: -- that it meets the five requirements of it, that's also part of our Rule 59 motion, the second one. And certainly my representations on this are not a waiver.

THE COURT: Sure. Assuming arguendo, however, that I deny your motion to reconsider certifying the class in the first place, the procedure of how that's going to happen, then this will be the way to handle it according to you.

MR. LINDEMANN: That's correct.

(Tr. p. 15, line 3-p. 16, line 4) (R. p. 208, line 3- p. 209, line 4).

DSS may not concede the issue at the trial court and object to it, now for the first time on appeal.²⁴

In this interlocutory appeal, DSS cites Doe v. Howe²⁵ which sets forth a three-part test which must be met for an order to be appealable. The order on appeal must, 1) conclusively determine the question, 2) resolve an important question independent of the

²⁴ Tucker v. John Doe, Opinion No. 5338 S.C. Court of Appeals, heard June 3, 2015 - filed August 5, 2015. See also City of Greer v. Humble, 402 S.C. 609, 614 742 S.E.2d 15, 18 (Ct. App. 2013) (stating that an issue conceded in the trial court cannot be argued on appeal.)

²⁵ 362 S.C. 212, 607 S.E.2d 354 (2004).

merits, 3) and is effectively unreviewable from a final judgment.²⁶ None of these three factors are met in our present case. The trial court order does not conclusively determine the question of notice to class members, as this notice has yet to be prepared, has yet to be critiqued by opposing counsel, and has yet to be ordered. This order does not resolve an important question independent of the merits because, as argued in the previous section of this brief, DSS seeks to protect a right that does not exist. Finally, the lower court order is not effectively unreviewable, as no order specifying the form, content and procedure of the notice has yet to be issued. In short, DSS has conjured up a purported right of confidentiality which they are now attempting to bootstrap to allow review of an otherwise unreviewable class certification order.

III. The Circuit Court did not abuse its discretion in certifying the class because the class representative proved the element of commonality.

a. Introduction

The issue of class certification is not properly reviewable for all the reasons cited in the foregoing. However, even if the Court were to find that this issue is currently reviewable, the following illustrates why the lower court did not abuse its discretion in finding the element of commonality was met.

Circuit courts enjoy discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d).²⁷ South Carolina Appellate Courts “generally defer to the trial court’s discretion in granting class certification absent an error of law.”²⁸ Rule 23(d) requires the court to determine whether a class action is to be maintained as soon as

²⁶ Howe, 362 S.E. 2d at 216.

²⁷ Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998).

²⁸ Gardner v. S.C. Dep’t of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003); *See also Waller v. Seabrook Island Property Owners Ass’n*, 300 S.C. 465, 388 S.E.2d 799 (1990) (Finding that South Carolina Appellate Courts generally defer to the trial court’s discretion in granting class certification absent an error of law).

practical after the commencement of an action.²⁹ The court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23.³⁰

In a case analogous to the case at bar, our Supreme Court found that the lower court abused its discretion in denying class certification where the common claim was the misapplication of a statute by a state agency.³¹ In that case, the Court held that class treatment is especially appropriate where the number of potential plaintiffs is large, there was one main issue of law identical for all plaintiffs, all injuries resulted from the same act, and calculation of damages would not be difficult.³² These factors are all present in the case at bar and accordingly this Littlefield decision is most instructive.

While not binding on this Court, it is worth noting that the U.S. District Court previously certified this same class based on a nearly identical class definition under a much stricter Federal Rule 23.³³ (R. pp. 76-84). The drafters of South Carolina's Rule 23 intentionally omitted from our state rule the additional requirements found in Federal Rule 23. By omitting the additional requirements, South Carolina Rule 23 endorses a more expansive view of class action availability than its federal counterpart.³⁴ For example, contrary to the federal rule, South Carolina has no requirement that the class issues predominate or that class status is the superior method of adjudication.³⁵ In fact, the South

²⁹ Rule 23(d), SCRCP.

³⁰ Rule 23, SCRCP.

³¹ Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).

³² Id.

³³ BLH (dob 2/20/97), by parents Kenneth and Angela Hensley, AND on behalf of all other similarly situated v. Lillian Koller, et al 7:11-cv-02827-GRA (2012).

³⁴ Id. at 354–55, 523 S.E.2d at 784.

³⁵ Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing Rule 23, SCRCP).

Carolina Rule requires only that the “court find” that the above five elements are met.³⁶ The following illustrates why the lower court did not abuse its discretion in doing so.

b. There is commonality of factual and legal issues in this case.

Rule 23(a)(2) of the South Carolina Rules of Civil Procedure requires that there be “questions of law or fact common to the class.”³⁷ Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue.³⁸ “Not every issue in the case must be common to all class members.”³⁹ “It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. A single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.”⁴⁰

In this case, the common claim is that Defendant unilaterally breached the form contract it had with approximately four thousand (4,000) recipients of adoption subsidy benefits. The undisputed⁴¹ facts of the case are that this alleged breach of contract for these four thousand contracting parties took place at precisely the same time (2002), in precisely the same manner (letter sent to all families), and in precisely the same amount (twenty dollars (\$20) per month). There are undoubtedly multiple common questions of fact as each

³⁶ Rule 23(a), SCRCPP.

³⁷ Rule 23(a)(2), SCRCPP.

³⁸ Gardner, at 21-22, 577 S.E.2d at 200-01.

³⁹ Id.

⁴⁰ McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) (“Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.”).

⁴¹ Defense counsel has stipulated in lower court proceedings that there is “no doubt there is a common issue of fact that each of these parties signed a contract” and “no doubt there was \$20 across the board deduction in the adoption subsidy payments.” (R. p. 216. lines 6-8, 11-12).

named Plaintiff and each putative class member is subject to the same action by Defendants.

There are also common questions of law. Just like in Littlefield, Respondents in this case claim that a Defendant state agency misapplied a statute in applying across-the-board cut of contractually guaranteed benefits. More specifically, the questions are:

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

These legal claims are the same for all class members and are particularly appropriate for class certification because of the form contract used for all class members. Courts across the country have found that “claims arising out of form contracts are particularly appropriate for class action treatment.”⁴² Another such case is La Sala v. American Sav. & Loan Ass’n. In that case, the California Supreme Court held that “[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication: the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party.”⁴³

There are common questions of law and the common determinative facts have been stipulated to. This is a classic case for class certification.

⁴² Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995).

⁴³ La Sala v. American Sav. & Loan Ass’n, 5 Cal. 3d 864, 877, 489 P.2d 1113, 1121 (1971).

c. Appellant's attempted analogy to the Gardner case is without merit.

