STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case Number 2014-002254

Opinion # 5556 (S.C. Ct. App. filed April 25, 2018)(Shearouse Ad. Sh. No. 17)

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

v.

South Carolina Department of Social Services, Respondent

APPENDIX

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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

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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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4201569

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Other: _____

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

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

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: Defendant's motion for summary judgment is DENIED. Plaintiff's motion for class certification is GRANTED. Motion for Appellate Inadequate

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

2168
Judge Code

4/8/14
Date

For Clerk of Court Office Use Only

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

Timothy Ryan Langley PO Box 2765 Spartanburg, SC 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley pro se cc

Court Reporter

M Hope Blackley - Clerk of Court

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

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

2014 APR -8 PM 3:41

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

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

I. **Introduction/Factual and Procedural History**

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

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

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

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

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

II. Analysis and Citation of Authority

II.A. Defendant's Motion for Summary Judgment

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

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

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

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

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[1] Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRCP.

[2] Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

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

[4] Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999).

[5] Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sheriff's Dep't. 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).

[6] Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

[7] Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).

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

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

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

He said specifically:

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

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

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

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

Among these principles are the following:

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

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

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

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

II.B. Plaintiff's Motion for Class Certification

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

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

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

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

II.B.1 Numerosity

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

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

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

II.B.2 Commonality

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

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

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

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

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

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

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

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

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

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

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

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

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

[31] Id. at 22.

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

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

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

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

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[32] Id.

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

[34] McGann, 340 S.E.2d at 158.

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

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

II.B.3 Typicality

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

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

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

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

II.B.4 Adequacy and Class Definition

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

The Class the Plaintiffs seek to represent is as follows:

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

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

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

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

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

II.B.5 Amount in Controversy

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

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

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APPX0020

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

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

II.B.6 Notice

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

II.C. Plaintiff's Motion to Compel

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

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

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

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

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

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

IT IS SO ORDERED.

Honorable Brian Gibbons

May 21, 2014

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

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

I. Introduction/Factual and Procedural History

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

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

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

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

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

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

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

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

II. Analysis and Citation of Authority

II.A. Defendant's Motion for Summary Judgment

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

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

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

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

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

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

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

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

He said specifically:

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

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SPARTANBURG COUNTY
2014 SEP 16 PM 3:35
M. HOPE BLACKLEY

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

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

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

Among these principles are the following:

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

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

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

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

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

II.B. Plaintiff's Motion for Class Certification

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

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

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

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

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

II.B.1 Numerosity

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

II.B.2 Commonality

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

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

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

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

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

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

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

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

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

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

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

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

[35] Id. at 22.

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

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

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

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

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

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

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

II.B.3 Typicality

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

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

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

II.B.4 Adequacy and Class Definition

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

The Class the Plaintiffs seek to represent is as follows:

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

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

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

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

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

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

II.B.5 Amount in Controversy

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

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

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

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

II.B.6 Notice

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

II.C. Plaintiff's Motion to Compel

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

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

to Compel if these matters are not resolved.

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

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

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

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

IT IS SO ORDERED.

Honorable Brian Gibbons

~~May~~ 9/12, 2014

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SPARTANBURG COUNTY
2014 SEP 16 PM 3:35
M. HOPE BLACKLEY

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STATE OF SOUTH CAROLINA **COUNTY OF SPARTANBURG**	)	**IN THE COURT OF COMMON PLEAS**
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Plaintiff, v. South Carolina Department of Social Services, Defendant.	)	Civil Action No. 2013-CP-42-1569 **ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR RECONSIDERATION**

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

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

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

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

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

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

SUMMARY JUDGEMENT ISSUE

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

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

CLASS CERITIFICATION ISSUE

The Circuit court has wide discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d). Rule 23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action. The circuit court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23, but the class must comply with the following five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy.

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

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

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

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

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

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

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

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

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

Numerosity

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

Commonality

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

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

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

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

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

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

Typicality

The alleged legal violations against the Plaintiffs are typical of those against each member of the putative class under Rule (23)(a)(3) of the South Carolina Rules of Civil Procedure. Plaintiffs allege that Defendant's unilateral, simultaneous cut of benefits, similarly applied to all Class Members, gives rise to the claims at issue. Because Plaintiffs allege the written agreements they signed have been breached applies uniformly to all Class Members, Plaintiffs have satisfied the typicality requirement. Like the members of the Class, the Plaintiff through her parents is the third party beneficiary of a contract who had its contractually owed benefits cut. In addition, the claims of Plaintiff and the Class Members arise under the same legal theories that the written contract has been breached. The harms suffered by the Plaintiff are

typical of the harms suffered by all children in the putative class because they arise from the same cut of benefits and are based on the same legal theories. Defendant's brief and arguments at the hearing made no meaningful arguments to the contrary.

Adequacy and Class Definition

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

The Class the Plaintiffs seek to represent is as follows:

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

A proper class definition describes the class in objective terms, capable of membership ascertainment without regard to the merits of the proposed class members' claims or the particular relief they seek. The Plaintiffs have no interest in the subject matter of the lawsuit

that would render them antagonistic to other class members. Accordingly, Plaintiffs truly are representative of the class and the class is defined as outlined above.

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

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

Amount of Controversy

Rule 23(a)(5) of the South Carolina Rules of Civil Procedure requires an amount in controversy for each class member to be at least one hundred ($100.00) dollars to certify a class in cases where the relief sought is not primarily injunctive relief. Plaintiff concedes that the class is narrowed to those who have lost at least five months of benefits. Accordingly, the requirements of SCRCP Rule 23(a)(5) are met.

Notice

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

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

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

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

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

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

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

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

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

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

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

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

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

AND IT IS SO ORDERED.

BRIAN M. GIBBONS
Presiding Judge, Seventh Judicial Circuit

Chester, South Carolina

April 13, 2015

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	7TH JUDICIAL CIRCUIT
BLH (dob /) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated Plaintiff, vs. South Carolina Department of Social Services Defendants.	)	CA NO. 13-CP-42- 1569 COMPLAINT (CLASS ACTION)

Plaintiff, BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley individually and on behalf of all others similarly situated hereby files this Complaint and alleges the following based upon information, belief, and the investigation of counsel:

INTRODUCTION

1. This class action is brought by Plaintiffs (hereinafter "Class Representatives") individually and on behalf of all recipients of Adoption Assistance Subsidies (hereinafter referred to as "AAS") who had their benefits unilaterally cut by Defendant without their consent (hereinafter "Class Members" or "putative class members"). AAS are provided to help thousands of abused and neglected children, all of them currently or formerly in the custody of the South Carolina foster care system, which have highly specialized medical, mental health or other special needs. The law provides subsidies for these children because, due to their special needs, they would likely not otherwise have a chance for a permanent family through adoption. These subsidies are continued by contract for children who are adopted out of foster care from the State of South Carolina to the child's adoptive parents for the benefit of the child.

2. The contract between the State of South Carolina Department of Social Services ("SCDSS")

and the Class Representatives and putative class members provided for a monthly adoption subsidy.

3. On or about June, 2002, in an ill-conceived, and illegal effort to cut benefits to the state's most needy, Defendants unilaterally cut twenty dollars ($20.00) per month from the adoption assistance subsidy provided to BLH. Defendants also cut twenty dollars ($20.00) per month from the South Carolina Foster Care Subsidies ("FCS"), but this cut was reversed in 2004 and the twenty dollars ($20.00) per month was restored to the South Carolina Foster Care Subsidies.

4. The unilateral cut of the adoption benefits Defendants' contractually agreed to violates Plaintiff's contractual rights and has proximately caused Class Representatives and putative class members substantial damages.

PARTIES

5. Class Representatives Kenneth and Angela Hensley appear as guardians and adoptive parents on behalf of BLH (dob , pursuant to Fed. R. Civ. P. 17(c) and are citizens and residents of Spartanburg, South Carolina. Kenneth and Angela Hensley are sufficiently familiar with the facts of BLH's situation to fairly and adequately represent the child's best interest in this litigation.

6. Defendant South Carolina Department of Social Services, ("SCDSS") is a state agency that entered into the contractual agreements outlined herein and is required to comply with state and federal laws. SCDSS has been on notice of these specific allegations since at least October 2011.

CLASS ACTION ALLEGATIONS

7. This action is properly maintained as a class action pursuant to S.C. R. Civ. P. 23.

8. The class is defined as: "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."

9. This class has previously been certified as compliant with the requirements of Fed.R.Civ. P. 23 and applicable common law by federal judge G. Ross Anderson in CA NO. 7:11-cv-02827. That case involves a related, but distinct cause of action under 42 U.S.C. Section 1983. Judge Anderson agreed with the following in certifying the class:

   A The class is sufficiently numerous. As of June 20, 2002, approximately 4,100 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. Therefore, the class as a whole is comprised of at least 4,100 current and former adopted children and joinder of all putative class members is impracticable. The disposition of the claims asserted herein through this class action will be more efficient and will benefit the parties and the Court.

   B The questions of law and fact raised by the Class Representatives are common to and typical of those of the putative class members. Each named Class Representative and each putative class member is subject to Defendants' action concerning adoption assistance subsidy contracts and Defendants' unlawful pattern and practice of unilaterally cutting benefits in violation of the contract obligations it had to Class Representatives. The damages calculation is also common to each of the Class Representatives. The facts of the case at bar present a textbook example of the commonality element: a uniform, across-the-board cut of benefits, in the exact same amount, at the exact same time, in violation of the same contractual rights.

C All Class Representatives and putative class members share a united interest in the fair, just, and consistent determination of the questions of law and fact necessary to the adjudication of Defendant's liability, which predominate over questions affecting only individual members. The key question being: whether the unilateral cut of adoption assistance benefits violates Class Representatives and putative class members rights under the adhesion contract entered into by Defendant and members of the class ;

D Common questions of fact include: whether Defendant nullified the primary terms of pre-existing, long-term adoption assistance agreements between SCDSS and parents that adopted former wards of South Carolina's foster care system and third-party beneficiaries to that contract.

E The legal violations against the Class Representatives are typical of those against each member of the putative class. The harms suffered by the Class Representatives are typical of the harms suffered by all children in the putative class.

F The Class Representatives will fairly and adequately represent and protect the interest of the members of the putative class. The Class Representatives adequately and truly represent the interests of the absent class members. Class Representatives and all members of the class they seek to represent have been damaged by reason of the Defendants' conduct. The interests of Class Representatives are coextensive with the interests of the proposed class members, with common rights of recovery based on the same essential cut of benefits by Defendants. Class Representatives are intended third-party beneficiaries of the adoption assistance benefits conferred under the Adoption Assistance Act. Class Representatives have retained counsel, who are competent in complex class action litigation. Class Representatives have no interest

adverse to those of any putative class members, with respect to the key common issues.

G In this case, the prosecution of separate actions by or against individual members of the class would create the risk of: 1) inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class; and/or 2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

H The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

I Class action treatment is a superior method for the fair and efficient adjudication of this controversy, in that, among other things, there is no interest by members of the class in individually controlling the prosecution of separate actions and the expense of prosecuting individual claims is prohibitive. It is desirable to concentrate the litigation of the claims made herein in a single proceeding, in order to provide claimants with a forum in which to seek redress. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class action procedure, including but not limited to, providing claimants with a method for the redress of claims that may not otherwise warrant individual litigation. The questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual proposed class members.

10. Accordingly, class certification was found proper under Fed. R. Civ. P. 23 and should be found by this Court to be proper under S.C. Rule of Civ. Pro. 23.

GENERAL ALLEGATIONS

11. Each and every allegation of the Complaint is incorporated as if fully set forth herein.

12. Prior to and up until the effective date of the unilateral cut of benefits by Defendants, the State of South Carolina provided adoption assistance benefits to special needs children pursuant to the provisions of South Carolina and federal law.

13. The state-authored, standard form Adoption Assistance Agreement customarily and routinely entered into between SCDSS and adoptive parents, as parties and signators, provides for the continuation of benefits until: (1) the 18th birthday of the adopted child, or (2) termination of the parents' rights to the child, or (3) the parent is no longer financially responsible for the child, or (4) the child is no longer in the legal custody of the parents, or (5) the child has moved out of the home or (6) the child or both adoptive parents have died.

14. In contravention of this essential contractual understanding, Defendant unilaterally cut the benefits to Class Representatives and putative class members by twenty dollars per month.

15. The unilateral cut of benefits by Defendants interferes with and frustrates the clear and reasonable expectation of Class Representatives and putative class members when they acted to adopt a special needs foster child and entered into an adoption assistance agreement that government-paid subsidies would continue until the adoptive child attains the age of majority. This continuous benefits stream forms the very essence of the adoption assistance agreement from the perspective of both contracting parties – the parents, who accept legal responsibility for a special needs child, and the state, which secures permanency for the foster child in a stable family setting and frees itself of legal custody.

16. The impairment of existing contractual rights caused by the unilateral cut of benefits by Defendant serves no legitimate governmental purpose, and certainly is not in the best interests of the state's most needy – its vulnerable, special needs children adopted from foster care. Instead, the unilateral cut of benefits by Defendant completely interferes with and undermines the essential contractual promises and valuable consideration exchanged by the state and putative class members that was contractually agreed to in order to secure adoptive parents for special needs children. This retroactive nullification of the state's covenants and commitments constitutes a substantial impairment of pre-existing contractual rights.

17. Even assuming there was some justification for the cut in 2002 based on the cut to the Foster Care Subsidy (which Plaintiffs' deny); this justification was removed in 2004 when the Foster Care Subsidy was reversed. Accordingly, at the very least Plaintiffs are entitled to recovery of benefits dating back to 2004.

FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)

18. Each and every allegation of the Complaint is incorporated as if fully set forth herein.

19. As a result of the unilateral cut of benefits by Defendant, the essential rights and obligations in the long-term, pre-existing contract with Class Representatives and putative class members have been and will continue to be substantially impaired without serving a legitimate governmental purpose. This retroactive nullification of the state's covenants and commitments constitutes a substantial impairment of pre-existing contractual rights and further deprives Class Representatives and putative class members of rights, privileges, and immunities secured by the adhesion contract drafted by Defendant.

20. Defendant's actions and inactions in violation of the contract have caused Class Representatives and putative class member's substantial damages.

PRAYER FOR RELIEF

WHEREFORE, the putative class member children respectfully request that this Court:

a. Assert jurisdiction over this action;

b. Apply the class certification adopted in federal case number 7:11-cv-02827.

c. Award Class Representatives and putative class members damages in the amount of past due adoption assistance benefits and prospective adoption assistance benefits;

c. Award Class Representatives and putative class members their reasonable attorneys fees and costs; AND

d. Grant such other and further equitable relief as the Court deems just, necessary and proper to protect the special needs children from further harm by the State of South Carolina.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C. and JAMES FLETCHER THOMPSON, LLC

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DATED: April 1, 2013

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated, Plaintiff, v. South Carolina Department of Social Services, Defendant.	)	Civil Action No. 13-CP-42-1569 **AMENDED ANSWER**

The Defendant South Carolina Department of Social Services (SCDSS) hereby answers the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The Complaint fails to state facts sufficient to state a cause of action. The Defendants reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCP.

FOR A SECOND DEFENSE

2. The Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained.

3. That as to paragraph 1, the Defendant would allege that such allegations set forth legal conclusions which require no response on the part of the Defendant. In so far as such allegations attempt to establish liability on the part of the Defendant, the Defendant would deny same and demand strict proof thereof.

4. That as to paragraph 2, the Defendant denies these allegations as stated. The Defendant admits only that it has contracted with a number of adoptive parents, including Kenneth and Angela Hensley, to provide monthly adoption subsidies.

5. That as to paragraph 3, the Defendant admits only that on June 20, 2002, the then acting Director for the Department of Social Services (DSS) sent a letter to foster and adoptive parents notifying said parents of a decrease to the monthly adoption assistance subsidy by twenty dollars ($20.00). All other allegations in this paragraph are denied as stated.

6. That as to paragraph 4, the Defendant denies these allegations and demand strict proof thereof.

7. That as to paragraph 5, the Defendant, upon information and belief, admits only that Kenneth and Angela Hensley are citizens and residents of Spartanburg, South Carolina. The Defendant denies the remaining allegations as stated.

8. That as to paragraph 6, the Defendant admits only that the Department of Social Services is a state agency and thereby an arm of the State of South Carolina. The Defendant asserts the remaining allegations set forth legal conclusions which require no response on the part of the Defendant. In so far as such allegations attempt to establish liability on the part of the Defendant, the Defendant would deny same and demand strict proof thereof.

9. That as to paragraph 7, 8, 9, and 10, the Defendant specifically denies that a class action has been certified in this matter, that class certification is appropriate, and that Plaintiff, BLH, or Kenneth and Angela Hensley, are appropriate representatives for any alleged putative class in this matter. Further answering, the Defendant asserts that the federal suit referenced by Plaintiff has no precedential value at this point, as it is currently on appeal in the Fourth Circuit Court of Appeals on grounds that would be entirely dispositive of the claim and the separate and

distinct cause of action in this instant matter was abandoned by Plaintiff in the referenced federal action. The Defendant further asserts such allegations set forth legal conclusions which require no response on the part of this Defendant. In so far as such allegations attempt to establish liability on the part of this Defendant, this Defendant would deny same and demand strict proof thereof. The Defendant further reserves the right to contest any attempt by Plaintiff to certify this matter as a class action.

10. That as to paragraph 11, the Defendant reiterates and realleges each and every paragraph and affirmative defense as if set forth herein verbatim.

11. That as to paragraph 12, the Defendant admits only that the SCDSS provided and provides adoption assistance benefits to adoptive parents of special needs children. All other allegations are denied as stated.

12. That as to paragraph 13, the Defendant denies these allegations as stated. Further answering, the Defendant would crave reference to the Adoption Assistance Agreement as the best evidence of the terms and conditions therein.

13. That as to paragraphs 14, 15, 16 and 17, the Defendant denies these allegations as stated and demand strict proof thereof.

14. That as to paragraph 18, the Defendant reiterates and realleges each and every paragraph and affirmative defense as if set forth herein verbatim.

15. That as to paragraphs 19 and 20, the Defendant denies these allegations as stated and demand strict proof thereof.

16. That as to the Defendants Prayer for Relief, the Defendant denies the Plaintiff is entitled to the relief requested, or any other relief, from the Defendant. The Defendant further denies that class certification is appropriate in this matter.

FOR A THIRD DEFENSE

17. The Defendant alleges, upon information and belief, the Plaintiff has failed to exhaust the administrative remedies available to them.

FOR A FOURTH DEFENSE

18. The Plaintiff's Complaint fails to state a justiciable claim.

FOR A FIFTH DEFENSE

19. The Defendant asserts the Plaintiff's claim is barred, in whole or in part, by the applicable statute of limitations.

FOR A SIXTH DEFENSE

20. The Defendant asserts the Plaintiff's claim is barred by the doctrine of laches.

FOR A SEVENTH DEFENSE

21. The Defendants crave reference to South Carolina Code § 63-9-1770 and to South Carolina of Regulations §114-4380 as a complete bar to any claim for breach of contract in this matter.

FOR AN EIGHTH DEFENSE

22. The Defendant asserts the Plaintiff's claim is barred by the defense of accord and satisfaction.

FOR A NINTH DEFENSE

23. The Defendant asserts the Plaintiff, a minor, lacks capacity to enter into any contractual arrangement, and as such, the Plaintiff lacks standing in this Court to pursue recovery for any alleged breach.

FOR A TENTH DEFENSE

24. The Defendant asserts the Plaintiff lacks standing in this Court to pursue recovery on behalf of any unnamed plaintiff, including but not limited to, any other special needs child or children.

FOR AN ELEVENTH DEFENSE

25. The Defendant asserts waiver as a complete bar to the Plaintiff's claim.

FOR A TWELFTH DEFENSE

26. The Defendant asserts estoppel as a complete bar to the Plaintiff's claim.

FOR A THIRTEENTH DEFENSE

27. The Defendant asserts the Plaintiff BLH lacks standing in this Court to pursue recovery on behalf of Kenneth and Angela Hensley.

FOR A FOURTEENTH DEFENSE

28. The Defendant asserts the Plaintiff's claim is barred, in whole or in part, by the doctrine of collateral estoppel.

FOR A FIFTEENTH DEFENSE

29. The Defendant asserts the Plaintiff's claim is barred, in whole or in part, by the defense of illegality.

FOR A SIXTEENTH DEFENSE

30. The Defendant asserts the Plaintiff's claim is barred by the lack of valid consideration.

FOR A SEVENTEENTH DEFENSE

31. The Defendant asserts the Plaintiff's claim is barred as a result of the modification of the Adoption Assistance Agreement.

FOR AN EIGHTEENTH DEFENSE

32. The Defendant asserts the Plaintiff's claim is barred by the defense of contract novation by operation of law and/or by assent of the parties.

FOR A NINETEENTH DEFENSE

33. The Defendant asserts acquiescence as a complete bar to the Plaintiff's claim.

FOR A TWENTIETH DEFENSE

34. The Defendant asserts that, to the extent Kenneth and Angela Hensley are attempting to assert any claims on their own behalf, the Defendant would reiterate and reassert every defense as if fully set forth herein.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

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Counsel for Defendant South Carolina Department of Social Services

Columbia, South Carolina

July 8, 2013

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
BLH (dob:) by parents/ general guardians Kenneth and Angela Hensley,	)	
	)	
Plaintiffs,	)	CA NO. 13-CP-42-1569
	)	
vs.	)	
	)	**MOTION TO COMPEL**
Lillian Koller, individually and in her official Capacity as State Director for the South Carolina Department of Social Services South Carolina Department of Social Services,	)	
	)	
Defendants.	)	

Plaintiff served discovery on July 26, 2013, making responses due on August 26, 2013. No answers have been provided. Plaintiff communicated with counsel for defense in an effort to resolve this dispute, but no responses have been received to date. Plaintiff therefore moves to compel responses to this discovery.

By: _____

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Attorneys for Plaintiff

October 4, 2013
Spartanburg, SC

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
BLH (dob by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	INTERROGATORIES
South Carolina Department of Social Services	)	
Defendants.	)	

TO: THE DEFENDANT ABOVE NAMED:

Pursuant to Rule 33, S.C.R.C.P., you are hereby required to answer all interrogatories below as set forth and to serve said answers upon the undersigned within the time provided in said rule.

Definitions

The term "party" or "defendant" refers to the Defendant and *any agents acting on the defendant's behalf* at any time regarding the subject incident.

The term "documents" or "things" means all writings of any kind, including the originals and all nonidentical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, offers; notations of any sort of conversations, telephone calls, meetings, or other communications; bulletins, printed matter, computer printouts, teletypes, telefax, invoices, work sheets; all drafts, alterations, modifications, changes, and amendments of any of the foregoing graphic or aural records; representations of any kind, including without limitation, photographs, charts, microfilm,

videotape, recordings, and motion pictures; and electronic, mechanical, or electrical records or representations of any kind, including, without limitation, tapes, cassettes, discs, or other records.

The term "documents" means every document as above defined known to the party, the party's agents or counsel, and each document, which can be located or discovered by reasonably diligent efforts.

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from these witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in the possession of the party that relate to the claim or defense in this case.

3. List the names and addresses of any expert witnesses who the party proposes to use at the trial of this case.

4. For each person known to the party or counsel for the party to be a witness concerning the facts of this case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

5. Are you aware of the identity of any person who possesses or claims to possess knowledge of any fact relating in any manner whatsoever to the incident which is the subject of Plaintiff's complaint? If yes, please disclose name, address, telephone number and statements taken.

6. Please disclose any and all statements made by, to, or regarding the parties to this litigation regarding the facts or circumstances of this case.

7. Please state whether you have conducted an investigation of any fact or circumstance pertaining to the subject incident, and if so, disclose fully the findings and a full description of any

and all reports or documents related thereto, (If asserting any privilege, please provide a privilege log.)

8. Identify any other litigation and/or administrative procedures against the Defendants in which the claim was made that the twenty dollar reduction should be reinstated.

9. Define the phrase "allowable rate" in the adoption subsidy contract.

10. Identify any formula used to calculate the "allowable rate" in the adoption subsidy contract. If there is no formula, identify how the "allowable rate" is computed.

11. Identify any formula used to determine how much each family receives in adoption subsidy payments. If there is no formula, identify how the adoption subsidy is computed.

12. Identify any formula used to determine how much each family receives in foster care payments. If there is no formula, identify how the foster care payment is computed.

13. Identify the party responsible for making the cut to the adoption subsidy payment described in Plaintiff's complaint.

14. Identify the party responsible for making the cut to the foster care payment described in Plaintiff's complaint.

15. Identify the party responsible for reversing the cut to the foster care payment described in Plaintiff's complaint.

16. Did all South Carolina adoptive parents who had a contract with DSS for adoption benefits receive the same twenty dollar cut as the Plaintiff received?

17. Identify the purpose of the contract entered into with Plaintiff and other adoptive parents.

18. Identify the consideration exchanged in the contract entered into with Plaintiff and other adoptive parents.

19. Identify the drafter of the contract entered into with Plaintiff and other adoptive parents.

20. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that Plaintiff failed to exhaust the administrative remedies available.

21. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that Plaintiff's complaint fails to state a justiciable claim.

22. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by collateral estoppel.

23. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by illegality.

24. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by the lack of valid consideration.

25. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by modification.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C.

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p. 864-585-3873

JAMES FLETCHER THOMPSON, LLC
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DATED: July 26, 2013

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	REQUESTS FOR PRODUCTION
South Carolina Department of Social Services	)	
Defendants.	)	

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Plaintiff demands production of documents as follows:

INSTRUCTIONS AND DEFINITIONS

A. In responding to these requests, produce all documents and things that are in your custody, possession, or control, including documents and things in custody, possession, or control of your attorneys, independent accountants, agents, or any person acting on behalf of or in concert with you or with any of these individuals, and not merely documents and things form your own personal files.

B. If you cannot respond to any of the following requests in full, respond to the extent possible, specifying the reasons why you are unable to respond in full, and provide whatever information you have concerning the un-provided things, documents, or portions of documents, including the source or sources from which the things, documents, or portions of documents can be obtained.

C. If documents or things requested are not reasonably available to you in precisely the form requested, or for the particular date or period specified, but could be produced in a modified form and/or for a slightly different date or period, then you are requested to respond in such modified form or for such different date or period.

D. If any document or thing that is responsive to a request is incomplete or has been altered, state in what respect the document or thing is incomplete or altered and explain the reasons therefore.

E. If any document or thing is no longer in existence or no longer in your possession, custody, or control, state the disposition that was made of the document or thing, the reasons for

such disposition, the date of the disposition, the identity of the person(s) ordering, authorizing, and supervising such disposition and the person(s) performing such disposition, the substance or contents of the document of the nature of the thing disposed of, and the identity of all person(s) having knowledge of such documents or thing.

F. If any document or portion therefore is or will be withheld because of a claim of privilege or work product:

1. State the basis on which privilege is or will be claimed.
2. Identify the author of the document.
3. Identify each person to whom the document indicates the original or a copy thereof was sent and any others who at any time possessed the document.
4. Give the date of the document.
5. Describe the subject matter of the document or portion thereof for which privilege is claimed.

G. The term "document" has the broadest meaning accorded to it by Rule 34 of the South Carolina Rules of Civil Procedure. The term "document" includes all written, printed, typed, electronic, recorded, transcribed, punched, taped, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, in the actual or constructive possession, custody, or control of you, including but not limited to all writings, letters, minutes, bulletins, telegrams, telexes, memoranda, notes, instructions, literature, work assignments, notebooks, diaries, calendars, records, agreements, contracts, notations of telephone or personal conversations or conferences, messages, interoffice or intra office communications, e-mail, electronically-stored information, disks, metadata, microfilm, circulars, pamphlets, studies, notices, summaries, reports, books, checks, credit card vouchers, statements of account, receipts, invoices, graphs, photographs, drafts, data sheets, data compilations, computer data sheets, computer data compilations, work sheets, statistics, speeches or other writings, tape recordings, videotapes, audiotapes, phonograph records, data compilations from which information can be obtained or can be translated though detection devices into reasonable useable form, or any other tangible thing that records information in any way. The term "document" shall include the original and any copied that differ in any manner whatsoever form the original (whether different from the original because of notes made on such copy or otherwise) and any drafts thereof. For purposes of this definition, a document is in your possession or control if it is in the possession or control of any of your attorneys, investigators for your attorneys, independent accountants, directors, trustees, or any person acting on behalf or in concert with you or with any of these persons, or otherwise under their possession or control.

