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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	2013-CP-06-00059
ARCHIE PATTERSON AND TAMMIE BOLLERMAN,	)	
PLAINTIFFS,	)	
v.	)	ORDER
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORK FORCE,	)	
DEFENDANT.	)	

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SC Court of Appeals

In this class action, Plaintiffs allege Defendant, the South Carolina Department of Employment and Workforce (SCDEW) failed to promulgate regulations implementing its online work search requirement. As a result, Plaintiffs contend they were wrongfully denied unemployment benefits. Defendant denies these allegations and also asserts plaintiffs lack standing and failed to exhaust administrative remedies before bringing this action.

For the reasons set forth below, I find SCDEW was required to promulgate regulations before it began requiring online work searches. I also find Plaintiffs have standing to maintain this action and were not required to exhaust administrative remedies before bringing the action. Finally, I reaffirm this Court's previous order certifying the class.

PROCEDURAL HISTORY

Plaintiffs allege in August, 2012, SCDEW, without first promulgating regulations, began requiring claimants to complete at least one job search on line. As a result, numerous workers were denied benefits.

This case was certified as a class action. Defendant moved for reconsideration of the Class Certification Order under S.C.R.C.P. 59 (e). A hearing was held on this motion, and as a result of the hearing Defendant moved for an evidentiary hearing to take evidence on Named Plaintiffs standing to represent the class. Plaintiffs consented to the motion and hearings were held on November 2, 2016 and January 11, 2017.

Afterwards, this Court issued its order finding Named Plaintiffs had standing to serve as class representatives. Defendant filed a 59(e) motion for reconsideration of this order and then filed an appeal. Defendant then moved the Appellate Court for a remand to hear the 59(e) motion. Plaintiffs consented and the motion to remand was granted. This Court held a hearing to hear any remaining issues on defendant's 59(e) motions to the class certification order and its Order finding the named Plaintiffs, Tami Bollerman and Archie Patterson, have standing to represent the class. Both 59 (e) motions were denied. The appeal resumed.

Thereafter, the appeal was dismissed, and the case was remanded to this Court. A status conference was held for the purpose of scheduling a final hearing. As a result, a consent order was issued scheduling the hearing for October 31, 2018. In the order, the parties stipulated that either party may submit deposition testimony, testimony before this Court, as well as prior affidavits submitted to this Court. Also, the parties stipulated that it would not be practical to send notice of the class action at this time, since further appeals were likely. Further, any modification of this court's order could, among other things, alter the composition of the class, requiring a new notice to be sent which could be confusing to class members.

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SCDEW AND UNEMPLOYMENT BENEFITS

The purpose of providing unemployment benefits is to lighten the burden caused by unemployment "...which so often falls with crushing force on the unemployed worker and his family...." S. C. Code Ann. 41-27-20 (1976, as amended). To facilitate this purpose, the legislature created the South Carolina Department of Employment and Workforce and charged it with the administration of the unemployment insurance laws of this state. S.C. Code Ann. 41-29-10 (1976, as amended). [SCDEW] "... must promulgate regulations necessary to carry out the provision of the unemployment security laws. S. C. Code Ann. 41-29-110 (1976, as amended).

The importance of these benefits to the unemployed worker cannot be overstated. John Ruoff who was qualified by this court as an expert in economic policy testified that many workers in South Carolina live from paycheck to paycheck. If a worker becomes unemployed, he might be able to rely on savings (if he has savings) or a spouse's income (if he has a spouse). He might also qualify for SNAP benefits (food stamps) which, by itself is not enough to purchase sufficient nutritious food for nourishment. Otherwise, there are no other sources of help other than unemployment benefits. With unemployment benefits, many workers go from living paycheck to paycheck to living half-paycheck to half-paycheck. While some expenses such as the purchase of clothing can be delayed, many cannot. Expenses such as food, housing, utilities, and minimal transportation cannot be avoided. Bills, such as car payments and mortgage payments, cannot be placed on hold. As far as borrowing money, many are left with no alternative other than high interest lenders such as title lenders who can charge up to 391% interest. Missing a weekly unemployment payment places the worker in a more difficult place.

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(Testimony of Ruoff, Exhibit 1 10/31/18 hearing [11/2/16 Transcript. P. 50 – 59]; Affidavit of Ruoff Filed September 15, 2016).

In order to be eligible to receive unemployment benefits, a claimant must be able to work, available for work and actively seeking work. S. C. Code Ann. 41-35-110 (1976, as amended). SCDEW requires claimants to certify weekly, by phone or online, their continuing entitlement to benefits and requires claimants to maintain a record of work seeking activities (Form UCB-303). SCDEW does not review these forms weekly but may periodically review them for compliance. (Second affidavit of Kevin Cummings, dated 3/3/14 and filed 4/24/14, para.10-12)

SCDEW requires claimants to make a minimum number of job contacts per week in order to receive benefits. According to its Procedure Transmittal Letter 1267-3, dated August 10, 2012 SCDEW, in March of 2012, revised its work search policy to require all claimants to make a minimum of four (4) job contacts per week. At least one of the job contacts must be made through SC Works Online Services (SCWOS) (Procedural Transmittal letter attached to affidavit of John Matthews, filed 5/28/13).

Beginning with the claim week ending August 11, 2012, without first promulgating regulations, SCDEW began enforcing its March 2012 work search policy and began requiring all claimants to search for employment though South Carolina Works Online System (SCWOS). According to Cummings, noncompliance by claimants led to numerous weeks of disqualified weekly claims between August 2012 and early February 2013. (Second Cummings affidavit dated 3/3/14, filed 4/24/14, para. 21) In fact, the affidavit of Senator John Matthews and attached correspondence from SCDEW indicates between August 18, 2012 and February 2, 2013, 61,900

workers were denied benefits because of the online work search requirement. (Matthews affidavit, filed 5/28/13).

According to Kevin Cummings, when a claimant is deemed out of compliance with SCDEW requirements for a given week, SCDEW takes a statement from the claimant on the reason for non-compliance. Then, either a disqualification or a determination of eligibility is issued by a claims adjudicator. (Second Affidavit of Kevin Cummings, dated 3/3/14, filed 3/14/14, para.22 - 24.) S.C. Code Ann. 41-35-670 allows SCDEW to stop benefits after the claims adjudicator makes a ruling.

While Cummings indicates this same procedure is used for a claimant's failure to conduct an online work search, there are apparent differences. First, when the SCWOS system detects that a claimant did not conduct an online work search, it automatically stops payment of benefits in violation of S.C. Code Ann. 41-35-670. Then, it sends a notice particular to the online work search requirement entitled: "Work Search Verification Failure – Benefits Stopped". (Exhibit 12, 10/31/18 hearing; Tab 14, Hearing Notebook) This notice informs the claimant their benefits were stopped because of failure to comply with the online work search requirement and directs them to report to a local SCDEW office with the notice and a copy of their form UCB-303 report of work seeking activities if they would like to receive future benefits.

This form was mailed to all claimants/class members who did not receive benefits because of failing to do an online job search. (Exhibit 6, 10/31/18 hearing, [10/27/2014 30(b)(6) deposition of SCDEW {Kevin Cummings}] p.34, l.6 - p.35, l.15; Tab 13, Hearing Notebook- discussing identical notice forms sent to former Plaintiff Lorinda Robinson and describing how the notices are mailed to all claimants who the system determines did not complete an online search.) (See also attachments to Sen. John Matthews affidavit filed 5/28/13). The notice does

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not inform claimant that the purpose of the meeting is to issue a ruling on whether they complied with the work search requirement.

The adjudication procedure used by SCDEW in issuing its rulings (determinations) is set forth in department guidelines and is not promulgated by regulation. (Exhibit 6 [10/27/14 30(b)(6) Deposition of SCDEW {Cummings}] p.36 l.25 – p.38 l.11; Tab 13, Hearing Notebook)

THE NAMED PLAINTIFFS

Named Plaintiffs were denied weekly benefits because of their inability or failure to apply online through SCWOS for employment. No other reason was given for denial of benefits on the SCDEW "Determination by Claims Adjudicator on Claim for Benefits" form issued to the named plaintiffs. (Exhibits 10 and 11, 10/31/18 hearing, Form UCB-103 for Bollerman and Patterson, respectively; Tabs 10 and 9, Hearing Notebook)

Tami Bollerman's Claim

Tami Bollerman, now known as Tami Weber, testified that after losing her job she became eligible and began receiving unemployment benefits. She also testified that on a weekly basis she made the required work searches and filled out forms required by SCDEW to show she was making the requisite work searches. She became aware of the online work search requirement and also began searching for work on line. (Exhibit 1 [11/2/2016 Transcript] p.13, l.21 – p. 15, l.2; Tab 7, Hearing Notebook). The week of October 7, 2012, Ms. Bollerman did not receive her benefit. She was notified by SCDEW that her weekly benefits were stopped because of she failed to make an SCWOS (online) job search.