Appellant partially quotes Gardner v. South Carolina Dep't of Revenue as holding that "a representative class cannot exist where the court must investigate each plaintiff's prejudice claim . . ."⁴⁴ First, Appellant's citation is incomplete. The complete quote is "a representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case."⁴⁵ This additional language is important as it further clarifies that the Court is addressing the elements of Plaintiff's claim for relief, not a purported defense as Appellant suggests. Appellant's attempted analogy of Gardner to this case therefore misses the mark because prejudice is not an element of a claim for breach of contract. Indeed, Plaintiff and the Class are seeking relief under basic breach of contract principles as follows:

1. "The necessary elements of a contract are an offer, acceptance, and valuable consideration."⁴⁶
2. The South Carolina General Assembly requires the Department of Social Services to execute a written agreement with adoptive parents whenever it determines that a child is eligible for supplemental benefits. S.C. Code Ann. § 63-9-1770 (A)(formerly § 20-7-1950).
3. When a state agency or commission is statutorily required or authorized to contract, the contract, by necessary implication, carries with it the authority to enforce the contract by an action at law.⁴⁷

⁴⁴ Appellant's Initial Brief, p. 23.

⁴⁵ Gardner, at 22, 577 S.E.2d at 201.

⁴⁶ Sauner v. Pub. Serv. Auth. of S. Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).

⁴⁷ Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Chesterfield noted that a contract would otherwise be one-sided, where

4. When there are conflicts in a contract's interpretation "a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."⁴⁸ This is especially so for adhesion contracts.⁴⁹
5. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.⁵⁰ This covenant requires that neither party will do anything which will injure the right of the other to receive benefits of the agreement.⁵¹

No showing of prejudice is required in order for Plaintiff Class members to prevail on their breach of contract claims and accordingly Gardner is inapposite on this issue.

d. The individual defenses raised by appellant lack merit.

Appellant's arguments against commonality essentially ask the court to accept the merit of the various defenses Appellant has plead, which is generally inappropriate at this stage. Further, the mere existence of individual issues does not defeat class action status."⁵²

Finally, Appellant's argument lacks merit because the defenses it raises are just that: defenses. Nothing in the class certification cases cited by Appellant, including Gardner, says that certification requires analysis of purported defenses. All that is required is that the

the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).

⁴⁸ Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).

⁴⁹ Southern Atlantic Fin. Serv., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App. 2002) ("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.").

⁵⁰ Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).

⁵¹ Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).

⁵² McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.").

Plaintiff's claims have a single common issue.⁵³ The historical "purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."⁵⁴ The single common issue, much like the Littlefield case, is; did the state agency misinterpret the law in cutting contractually guaranteed benefits to the Plaintiff's Class? Appellant is trying to bootstrap an individualized inquiry by adding an affirmative defense that requires proof that the claimant intended to decrease the amount of money they received from the state. This approach has never been accepted by any South Carolina court and should not be accepted in this case. If Appellant's interpretation of the law were accepted then all that would be required to defeat class certification in any breach of contract or consumer fraud case would be pleading an affirmative defense, which purportedly required individual evaluation of each case. This is not the law in South Carolina and Appellant's arguments regarding individual inquiry should be rejected.

i. Implied consent is not a proper defense.

Even assuming it would be proper for the Court to evaluate alleged defenses for purposes of class certification, implied consent is not a proper defense to the Class breach of contract claim. The only cases cited by Appellant in support of this defense involve oral employment contracts. The implied consent defense in those cases is limited to employment wage cases. Specifically, the law on which both those decisions are based is: "the same scale of wages is held to continue from one term to the next; until the employee has had actual notice of a reduction either directly from his employer, or indirectly through his fellow employees."⁵⁵ This is not a wage case and accordingly implied consent is not

⁵³ Id.

⁵⁴ O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) (emphasis added).

⁵⁵ Cooksey v. Beaumont Mfg. Co., 194 S.C. 385, 9 S.E.2d 790, 792 (1940) (citing 39 C.J. 175).

a proper defense. Appellant does not even attempt to explain how the defense would be proven in this case or what the elements of the defense would be. Further, Appellant would carry the burden of proof in showing a defense of implied consent. For all the reasons outlined above, it is the elements of the class claim, not affirmative defenses, that are the proper inquiry for a determination of commonality. Implied consent is not a proper defense and even assuming it was, it is not relevant to an analysis of commonality.

ii. Novation

The burden of proving novation is on the party asserting it.⁵⁶ The party asserting novation must prove “the intention to substitute a new obligation in place of the existing one.”⁵⁷ The holding in Gardner was that class certification is improper if an element of Plaintiff’s claim would require individual inquiry. Specifically, the Court stated: “Plaintiffs cannot prevail unless they establish they were prejudiced . . . A representative class cannot exist where the court must investigate each plaintiff’s prejudice claim where it is one of the two predominate issues in the case.”⁵⁸ As noted above, the class certification analysis is conducted on the elements of Plaintiff’s claim, not on concocted defenses. Accordingly, Appellant’s argument on novation is without merit.

iii. Renewal agreement , appeal, early termination

Appellant’s arguments that the claims require individual inquiry on the issues of renewal, appeal, and early termination are all relevant only to the amount of damages suffered by each class member. Again, there is no requirement under South Carolina law that each class member has suffered the exact same amount of damages. South Carolina

⁵⁶ Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct.App.1990) (citation omitted).

⁵⁷ Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973).

⁵⁸ Gardner, at 22, 577 S.E.2d at 201.

courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member.⁵⁹

In McGann v Mungo, hundreds of residents and owners of improved residential properties in Cold Stream (a subdivision near Columbia) filed a class action concerning negligent design and construction of streets and drainage systems. The defense in that case argued that each class member's individualized damages prevented the Court from certifying the case as a class action. In rendering its decision, the South Carolina Court of Appeals attached no significance to the undisputed fact that each class member had different damages: The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.⁶⁰

McGann has been cited consistently by the Courts of this state and no less than eleven times by the South Carolina Supreme Court in ruling on class certification cases, which is consistent with the historical "purpose of a class action [which] is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."⁶¹

Furthermore, the question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Appellant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Appellant's actions are determined to violate

⁵⁹ Littlefield, 337 S.C. at 355, 523 S.E.2d at 784; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the proposed representatives' claims).

⁶⁰ McGann, 340 S.E.2d at 158.

⁶¹ O'Quinn, at 104, 249 S.E.2d at 738 (emphasis added).

the law. Further, Appellant can easily determine if there was a renewal, appeal, or early termination, which, admittedly, may reduce the damages to which that particular claimant would be entitled.