H. "Person" means and includes, without limiting and generality of its meaning, any natural person; corporate or business entity; firm; partnership; association; group; governmental body, agency, or subdivision; committee; commission; or other organization or entity.

I. The term "relate to," "relating to," and "concerning" include referring to, alluding to , responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, reflecting, analyzing, constituting, or in any way relevant to the specified subject within the meaning of Rule 26 of the South Carolina Rules of Civil Procedure.

J. "Communication" includes any written or oral communication.

K. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun so used and vice versa. The male gender form or a pronoun shall also include the female gender form of the pronoun. The use of any tense of any verb shall be considered to include also within its meaning all other tenses of the verb so used.

L. "And" and "or" shall be construed conductively or disjunctively as necessary to make the request inclusive rather than exclusive.

M. "Each," "any," and "all" are both singular and plural.

REQUESTS TO PRODUCE

1. Any and all documents identified in response to Plaintiff's Interrogatories or Requests to admit.

2. Any and all documents, policies, procedures, and/or formulas related to how adoption subsidy payments are determined by Defendant for an individual child.

3. Any and all documents, policies, procedures, and/or formulas related to how foster care maintenance payments are determined by Defendant for an individual child.

4. Any and all documents in Defendant's possession that mention Plaintiffs, including but not limited to Plaintiffs contract(s) with DSS.

5. Any and all documents reflecting the decision to decrease South Carolina adoption subsidy payments, including but not limited to the letter informing the Plaintiff of the twenty dollar subsidy reduction.

6. Any and all documents reflecting the decision to decrease the South Carolina foster care maintenance payments by twenty dollars.

7. Any and all documents reflecting the decision to reinstate the South Carolina foster care maintenance payments by twenty dollars.

8. Any and all versions of contracts used by DSS for adoption subsidy payments between 1992-2003.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C.

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DATED: July 26, 2013

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	CERT OF SERVICE
South Carolina Department of Social Services	)	
Defendants.	)	

I hereby certify that a true and correct copy of the foregoing **PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION** was served this day via U.S. Mail and email addressed as follows:

Joel Hughes, attorney for Defendants
1611 Devonshire Drive, Second Floor
Columbia, South Carolina 29204
jhughes@dml-law.com

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 OCT -4 AM 9:40
M. HOPE BLACKLEY

Regina Champion – paralegal for:
Charles J. Hodge
T. Ryan Langley
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p. 864-585-3873

DATED: July 26, 2013

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
BLH (dob) by parents/ general guardians Kenneth and Angela Hensley,	)	
	)	
Plaintiffs,	)	CA NO. 13-CP-42-1569
	)	
vs.	)	
	)	**MOTION FOR CLASS CERTIFICATION**
Lillian Koller, individually and in her official Capacity as State Director for the South Carolina Department of Social Services South Carolina Department of Social Services,	)	
	)	
Defendants.	)	

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SPARTANBURG COUNTY
2013 OCT 11 AM 9:39
M. HOPE BLACKLEY

Pursuant to SCRCivPro 23, plaintiff hereby moves that the class identified in the Complaint be certified by this Court. This motion will be supported by the pleadings, South Carolina common and statutory law, and a memorandum to be filed with the Court.

By: _____

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October 4, 2013
Spartanburg, SC

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	MEMO IN SUPPORT OF CLASS CERTIFICATION
South Carolina Department of Social Services	)	
	)	
Defendants.	)	
	)	

INTRODUCTION AND ANALYSIS

South Carolina Rule of Civil Procedure 23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action. S.C.R.Civ.P. 23(d). It is well-settled that South Carolina's Rule 23 "endorses a more expansive view of class action availability than its federal counterpart." See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (citing Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999)). Thus, the fact that the class was previously certified in federal court, under the more rigorous standard, is informative to the qualification of the present class for certification. Order attached as Exhibit A.

Finally, there need not be any consideration of the merits of the action as an order under S.C. Rule 23 may be conditional and may be altered or amended before the decision on the merits. S.C.R.Civ.P. 23(d).

Pursuant to Rule 23, a class action must comply with the five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy. S.C.R.Civ.P. 23.

ELEMENTS OF S.C.R.CIV.P 23 ARE MET

The class is sufficiently numerous. As of June 20, 2002, approximately 4,100 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. See pleadings in which this is admitted. Therefore, the class as a whole is comprised of at least 4,100 current and former adopted children and joinder of all putative class members is impracticable. Id. The disposition of the claims asserted herein through this class action will be more efficient and will benefit the parties and the Court. Id.

There is commonality of factual and legal issues in this case. In the case at bar, each named Plaintiff and each putative class member is subject to the same action by Defendants. Specifically, Defendants' unlawful pattern and practice of unilaterally cutting benefits in violation of its obligation to fulfill the contracts it entered with the class members. All putative class members share a united interest in the fair, just, and consistent determination of the questions of law and fact necessary to the adjudication of Defendants' liability, which predominate over questions affecting only individual members. Thus, this Court can resolve the issue that is central to the validity of each one of the claims in one stroke.

The legal violations against the Plaintiffs are typical of those against each member of the putative class. The harms suffered by the Plaintiffs are typical of the harms suffered by all children in the putative class.

The Plaintiffs will fairly and adequately represent and protect the interest of the members of the putative class. The Plaintiffs adequately and truly represent the interest of the absent class members. Plaintiffs and all members of the class they seek to represent have been damaged by reason of the Defendants' conduct. The interests of Plaintiffs are coextensive with the interests of the proposed class members, with common rights of recovery based on the same essential cut of

benefits by Defendants. Plaintiffs have retained counsel, who are competent in complex class action litigation. Plaintiffs have no interest adverse to those of any putative class members, with respect to the key common issues.

Further, class action treatment is a superior method for the fair and efficient adjudication of this controversy, in that, among other things, there is no interest by members of the class in individually controlling the prosecution of separate actions and the expense of prosecuting individual claims is prohibitive. It is desirable to concentrate the litigation of the claims made herein in a single proceeding, in order to provide claimants with a forum in which to seek redress. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class action procedure, including but not limited to, providing claimants with a method for the redress of claims that may not otherwise warrant individual litigation. The questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual proposed class members. Accordingly, class certification is proper under S.C. R. Civ. P. 23 is appropriate.

CONCLUSION

For the reasons stated, the Motion to Amend and Motion for Class Certification must be granted.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C.

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DATED: April 7, 2014

EXHIBIT A

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

BLH (dob)), by parents/general Guardians Kenneth and Angela Hensley, AND on behalf of all other similarly situated, Plaintiff, v. Lillian Koller, individually and in her official capacity as State Director of SCDSS; Elizabeth Patterson, individually as Former State Director of SCDSS; Kim Aydlette, individually as Former Director of SCDSS; and Kathleen Hayes, individually as Former Director of SCDSS, Defendants.	C/A No.: 7:11-cv-02827-GRA **ORDER** (Written Opinion)

This matter comes before the Court upon cross-motions for Summary Judgment and Plaintiff's Motion for Class Certification. A hearing was held on August 9, 2012. For the reasons set forth below, this Court denies Plaintiff's Motion for Summary Judgment, denies Defendants' Motion for Summary Judgment, and grants Plaintiff's Motion for Class Certification.

BACKGROUND

In 1999, Plaintiff's adoptive parents, Kenneth and Angela Hensley, entered into an Adoption Assistance Agreement with the South Carolina Department of Social Services, which provides adoption subsidy payments to the Hensleys for the support of Plaintiff, a minor with designated special needs. In June 2002, Defendant

Elizabeth Patterson unilaterally cut adoption subsidy and foster care subsidy benefits to approximately 4,100 children in South Carolina due to budget issues. In 2004, the foster care subsidy benefit was reinstated but the adoption subsidy was not. Plaintiff brings this suit under § 1983 and alleges that Defendants' action violated her rights established by the Adoption and Child Welfare Act and the Contracts Clause.

DISCUSSION

I. Plaintiff's Motion for Class Certification

In *Gunnells v. Healthplan Servs, Inc.*, the Fourth Circuit stated that:

> Class actions must meet several criteria. First, the class must comply with the four prerequisites established in Rule 23(a): (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). Second, the class action must fall within one of the three categories enumerated in Rule 23(b). . . .

348 F.3d 417, 423 (4th Cir. 2003).

Plaintiff bears the burden of proving the proposed class complies with the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See Windham v. Am. Brands, Inc.*, 565 F.2d 59, 64–65 n.6 (4th Cir. 1977) (en banc) ("[T]he proponent of class certification has the burden of establishing the right to such certification under Rule 23."); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) ("The party seeking class certification bears the burden of proof." (citing *Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1267 (4th Cir. 1981))). Plaintiff needs not establish her case on the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("[T]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427

(5th Cir. 1971) (internal quotations omitted)); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428 (4th Cir. 2003) (recognizing that the Supreme Court holds that courts may not consider the merits of a plaintiff's case in ruling on a motion for class certification). A preliminary evaluation of the merits is permissible, if necessary to make specific factual findings that the case meets the requirements of Rule 23. *See Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312–13 (4th Cir. 1978). The district courts have wide discretion in deciding whether to certify a proposed class, and a court's ruling on class certification may be reversed only upon a showing of abuse of that discretion. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997).

The numerosity requirement of Rule 23(a)(1) is met where the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978). Accordingly, the numerosity inquiry must be address the particular facts and circumstances of each case. *See Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) ("[A]pplication of the [Rule 23] is to be considered in light of the particular circumstances of the case and generally, unless abuse is shown, the trial court's decision on this issue is final."). While there is no magic number threshold that must be met in order to meet the numerosity requirement, more than one or two potential class members are required. *See Kelley*, 584 F.2d at 35–36 (finding no error in district court's determination that numerosity was not met by the proposed class of approximately eight to twenty-five members); *Brown v. Eckerd Drugs, Inc.*, 669 F.2d 913, 917 (4th Cir. 1981) ("[I]t is well

settled that one or two will not meet the numerosity test."). However, it is clear that it does not take many potential class members to satisfy Rule 23(a)(1). *See, e.g., Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (holding that seventy-four class members sufficient to meet the numerosity requirement); *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) (finding that between forty-six to sixty members satisfied the numerosity requirement).

The Court finds Plaintiff has satisfied the numerosity requirement of Rule 23(a)(1). It is readily apparent, and Defendants do not dispute, that Defendants entered into approximately 4,100 contracts with adoptive parents of special needs children. Plaintiffs have satisfied their burden under Rule 23(a)(1).

i. Commonality and Predominance of Factual and Legal Issues/ Requirements of Rule 23(a)(2)

The commonality requirement of Rule 23(a)(2) is met when a plaintiff's claims have "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court recently clarified that, in order to satisfy the commonality requirement, the plaintiff must "demonstrate that the class members 'have suffered the same injury,'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)), and must be "capable of classwide resolution," meaning "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke," *id.* "A question is not common, by contrast, if its resolution turns on a consideration of the individual circumstances of each class member." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 314, 319 (4th Cir. 2006) (internal quotations and citations omitted).

Plaintiff asserts that she has satisfied this requirement because "each named Plaintiff and each putative class member [was] subject[ed] to the same action by Defendants" when the Defendants unilaterally cut the benefits at issue. Defendants argue (1) that Plaintiff overlooks the portion of 42 U.S.C. § 673(a) that requires an individualized plan and review for each prospective class member and (2) that each prospective class member may not be allowed to recover the monthly twenty dollar payment because it might violate state and federal law. In considering these arguments, this Court finds that commonality is met in this case because the putative class members were subject to a uniform, across-the-board cut of benefits, in the exact same amount, at the exact same time.

ii. Typicality

The typicality requirement of Rule 23(a)(3) is met where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement tests whether the "representative party's interest in prosecuting [her] own case . . . [will] simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). Plaintiff's claims need not be "perfectly identical" to absent class members, *id.* at 467; however, Plaintiff must be able to "advance the same factual and legal arguments," *Broussard v. Meineke Disc. Muffler Shops, Inc*, 155 F.3d 331, 340 (4th Cir. 1998), as the class she seeks to represent. Here, Defendants concede that this requirement is likely met. This Court agrees and finds that Plaintiff has satisfied the typicality requirement of Rule 23(a)(3).

iii. Adequacy of Class Representative

The adequacy requirement of Rule 23(a)(4) is met where it is shown that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The determining factor in the adequacy analysis is whether Plaintiff will vigorously prosecute her claims on behalf of the class. *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 329 (D.S.C. 1991). Central to that inquiry is "(i) whether plaintiff[] [has] any interest antagonistic to the rest of the class, and (ii) whether plaintiff['s] counsel [is] qualified, experienced and generally able to conduct the proposed litigation." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 330 (D.S.C. 1991) (internal quotation marks omitted) (citing *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987)).

In Defendants' Response in Opposition to Plaintiff's Motion to Class Certification, they argue that (1) Plaintiff is not an adequate class representative because she was a substitute party in order to circumvent the statute of limitations in this case, (2) Plaintiff was not a "real party" to the contract at issue here, and (3) Plaintiff is a minor. However, the Court finds fault with this argument. First, the fact that Plaintiff is a minor does not make her an inadequate representative in this case. Next, the Court finds that Plaintiff is properly considered a third-party beneficiary to the contract entered into by her adoptive parents and the South Carolina Department of Social Services in this case and, as such, can enforce the contract. Therefore, the Court holds that Plaintiff is an adequate class representative in this case. After

reviewing the briefs and oral arguments, this Court finds that all requirements under Rule 23 are met.[1] Thus, class certification in this case is proper.

II. Cross-Motions for Summary Judgment

Both parties in this case move for summary judgment. Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). To grant a motion for summary judgment, the court must find that "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence but rather must determine if there is any genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123–24 (4th Cir. 1990). However, the "non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in [its] pleadings." *Rucker v. Greenville Cnty. Sheriff Dep't*, No. 10-01533, 2012 U.S. Dist. LEXIS 37685, at *6 (D.S.C. Mar. 20, 2012). Moreover, "[t]he existence of a mere scintilla of evidence in support of the nonmoving party's position is insufficient to withstand the summary judgment motion[, and] conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment

[1] From the briefs and the oral arguments, it does not appear that Rule 23(b) requirements are in dispute here.

motion." *Nat'l Specialty Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. 10-826, 2012 U.S. Dist. LEXIS 69456, at *6–7 (D.S.C. May 18, 2012). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In the case at hand, the following is at issue: (1) whether there is a violation of a right that would entitle Plaintiff to relief under § 1983; (2) whether the Plaintiff has standing to bring this case; (3) whether Plaintiff failed to state a claim under § 1983 for a violation of the Contracts Clause; (4) whether the Plaintiff's claims are barred by the statute of limitation; (5) whether the Defendants are entitled to qualified immunity; and (6) whether the Defendants are "persons" amendable to suit under § 1983. After hearing oral arguments on August 9, 2012 and a thorough review of the record, this Court holds that neither party is entitled to summary judgment in this case because genuine issues of material fact exist in this case.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is DENIED.

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

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

IT IS SO ORDERED.

G. Ross Anderson, Jr.
Senior United States District Judge

August 17, 2012
Anderson, South Carolina

NOTICE OF RIGHT TO APPEAL

Plaintiff has the right to appeal this Order within thirty (30) days from the date of the entry of this Order, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure. Failure to meet this deadline, as modified by Rule 4 of the Federal Rules of Appellate Procedure, will waive the right to appeal.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Plaintiff, v. South Carolina Department of Social Services, Defendant.	Civil Action No. 2013-CP-42-1569 **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

BACKGROUND

The Plaintiff BLH, a minor, brings this action by and through her adoptive parents, Kenneth and Angela Hensley, as a purported class action alleging a third-party beneficiary breach of contract cause of action against the Defendant South Carolina Department of Social Services ("DSS"). The Plaintiff BLH contends that DSS breached an Adoption Subsidy Agreement entered March 22, 1999, when DSS implemented an across the board decrease of $20.00 to any foster care board rate or adoption subsidy payments in June 2002. The Adoption Subsidy Agreement was entered between DSS and BLH's adoptive parents, but BLH seeks to recover as a third-party beneficiary.

By way of procedural history, in September 2011, a prior action was filed in state court which was assigned Civil Action Number 2011-CP-42-3992. That action was then removed to the United States District Court based upon federal question jurisdiction under 28 U.S.C. § 1331.

The party-plaintiffs in that action initially were Kenneth and Angela Hensley who brought what was alleged to be a breach of contract cause of action under 42 U.S.C. § 1983. The Plaintiff BLH was later substituted for her parents as the party-plaintiff in an attempt to avoid a statute of limitations defense. The defendants in the prior action were current DSS Director Lillian Koller and three former Directors including Elizabeth Patterson, Kim Aydlette, and Kathleen Hayes (hereafter referred to as "DSS Directors").

After several pleading amendments, the Plaintiff 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. The Plaintiff 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 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, the Plaintiff 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.

On October 4, 2013, the Plaintiff BLH filed a motion for class certification that was unsupported by any affidavits or other evidence. The Plaintiff requested merely that "the class identified in the Complaint be certified by this Court." The Plaintiff seeks 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."[1]

DISCUSSION

Rule 23, SCRCP, 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 the South Carolina Rule 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, the trial court must

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

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).

In the present case, the Defendant DSS opposes the Plaintiff's motion for class certification on four primary bases: (1) the Plaintiff has submitted no affidavits or other evidence to support her motion; (2) the Plaintiff cannot satisfy the commonality element; (3) the Plaintiff is not an adequate representative of the proposed class, and (4) the damages sustained by each proposed class member may not meet the $100 threshold amount. Each of these points will be addressed in turn.

A. No Evidentiary Support for Motion for Class Certification

As indicated, the South Carolina Supreme Court has held that "[p]roponents of class certification bear the burden of proving five prerequisites under South Carolina law." *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190, 200 (2003). The first four criteria are referred to as the "requirements for numerosity, commonality, typicality and adequacy of representation." *Id.* In addition, the amount in controversy for each class member must exceed $100. *Id.*

In the leading case of *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), the United States Supreme Court explained that "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 131 S.Ct. at 2551. (Emphasis in original).

In the present case, the Plaintiff has merely filed an unsupported motion for class certification. The motion itself consists of two sentences. It was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five requirements on which the Plaintiff has the burden of proof. Using the mandatory language "shall," Rule 6(d), SCRCP, requires that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion." Rule 6(d), SCRCP. Again, no affidavits or other evidence were filed with the motion for class certification and, in fact, no evidence is even identified in the motion. The Plaintiff has not even presented any evidence to demonstrate any of the elements including proof that the Plaintiff would be an appropriate or adequate class representative.

Therefore, the Plaintiff's motion should be denied because she has not properly met her burden of proving the five prerequisites for class certification under South Carolina law.

B. Commonality Requirement

The Plaintiff cannot satisfy 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). 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 2012 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.

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:

(1) 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 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.

(2) 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.

(3) 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 2002 containing an agreed upon monthly subsidy amount or other new or different terms or benefits.

(4) 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." 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.

(5) The Adoption Subsidy Agreement provides that "adjustments in monthly cash payments may be made ... based upon changes in the needs of [the child] [or] changes in circumstances of the adoptive family." Thus, an individualized inquiry must be made whether each class member's adoptive parents received any adjustment, upward or downward, from 2002 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 $20.00 reduction since 2002.

(6) The Adoption Subsidy Agreement includes a "termination" provision which includes eight different bases for termination. One such basis is termination of the subsidy payments when the adoptive child reaches the age of eighteen. The Plaintiff BLH has attempted to address that 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. Thus, an individualized inquiry must be made whether the agreement with each class member's adoptive parents was terminated by DSS or the parents prior to age eighteen.

(7) The Court will note that 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 are DSS and the adoptive parents, namely Kenneth Hensley and Angela Hensley. BLH is not a contracting party but is attempting to assert her claim as a third-party beneficiary. This was done in an attempt to avoid a dispositive statute of limitations defense on the parents'

claims in the prior action. The Defendant 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 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." 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. The 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 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 is *Gardner*, the 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 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*, the Plaintiff has not demonstrated the requirement of commonality because, quite simply, the Plaintiff has not shown that the "determinative issue" is 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.

C. Adequacy of Representation Requirement

The Plaintiff is also required to show that the Plaintiff is a proper and adequate class representative. The Plaintiff has not made that showing. As already discussed above, the Plaintiff BLH is a minor who is attempting to be the class representative. The Court will note that the contracting parties to the Adoption Subsidy Agreement are DSS and the adoptive parents, namely Kenneth Hensley and Angela Hensley. BLH is not a contracting party and is attempting to assert her claim as a third-party beneficiary. The Defendant DSS disputes that the minor adoptive child may sue under a third-party beneficiary theory. That legal question which is relevant to issues of standing and justiciability should be resolved before BLH is found to be an adequate class representative.

D. $100.00 Amount in Controversy Requirement

South Carolina class certification law requires that the amount in controversy for each proposed class member exceed $100.00. The Plaintiff has made no such showing. The prayer in the Plaintiff's complaint does not include a prayer exceeding $100.00 for each class member. The allegations in the complaint likewise make no mention of this requirement. The Plaintiff has presented no affidavits or other evidence to demonstrate that this element is satisfied.

In her complaint, BLH seeks "damages in the amount of past due adoption assistance benefits and prospective adoption assistance benefits." As discussed above, however, the Plaintiff has not demonstrated that BLH and the proposed class of adoptive children are entitled to recover $20.00 per month in the reduced adoption subsidies. The contracting parties were DSS and the adoptive parents – not the adoptive child. If BLH and the adoptive children are permitted to recover under a third-party beneficiary theory, they cannot recover the damages sustained by their parents. Instead, they can only recover the damage caused directly to them by the alleged breach of contract. It is doubtful that the Hensleys or any adoptive parents simply transferred the subsidy directly to their child. Rather, the subsidy payments were to be used "to aid the adoptive parent(s) in providing proper care for [the] child." Thus, the proper measure of damages for BLH and the proposed class members consisting of other adoptive children is the harm that that $20.00 monthly reduction had on the child, which in most cases was likely negligible or non-existent. As previously pointed out, the 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 her parents. 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 and sustained no harm at all.

In short, the Plaintiff has not pled nor shown that the amount in controversy for each potential class member exceeds $100.00. For this additional reason, the motion for class certification should be denied.

CONCLUSION

Based on the foregoing discussion and analysis, the Defendant South Carolina Department of Social Services respectfully requests that the Court deny the Plaintiff's motion for class certification.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

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South Carolina Department of Social Services

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April 7, 2014

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Plaintiff, v. South Carolina Department of Social Services, Defendant.	)	Civil Action No. 2013-CP-42-1569 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER AND/OR MOTION FOR RECONSIDERATION**

TO: THE HONORABLE BRIAN M. GIBBONS

CHARLES J. HODGE, ESQUIRE, T. RYAN LANGLEY, ESQUIRE, AND JAMES FLETCHER THOMPSON, ESQUIRE, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Department of Social Services will move before the Honorable Brian M. Gibbons at the Spartanburg County Courthouse, Spartanburg, South Carolina, at such time and place as may be set by the Court, for an Order pursuant to Rule 59(e), SCRCP, altering, amending, and/or reconsidering the Form 4 Order dated and filed April 8, 2014, granting the Plaintiff's Motion for Class Certification. A filed copy of the Form 4 Order was received by the Defendant's counsel on April 17, 2014.

The Defendant's motion is based on the following:

1. In the Form 4 Order, the Court denied the Defendant's Motion for Summary Judgment and granted the Plaintiff's Motion for Class Certification. The Form 4 order does not affirmatively state that a formal order will follow.

2. The Defendant is therefore filing this Rule 59(e) Motion to specifically request that the Court issue a formal order addressing the Court's reasons for granting the Motion for Class Certification and further addressing the Defendant's arguments against class certification as argued at the hearing and as set forth in detail in the opposition memorandum provided to the Court at the hearing and as filed on April 11, 2014.

3. With the Form 4 Order, the Court has not stated any bases for the class certification and has not even articulated or defined the class that has been certified. Moreover, the Form 4 Order fails to address whether the Plaintiff has satisfied any of the five elements as set forth in Rule 23(a), SCRCP.

4. The Defendant opposed the Plaintiff's Motion for Class Certification on four primary bases, including (1) the Plaintiff has submitted no affidavits or other evidence to support her motion; (2) the Plaintiff cannot satisfy the commonality element; (3) the Plaintiff is not an adequate representative of the proposed class, and (4) the damages sustained by each proposed class member may not meet the $100 threshold amount. The Form 4 Order fails to address any of these defenses or arguments against class certification. The Defendant requests that the Court reconsider these defenses or arguments against class certification for the reasons fully briefed in the opposition memorandum provided to the Court at the hearing and filed April 11, 2014. However, if the Court rejects these defenses or arguments against class certification, the Defendant respectfully requests that the Court set forth its reasoning in detail to allow for appropriate appellate review.

5. The Form 4 Order fails to comply with the requirements for a class certification order under Rule 23(d), SCRCP. Rule 23(d) does not contemplate that class certification will be granted by a form order or summary order.

6. The Court has also not addressed the notification procedures per Rule 23(d), SCRCP, and the process to be implemented for purported class members to "opt out." *See, Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, 91 (2008) (South Carolina Supreme Court held that "an 'opt-out' notification procedure is the proper method to be offered to putative class members in the instant case and future class action cases").

The Defendant's motion is based upon the pleadings filed in this case, the Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification filed April 11, 2014, the rules of court, and such other matters as may be properly presented to the Court at the time of the hearing.

DAVIDSON & LINDEMANN, P.A.

BY: _____

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Counsel for Defendant
South Carolina Department of Social Services

Columbia, South Carolina

April 28, 2014

ORAL ARGUMENT REQUESTED

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF SPARTANBURG	)	
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated,	)	Civil Action No. 2013-CP-42-1569
Plaintiff,	)	**NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER AND/OR MOTION FOR RECONSIDERATION**
v.	)	
South Carolina Department of Social Services,	)	**(Oral Argument Requested)**
Defendant.	)	

TO: THE HONORABLE BRIAN M. GIBBONS

CHARLES J. HODGE, ESQUIRE, T. RYAN LANGLEY, ESQUIRE, AND JAMES FLETCHER THOMPSON, ESQUIRE, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Department of Social Services will move before the Honorable Brian M. Gibbons at the Spartanburg County Courthouse, Spartanburg, South Carolina, at such time and place as may be set by the Court, for an Order pursuant to Rule 59(e), SCRCP, altering, amending, and/or reconsidering the Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, as filed May 29, 2014. A filed copy of the Order was received by the Defendant's counsel on July 21, 2014.

The Defendant's motion is based on the following:

1. With regard to the portion of the Order addressing the Defendant's Motion for Summary Judgment, the Court relied on an unofficial, non-certified transcript of the oral argument

held before the Fourth Circuit Court of Appeals to reach the erroneous conclusion that Defendant's counsel somehow waived a collateral estoppel defense in the state court action. The Court has misapprehended the colloquy that occurred during oral argument as cited by Plaintiff's counsel and its ultimate meaning and implications.

At the time of the oral argument in the Fourth Circuit, the Plaintiff had alleged a cause of action under the Contracts Clause of the United States Constitution, in addition to a claim for alleged violation of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"). The Federal Court Defendants (consisting of four former DSS Directors) argued that they were entitled to summary judgment on the Contracts Clause claim because "recourse to § 1983 for the deprivation of rights secured by the Contracts Clause is limited to the discrete instances where a state has denied a citizen the opportunity to seek adjudication through the courts as to whether a constitutional impairment of a contract has occurred, or has foreclosed the imposition of an adequate remedy for an established impairment." *Crosby v. City of Gastonia,* 635 F.3d 634, 640 (4th Cir. 2011). The Federal Court Defendants pointed out that the Plaintiff was not foreclosed from pursuing a state law breach of contract claim, and hence, had no viable claim under the Contracts Clause.