Ms. Bollerman's file from SCDEW contains the "Work Search Verification Failure-Benefits Stopped" form (Exhibit 12, 10/31/18 hearing; Tab 14, Hearing Notebook; See also

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Exhibit 6, 10/31/18/hearing [10/27/18 30(b)(6) deposition of SCDEW {Kevin Cummings}] ex. 3, Bates Stamp No. 9168-B-60;) directing her to report to her local SC Works Center immediately if she would like to receive future benefits. The form makes no mention that one outcome of the meeting will be to issue a ruling (determination) on whether she complied with the online work search requirement.

Ms. Bollerman complied with the notice and appeared at a SCDEW office and explained she did conduct an online job search. (Exhibit 1, 10/31/18 hearing [11/2/16 Transcript] p.15, l.14 – p.20, l.4; Tab 7, Hearing Notebook). Although she brought in her record of work seeking activities (form UCB-303), SCDEW representatives did not ask to see it. The whole discussion concerned compliance with the online work search requirement. (Exhibit 1, 10/31/18 hearing [11/2/16. Transcript] p.29, l.15 – p.31, l.8; Tab 7, Hearing Notebook)

As a result, Ms. Bollerman's benefits for the week 10/7/12 were denied. The sole reason given by the claims adjudicator for denying benefits was the failure to perform the online work search. (Exhibit 1, 10/31/18 hearing [11/2/16 Transcript] Testimony of Cummings, p.40, l.6 – 15; Tab 7) (See also SCDEW form UCB-103 found at Exhibit 10, 10/31/18 hearing Tab 10, Hearing Notebook). According to the Determination of Denial form, the amount of her weekly benefit was $326.00. (Exhibit 10, 10/31/18 hearing; Tab 10, Hearing Notebook).

Kevin Cummings, SCDEW's witness and deputy director of policies and procedures, confirms Bollerman's testimony. He testified Bollerman was receiving benefits, that her benefits were stopped because of not complying with the online work search requirement, and that the claims adjudicator gave no other reason for denying her benefit. Further, Ms. Bollerman had not exhausted all of her unemployment benefit. (Exhibit 1, 10/31/18 hearing [11/2/2016 Transcript] p.37, l.24 – p.40, l.16; Tab 7, Hearing Notebook)

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Archie Patterson's Claim

Like Bollerman, Archie Patterson became unemployed, applied for and began receiving benefits. Like Bollerman, he made the job contacts required of him. In August of 2012, the same month SCDEW implemented the online work search requirement, he did not receive a benefits check. (Exhibit 3, 10/31/18 hearing [1/11/2017 Transcript] p.5 l.24 – p.7 l.5; Tab 8, Hearing Notebook)

Like Bollerman, Patterson's SCDEW file contains the same "Work Search Verification Failure – Benefits Stopped" notice form telling him his benefits were stopped for failing to conduct an online work search. He was instructed to report to SCDEW immediately with the notice and his UCB-303, Report of Work Seeking Activities. (Exhibit 12, 10/31/18 hearing; Tab 14, Hearing Notebook; see also Exhibit 6, 10/31/18 hearing [10/27/2014 30 (b)(6) deposition of SCDEW {Kevin Cummings} ex.2, Bates Stamp No. 9168 – B – 191]).

Like Bollerman, Patterson appeared at SCDEW pursuant to the Work Search Verification Failure Notice. As a result, a claims adjudicator issued a Determination denying benefits for the week of August 19, 2012 for failing to comply with the online work search requirement. The form gives no other reason for denial. (Exhibit 11, 10/31/18 hearing; Tab 9, Hearing Notebook). According to this form, the amount of his weekly benefit was $326.00.

Mr. Patterson continued to receive benefits, but in 2013 became frustrated with the unemployment claims process and stopped applying for them. (Exhibit 3, 10/31/18 hearing [1/11/2017 Transcript] p.14, l.6 – 24; Tab 8, Hearing Notebook). At the time he stopped receiving benefits, Mr. Patterson had not exhausted his unemployment benefits. (Exhibit 3,10/31/18 hearing [1/11/2017 Transcript] p.37, l.18 – 21; Tab 8, Hearing Notebook)

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LEGISLATIVE AUDIT REPORT

The Legislative Audit Counsel (LAC) was created by the General Assembly and is charged with review of operation of state agencies to assist the General Assembly. In its May, 2014 report entitled "A Management Review of the Department of Employment and Workforce", the LAC found that SCDEW had not promulgated regulations for policies that have general applicability to the public. Citing S.C. Code Ann. 41-29-110 (providing SCDEW must promulgate regulations to carry out its duties) the report noted that SCDEW had not put its job search requirements, including its online job search requirement, into regulation. The report noted that out of the 33 states that have work search requirements, 26 of them have codified those requirements in law or regulation. The report then outlines the importance of having the work search requirements put into regulation. (Exhibit 7, 10/31/18 hearing [ex. 1 to Stanton deposition, LAC Report pages 34-35])

SCDEW responded to the report by letter from its Director, Cheryl Stanton, dated May 20, 2014, asserting that regulations were not needed since SCDEW was mandated by a budget proviso to implement the work search requirement. This position, as discussed below, is inconsistent with other positions taken by SCDEW regarding the effect of the Budget Proviso. It is also inconsistent with SCDEW's Procedure Transmittal letter 1267-3, discussed above, which indicates SCDEW Changed its work search procedure in March of 2012, before enactment of the Budget Proviso.

WHY THE REGULATION PROCESS MATTERS

In concluding SCDEW needed to Promulgate regulations, the LAC found:

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> Putting work search requirements into regulations will help provide **clarification** to claimants, SCDEW staff, and the general public regarding SCDEW's work search requirements. Additionally, it will provide the public and the General Assembly an **opportunity to comment** on the policy. It will also provide **consistency** by requiring SCDEW to go through the regulatory approval process before changing its work search requirements. Finally, the regulatory approval process as set forth by the APA requires agencies to address the **reasonableness** and need for proposed regulations, as well as judgments relied upon in developing the regulation. (Emphasis Added)

Therefore, requiring agencies to promulgate regulations has practical benefits for the public, in particular, those who have business with the agency. But it has greater implications. Administrative agencies as part of the executive branch of government often exercise quasi-legislative and quasi-judicial functions, which if left unchecked, could violate the separation of powers doctrine.

As noted in Justice Kittredge's Concurrence in *Joseph v. South Carolina Department of Labor Licensing and Regulation,* 417 S.C. 436, 790 S.E. 2d 763 (2016):

> The ever increasing reach of the so-called Fourth Branch of government presents a threat to our civil society, especially the principle of separation of powers. If the executive branch, through unelected bureaucrats and seemingly countless administrative agencies, is going to set policies having the force of law, **the judicial branch must insist on clear delegation from the legislative branch and strict compliance with the APA, including submission of administrative policies having the force and effect of law to the legislature for review.** *Joseph*, 417 S.C. at 465, 790 S.E.2d at 778. (emphasis added)

Moreover, the legislature must also prescribe all procedures used for the enforcement of an agency's rules/policies. S. C. Constitution, Art. I Section 22 provides: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; ... nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review." Regulations promulgated in accordance with

the APA would satisfy this constitutional requirement, since they would have to be approved by the General Assembly.

SCDEW MUST PROMULGATE REGULATIONS TO CARRY OUT ITS DUTIES

The Administrative Procedures Act prohibits an administrative agency from making law without legislative oversight. *Joseph*, 417 S.C. at 461, 790 S.E.2d at 776. Further, the legislature has mandated SCDEW promulgate regulations. This conclusion is abundantly clear in the numerous statutory provisions governing SCDEW. S.C. Code Ann. 41-29-110 – entitled "Duties and Powers of the Department" – provides: The department **must promulgate** regulations necessary to carry out the provisions of Chapters 27 through 41 of this title [41] ...." S.C. Code Ann.41-27-510 provides: "[t]he department **must promulgate** regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as the department considers necessary." S.C. Code Ann. 41-35- 610 – entitled "Procedures must be pursuant to department regulations; duties of Employers" – provides "[a] request for determination of insured status...and a claim for benefits **must be made pursuant to regulations the department promulgates.**" "Under the rules of statutory interpretation, use of words such as "shall or "must" indicates the legislature's intent to enact a mandatory requirement." *Joseph*, 417 S.C. at 463, 790 S.E.2d at 777. The use of these words in the above cited statutes, coupled with the requirements of the APA, leave no doubt that SCDEW is mandated to promulgate regulations.