Finally, even assuming Appellant is correct that renewal, appeal, or early termination would cause some type of issue to the lower court, any such issue could be remedied by revising the class definition as necessary given the circuit court's authority to redefine the class as appropriate.⁶² This is among the many reasons an interlocutory appeal of class certification is improper.

iv. Damages to third-party beneficiaries do not require individual inquiry.

Third-party beneficiaries (BLH and the putative class members) have the right to enforce all of the terms of a contract intended for their benefit.⁶³ There is no requirement under the law that the third-party beneficiaries show that the contractually owed amount, if paid, would have actually been used for the third-party beneficiary's benefit. It is enough to show that there was a breach in the contract and the damages that consequentially flowed from the breach. In this case, the contract at issue clearly is intended for the benefit of the child and the child has the right to enforce that contract.

Further, in evaluating class certification, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the

⁶² Littlefield, 337 S.C. at 354, 523 S.E.2d at 784

⁶³ 30 S.C. Jur. Contracts § 68 (citing Svenningsen v. Knight, 286 S.C. 299, 303, 333 S.E.2d 78, 81 (Ct. App. 1985) ("a contract between two persons for the benefit of a third can be enforced by the third person even if he is not named in the contract"); see also, R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n., 384 F.3d 157, 164 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person) (citing Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827, 833 (1997)).

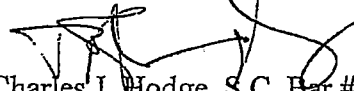
claim is really for less than the jurisdictional amount to justify dismissal.”⁶⁴ The Plaintiff’s Class claim for damages was made in good faith and it controls on this issue. Appellant’s speculative argument that perhaps the third-party beneficiaries received the same care anyway is without merit as the damages caused by the breach are tangible, identifiable, and real. For the foregoing reasons, the lower court did not abuse its discretion in certifying the class and finding Plaintiff’s class met the element of commonality.

⁶⁴ Gardner v. Newsome Chevrolet-Buick Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 201-02 (1991)(emphasis in original).

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Court should dismiss the appeal and remand the case to the circuit court.

Respectfully submitted:



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June 9, 2016

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STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Judge

RECEIVED

JUN 10 2016

SC Court of Appeals

Appellate Case No. 2014-002254

BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of
all others similarly situated, Respondent,

v.

South Carolina Department of Social Services, Appellant.

CERTIFICATE OF SERVICE AND COMPLIANCE WITH 211(b)

This is to certify that I did serve on this date a copy of **RESPONDENT'S FINAL BRIEF** in the above-mentioned matter on the person(s) listed below by enclosing a copy of same in an envelope with sufficient postage thereon prepaid in the United States mail, addressed as follows:

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This will further certify that Respondent's Final Brief is in compliance with SCACR 211(b).


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June 9, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Brian M. Gibbons, Circuit Court Judge

Case No. 2013-CP-42-1569

RECEIVED
JUN 09 2016
SC Court of Appeals

BLH by parents/general guardians Kenneth and
Angela Hensley, and on behalf of all others similarly
situated, ... Respondent,

v.

South Carolina Department of Social Services, ... Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

- I. **The certification of the class and the notification process put into place by the Circuit Court violates the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.**

In its opening brief, the Appellant South Carolina Department of Social Services expressed grave concerns that the class action process is being applied in this case to violate the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents. As DSS points out, it is not those participants in the adoption process that are seeking confidential information for their own purposes or to disclose that information to adopted children who may currently be unaware of their status as such. It is the class representative and class counsel that seek that information, which makes this situation unique as well as troubling.

In response, the Respondent BLH does not confront this issue directly. Instead, BLH proclaims in conclusory fashion that "the certification of the class and the notification process does not violate the statutory or constitutional rights of confidentiality, privacy or due process." See, Respondent's Brief, p. 6. Then BLH further argues that DSS is taking the position in this appeal that a child's adoptive status should be shrouded in secrecy and that such a position is contrary to the policies and advice typically offered by DSS to adoptive parents.

BLH, however, has totally misconstrued DSS's position and concerns. DSS is not even remotely suggesting that adoption is a stigma or should be shrouded in secrecy. DSS does encourage parents to advise children of their adoptive status. But that is ultimately a familial decision that DSS cannot make for the parents. There is recognition, which BLH does not dispute, that some adoptive parents choose for a variety of reasons not to disclose the adoptive status to their adopted children. That is a personal decision to be made by the parents and not by the State.

While BLH is correct that there is not a case holding that a child's adoptive status should be kept secret, there is a whole body of authority that recognizes the due process rights of parents to make child-rearing decisions without interference from the government. The United States Supreme Court has recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The Supreme Court has observed that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Similarly, the Fourth Circuit Court of Appeals has held that "[m]uch like the foundational concept of individual privacy, the sanctity of the family unit is a fundamental precept firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment." *Hodge v. Jones*, 31 F.3d 157, 163

(4th Cir. 1994). "The bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994). "The concept of familial privacy has been restricted by the Supreme Court to (1) thwarting governmental attempts to interfere with particularly intimate family decisions, and (2) voiding government actions that sever, alter, or otherwise affect the parent/child relationship." *Hodge*, 31 F.3d at 163.

In short, contrary to any suggestion by BLH to the contrary, there are certainly constitutional rights at play that must be examined closely and great effort made to protect. That is the concern voiced by DSS. To reiterate, the decision to disclose a child's adoptive status is that of the parent, and for the state to make or sanction that disclosure — particularly under the unique and unprecedented circumstances presented by this class action lawsuit — would interfere with the sanctity of the parent-child relationship. That intimate family decision falls within the protections of due process and should be safeguarded.

BLH also complains that DSS has made the claim without any evidentiary support that there are likely certain adoptive children who qualify as class members who are unaware of their adoptive status and would learn of that status only upon receipt of the court-ordered and sanctioned Notice of Class Action. BLH, nonetheless, cites to a report from the United States Department of Health and Human Services to the effect that 97% of children ages five and older know

they were adopted. In so doing, BLH suggests that a majority of children know of their adoptive status; yet that misses the point entirely. It is not alright that only three percent of families will have their rights to confidentiality, privacy and due process violated. If even one family will have their constitutional rights violated, that is not something that the courts should order to occur and sanction with the imprimatur of the state. And, that is particularly true since those due process rights would be violated only to allow a class action lawsuit to proceed that will result in a maximum recovery of less than \$3,000 for any one class member. The class members will receive at most \$240 per year for the number of years since 2004 that their adoptive parents were receiving an adoption subsidy from DSS.