During oral argument, Judge Andre Davis (identified in the unofficial transcript as "male speaker") inquired whether defense counsel had "any strenuous objection to a dismissal of the Contract Clause claim without prejudice." (Tr. 55). That was asked because prior to the oral argument the Plaintiff had filed a voluntary withdrawal of the Contracts Clause claim. (See attached Exhibit A). The Federal Court Defendants had filed a return consenting to the dismissal of the Contracts Clause claim but only *with* prejudice. (See attached Exhibit B). Defense counsel reiterated during oral argument that he opposed a dismissal without prejudice because the Plaintiff could amend the pending state court action to re-allege the Contracts Clause claim.

(Tr. 55-56). Thereafter, Judge Diane Motz (identified in the unofficial transcript as "female speaker") asked whether defense counsel would be satisfied with a representation/stipulation by Plaintiff's counsel that the Contracts Clause would not be re-alleged in the state court action. (Tr. 56-57). Plaintiff's counsel agreed to that representation but also asked that his stipulation not be used as a bar to the state contract claim based on res judicata or collateral estoppel. (Tr. 57-58). Defense counsel responded: "If it's without prejudice, there would be no such argument," (Tr. 58) meaning that a dismissal without prejudice is never given preclusive effect, which is well-settled law. *See, International Fidelity Ins. Co. v. China Const. America (SC) Inc.*, 375 S.C. 175, 650 S.E.2d 677, 680 (Ct. App. 2007) ("a dismissal of a claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law"). Thus, defense counsel only agreed in this colloquy that the stipulation by the Plaintiff to refrain from re-filing the federal Contracts Clause claim in state court could not possibly create any preclusive effect because it was a dismissal without prejudice.

In effect, the voluntary dismissal of the Contracts Clause claim has no preclusive effect, but the Fourth Circuit's rulings on the AACWA claim do have preclusive effect. The colloquy makes no mention of the AACWA claim, which of course was not voluntarily dismissed by the Plaintiff but rather was dismissed by the Fourth Circuit *on its merits*.

Importantly, there was never the representation or agreement that the Fourth Circuit's rulings *on the merits* of the AACWA claim would have no preclusive effect in later litigation. The Court has erred in accepting the Plaintiff's blatantly incorrect interpretation of the colloquy at the close of the Fourth Circuit oral argument as some waiver of a collateral estoppel defense – which incidentally is a defense based on rulings on the AACWA claim that the Fourth Circuit

had not even made yet at the time of the oral argument.[1] Of course, "a waiver is a voluntary and intentional abandonment or relinquishment of a known right," and "a party claiming waiver must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384, 387-88 (1992). The Defendant DSS, which was not even a party to the appeal, certainly did not abandon a collateral estoppel defense based on a Fourth Circuit decision that had not even been issued.

In short, the Court is urged on reconsideration to review carefully the colloquy and to consider the context as presented. There was no waiver of any collateral estoppel argument based on any rulings by the Fourth Circuit on the merits.

2. The Court is also respectfully requested to actually consider the merits of the Defendant's collateral estoppel arguments. Collateral estoppel is, of course, issue preclusion and not claim preclusion. The Fourth Circuit's adjudication of the AACWA claim is not res judicata because the federal statutory claim is different from the state breach of contract claim. However, and most importantly, the Fourth Circuit's adjudication of *issues* common to both the AACWA claim and the state contract claim is subject to collateral estoppel. As discussed in the Defendant's Motion for Summary Judgment and supporting memorandum, which are incorporated herein by reference, the Plaintiff cannot re-litigate those *issues* as already decided by the Fourth Circuit.

As the Fourth Circuit has ruled, DSS was prohibited by federal law from allowing the adoption subsidy to exceed the foster care maintenance rate. The Plaintiff is collaterally estopped from re-litigating this issue or taking a position inconsistent with the Fourth Circuit's ruling which is now a final judgment The foster care board rate on July 1, 2002 decreased from

[1] Oral argument was held on May 16, 2013, and the Fourth Circuit did not issue its opinion until July 3, 2013.

$675.00 to $655.00 per month. Therefore, both the AACWA and South Carolina Code of Regulations § 114-4380 mandated that the subsidy paid to the Hensleys on July 1, 2002, as well as future payments, be decreased by at least $20.00 to $655.00 per month as well. There is no breach of contract. The Adoption Subsidy Agreement, consistent with its terms, allows for an adjustment to comply with "changes in the maximum allowable subsidy payment."

To the extent that the Plaintiff BLH argues that DSS breached the Adoption Subsidy Agreement by making the $20.00 adjustment without "parental concurrence," that issue has also been conclusively resolved by the Fourth Circuit. The requirement of "parental concurrence" for a readjustment of the adoption assistance payments is provided in 42 U.S.C. § 673(a)(3). The Fourth Circuit determined that "§ 673(a)(3) establishes a right to parental concurrence in subsidy readjustment determinations *except* when the subsidy must be reduced due to reductions in foster care maintenance payments." *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013). (Emphasis in original). Thus, the requirement of "parental concurrence" in the Adoption Subsidy Agreement, which the Plaintiff may contend was breached, is inapplicable to the 2002 reduction of $20 per month because federal law required the subsidy to be reduced so that it did not violate federal law and exceed the foster care maintenance rate. The Adoption Subsidy Agreement, including the "parental concurrence" provision, must be interpreted consistently with 42 U.S.C. § 673(a)(3) and so that it is consistent with federal law. The Adoption Subsidy Agreement, or any provisions thereof, may not be read or construed as violating the provisions of the AACWA that govern adoption assistance agreements. As a result, the 2002 reduction of $20 per month was in compliance with the AACWA, as determined by the Fourth Circuit, and was not in breach of the Adoption Subsidy Agreement entered with the Hensleys.

Additionally, the Plaintiff may argue that DSS breached the Adoption Subsidy Agreement when the Defendant increased foster care maintenance payments in 2004 without

also increasing the adoption assistance subsidy. On this issue, the Plaintiff is likewise collaterally estopped from taking a position contrary to the rulings of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). On this issue, the Fourth Circuit has already ruled that "the 2004 increase did not 'readjust' the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger -- let alone violate -- the parental concurrence requirement." 722 F.3d at 183. Therefore, because there was no requirement for DSS to "readjust" the amount of the adoption subsidy, as already determined by the Fourth Circuit, there was no breach of the Adoption Subsidy Agreement when the adoption assistance subsidy was not increased in 2004.

The Plaintiff's position is also unsupported by any case law or other authority, and in fact, her argument is contrary to the express language of Section 673(a)(3). A clear reading of Section 673(a)(3) demonstrates that there is no requirement for the adoption subsidy rate to equal the foster care maintenance rate. Those rates are not required to be the same. Instead, Section 673(a)(3) clearly establishes a cap or ceiling for the adoption subsidies – they may "in no case" exceed the foster care rate. Thus, when the foster care rate is reduced below the adoption subsidy rate, the adoption rate must also be reduced. However, the converse is not required. If the foster care rate is increased, there is no requirement to increase the adoption subsidy rate. It is perfectly acceptable under Section 673(a)(3) for the adoption subsidy rate to be less than the foster care rate. Likewise, there is no requirement in the Adoption Subsidy Agreement for the adoption subsidy rate to equal the foster care maintenance rate. Nor is there a requirement in the contract for DSS to increase the adoption subsidy whenever the foster care rate is increased. The Fourth Circuit recognized that the increase in the foster care rate in 2004 did not "trigger" or "violate" the requirements under Section 673(a)(3), which are incorporated as part of the Adoption Subsidy Agreement.

In sum, the Court erred in (1) concluding that DSS somehow waived a collateral estoppel defense during the Fourth Circuit oral argument, which is incorrect, and (2) that the Fourth Circuit's rulings were based "solely on federal law" and thus have no preclusive effect. That too is incorrect. The Plaintiff alleges that the $20.00 reduction in monthly benefits in 2002 constitutes a breach of the Adoption Subsidy Agreement. The Adoption Subsidy Agreement, however, includes the following language: "Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [BLH], changes in circumstances of the adoptive family, or *changes in the maximum allowable subsidy payment.*" (Emphasis added). This language is required by and must be construed in conformity with the AACWA. For, it is the AACWA that requires a state to "enter into adoption assistance agreements ... with the adoptive parents of children with special needs." 42 U.S.C. § 673(a)(1)(A). The Adoption Subsidy Agreement must therefore be construed consistently with the AACWA, and the Fourth Circuit's ruling on what is required by the AACWA is clearly entitled to preclusive effect and cannot be re-litigated.

3. In the event that the Court after the above discussion still concludes that summary judgment is not appropriate, the Court is urged to follow the direction of the South Carolina appellate courts and refrain from making findings of fact and conclusions of law. In *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014), the Court of Appeals explained that "it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment" and that findings of fact and conclusions of law that are made do not establish the law of the case, are not binding on the parties, and are not binding on the next judge to hear the same issues when renewed in a subsequent motion or at trial. 756 S.E.2d at 162-163.

4. With regard to the portion of the Order addressing the Plaintiff's Motion for Class Certification, the Defendant respectfully requests that the Court reconsider its ruling that the

Plaintiff need not support her motion for class certification with evidence proving the five requirements under Rule 23, SCRCP. As the Defendant previously argued, the Plaintiff merely filed an unsupported motion for class certification. The motion itself consists of two sentences. It was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five requirements on which the Plaintiff undoubtedly has the burden of proof. The Court nonetheless found that the "arguments of counsel at the hearing" is proof of the five elements. That is mistaken and contrary to well-established law that "counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence." *Ex Parte Morris*, 367 S.C. 56, 624 S.E.2d 649, 653 (Ct. App. 2006). Likewise, a court "may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments. *Id.* Yet that is precisely what has occurred here. The record has no evidence to support the Court's rulings in allowing the certification of a class action.

5. The Court is also respectfully requested to fully consider and rule on the Defendant's position that the Plaintiff cannot satisfy the commonality element. Specifically, the Court failed to recognize that "[c]ommonality is met only where the class shares a *determinative* issue." *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190, 200-201 (2003). (Emphasis added). While the Court cites that principle of law in its Order, the Court does not apply it. As the Supreme Court further explained in *Gardner*, "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 *Gardner*, the Supreme 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. The Defendant has identified seven issues that will require individualized inquiry and adjudication. The Court did not refute any of those points but rather rejects the arguments in a conclusory manner by stating that the arguments "fail to comport with the case law on the issue of commonality" although no case law is cited. The controlling case law is *Gardner*, which this Court mentions only in passing with respect to the issue of damages. With all due respect, the Defendant is entitled to a full adjudication of this critical issue of commonality. Due process requires it, and such a full adjudication is also needed for appropriate appellate review.

6. The Court has also erred in its rulings regarding the notification procedures per Rule 23(d), SCRCP. First, the Court has not given the Defendant an opportunity to be heard on this issue. The Plaintiff did not propose any notification procedures in her Motion for Class Certification or at the motion hearing. The issue was first mentioned in the Defendant's initial Rule 59(e) motion that was directed at the Form 4 Order filed April 8, 2014. The Defendant requested oral argument in that motion, but the Court proceeded to issue rulings on the notification procedures without holding any hearing or giving the Defendant any opportunity to be heard.

Second, the Court has committed error in placing the duty to notify the purported class on the Defendant. The Court not only requires the Defendant to serve a "Notice of Class Action" on the purported class members but also requires the Defendant to prepare the Notice and to determine who the class members may be. These procedures which place the burden and expense associated with prosecuting the class action on the Defendant are unsupported by South Carolina case law and, in fact, are contrary to the very language of Rule 23(d)(2), SCRCP. Rule 23(d)(2) provides that the Court "may order that notice be given in such a manner as it may

direct of the action *by the party seeking to maintain the action on behalf of the class.*" Rule 23(d)(2), SCRCP. (Emphasis added). The Court's Order is also contrary to the Notes to Rule 23, which state that "[t]his Rule requires those seeking to maintain an action on behalf of a class to notify the members of the class of the pendency of the action." The Defendant therefore respectfully request that the Court reconsider its notice requirements. The "Notice of Class Action" shall be approved by the Court and the expense and resources of notifying the purported class members should fall on the Plaintiff, as is required by Rule 23(d)(2), SCRCP. The Defendant cannot and should not be required to give notification to the class members.

The Defendant's motion is based upon the pleadings filed in this case, the Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification filed April 11, 2014, the Defendant's Memorandum in Support of Motion for Summary Judgment filed April 11, 2014, the attached exhibits, the rules of court, and such other matters as may be properly presented to the Court at the time of the hearing.

The Defendant requests oral argument on this motion.

DAVIDSON & LINDEMANN, P.A.

BY: _____

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South Carolina Department of Social Services

Columbia, South Carolina

July 31, 2014

ORAL ARGUMENT REQUESTED

Exhibit A

RECORD NO. 12-2147

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BLH by Parents/General Guardians KENNETH and ANGELA HENSLEY and on behalf of all others similarly situated

Plaintiff-Appellee,

LILLIAN KOLLER, individually and in her official Capacity as Director for the S.C. Dep't. of Social Services; ELIZABETH PATTERSON, Individually as former director of the S.C. Dep't of Social Services; KATHLEEN HAYES individually as Former Director of the S.C Dep't. of Social Services; and KIM AYDLETTE, individually as Former Director of the S.C. Dep't of Social Services

Defendants – Appellants.

NOTICE OF WITHDRAWAL OF CONTRACTS CLAUSE CLAIM

Appellants Reply Brief filed in February, 2013 outlines the reasons why Appellee's have a remedy under state law for breach of contract. Appellee's have reviewed and now accept this concession. Accordingly, Appellee's have pursued this remedy in the South Carolina State Courts by filing a breach of contract class action complaint on behalf of BLH and all others similarly situated. [Case No. 13-CP-42-1569; Filed: 4/1/2013]. Therefore, Appellees hereby withdraw, without prejudice, the Contracts Clause claims pending before the Court.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C. and JAMES FLETCHER THOMPSON, LLC

s./T. Ryan Langley
Charles J. Hodge

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Counsel for Appellees

DATED: April 2, 2013

Exhibit B

RECORD NO. 12-2147

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BLH by Parents/General Guardians KENNETH and ANGELA HENSLEY and on behalf of all other similarly situated,

Plaintiff-Appellee,

v.

LILLIAN KOLLER, individually and in her official capacity as State Director for the South Carolina Department of Social Services; ELIZABETH PATTERSON, individually and as Former Director of the South Carolina Department of Social Services; KIM AYDLETTE, individually as Former Director of the South Carolina Department of Social Services; KATHLEEN HAYES, individually as Former Director of the South Carolina Department of Social Services,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLANTS' RETURN TO APPELLEE'S NOTICE OF WITHDRAWAL OF CONTRACTS CLAUSE CLAIM

On April 3, 2013, the Appellee BLH filed a document captioned "Notice of Withdrawal of Contracts Clause Claim" whereby BLH purports to dismiss without

prejudice its Contracts Clause claim.[1] BLH seeks to dismiss that claim based on what its describes as a "concession" made in the Appellants' Reply Brief to the effect that "Appellee's have [sic] a remedy under state law for breach of contract." (Dkt. #35).

The Appellants make two principal points in response. First, the Appellants made no concession in their Reply Brief that BLH will actually recover under state law for breach of contract. Instead, the Appellants only made the point that a state law breach of contract claim against the South Carolina Department of Social Services (DSS) is not barred by sovereign immunity. The Appellants in no way stated or insinuated that BLH or her adoptive parents would be successful on a breach of contract claim against DSS. To the contrary, the Appellants wrote: "If DSS failed to satisfy its contractual obligations under the Adoption Assistance Agreement, which is denied, BLH (or her adoptive parents) as contracting parties would have the right to sue for breach of contract." Thus, the Appellants denied that DSS failed to meet its contractual obligations. In addition, by footnote, the Appellants pointed out that a "breach of contract claim would be subject to available common law defenses, including a statute of limitations defense." That

[1] Where a plaintiff seeks to dismiss its complaint or a portion of a complaint without prejudice after the defendant has answered, a court order is required under Rule 41(a)(2), FRCP. Typically, a court order is sought by motion. In this instance, the Appellee BLH has unilaterally attempted to dismiss without prejudice a cause of action without filing a motion. Moreover, BLH has not even sought a court order either in the district court or in this Court. Although no motion has been filed, the Appellants have filed this return because of the Court's request for a response. (Dkt. #36).

remains true. Moreover, it remains at issue whether BLH would even have standing to sue for breach of contract under state law. These are issues and defenses that will need to be litigated as part of the state court complaint that has now been filed by BLH. In short, the Appellants did not and do not concede that a breach of contract claim in state court against DSS would be successful.

Second, the Appellants do not consent to the dismissal of the Contracts Clause claim *without prejudice*. The Appellants, however, will consent to the dismissal *with prejudice*. The Appellants believe that the Contracts Clause claim has no merit for the reasons discussed in their briefs to this Court and which BLH appears almost willing to concede. The Appellants wish to obtain an adjudication now rather than face the possibility of having to repeat this same process again.

Frankly, a dismissal without prejudice of one cause of action requires an analysis under Rule 41(a)(2), FRCP. *See, Howard v. Inova Health Care Services*, 302 Fed. Appx. 166 (4th Cir. 2008). Yet, the Appellants are unaware of any procedure for an appellate court to make that determination initially as opposed to on review from the district court. Therefore, if BLH insists on dismissing the Contracts Clause claim without prejudice, that will likely require a remand to the district court which should not be permitted given the current stage of this appeal and with oral argument scheduled for the May term.

Based on the foregoing, the Appellants submit that the dismissal or withdrawal of BLH's Contracts Clause claim should be permitted at this stage only if it is taken *with prejudice*.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: *s/ Andrew F. Lindemann*

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April 10, 2013

FILED: May 29, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2147
(7:11-cv-02827-GRA)

KENNETH HENSLEY, as adoptive parents of BLH; ANGELA HENSLEY, as adoptive parents of BLH; BLH, by parents-general guardians Kenneth and Angela Hensley,

Plaintiffs – Appellees,

v.

LILLIAN KOLLER, individually and in her official capacity as State Director for the South Carolina Department of Social Services; ELIZABETH PATTERSON, individually as Former Director of the South Carolina Department of Social Services; KIM AYDLETTE, individually as Former Director of the South Carolina Department of Social Services; KATHLEEN HAYES, individually as Former Director of the South Carolina Department of Social Services,

Defendants – Appellants,

and

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Defendant.

ORDER

On April 3, 2013, the Hensleys filed a "Notice of Withdrawal of the Contracts Clause Claim." The court interprets this "notice" as a motion to dismiss pursuant to Fed. R. Civ. P. 41(a)(2). Having had the benefit of oral argument, and considering the representations of Hensleys' counsel that the Hensleys would not amend their pending state court action to include a federal Contracts Clause claim under 42 U.S.C. § 1983, the court **GRANTS** the Hensleys' motion to dismiss their Contracts Clause claim without prejudice.

Entered at the direction of the panel: Judge Motz, Judge Davis, and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk

STATE OF SOUTH CAROLINA **COUNTY OF SPARTANBURG**	)	**IN THE COURT OF COMMON PLEAS**
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Plaintiff, v. South Carolina Department of Social Services, Defendant.	)	Civil Action No. 2013-CP-42-1569 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER AND/OR MOTION FOR RECONSIDERATION** **(Oral Argument Requested)**

TO: THE HONORABLE BRIAN M. GIBBONS

CHARLES J. HODGE, ESQUIRE, T. RYAN LANGLEY, ESQUIRE, AND JAMES FLETCHER THOMPSON, ESQUIRE, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Department of Social Services will move before the Honorable Brian M. Gibbons at the Spartanburg County Courthouse, Spartanburg, South Carolina, or at such time and place as may be set by the Court, for an Order pursuant to Rule 59(e), SCRCP, altering, amending, and/or reconsidering the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, as filed September 16, 2014. A filed copy of the Order was received by the Defendant's counsel on September 16, 2014.

The Defendant's motion is based on the following:

1. On September 9, 2014, the parties received an email from Judge Gibbons stating that he was denying the Defendant's Motion to Alter or Amend Order and/or Motion for Reconsideration filed August 5, 2014. No form order or formal order, however, has been issued. The parties have now received the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, which was filed September 16, 2014, but that Amended Order does not mention the Defendant's Rule 59(e) Motion to Reconsider or set forth the Court's rulings on that motion. The Court's September 9, 2014 email has not been 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. The Defendant is therefore filing this Rule 59(e) Motion to specifically request that a formal order adjudicating the Rule 59(e) Motion to Reconsider be issued. The Defendant further requests that the order address with specificity each of the issues raised by the Defendant so as to allow for proper appellate review.

2. In the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, which was filed September 16, 2014, the principal amendment or change from the original Order is the reference to and reliance on two affidavits of Judy Caldwell and Jessica Hanak Coulter. Those two affidavits were never filed with the Court contemporaneously with the Motion for Class Certification as required by Rule 6(d), SCRCP. Those affidavits were likewise not filed at or before the April 8, 2014 motion hearing. Those affidavits were submitted by the Plaintiffs to Judge Gibbons for the first time by email on September 5, 2014, together with the Plaintiff's response to the Defendant's Motion to Alter or Amend Order and/or Motion for Reconsideration filed August 5, 2014. Those affidavits were submitted because the Defendant had challenged the Court's reliance in the original Order on

the "arguments of counsel at the hearing" as proof of the five requirements under Rule 23, SCRCP, for class certification. The record was closed at the April 8, 2014 hearing. Therefore, the Court relied in error in the Amended Order on the affidavits that were not filed as required by Rule 6(d) or properly part of the record.

A Rule 59(e) motion may not be used to present evidence that was available but not submitted prior to the entry of an order or judgment. In other words, Rule 59(e) should not be used to supplement the record with otherwise available evidence after an order or judgment is entered. In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the South Carolina Supreme Court noted that the Rule 59(e) in the Federal Rules of Civil Procedure is "practically identical" to its state counterpart. 602 S.E.2d at 779. As a result, the Supreme Court has relied on federal case law in construing Rule 59(e), SCRCP. The federal courts have recognized that one of the limited purposes of Rule 59(e) is "to account for new evidence not available at trial" meaning not available prior to judgment. *See*, *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). The federal courts thus impose a burden on the moving party to demonstrate that the new evidence was unavailable at the time that the trial court entered judgment. *Id.* The federal district court in *Nagle Industries, Inc. v. Ford Motor Co.*, 175 F.R.D. 251 (E.D. Mich. 1997), explained that a Rule 59(e) motion "should not be utilized to submit evidence which could have been previously submitted in the exercise of reasonable diligence." 175 F.R.D. at 254. The Eighth Circuit has held that "[a]rguments and evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion." *Peters v. General Service Bureau, Inc.*, 277 F.3d 1051, 1057 (8th Cir. 2002). *See also*, *BP Amoco Co. v. Sun Oil Co.*, 200 F.Supp.2d 429, 432 (D. Del. 2002) ("a motion for reargument may not be used to supplement or enlarge the record on which the court made its initial decision").

Consequently, Rule 59(e) may not be used to supplement or enlarge the record on which the Court made its decision. A Rule 59(e) motion may be used only to ask a court to reconsider a prior decision, but that reconsideration needs to be based on the same evidentiary record presented. Here, the Plaintiff has made no showing that affidavits of Judy Caldwell and Jessica Hanak Coulter were unavailable prior to the April 8, 2014 hearing or the date that the Court issued its ruling on the Motion for Class Certification. The dates of those two affidavits show that the evidence was available, but the Plaintiff did not submit it. Rule 59(e) cannot be used to get a "second bite of the apple" and correct an error made by the Plaintiff in failing to provide evidentiary support for his motion. The Court therefore has erred in accepting and citing to the affidavits in the Amended Order. The Court has further erred in accepting the late affidavits without at the very least giving notice of doing so to the Defendant and without allowing for the Defendant to file counter-affidavits or objections or having any opportunity to be heard on the newly considered evidence or requiring the Plaintiffs to show good cause.

As a result, the Court is requested to disregard the affidavits which were not timely or properly submitted and to rule that the Plaintiff has not proven his request for class certification. The Court is asked to rely on the record as closed at the April 8, 2014 hearing. The Plaintiff merely filed an unsupported motion for class certification. The motion itself consists of two sentences. It was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five requirements on which the Plaintiff has the burden of proof. In short, the record that was properly closed at the April 8, 2014 hearing has no evidence to support the Court's rulings in allowing the certification of a class action.

The Defendant's motion is based upon the pleadings filed in this case, the Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification filed April 11, 2014, the

Defendant's Memorandum in Support of Motion for Summary Judgment filed April 11, 2014, prior orders issued by the Court, and the rules of court.

The Defendant requests oral argument on this motion.

DAVIDSON & LINDEMANN, P.A.

BY: _____

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Counsel for Defendant
South Carolina Department of Social Services

Columbia, South Carolina

September 26, 2014

ORAL ARGUMENT REQUESTED

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated, Plaintiff, v. South Carolina Department of Social Services, Defendant.	)	Civil Action No. 2013-CP-42-1569 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

TO: CHARLES J. HODGE, ESQUIRE, T. RYAN LANGLEY, ESQUIRE AND JAMES FLETCHER THOMPSON, ESQUIRE, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Department of Social Services will move before the Presiding Judge of the Seventh Judicial Circuit at the Spartanburg County Courthouse, Spartanburg, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRCP, granting summary judgment to the Defendant and dismissing the Plaintiff's Complaint with prejudice.

The Defendant's motion is based on the following grounds:

1. The Plaintiff's breach of contract cause of action is barred by the doctrine of collateral estoppel resulting from the final order and judgment entered in the action captioned *Hensley v. Koller*, Civil Action Number 7:11-02827-GRA, and the decision of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013), which are dispositive of the

issues raised in this litigation. In particular, the "parental concurrence" provision of the Adoption Subsidy Agreement, which the Plaintiff contends was breached by the Defendant, is required by and must be construed in conformity with the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670, *et seq.* (AACWA). The AACWA requires a state to "enter into adoption assistance agreements ... with the adoptive parents of children with special needs." 42 U.S.C. § 673(a)(1)(A). The requirement of "parental concurrence" for a readjustment of the adoption assistance payments is provided in 42 U.S.C. § 673(a)(3). Based on the decision of the Fourth Circuit Court of Appeals, "§ 673(a)(3) establishes a right to parental concurrence in subsidy readjustment determinations *except* when the subsidy must be reduced due to reductions in foster care maintenance payments." *Hensley v. Koller*, 722 F.3d 177,.183 (4th Cir. 2013). (Emphasis in original). The Fourth Circuit further ruled:

> It is undisputed that DSS reduced the foster care maintenance payments by twenty dollars at the same time DSS reduced the adoption assistance subsidy by the same amount. The Hensleys do not contend that at any time prior to the 2002 reduction, the adoption assistance subsidy they received for BLH was less than BLH's $675 foster care maintenance payment.
>
> It was only in 2002, when South Carolina decreased by twenty dollars *all* foster care maintenance payments, that the State also decreased BLH's adoption assistance subsidy by twenty dollars. The State's failure to do so would have violated federal law. For, under § 673(a)(3), a failure to reduce BLH's adoption assistance payment would have resulted in a payment "exceed[ing] the foster care maintenance payment" she would have received had she remained in foster care.

Id. The Plaintiff is collaterally estopped from re-litigating this issue or taking a position inconsistent with the Fourth Circuit's ruling which is now a final judgment.[1] The requirement of "parental concurrence" in the Adoption Subsidy Agreement, which the Plaintiff contends was

[1] The time for the Plaintiff to have filed a petition for writ of certiorari with the United States Supreme Court has expired.

breached, is inapplicable to the 2002 decrease of $20 per month because federal law required the subsidy to be reduced so that it did not violate federal law and exceed the foster care maintenance rate. The Adoption Subsidy Agreement, including the "parental concurrence" provision, must be interpreted consistently with 42 U.S.C. § 673(a)(3) and so that it is consistent with federal law. The Adoption Subsidy Agreement, or any provisions thereof, may not be read or construed as violating the provisions of the AACWA that govern adoption assistance agreements. As a result, the 2002 decrease of $20 per month was in compliance with the AACWA, as determined by the Fourth Circuit, and was not in breach of the Adoption Subsidy Agreement entered with the Hensleys.

2. Additionally, the Plaintiff argues that the Defendant breached the "parental concurrence" provision of the Adoption Subsidy Agreement when the Defendant increased foster care maintenance payments in 2004 without also increasing the adoption assistance subsidy. On this issue, the Plaintiff is likewise collaterally estopped from taking a position contrary to the rulings of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). On this issue, the Fourth Circuit has already ruled that "the 2004 increase did not 'readjust' the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger -- let alone violate -- the parental concurrence requirement." *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013). Therefore, there was no breach of the Adoption Subsidy Agreement when the adoption assistance subsidy was not increased in 2004.