"Regulation" includes "...each agency statement of general public applicability that

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implements or prescribes law or policy or practice requirements of any agency...." S.C. Code Ann. 1-23-10 (4). A policy or guideline has the force of law if it creates a binding norm. *Joseph*, 417 S.C. at 453, 790 S.E. at 772. "The key inquiry is:

> the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. *Id*. 417 S.C. 454, 790 S.E. 772.

SCDEW's policy of requiring online work searches is a mandatory requirement for all unemployment claimants. SCDEW consistently refers to it as a requirement and denies benefits if its computer system detects a claimant did not make the search. In fact, Procedure Transmittal Letter 1267-3 states: "Warnings are NOT acceptable for SCWOS searches." (Matthews affidavit attachment, filed 5/28/13). As the agency has bound itself to follow this policy, it has the force of law and constitutes an invalid regulation.

As a creature of statutes, an agency of the state only has the powers conferred upon it by the legislature. If regulations are mandated, the agency must promulgate regulations to carry out its duties. *Captains Quarters Motor Inn Inc. v. South Carolina Coastal Council* 306 S.C. 488, 490, 413 S.E.2d 13, 14 (S.C. 1991). Any action taken by [the agency] outside of its statutory and regulatory authority is null and void. *Responsible Economic Development v. South Carolina Department of Health and Environmental Control,* 371 S.C. 547, 553, 641 S.E. 425, 428 (2007), citing *Triska v. Dep't of Health & Envtl. Control,* 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). See also *Captains Quarters* above, and *Charleston Television, Inc. v. South Carolina Budget and Control Bd.,* 301 S.C. 468, 392 S.E.2d 671 (1990) (failure to promulgate regulations for competitive bidding as mandated by statute rendered agency's lease approval invalid).

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SCDEW failed to promulgate regulations regarding the online work search requirement and, therefore, was without authority to implement it. Moreover, the procedure SCDEW used to notify and adjudicate class members claims for failing to conduct an online search was not by a mode of procedure prescribed by the General Assembly as required by Article I, Section 22 of the S.C. Constitution. Further, SCDEW's procedure of stopping payment before a determination was made violated S.C. Code Ann. 41-35-670 (requiring a redetermination or subsequent determination before payments are stopped).

THE BUDGET PROVISO DOES NOT RELIEVE SCDEW OF ITS DUTY TO PROMULGATE REGULATIONS

SCDEW asserts it was saved from having to promulgate Regulations by Budget Provisos enacted in the 2012 – 13 through the 2015 – 16 Budget years. Budget Proviso 67.7 (2012-2013), 83.6 (2013-2014) and (2014-2015) and 83.5 (2015-2016) provided:

> (SCDEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants **and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS) so that it can be electronically verified.** The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with the laws administered by the agency. (Emphasis Added) Tab 38

I find from a plain reading of this proviso that it is a funding mechanism and no intent is expressed in the proviso to suspend any statutes governing SCDEW.

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In *Amisub of South Carolina v. South Carolina Department of Health and Environmental Control*, 407 S.C. 583, 757 S.E.2d 408 (2014) the Supreme Court addressed the effect of a budget proviso on permanent legislation. The Court noted:

> There is no question that the General Assembly has the power, where there is no constitutional prohibition, to temporarily suspend a statute's operation. (internal citations omitted). An appropriations act, though generally temporary in duration, "has equal force and effect as a permanent statute" and may suspend the operation of a permanent statute during the time the appropriation act is in force. (citations omitted). "**When such intention is clearly manifest** [,] this [C]ourt has no choice but to give force and effect thereto." (citations omitted).
>
> The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. (citations omitted). It is well-established that this **Court will not construe a statute by concentrating on an isolated phrase.** *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."); *see also* *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (citations omitted). Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. (citations omitted). Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. (citations omitted).
>
> In determining whether a permanent statute is suspended, we must look to the budget proviso juxtaposed with the permanent statute. (citations omitted). In this regard, there must be an "irreconcilable conflict" between the appropriations act and the permanent statute before we will find the latter temporarily suspended. (citations omitted). **Thus, only provisions of a permanent statute that conflict with the current budget provisos are suspended.** (citations omitted). *Amisub* 407 S.C. at 597, 757 S.E.2d at 415. (Emphasis Added)

The Proviso Begins with "Thirty percent of the funds appropriated through the

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contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) ...." It then lists five (5) means of enforcement: 1) Eligibility Reviews; 2) Random Verification of Job Contacts; 3) Wage Cross matches; 4) to ensure seated meetings with Unemployment Insurance claimants; and 5) requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS) so that it can be electronically verified. While it is clear the Proviso is directing SCDEW to Spend 30% of the contingency assessment funds on the five listed items, it is unclear from the proviso what these items are. The Proviso does not define the 5 items. Nor does it give instruction on their implementation or establish any mode of procedure for their enforcement. From a plain reading, all the Proviso does is direct the expenditure of monies from the contingency assessment funds.

When juxtaposed with Sections 41-29-110, 41-27-510 and 41-35- 610, it is abundantly clear regulations are necessary to implement these five items, including the SCWOS work search requirement. The Proviso, therefore, did not suspend the operation of these statutes and does not absolve SCDEW of the requirement to promulgate regulations.

In addition, the Court notes SCDEW has taken positions consistent with this ruling. In its 30(b)(6) Deposition, SCDEW's witness designated as the most knowledgeable regarding the Budget proviso testified: "The only thing I know about this particular proviso is that it directed us to use 30 percent of the contingency fund collections for specific unemployment insurance program efforts." (Exhibit 13, 10/31/18 hearing [30(b)(6) deposition of SCDEW {Don Dubose Grant}] p.13, l.16 – p.14 l.1). Laura Robinson, the Assistant Executive Director in charge of the Unemployment Insurance Department, who is no longer employed with SCDEW, testified in her deposition that the Proviso was a funding mechanism. (Exhibit 8, 10/31/18 hearing [Deposition

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of Laura Robinson, p.38, l.1 – p.42, l.15]; Tab 15, Hearing Notebook).

Finally, in response to the Legislative Audit Report referenced above, SCDEW asserted inconsistent positions as to the interpretation of the budget proviso as it relates to online job searches and eligibility reviews, one of the five listed items mentioned in in the proviso. For the online work search requirement, SCDEW interpreted the Proviso to be a mandate from the legislature. (Exhibit 7, 10/31/18 hearing [Deposition of Stanton ex. 1 - May 20, 2014 letter in response to LAC report, p.5]; Tab 12, Hearing Notebook). However, when the LAC also found SCDEW was not conducting eligibility reviews (Exhibit 7,10/31/18 hearing [Deposition of Stanton – p. 33 of LAC report]; Tab 11, Hearing Notebook) SCDEW took the position that the proviso was merely a "laundry list" of potential integrity initiatives. (Exhibit 7, 5/24/14 Stanton letter, p.4; Tab 12 Hearing Notebook). SCDEW has interpreted the proviso inconsistently to justify its own actions. The proviso cannot be a mandate for one of the five listed items and at the same time a suggestion for another. I find SCDEW's inconsistent positions and interpretations of the provisos support the conclusion that it should be interpreted as a funding mechanism. As such it did not suspend any other statute governing SCDEW.

STANDING

SCDEW challenges Named Plaintiff's standing to bring this action. Upon SCDEW's motion, this Court held an evidentiary hearing on the issue of Tami Bollerman's and Archie Patterson's standing to represent the class. The Court issued an order on April 27,2017, finding both had standing and reaffirms that order herein.

As noted in *Joseph v. South Carolina Department of Labor,* 417 S.C. 436, 449, 790 S.E. 2d 763, 769 (2016)

A fundamental prerequisite to institute an action is the requirement that the

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> plaintiff have standing. (internal citations omitted) Standing is defined as "a personal stake in the subject matter of a lawsuit." (internal citations omitted). The United States Supreme Court has set forth the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an "injury in fact;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." (internal citations omitted) A party seeking to establish standing carries the burden of demonstrating each element. (internal citations omitted).

Plaintiffs seek the payment of benefits they were denied as a result of failing to comply with the online work search requirement. This loss of benefits constitutes an "injury in fact".

Further, there is a causal connection between this injury and the conduct complained of. SCDEW's policy requiring an online work search without first promulgating a regulation is directly related to Plaintiffs' injury, since failing to perform the online search is the sole reason for denial of benefits. Finally, a favorable decision by this Court would compensate for the injury. Therefore, Plaintiffs have met their burden of establishing standing to proceed in this matter.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

SCDEW next asserts that Plaintiffs failed to exhaust administrative remedies before filing this action and the action should be dismissed. The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law. *Stinney v. Sumter School District 17*, 382 S.C. 52, 358, 675 S.E.2d 760, 763 (2009), citing *Adamson v. Richland County School District One*, 332 S.C.121, 125, 503 S.E.2d 752, 754 (Ct. App. 1998). The doctrine is not jurisdictional. *Id.* Whether administrative remedies must be exhausted is a matter within the circuit court's sound discretion and this decision will not be disturbed absent an abuse of discretion. *Id*, citing *Hyde v. S.C. Dept. of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994).