In sum, DSS is not taking this position to suggest that adoption is a stigma or should be shrouded in secrecy. DSS is taking this position to make certain that fundamental rights are protected. The decision of an adoptive parent to reveal to their child that he or she is adopted is an intimate family decision. The state can make a recommendation that disclosure is beneficial, but the state does not mandate that. Instead, it is a decision that is protected by such fundamental rights as privacy and due process. Quite simply, contrary to BLH's assertions, DSS is not attempting to protect a right that does not exist.

II. The critical issues of confidentiality, privacy and due process as discussed herein are immediately appealable under existing precedent.

In its opening brief, DSS explained that the critical issues of confidentiality, privacy and due process are appropriate for consideration by way of an interlocutory appeal. In response, BLH contends that the appeal is premature. BLH contends that DSS should have waited until BLH prepared the Notice of Class Action and submitted it to the Circuit Court for approval before this issue was pursued on appeal. BLH claims that, until the language of the notice is approved and the procedure for dissemination of the notice is determined, there is no issue for this Court to even consider. BLH further contends that Judge Gibbons did not consider or address the issues raised in this appeal. DSS disagrees for several reasons.

First, the order on appeal certified the class action and, in doing so, set forth the procedures to be followed in notifying the class members and described what was to be included in the notice. The order on appeal also addressed issues of confidentiality and directed DSS to produce the names and available addresses of any potential class members to the class counsel. The provisions as contained in that order are sufficient enough to warrant this appeal and allow for a review on the merits.

Second, BLH contends that Judge Gibbons did not specifically address the issues of confidentiality, privacy and due process. Counsel for DSS did raise to Judge Gibbons the issues raised in this appeal, and there is no question that Judge

Gibbons did discuss confidentiality provisions in his order. The order does not, however, protect the rights of families where a decision was made not to disclose the adoptive status to the child. Nonetheless, it is fair to conclude that the issues are incorporated in his decision and that Judge Gibbons intended to proceed as he ordered despite the concerns raised.

Third, while it is certainly possible to allow the Notice of Class Action to be prepared and presented to the Circuit Court before this appeal is heard, that would accomplish nothing more than to waste judicial resources, waste the parties' resources and result in further delay of this litigation. The issues are legal ones. The parties have fully briefed the issues. There is no real purpose for finding this appeal premature and requiring DSS to re-file after the Notice of Class Action is prepared and approved by the Court.

Finally, BLH cites to a portion of the transcript of the April 4, 2015 hearing to suggest that DSS agreed to the entire procedure that Judge Gibbons ultimately adopted. However, the issue being addressed in that transcript excerpt was the earlier ruling by Judge Gibbons that placed the duty of notifying the class on DSS rather than class counsel. DSS's counsel indicated that he agreed that the burden of notification of the potential class, including expenses, was to be borne by the class counsel. DSS's counsel reiterated at that time that the order would need confidentiality provisions in place to allow for DSS to provide the names and addresses of class members to class counsel. However, DSS's counsel did not waive

objection to nor consent to any process that would potentially impair the confidentiality, privacy and due process interests of persons who were not even before the court, including potential class members and their families. From a logical standpoint, DSS would not have the standing or authority to waive the statutory and constitutional rights of others.

In sum, an interlocutory appeal is appropriate under the test set forth in *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). The Court is therefore urged to proceed with addressing this important issue. It has been fully briefed and is ripe for consideration. And it needs to be resolved so that the rights of persons not even before the court are not impaired.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully renews its request that this Court reverse the class certification orders issued by Judge Brian Gibbons, including the notification process which will necessarily inform class members that they are adopted children and which is in violation of the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.

Respectfully submitted,

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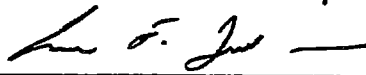
CERTIFICATE OF COUNSEL

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JUN 09 2016

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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APPX0344

CERTIFICATE OF COMPLIANCE

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SC Court of Appeals

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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APPX0345

CERTIFICATE OF SERVICE

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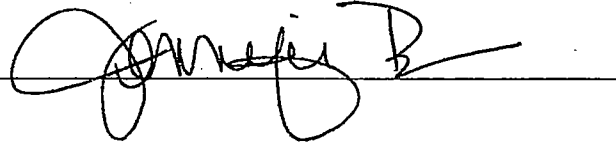
JUN 09 2016

SC Court of Appeals

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, South Carolina Department of Social Services does hereby certify that service of the final **Reply Brief of Appellant** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of June 2016:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BLH by parents/ general guardians Kenneth and Angela
Hensley, and on behalf of all others similarly situated,
Respondent,

v.

South Carolina Department of Social Services,
Appellant.

Appellate Case No. 2014-002254

Appeal From Spartanburg County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5556
Heard May 11, 2017 – Filed April 25, 2018

REVERSED

Andrew F. Lindemann and Joel Steve Hughes, both of
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Charles J. Hodge and T. Ryan Langley, both of Hodge &
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for Respondent.

MCDONALD, J.: This case involves the alleged breach of adoption assistance subsidy [AAS] agreements by the South Carolina Department of Social Services (DSS). DSS contends (1) the circuit court erred in certifying a class when the class representative failed to prove the necessary element of commonality, and (2) the

class certification and notification process violates the statutory and constitutional rights of potential class members and their families. We agree that the circuit court erred in granting class certification.

Facts and Procedural History

In April 2013, minor BLH brought this action against DSS through her adoptive parents, filing her complaint as a potential class action on behalf of "All children, age 19 or younger on the date of the Motion for Class Certification (January 6, 2012), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and [DSS], executed on or before June 20, 2002."¹ The complaint alleged DSS breached its AAS contracts with class members by unilaterally cutting adoption assistance benefits to special needs children by twenty dollars per month, beginning in June 2002.²

In October 2013, BLH moved to certify the class pursuant to Rule 23, SCRCF.³ At an April 2014 hearing, BLH argued the commonality requirement was satisfied because DSS cut all class members' benefits at the same time and in like manner. DSS disagreed, relying on *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), to support its argument.

¹ The circuit court stated there were approximately 4,000 affected children. DSS cut similar subsidies for special needs children in foster care as well; however, DSS restored the foster care benefits in 2004.

² In September 2011, BLH's adoptive parents sued DSS and four former directors on the same facts in a case removed to federal court. *See Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). The District Court certified the class, but the Fourth Circuit concluded parents could not establish the DSS directors violated their clearly established rights under the federal Adoption Assistance and Child Welfare Act of 1980. *Id.* at 180, 183. Thus, the Fourth Circuit found the directors were entitled to qualified immunity. *Id.* at 183.

³ *See* Rule 23(a), SCRCF (setting forth numerosity, commonality, typicality, adequacy of representation, and the amount in controversy as the five elements that must be satisfied for class certification).