3. The Adoption Assistance Agreement incorporates applicable federal and state laws as provisions of the contract, including the provisions of the AACWA that govern adoption assistance agreements. The Adoption Assistance Agreement may not be construed as violating the provisions of the AACWA, including the cap or limit on the amount of the adoption assistance

payment payable under the AACWA. Therefore, any provision of the Adoption Assistance Agreement that violates applicable state and federal laws is illegal or otherwise unenforceable and cannot be enforced by way of the Plaintiff's breach of contract claim.

4. The Plaintiff's breach of contract claim is barred as a result of the modification of the Adoption Assistance Agreement by operation of law and by the defense of contract novation by operation of law.

5. The Plaintiff BLH, as a minor, lacks capacity to enter into any contractual arrangement, and as such, the Plaintiff lacks standing to pursue recovery for any alleged breach of contract. Likewise, the Plaintiff BLH lacks standing to pursue recovery on behalf of the parents, Kenneth and Angela Hensley.

6. The Plaintiff BLH is not a contracting party. The contracting parties as stated in the Adoption Assistance Agreement are the adoptive parents, Kenneth and Angela Hensley, and the Defendant DSS.

The Defendant's motion is based upon the pleadings filed in this case; a copy of the Adoption Assistance Agreement from Fourth Circuit Joint Appendix (attached); the decision of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013) (attached); the Order and Judgment entered in *Hensley v. Koller*, Civil Action Number 7:11-02827-GRA (attached); the rules of court; the supporting memorandum that will be filed; and such other matters as may be presented to the Court at or prior to the time of the hearing.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
JOEL S. HUGHES
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Defendant
South Carolina Department of Social Services

Columbia, South Carolina

March 10, 2014

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES
ADOPTION SUBSIDY AGREEMENT

The following agreement has been entered into by and between the South Carolina Department of Social Services, Post Office Box 1520, Columbia, South Carolina 29202-1520, 803/734-6095, hereafter called the "DSS" and

Angela L. Hensley // [redacted] // Kenneth R. Hensley // [redacted]
(Adoptive Mother) (Social Security No.) (Adoptive Father) (Social Security No.)

[redacted] Spartanburg, SC 29303 // Spartanburg // [redacted]
(Mailing Address) (County) (Telephone #)

hereafter called the "adoptive parent(s)," for the purpose of facilitating the legal adoption of [redacted]
(Child's First Name)

[redacted] born on [redacted], and to aid the adoptive parent(s) in providing proper care for this child.
(Social Security No.) (Date)

The date of the initial adoption placement agreement for [redacted] is 03-22-99, the date of the
(Child's First Name) (Date)

initial adoption subsidy agreement is 03-22-99, and the date the adoption was legalized is _____.
(Date) (Date)

This document is the: (Check one)

☒ **Initial Agreement:** The adoptive parent(s) agree that ~~he/she~~ they intend to adopt [redacted]
(Child's First Name)

and ☒ have signed this document prior to legalization of the adoption for the purpose of receiving financial assistance or ☐ the child had a pre-existing medical or rehabilitative need and this agreement is being signed after legalization.

N/A ☐ **Renewal Agreement:** This is a renewal of the adoption subsidy agreement for N/A.
(Child's First Name)

Date of Next Renewal is: N/A, provided the child is financially dependent upon
(Date)

his/her parent(s), has not reached his/her 21st birthday, and remains in school full-time if he/she is 18 years old or older.

PROVISIONS OF AGREEMENT

I. **Assistance**

A. **Nonrecurring Adoption Expenses:**

Attorney Fee $ _____ Court Costs $ _____ Other $ _____ Unknown at this time X

B. **Monthly Cash Payment:** Yes X No N/A Date payments initiated 03-22-99 4-1-99 BA
(Date)

Current Funding Source: ☐ IV-E Adoption Assistance ☑ State Funded Supplemental Benefits

Amount $ 675.00

The amount of this monthly cash payment is based on the needs of the child and the circumstances of the adoptive parent(s) and has been determined by mutual agreement between the adoptive parent(s) and DSS.

The amount of the payment does not exceed the foster care maintenance payment for N/A
(Child's First Name)

if he/she were in a foster family home in the state of South Carolina. Other cash income received by the family on behalf of N/A is $ N/A from N/A.
(Child's First Name) (Amount) (Source)

This income is considered in determining the monthly cash payment. Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [redacted], changes in circumstances of the adoptive family, or changes in the maximum
(Child's First Name)

allowable subsidy payment. Documentation of changes in the child's needs or family's circumstances may be required.

C. Special Service thru Supplemental Benefits:

N/A (Child's First Name) is eligible to receive N/A (Amount) for the following special service: N/A

D. Medical Benefits: [redacted] (Child's First Name) is eligible for medical benefits, as provided under Title XIX of the Social Security Act (Medicaid), in accordance with the procedures of the state in which the child resides.

1. Eligibility is based on:

N/A IV-E Adoption Assistance for N/A (Child's First Name)

X State Funded Supplemental Benefits for [redacted] (Child's First Name), a child with medical or rehabilitative needs who could not have been placed without medical benefits.

2. Other medical payments through Supplemental Benefits will be provided by DSS for the following specific condition: [redacted], if not provided by Title XIX, family health insurance or other resources. Amount $ 2,000 per year, as long as funds are available.

3. Prior approval is required for all purchases of equipment over $500.00 and all inpatient or residential psychiatric treatment to be paid for through state funded Supplemental Benefits.

4. Resources for meeting cost of medical care: Medical insurance company _____

Policy # _____ Champus # _____ Medicaid # [redacted]

E. Social Services:

1. N/A (Child's First Name) is eligible for IV-E Adoption Assistance and, therefore, social services as provided under Title XX of the Social Security Act in accordance with the procedures of the state of South Carolina.

2. To access Title XX services in South Carolina, the family must apply with the Department of Social Services.

3. Children who are eligible for IV-E Adoption Assistance are eligible to receive Medicaid and Title XX social services regardless of the state in which the adoptive family lives. The family agrees to contact DSS prior to moving to a new state for instructions on accessing services in that state.

II. Notification of Change

A. The adoptive parent(s) shall immediately notify DSS, in writing, if he/she/they are no longer legally responsible for the child or are no longer financially supporting the child.

B. The adoptive parent(s) shall notify DSS, in writing, when there is a change in other income received by the family on behalf of the child.

C. DSS shall notify the adoptive parent(s) in writing of changes in adoption subsidy payments resulting from increases or decreases in allowable rates.

D. The adoptive parent(s) will contact DSS before moving out of state to implement the Interstate Compact on Adoption and Medical Assistance. The interstate interest of [redacted] (Child's First Name) is protected through the Compact.

III. Renewal Agreement

A. This agreement is renewed annually by the adoptive parent(s) and DSS.

B. DSS shall notify the adoptive parent(s), in writing, 45 days before the need for renewal and shall supply the adoptive parent(s) with the appropriate forms.

C. A second notice will be sent by certified mail 20 days before renewal. If the renewal request has not been received from the adoptive parent(s) within five (5) working days after the renewal date, the agreement will be terminated. A written termination notice will be sent.

IV. Termination

Termination will occur in any of the following circumstances:

A. Upon the conclusion of the terms of this agreement.

B. Upon the adoptive parent(s)' written request.

C. IV-E Adoption Assistance payments will terminate when the child reaches the age of 18. Supplemental Benefits may be provided at the discretion of DSS until the child is 21 years of age if the child is still in school.

N/A is/will be over 18 years of age before the next renewal date of the agreement.
(Child's First Name)

N/A is attending N/A
(Child's First Name) (School)

N/A
(Location)

and plans to finish school on N/A.
(Date)

Attach documentation of school enrollment such as grade sheets or a letter from the school. Verification is required to continue receiving Supplemental Benefits past the child's 18th birthdate.

D. Upon the child's death.

E. Upon the death of the parent(s) of the child (one in a single parent family and both in a two-parent family).

F. Upon cessation of the adoptive parent(s)' legal responsibility for the child.

G. Upon determination that the child is no longer receiving financial support from the adoptive parent(s).

H. Upon parent(s)' failure to complete the renewal process for adoption subsidy.

V. Appeal

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. Information may be requested from DSS.

Angela Hensley — Adoptive Mother's Signature — 3-22-99 — Date

Kenneth Hensley — Adoptive Father's Signature — 3-22-99 — Date

Eddie M Boyer P — Authorized Agency Representative's Signature — 3-25-99 — Date

[redacted] Supervisor
Title

Signed copy of the Adoption Subsidy Agreement given/sent to adoptive parent(s) on 3-31-99.
(Date)

8851-A-3

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2147

KENNETH HENSLEY, as adoptive parents of BLH; ANGELA HENSLEY, as adoptive parents of BLH; BLH, by parents-general guardians Kenneth and Angela Hensley,

Plaintiffs - Appellees,

v.

LILLIAN KOLLER, individually and in her official capacity as State Director for the South Carolina Department of Social Services; ELIZABETH PATTERSON, individually as Former Director of the South Carolina Department of Social Services; KIM AYDLETTE, individually as Former Director of the South Carolina Department of Social Services; KATHLEEN HAYES, individually as Former Director of the South Carolina Department of Social Services,

Defendants - Appellants,

and

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. G. Ross Anderson, Jr., Senior District Judge. (7:11-cv-02827-GRA)

Argued: May 16, 2013 Decided: July 3, 2013

Before MOTZ, DAVIS, and WYNN, Circuit Judges.

Reversed and remanded by published opinion. Judge Motz wrote

the opinion, in which Judge Davis and Judge Wynn joined.

ARGUED: Andrew Lindemann, DAVIDSON & LINDEMANN, P.A., Columbia, South Carolina, for Appellants. Timothy Ryan Langley, HODGE & LANGLEY LAW FIRM, P.C., Spartanburg, South Carolina, for Appellees. **ON BRIEF:** William H. Davidson, II, Joel S. Hughes, DAVIDSON & LINDEMANN, P.A., Columbia, South Carolina, for Appellants. Charles J. Hodge, HODGE & LANGLEY LAW FIRM, P.C., Spartanburg, South Carolina; James Fletcher Thompson, JAMES FLETCHER THOMPSON, LLC, Spartanburg, South Carolina, for Appellees.

DIANA GRIBBON MOTZ, Circuit Judge:

A minor, by and through her adopted parents, brought this class action challenging South Carolina's reduction of monthly adoption assistance benefits. She claims the reduction violates the Adoption Assistance and Child Welfare Act, and seeks declaratory and injunctive relief, as well as money damages. The district court certified the class and denied the parties' cross-motions for summary judgment. For the reasons that follow, we reverse and remand.

I.

The South Carolina Department of Social Services ("DSS") provides adoption assistance subsidies and foster care maintenance payments pursuant to federal funding authorized by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 et seq. (2006) ("the Act"). To receive funding under the Act, a state must develop a plan for a subsidy and maintenance program and must obtain approval of that plan by the United States Secretary of Health and Human Services. See id. § 671(a).

The Act sets forth specific requirements governing foster care maintenance payments, id. § 672, and adoption assistance payments, id. § 673. With respect to the latter, a state with an approved plan "shall enter into adoption assistance

agreements . . . with the adoptive parents of children with special needs." Id. § 673(a)(1)(A). The Act further provides:

> The amount of the [adoption assistance] payments . . . shall be determined through agreement between the adoptive parents and the State . . . , which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents . . . , depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment . . . exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

Id. § 673(a)(3). The adoption subsidy agreement between DSS and adoptive parents, referenced in § 673, establishes the payment rate for an adoptive child.

II.

In April 1997, BLH, a minor child, was placed in temporary foster care with Angela and Kenneth Hensley. Beginning in 1998, DSS approved monthly foster care maintenance payments of $675 to Mr. and Mrs. Hensley for the care of BLH. These payments included a "Difficulty of Care Rate" upward adjustment because DSS found BLH to be a special needs child. In early 1999, Mr. and Mrs. Hensley applied for a court order declaring them BLH's adoptive parents.

In preparing their application, Mr. and Mrs. Hensley sought to convert the foster care maintenance payment into an adoption

assistance subsidy. On March 22, 1999, DSS and Mr. and Mrs. Hensley entered into an Adoption Subsidy Agreement under which DSS agreed to furnish the Hensleys with monthly adoption assistance payments of $675. Two months later, a state court issued an order declaring Mr. and Mrs. Hensley the adoptive parents of BLH. Mr. and Mrs. Hensley continued to receive the $675 adoption subsidy monthly for three years.

But in June 2002, then-DSS Director Elizabeth G. Patterson announced that as a result of "South Carolina's budget crisis," DSS would reduce by twenty dollars all monthly foster care maintenance payments and adoption assistance subsidies, beginning that July. Pursuant to this across-the-board reduction, BLH's subsidy decreased to $655. In 2004, DSS rescinded the twenty dollar reduction to foster care maintenance payments, but DSS has never rescinded the 2002 reduction to adoption assistance subsidies; thus, for BLH, the latter remains $655.

In September 2011, BLH, by and through Mr. and Mrs. Hensley (collectively, "the Hensleys"), filed in state court a class action under 42 U.S.C. § 1983 against Lillian Koller, individually and in her official capacity as director of DSS. Koller removed the action to federal court. The Hensleys amended their complaint three times, removed the South Carolina Department of Social Services as a party, and added Patterson,

Kim Aydlette, and Kathleen Hayes, individually as former directors of DSS (collectively, with Koller, "the Directors").

The Directors then moved for summary judgment. The Hensleys opposed the motion and filed a combined cross-motion for summary judgment and motion for class certification. After the district court heard argument, it granted the Hensleys' motion for class certification and denied the cross-motions for summary judgment. The Directors timely noted this appeal.

III.

We have jurisdiction over this interlocutory appeal because the Directors' assertion of qualified immunity from suit presents purely legal questions. See Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). We review de novo a district court's denial of qualified immunity. Johnson v. Caudill, 475 F.3d 645, 650 (4th Cir. 2007). In doing so, "[t]o the extent that the district court has not fully set forth the facts on which its decision is based, we assume the facts that may reasonably be inferred from the record when viewed in the light most favorable to the plaintiff." See Waterman v. Batton, 393 F.3d 471, 473 (4th Cir. 2005) (citing Winfield v. Bass, 106 F.3d 525, 533-35 (4th Cir. 1997) (en banc)).

Qualified immunity shields government officials performing discretionary functions from suits for civil damages under

§ 1983. Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 306 (4th Cir. 2006). The qualified immunity inquiry asks (1) whether an official violated a federal right, and (2) whether that right was clearly established at the time the official acted. See Saucier v. Katz, 533 U.S. 194, 200 (2001). A court may address the second question -- whether a right is clearly established -- without ruling on the first -- existence of the right. Pearson v. Callahan, 555 U.S. 223, 232, 236 (2009). But "there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong." Id. at 236.

This is such a case. The Hensleys seek injunctive and declaratory relief in addition to money damages. A determination that a right is not clearly established only shields a state official from money damages. See Akers v. Caperton, 998 F.2d 220, 226-28 (4th Cir. 1982) (holding clearly established law protected state officials only from liability for money damages, and so remanding case for consideration of claim for equitable relief). Thus, if we resolved the case on the ground that no clearly established law permits an award of damages against the state officials, the case would necessarily return to the district court for a determination of the availability of injunctive and declaratory relief. Here, the

"conservation of judicial resources,". Pearson, 555 U.S. at 236, weighs strongly in favor of resolving the question of whether the Directors violated the Hensleys' federal rights.

For this reason, we begin (and end) with the first step of Saucier's two-step inquiry -- determination of whether § 673(a)(3) creates a privately enforceable right to parental concurrence, which the Directors have violated.

IV.

"[U]nless Congress speak[s] with a clear voice, and manifests an unambiguous intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement by § 1983." Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) (internal quotation marks omitted). In Blessing v. Freestone, the Supreme Court announced a three-factor test to determine whether a particular statutory provision gives rise to a federal right privately enforceable under 42 U.S.C. § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340-41 (1997) (internal quotation marks and

citations omitted). Of course, even if a statute meets the Blessing three-factor test establishing a privately enforceable right, a plaintiff cannot recover unless it can properly plead a violation of that statutory right. In this case we hold that the statute, § 673(a)(3), does set forth a privately enforceable right, but that the Hensleys have failed to plead any violation of that right by the Directors.

A.

Following the Blessing three-factor test, we initially consider whether the Hensleys have pled a violation of a federal right.

As to the first Blessing question, whether § 673(a)(3) "confer[s] rights on a particular class of persons," Gonzaga, 536 U.S. at 285 (internal quotation marks omitted), we agree with the only other circuit to address that question that § 673(a)(3) does "evinc[e] a clear intent to create a federal right," see ASW v. Oregon, 424 F.3d 970, 975-76 (9th Cir. 2005). For the Act provides that the adoption assistance payments:

> shall be determined through agreement between the adoptive parents and the State . . . , which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents . . . , depending upon changes in such circumstances.

42 U.S.C. § 673(a)(3) (emphasis added).[1]

In considering the second Blessing factor, we determine whether the asserted right is "so 'vague and amorphous' that its enforcement would strain judicial competence." 520 U.S. at 340-41. The Directors argue that the term "concurrence" is too "vague[] and amorphous[]" to create an enforceable right. We disagree. "In interpreting the plain language of a statute, we give the terms their ordinary, contemporary, common meaning." Minor v. Bostwick Labs., Inc., 669 F.3d 428, 435 (4th Cir. 2012) (internal quotation marks omitted). Black's Law Dictionary defines "concurrence" as "[a]greement; assent." Black's Law Dictionary (9th ed. 2009). Thus, § 673(a)(3) clearly provides that a state may not readjust an adoption assistance payment amount without an adoptive parent's "concurrence," i.e., agreement or assent.

Turning to Blessing's final factor, we examine whether the statute "unambiguously impose[s] a binding obligation on the State[]." 520 U.S. at 341. To do so we must resolve whether

[1] The Directors contend that the Act cannot be challenged by BLH, or Mr. and Mrs. Hensley in their capacity "as adoptive parents of BLH," because it contemplates only an agreement between the state and the adoptive parents. This argument fails. The Act provides that its stated purpose is to "enabl[e] each State to provide . . . adoption assistance for children with special needs." 42 U.S.C. § 670 (emphasis added). This language clearly reveals Congressional "inten[t] to confer individual rights upon" this "class of beneficiaries." See Gonzaga, 536 U.S. at 285.

"the provision giving rise to the asserted right" is "couched in mandatory, rather than precatory, terms." Id. In this case, the operative "provision," § 673(a)(3), requires states to enter into agreements with adoptive parents to determine adoption assistance payments. It further requires that such agreed determinations "take into consideration the circumstances of the adopting parents and the needs of the child being adopted." Id. See ASW, 424 F.3d at 976 ("[T]here is no ambiguity as to what [states must] do under § 673(a)(3) as a condition of receiving federal funding under [the Act]."). And if a state wants to readjust the agreed-to payments, it must have "the concurrence of the adopting parents" to do so, with the limited exception we address below. 42 U.S.C. § 673(a)(3).

For these reasons, we conclude that, pursuant to the Blessing test, § 673(a)(3) does give rise to a limited privately enforceable federal right cognizable under 42 U.S.C. § 1983.

B.

But only violations of such enforceable rights can provide a basis for recovery. See Saucier, 533 U.S. at 200 ("[T]he first inquiry must be whether a . . . right would have been violated on the facts alleged . . . ." (emphasis added)). Thus, we must also determine whether the Hensleys have alleged facts establishing that the Directors violated the Hensleys' rights under § 673(a)(3) when the Directors reduced adoption assistance

subsidies.

The statute's limited exception speaks to this very question. Section 673(a)(3) provides:

> in no case may the amount of the adoption assistance payment . . . exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

42 U.S.C. § 673(a)(3). The most logical reading of this language is that the statute prohibits adoption assistance subsidies that exceed foster care maintenance payments.[2] As a result, § 673(a)(3) establishes a right to parental concurrence in subsidy readjustment determinations except when the subsidy must be reduced due to reductions in foster care maintenance payments.

It is undisputed that DSS reduced the foster care maintenance payments by twenty dollars at the same time DSS reduced the adoption assistance subsidy by the same amount. The Hensleys do not contend that at any time prior to the 2002 reduction, the adoption assistance subsidy they received for BLH was less than BLH's $675 foster care maintenance payment.

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[2] The policy manual issued by the United States Department of Health & Human Services, which administers the federal funding authorized by the Act, supports this reading of § 673(a)(3). See Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Child Welfare Policy Manual § 8.2D.4 (2012).

It was only in 2002, when South Carolina decreased by twenty dollars all foster care maintenance payments, that the State also decreased BLH's adoption assistance subsidy by twenty dollars. The State's failure to do so would have violated federal law. For, under § 673(a)(3), a failure to reduce BLH's adoption assistance payment would have resulted in a payment "exceed[ing] the foster care maintenance payment" she would have received had she remained in foster care. For these reasons, the Hensleys cannot establish that the Directors violated the Hensleys' rights under the Act and therefore the Directors are entitled to qualified immunity.[3]

V.

For the reasons stated, we reverse the judgment of the district court and remand the case for entry of a judgment consistent with this opinion.

REVERSED and REMANDED

[3] The Hensleys also argue that the Directors violated their parental concurrence rights when DSS later increased foster care maintenance payments without also increasing the adoption assistance subsidy. However, the 2004 increase did not "readjust" the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger -- let alone violate -- the parental concurrence requirement.

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Kenneth Hensley, et al *Plaintiff* v. Lillian Koller, et al *Defendant*	)	Civil Action No. 7:11-2827-GRA

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

■ other: judgment is entered in favor of Defendants Lillian Koller, Elizabeth Patterson, Kim Aydlette, Kathleen Hayes.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Honorable G. Ross Anderson, Jr.

Date: October 15, 2013

CLERK OF COURT

_____

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Kenneth Hensley, as adoptive parents of BLH; Angela Hensley, as adoptive parents of BLH; BLH, by parents-general guardians Kenneth and Angela Hensley, Plaintiffs, v. Lillian Koller, individually and in her official capacity as State Director for the South Carolina Department of Social Services; Elizabeth Patterson, individually as Former Director of the South Carolina Department of Social Services; Kim Aydlette, individually as Former Director of the South Carolina Department of Social Services; Kathleen Hayes, individually as Former Director of the South Carolina Department of Social Services, Defendants.	C/A No.: 7:11-cv-02827-GRA **ORDER** (Written Opinion)

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. On July 3, 2013, the Fourth Circuit reversed this Court's certification of a class in this case and denial of the parties' cross-motions for summary judgment. *See Hensley v. Koller*, 722 F.3d 177, 184 (4th Cir. 2013). The Fourth Circuit concluded that "the Directors are entitled to qualified immunity" and remanded "the case for entry of a judgment consistent with this opinion." *Id.* at 183-84.

IT IS THEREFORE ORDERED that judgment is entered in favor of Defendants.

IT IS SO ORDERED.

G. Ross Anderson, Jr.
Senior United States District Judge

October 11, 2013
Anderson, South Carolina

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
BLH by parents/general)	
guardians Kenneth and)	TRANSCRIPT OF RECORD
Angela Hensley, and on)	2013-CP-42-1569
behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
-vs-)	
)	
South Carolina Department)	
of Social Services,)	
)	April 7, 2014
Defendant.)	Spartanburg, South Carolina

B E F O R E:

HONORABLE BRIAN M. GIBBONS, JUDGE

A P P E A R A N C E S:

TIMOTHY R. LANGLEY, ESQUIRE
Attorney for the Plaintiff

JOEL S. HUGHES, ESQUIRE
ANDREW F. LINDEMANN, ESQUIRE
Attorney for the Defendants

ORIGINAL

Margaret A. Woods
Circuit Court Reporter

THE COURT: Alright, this is Docket Number 13-CP-42-1569, BLH vs. South Carolina Department of Social Services. The matter's before the Court for several motions today and, gentlemen, looking at my docket, I'm sure ya'll saw the roster online as well, there's actually two motions listed but I've received from each one of ya memoranda in support or in opposition to summary judgment so that wasn't listed on the docket but, uh, I guess with both a your approvals I'll deal with that today as well.

MR. LINDEMANN: Well, Your Honor, we sent you a request last week to, uh, hear that motion at the same time, ---

THE COURT: That's right ---

MR. LINDEMANN --- you you indicated you would.

THE COURT: --- I did, I just ---

MR. LINDEMANN: Okay.

THE COURT: You're absolutely -- thanks for refreshing my memory, ---

MR. LINDEMANN: Thank Your Honor.

THE COURT: --- Mr. Lindemann. Alright, so we got three motions: motion for class certification, motion to compel and motion for summary judgment, is that correct, gentlemen?

MR. LANGLEY: Yes, Your Honor. I'm Ryan Langley, I apologize for being ---

THE COURT: Alright.

MR. LANGLEY: --- late earlier, my, uh, wife's car broke

down with our 2-year-old son, I had to go get her some jumper cables so ---

THE COURT: No problem. Uh, well then let's let's hear the summary judgment motion first, gentlemen, since it -- if I, if I grant summary judgment then the other stuff's moot.

MR. LINDEMANN: That'll be fine, Your Honor.

THE COURT: Yes.

MR. LINDEMANN: Uh, Your Honor, may it please the Court, Andrew Lindemann along with Joel Hughes on behalf of the defendants South Carolina Department a Social Services and if, uh, Your Honor, will allow me let me give ya a little bit of the, uh, procedural background of this litigation, uh, 'cause it's been goin' on for quite a while actually in federal court, uh, and and and this summary is contained in the memorandum of law that we've submitted to the Court.

This action is, uh, well prior to this state law case the, uh, the plaintiffs Kenneth and Angela Hensley who are the adoptive parents of BLH, uh, who is the named plaintiff in this action, uh, brought suit originally in state court in 2011 and that lawsuit and not sure we provided you a copy with that, I know there there should be a copy actually in the Court's file or we can get you a copy of that -- those pleadings to the extent they're relevant but, uh, that suit actually brought Section 1983 claims against the, uh, Department of Social Services and at the time also included as

a defendant, uh, the current S, uh, DSS director Lillian Koller. Uh, that suit as I indicated brought Section 1983 federal claims, uh, one for a contracts clause claim and the other for the breach of the Adoption Assistance and Child Welfare Act of 1980 and the allegations are similar to what we have in this particular case. The factual background is this: Uh, the Hensleys adopted BLH back in 1999 and as part of that adoption they entered into a an agreement, an adoption subsidy agreement with DSS at that particular time that provided a monthly adoption subsidy of $675. In June of 2002 because of the budgetary issues that was facing the State of South Carolina that obviously also applied to the Department of Social Social Services, the director at that time who was Elizabeth Patterson made a decision to unilaterally across the board cut not only the adoption subsidy benefits but also, uh, the, uh, foster board maintenance rate by $20 and as I will get into in a few moments with the applicable law in this particular case, uh, if the foster board rate is is dropped by $20, the, by federal law and by state regulation, the adoption subsidy can't be higher than that, uh, uh, foster board rate, so ultimately in this particular case with respect to the Hensleys their adoption subsidy rate was dropped $20 a month to $655, uh, and ultimately they brought this, uh, state law clai -- state law action in 2011 that included federal claims and the department at that particular time removed the case to

federal court. There were a number of amendments that were made to the pleadings in federal court. The case was assigned to, uh, Judge G. Ross Anderson, Jr.; ultimately, uh, by the time Judge Anderson heard a motion for class certification as well as cross-motions for summary judgment, the plaintiff was no longer the Hensleys, it was the child itself and, uh, that was done because, uh, initially DSS immediately raised a statute a limitations defense to the parents' claim so they were claiming obviously benefits back to 2002, everything other than three years would arguably have been barred by the statute limitations so in order to try to get around the bar on the statute limitations what the plaintiff did was they changed the plaintiff to the child itself who's a minor, uh, and, uh, and then also there were changes to the defendants. Ultimately at the time of the summary judgment motions, the Department of Social Services was no longer a defendant primarily because they're not a person ni -- under Section 1983 and in addition to the current director Lillian Koller, the plaintiffs had also added all of the directors since 2002 so that included Elizabeth Patterson, Kim Aydlette and, uh, ---

MR. LANGLEY: Kathleen Hayes.