The general rule is that administrative remedies must be exhausted absent circumstances that support an exception to application of the general rule. Id. citing Hyde, 314 S.C. at 208, 442 S.E.2d at 583. When an adequate administrative remedy is available to determine a question of fact, one must seek the administrative remedy or be precluded from pursuing relief in the courts. *Id.* However, S.C. Code Ann. Section 1-23-380 "does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law." Stinney 382 S.C. at 359, 675 S.E.2d at 764.

Citing Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000), SCDEW argues the requirement to exhaust administrative remedies is statutorily mandated, and the exceptions to the exhaustion requirements are few. When exhaustion of remedies is statutorily mandated, legislative intent prevails. Id. The Court in Ward did not list every exception to statutorily mandated exhaustion of remedies, but concluded that "the legislature would not require a futile act. Thus, a generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." Id 343 S.C. at 19, 538 S.E.2d at 247.

Subsequently, citing Ward, the Supreme Court ruled "...[a] party is not required to exhaust administrative remedies if the **issue** is one that cannot be ruled upon by the administrative body." Charleston Trident Home Builders, Inc. v. Town Council of Summerville, 369, S.C. 498, 502, 632 S.E.2d 864, 867 (2006). (emphasis added). In such an instance, exhausting remedies would be futile.

Romi Robinson serves as the Chief Administrative Hearing Officer and presides over the Lower Authority Appeals Department, which hears appeals from the claims adjudicator level. Ms. Robinson testified that SCDEW's appeals process would not have addressed the legal issue

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in this case – whether SCDEW was required to promulgate regulations prior to implementing its on line work search requirement. Ms. Robinson testified that SCDEW's Appellate panel only has the power to resolve factual disputes. It would not resolve issues of law pertaining to the authority of SCDEW to implement the online work search requirement without first promulgating regulations. (Exhibit 1, 10/31/18 hearing [11/2/16 Transcript, p.78, l.16 – 25]; Exhibit 9, 10/31/18 hearing [Deposition of Romi Robinson, p.10, 113 – p.11, l.22]; Tab 39, Hearing Notebook)

I also find the legislature would not require exhaustion of administrative remedies when an agency is acting outside of its authority. "As a creature of statutes, regulatory bodies ... have only the authority granted them by the legislature.... Any action taken ... outside of its statutory and regulatory authority is null and void." *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (internal citations omitted). In such an instance, an exception would exist to any statutorily mandated requirement to exhaust administrative remedies, since the conduct complained of would be beyond the administrative agency's authority. *Brown v. James* 389 S.C. 41, 55, 697 S.E.2d 604, 612 (2010) ("Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority"). The issue of whether an agency is acting outside the scope of its authority is a matter of law and excuses any failure to first seek administrative remedies. *Ex parte Allstate Ins. Co.*, 248 S.C. 550, 568, 151 S.E.2d 849, 855 (1966). As noted above, SCDEW was without authority to implement the online work search requirement without first promulgating regulations, since it is statutorily mandated to do so. Plaintiffs are therefore not required to exhaust administrative remedies.

Finally, SCDEW asserts Plaintiffs are barred from bringing this claim by SC Code Ann.

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41-35-660 which provides: "[a] claimant ... may file an appeal from an initial determination, redetermination, or subsequent determination not later than ten days after the determination was mailed to his last known address..." Since this action is not an appeal from an initial determination, redetermination or subsequent determination this section is not applicable.

CLASS CERTIFICATION

I find this action should remain certified as a class action and re-affirm this Court's previous order. The class is defined as:

All persons who are:

(1) citizens and residents of South Carolina;

(2) who were eligible to receive unemployment benefits, through SCDEW;

(3) who made application through SCDEW to receive benefits;

(4) who were denied a benefit between August 6, 2012, and July 1, 2016, for failure to perform an online work search; and

(1) did not exhaust their benefit allotment for the pertinent period despite the work search ineligibility;

(2) can document that they were actively seeking work during the week or week for which a benefit was denied, by producing a contemporaneously-kept Form UCB-303, or a re-created Form UCB-303 that presents substantial evidence that the four non-online work searches were actually made; and

(3) were otherwise eligible to receive a benefit,

Plaintiffs proposed Order, p. 20, would define the class as "all persons. . . (2) who were eligible to receive unemployment benefits, through SCDEW . . . and (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search on or

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after August 5, 2012." The Court concludes that item (2) above, properly read, correctly limits class membership to persons who were otherwise entitled to unemployment benefits for the weeks in which they were denied a benefit for failure to make an online work search. However, in order for a claimant to show that he or she was actually "eligible to receive unemployment benefits, through SCDEW," claimants must still show that they satisfied the requirements to receive benefits for the week or weeks in question, once the disqualification for failure to make an online work search is removed.

There is nothing about this case that would excuse the named Plaintiffs and plaintiff class members from complying with the statutory requirements applicable to all claimants for DEW benefits that they were "able to work and available for work" in their usual employment or other similar employment for which the claimants were qualified. § 41-35-110(3). The claimant class members are also required, like all other claimants for unemployment benefits, to make a weekly showing that they were "actively seeking work." *Id.*

The claimant at all times bears the burden of showing that he or she is available for work, able to work, and actively seeking work. *See, e.g., Hyman v. South Carolina Employment Sec. Commission,* 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). The Court of Appeals has held that "compliance with benefit eligibility requirements . . . includes a duty to show availability for work and a reasonable effort to obtain employment." *Wellington v. S.C. Employment Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984). *Wellington* further holds that "Whether a claimant is available and actively seeking work is an issue of fact to be determined by the administrative agency [i.e., DEW] in accordance with the facts and circumstances of <u>each case</u>." 281 S.C. at 117, 314 S.E.2d at 39 (emphasis added). In reviewing the factual question of whether the claimant was available and actively seeking work, a court must apply the

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"substantial evidence" test of the Administrative Procedures Act. *Id.* citing the provision of the APA now codified as S.C. Code Ann. § 1-23-380(5)(e). *Accord, e.g., Murphy v. S.C. Employment Sec. Comm'n,* 328 S.C. 542, 492 S.E.2d 625 (Ct. App. 1997).

Plaintiffs have argued that there is no further need for class members to make a showing of compliance with those requirements applicable to all claimants for benefits. However, there is no legal basis for excusing such compliance. The class members to whom DEW denied weekly benefits were denied those benefits because they did not make at least one online work search for the week in question. However, that does not mean that DEW concluded that those claimants had otherwise shown an entitlement to benefits for the weeks in question. Rather, there was no need for DEW to address any issues of whether the claimants were otherwise entitled to benefits. The failure to do an online work search was sufficient in and of itself to disqualify the person for the benefit for the week or weeks in question, and it would have been a superfluous exercise for DEW to consider and determine whether the claimants would otherwise have qualified for the benefit for the week or weeks in question.

In addition, the undisputed facts of record in this case show that even when a benefit is paid, DEW will thereafter, on a periodic basis, require verifications of this weekly information. March 3, 2014, Cummings Affidavit, ¶ 10. At those times, the claimant is required to submit to DEW proof of work searches, that is, completed Forms UCB-303. *Id.* DEW then randomly conducts verifications of the information provided by the claimant on the Form UCB-303, and requires repayment of benefits if the information is shown to be false. *Id.*, ¶¶ 10, 11. There is no reason why compliance with these requirements should be excused.

Plaintiffs argue in effect that any determination by DEW to deny benefits for failure to conduct an online work search also reflected a conclusion by DEW that all other requirements

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had been met. This argument, however, is completely fallacious. The denials of benefits to Patterson and Bollerman were made solely because they either did not make an online job search, or because there was no record of it. (Tabs 9 and 10, 10/31/18 hearing). There was no need for DEW to consider or decide anything else, because the determination that there was no evidence of an online search was dispositive of the individuals' claims. Nor is there anything in the record to indicate that DEW actually reviewed or decided any other issue. The situation is analogous to that in the frequently-cited case, *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), which holds that an "appellate court need not address remaining issues when disposition of prior issue is dispositive." Having found no evidence that online work searches were made, DEW had no need to consider anything else.[1]

It has been held that "there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011). *See also, e.g., Milliron v. T-Mobile*, 2009 WL 3345762, *6 (D.N.J.2009)("the Court finds it perfectly appropriate to require Class members to submit certain information proving they are entitled to collect the relief awarded in this case"). As another court has stated, "[f]iling a claim form is a 'reasonable administrative requirement' which generally does not impose an undue burden on members of a settlement class." *Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV, 2014 WL 5419507, at *6 (S.D. Fla. Oct. 24, 2014)

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[1] Plaintiffs' proposed order at 23, cites Exhibit 12 (actually Tab 14) at the 10/31/18 hearing as evidence that DEW decided other issues, but the several identical documents in that exhibit only advised the claimants that benefits were stopped because the claimants "failed to make an SC Works [i.e., online] job search contact for the week ending [date]. Therefore your benefits have been stopped." The notice advised that if the person wished to receive future benefits, they should bring the notice and their Form UCB, Report of Work Seeking Activities. There is nothing in those documents to indicate that DEW made any decision about the person's non-online work searches for the past week or weeks in question, nor would such a decision be expected, given the determination that the benefit should be stopped because of the failure to make an online search.