After the hearing, the circuit court issued a Form 4 order granting class certification. DSS moved for reconsideration and requested a formal order addressing its commonality argument.

On May 21, 2014, the circuit court issued a more detailed order. Concerning commonality, the court ruled there were two "critical common questions of law and fact," namely: (1) whether the benefits cut breached the contracts with the families of adopted children or violated the implied duty of good faith and fair dealing, and (2) whether, in light of DSS's reinstatement of benefits for families of foster care children, the failure to reinstate benefits for families of adopted children breached the contracts or violated the implied duty of good faith and fair dealing. Separately, the court ordered an "opt-out" notice procedure and ordered DSS—which the court found "regularly corresponds or has previously corresponded with all class members"—to serve each class member a notice "which shall advise them of the facts of this case and their right to opt out within 30 days."

In August 2014, DSS filed a second motion to reconsider and requested oral argument. In the motion, DSS again asked the court to rule on its position that BLH could not satisfy the commonality element required by Rule 23 and *Gardner*. DSS further argued the court erred in establishing notice procedures without giving DSS an opportunity to be heard and in requiring DSS to bear the burden and expense of notifying potential class members.

On September 16, 2014, the circuit court filed an amended order, but the only change related to the class certification issue was the court's inclusion of language indicating it had also relied on two affidavits.⁴ On September 30, 2014, DSS filed a third motion for reconsideration requesting a formal order adjudicating the issues raised in its second motion for reconsideration.

On October 16, 2014, DSS appealed; the court of appeals stayed the appeal until the circuit court could rule on DSS's third motion for reconsideration.

In February 2015, the circuit court held a hearing on the third motion for reconsideration. Regarding the notice issue, DSS consented to providing BLH with information about potential class members but asserted it should not be required to notify potential class members of the opt-out procedures. Additionally, DSS again challenged the commonality requirement, citing *Gardner*. On the

⁴ These affidavits do not appear in the record, and any issues concerning them were not appealed.

record, the circuit court denied reconsideration of the class certification, but granted DSS's request to make BLH responsible for notifying potential members of the class of the opt-out procedures. However, DSS was required to provide BLH with information about potential class members within ninety days of the circuit court's filing of its formal order. The parties agreed the formal order would include language protecting the confidentiality of the parties involved. The court asked BLH to prepare a proposed order and submit it to DSS.

On April 1, 2015, DSS sent the circuit court and BLH an alternative proposed order. DSS's proposed order included language that allowed for the production of names and addresses but "protect[ed] the identities of persons who have been adopted to the extent possible." DSS expressed concern that the class action notices might be the "first information" some class members receive that informs them they were adopted. DSS also questioned what legal authority minors would have to opt out of a class action. DSS requested that these issues be addressed before the notices were mailed in order to ensure DSS and its lawyers had no liability for "sending . . . adopted children a class action notice that tells them that they were adopted."

BLH responded that the procedures in its proposed order provided for confidentiality and it saw "no reason" for the notices to inform the children that they were adopted. BLH also clarified the notices would be sent to the children's adoptive parents, not the children themselves. In an email two days later, DSS further objected to language in BLH's proposed order requiring that it provide copies of the potential class members' AAS contracts, arguing there had been no discussion about whether DSS would have to "produce thousands of contracts within [the] 90 day timeframe." DSS also asserted that mailing the notices to the adoptive parents did not solve the confidentiality problem because some of the children were no longer minors. Finally, DSS argued there was no way to explain the suit to potential class members so that they could make an informed opt-out decision without mentioning that they were adopted.

On April 30, 2015, the circuit court issued another order. As to commonality, the court found it determinative that DSS had stipulated that each of the potential class members signed a contract for AAS payments, and there was a subsequent twenty dollar reduction in payments. The court stated, "Given the abundance of common issues, ease of [DSS's] access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar." Regarding the notice procedure, the court found "good cause" was shown

under the relevant adoption confidentiality law to require DSS to provide the names and addresses of potential class members to BLH. However, the court ordered the information was to remain confidential, was to be redacted in public filings, and could not be disseminated to third parties. All correspondence to class members was to be marked "Confidential." On June 8, 2015, DSS amended its notice of appeal to include the April 30 order.

Law and Analysis

A. Appealability

"The general rule established by [our supreme court] is that class certification orders are not immediately appealable." *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008). The supreme court has, however, "reviewed interlocutory orders involving class certification when they contain other appealable issues." *Id.* at 449, 661 S.E.2d at 85. DSS argues the challenged orders are immediately appealable because if the identities of the class members are revealed, the resulting harm cannot be corrected. To support its argument, DSS cites *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006).

In *Howe*, a client attempted to sue his attorney anonymously for breach of fiduciary duty and professional negligence. 362 S.C. at 215, 607 S.E.2d at 355. The client moved to proceed anonymously because the underlying matter was a civil suit alleging sexual abuse, but the circuit court denied the motion. *Id.* On appeal, this court explained that "[u]nder the collateral order analysis employed by the federal courts, the order is appealable if it (1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." *Id.* at 216, 607 S.E.2d at 356. Under this framework, this court held the appealability criteria were met because the order denying the client's motion to proceed anonymously "ha[d] the effect of revealing his identity, the very thing he was seeking to keep confidential." *Id.* at 217, 607 S.E.2d at 356.

Ex parte Capital involved a company that attempted to unseal the divorce records of an employee who had admitted to embezzling from the company. 369 S.C. at 4–5, 630 S.E.2d at 466. The employee appealed an order permitting the company to examine the divorce records to inspect the employee's financial representations. *Id.* at 5, 630 S.E.2d at 466. Our supreme court held the order unsealing the records "determined a substantial matter forming the whole or part of the family court

proceeding in which [the company] sought access to the record of the [employee's] divorce. No further action is required in the family court to determine the parties' rights; therefore, the order is immediately appealable" *Id.* at 7–8, 630 S.E.2d at 468. "Moreover, [the supreme court] agree[d] with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." *Id.* at 8, 630 S.E.2d at 468. The court wrote that "[c]ompelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the [lower] court's directive was ultimately found to be erroneous." *Id.* (quoting *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 9 (1st Cir. 1998)).

We find *Howe* and *Ex parte Capital* instructive. Like those cases, this case involves the disclosure of personal and potentially sensitive information for which there would be "no appellate remedy . . . likely to repair any damage done by an improper disclosure." *Ex parte Capital*, 369 S.C. at 8, 630 S.E.2d at 468. Therefore, we hold this case is properly before the appellate court.

B. Commonality

DSS asserts BLH cannot satisfy the necessary element of commonality because numerous individualized inquiries of potential class members are needed in this case. We agree.

