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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-00059
Appellate Case No. 2019-000599

Lorena Robinson, Elaine Nix, Archie Patterson,
and Tami Bollerman, ... Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents,

v.

South Carolina Department of Employment and
Workforce ..... Appellant.

RECORD ON APPEAL VOLUME I

Vordman Carlisle Traywick, III (SC Bar 102123)
Robert E. Stepp (SC Bar 5335)
Robert E. Tyson, Jr. (SC Bar 10820)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com
rstepp@robinsongray.com
rtyson@robinsongray.com

William H. Davidson, II (SC Bar 1558)
Kenneth P. Woodington (SC Bar 6213)
DAVIDSON WREN & DEMASTERS, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222
wdavidson@dml-law.com
kwoodington@dml-law.com

Counsel for Appellant South Carolina
Department of Employment and Workforce

Daniel W. Williams
BEDINGFIELD & WILLIAMS
Post Office Box 616
Barnwell, South Carolina 29812
dan@danwilliamslaw.com

C. Bradley Hutto
WILLIAMS & WILLIAMS
Post Office Box 1084
Orangeburg, South Carolina 29116
cbhutto@williamsattys.com

Alexander D. Paterra
THE PATERRA LAW FIRM, LLC
104 S. Calhoun Street
Greenville, South Carolina 29601
alex.paterra@paterralaw.com

Adam Protheroe
Susan B. Berkowitz
S.C. APPLESEED LEGAL JUSTICE CENTER
Post Office Box 7187
Columbia, South Carolina 29202
adam@scjustice.org
sberk@scjustice.org

Counsel for Respondents Archie Patterson and Tami Bollerman

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The South Carolina Court of Appeals

Lorenda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman, Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents/Appellants,

v.

South Carolina Department of Employment and Workforce, Appellant/Respondent.

Appellate Case No. 2019-000599

ORDER

Appellant/Respondent's motion to hold this appeal in abeyance and partially remand this matter to the circuit court to consider the pending motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure is granted. Appellant/Respondent shall provide this court with status updates every thirty days until the pending motion is resolved.

Paul G. Short, Jr.
FOR THE COURT

Columbia, South Carolina

cc:
The Honorable Rhonda Dale McElveen
William H. Davidson, II, Esquire
Kenneth P. Woodington, Esquire
Daniel Webster Williams, Esquire
C. Bradley Hutto, Esquire
Alexander D. Paterra, Esquire
Adam Protheroe, Esquire
Susan B. Berkowitz, Esquire

FILED
July 12, 2019

ELECTRONICALLY FILED - 2020 Jul 22 9:56 AM - BARNWELL - COMMON PLEAS - CASE#2013CP060059

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL)	
)	Case No.: 2013-CP-06-00059
ARCHIE PATTERSON AND TAMMIE)	
BOLLERMAN,)	
)	
PLAINTIFFS,)	
)	ORDER ON
v.)	DEFENDANT'S 59(e) MOTION
)	
SOUTH CAROLINA DEPARTMENT OF)	
EMPLOYMENT AND WORK FORCE,)	
)	
DEFENDANT.)	
)	

This matter is before me on Defendant's Amended Motion to Alter or Amend filed March 28,2019. Defendant seeks to alter or amend this Court's Order of March 21, 2019 granting Plaintiff's Motion to Alter or Amend the February 15, 2019 Order of this Court. Both Orders were issued by the Honorable Doyet A. Early who was designated to hear all matters in this case, but has since retired. Therefore, the matter falls to me to hear as Chief Judge for Administrative Purposes.

During the hearing, the parties agreed to modify the language of the Order to clarify that if Plaintiffs ultimately succeed on the merits of this case, persons who have otherwise exhausted the full amount of unemployment benefits they were entitled to receive in any pertinent period shall not be included in the class. Therefore, page 5 of the March 21, 2019 Order and the corresponding language in the Notice to Class on p. 44 of the February 15, 2019, Order shall be amended to define the class as:

All persons: (1) who were citizens and residents of South Carolina at the time the action was filed; (2) who were eligible to receive state or federal unemployment benefits, through SCDEW;

(3) who made application through SCDEW to receive benefits; (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search between August 6, 2012, and July 1, 2016; and (5) who did not subsequently exhaust the full amount of state or federal benefit they were entitled to receive in the pertinent benefit year, as that term is defined in S.C. Code Ann. § 41-27-160, that is, whose benefits did not exceed the maximum potential benefit amount for a given benefit year, as governed by S.C. Code Ann. 41-35-50.

After hearing the remainder of the motion and carefully considering all arguments made as well as all documents and memoranda presented, I find no other reason to alter or amend the March 21, 2019 Order. Therefore, the remainder of the motion is denied. Counsel for Defendant advised the Court at the hearing on the motion that in agreeing to the above modification of the definition of the class, the Defendant preserves, and expressly does not waive, any contention previously made in this case as to any disputed issue, but instead reserves the right to present all such issues on appeal. Plaintiffs' counsel have agreed, and the Court so holds. The parties' consent to clarify the class definition shall not be construed as consenting to any other portion of this or any other Order previously issued in this case.