In fact, "claims-made" procedures would appear to be the general rule. *See, e.g., Gascho v. Glob. Fitness Holdings*, LLC, No. 2:11-CV-436, 2014 WL 1350509, at *29 (S.D. Ohio Apr. 4, 2014), *report and recommendation adopted*, No. 2:11-CV-00436, 2014 WL 3543819 (S.D. Ohio July 16, 2014), *aff'd*, 822 F.3d 269 (6th Cir. 2016)(class action administration expert testified that "in his experience with 3,000 class action settlements, most settlements are claims-made and "relatively few [of the settlements that he has been involved in]—... maybe less than ten or 20—[provide for] direct payments" [;] only 'a handful,' including three consumer cases, provided for checks to be sent without a claims process.") Requiring a claims process is particularly warranted in this case where a claimant may be ineligible to receive benefits for a particular week for a variety of reasons other than a failure to perform an online work search (e.g., other availability issues or a disqualification due to the claimant's separation from employment). Moreover, claimants may have been denied multiple weeks for failure to perform an online work search and still nearly received the total amount of benefits they were eligible to receive in a given claim year. For instance, a claimant with a weekly benefit amount of $300.00 may have been denied three weeks due to failure to perform an online work search, but nonetheless received all but $100 of their yearly allotment. Under plaintiff's class administration plan, that claimant would receive $800 more than the maximum they were eligible to receive during a year.[2]

The Court would also note that in another South Carolina class action suit involving DEW's predecessor agency, the class members were required to prove their entitlement to benefits in the manner of a claims made approach. In *Brown v. Porcher*, 502 F. Supp. 946

[2] *See* S.C. Code Ann. § 41-35-50 ("The maximum potential benefits of any insured worker in a benefit year are the lessor of: (1) twenty times his weekly benefit amount; (2) one-third of his wages for insured work paid during his base period.")

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(D.S.C. 1980), *aff'd in part*, 660 F.2d 1001 (4th Cir. 1981), the district court's order provided for the mailing of notice to class members, but further provided that actual payment would be made only to " those who respond to the aforedescribed notice within ninety (90) days of its mailing. . . ." 502 F. Supp.at 959 (emphasis added). In addition, the court in *Brown* provided that the defendant agency had a right to contest the claim made by any class member. *Id.* This procedure, like the one proposed by DEW in the present case, ensures that the only persons who receive unemployment compensation are those who are fully qualified for it, and then only in the amount they are eligible to receive.

The Court therefore concludes that the class notice should reflect the need for class claimants to make the same showing required of every other claimant for unemployment benefits at the time, including the need to show that for the period in question they were actively seeking work. Those changes are incorporated in the Class Notice which the Court approves via this Order.

PREJUDGMENT INTEREST

Plaintiffs have made a claim for prejudgment interest, but such claims are barred by sovereign immunity. There is no South Carolina case which holds, nor any statute which provides, that the State or any of its agencies may be ordered to pay prejudgment interest. While the issue has not directly arisen in any case decided after the enactment of the Tort Claims Act in 1986, there is every indication, both in that Act and in at least one judicial opinion, that sovereign immunity continues to bar the payment of prejudgment interest by the State or its agencies.

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The aforementioned judicial opinion concerning this point was rendered by Justice Pleicones, concurring in *EllisDon Const., Inc. v. Clemson Univ.*, 391 S.C. 552, 707 S.E.2d 399, 402 (2011). The *EllisDon* case declined to award prejudgment interest on grounds other than sovereign immunity. Justice Pleicones issued a concurring opinion to the effect that sovereign immunity would bar the prejudgment interest claim in any event:

> I find, however, that appellant is barred from recovering prejudgment interest by the doctrine of sovereign immunity. It is well-settled that the doctrine bars recovery of interest against the State "unless [the State has been] bound by an act of the Legislature or by a lawful contract of its executive officers...." *Monarch Mills v. S.C. Tax Comm'n*, 149 S.C. 219, 146 S.E. 870 (1929); *see also e.g. Div. of Gen. Serv. v. Ulmer*, 256 S.C. 523, 183 S.E.2d 315 (1971).

391 S.C. at 556, 707 S.E.2d at 402 (Pleicones, J., concurring). Plaintiffs have argued that the two cases on which Justice Pleicones relied were overruled by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). However, Justice Pleicones himself anticipated and addressed any such contention, noting that

> *McCall* included Appendix A, a list of 122 cases, and provided that these cases were "overruled to the extent that they hold that an action may not be maintained against the State without its consent." Although *Monarch Mills* and *Ulmer* are on that list, their holdings that the State is not liable for prejudgment interest except when bound by statute or by contract remain unaffected as the right to this interest is not a matter of tort liability.

391 S.C. at 557, 707 S.E.2d at 402. Thus, by the Supreme Court's express language in *McCall,* the Court overruled *Monarch Mills* and *Ulmer* only to the extent those cases held an action may not be maintained against the State without its consent. The *McCall* court did nothing to overrule or impact our Supreme Court's earlier rulings in *Monarch Mills* and *Ulmer* that held sovereign immunity bars interest against the State unless the State is bound by a contract or an

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act of the legislature. On the issue of prejudgment interest, *Monarch Mills* and *Ulmer* remain good and binding precedent.

In addition, even if it were to be held that *McCall* abrogated sovereign immunity in matters not involving torts, the Tort Claims Act restored any such abrogation, providing in § 15-78-20(b) as follows:

> The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. **All other immunities** applicable to a governmental entity, its employees, and agents are expressly preserved.

(Emphases added.) The Supreme Court of South Carolina has specifically held that "The [Tort Claims] Act first completely restores sovereign immunity. S.C. Code Ann § 15-78-20(b) . . . and then provides specific waivers and limitations on actions against governmental entities." *Murphy v. Richland Mem'l Hosp.*, 317 S.C. 560, 563, 455 S.E.2d 688, 690 (1995)(emphasis added).

In addition, even for those instances in which sovereign immunity was waived in the Tort Claims Act, the General Assembly expressly provided in § 15-78-120(b) that "No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment." The fact that the General Assembly precluded prejudgment interest even in cases where sovereign immunity was expressly waived is strong evidence of a legislative intent to preclude such claims in all other contexts as well.

In addition, the system for the payment of unemployment insurance is entirely created and governed by statute. The statutes do not authorize the payment of interest on unlawfully

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withheld benefits. On the contrary, the legislature in § 41-27-630 expressly prohibited claimants from receiving anything more than their weekly benefit amount:

> "A benefit is considered due and payable pursuant to Chapters 27 through 41 of this title **only to the extent provided in those chapters** and to the extent that money is available for them to the credit of the unemployment compensation fund and **neither the State nor the department must be liable for an amount in excess of that sum.**"

(Emphases added.) Plaintiffs argue that "The legislature has not precluded the recovery of prejudgment or post judgment interest in claims not sounding in tort." Proposed Order at 22. That is incorrect, because as quoted above, the legislature has expressly precluded a claimant from receiving "an amount in excess of [the weekly benefit amount]." Moreover, the Tort Claims Act expressly preserves "[a]ll other immunities applicable to a governmental entity. . . ." This includes the established sovereign immunity from the payment of prejudgment interest.

PRODUCTION OF CLASS MEMBERS NAMES, ADDRESSES, AMOUNT OF BENEFIT DENIED AND DATE BENEFIT DENIED

The parties in the Second Amended Scheduling Order filed February 2, 2015, provided that upon Class Certification SCDEW agreed "upon an appropriate order" to provide Information requested in Plaintiffs interrogatories 5 and 6 pertaining to the names and addresses of class members as well as the amount of benefit and the date it would have been paid. (See Plaintiffs Motion to Compel filed June 27, 2013) SCDEW initially objected to production of this information, citing confidentiality restrictions found in 20 CFR 603, which require state agencies administering unemployment insurance benefits to keep certain information confidential. 20 CFR 603.5 (h) provides an exception to this confidentiality requirement, if the disclosure is in response to a court order.

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Therefore, within 30 days of this order becoming final, SCDEW shall provide a list of class members names, addresses, the amount of benefit denied as well as the date the benefit was to have been paid.[3] To save cost of administration and notice, this information shall be provided in electronic format, in excel or a software platform of general commercial use, if practicable. Pursuant to 20 CFR 603.7(a), Plaintiffs must keep this unemployment compensation information confidential and utilize it only as permitted in this order.