"Proponents of class certification bear the burden of proving five prerequisites under South Carolina law." *Gardner*, 353 S.C. at 20, 577 S.E.2d at 200. "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Id.* at 21, 577 S.E.2d at 200. "We generally defer to the trial court's discretion in granting class certification absent an error of law." *Id.*

Failure to establish any prerequisite is fatal to class certification; therefore, we limit our discussion to BLH's inability to prove commonality. *Id.* ("Because failure to satisfy even one prerequisite is fatal to class certification we limit our discussion to the Named Plaintiffs' inability to prove commonality."). "To establish commonality, a party must show that 'there are questions of law or fact common to the class.'" *Id.* (quoting Rule 23, SCRPC). "In practical terms this means the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together." *Id.* (quoting *Boggs v. Divested Atomic Corp.*,

141 F.R.D. 58, 64 (S.D. Ohio 1991)). "Critically, '[n]ot every issue in the case must be common to all class members.'" *Id.* (quoting *O'Connor v. Boeing N. Amer., Inc.*, 184 F.R.D. 311, 329 (C.D. Cal. 1998)). "Commonality is met only where the class shares a determinative issue." *Id.* at 21, 577 S.E.2d at 200–01.

Gardner involved several taxpayers who sued the Department of Revenue and other agencies for improperly seizing their tax refunds due to their outstanding debts with the agencies. 353 S.C. at 8, 577 S.E.2d at 194. The circuit court certified a class "'composed of all persons who had their 1996, 1997, or 1998 South Carolina income tax refund seized' by certain enumerated agencies." *Id.* at 19 n.11, 577 S.E.2d at 199 n.11. The taxpayers asserted the "common thread" was that they all had their refunds seized without proper notice. *Id.* at 22, 577 S.E.2d at 201.

On appeal, the supreme court found there were two common questions of law: (1) whether the notices were deficient and (2) whether the deficiency prejudiced the taxpayers. *Id.* However, the court ultimately held there was no commonality, explaining:

This is not a typical class action where minor factual differences exist among the individualized cases of class members. Instead, the factual differences (whether prejudice exists) are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit.

Id. (citation omitted).

We find this case analogous to *Gardner* as there are more than "minor factual differences" among the various class members. This is not a case in which the relevant inquiry merely involves plaintiffs who "may be entitled to different amounts of damages." *See McGann v. Mungo*, 287 S.C. 561, 569, 340 S.E.2d 154, 158 (1986) (recognizing Rule 23(a)(2) "does not demand that all questions of law and fact be common"). Several issues here will require individualized inquiry, such as whether each set of adoptive parents accepted or consented to the reduction in payments, exhausted any available administrative remedies, entered into renewal agreements, or at any pertinent time terminated their agreements. Accordingly, we

hold the necessity of such individualized inquiries "negates the benefits of a class action suit." *Id.*

Conclusion

We reverse the grant of class certification.⁵

GEATHERS and HILL, JJ., concur.

⁵ Because we find BLH failed to establish commonality, it is unnecessary that we address the constitutional and statutory concerns raised in DSS's challenge to the notification process. *See Gardner*, 353 S.C. at 20, 577 S.E.2d at 200 (limiting its consideration to the element of commonality).

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED

MAY 09 2017

1st Court of Appeals

Appellate Case Number 2014-002254

BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Respondents,

v.

South Carolina Department of Social Services, Appellant

PETITION FOR REHEARING

Respondents ask the Court to review whether it overlooked or misapprehended the standard of review; the text of Rule 23, SCRCPP; and three distinctions between this case and *Gardner v. South Carolina Dep't. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). The Court should withdraw its Opinion and either affirm the circuit court or more specifically address these issues.

I. The Opinion does not explain how the circuit court abused its discretion.

"A trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion." *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). Appellate courts thus "generally defer to the trial court's discretion in granting class certification

absent an error of law.” *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200. Respondent earlier emphasized this limited standard of review. Respondent’s Brief at 13.

The Opinion states this standard yet reverses because it views the *Gardner* decision as more “analogous” to this case than did the circuit court. Opinion at 6-7. The circuit court concluded that *Gardner* was not analogous because the prejudice issue that created the individualized inquires in that case was one of the two elements that each plaintiff in *Gardner* had to prove to establish its claim. ROA 12-13, 28-30. The circuit court found that this was not true here as there was no prejudice element to the causes of action in the case at bar. ROA 10-14, 26-30, 39-40.

A few facts put this in context. In June 2002, the then-Director of DSS issued across-the-board cuts in the adoption subsidies that DSS had contracted to pay some 4,000¹ families, including BLH’s adoptive parents. ROA 3, 19-20, 131-133, 216 lines 8-12, 226 lines 6-9. In 2004, the DSS rescinded a similar cut in subsidies for children in foster care yet has never restored the cut in benefits for adoptees whose adoptive parents had earlier accepted all the legal responsibilities of parenthood. ROA 3, 19-20.

BLH alleges a single count against DSS for a breach of contract. ROA 52 ¶¶ 18-20. To establish a prima facie case, Respondent and other similarly situated adoptees need only show the existence of a contract, its breach, and damages caused by the breach. *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015)(citing elements for a breach of contract).

The circuit court ultimately certified a class of adoptees who had “at least five (5) months of lost benefits due to the cut in the assistance agreement[s] beginning on the date of the foster care reinstatement in 2004.” ROA 41-42. The court ruled that the common issues it certified

¹ While the initial approximate number alleged was 4,000; DSS has indicated in discovery responses that only about 1,600 meet the class definition.

determine the class member's prima facie case because DSS stipulated that it made a fixed, across-the-board cut in the amount of the adoption subsidies that it had contracted to pay adoptive parents. ROA 39-40. To the circuit court, this means that the lawfulness of the DSS's simultaneous, unilateral cut in the amount it contracted to pay determines every element of every class member's prima facie claim such that liability for the breach of contract may be established—or defeated—in one stroke. ROA 10-14, 26-30. And the fact that there was “a uniform, across the board cut of benefits, in the exact amount, at the exact same time[,]” is also what the federal court similarly focused on when it found that the common issues not only exist but predominate. ROA 80.

So how one views the strength of the analogy to *Gardner* depends on how one views the relative importance in having one proceeding resolve 4000 breach of contract claims. The abuse of discretion standard normally leaves such judgment calls to the circuit court. To reverse, the Opinion should explain how that court crossed out of its zone of discretion into reversible error. As it is now, it seems that the Court simply substituted its judgment for that of the circuit court.

II. The Court did not apply the text of Rule 23, SCRPC.

This Court further concluded that the individual defenses that DSS identified negate the benefits of a class action on the common questions that were certified. Opinion at 7-8. This misreads Rule 23, SCRPC, in three ways.