MR. LINDEMANN: Kathleen Hayes, thank you. Uh, at that particular point, uh, Judge Anderson heard a motion for class certification, he also heard cross-motions for summary

judgment. He denied the cross-motions for summary judgment. We took an immediate appeal to the Fourth Circuit based upon the denial of qualified immunity. The Fourth Circuit heard that case, we've got a copy of their or -- uh, decision attached to our motion and, uh, I have actually a copy with the the West version that I can hand up to the Court, uh, since that's actually what I've cited in the memo but essentially what the Fourth Circuit did was they ruled in favor of the four DSS directors, found they were entitled to qualified immunity, found that there was no constitutional deprivation under the Adoption Assistance and Child Welfare Act.

The second cause of action as I'd indicated earlier was a breach of contract claim based upon the contracts clause of the United States Constitution, it's not really a breach a contract claim, you know, that's the way it was styled, it was actually a violation of the contracts clause claim. Ultimately while the case was on appeal the plaintiffs, uh, dismissed that claim without prejudice which is something that we agreed to during the, uh, oral argument betwee -- before the Fourth Circuit, uh, so ultimately what the Fourth Circuit did was they ruled in favor of the DSS directors on the federal claim brought pursuant to the Adoption Assistance and Child Welfare Act. They remanded with direction to Judge Anderson to enter judgment in favor of the defendants which he

did and we've got a copy a that order attached to our motion as well, that was done by order dated October 11, 2013. In the interim, uh, the plaintiffs filed a second state court action which is the action that's before Your Honor at the present time. Uh, that was filed on April 1st of last year and it raises purely a state law breach of contract claim alleging that the adoption, uh, subsidy agreement was breached by, uh, DSS. Again, the way they styled that is the plaintiff, it's not the parents who are the contracting parties with DSS but it's the child itself who is still, who still remains a minor, I think she was born in if I remember correctly ---

MR. HUGHES:

MR. LINDEMANN: Oh, I'm sorry, --- so she's actually right now. Uh, we had moved for summary judgment based on, uh, on the state law breach of contract claim, that's the only cause of action that was asserted in the current state law claim, state law action, and what we're relying on, Your Honor, is, uh, decisions that were rulings that were made by the Fourth Circuit so we have moved based upon collateral estoppel, uh, recognizing j -- res judicata doesn't apply because it's not claim preclusion because federal courts are dealing with federal claims, this is a state law claim but there common issues that were, uh, involved in both of these suits and the Fourth Circuit has

already ruled conclusively on a number of those issues that I'll discuss here in a moment, uh, and incidentally the time for appealing to the United States Supreme Court has run so the decision by the Fourth Circuit and ultimately the judgment entered by Judge Anderson after remand are final. Uh, we have included in our memo a a brief statement of undisputed facts, uh, those come actually word for word directly from the Fourth Circuit's opinion so the reason why I state they're uns -- undisputed, they can't be disputed, those are facts that were used by the Fourth Circuit in deciding this case and frankly it simply is a a recitation of the history of how the deduction or the reduction of $20 per month, uh, came about.

Uh, the the key points as far as our summary judgment motion goes, uh, there there were several rulings that the Fourth Circuit made that are, that are critical and again, we're relying on collateral estoppel and in order to for us to prevail on collateral estoppel we must show that the issues were actually litigated in the prior action, they were de -- uh, directly determined in the prior action and they were necessary to support the prior judgment and all of the points that we have raised come directly from the Fourth Circuit's decision, I don't think there's any question that we meet those three, uh, criteria.

Initially what they, what BLH, the child has alleged in this particular case, she has alleged a third party

beneficiary theory, uh, alleging that the contract between DSS and her parents for this adoption subsidy was breached, uh, and what, uh, that particular contract provides is, and a copy of that was attached to our motion as well, I believe a a copy has been attached to one of the, uh, filings by plaintiffs' counsel as well, that contract actually has a provision that says, this is on the first page, it's under the topic called "Provisions of agreement", the very first section calls -- it's called "Assistance" and it says, "Adjustments and monthly cash payments may be made with the concurrence of the adoptive parent based upon changes in the needs of the child," there's a blank there for the child's name, "changes in circumstances of the adoptive family or changes in the maximum allowable subsidy payment," and the focus that I would ask the Court to take is on that last phrase, "changes in the maximum allowable subsidy payment," this language incidentally comes from the federal act. Uh, the federal act, uh, the Adoption Assistance and Child Welfare Act actually provides for and requires the State to enter into an adoption assistance agreement with adoptive parents who have special needs children and then that particular section which is outlined on page 5 of the memo, section 673(a)(3)actually provides several of the different points, it includes the language regarding any type of adjustments but it also says the following, it says, "In no case may the amount of the adoption assistance payment, uh,

exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoptions assistance payment is made had been in a foster family home, so in essence what it says is if the child hadn't been adopted and was in foster care, they would have obviously had a foster care payment, a board rate. The subsidy can never exceed what they would have received if they were still in foster care and so what the Fourth Circuit determined in this particular case because then DSS director Elizabeth Patterson reduced the foster care board rate by $20 and then reduced, uh, the, uh, adoption subsidy by $20, it actually made the adoption subsidy the same amount as the foster care board rate woulda been for BLH and so clearly based upon this federal statute and there's a, there's an accompanying state regulation as well that we cite in the memoranda, based upon that, Your Honor, the, uh, the adoption subsidy cannot exceed, based on the language I just read you cannot exceed the, uh, foster board rate and so by reducing the foster, by the fact that the, uh, board rate, the foster care board rate was reduced the subsidy had to be reduced as well and what the Fourth Circuit determined is that there was no violation, even though they recognize that there was a private right of action, which was another issue that was litigated at the Fourth Circuit, they found that there was a private right of action under that statute but they found no violation by the

DSS directors for that reason. They go on to address the, one of the main issues that was at the Fourth Circuit was whether or not the reduction coulda been made without parental concurrence. The parental concurrence language that I just read to you from the adoption subsidy agreement is also in Section 673(a)(3)and the way the s -- Fourth Circuit interpreted that is that the parental concurrence language does not apply to an across-the-board cut so they found that the parental concurrence provision does not apply in this particular sell, so what does that, what does that show? that shows; number one, that there's no violation of the federal statute, uh, by the deduction by $20 per month of the adoption subsidy; number two, the fact that that reduction was done without parental concurrence the Fourth Circuit has already determined the issue that parental concurrence does not apply to that provision. Uh, and again, what's important to recognize of course is that this particular contract incorporates, uh, as a matter of law it will incorporate the federal statutes that require this agreement to start with as well as the state regulation so the fact that it includes the exact same language should be interpreted the same way that the Fourth Circuit has interpreted the statute.

Uh, in addition, Your Honor, there's the potential argument the plaintiffs' pleadings are not terribly clear as to what they're alleging as a breach but based on arguments

that were made during the, uh, federal case I assume that they also argue that, uh, in 2004, uh, after the economy got a little bit better I suppose, DSS increased the foster board rate by $20 but did not subsequently increase the adoption subsidies. There's nothing in the statutory scheme, either the federal statute or state regs, there's nothing in the contract that actually requires that the adoption subsidy should be the same as the bo -- foster care rate, it can be less than the foster care rate, it just can't be higher than the foster care rate, so the fact that the foster care rate was, uh, uh, raised does not mean that there is any type of contractual or statutory or regulatory requirement for the adoption subsidy be raised. Uh, the Fourth Circuit also touched on that particular issue which is why we asking for collateral estoppel on that. Uh, in the final footnote of the Court's opinion, the Court actually stated the following, the Court's indulgence, the Court stated the following, uh, "The Hensleys also argue that the directors violated their parental concurrence rights when DSS later increased foster care maintenance payments without also increasing the adoption assistance subsidy, however the 2004 increase did not readjust the amount of the adoption assistance subsidies, accordingly the directors' 2004 action did not trigger, let alone violate the parental concurrence requirement," so what they're saying there is the fact that there was an increase in one rate but

not the other was not a violation of any federal law, wasn't a violation of any any provision of the act and of course the South Carolina regulations, uh, uh, mimic the federal act and that, uh, there was no, uh, requirement then it didn't trigger the parental concurrence requirement and didn't violate it so the same argument could be ma -- should be made in this particular case it's collateral estoppel, that there was no violation of the contract in 2004 when the adoption subsidy was not increased to match the increase in the foster board payment and as I indicated there's nothing in the contract that requires that, there's nothing in state law or federal law that requires that. The adoption subsidy can't exceed the foster board rate but it doesn't have to be the same and there's not a requirement that one can be increased without the other or or that both have to be increased if one is, uh, so our position is that the Fourth Circuit's decisions, their ruling on these various issues while they didn't have a state law breach a contract claim in front of 'em that these same issues are determinative as a matter of law of the breach of contract claim, uh, that is currently pending before, uh, Your Honor.

Uh, and let me make a, clarify one point. Uh, I mentioned earlier, uh, that there was also a contracts clause claim that had been brought in the federal action and while the case was on appeal the, uh, the plaintiffs had indicated

that they wanted to withdraw that contracts claim clause and during the oral argument and this was, uh, just, uh, provided to me earlier today that, uh, apparently, uh, and I'm not sure how they ended up getting this but they ha -- the, uh, plaintiffs have produced a transcript to Your Honor in opposition to our motion for summary judgment from the Fourth Circuit, uh, oral argument, I assume this was obtained, uh, because a, the oral arguments are now online and they apparently must have recorded it and had a court reporter transcribe it last week, uh, but what has been argued by, uh, plaintiffs' counsel is is frankly not correct. They have argued that, uh, the, uh, the colloquy between Mr., uh, by -- between plaintiffs' counsel and the Court and myself during the Fourth Circuit argument somehow affects the ability to bring a collateral estoppel argument in this case and if you read it closely what the Court has, what the Court did and it's towards the end of the the, uh, Fourth Circuit, uh, uh, oral argument, what happened was they asked me whether or not I had any objection to the dismissal of the contract claim without prejudice and I indicated to the Court what, similar to what I had filed with the Fourth Circuit that I did to the extent that I did not want, uh, that claim to be dismissed without prejudice because the plaintiffs coulda turned around and amended their existing lawsuit in state court to bring that 1983 claim, since 1983 there's concurrent jurisdiction in

state court, and then I'd be in a position where I'd have to remove it again and essentially start over with that particularly -- particular claim and so what counsel, uh, was asked and plaintiffs' counsel was asked whether or not they were intending to do that and Mr. Langley, uh, represented to the Court that he would not do that, uh, and at the same time I indicated that because, uh, it was also a question as to whether or not we would attempt to use the dismissal of the contracts clause claim as having some type of preclusive effect in this cour -- in this, uh, state law claim, state court action, and I indicated that that was not possible because the dismissal was without prejudice, it's a dismissal without prejudice, it isn't a decision on the merits, and so I conceded that the dismissal, the voluntary dismissal of the contracts clause claim could not be used for collateral estoppel effect, that's not what we're asking this court to do, we're asking this court to use the rulings by the Fourth Circuit on the claim that did get litigated at the Fourth Circuit that was decided on the merits, that claim which is the, uh, statutory claim under the Adoption Assistance, uh, Act, that claim is subjection to collateral estoppel and I certainly didn't think any type a waiver, uh, in the, during the oral argument and I know that's what they're claiming is that there was some type of waiver made but that's not the case but the discussion with the Court dealt solely with the

dismissal without prejudice to the contracts clause claim and we're not attempting to use that dismissal without prejudice as having any preclusive effect on the existing state court case nor could we because as I indicated it was a dismissal without prejudice so I did wanna clarify that point as well. Thank Your Honor.

THE COURT: Thank you, Mr. Lindemann. Yes, sir.

MR. LANGLEY: Yes, sir, Your Honor, Ryan Langley, may it please the Court, ---.

THE COURT: Okay.

MR. LANGLEY: --- let's just read the words. This is Judge Motz askin' me, "Can you make a representation you're not going to bring a 1983 action in state court?"

"Yes, ma'am."

"Okay," that's what she says back back to me, it's on page 57, you've got this if you wanna follow that.

THE COURT: That was emailed to me?

MR. LANGLEY: Yes, sir, Your Honor, ---

THE COURT: Okay.

MR. LANGLEY: --- but I've got another copy of it if you ---

THE COURT: Yeah, you got ---

MR. LANGLEY: (Indiscernible cross-talk.)

THE COURT: --- a hard copy I can follow ---

MR. LANGLEY: Yes.

THE COURT: --- along with ya, ---

MR. LANGLEY: Yes, sir.

THE COURT: --- it be easier than -- I didn't bring my computer in here in my ---

MR. LANGLEY: No problem.

THE COURT: --- delights. Okay.

MR. LANGLEY: Page 57 there, Your Honor.

THE COURT: Alright, I'm lookin' at, go ahead.

MR. LANGLEY: Okay. Judge Motz asked me, "Can you represent you're not gonna bring a 1983 action in state court?"

"Yes, ma'am."

She says, "Okay."

And I say, "And stipulate there's not a bar to the state court contract claim in state court."

What he just told you was there was no discussion of the state court contract claim, that's just not true. Right here it is.

So what does she say? "Yeah."

I say, "Yes, ma'am, Your Honor."

She says, "We're not deciding whether there's a bar or not," referring to the state court claim. Their whole argument is premised on the fact that the Fourth Circuit made a decision barring the state court claim. Here it is directly from the judge's mouth where she says they didn't, they didn't

make that decision, so I say, "Alright, on the grounds of res judicata or collateral estoppel by virtue of some dismissal with prejudice," that's what I say.

Mr. Lindemann, "If it's without prejudice, there would be no such argument."

"Right," Judge Motz says.

Back to Mr. Lindemann, "And that wasn't my intent to try to make that argument I can represent to the court," when we're talking about the state court contract claim. Now he's come in and he's giving ya his spin job on it and and and twisted it around but he didn't read ya this language, this is exactly what was said so, you know, they make one representation then they come and they do exactly the same thing. Settin' that aside for a minute if you go just to the issue about whether or not collateral estoppel applies, you've got these three factors, okay. Well taking a step back from that first, we filed our dis -- our discovery, uh, submitted it a, almost a year ago now, ten months ago I think, no response, no -- I I sent several emails, letters, nothin', not even, I think there was somethin' about we'll get it to you but then nothin' so we didn't have any choice but to file a motion to compel. Thursday afternoon last week at five o'clock after here here we've been going ten months, we finally get a response from him that's a hundred pages of discovery and we've asked for documents on behalf of 4,000

children who had their their benefits cut $20 a month and the summary judgment law of our state is that that summary judgment's improper when you hadn't had a full and fair opportunity to conduct discovery. They've been critical of us for not submitting deposition testimony, well I think Your Honor practiced law, you understand that you can't move into to oral deposition discovery until they've answered your written discovery, it's just not feasible, you find yourself in a situation where they say, Oh, you took this deposition, now you you you you can't have two bites at the apple once they produce the documentation, so that's the position that we're in.

So movin' to the, to the standard. If you -- if you're, if you're gonna consider even their motion for summary judgment even though that they've refused to answer discovery until last Thursday then you look at three factors: was the exact issue actually litigated in the prior action? Well we know Judge Motz doesn't think so and she she wrote the order on behalf of the Fourth Circuit and here's why she said that. The contract that you're lookin' at that's been attached to their brief and to ours makes no mention of all these federal statutes that Mr. Lindemann just cited to ya; in fact, it says the sole basis for the provision a these funds to to BLH is state funded supplement benefits. Page 1 a the contract "Monthly cash payment $675, current funding source," it's got

4(e) adoption assistance, that's the federal statute. The state funds are state funded supplemental benefits. Then this whole basis that he's he's told ya about it cannot exceed what's paid under foster care, you look two lines down and this is on the contract, Your Honor, it's also attached after that transcript, page 1, "The amount of the payment does not exceed the foster care payment for ---

THE COURT: What page is that?

MR. LANGLEY: Page 1 ---

THE COURT: Okay.

MR. LANGLEY: --- under under "Provisions of agreement 1(b)."

THE COURT: Okay, go ahead.

MR. LANGLEY: You look at the third sentence under "State funded supplemental benefits."

THE COURT: Okay.

MR. LANGLEY: "The amount of this monthly cash payment is based on the needs of the child, the circumstances the adoptive parents and has been determined by mutual agreement between the the adoptive parents and DSS. The amount of the payment does not exceed the foster care maintenance payment for not applicable if she were in a foster care home. Other cash income not applicable, not applicable, not applicable." Well today all of a sudden it's applicable and they wanna bar after ignoring discovery for almost a year this child from

going forward and trying to recover these benefits, so they can't say the exact issue was litigated before, they're not entitled to summary judgment 'cause they hadn't fully and fairly completed discovery and I'd be happy to answer any other questions about why collateral estoppel is inapplicable but that the rules or the elements of it are essentially the same, the three factors, uh, are covered by what we just discussed, actually litigated in prior action, been over that one, directly determined in the prior action. Nowhere in the Fourth Circuit order will it say, and it's been provided to you by Mr. Lindemann and if I'm missin' it he can point it out to me I'm sure, nowhere does it say that the Fourth Circuit determined that the plaintiff had no state law claim, Judge Motz said just the opposite, We're not making that determination. That's it, that's in the transcript and then a it can't be necessary to support the Fourth Circuit finding because it it didn't have anything to do with it. State law breach of contract in South Carolina is far more broad than just what would apply under these federal statutes that have been described to you, that the issues about, uh, when you've got a contract, you've got a a duty of good faith and fair dealin' in South Carolina, it's a very important component that goes along with, so under that duty of good faith and fair dealing if in, if in fact in 2002 when they did the cut, let's say that state regulation applies, let's say that they

can create a set a circumstances unilaterally where they have to purposely reduce the benefits to an adopted child 'cause that's what they did, nobody nobody said, the legislature didn't say you gotta cut foster care rates but that the DSS director cut the foster care rates and then said, Oh, I've cut foster care rates, now I have to cut the adoption subsidy because the adoption subsidy can't be higher than the foster care rate, well I think there's there's at least an issue of fact on whether that complies with the duty good faith and fair dealin'. Can can a party to a contract create a set a circumstances that then give them an out? I I don't think so, not without at least submittin' that issue to the jury and have them make a determination whether or not that's fair to a child that's receiving these benefits who by the way is a special needs child, all a these children are, that's why they get these benefits so, Your Honor, they're two entirely separate actions, we didn't hear anything about this issue when it, when it was before the Fourth Circuit. I specifically brought it up, I wanted to make sure we wouldn't be here before ya today and I specifically said the words, "We're not gonna have any a this collateral estoppel argument because it's been dismissed without prejudice, right," and you saw what he said and yet here we are.

THE COURT: Alright.

MR. LINDEMANN: Real quickly, Your Honor?

THE COURT: Thank you, sir. Yes, sir, in res -- brief reply.

MR. LINDEMANN: Clearly Mr. Langley is, uh, confusing res judicata and collateral estoppel. I'm not standing here claiming that the state law breach a contract claim was before the Fourth Circuit, wouldn't imply that's part a the Fourth Circuit case. Judge Motz is recognizing that and she's also recogni -- the concern here was not even anything to do with the, uh, the statutory claim, the claim pursuant to the Adoption Assistance Act, it was purely this contracts clause claim which was dismissed without prejudice; in fact, if I could hand up to the Court here's a copy of the, uh, the Fourth Circuit's decision dismissing that claim without prejudice. That is not the decision by the Fourth Circuit that we're relying on for collateral estoppel purposes, we're not relying on res judicata, we're not arguing that that claim has been previously litigated in federal court, what we're arguing is three critical determinative issues have been litigated in federal court and cannot be relitigated and that was not prohibited by this exchange with the Fourth Circuit; in fact, Judge Motz actually says, We're not deciding whether there's a bar or not. They're not -- that's how she answered his collateral estoppel point, We're not deciding that. I mean, the Fourth Circuit hadn't even issued their decision yet, I didn't know what their decision would be at this point

to know whether or not it would potentially have collateral estoppel effect, so this dealt solely with the contracts clause claim, it was dismissed without prejudice. I'm not standing here arguing res judicata or collateral estoppel with respect to the dismissal of the contracts clause claim, I can't, it was dismissed without prejudice, it wasn't litigated on the merits. The Adoption Assistance Act claim was litigated on the merits. Ultimately the Fourth Circuit issued several distinct rulings that should not be relitigated in this case and based upon those rulings which we've already discussed in our outline, in more detail in our memoranda, I contend that those issues are dispositive of the state law breach of contract claim and I still contend that.

Uh, as far as this issue about discovery, there was discovery, uh, in the, in the federal court claim in the federal court action and; in fact, what we have submitted to plaintiffs' council is the same that they've had for couple years now on the federal court case, that discovery has been done. There was no request for any type of discovery for 4,000 plaintiffs, nor could the plaintiff ask for discovery on 4,000 plaintiffs at this point because class has not been certified and so that discovery, uh, would not be appropriate and and it hasn't been asked and I'll be happy to, we'd be happy to discuss that when we get to the motion to compel. What we are arguing on summary judgment is not fact-based at

all, it is purely based on collateral estoppel based on issues of law that have already been decided by the Fourth Circuit. As much as, uh, Mr. Langley would love to be able to relitigate those in federal -- in state court because he lost 'em in federal court, he cannot do so because of collateral estoppel. He had his opportunity to litigate those issues, he's the one who framed those issues in the federal court, he lost them and they w -- they are determinative of the state law breach of contract claim as well because you're dealing with parts of a contract that are identical to the parts of the statute that the Fourth Circuit has already relied on so that is the basis ---

THE COURT: Okay.

MR. LINDEMANN: --- of our decision, I don't wanna confuse res judicata and collateral estoppel, I know lots a people do but this has nothing to do with res judicata, no claim that the contracts claim had somehow or the con -- breach a contract claim was somehow litigated in federal court, it was not.

THE COURT: Alright.

MR. LINDEMANN: Thank Your Honor.

THE COURT: I understand both your positions, gentlemen, and I'm gonna take that matter under advisement. Obviously I'm gonna read the memorandas in more detail before I can make a decision on the summary judgment motion.

Alright, the two other motions then, uh, obviously since I've taken the summary judgment motion under advisement I'm gonna have to take the two other motions under advisement as well so let's just deal with those in the order in which they were filed. Uh, first would be a motion for class certification and, Mr. Langley, I believe that's your motion.

MR. LANGLEY: Yes, sir, Your Honor, I'll, uh, hand up memo support a that, I've already provided it to opposing counsel.

(Whereupon, counsel handed the document to the Court.)

(Whereupon, a discussion was held off the record.)

THE COURT: Thank you.

MR. LANGLEY: Yes, sir.

THE COURT: Well hold on a second, that's the summary judgment one. Hand me the, uh, I've already got this one. I have your memo in opposition to motion for summary judgment. There you go, we'll swap again.

MR. LANGLEY: Sorry, Judge.

THE COURT: Alright. Alright, handed up is a memo in support of class certification. Mr. Langley.

MR. LANGLEY: Yes, Your Honor, this class was certified under federal Rule 23 and that the South Carolina law is real clear that the South Carolina's Rule 23 is much more expansive in in determining what's a class that it's certifiable than

its federal counterpart. There's the cases right there on the first page that are cited on that issue so, uh, this this issue was, uh, heavily briefed before Judge Anderson, a hearing was held, he granted class certification, I've pro -- I've got a copy a that order, Your Honor, I believe it is attached.

THE COURT: Yes, sir, it's attached to your motion.

MR. LANGLEY: Okay, yes, sir, it's attached there for your review. Uh, essentially the the Judge Anderson went through why the class was sufficiently numerous, why if it was commonality of issues, uh, the claims were were all typical and you heard it from their mouth, unilaterally cut benefits to everybody at the same time. If you can't certify this group of kids as a class then what what could you possibly certify, that ev -- everything took place at the same time, that that all these folks were treated precisely the same way, that that's the the alleg -- the undisputed allegation in the case, uh, so it meets the typicality and commonality a the class.

Now, uh, adequacy of representation has been challenged, that that case case law on third party beneficiary and statutory law in South Carolina is clear that a third party beneficiary can enforce a contract. Each of these children will be third party beneficiaries. The way that we've structured, uh, that that argument for what child will be

included in class, uh, and, you know, that that and so that leaves the fifth issue of amount in controversy. I suppose that one more modification may be needed to the, to the class definition to include that they have been the subject of this $20 cut for at least 5 months because South Carolina does have the additional Rule 23 requirement that it has to be at least a hundred dollars an individual and I suppose it's possible that you could have a child who was 17-years-old and 7 months or 8 months and therefore their loss before they turned 18 was only four ---

THE COURT: Well I was a family court judge for eight years, I can count the number of 17-year-old adoptions I did on one hand.

MR. LANGLEY: Yeah, that's right, so I think what we're talkin' about here is a real esoteric, uh, sort of anomalous situation but in any event that under Rule 23, Your Honor, has the ability to issue conditional orders for class certification; in fact, that's the obligation at at the earliest opportunity of the case, uh, and so that that the the reading in this obligation on the plaintiff to produce evidence, that's nowhere in the statute. The one case that they cite for support for that, the *Dukes* case, the *Wal-Mart*, uh, *vs. Dukes* case or vice versa from the U.S. Supreme Court a -- was applying federal rule -- rules of civil procedure, federal Rule 23 so, uh, it it doesn't have any bearing on this

case and interestingly they don't want collateral estoppel to apply under these circumstances but they do under their circumstances. Uh, so specifically, Your Honor, that the the elements of class certification certification are met under the statute, that the standard that they're seeking to apply is the federal more rigorous standard which Judge Anderson already concluded had been met and so be appropriate under these circumstances.

On the motion to compel, I I think the discovery produced is a hundred pages, it's limited to this plaintiff, you know, you've already heard him say that they're they're they're not going to produce any of the contracts for the other individuals although they were asked for, uh, so that's that's gonna be the main issue, Your Honor, is any of the, uh, contractual agreements with the other 4,000 children ---

(Indiscernible cross-talk.)

THE COURT: So so what were you seeking in your motion to compel the other stuff?

MR. LANGLEY: Well initially we were seekin' whatever they had. They didn't respond to anything until last Thursday so we've sorta scrambled, I was in a med mal trial all week last week, I looked over the weekend at what they produced at five o'clock on Thursday, uh, and I -- it it's a hundred and some pages, it's limited to the one named plaintiff in this case ---

THE COURT: Okay.

MR. LANGLEY: --- and so I think, you know, frankly, Your Honor, that's probably subject to your rulings on these or subject to your ruling on summary judgment but also subject to your ruling on class certification whether or not those documents would be, uh, subject to discovery.

THE COURT: Well and if if let's say, just thinkin' out loud, let's say I deny the motion for summary judgment, grant your motion class certification, I mean, these -- ya'll gotta still go through discovery process and your motion to compel would, you know, wouldn't be ripe then anyway 'cause ya haven't asked for it with ---

MR. LANGLEY: I think that that's fair.

THE COURT: --- a certified class yet.

MR. LANGLEY: I think that's fair.

THE COURT: Why don't we just hold the motion to compel in abeyance.

MR. LANGLEY: That's fine by me, Your ---

THE COURT: You okay with that, Mr. Lindemann?

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

THE COURT: Alright, well let's -- let me hear from you then. Anything further on your class certification?

MR. LANGLEY: No, sir, Your Honor.

THE COURT: Alright. Yes, sir, Mr. Lindemann.

MR. LINDEMANN: Thank Your Honor. Uh, the the motion for

class certification, uh, is actually two sentences that didn't actually cite to, uh, any type of evidence, didn't a -- didn't include any affidavits attached, uh, it essentially says, We ask the Court for a class certification based upon, uh, the identification of the class con -- contained in the pleadings and I I strenuously disagree with Mr. Langley to suggest that the, uh, United Supreme Court case law interpreting Rule 23, uh, is not applicable to, uh, South Carolina; in fact, if you look at South Carolina Supreme Court and South Carolina Court of Appeals decisions, uh, dealing with class certification through the years, they constantly rely on, uh, federal case law and particularly United States Supreme Court case law, uh, and *Wals -- Wal-Mart vs. Dukes* clearly indicates that as it says in in page 4 of our memoranda, Rule 23 does not set forth a mere pla -- pleading standard, a party seeking class certification must affirmatively demonstrate his compliance with the rule, that is he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc., so it isn't simply enough to plead, uh, the elements of class certification, they need to produce evidence of it and they've done none of that, uh, in this particular court.