NOTICE TO THE CLASS

Plaintiffs have filed a motion to approve a class notice. SCDEW has filed an objection to the proposed notice. SCDEW does not object to the general form of the notice but asserts that class members still have the burden of proving they are otherwise entitled to unemployment benefits and more information is needed to determine whether class members are entitled to benefits. For example, SCDEW contends class members still need to prove they made four job contacts for the week(s) benefits were denied.

After review of the notice, I find that Plaintiffs' proposed notice, as modified by Defendant, informs the class of the pendency of the action, the nature of the action, the class members' rights to participate in the action, the class members' rights to opt out of the class action, and the documentation each class member must produce to receive payment. While it may be necessary to make some modification to the Notice and this Order to reflect any subsequent appeals or developments, or to provide additional details about the administration and claims process, the general form of this Notice is hereby approved. A copy of the notice

[3] All references herein to a period of "__ days of this order becoming final" are intended to refer to finality after any and all appeals have been resolved.

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form (and opt out form) is attached to this Order. Further instructions regarding this notice are given below.

ATTORNEY FEES

Plaintiffs assert they are entitled to attorney fees either from the common fund of the class or pursuant to S.C. Code Ann. 15- 77-300. Within 30 days of this order becoming final, Plaintiffs shall file their petition for attorney fees and costs, together with any affidavits in support of its petition.

CLASS ADMINISTRATION

The following class administration process is subject to change pursuant to a final order resulting from the supplemental hearing described in Section 4.

1. **Administration Costs.** The Plaintiffs will bear the costs of class administration and notice. "Rule 23(d)(2) provides that the notice is given by the party seeking to maintain the action as a representative suit . . . The language of our rule imposes the costs of notice on the party seeking class status. This is consistent with federal practice." James F. Flanagan, South Carolina Civil Procedure, 197 (3d ed.). See Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 178-79 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class."). Plaintiff's may petition to recover these costs in its petition for fees and costs.

2. **Appointment of Class Administrator.** Within 15 days of this Order becoming final, the parties shall confer for the purpose of selecting a class administrator to effect class notice, collect any opt outs from class members, collect any objections to the award of attorney fees and costs from those who do not opt out, to disburse settlement funds to class

members who do not opt out, and to handle all other aspects of managing class administration. If the parties cannot agree, either party shall move before the court for an administrator to be appointed. During the administration of the award to the Class, the Administrator shall submit a written activity status report to the Court no less frequently than monthly with copies to counsel for the parties.

3. **Attorney fees and costs petition.** Within 30 days of this Order becoming final Plaintiffs counsel shall submit its fee petition, and Defendant shall comply with this Order regarding production of class member information.

4. **Supplemental hearing.** Within 60 days of this Order becoming final, or as soon as practicable, this Court shall conduct a supplemental hearing for the purpose of hearing Plaintiff's counsel's petition for attorney fees and costs, determining the final amount to be paid to each claimant, approving a class administrator, making any modifications to the Class Notice and this Order, and to issue any order necessary for the administration of the class. As soon as practicable after this Order becomes final, the parties shall contact the Chief Judge for Administrative Purposes for this Circuit for the purpose of assigning a judge and conducting a supplemental hearing is this matter.

5. **Notice to Class.** Within 15 days of the order from the supplemental hearing described in Section 4 becoming final (Supplemental Order), or at such later time as Court may direct, the class administrator shall:

   a) mail to each Class Member via first class mail a copy of the Notice as finally approved by this Court. The Administrator shall file an affidavit of mailing with the

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Court and provide copies to counsel for the parties. Refer to parts 10(f) and (g) below for instructions regarding "Returned Mailings."

b) The Administrator shall also cause the Publication Notice (as finally approved by the Court) to be published once per week on two (2) consecutive weeks in accordance with S.C. Code 15-29-40, in papers of general circulation in the cities of Greenville, Columbia, Charleston and Florence. The Publication Notice shall first be published simultaneously with the mailing of the Notice to Class Members or as soon thereafter as practicable, and in no event more than ten (10) days after Notices have been dispatched by mail. Proofs of the Notice shall be provided to counsel for the parties for review prior to publication. The Administrator shall file or cause to be filed an affidavit of publication with the Court and provide copies to counsel for the parties.

6. **Opt outs.** Each Member of the Class shall be provided with the individual right to exclude himself or herself ("opt out") from the Class by advising the Clerk of Court in writing of such a decision by a date that is to be later determined by the Court. Notices of decisions to opt out received after such date shall be of no force or effect. The right to opt out shall be described in both mailed and published notices, as approved by the Court. If a Class Member elects to opt out, the Class Member shall not participate in the final award.

7. **Objections.** Any objections to Class Counsel's request for reasonable fees and costs or to the compensation for the Class representatives or to any other matters must be filed with the Clerk of Court within thirty (30) days of the first publication of the Publication.

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8. **Final hearing.** The notice shall also advise the Class Members of the time and location of the final hearing and their rights to appear and voice any objections they have to any award of attorney fees and costs.

9. **Payments to Class Members.** The following procedures shall be followed to effectuate payment to class members who are eligible to receive payment pursuant to this order:

(a) Transfer to Administrator. Within a reasonable time after the Supplemental Order becomes final, Defendant shall pay to Administrator as Escrow Agent for the Members of the Class the aggregate sum owed to each class member as computed above. This amount will be adjusted downwards to account for any Members that choose to opt out. The payment shall be via Electronic Funds Transfer (EFT) in immediately available U.S. funds.

(b) Administration of the Fund. The Fund shall be held in trust in the name of Administrator as Escrow Agent in one or more interest-bearing accounts. Each account shall clearly be designated as an "SCDEW Distribution Account." All interest earned on the Fund shall be added to and made a part of the Fund.

(c) Recognition Payments to Class Representatives. In recognition of the Named Plaintiffs' willingness to serve as Class Representatives and to assist in the prosecution of this case on behalf of all Class Members, the Administrator shall pay out of the Fund to Plaintiff Tami Bollerman Webb the sum of ___ and to Plaintiff Archie Patterson the sum of ___, said sums being computed on the basis of $ 0.50 times the number of class members who do not opt out. These payments shall be made within a reasonable time after the Supplemental Order becomes final, assuming they remain members of the class after making a claim and submitting the required documentation of their job searches. These payments will be deducted

from the gross payment of benefit owed to each Class Member who does not opt out. These payments will be in addition to the distributions ordered below.

(d) Checks Class Members. Payments to class members shall be made in accordance with the claims process and timelines detailed in the final Supplemental Order.

(e) Adjustments for Opt-Outs. The Fund shall be reduced by the total amount owed each Class Member who elects to opt out in the manner specified in this Order. Any monies paid into the Fund on behalf of any Class Member who timely elects to opt out shall be returned by Administrator to Defendant. Likewise, the recognition payments to the two Class Representatives will be reduced by a total of 1.00 for each Opt-Out.

(f) Returned Mailings. If any mailing to a Class Member is returned by the United States Postal Service (USPS), the Administrator will promptly use the National Change of Address service provided by the USPS to attempt to locate such Class Member and a current address. Once Administrator obtains an updated address from the USPS for Class Members previously not located, Administrator will attempt another mailing to the Class Member. If the USPS is unable to provide an updated address, Administrator will then attempt to utilize the services of a credit-reporting agency in accordance with the Federal Credit Reporting Act. Regardless of any returned mailings, claims to receive benefits under this class action must be made within the timeframe specified in the final Supplemental Order.

(g) Additional Location Efforts. Thirty (30) days the class notice is first mailed (or as soon as practicable after this 30-day period has elapsed), the Administrator shall identify all persons whose notices have been returned. Within ten (10) days after identifying such persons, the Administrator, using data from a credit bureau and/or the National Change of Address service, will update addresses to locate all such persons so identified. Within

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ten (10) days after obtaining the addresses for such persons, Administrator will attempt another mailing to any Class Members thus located. The Administrator is not required to make a mailing to any person whose initial mailing is returned undeliverable until after the postal address has been updated in the manner prescribed hereinabove. Regardless of any additional location efforts, claims to receive benefits under this class action must be made within the timeframe specified in the final Supplemental Order.

(h) Personal Identifiers. By this Order, the Court hereby authorizes the Administrator and Class Counsel to collect the Social Security numbers, dates of birth, driver's license numbers and any other identifying information of Class Members, if necessary. Such data are to be used only in connection with the disbursement of proceeds, any required tax-related filing, and related aspects of the Class administration.