First, the Court is reading predominance and superiority requirements into the rule. The official commentary to Rule 23(a), SCRPC, notes that the rule “is drawn principally from Federal Rule 23(a).” The federal rule differs from the South Carolina rule, however, in that federal class actions for damages also require that the common issues predominate and that this predominance render the class action method superior to other ways of resolving the case. *See*,

e.g., *Deposit Guar. Nat. Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326, 329 n. 2 (1980)(describing Federal Rule 23(b)). The text of the South Carolina rule lacks these predominance and superiority requirements.

Nearly 20 years ago, the Supreme Court of South Carolina described these omissions as “intentional.” The Court stated, “The drafters of Rule 23, South Carolina Rules of Civil procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP endorses a more expansive view of class action availability than its federal counterpart.” *Littlefield v. South Carolina Forestry Comm’n*, 337 S.C. 348, 354-355, 523 S.E.2d 781, 784 (1999). Then, years after *Gardner* was rendered in 2003, the Court repeated the same observation that these omissions were intentional. *Grazia v. South Carolina Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). After that, new terms were added to Rule 23, SCRCP, in 2016. But the rule has never been amended to add the predominance and superiority requirements that the drafters intentionally omitted.

In this case, the circuit court repeatedly cited *Littlefield* to note that neither predominance nor superiority is required to certify a class. ROA 9, 25. Respondents made the same point on appeal. Respondent’s Brief at 14. Yet the Opinion does not address *Littlefield* and appears to impose the omitted predominance and superiority requirements.

The Court also misapprehended the text a second way. In Rule 23(a), SCRCP, the requirement that there be “questions of law or fact common to the class” is immediately followed by the requirement that “the claims *or* defenses of the representative parties are typical of the claims *or* defenses of the class.” Rule 23(a), SCRCP (emphasis added). The disjunctive is significant. It shows that a class is proper if the common questions are typical of claims alone.

There is no requirement that the common questions simultaneously resolve both the claims and defenses to those claims.

The circuit court in this case was faithful to the disjunctive “or,” ruling that class actions are designed to avoid each class member from having to prove the elements of their causes of action. ROA 13, 29-30. Respondents echoed this on appeal, arguing that the class certification should be evaluated on how well the common questions resolve the class members’ causes of action and not the potential defenses to the claims. Respondent’s Brief at 18-19.

This is how the United States Supreme Court does it. When “one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045, 194 L.Ed.2d 124 (2016). In *Tyson Foods*, the Court affirmed a class certification to determine whether time employees spent donning and doffing protective gear counts toward overtime pay. The Court acknowledged that the employer had individual defenses against those workers who did not work enough hours for the issue to matter. This did not defeat class certification, however, because the class could present statistical evidence on the hours worked. *Id.*, 136 S.Ct. at 1045-1049.

This case is even more suitable for class treatment. In *Tyson Food*, plaintiffs had to rely on statistical evidence to prove their class membership and common injury because the defendant did not keep records. *Id.* 136 S.Ct. at 1046-1047. In this case, the circuit court ruled that the DSS records would identify exactly who is in the class, and precisely how much damages they would recover, if the breach of contract claim succeeds. ROA 14, 30, 40.

Lastly, the Rule 23(e), SCRCF, provisions on residual funds, added to the rule in 2016, further confirm that individual defenses do not, by themselves, defeat class certification. The rule envisions that a class action may be certified, and a judgment entered on common questions that resolve every class member's prima facie case. This class-action judgment may create a fund upon which class members may make claims. If there is a fund, a defendant may remain free to assert any individual defenses to a particular class member's claim. If successful, those individual claims are not approved and are never paid, thus creating the residual fund that Rule 23(e) envisions.

Accordingly, Rule 23, SCRCF does not require plaintiffs to prove common defenses to certify a class that resolves the class members' prima facie case. Individual defenses may be handled when one later proves their class membership and makes a claim.

III. The case differs from *Gardner* in three significant ways.

This Court's analogy to *Gardner* also seems to have overlooked three significant distinctions that the circuit court drew and that the Respondents raised on appeal. ROA 10-14, 26-30, 39-40; Respondent's Brief at 17-23.

Initially, the Supreme Court in *Gardner* made a point to say that the case "is significantly more complex due to the fact it is a bilateral class action," meaning that the plaintiffs wanted a class of plaintiffs who were suing and to certify a separate class of defendants being sued. *Gardner*, 353 S.C. at 21 n. 12, 577 S.E.2d at 200 n. 12. This case is a single count, breach of contract action against one defendant for failing to pay what its form contracts require.

The next distinction has already been mentioned in that the individual class-defeating issues in *Gardner* case went to the heart of what the plaintiffs in that case had to prove to prevail in

their prejudice claim. For this reason *Gardner* is not precedent on whether a court may even consider affirmative defenses in determining whether to certify a class of plaintiffs.

In stating this, BLH is not suggesting that each plaintiff has the same amount of damages. A prima face case, however, only requires proof that the breach of contract caused some damages and—by definition—all the class members lost at least \$100 in benefits “due to the cut in the assistance agreement[s].” ROA 41-42. Beyond these required, minimum damages, the amount of damages from the breach may vary for each class member. Respondent cited multiple cases noting that South Carolina courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member. Respondent’s Brief at 21 (citing *Littlefield*, 337 S.C. at 355, 523 S.E.2d at 784; *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the proposed representatives’ claims); and *McGann v Mungo*, 287 S.C. 561, 569, 340 S.E.2d 154, 158 (Ct. App. 1986) (noting: “The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.”). The Opinion, however, improperly focused on the damages and concluded potential administrative remedies, contract renewals, and early terminations precluded class certification without distinguishing the foregoing well-established law. Opinion at 7.

The last distinction between the case at bar and *Gardner* is that the individual issues in *Gardner* involved prejudice which had to be proven by every proposed class claimant. *Gardner*, 353 S.C. at 14-15, 577 S.E.2d at 197. In contrast, prejudice is not an element of the breach of contract claim for Respondent’s and the other class members. The alleged defenses by the DSS may not actually ever apply to anyone in the class. They are just allegations without any basis for

applicability at all in the ROA. The circuit court emphasized this, and declined to go down that path, because it is inappropriate to deny class certification based on defenses that may never apply. ROA 12, 28.

Two examples make the point. On administrative remedies, there is no evidence to support this purported defense. The only record evidence states that adoptive parents "may appeal" a reduction in the adoption subsidy. ROA 133. The permissive "may" means that administrative remedies need not be exhausted. And there is no suggestion that the DSS's administrative procedures could redress its Director's decision to impose the across-the-board cuts that she imposed. The DSS final decision maker had already made her decision. One need not try to invoke administrative remedies to redress wrongs that the administrative scheme is not designed to redress. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009).