Uh, as far as the reference to the fact that Judge Anderson certified a class in the federal case, uh, his his, uh, uh, order after remand indicates that that has been

reversed. He says on July 3rd two thousand nine -- uh, 2013, "Fourth Circuit reversed the Court's certification of a class this case in denial of the parties cross-motions for summary judgment and then he proceeds to enter judgment on behalf of, uh, the DSS defendants. In addition, the actual defendant in this case which is the department itself was no longer a defendant in that particular case at that particular time, uh, and finally, I would also point out that there are additional requirements in South Carolina for class certification that are not required under the federal rule including the requirement that there be, uh, damages of a hundred dollars per per each class member, uh, so; number one, we've we've got four different reasons why class certification is not appropriate in this case; number one, is is a procedural one, the plaintiffs have simply not provided e -- any evidentiary support whatsoever, uh, for their motion for class certification, they have not presented any evidence on any of the five, uh, requirements that they have the burden of proving in order for this court to certify a class. Uh, ---

THE COURT: Alright, but didn't Judge Anderson say they did?

MR. LINDEMANN: Judge Anderson addressed, uh, four of the prongs, uh, and he ultimately did certify a class, ---

THE COURT: Okay, go ahead.

MR. LINDEMANN: --- he did. Uh, but again, that is not,

obviously that is not binding in this particular court for the reasons that I just stated. Uh, looking at the, uh, and and quite frankly there's some additional reasons that we're asserting, uh, based on the breach of contract claim that were not applicable to the federal, uh, statutory claim, uh, and and I'll get to those in a minute, they all go to the commonality requirement. Uh, well, first of all, Your Honor, uh, we rely on the case of *Gardner vs. South Carolina Department a Revenue*, uh, which is a significant case from the South Carolina Supreme Court in 2003 that addressed what needs to be shown in order to satisfy the requirement of commonality and again, uh, unfortunately I meant to make a copy of this case for Your Honor and I didn't before I left, I have a highlighted version that I'll leave with you, uh, but if you look at the sections, uh, of that particular decision dealing with class certification, the South Carolina Supreme Court relies on a a substantial number of federal cases, uh, so this suggestion that somehow federal cases have no, uh, no weight on this particular issue, uh, I I clearly disagree with. Uh, on the issue of commonality, the Court indicated that commonality, and this is a quote from, uh, the *Gardner* case, it says, "Commonality is met only where the class shares a determinative issue," not the fact that there may be some questions of law or fact that might be common, this particular case obviously they are, no, but the the issue of, the issue

that must be, uh, that that for which there must be commonality must be a determinative issue. and the Court went on to say, again citing a district of Maryland case, "That a representative plaintiff cannot establish commonality if the Court must investigate each plaintiffs individual claim:." Now the *Gardner* case as I indicated is right on point. In *Gardner* Judge Clary had, uh, certified both a plaintiffs' class and a defendant class and on appeal the South Carolina Supreme Court found that he had erred in certifying both classes, of course what I'm focusing on is the plaintiff's class. In this particular case it was a challenge to, uh, you may remember this, uh, if if I remember correctly you were representing, uh, governmental entities back in the early 2000s, uh, this dealt with the Setoff, uh, the Setoff Debt Collection Act where thi -- this particular act allowed governmental entities, municipalities, counties, all kinds of agencies are owed money by taxpayers to be able give notice to those taxpayers and then obtain those monies from the taxpayer's refund by submitting a claim to the Department of Revenue and, uh, this was a large clax -- class action involved many people, many different agencies in different municipalities and counties and school districts and what the, uh, what the issue was was whether or not there was an appropriate notice given to taxpayers, uh, and ultimately Judge Clary found that that was a common issue of fact but he also failed to consider

the fact that there was a issue of prejudice to the taxpayers and each taxpayer would have to show prejudice and that that was an individualized inquiry that was needed and based upon that indili -- individualized inquiry the Supreme Court found that class certification was inappropriate and ordered the decertification of the plaintiffs' class. We have the same situation in this case and I've outlined a number of different issues that will arise, uh, with respect to the breach of contract action, assuming Your Honor doesn't grant summary judgment on it, that will need to, uh, be dealt with on a case by case or individualized basis. First of all, Your Honor, uh, there's the issue of whether or not the adoptive parents actually accepted or acquiesced or impliedly consented to the $20 reduction in subsidy payments. Uh, we've cited a couple of cases, uh, this is on page 7 of my memorandum, where in a analogous situation where, uh, an employer has, uh, reduced a compen, a, uh, excuse me, a commission rate for a plaintiff or reduced, uh, the amount that was paid per hour on a employment contract, the South Carolina Supreme Court in both those cases, a 1985 case and a 1940s case, uh, both found that, uh, the reduction was impliedly consented to, well that's obviously an issue in this particular case, you would have to look at each potential class member, remember the class members are supposed to be the the adolescents, the minors, so you would have to look at each class member's adoptive

parents, the adoptive parents are the contracting parties, and you would have to look at each a them to see if they acquiesced or impliedly consented to the $20 reduction in subsidy payments, that is an individualized inquiry, uh, similar to what, uh, was found to be, uh, insufficient to support class certification in the *Gardner* case. You would also have to look at whether or not there was a novation that was, uh, that was entered as a result of the reduction in monthly benefits and a novation requires the Court to look at the intent of the parties to the contract, so again it would require individualized inquiry into each class member's, purported class member's adoptive parent's intent, uh, following the reduction in benefits. Uh, the Adoption Subsidy Agreement also includes a process for the entry of renewal agreements so for each, uh, class member's adoptive parents you would have to determine that between 2002 and present whether there were any renewed agreements and what those renewed agreements provided for, again that's an individualized inquiry.

There's also a provision in the Adoption Subsidy Agreement that allows the adoptive parents to appeal any DSS decision on the reduction, change or termination of adoption subsidies, re -- that requires an individualized inquiry that must be made as to each class member's adoptive parents to determine whether an appeal was made at any point since 2002,

what -- how that appeal was decided and how that appeal may impact that particular class member's claims, again individualized inquiry.

There's also provisions in the Adoption Subsidy Agreement that adjustments can be made based upon the needs of the child or changes in the circumstances for the adoptive family, so again that will require individualized inquiry. For each class member's adoptive parents, one will have to determine whether or not any of those parents made a request for, uh, any adjustment in the adoption subsidy for those reasons since 2002, again that would have to be done on a case by case basis.

Uh, the Adoption Subsidy Agreement also includes a termination provision that has eight different provisions for how the Adoption Subsidy Agreement is terminated one of which is that the adoption subsidies end at the age of 8-- 18, that is the only termination condition that's taken into account in the definition of the case.

There's a number of other, uh, provisions as I indicated that are all listed on the, uh, last page of the agreement, uh, they include, uh, whether or not the, uh, the adoptive parents have requested the termination, whether or not the child is deceased, that the child's death would -- agreement is terminated, at the death of the parents agreement is terminated, at the succession of the adoptive parent's legal

responsibility for the child the, uh, agreement is terminated, uh, also whether if they are no longer receiving financial support from adoptive parents the agreement is terminated and then, lastly, their failure to complete the renewal process for the adoption subsidies, those are all different methods or means for the Adoption Subsidy Agreement to be terminated. For each of the class member's adoptive parents, for each of their contracts, a individualized determination will need to be made as to whether or not, uh, those contracts were terminated between 2002 and present, and then last but not least you've got the issue of damages and this particular case it's unusual because the plaintiffs are trying to circumvent the statute limitations. Typically in these situations you would see the contracting parties be the, be the parties to the litigation, here it's not the Hensleys that are suing DSS for the breach of the contract even though the Hensleys are the contracting party, it is their child that is doing it and under a third-party beneficiary theory. Well as a third-party beneficiary you don't become an assignee of the contracting party's rights, you can make a claim if you are harmed by the breach of contract as a third-party beneficiary but you can't make a claim for the harm to the parents, you make a claim to the harm to yourself and there's no indication whatsoever that DSS, and the contract certainly doesn't provide for that, paid these $20 a month or any a these subsidy payments to the

child, they paid it to the parent and; in fact, the contract provides that it's paid to aid the adoptive parent in providing proper care for the child, so the child's damage is not the $20 a month in reduction in reduced benefits, that may be the parents' claim but the parents are not bringing the claim here. The child's claim would be whatever detrimental effect, if any, that the loss of those $20 a month may have on them and that clearly is re -- is an individualized inquiry. I would submit that many of the kids got the same care, the $240 deduction in a, in a yearly subsidy did not change the quality or the amount of care that those adoptive parents provided for that child but it is certainly possible that some a those children may have a way to make a claim. To say that because I did -- my parents didn't get $240 I didn't get to play Little League that year, I didn't get this benefit that I would have gotten otherwise but that is an individualized inquiry, damages are not the same across-the-board. They may be across-the-board the same for the adoptive parents because each of adoptive parents lost $20 a month, that's the plaintiffs' theory but the adoptive parents are not the proposed class members, the proposed class members are the children. The children don't receive that money directly, they're supposed to receive care from their adoptive parents, so they have been harmed in some way by their parents not getting that additional money, it's gonna be a some type of

subjective harm and that is gonna require a case by case determination, uh, so those are the seven different reasons why we believe that to properly litigate the breach of contract claim that has now been asserted that it requires individualized inquiries into a number of different issues and I would point out to the Court as well that the, uh, *Wal-Mart vs. Dukes* case, uh, on the issue of damages, uh, reiterated the fact that under rule 23 and again, I submit that *Wal* -- *Wal-Mart vs. Dukes* is, uh, is consistent with South Carolina law, the Supreme Court said, Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. They can't show that they suffered the same injury here because I indicated each child's injury is gonna be different and I would submit most of the children probably have no harm that was caused by their parents having, uh, $240 de -- uh, ri -- out of their yearly supplement or yearly subsidy, uh, and that also takes me to the last element to 'bout the hundred dollar amount in controversy, that is something that is not required under federal Rule 23 but it is under South Carolina Rule 23. Because that's an individualized inquiry for each, uh, child in, uh, in this particular class, the proposed class, many of these children might not have a hundred dollars worth of harm, uh, many of these children might not have any harm, many of these children probly cannot articulate any harm if they were required to do

so by the fact that their parents received $240 less a year, uh, in adoption subsidies but there has definitely been no showing by the plaintiffs whatsoever, they produced no evidence to show this court that each member of this proposed class satisfies that hundred dollar amount in controversy requirement so on all of those bases, Your Honor, we submit that this court -- this case is not appropriate for class certification and, uh, again, if Your Honor I apologize for ---

THE COURT: That's fine.

MR. LINDEMANN: --- the highlighting but, uh, let me hand up a copy of the *Gardner* case because I do believe that that is the, uh, uh, the controlling case in South Carolina on the commonality requirement and, uh, that case as I indicated shows that if there is any type of individualized inquiry required in order for the Court to grant complete relief, not just on liability but also on damages, that it is not an appropriate candidate for class certification and I think clearly, uh, this case probly more so than the *Gardner* case, uh, dealing with the debt setoff. Thank Your Honor.

THE COURT: Thank you, Mr. Lindemann. Brief reply?

MR. LANGLEY: Yes, Your Honor. Well we heard a a whole lot about different claims involving prejudice, intent, the employment statute, uh, whether or not there was renewed agreement, every single one of the arguments that you just

heard either has no applicability to a breach a contract claim where there's an across-the-board cut in the precise same amount or goes to whether or not some individual child is going to be a member of the class. You always have an individualized determination about whether or not you're in a class. If you took this particular cholesterol drug during this set of years, uh, and and had Type 2 diabetes as a result, that determines whether or not you're in a particular class, so every one of the issues that he's talking about you'd never have a class action if there wasn't some individualized determination at some point in the, in the whole structure because determining who's in the class and who's not in the class has to be done on an individualized basis. I don't have children that receive, I don't adopted children that that receive subsidy benefits so there's an individualized determination that I'm not in that group, uh, and every one of those issues that he just cited to you goes to that first question about are you in the class or not. He ignores the class definition that we've provided to the Court subject to the one additional modification of of having at least five months a damages. Mr. Lindemann's awful bold to say that these children, many of whom, every single one of them is a special needs child, felt no effects from losing $240 a year, that may not be much to him but it's a hell of a lot to them and to say that they had no effect of it, this

this contract specifically identifies these children as the beneficiaries, I suspect when we get into discovery we'll find that DSS will take action against a parent who does not use these funds for the benefit of the children, that's exactly what they're identified to be provided for by the contract, that's the sole reason for, tow -- so to say that they're somehow not getting to the child now, well that's perverting the purpose of this contract.

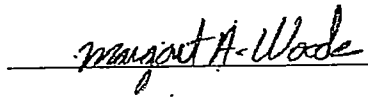
THE COURT: Got it. Gentlemen, ya'll have exhausted me with with your arguments which is a, which is a healthy exercise from time to time but obviously I'm gonna take this matter under advisement, I have a lotta studying to do, uh, either I or my law clerk will be back in touch with ya in the near future as to any, uh, order, anything. My law clerk will hand you his card if you don't already have his email address, direct line, give me your paralegals and assistants.

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on April 7, 2014 at the time and place heretofore set forth; and that the foregoing pages numbered from 2 through 43, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

January 19, 2015



Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2013-CP-42--1569

BHL, by parents\general guardians Kenneth and Angela Hensley, and on behalf of all other similarly situated

vs.

South Carolina Department of,Social Services

Chester, South Carolina

February 27, 2015

Before the Honorable Brian Gibbons

APPEARANCES

For the Plaintiffs: Langley, Thompson

For the Defendant: Lindemann, Hughes

Reported by: Michael C. Watkins

Official Court Reporter

NO EXHIBITS

THE COURT: This is in the matter of Hensley versus DSS, cause of action number 13-CP-42-1569. It's a matter out of Spartanburg County that I heard last year when I was holding court over in Spartanburg County. It's before me, I believe, on a motion to reconsider. All of the attorneys are present, and I believe Mr. Lindemann, it's your motion?

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

THE COURT: I will be glad to hear from you.

MR. LINDEMANN: I appreciate it, Your Honor. Thank you for scheduling this hearing.

THE COURT: Well, thank all of y'all for coming to me, I appreciate that.

MR. LINDEMANN: Your Honor, just to give you -- or remind you a little bit of the procedural history of this case. Well, first of all, the order granting class certification in this matter is currently on appeal to the South Carolina Court of Appeals which has stayed the appeal and remanded for purposes of the Court ruling on the Rule 59E motion that we're here on today. As Your Honor recalls you heard various motions, the motion for summary judgment as well as a motion for class certification, I think it was in last April in Spartanburg. Your Honor entered an order I believe it was in late May or early June denying the motion for summary judgment and granting class certification. There was a form order that was issued and

I think due to clerical error or some mistake there wasn't actually any indication that there would be a formal order that would follow. As a result of that we filed the first Rule 59E motion asking the Court to issue a formal order, which you did, and then you issued the formal order. In response to that we filed a second Rule 59E motion. In response to that motion no hearing was held but Your Honor did request that plaintiff's counsel submit some type of response to Your Honor, and what they responded -- what they provided the Court was not any type of brief. They provided the Court with an amended order denying summary judgment and granting class certification, making various changes to the initial order that Your Honor had issued. And they also submitted two affidavits. As Your Honor might remember this case was originally -- or there was a companion action I guess is the best way to put it just that worked its way through the federal courts. The Fourth Circuit of Appeals found no violation of federal law by DSS, the four directors of DSS who were sued in this case. And what the plaintiffs then submitted with that amended -- proposed amended order to Your Honor last I want to say it was July or August, was two affidavits that had been filed in that federal case. They had not been submitted in the record in this case prior to that time, they sent you that amended order plus those two affidavits. And Your Honor

issued an email to the parties on September 9, 2014, indicating that you were denying the motion for reconsideration and that you would be signing the proposed amended order that had been submitted by plaintiff's counsel. Ultimately there was no form order, there was no order actually ruling on the 59E motion, we were left with your email. You did actually sign and enter the amended order. As a result of that there was a third Rule 59E motion that was filed that essentially did raise two issues, number one, ask the Court for a formal order ruling on the second Rule 59E motion on the premise that even though you indicated your ruling in an email, that had never been memorialized actually in an order because the amended order -- I'm sorry this sounds convoluted.

THE COURT: I'm following you believe it or not.

MR. LINDEMANN: The amended order that had been submitted to Your Honor didn't actually adjudicate the rule 59E motion, didn't mention it. And obviously the purpose I assume in signing it was to take care of that motion, but there was never actually a ruling on I think there were six different grounds that we raised in that Rule 59E.

THE COURT: And you've got to have all of that stuff so the court of appeals can see it.

MR. LINDEMANN: Right. So the Court is aware of what your rulings are so a meaningful review can be had. And so

the third Rule 59E motion was ruled asking -- I mean, was filed asking you to issue a ruling on the second one. But then we also raised our objections to the fact that they had submitted those two affidavits, what I would submit were out of time in an attempt to supplement the record that were then included in the discussion in that amended order, and Your Honor never ruled nor did we have an opportunity to object to them. Because there was no hearing filed to the fact they were supplementing the record what I would submit was improperly and in violation of Rule 6D, and that information was at least cited in your amended order. So those are the two issues that were in the third Rule 59E motion that's before you. Ultimately because DSS did not want to take a chance that that third motion would be deemed successive and that we would let our appeal time run, we went ahead and filed our notice of appeal within 30 days, and ultimately then asked the Court to remand for purposes of this Court issuing a decision on the Rule 59E motion. So where does that leave us? We would ask the Court to issue an order on the second Rule 59E motion that addresses all of the different grounds that are in that motion. And I'll be happy to reargue that motion if that's what Your Honor wants to hear today, we're prepared to do that, and then issue on the second Rule 59E motion, which is the only "new issue" that's raised in that

one is the contention that the plaintiffs in order to correct one of the issues that we raised, which was the fact that there is no evidence before Your Honor on which you could base a motion for class -- an order of class certification because the motion itself was not supported by affidavits or any deposition testimony. In fact, it's a two sentence motion that doesn't even identify anything in the record that it was relying on. And then Your Honor, in the first order that you issued indicating that you were granting class certification making findings based upon the arguments of counsel. One of the points that we raised in that second Rule 59E motion is that there is clear case law in South Carolina that findings of fact cannot be based upon arguments of counsel. I suppose in an effort to try to correct that plaintiff's counsel sent you an amended order which is the one you ultimately singed that referenced those two affidavits.

THE COURT: Which weren't produced the first time.

MR. LINDEMANN: Which were never produced the first time, they were just simply sent to you. Your Honor never indicated that the record was open, there was never a motion filed asking the Court to allow supplementation, there was none of that, and there was actually no hearing held so we didn't have the opportunity to be heard on that. So that's where we are in an essence. I don't know where

you want to go with this hearing. I'm prepared to reargue the original class certification issues. I'm not attempting to reargue summary judgment even though I will if Your Honor wants to hear that, because I do believe that there are serious misinterpretations of the oral argument between the Fourth Circuit. And, in fact, one of the things we raised in our second 59E motion was asking this Court that if you are denying the motion for summary judgment that the appropriate way to address that is simply deny the motion and not attempt to make findings of fact or conclusions of law, which is a point that we raised in our second 59E. But you signed the second amended order, or the amended order.

THE COURT: So are you saying -- go back to that -- are you saying I should have done a simple form four summary judgment denied?

MR. LINDEMANN: That's correct. And I think that's what the South Carolina Supreme Court suggests judges should do for the reason being that it is very clear case law in the South Carolina that the denial of summary judgment does not decide the merits, it just simply means the case proceeds. It can be a subsequent motion for summary judgment after discovery, of course, the same issue can be raised at directed verdict. And quite frankly, your rulings on those issues are not binding upon the next

judge. So ideally if Your Honor finds that there are issues of fact that precludes summary judgment, you know, and I think the best way to approach that -- and of course, I'm not a judge -- is simply to deny the motion and not attempt to make rulings on that particular issue. I think that's particularly true in this case because with all due respect to Your Honor, I think there was a clear misunderstanding of what took place at the fourth circuit, we don't even have an official transcript. What Mr. Langley provided the Court today of that hearing was a transcript that -- I don't know how they had it prepared, but the oral argument is available orally on the internet, so I assume they took that recording and had somebody type it up. And I'm not even sitting here challenging it, I haven't looked to see if it is absolutely accurate. But the interpretation of it is absolutely incorrect, and I don't want a future court to be bound by your interpretation of it, because quite frankly I got questions about how it was presented to the Court. It certainly wasn't presented through any type of verified means, and frankly, it's just incorrect. It doesn't identify who the different judges are, who talked. We identified that in our Rule 59E motion, who said what and why in trying to get the Court a procedural history. And I would be happy to go through and argue that again now, although I figured today

we would focus primarily on the class certification.

THE COURT: All right. Let me -- Mr. Langley, you heard Mr. Lindemann's presentation as to the procedural nature of where we are, do you agree with that? Or if not, tell me why.

MR. LANGLEY: Well, Your Honor, it's long and convoluted and I disagree with a lot of what was said, but I don't want to deteriorate into things that don't really matter frankly. What we think -- where we think we are is we want a clean record. Okay. The affidavits that were provided were not procured by us, they were procured by Mr. Lindemann, one of which was filed in the common pleas court prior to Mr. Lindemann removing it to federal court. So those are not affidavits that are new to him, there's no prejudice even presuming there's some procedural issue in the case. These are his affidavits that he procured. Now, if he wants to have an opportunity to argue against its material in his affidavits then we're here, Your Honor, we're happy to have any argument over the language that he included in his affidavits.

THE COURT: What about Mr. Lindemann's assertion -- and I don't want to put words in your mouth, Mr. Lindemann, but I kind of caught on to it, that the simple thing to do would be for me to just issue a form four order denying their motion for summary judgment and then we can all move

on.

MR. LANGLEY: Well, you'll recall, Your Honor, that you did, and then he complained about that and said we have to have details about why because it's got to be in appeals. You can't win for losing. Okay. He's going to try to find a way to appeal it, that's what he does. So Your Honor, in terms of the class certification, you know -- I'll take a step back. I think that's the issue. I think you did issue a form four order and you got a complaint about it and so we're happy with that. We want a clean record. If he wants a form four order, so be it.

THE COURT: All right. Are you okay with the form four order, Mr. Lindemann?

MR. LINDEMANN: Your Honor, that's fine for the motion for summary judgment. The point that I was trying to raise with that form four is the form four doesn't -- even though you indicated you were granting the class certification, a form four does not satisfy --

THE COURT: It satisfies the summary judgment aspect of the case.

MR. LINDEMANN: That's correct. If you want to just issue a form four denying summary judgment, that's absolutely fine.

THE COURT: That's what I'm going to do. The form four order -- and I have -- I thought that's what I

initially intended on doing and then we got caught up in all of this other stuff. And, of course, that's the problem when an out-of-town judge gets assigned with something like this and I travel around and haven't been back to Spartanburg since, things get lost in the cracks and, of course, I apologize for that, as I'm sure I did in my emails to you. All right. The summary judgment motion I deny, and I issue a form four on that, that's the one thing that's going to come from this hearing today. So I guess the other pending issue then, Mr. Lindemann, is your motion to reconsider my finding to certify the class?

MR. LINDEMANN: That's correct, as well as the notice procedures. You might recall also -- I left this out of my background -- when you issued the initial -- in fact, if Your Honor will give me one second I want to make sure what I'm telling you is absolutely correct. Your Honor issued the form four, which actually denied the summary judgment and granted class certification, in that first 59E motion we pointed out that there was no -- never a discussion, there was nothing in the motion, there was no discussion before Your Honor at the previous hearing dealing with how the class would be provided notification, whether it would be an opt-out class, anything along those lines. And so then in response to our 59E motion when you issued your first order, you included opt-out language, and that was

something that was never addressed at the hearing, was never requested by the plaintiff, we simply pointed out that that was a deficiency. The way Your Honor did the notice provision we contend is in violation of Rule 23 with all due respect. Because what Your Honor did was he put the onus on the department of social services to, number one, prepare the notice, and number two, to provide notification to the class. And Rule 23 -- and certainly more accurately the notes to Rule 23 actually make it clear, I would submit, that the onus of having to notify the class falls on the class representative, and specifically, Your Honor, the last sentence of the note says that this rules requires --

THE COURT: Where are you looking at? The note under A?

MR. LINDEMANN: It is actually the last note for Rule 23, it deals with Rule 23D.

THE COURT: Down at the bottom. Okay, got it.

MR. LINDEMANN: And it says after saying it's similar to the federal rules says, "This rule requires those seeking to maintain an action on behalf of the class to notify the members of the class of the pendency of the action." In addition the actual language of Rule 23 talks about that the responsibility is on the party seeking the class certification. And frankly -- and I don't profess to

have handled numerous class actions, I've handled a few, I have never seen a class action where the responsibility to prepare the class notifications for the Court, and then more importantly to incur the expense of notifying the class of the opt-out procedures falls on the defendant. I mean, that falls on the class representative. The attorneys who wish to represent the entire class should have that onus. So that was one of the points that we raised in our second Rule 59E motion, the one that was denied and you indicated by email but never officially ordered. I know there has been some communications and I will let counsel speak for themselves on that, but there may be some concessions that they are willing to make as Mr. Langley said to clean that up. But obviously we take the position that DSS should not have the responsibility to actually incur the expense to notify the class. Now, I fully recognize that the members of the class is information that the plaintiffs will need to get from us, and ultimately if jurisdiction is actually returned to the lower court and the class certification is affirmed, that is information that we'll certainly work on. I know there was a letter yesterday to the Court indicating that they wanted to reopen a motion to compel, and quite frankly that is beyond jurisdiction that was returned to you by the court of appeals. By I can represent to the Court that I

obviously know the members of class is information that they would need to get from us.

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 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.

THE COURT: All right. Mr. Langley?

MR. LANGLEY: Your Honor, going back to September 5th, 2014 in our reply to one of the first or second motions for reconsideration, we have been saying that they haven't provided us the names and contact information. So Rule 23D2 gives the Court the authority to make any appropriate orders that at anytime shall fairly and adequately protect the interest on whose behalf the action is brought a defendant. So given that for months and months and years now, going on years, they refuse to provide us the information. The only way to fairly and adequately protect the class was to issue the order that Your Honor did. Despite that we are still willing as we have been all along to provide the notice if they give us the information.

THE COURT: What would you suggest then is the remedy to make that happen? Under 23D2, ordering them to do something within a specified time?

MR. LANGLEY: Well, we tried that. You ordered them back in May.

THE COURT: I ordered them to do it, I know, and that's on appeal right now.

MR. LANGLEY: You ordered them -- that's right, Your Honor. I would attempt to order them again to provide us the information so that we can provide the notice, we're happy to do that.

THE COURT: Or just leave it as is.

MR. LANGLEY: Well, no. I think just like I said at the outset, we're not interested in some protracted appeal. We have been working for these kids for four years, I'm not interested in continuing to employ Mr. Lindemann. What we want to do is get some relief for these kids. Okay. And if that means us preparing the notice and there's some argument that is out there that maybe we should do it, fine, we're ready to do it, but we've got to have the info to do it.

THE COURT: Okay. So I will come back to that in a moment then as to the mechanics of making that happen, provided I don't reconsider the issue of certifying the class in the first place. So that's where we are on that.