(i) Reports. No less frequent than monthly, Administrator will provide counsel for the parties a list of checks consisting of check numbers with each check, the payee(s), the amount, and the mailing address, and date of mailing. Class Counsel shall also file with the Clerk of Court a summary affidavit setting forth the date of mailing of the checks. A copy of this affidavit shall be served upon counsel for the parties.

(j) Death. If Administrator is informed that any Class Member becomes deceased after substantiating their claim in accordance with the final Supplemental Order, the Administrator shall work with class counsel to have the check appropriately reissued in the name of the estate, the name of the personal representative, or the spouse or heir(s) as circumstances dictate. If the Administrator is unable to successfully issue a check to address the death of the Class Member, then the amount due to the decedent shall be shall lapse and revert to the unemployment trust fund as provided in S.C. Code Ann. § 41-35-30.

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(k) Bankruptcies. Administrator shall endeavor to identify each Class Member who is currently a debtor in a bankruptcy proceeding in the Bankruptcy Court for the District of South Carolina, and for such persons, Administrator shall make the checks jointly payable to the Trustee and Class Member, to be mailed to the Trustee or will issue checks as directed by the Bankruptcy Court and/or Trustee. Further, if Administrator becomes aware of any Class Member who is currently a debtor in a bankruptcy proceeding in any other jurisdiction, Administrator will make the checks jointly payable to the Trustee and Class Member, to be mailed to the Trustee or will issue checks as directed by the Bankruptcy Court and/or Trustee.

(l) Unclaimed funds. Plaintiffs have asserted that all funds that are not claimed by a Class Member shall be deemed residual funds and paid pursuant S.C.R.C.P. 23(e) to the South Carolina Bar Foundation. The Court disagrees, and directs that such funds shall lapse and revert to the unemployment trust fund.

Rule 23(e) became effective April 27, 2016. At the time the amendment to the Rule was added, almost all of the complained-of acts in this case had occurred, with only about two month (May-June 2016) remaining until DEW ceased stopping benefits, the proviso not having been re-enacted for 2016-17. Rule 86(a) provides that

> (a) These rules shall take effect on July 1, 1985. They govern all proceedings in civil actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

The Supreme Court has held that the same rules of applicability apply when new civil rules are promulgated after the original 1985 enactment. *Graham v. Dorchester Cty. Sch. Dist.*, 339 S.C. 121, 124, 528 S.E.2d 80, 82 (Ct. App. 2000).

First of all, Rule 23(e) does not require the Court to provide for residual funds. Specifically, Rule 23(e)(2) provides only that "Any order, judgment, or approved compromise in a class action under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds." (Emphasis added.) The rest of Rule 23(e)(2) only provides for what would happen if the court elects to provide for the disbursement of residual funds.

However, even if language of the Rule were to be deemed mandatory, it would nevertheless "not be feasible or would work injustice" to apply it here for several reasons; First, the distribution of unpaid or unclaimed funds is covered by statute, specifically § 41-33-170 ("Disposition of unused amounts in benefit payment account"), which provides as follows:

> A balance of money requisitioned from the unemployment trust fund under Section 41-33-80 which remains unclaimed or unpaid in the benefit account and the benefit payment account after the expiration of the period for which those sums were requisitioned either must be deducted from an estimate for, and may be used for the payment of, a benefit during a succeeding period or, in the discretion of the department, must be redeposited with the Secretary of the Treasury of the United States to the credit of this State's account in the unemployment trust fund, as provided in Section 41-33-50.

In other words, DEW is required either to use unclaimed funds for a succeeding year or to deposit it to the State's federal trust fund account. This rules out any use of unclaimed funds for other purposes or under different statutes, such as the Unclaimed Property Act cited in Plaintiffs' most recent correspondence to you. As an aside, all UI funds, including funds that were originally "state funds" received from employers, are transferred to the US Treasury to be held in South Carolina's unemployment trust fund. S.C. Code Ann. § 41-33-50. Moreover, the General Assembly has, however, provided that when there is no one available from a list of possible heirs to claim a benefit payable to a deceased person, "the payments due the deceased must lapse and

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revert to the unemployment trust fund." § 41-35-30(B). The Court finds that similar result should apply here by analogy, meaning that any unclaimed funds would effectively remain with DEW for the payment of unemployment claims to others. This is similar or identical to the purpose sought to be served by the distribution of funds proposed by Plaintiffs, and if anything is more specifically directed to the class members, i.e., persons making unemployment insurance claims, than the more broad distribution for which Plaintiffs advocate.

Secondly, the Defendant is a state agency charged with expending its funds for the public benefit. Unlike a private defendant in a class action DEW would not retain funds in a way that would be comparable to permitting a private defendant to profit. Moreover, unlike some situations in which a residual fund account is created, the unemployment insurance funds in the present case were not paid to DEW by class members, but rather were paid by employers. DEW therefore did not "profit" at the expense of class members, unlike a situation, for instance, in which a business is found to have overcharged a number of people and there is no reason in equity why the business should be permitted to keep its overcharges simply because not all of the overcharges could be repaid.

Thirdly, even if DEW should ultimately not prevail on the merits in this action, it cannot be disputed that DEW's actions were nevertheless prompted by a good faith effort to comply with the expressed will of the General Assembly as DEW understood it. In other words, there is no need in this situation to regard DEW's actions as something that is necessary in order to deter DEW from similar conduct in the future.

Finally, there is no reported South Carolina case in which a court has ordered the distribution of unclaimed funds in a manner akin to the *cy pres* doctrine. Accordingly, there is nothing in "former procedure" that would require a class action defendant to turn over funds not

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paid to class members . To apply Rule 23(e) to this case would be (except for possibly two months in 2016) an impermissible retroactive award.

Supplemental Hearings

This Court shall hold all supplemental hearings necessary to effectuate the Order and distribute funds to the class.

It is Therefore Ordered that:

1. SCDEW was required to promulgate regulations before implementing its online work search, and each class member who

(a) was denied a benefit between August 6, 2012, and July 1, 2016, for failure to perform an online work search;

(b) did not exhaust his or her benefit allotment for the pertinent period despite the work search ineligibility;

(c) can document that he or she was actively seeking work during the week or week for which a benefit was denied, by producing a contemporaneously-kept Form UCB-303, or a re-created Form UCB-303 that presents substantial evidence that the four non-online work searches were actually made; and

(d) was otherwise eligible to receive a benefit,

is entitled to receive the benefits denied as a result of the online requirement;

2. Attorney fees and costs are held in abeyance as set forth above;

3. Class notice and administration shall be implemented as set forth above;

4 All funds that are not claimed by a Class Member shall remain in the possession of DEW.

5. This Court reaffirms its prior orders certifying the class and finding that Named

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Plaintiffs have standing to represent the class;

It is further Ordered that his case shall remain open for the administration and distribution of payments to the class, as well as other issues which may arise.

AND IT IS SO ORDERED.

____
Doyet A. Early, III
Circuit Court Judge
Second Judicial Circuit

________________________, South Carolina

______________________, 2019

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COURT OF COMMON PLEAS FOR BARNWELL COUNTY, SOUTH CAROLINA

THIS IS A COURT-AUTHORIZED NOTICE.
THIS IS NOT A SOLICIATION FROM A LAWYER.

- The purpose of this Notice is to inform you of a class action lawsuit that is now pending in the Court of Common Pleas for Barnwell County, South Carolina. This Notice is intended to advise you of the lawsuit and of your rights with respect to the lawsuit. The Notice is not, and should not be understood as, an expression of opinion by the Court concerning the merits of the lawsuit or the defenses to the lawsuit.

- **Read this Notice carefully and in its entirety. Your legal rights will be affected by proceedings in this lawsuit.**

- Your rights, and the deadlines to exercise them, are explained in this Notice.

- While the Court in charge of this case has issued an order in favor of the Plaintiffs, appeals are also expected and this court still has to decide other issues, such as the award of attorney fees. Payments will be made after the Court issues its final rulings, unless those rulings are reversed on appeal. Please be patient.

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BASIC INFORMATION

1. Why is there a notice?

You have a right to know about this class action lawsuit and about your options. This notice explains this lawsuit to you and explains how you can participate or exclude yourself from the lawsuit. Please read it carefully.

The Court in charge of this case is the Court of Common Pleas for Barnwell County, South Carolina, and the case is called Lorinda A. Robinson, et al. v. South Carolina Department of Employment & Work Force, Case No. 2013-CP-06-00059 (the "Lawsuit"). The people who sued are called the "Plaintiffs," and the state agency they sued, the South Carolina Department of Employment and Workforce, is called the "Defendant".

2. What is this Lawsuit about?

Plaintiffs seek to recover money for class members who they allege were wrongfully denied unemployment benefits as a result of the Defendant's failure to comply with South Carolina law.