Waiver is the second example of a conjured defense that defies logic. This Court pointed to the individualized issues surrounding whether each set of adoptive parents accepted or consented to the cut in their payments. Opinion at 7. The Supreme Court calls this a waiver of the breach of contract. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). Waiver is an affirmative defense under Rule 8, SCRCF, and will require that the DSS prove a voluntary and intentional abandonment or relinquishment of a known right. *Id. at* , 415 S.E.2d at 387. In other words, DSS must prove that an adoptive parent (made fully aware of their right to more money for the adoptive child) voluntarily and intentionally responded "no, I choose not to provide my adopted child with funds for food, clothing, and other needs."

Even if there were some legal theory on how contract defenses could apply to any class member, this itself would create a common, class-wide question of law because there is only one

form contract that was used for the entire class. On these facts there is no reason to break up a class that will fully resolve everything a plaintiff must prove.

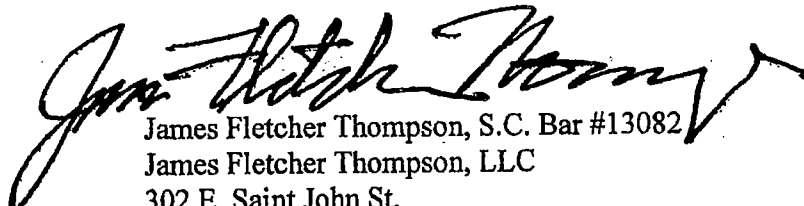
Conclusion

The Supreme Court noted years ago, "[I]t cannot be true that the State is empowered to contract with individuals and yet retains the power to avoid its obligations. Neither the State nor its citizens can be bound, yet not bound, by a single contract." *Kinsey Const. Co., Inc. v. S.C. Dep't of Mental Health*, 272 S.C. 168, 172, 249 S.E.2d 900, 903 (1978), *overruled on other grounds McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Despite this, the DSS unilaterally decided that it did not have to pay at least 1,600 families what it contracted to pay to induce the adoptive parents to adopt some of the State's neediest children. This is not right, and the adoptive parents should be able to prove it is not right without atomizing the dispute into many separate claims.

The Court should withdraw its opinion and affirm that the circuit court had the discretion to properly certify the class under Rule 23, SCRCP. Alternatively, Respondents' ask that the Court explain how the circuit court committed a legal error or other abuse of discretion and address the distinctions that the circuit court drew between this case and the *Gardner* decision.

Respectfully submitted,

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May 9, 2018

Attorneys for Respondents

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Judge

Appellate Case No. 2014-002254

BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of
all others similarly situated, Respondent,

v.

South Carolina Department of Social Services, Appellant.

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CERTIFICATE OF SERVICE

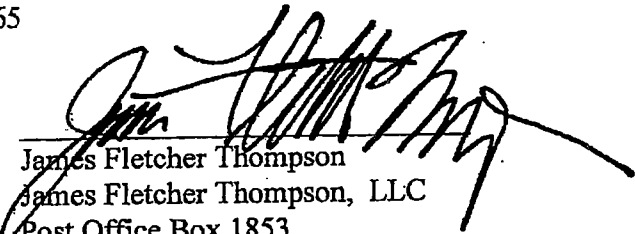
I certify I have served the Respondent's Petition for Rehearing on all counsel of record
by facsimile transmission and by depositing a copy of it in the United States Mail,
postage prepaid, on May 9, 2018, addressed as follows:

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May 9, 2018

Attorney for Respondent

APPX0365



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CIVIL LITIGATION * ADOPTION * SURROGACY

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May 9, 2018

(via facsimile (803) 734-1839 and FedEx Priority Overnight)

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated v. South Carolina Department of Social Services*
Appellate Case No. 2014-002254

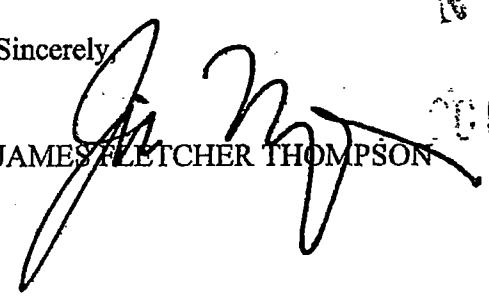
Dear Ms. Kitchings:

Please find enclosed by facsimile transmission the Respondents' *Petition for Rehearing* and copy of Certificate of Service. By FedEx priority overnight, we are transmitting the following:

1. Original and six (6) copies of the Respondents' *Petition for Rehearing*
2. *Check for \$25 filing fee*
3. Original Certificate of Service

With respect and kind regards, I am,

Sincerely,


JAMES FLETCHER THOMPSON

/mhw

Enclosures

Cc (via facsimile and U.S. Mail): Andrew F. Lindemann, Esq.
Joel S. Hughes, Esq.
T. Ryan Langley, Esq.

APPX0366

The South Carolina Court of Appeals

BLH by parents/ general guardians Kenneth and Angela
Hensley, and on behalf of all others similarly situated,
Respondent,

v.

South Carolina Department of Social Services,
Appellant.

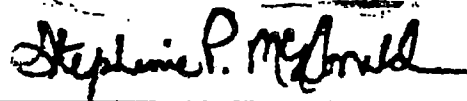
Appellate Case No. 2014-002254

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



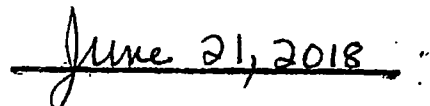
J.

Columbia, South Carolina

cc:

Andrew F. Lindemann, Esquire
Joel Steve Hughes, Esquire
Timothy Ryan Langley, Esquire

FILED



APPX0367

James Fletcher Thompson, Esquire
Charles J. Hodge, Esquire
The Honorable Brian M. Gibbons

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LICENSED IN SOUTH CAROLINA, NORTH CAROLINA, AND GEORGIA

September 5, 2018

Ms. Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

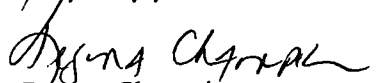
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SC Court of Appeals

RE: BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others
similarly situated v South Carolina Department of Social Services
Appellate Case No.: 2014-002254

Dear Clerk:

I hope this letter finds you well. Per our conversation, please find enclosed one unbound copy of the Brief of Appellant with the redactions. If you need anything further please let me know.

Very truly yours,


Regina Champion
Paralegal to T. Ryan Langley

TRL/rc

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TO:

Ms. Jenny Abbot Kitchings
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