MR. LINDEMANN: That's where we are on that. There were two arguments that were primarily made before you back last April. Number one was what we've already touched on, the plaintiff's motion class certification is a two sentence motion, doesn't say anything, isn't supported by any type of evidence, yet this Court has to make findings of fact on five different elements in order to certify the

class. When Your Honor issued your initial order you indicated that you were making those findings based on the arguments of counsel. We pointed out in our second Rule 59E motion that -- we're citing the case of ex parte Morris and there are many cases that say this, that courts can't make findings of fact based upon arguments of counsel, it's not evidence. What is evidence are affidavits, depositions, whatever the plaintiff thinks is necessary to support their motion and show this Court that meet the five elements, which we don't believe that they meet the five elements. But they never even made an attempt to provide that information. As I indicated the motion itself doesn't include any factual information. It is two sentences, didn't include any information on how to notify the class, didn't even identify what the class should consist of, and in fact, the class as defined by this Court has changed already from what was in the complaint to what was in the first order to what was in the second order. But bottom line is they didn't support their motion and they don't get two bites at the apple. Rule 59 is designed to order to supplement the record. Rule 59E is to ask the Court in order to reconsider or rule differently based on the record that was created. And in fact, they never filed a 59E motion, and as I indicated earlier, they never asked the Court -- filed a motion asking the Court to be able to

accept these two affidavits. And the proper procedure I would suspect was either ask the Court to keep the record open at the hearing, which wasn't done, or ask the Court to reopen the record. And of course, at that point you would have us being able to argue against that and that's not a motion before Your Honor, we would then potentially be able to submit counter-affidavits and essentially reopen the whole matter. That hasn't been asked of Your Honor. I mean, the posture of this motion right now before Your Honor is they haven't supported their motion with any evidence whatsoever, and that was grounds alone for this Court to deny the motion for class certification. Why they didn't do it? I don't know why they didn't do it. But they obviously acknowledged that they didn't do it because in response to your order where you issued findings based on the arguments of counsel they quickly tried to send you two affidavits. And incidentally what Mr. Langley indicated to you is incorrect, neither of those affidavits had previously been filed in this particular case. They both have been previously filed in the first lawsuit which had been filed in the court of common pleas and then removed to federal court. So yes, one of the affidavits has a state court caption on it. It's not the state court caption in this case, it is from the earlier case that got removed, that ultimately the fourth circuit granted

complete relief to the DSS defendants in that case. So those affidavits are not submitted in this case, we had no knowledge that they were relying on them, they didn't identify them in their motion, they didn't provide them to this Court at or before the hearing back in April, there was no argument related to those affidavits. And simply after Your Honor rules, and with all due respect, based your findings on arguments of counsel which is not appropriate, they come back and start sending you affidavits. Well, Your Honor, that's not proper procedure and it clearly violates Rule 6D, which using mandatory language shall says that affidavits supporting a motion shall be filed with the motion. Why does the rule require that? Because of due process. Because we would have the opportunity then according to Rule 6D to provide counter-affidavits, or counter-testimony before the hearing, before that record is closed. So at that hearing last April the record was set, we made these exact arguments to Your Honor that they hadn't supported their motion, they didn't attempt to try rectify it at that point by saying, "Your Honor, can we continue this hearing?" They didn't ask for that. They didn't ask for the Court to hold the record open so that they could submit evidence because they hadn't done so, didn't do any of that. It was after Your Honor ruled, after the first -- the second 59E

motion pointed out that there's no factual basis, no evidentiary basis for your rulings, they try to sneak through some affidavits, which quite frankly they even say are attached to your order and I've never seen affidavits attached to your order, they ultimately didn't do it. But the order itself, I guess it is the amended order, says "based on the affidavit cited herein and attached hereto," this is on page seven of that order, there aren't even affidavits attached to it. But Your Honor, with all due respect I have never seen an order that had affidavits attached to it. They also talk about the Court having to find, and they actually put quotes around the word find -- this is in the amended order that they proposed to Your Honor -- it's not "find", the courts have to make findings. Class certifications are serious business. What's implicated in this case is multiple millions of dollars in state taxpayer money. We've already litigated this thoroughly in federal court and DSS absolutely prevailed under federal law, so this is not a minor case. Even though we're talking about $20 a month, we're talking about $20 a month over multiple months with multiple different potential class members. So it is, it's a case that's quite significant. With all due respect to the Court and to opposing counsel, this is the type of case where due process should be complied with. Plaintiffs haven't done

it, they haven't supported their motion, and it's too late to come in after that's been raised and try to slip in some affidavits. It doesn't make a difference whether or not they're affidavits that DSS used in the federal case or not, they simply didn't support their motion. In addition to that, Your Honor, as an additional point those affidavits don't even provide the Court the factual background to make the rulings that Your Honor made with all due respect. The key issue here is commonality, the key case is the Garner case. We gave this Court seven different ways, seven different areas where individual inquiries are going to have to be made as to each of these class members, and Your Honor only addressed the Garner case in relation to damages. It's very key -- in fact, Garner didn't -- the supreme court in Garner didn't throw out the class certification or reverse the order of class certification in that case because of difference of damages between the different parties, it was because a certain defense, the prejudice defense, required individual inquiry. The supreme court said each class member, there would need to be a determination as to whether or not they were prejudiced by the insufficient notice, that was in that debt setoff case. Well, we have proposed in this case the similar type defenses. Now, your order, which they drafted and Your Honor has signed, says that we're

requiring the Court to decide the merits of those defenses. That's absolutely not the case. We are doing exactly what the supreme court looked at in Garner, and I actually pointed out to the Court that there are numerous defenses that are going to require individual inquiry for all of the various class members. There's no doubt there's a common issue of fact, that each of these parties signed a contract. 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. There was no doubt there was a $20 across the board deduction in the adoption subsidy payments. The federal court has already addressed that and said that was absolutely in compliance with the federal law. And of course, this contract is provided for because of federal law, but now going back to my collateral estoppel argument, and I don't mean to, but the bottom line is the only common issues of fact in this case are agreed and that doesn't make it appropriate for class certification. But there are numerous, numerous issues for each of the class members that's going to require individualized inquiry, not only damages, because as we indicated to the Court, the damages in this case are kind of squirrly the way this case was brought, it was brought this way to avoid the statute of limitations. The contracts are entered into between DSS

and the adoptive parents, the money is paid to the adoptive parents. Of course, the adoptive parents don't have the benefit of tolling under the statute of limitations. So what did the plaintiffs do? They didn't bring this case for the adoptive parents, they brought it for the child. Well, the child's damages, Your Honor, as a third party beneficiary, assuming that's even a valid cause of action, and that's going to be ultimately litigated in this case, but assuming it is, a third party beneficiary doesn't get the damages that would be owed to their parents, they get the damages that the alleged breach of contract caused them. What would that be? I would presume it would be any type of services, any type of activities, anything that they were deprived of because their parents didn't get that extra $20 a month. You know, if Little Johnny couldn't play little league baseball because they couldn't afford it because of the deduction of $20 a month, that could be an element of damages perhaps, just throwing that out as an example, because he got deprived of the ability to participate in that activity because his parents didn't have enough money because of the deduction. But the kids, this money isn't paid to the kids, this money is paid to the parents. So even on damages it's going to require individualized inquiry for every single class member because some class members probably don't have any damages.

The parents probably provided fully for the kids and a difference between maybe getting $240 in a year probably didn't make a difference as to whether the kids got properly clothed, fed, activities, all of those sorts of things because that's what we're talking about, we're talking about $240 a year. But in addition to that there are questions as to whether or not the agreement was properly renewed, whether or not a novation was formed in 2004, whether or not there was any type of consent or acquiescence, that's not different than the prejudice issue that was on play in Garner where the supreme court said that requires individualized inquiry. So that's why we don't believe that the element of commonality is present here. And I think Garner is right on point on this particular case, and Garner shouldn't be limited just to a consideration of damages. And the Court doesn't have to decide the merits of these defenses, just like in Garner the supreme court didn't decide the merits of whether or not prejudice was a legitimate defense, the Court recognized that that is a defense and that that required an individualized inquiry. This case is absolutely no different. And again, not to harp back on that initial issue, they've got to prove commonality and they haven't done it. And I would submit the two affidavits of DSS personnel, they're focused totally on the Hensleys. The

Hensleys were the only parties at the time that the affidavits were filed, that was even before class certification even came up, and they addressed solely the Hensley situation. The only fact that could remotely be drawn from those particular affidavits is that this is an across the board $20 cut, and like I indicated, that is undisputed. That was done in 2002, it's clear from the fourth circuit decision, nobody is disputing that. So I don't know how you find commonality when the sole issue of fact that's common is stipulated to and it's essentially agreed to. While there's so many other issues that were going to require individualized inquiry, and frankly I don't know how you're going to do discovery with a class such as this because we are going to have to do individualized discovery with every class member because every one is different and every one has got different circumstances. And that's why I think Garner is right on point and I would respectfully ask the Court to seriously reconsider your decision in this case and take a close look at Garner and how it actually does work in relation to this case. It is not an issue of asking this Court to decide the merits of those issues, it's a question of is there going to be individualized inquiry that's going to be necessary, is there a determinative issue that is common to everyone and there is not in this case just like there is

not in Garner. And that's really the focus of the second Rule 59E motion and the real problems with the case. And I would ask the Court reconsider that, and also reconsider the fact that plaintiffs just haven't supported any of the elements. They had the opportunity to do so, they had the opportunity to ask this Court -- I'm sure we would have opposed it to keep the record open back last April, but the appropriate way to prove your entitlement to class certification isn't making oral arguments, having the Court rule on those arguments and then later when you're called on trying to sneak in some affidavits, that is not the proper procedure. It violates Rule 6, and as I indicated, I don't think those affidavits provide the factual basis for the class certification. Thank you.

THE COURT: Thank you, Mr. Lindemann. Mr. Langley?

MR. LANGLEY: You know, it's a heck of a thing, Your Honor, when you can ignore your discovery obligations for a year, essentially preclude any taking of deposition, file no meaningful response to a motion for class certification, and then on the eve of the hearing provide your discovery responses and a new motion for summary judgment, and then say when the ruling is adverse to you it had to be supported by evidence even though we precluded you from getting into the evidence. So there are issues with -- I take issue with a lot of Mr. Lindemann's language, sneaking

stuff in, we slightly brought this claim. We represent children. Okay. We're going to do whatever the law allows us to do to provide for a recovery for them. If he wants to call it sneaking it in -- the only thing that was snuck in was a removal of four kids of $20 a month solely to benefit the State. Now, they didn't do it where the foster care children were involved, they only did it where there was no available remedy essentially, according to them, for adopted families who already had the children who couldn't go back and renegotiate their rate on a contract that automatically renewed. The foster families, they got their $20 increase in 2004, so why not give it to the adoptive families? It was almost the identical contract. Well, the reason is the adoptive families are stuck according to them with the rate they negotiated. Foster families, if they wanted to, could say, "All right, this arrangement is not working out anymore for us, these are now returned as wards of the State." Now, thank God, most foster families are not like that, they wouldn't have taken the children in the first instance had they had that attitude, but that's what we're talking about. So I just reject the condescending language, and it's a repeated thing. To the merits, Your Honor. I think I heard the affidavits don't seem to matter, I think I heard Mr. Lindemann say, "They don't add anything to the case." Well, if they don't add anything to

the case -- and by the way, there's no evidentiary requirement, no requirement in Rule 23D that the Court has to rely on evidence, that word is made up by Mr. Lindemann, he threw that in there. But even presuming there was, he's saying now that the affidavits don't add anything, they're not even a big deal, unless I misunderstood him. He said any facts they add to the case have already been stipulated to. So stipulations are certainly something that this Court can rely on. Pleadings, certainly something this Court can rely on in making its findings. Now, on -- I think I also heard Mr. Lindemann say there is no doubt -- and I took this down as a quote -- there's no doubt there is a common issue of fact. If you look at Rule 23A2 of what is required for commonality here is a quote, "In order for the element of commonality to be met there must be questions of law or fact common to the class." I think I just heard Mr. Lindemann admit that's met. In the Garner case the Court said plaintiffs meet this test when their claims and the claims of the absent class members share one determinative issue; one, it doesn't have to be across the board, every single element. If so you would never have a class certify because there are always some distinctions between class members. If you've got one determinative of issue in South Carolina, a quote even from the McGann v Mungo case, a single common issue will suffice. And that

case is 287SC561, that's on page 568. A single common issue will suffice. So Your Honor, setting everything else aside the commonality element is met. If you could -- if a defense lawyer could in every case say, "Oh, well we've got a contract question," and come up with all of these fancy lawyer words, novation and waiver and the different things Mr. Lindemann has pled, you would never have a contract class certify because all they would have to do at the certification stage would say, well, novation, waiver, can't do it, I've got to depose every single one of them. No, that's not what we're saying. The contract is clear, it provided for these benefits, that's it. They cut them, they didn't have the right to do it. The damages are going to be a little bit different but we can calculate those. As soon as we know the ages of the children, five months as we have pointed out before, it has got to be five months, $100, beginning five months after that 2004 cut, it is going to be easy to calculate the damages. I bet I can do it -- I will time myself for Your Honor, I bet I could do it in half a day. So the point is, Garner does not require that every single issue be identical because no such test could ever be met. This case is a -- excuse me -- it would be harder to even conceive a case more appropriate for class certification. One time, one day, one letter, the same exact amount across the board, they describe it as in

an across the board cut. If this case is not appropriate for class certification I challenge them to provide a set of facts under a contract law where you would have one appropriate for class certification. Now, I want to again go back to something I said earlier. Mr. Lindemann now has had at least two or three opportunities at a Rule 59E motion and at least two or three hearings, he has argued today at length about these affidavits. Any issue on appeal he would have to prove that any procedural irregularity, even presuming that there would be one, cost him some kind of prejudice, and I don't know how he can articulate that. Now, I understand we're not before the court of appeals today, but I want to make sure the record is very clear that he has argued vehemently against these affidavits today, that he has never submitted any opposing affidavits in the months and years that this case has been pending since the initial class certification motion was filed. So Your Honor, at the end of the day you're faced with sort of this procedural back and forth. The affidavits shouldn't have been included, the affidavits don't matter, you know. Which is it? Okay. The classification wasn't supported by affidavits, but then the rule doesn't require any evidentiary support. So the class was certified appropriately, it was defined appropriately, it was narrowly defined. And he made the mention about the

opt-out class. There is no other class. In Salmonsen the supreme court said an opt-in class is per se improper. So the opt-out class is no issue, it had to be an opt-out class. So Your Honor, we are fine with whatever the Court would like to make sure that its comfortable, that the record is clear, that the opportunity has been made or been provided, even though I think it's more than been provided to Mr. Lindemann to make any arguments that he wishes to make. But should the Court wish to grant him yet another bite at the apple and say okay, whatever affidavits you want to support in opposition, we're fine with that, we're fine with that. Because at the end of the day we want to move this case forward to a result for these children.

THE COURT: All right. Thank you, Mr. Langley. Coming back to you.

MR. LINDEMANN: Thank you, Your Honor. Quite a few points I need to address with that. First of all, and this is actually included in your order, that there's no requirement under Rule 23 for there to be evidentiary support for the class certification. I have no idea where that comes from. There's no case law that has been cited for that premise. I don't know how courts make findings of fact if there's no evidence. So to sit here and say we didn't have to support our motion for a class certification, that's crazy. I mean, obviously the Court

can't pull this out of the air, it can't rely on arguments of counsel so it does require evidentiary support. The argument about the affidavits, I take the position those affidavits only -- and just so the record is clear, I haven't stipulated to everything that's in the affidavits even though they were filed in the federal system. What I said was it is clear, the one common fact that I mention is that there was an across the board $20 cut back in 2002, I did agree to that, and that's true, and that's probably all those affidavits add to the equation. Now, obviously the plaintiffs think they have to support that motion with those affidavits because they submitted them to the Court, they also included it in the amended order that Your Honor ultimately signed. So I can argue alternatively, number one, obviously this Court believes those affidavits were necessary because you added them to your order and you relied on them to grant class certification, so in that respect I'm prejudiced by those because they weren't submitted in accordance to Rule 6D, they weren't considered at the original hearing I didn't get an opportunity to be heard and I didn't get an opportunity to provide counter-evidence if I needed to or to ask the Court to hold it open and do discovery on that particular issue. And no, I haven't submitted counter-affidavits at this point because that's not proper. You don't take affidavits that

were submitted essentially with the amended order and then say, you know, that procedure is proper so we're now going to submit affidavits. You don't take an improper procedure and add on another improper procedure to it. It just shows just the flaws, the due process flaws, with all due respect to Your Honor, that has been the problem with these motions that are before Your Honor. And they aren't problems that Your Honor has caused, they're problems that the plaintiff has caused and so I'm just trying to respond to these. In fact, the whole opt-out issue wouldn't even have come up if I hadn't mentioned that they didn't even ask for notice provisions that didn't even come during the hearing back in April. And incidentally for the record he said two or three hearings, this is only our second hearing. There were a lot of motions that we asked for in our argument and the Court didn't set it so there haven't been a lot of hearings. It's also a contention that they haven't had the opportunity to do discovery. They could have asked this Court to continue it if they needed to do discovery. There was a whole case that was litigated all of the way through the Fourth Circuit Court of Appeals, it's the exact same issues that were litigated all of way to the Fourth Circuit Court of Appeals. They knew what the evidence was, and if they didn't the argument doesn't come in here and go excuse our burden of proof on the class certification motion

because we haven't had the opportunity to do discovery. If that's keeping them from being able to prove their class certification motion, they should ask for a continuance and the ability to do additional discovery. We also didn't make them file their motion for class certification when they did. In theory, you don't file your motion for class certification in a class action until you're ready to prove it. So I have no idea where Mr. Langley is coming from acting like he's prejudiced by the fact that this Court had to hear what I guess is a premature motion for class certification, but he didn't get to do discovery. He's the one who filed it, it is just absolutely absurd. And the irony with the way he started his argument with all due respect to Mr. Langley was he starts arguing the merits of this case. The foster parents were given some benefit that adoptive parents weren't. Well, this Court doesn't take into account the merits of either the plaintiffs case or the defenses in determining class certification, so trying to argue that somehow DSS did something wrong, obviously the federal courts found nothing wrong. They found total compliance with federal law, total compliance with federal law and we believe that's going to be dispositive of this case eventually. But bottom line is the merits don't come into play in determining class certification. What comes into play is they have got to file the motion, they've got

to identify the class, which they didn't in their motion, they've got to identify notice procedures, which they didn't in their motion. They've got to support their motion with evidence so this Court can make findings, without evidence the Court with all due respect cannot make findings. They didn't do so. It's as easy as that, motion for class certification denied. But at this point in time even if you consider those late affidavits our point is this: They cannot prove commonality, they haven't proven commonality. And that brings me to my very last point, and I know Your Honor has probably heard enough.

THE COURT: Well, I need to take a break, but go ahead.

MR. LINDEMANN: I have honestly probably another minute.

THE COURT: Okay.

MR. LINDEMANN: Commonality -- and again, this is all -- Garner -- it's in Garner, it's in a number of different cases. Commonality is not met simply by showing there's a common issue of law or fact. And so Mr. Langley heard me say, "Hey, there's a common issue of fact, he just admitted it." I didn't just admit it, it just shows he doesn't understand, and he actually used the right word and just ignored it. Commonality is met only where the class shares a determinative issue, a determinative issue. There

are going to be common issues of fact and even common issues of law that are not determinative. So that's the key, and that's why the supreme court threw out the class certification in Garner because there was a determinative issue, the prejudice issue which could not be determined to the class as a commonality, it had to be dealt with on an individual basis. The Court identifies in Garner that there were common issues of fact in law. In fact, one of the principle questions was, in fact, the supreme court identified them, it says at least two common questions of law in the 1995 Act; one, whether the defendant's notice pursuant to the 1995 Act were deficient, and the court said that is, that's a common issue of law. It's going to be -- to say use the same notice, if it was deficient for one class member it was deficient for all of them. So there was a common issue of law in Garner, that didn't cause the supreme court to then throw out class certification. The second question they said, whether plaintiffs were prejudiced by the alleged deficiency. And then the Court goes on -- and this is the key, this is why that was determinative and the first one wasn't, even if the notices were deficient plaintiffs cannot prevail unless they establish they were prejudiced by the insufficiency. So what the Court recognized is the determinative issues in the case, i.e. was there prejudice or not, was not common.

And there are numerous issues in this case which are not common. The one issue of fact that I have acknowledged that Mr. Langley jumped all over, the fact there was a $20 monthly deduction back in 2002, that's not determinative of anything. That was the issue in the federal court too and the fourth circuit found there was no violation of federal law. So it's not that there's a common issue of law or fact that causes this Court to find commonality, it's a common issue of law or fact that is determinative for all of the class members, don't have that here and he hasn't shown it. Thank you.

THE COURT: Thank you. Last word, Mr. Langley and then we'll take a recess. I'm going to let you know my ruling this morning since we're on the record because I don't want to take anything under advisement anymore in this case, it has gone on too long.

MR. LANGLEY: Yes, Your Honor. I disagree with the characterization of what the fourth circuit found. Ultimately they did find a violation of the act but found that there was not sufficient notice to get around qualified immunity, but that's neither here nor there. The federal issues have been resolved, we're here on a state law breach of contract claim. There is no requirement anywhere. Mr. Lindemann can't point you to any singling case that says this Court has to consider affidavits in

certifying a class. The rule requires that the Court find certain elements are met. Look at the pleadings, look at stipulations made by the parties and that's what's taking place. You can look at documents that have been provided that have been submitted into the record in this case. So that is what the Court based its ruling on, it properly based its ruling on those items. Class certification is not appealable and Mr. Lindemann is trying to create a way to do it. Well, the notice issue has been resolved, we will undertake the notice and I think that ends the inquiry.

THE COURT: Thank you. Gentleman, I am going to take this matter under advisement, I will be back out here momentarily with my decision, probably within the next 20 minutes. Thank you.

(A break was taken.)

THE COURT: Gentleman, I am going to go through it because I want the record to be clear, at least the printed record to be clear because I know this is pending in the court of appeals now and I want them to be able to see what I'm doing so I want to get it all down right now so there won't be anything sitting out there for me to do other than sign the order as I now state it. All right. The first issue I believe I've dealt with and I want to make clear, that the summary judgment order which I issued back in

April should have been and is now only going to be accomplished by way of the form four. So to the extent any other order I issued had all kinds of findings of fact and conclusions of law supporting that summary judgment denial, those orders are void and vacated. Okay. At the end I'll direct one of the lawyers to prepare all of this. So summary judgment is denied via form four. Now, the next request in the various motions, I'm not calling them the second motion or the third motion or the whatever, I'm just -- this is how we're going to do it. Whatever 59E motion brought up the issue about the certification of class asking me to reconsider certifying the class, that motion is denied based upon my review of Rule 23 and based upon my previous reasoning as to why I found that the class should be certified. Now, whatever Rule 59E motion brought up the mechanics of notifying the class, i.e. preparing a notice, the expense of it, the opt-out provision, doing the notifications, et cetera, et cetera, that motion is granted to not require the defendant, DSS, to do that. The plaintiff -- pursuant to Rule 23 the plaintiff shall be responsible for doing that. As part of this order then to go ahead and have the mechanics in place so the plaintiffs can do that, I want Mr. Langley, you to include language in this order for DSS to provide you the information for potential class members. Now, I know we argue in here and

everything in this courtroom because y'all are all zealots for your clients, but can y'all agree upon a timeframe for DSS to do that or do I need to order that? I understand these issues are going to be litigated in a higher court and I understand that, but for the purpose for my order, can y'all agree to a timeframe? Which I understand will be argued in front of the court of appeals so that timeframe may pass, but can y'all agree on that or do I need to tell you?

MR. LINDEMANN: Your Honor, I know some of this information was provided to us a long time ago that's probably -- Mr. Hughes might know, probably not as complete as what they would need to be able to actually notify the class. What I would ask is since this order is not going to be issued today, can you give us the opportunity to talk to DSS and see how long realistically it would take for them to run these searches for us? And then obviously if it's something that's deemed inappropriate, Your Honor can issue a different timeline. I'm thinking something like 30 days, maybe 45 on the outside, but I would like to get their input before I --

THE COURT: Well, honestly I was thinking several months from now. I'm anticipating how this order is going to play out.

MR. LANGLEY: Your Honor, if we wanted to just leave

it to them and just say something --

THE COURT: I don't want to have to address anything else in this case. I'm not coming to Spartanburg anytime soon that I know of, I'm not going to hear this case again except maybe when I read about it, so I don't -- you know --

MR. LANGLEY: What about 90 days at the --

MR. LINDEMANN: I was going to say if you say 90 days, 90 days should work.

THE COURT: 90 days from the date of the filing of the order. Okay. DSS ordered to release the names of the -- potential names of the class within 90 days of the filing of the order.

MR. THOMPSON: With a protective -- Your Honor, Jim Thompson, also for the plaintiff -- a protective order that suits the confidentiality of those involved.

THE COURT: Court reserves jurisdiction to sign a protective order as submitted by the parties to the extent this order is not overturned by the court -- or by an appellate court, I think that would be the language. Well, yeah, we can put the language of that in there. I will be glad to sign the protective order because it's the intent of my order to do what I'm doing here. I believe I'm the one who needs to sign it rather than one of your judges in Spartanburg.

MR. LINDEMANN: But just so we're clear, you want the protective language included in the order that I draft with these other provisions?

THE COURT: No. That will be a separate order borne by DSS because they're the ones whose -- well, I don't know, you tell me.

MR. LINDEMANN: I think it could be included in this order.

THE COURT: Okay. Let's do that. Do you know how to do all of that?

MR. LANGLEY: Yes, sir.

MR. LINDEMANN: And we can agree with some language on the protective order.

THE COURT: What did I not address? I believe I have addressed everything.

MR. LINDEMANN: You haven't specifically addressed the issue regarding the filing of affidavits. I mean, I guess you have by simply denying the motion.

THE COURT: Right. I'm denying the motion. I specifically find that I allowed that to happen. And in making my decision I didn't rely solely on those affidavits. I relied on my interpretation of Rule 23 -- and I did rely upon the pleadings. I did rely on arguments of counsel but arguments of counsel I know is not evidence, I have to tell juries that all the time, I certainly

understand that. But I based my decision partly upon arguments of counsel and looking through the pleadings and reading the affidavits. In 23D one of the basis for me determining that the class action was appropriate, and Mr. Lindemann, you addressed this in your argument about having some type of evidence to make findings upon or evidentiary support to order a class certification, 23D doesn't have that language in it. And so I find Mr. Langley's argument as to that issue more credible, however y'all want to word that in the form of an order is fine with me. I want to give the court of appeals something where they can -- there's nothing left at this level. Is there anything else I need to address to make sure there's nothing else left at this level? Whether I'm right or wrong, it doesn't hurt my feelings.

MR. LINDEMANN: I don't believe so.

THE COURT: Do you know of anything else at this level that I need to address, Mr. Langley or Mr. Thompson?

MR. LANGLEY: I can't think of anything, Your Honor.

THE COURT: Well, the intent of my ruling today then is "wash my hands of it" so y'all can move on with this litigation one way or the other, whether it goes to our appellate courts or whether it goes to another trial court in the seventh circuit, but may maybe I will see it again, maybe I won't. Thank you, gentlemen. Mr. Langley, I'm

going to ask that you prepare this order, submit it to Mr. Lindemann and we'll go from there.

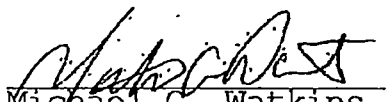
MR. LANGLEY: Yes, sir.

(End of the hearing.)

I, the undersigned, Michael C. Watkins, Official Court Reporter for the Sixth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings had and evidence introduced in the trial of the captioned case relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 27th day of February, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 27, 2015



Michael C. Watkins
Court Reporter

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
BLH (dob _) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	INTERROGATORIES
South Carolina Department of Social Services.	)	
	)	
Defendants.	)	
	)	

TO: THE DEFENDANT ABOVE NAMED:

Pursuant to Rule 33, S.C.R.C.P., you are hereby required to answer all interrogatories below as set forth and to serve said answers upon the undersigned within the time provided in said rule.

Definitions

The term "party" or "defendant" refers to the Defendant and *any agents acting on the defendant's behalf* at any time regarding the subject incident.

The term "documents" or "things" means all writings of any kind, including the originals and all nonidentical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, offers; notations of any sort of conversations, telephone calls, meetings, or other communications; bulletins, printed matter, computer printouts, teletypes, telefax, invoices, work sheets; all drafts, alterations, modifications, changes, and amendments of any of the foregoing graphic or aural records; representations of any kind, including without limitation, photographs, charts, microfilm,

videotape, recordings, and motion pictures; and electronic, mechanical, or electrical records or representations of any kind, including, without limitation, tapes, cassettes, discs, or other records.

The term "documents" means every document as above defined known to the party, the party's agents or counsel, and each document, which can be located or discovered by reasonably diligent efforts.