Plaintiffs assert as of August 6, 2012, and ending July 1, 2016, SCDEW, without first promulgating regulations, began to require claimants to file at least one online application seeking employment. The named Plaintiffs were denied benefits because of their failure to apply online for employment. Plaintiffs assert that SCDEW is required by Statute to implement regulations to establish policies to pay claims for unemployment benefits in particular S.C. Code Ann. §41-27-510, §41-29-110, §41-35-610, and §1-23-10 et. seq. Alternatively, Plaintiffs assert the new policy constitutes a binding norm which must be implemented by regulation.

The Defendant denies all claims made against it, denies that its practices violated any laws, and denies that the Plaintiffs are entitled to any relief.

3. What is the status of the Lawsuit?

By Order dated April 29, 2016, the Court ruled that the Lawsuit should be maintained as a class action. A merits hearing was held on October 31, 2018. After the hearing the Court issued its Order finding SCDEW was required to promulgate regulations before implementing its online requirement and each class member is entitled to receive the benefits denied as a result of the online requirement.

4. Why is this a class action?

In a class action, one or more people, called "class representatives," sue on behalf of people who have similar claims. All these people are a "Class" or "Class Members," except for those who exclude themselves from the Class.

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To certify a class, a Court must find there are numerous people who have common legal or factual issues to be resolved and that the class representative has similar claims and will adequately represent the interest of the class. Usually, class actions involve numerous small claims which might not be economical for the class members to file and maintain as individual suits.

WHO IS IN THE CLASS?

5. How do I know if I am part of the Class?

If you receive this Notice in the mail, the Court has reason to believe you are a member of the Class.

The Court has defined the Class as "...All persons who are:
(1) citizens and residents of South Carolina;
(2) who were eligible to receive unemployment benefits, through SCDEW;
(3) who made application through SCDEW to receive benefits;
(4) who were denied a benefit between August 6, 2012, and July 1, 2016, for failure to perform an online work search; and

(1) did not exhaust their benefit allotment for the pertinent period despite the work search ineligibility;

(2) can document that they were actively seeking work during the week or week for which a benefit was denied, by producing a contemporaneously-kept Form UCB-303, or a re-created Form UCB-303 that presents substantial evidence that the four non-online work searches were actually made; and

(3) were otherwise eligible to receive a benefit."

CLASS BENEFITS

6. What will I get if I stay in the Class?

If you stay in the Class and the Plaintiffs prevail, and if you can make the showing referenced below, you will receive the benefit amount you would have received had your benefit not been denied for failing to comply with the online work search requirement. Please note, you cannot receive more than your maximum potential benefit amount for a year under S.C. Code Ann. § 31-35-50. Further, before you can collect the benefit amount, you will be required to document that you were actively seeking work during the week or weeks for which the benefit would have been paid. DEW requires this documentation to be made by a Form UCB-303, kept by you at the time the benefit was sought. DEW will also accept a re-created Form UCB-303 for the period in question, but DEW will review any such forms, whether original or re-created, to determine whether they present substantial evidence that the four non-online work searches were actually made. You will need to have been otherwise qualified to receive a benefit during the period in question.

7. What am I giving up to stay in the Class?

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If you remain in the class, you can't sue the Defendant, continue to sue, or be part of any other lawsuit against the Defendant about the issues in this case and you will be bound by the Court's decision in this case.

8. How can I get a payment?

If you decide to remain in the Class and the case results in an award of monies to the class after all appeals have been resolved, you will be notified of that result, and advised how to submit your proof of entitlement to benefits for the period in question.

9. When will I get my payment?

If the Court awards monies to the Plaintiffs, this case will not be over. The Defendant has the right to appeal. No payments will be made until all appeals have been resolved, and only if those appeals are resolved in the Plaintiffs' favor. It is not possible to predict what the appellate courts will decide. Resolving appeals can take time, and its uncertain how long that process will take. Please be patient.

EXCLUDING YOURSELF FROM THE CLASS

If you don't want a payment and you want to keep the right to sue or continue to sue the Defendant on your own about the issues in this Lawsuit, then you must take steps to get out of this lawsuit. This is called excluding yourself, or it is sometimes referred to as "opting out" of the Class.

10. How do I get out of the Class?

To exclude yourself from or "opt out" of the Class, complete the attached "Election to Opt out of Class Action" form, and mail it to the Class Administrator at:

{insert Class Administrator's address}

The form must be postmarked no later than ________________________. If your form is not postmarked by ____________________, you will remain a member of the Class and you will be bound by the Court's orders. You will also give up your right to sue the Defendant for the claims that this Lawsuit resolves.

11. If I don't exclude myself, can I sue the Defendant for the same thing later?

No. Unless you exclude yourself, you give up the right to sue the Defendant for the claims that this Lawsuit resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from this Class to continue your own lawsuit.

12. If I exclude myself from the Class, can I still get a payment if the class is awarded money?

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No. You will not get any money from this class action if you exclude yourself from the Class.

THE LAWYERS REPRESENTING YOU

13. Do I have a lawyer in the case?

The Court has appointed these lawyers and firms as "Class Counsel," meaning that they were appointed to represent the interests of all class members through the class representative(s): C. Bradley Hutto of Williams & Williams, Daniel W. Williams of Bedingfield & Williams, LLC, Alex Paterra of The Paterra Law Firm, LLC, and Adam Protheroe of S.C. Appleseed Legal Justice Center. Their addresses appear on the last page of this Notice.

You will not be charged separately for these lawyers' services to the class. If you want to be represented by your own lawyer, you may hire one at your own expense.

14. How will the lawyers be paid?

Depending on the outcome of the case, the lawyers will be paid in one of two ways: 1) from the common fund created by the Court to pay the judgment it entered; 2) from statutory provisions which allow recovery of attorney's fees, if the Court finds these provisions are applicable. The attorneys will not seek payment from class members individually.

IF YOU DO NOTHING

15. What happens if I do nothing at all?

Unless you exclude yourself, you won't be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the Defendant about the issues in this case in the future and you will be bound by the decision of the Court in this case.

GETTING MORE INFORMATION

16. What should I do if I have moved or if my situation has changed?

If you have moved, or if your situation has changed because of death or divorce, please contact the Class Administrator:

{Class Administrator Contact Information}

17. How do I get more information?

This Notice summarizes the Lawsuit. The pleadings and other papers filed in the Lawsuit are available for inspection in the Office of the Clerk of Court in the Barnwell County Courthouse in Barnwell, South Carolina.

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Please do not call the Court or the Clerk of Court's office. If you have questions, or if you need to update your address or other information, you should call Class Counsel or contact them at:

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS
Post Office Box 1084
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(803) 534-5218

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BEDINGFIELD & WILLIAMS, LLC
Post Office Box 616
Barnwell, SC 29812
(803) 259-2759

Alex Paterra, Esquire
THE PATERRA LAW FIRM, LLC
104 S. Calhoun Street
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(864) 232-2776

Adam Protheroe, Esquire
S.C. APPLESEED LEGAL JUSTICE CENTER
PO Box 7187
Columbia, SC 29202
(803) 779-1113, Ext. 106

BY ORDER OF THE COURT.

____
Doyet A. Early, III
Presiding Judge
Second Judicial Circuit

__________________, South Carolina

Dated: ________________________________

CLASS COUNSEL

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS

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ELECTION TO OPT OUT OF CLASS ACTION

Lorinda A. Robinson, et al. v. SC Department of Employment & Workforce
Barnwell County, South Carolina Court of Common Pleas
Civil Action No. 2013-CP-06- 00059

INSTRUCTIONS:

Only complete this opt-out form if you want to opt out of the class in the action known as **Lorinda A. Robinson, et al. vs. SC Department of Employment & Workforce**, pending in the Barnwell County, South Carolina Court of Common Pleas, Civil Action No. **2013-CP-06-00059**. **If you opt out, you will not receive a payment from this lawsuit if one is made.**

If you do not want to opt out and you want to receive a payment, **DO NOT** complete this form.

I want to opt out of the class in the matter known as *Lorinda A. Robinson, et al. v. SC Department of Employment & Workforce.* I do not wish to participate in this action.

Date: ______________________________ ______________________________

Signature

Please type or print the following information:

Name: ____
FIRST MIDDLE LAST

Former Name(s) (if any): ____

Mailing Address: ____
NUMBER STREET APT. #

____
CITY STATE ZIP

Telephone Number: ____

Mail the completed form to: {Insert Class Administrator's Address}

IMPORTANT! THIS FORM MUST BE POSTMARKED BY ______________
OR ELSE YOU WILL LOSE YOUR RIGHT TO OPT OUT OF THE CLASS.

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Barnwell Common Pleas

Case Caption: Lorinda A Robinson, et al , plaintiff, et al VS SC Department of Employment & Work Force

Case Number: 2013CP0600059

Type: Order/Other

So Ordered

s/D.A. Early III 2136

Electronically signed on 2019-02-15 14:01:23