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from these witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in the possession of the party that relate to the claim or defense in this case.

3. List the names and addresses of any expert witnesses who the party proposes to use at the trial of this case.

4. For each person known to the party or counsel for the party to be a witness concerning the facts of this case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

5. Are you aware of the identity of any person who possesses or claims to possess knowledge of any fact relating in any manner whatsoever to the incident which is the subject of Plaintiff's complaint? If yes, please disclose name, address, telephone number and statements taken.

6. Please disclose any and all statements made by, to, or regarding the parties to this litigation regarding the facts or circumstances of this case.

7. Please state whether you have conducted an investigation of any fact or circumstance pertaining to the subject incident, and if so, disclose fully the findings and a full description of any

and all reports or documents related thereto, (If asserting any privilege, please provide a privilege log.)

8. Identify any other litigation and/or administrative procedures against the Defendants in which the claim was made that the twenty dollar reduction should be reinstated.

9. Define the phrase "allowable rate" in the adoption subsidy contract.

10. Identify any formula used to calculate the "allowable rate" in the adoption subsidy contract. If there is no formula, identify how the "allowable rate" is computed.

11. Identify any formula used to determine how much each family receives in adoption subsidy payments. If there is no formula, identify how the adoption subsidy is computed.

12. Identify any formula used to determine how much each family receives in foster care payments. If there is no formula, identify how the foster care payment is computed.

13. Identify the party responsible for making the cut to the adoption subsidy payment described in Plaintiff's complaint.

14. Identify the party responsible for making the cut to the foster care payment described in Plaintiff's complaint.

15. Identify the party responsible for reversing the cut to the foster care payment described in Plaintiff's complaint.

16. Did all South Carolina adoptive parents who had a contract with DSS for adoption benefits receive the same twenty dollar cut as the Plaintiff received?

17. Identify the purpose of the contract entered into with Plaintiff and other adoptive parents.

18. Identify the consideration exchanged in the contract entered into with Plaintiff and other adoptive parents.

19. Identify the drafter of the contract entered into with Plaintiff and other adoptive parents.

20. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that Plaintiff failed to exhaust the administrative remedies available.

21. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that Plaintiff's complaint fails to state a justiciable claim.

22. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by collateral estoppel.

23. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by illegality.

24. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by the lack of valid consideration.

25. Identify any and all facts, documents, or other evidence upon which Defendant bases its allegation that the claim is barred by modification.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C.

Charles J. Hodge
T. Ryan Langley
229 Magnolia St.
Spartanburg, SC 29302
p. 864-585-3873

JAMES FLETCHER THOMPSON, LLC
James Fletcher Thompson
302 E Saint John St
Spartanburg, SC 29302-1545
p. (864) 573-5533

DATED: July 26, 2013

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
BLH (dob) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated	)	
Plaintiff,	)	CA NO. 13-CP-42-1569
vs.	)	
	)	REQUESTS FOR PRODUCTION
South Carolina Department of Social Services	)	
Defendants.	)	

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Plaintiff demands production of documents as follows:

INSTRUCTIONS AND DEFINITIONS

A. In responding to these requests, produce all documents and things that are in your custody, possession, or control, including documents and things in custody, possession, or control of your attorneys, independent accountants, agents, or any person acting on behalf of or in concert with you or with any of these individuals, and not merely documents and things form your own personal files.

B. If you cannot respond to any of the following requests in full, respond to the extent possible, specifying the reasons why you are unable to respond in full, and provide whatever information you have concerning the un-provided things, documents, or portions of documents, including the source or sources from which the things, documents, or portions of documents can be obtained.

C. If documents or things requested are not reasonably available to you in precisely the form requested, or for the particular date or period specified, but could be produced in a modified form and/or for a slightly different date or period, then you are requested to respond in such modified form or for such different date or period.

D. If any document or thing that is responsive to a request is incomplete or has been altered, state in what respect the document or thing is incomplete or altered and explain the reasons therefore.

E. If any document or thing is no longer in existence or no longer in your possession, custody, or control, state the disposition that was made of the document or thing, the reasons for

such disposition, the date of the disposition, the identity of the person(s) ordering, authorizing, and supervising such disposition and the person(s) performing such disposition, the substance or contents of the document of the nature of the thing disposed of, and the identity of all person(s) having knowledge of such documents or thing.

F. If any document or portion therefore is or will be withheld because of a claim of privilege or work product:

1. State the basis on which privilege is or will be claimed.
2. Identify the author of the document.
3. Identify each person to whom the document indicates the original or a copy thereof was sent and any others who at any time possessed the document.
4. Give the date of the document.
5. Describe the subject matter of the document or portion thereof for which privilege is claimed.

G. The term "document" has the broadest meaning accorded to it by Rule 34 of the South Carolina Rules of Civil Procedure. The term "document" includes all written, printed, typed, electronic, recorded, transcribed, punched, taped, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, in the actual or constructive possession, custody, or control of you, including but not limited to all writings, letters, minutes, bulletins, telegrams, telexes, memoranda, notes, instructions, literature, work assignments, notebooks, diaries, calendars, records, agreements, contracts, notations of telephone or personal conversations or conferences, messages, interoffice or intra office communications, e-mail, electronically-stored information, disks, metadata, microfilm, circulars, pamphlets, studies, notices, summaries, reports, books, checks, credit card vouchers, statements of account, receipts, invoices, graphs, photographs, drafts, data sheets, data compilations, computer data sheets, computer data compilations, work sheets, statistics, speeches or other writings, tape recordings, videotapes, audiotapes, phonograph records, data compilations from which information can be obtained or can be translated though detection devices into reasonable useable form; or any other tangible thing that records information in any way. The term "document" shall include the original and any copied that differ in any manner whatsoever form the original (whether different from the original because of notes made on such copy or otherwise) and any drafts thereof. For purposes of this definition, a document is in your possession or control if it is in the possession or control of any of your attorneys, investigators for your attorneys, independent accountants, directors, trustees, or any person acting on behalf or in concert with you or with any of these persons, or otherwise under their possession or control.

H. "Person" means and includes, without limiting and generality of its meaning, any natural person; corporate or business entity; firm; partnership; association; group; governmental body, agency, or subdivision; committee; commission; or other organization or entity.

I. The term "relate to," "relating to," and "concerning" include referring to, alluding to , responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, reflecting, analyzing, constituting, or in any way relevant to the specified subject within the meaning of Rule 26 of the South Carolina Rules of Civil Procedure.

J. "Communication" includes any written or oral communication.

K. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun so used and vice versa. The male gender form or a pronoun shall also include the female gender form of the pronoun. The use of any tense of any verb shall be considered to include also within its meaning all other tenses of the verb so used.

L. "And" and "or" shall be construed conductively or disjunctively as necessary to make the request inclusive rather than exclusive.

M. "Each," "any," and "all" are both singular and plural.

REQUESTS TO PRODUCE

1. Any and all documents identified in response to Plaintiff's Interrogatories or Requests to admit.

2. Any and all documents, policies, procedures, and/or formulas related to how adoption subsidy payments are determined by Defendant for an individual child.

3. Any and all documents, policies, procedures, and/or formulas related to how foster care maintenance payments are determined by Defendant for an individual child.

4. Any and all documents in Defendant's possession that mention Plaintiffs, including but not limited to Plaintiffs contract(s) with DSS.

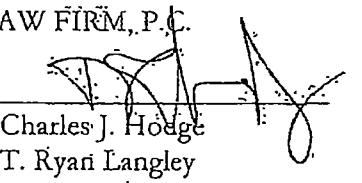
5. Any and all documents reflecting the decision to decrease South Carolina adoption subsidy payments, including but not limited to the letter informing the Plaintiff of the twenty dollar subsidy reduction.

6. Any and all documents reflecting the decision to decrease the South Carolina foster care maintenance payments by twenty dollars.

7. Any and all documents reflecting the decision to reinstate the South Carolina foster care maintenance payments by twenty dollars.

8. Any and all versions of contracts used by DSS for adoption subsidy payments between 1992-2003.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C.



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p. 864-585-3873

JAMES FLETCHER THOMPSON, LLC
James Fletcher Thompson
302 E Saint John St
Spartanburg, SC 29302-1545
p. (864) 573-5533

DATED: July 26, 2013

From: Joel S. Hughes <jhughes@DML-LAW.com>
Sent: Friday, September 06, 2013 4:38 PM
To: Ryan Langley
Subject: RE: Hensley Discovery

I've been slammed this week, but we've got most of the documents together I think. I'll try to take a look on Sunday and get back with you.

JSH

From: Ryan Langley [mailto:RLangley@hodgelawfirm.com]
Sent: Wednesday, September 04, 2013 4:35 PM
To: Joel S. Hughes
Cc: Ryan Langley
Subject: Hensley Discovery

Joel,
Hope you're doing well. By my math your responses to our discovery were due a week or so ago. Please let me know when we can expect them. Thanks
Ryan

T. Ryan Langley
Hodge & Langley Law Firm
PO Box 2765
Spartanburg, SC 29304
864-585-3873-p
864-585-6485-f
rlangley@hodgelawfirm.com

From: Joel S. Hughes <jhughes@DML-LAW.com>
Sent: Thursday, September 12, 2013 3:48 PM
To: Ryan Langley
Subject: RE: Hensley Discovery

Hope not. Just been out of office most of this week. (Monday expert depo in Greenville, Tuesday Root canal, Wednesday Mumford Concert, Thursday recovery from mumford concert). I'm in office all day tomorrow.

From: Ryan Langley [mailto:RLangley@hodgelawfirm.com]
Sent: Thursday, September 12, 2013 3:48 PM
To: Joel S. Hughes
Subject: RE: Hensley Discovery

You gonna make me file a motion?

From: Joel S. Hughes [mailto:jhughes@DML-LAW.com]
Sent: Friday, September 06, 2013 4:38 PM
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E-MAIL: hodgecharles@hotmail.com
NBTA CERTIFIED CIVIL TRIAL SPECIALIST

T. RYAN LANGLEY
E-MAIL: RLangley@hodgelawfirm.com
LICENSED IN SOUTH CAROLINA AND GEORGIA

April 1, 2015

Brian M. Gibbons
Judge, SC Circuit Court
140 Main Street
P.O. Drawer 580
Chester, SC 29706

RE: Hensley v. DSS - CA NO. 13-CP-42-1569

Dear Judge Gibbons:

Once again the position asserted by the defense serves only to delay proper adjudication of this case for the thousands of children aggrieved for years at the hands of DSS. At the most recent hearing on February 27, 2015, the arguments Mr. Lindemann made on class certification began with: "I'm prepared to reargue the original class certification issues." (TR., p. 8). He then in fact did argue these issues spanning over ten pages of the transcript (TR., p. 17-27). He addressed all contested class certification issues under S.C.R.Civ.P. 23, including issues of commonality, whether there were determinative questions for the class, and items of class damages.

These arguments followed DSS's multiple 59(e) Motions complaining that the Court's prior Orders had not fully addressed the class certification issues. (See attached). The arguments at the hearing and the current proposed Order from the Plaintiff fully addresses all these class certification issues. Going back to a previous class certification order after having heard additional relevant arguments seems entirely inconsistent with defense's multiple 59(e) motions. What would be the purpose of the Court hearing argument on the class certification issues on February 27th only to ignore these issues in the Order that goes to the Court of Appeals?

The Plaintiff class submits that the proper course is to accept the proposed Order, which comprehensively includes all arguments addressed by the Court. This is what counsel for the Plaintiff class understood the Court to mean when, after hearing Defendant's 59(e) arguments, stated:

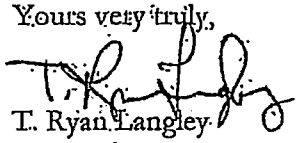
> I'm denying the Motion . . . And in making my decision I didn't rely solely on those affidavits. I relied on my interpretation of Rule 23 and I did rely upon the pleadings...
>
> In 23D one of the basis for me determining that the class action was appropriate, and Mr. Lindemann, you addressed this in your argument about having some type of evidence to make findings upon or evidentiary support to order a class certification, 23D doesn't have that language in it. And so I find Mr. Langley's argument as to that issue more credible, however y'all want to word that in the form of an order is fine with me. (TR., p. 43-44).

The Plaintiff's attempt in the proposed order submitted was to word the class certification language in a manner consistent with the Court's multiple requests of both parties to fully and finally address any and all issues in the case at the February 27th hearing. The proposed order submitted to the Court does just that and more fully and accurately represents the record than Mr. Lindemann's request that the Court go back to a previous Order.

As to the language for the confidentiality/protective order, he Plaintiff's proposed order includes sufficient language addressing this issue. Specifically, the proposed order includes the language: "All correspondence to the class shall be conspicuously marked "Confidential." The identity of class members shall be held confidential by the clerk of Court, under seal. See S.C. Code Section 63-9-780(B), (C)." Plaintiff class is happy to add language to this as necessary but has had no input from Defense counsel on this issue in the two weeks they have had the proposed order in their possession.

I will make myself available the remainder of the week at the Court's convenience if your honor desires to have a conference call on these issues.

Yours very truly,



T. Ryan Langley

P.S. Also attached is a draft Form 4 Order for the Court's consideration on the Summary Judgment issue.

cc: Andrew Lindemann

FORM 4

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

BLH by Parents/General Guardians Kenneth and Angela HENSLEY
PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO: 13 -CP- 42- 01569

SC Dept. of Social Services
DEFENDANT(S)

CHECK ONE:

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

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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

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

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☑ Statement of Judgment by the Court:

SUMMARY JUDGMENT FOR DEFENDANT IS DENIED

Dated at _____, South Carolina, this _____ day of _____, 20____.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

T. RYAN LANGLEY
PO BOX 2765
SPARTANBURG, SC 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

ANDREW CINDEMANN
1611 Devonshire Dr.
Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

From:	Andrew Lindemann
Sent:	Wednesday, April 01, 2015 5:59 PM
To:	'Gibbons, Brian M.'; Jennifer M. Baker
Cc:	Gibbons, Brian Law Clerk (Bart Stegall); hodgecharles@hotmail.com; rlangley@hodgelawfirm.com; RChampion@hodgelawfirm.com; jamesfletcherthompson@gmail.com; mary@thompsonlawfirm.net; Joel S. Hughes
Subject:	RE: BLH v. SCDSS (C/A No. 2013-CP-42-1569)
Attachments:	Proposed Order - Rule 59(e) Motion (00711798).docx; Form 4 (00711575).docx

Judge Gibbons:

Per your directions, I am submitting an alternative proposed order which I believe follows the specific directions that you gave at the close of the February 27, 2015 hearing and does not re-write your prior rulings on class certification. I am also submitting a Form 4 Order which denies the Defendant's Motion for Summary Judgment.

I have also included language in my proposed Order that allows for the production of the names and addresses of potential class members consistent with confidentiality laws and which includes "protective order" language that protects the identities of persons who have been adopted to the extent possible.

I continue to have concerns, however, as to how this class will be managed. The class members --based on the class definition adopted by the Court -- are the adopted children -- not the parents but the adopted children themselves. Many of those children may have no idea that they were adopted and the Notice of Class Action may be their first information of that potentially life altering event. While some of the class members will no longer be minors, many will still be minors. Moreover, I do not know what legal authority that minors have to opt-in versus opt-out of a class action. These are some issues that have not been addressed by the Orders thus far issued by the Court and I believe will need to be addressed before the Notice of Class Action is approved and sent out. 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 these issues will need to be addressed before a Notice of Class Action is mailed to an adopted child who may have no idea that he/she was adopted. Jim Thompson knows much more about adoptions than I do, and he may be able to shed some light on this. 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.

Thank you for your consideration of this proposed order. If you require any changes or anything further, please let me know.

Andrew Lindemann

-----Original Message-----
From: Gibbons, Brian M. [mailto:BGibbonsj@sccourts.org]
Sent: Wednesday, April 01, 2015 9:37 AM
To: Andrew Lindemann; Jennifer M. Baker
Cc: Gibbons, Brian Law Clerk (Bart Stegall); hodgecharles@hotmail.com; rlangley@hodgelawfirm.com; RChampion@hodgelawfirm.com; jamesfletcherthompson@gmail.com; mary@thompsonlawfirm.net
Subject: RE: BLH v. SCDSS (C/A No. 2013-CP-42-1569)

Yes, go ahead and do that. Thank you

Brian M. Gibbons

From: Gibbons, Brian M. <BGibbonsj@sccourts.org>
Sent: Wednesday, April 01, 2015 6:20 PM
To: Andrew Lindemann
Cc: Jennifer M. Baker; Gibbons, Brian Law Clerk (Bart Stegall); hodgecharles@hotmail.com; rlangley@hodgelawfirm.com; RChampion@hodgelawfirm.com; jamesfletcherthompson@gmail.com; mary@thompsonlawfirm.net; Joel S. Hughes
Subject: Re: BLH v. SCDSS (C/A No. 2013-CP-42-1569)

Thank you. Mr. Langley, do you have any comments on Mr. Linden men's proposed order? If so, please have them to me by the end of the week. I will sign an order next week. I am on vacation this week.

Sent from my iPhone

> On Apr 1, 2015, at 6:05 PM, "Andrew Lindemann" <alindemann@dml-law.com> wrote:
>
> Judge Gibbons:
>
> Per your directions, I am submitting an alternative proposed order which I believe follows the specific directions that you gave at the close of the February 27, 2015 hearing and does not re-write your prior rulings on class certification. I am also submitting a Form 4 Order which denies the Defendant's Motion for Summary Judgment.
>
> I have also included language in my proposed Order that allows for the production of the names and addresses of potential class members consistent with confidentiality laws and which includes "protective order" language that protects the identities of persons who have been adopted to the extent possible.
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> I continue to have concerns, however, as to how this class will be managed. The class members -- based on the class definition adopted by the Court -- are the adopted children -- not the parents but the adopted children themselves. Many of those children may have no idea that they were adopted and the Notice of Class Action may be their first information of that potentially life altering event. While some of the class members will no longer be minors, many will still be minors. Moreover, I do not know what legal authority that minors have to opt-in versus opt-out of a class action. These are some issues that have not been addressed by the Orders thus far issued by the Court and I believe will need to be addressed before the Notice of Class Action is approved and sent out. 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 these issues will need to be addressed before a Notice of Class Action is mailed to an adopted child who may have no idea that he/she was adopted. Jim Thompson knows much more about adoptions than I do, and he may be able to shed some light on this. 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.
>
> Thank you for your consideration of this proposed order. If you require any changes or anything further, please let me know.
>
> Andrew Lindemann
>
> -----Original Message-----
> From: Gibbons, Brian M. [mailto:BGibbonsj@sccourts.org]
> Sent: Wednesday, April 01, 2015 9:37 AM
> To: Andrew Lindemann; Jennifer M. Baker
> Cc: Gibbons, Brian Law Clerk (Bart Stegall); hodgecharles@hotmail.com;

From: Ryan Langley <RLangley@hodgelawfirm.com>
Sent: Friday, April 03, 2015 10:32 AM
To: Andrew Lindemann; Gibbons, Brian M.; Jennifer M. Baker
Cc: Gibbons, Brian Law Clerk (Bart Stegall); hodgecharles@hotmail.com; Regina Champion; jamesfletcherthompson@gmail.com; mary@thompsonlawfirm.net; Joel S. Hughes
Subject: RE: BLH v. SCDSS (C/A No. 2013-CP-42-1569)

Judge Gibbons,
I don't have too many comments other than to again reiterate the Plaintiff's position that a complete record requires that all arguments made at the multiple hearings are taken into consideration for the Order being considered by the Court now. This cannot and will not be accomplished by going backwards to an Order previously entered on the class certification issues that excludes the February 27th arguments. Given Defendants insistence on the February 27th hearing, it only makes sense to include what happened at that hearing in the record and in the Order.

As far as the class notification, this would be done to the parents as they are the guardians of the children. This is no different than any other class action notice where the child is the party through their parent/guardian. The procedures cited in the Order and particularly the statute for protection of the information dictate this confidentiality. I see no reason for the notice to require that the children be told they are adopted. Nor do I see any proposal for how this issue should be addressed from Mr. Lindemann other than an assurance that he and his client have no liability.

While I will be on vacation next week with my family and young children at Disney World, I will make myself available at the Court's convenience for a phone conference if needed to discuss these matters.
Best
Ryan

T. Ryan Langley
Hodge & Langley Law Firm
PO Box 2765
Spartanburg, SC 29304
864-585-3873-p
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From: Andrew Lindemann
Sent: Friday, April 03, 2015 3:18 PM
To: 'Gibbons, Brian M.'; Ryan Langley
Cc: Jennifer M. Baker; Gibbons, Brian Law Clerk (Bart Stegall); hodgecharles@hotmail.com; Regina Champion; jamesfletcherthompson@gmail.com; mary@thompsonlawfirm.net; Joel S. Hughes
Subject: RE: BLH v. SCDSS (C/A No. 2013-CP-42-1569)

Judge Gibbons:

I do not intend to disturb your vacation, but I do want you to consider two further points when you review these proposed orders next week:

1. At the February 27, 2015 hearing, the parties discussed the production of the names of the potential class members. Based on that discussion and the agreement of the parties you instructed as follows: "DSS ordered to release the names of the -- potential names of the class within 90 days of the filing of the order." (Tr. p. 42, lines 11-13). Yet, the Plaintiff's proposed order reads as follows: "IT IS FURTHER ORDERED that Defendant shall provide the name, address, phone number and contract for each class member to Plaintiff within 90 days." There was no discussion among the parties or order by Your Honor that DSS would produce thousands of contracts within that 90 day timeframe. That was simply thrown into the proposed order as submitted by the Plaintiff's counsel. The agreement was to produce the names and contact information so that the class could be notified. Moreover, the Plaintiff's counsel have repeatedly argued that individualized discovery for each class member is not necessary in convincing the Court that this case meets the "commonality" prong and is appropriate for class certification. Therefore, I would object to this attempt to now have the Court order individualized discovery. Quite simply, DSS was not heard on the issue regarding the production of all of the contracts.

2. The problems that I raised about sending Notice of Class Action is not resolved by simply mailing the Notice to the parents. First of all, many of the class members are no longer minors. The class definition identifies the class as including all persons who were nineteen or younger on September 16, 2011. Therefore, there will be many class members who were already 18 years old on September 16, 2011 or who have turned 18 years old in the 3 1/2 years since September 16, 2011. Certainly, service of the Notice on the parents of persons who are no longer minors in 2015 will not be proper notice to the class members. The parents of those class members certainly have no standing to decide the rights of those class members. So this is a legitimate issue. Moreover, I do not know how you can give an explanation to the class members as to what this suit is about -- so as to allow for a proper and informed opt-out decision -- without mentioning that the class members are persons who were adopted. I also disagree with Mr. Langley's assertion this is not like "any other class action notice where the child is the party." This case involves highly personal and confidential information under South Carolina law which will necessarily be revealed by the Notice of Class Action. That is much different than your typical class action.

Thank you for your consideration of these additional points.

I hope you have a Happy Easter.

Andrew Lindemann

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Record on Appeal contains all material proposed to be included by all parties and not any other material.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
JOEL S. HUGHES
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant

Columbia, South Carolina

May 20, 2016

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that Record on Appeal complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
JOEL S. HUGHES
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Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant

Columbia, South Carolina

May 20, 2016

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

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

Andrew F. Lindemann
Joel S. Hughes
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Post Office Box 8568
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Counsel for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. Does the certification of the class and the notification process put into place by the Circuit Court 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?

II. Did the Circuit Court err in certifying the class when the class representative failed to prove the necessary element of commonality?

STATEMENT OF THE CASE

The Respondent BLH, a minor, brings this action by and through her adoptive parents, Kenneth and Angela Hensley, as a purported class action alleging a third-party beneficiary breach of contract cause of action against the Appellant South Carolina Department of Social Services ("DSS"). The Respondent BLH contends that DSS breached an Adoption Subsidy Agreement entered March 22, 1999, when DSS implemented an across the board decrease of $20.00 to any foster care board rate or adoption subsidy payments in June 2002. The Adoption Subsidy Agreement was entered between DSS and BLH's adoptive parents, but BLH seeks to recover as a third-party beneficiary.

By way of procedural history, in September 2011, a prior action was filed in state court which was assigned Civil Action Number 2011-CP-42-3992. That action was then removed to the United States District Court based upon federal question jurisdiction under 28 U.S.C. § 1331. The party-plaintiffs in that action initially were Kenneth and Angela Hensley who brought what was alleged to be a breach of contract cause of action under 42 U.S.C. § 1983. The Respondent BLH was later substituted for her parents as the party-plaintiff in an attempt to avoid a statute of limitations defense. The defendants in the prior action were four former DSS Directors including Elizabeth Patterson, Kim Aydlette, Kathleen Hayes, and Lillian Koller (hereafter referred to as "DSS Directors").

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 form 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

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[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

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[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.*

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[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]

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[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 *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). Admittedly, in *Salmonsen*, 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 *Salmonsen*, 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]

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[7] In footnote five of the *Salmonsen* 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 *Salmonsen 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

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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 *Salmonsen* 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, SCRCP, 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

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[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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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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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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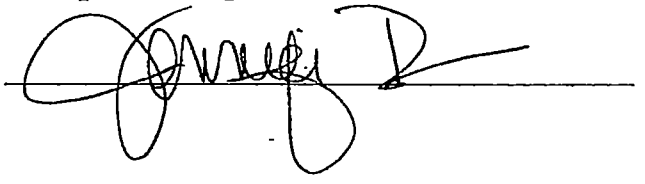

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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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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 02-20-97)." (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 2/20/97) 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

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[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 adoptee[6] 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 employee 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

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adopted); *See slso* 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.scbar.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 law[17] 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

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[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 Circuit[21] 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

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[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. Howe [25] 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

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[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 undisputed[41] 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

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[36] Rule 23(a), SCRCP.

[37] Rule 23(a)(2), SCRCP.

[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.

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[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]

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[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

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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

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[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

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[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

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

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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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 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 of 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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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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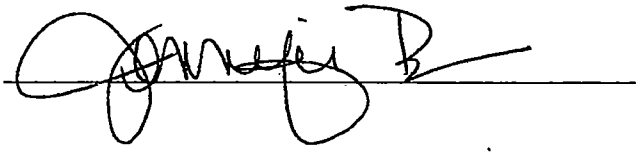

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Davidson & Lindemann, PA, of Columbia, for Appellant.

Charles J. Hodge and T. Ryan Langley, both of Hodge & Langley Law Firm, PC, and James Fletcher Thompson, of James Fletcher Thompson, LLC, all of Spartanburg, 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, SCRCP.[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.

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[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), SCRCP (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

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[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." *Salmonsen 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, SCRCP). "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.

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[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

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, SCRCP; 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 4,000[1] 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, SCRCP.

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, SCRCP, in three ways.

First, the Court is reading predominance and superiority requirements into the rule. The official commentary to Rule 23(a), SCRCP, 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), SCRCP, 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, SCRCP 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, SCRCP, 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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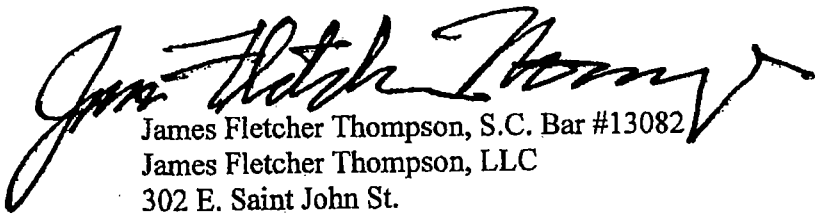

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May 9, 2018 Attorneys for Respondents

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.

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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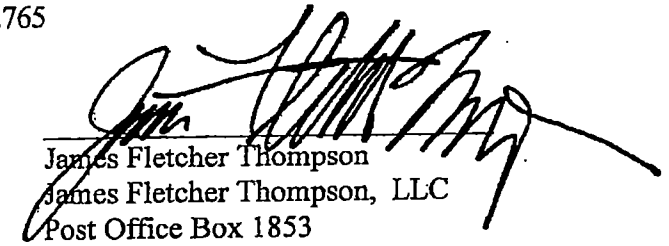

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May 9, 2018
(via facsimile (803) 734-1839 and FedEx Priority Overnight)

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.

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

FILED

June 21, 2018

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

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