AND IT IS SO ORDERED.

_____

Honorable Clifton Newman
Chief Judge for the 2nd Circuit

_____, South Carolina
June _____, 2020

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Barnwell Common Pleas

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

Case Number: 2013CP0600059

Type: Order/Amend

So Ordered

s/ Clifton B. Newman, 2127

ELECTRONICALLY FILED - 2019 Mar 21 1:52 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL ARCHIE PATTERSON AND TAMMIE BOLLERMAN, PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORK FORCE, DEFENDANT.	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT Case No.: 2013-CP-06-00059 ORDER GRANTING PLAINTIFFS' 59(e) MOTION

Plaintiffs in their 59(e) motion challenge the provisions of the Court's February 15, 2019 Order which requires class members to present their record of work seeking activities, or recreate their record of work seeking activities, in order to make a claim for benefits. They assert the claims made procedure and altered class definition is not supported by the record in this case and is unfair and unnecessary. Citing *Hyman v. South Carolina Employment Sec. Commission*, 234 S.C. 369, 108 S.E.2d 554 (1959), SCDEW asserted, and this Court agreed, that a claims-made process was necessary, since class members were still required to prove their entitlement to benefits. However, after hearing the parties' respective positions and reviewing the record, I find class members met their required burden of proof, and Plaintiff's motion should be granted.

EVIDENCE PRESENTED

Eligibility Requirements for Unemployment Claims

At the October 31, 2019 hearing, SCDEW offered into evidence by way of affidavit the testimony of Kevin Cummings who serves as its Unemployment Insurance Benefits Manager. According to Paragraphs 5 and 6 of Cummings Second Affidavit dated March 3, 2014, claimants are required weekly to advise SCDEW whether they are able, available, and looking for work.

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Exhibit F to this Affidavit, pages 12 and 13, describes the weekly filing process in detail. Claimants are required, either online or by telephone to certify they have met the eligibility requirements to collect benefits. This includes whether the claimant was able, available for and actively seeking work. Class members were not denied benefits for failing to make this certification.

Claimants are also required to document their work seeking activities on a UCB-303 form. Cummings 2d Affidavit, Para. 7. The Purpose of the form is to allow SCDEW to audit a claimant's work seeking activities. A sample copy of this form is attached to the affidavit as Exhibit A. The Form states: "This work search information is **subject to audit.**" (emphasis added) The form further states: "Bring this form each time you are called into the SC Works Center for an interview. Failure to provide this form **may** result in a denial of benefits." (capitalization omitted) Exhibit B to the Cummings affidavit tells claimants: "Your work searches and accompanying documentation are subject **to random audit** and verification.... Failure to adhere to this policy **could** result in a denial of benefits."

While the SCDEW documents refer to the audits as "random", Cummings in paragraph 10 of his Second Affidavit describes the audits as "periodic". Regardless of how they are characterized, it is undisputed the audits were not a weekly occurrence necessary for claimants to receive their benefits. Also, Exhibits A and B to the Affidavit indicate that failure to present the form does not automatically result in a denial of benefits, but "may" (or "could") result in a denial of benefits.

Denial of benefits to Class Members

This Court in its February 15, 2019 Order, has already found that each class member was denied because of their failure to conduct an online job search. Each class member received a

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Work Search Verification Failure-Benefits Stopped notice informing them their benefits were stopped for failing to make at least one job contact online using the SC Works website. This notice directed them to report to their local SC works center immediately, along with their record of work seeking activities form UCB 303 if they would like to receive future benefits.[1]

When class members appeared SCDEW completed an Availability Fact Finding (form UCB-102AV) inquiring whether class members were able to work, available to work, and seeking work.[2] SCDEW also required claimants to bring their record of work seeking activities form UCB-303 with them and would have had the opportunity to review this form. The UCB-102AV form also includes a statement regarding the online work search. Afterwards, SCDEW issues a determination denying benefits to the class member.[3]

CLASS MEMBERS HAVE SATISFIED THEIR BURDEN OF PROOF

Class members, like all claimants, were required to certify to SCDEW that they were able, available, and actively seeking work and would have received their benefit but for the illegal online job search requirement. After benefits were stopped for failing to conduct an online job search, class members were required to appear at an SCDEW office and were again required to certify they were able, available and actively seeking work. Class members were also required to bring their form UCB-303 record of work seeking activities to the meeting. The only plausible reason for requiring the class member to bring their form UCB 303 would be to verify past job contacts.

This same form, or a recreation of it, is what SCDEW wishes the class member to produce in

[1] While the notice references future benefits, Kevin Cummings in his 30(b)(6) deposition stated the reason for the notice was to get the claimant to come in and give a statement about why they did not conduct the online work search. 30 (b)(6) Deposition of Kevin Cummings, dated 10/27 14, pages 34-35.

[2] Bollerman and Patterson's UCB-102AV form is attached as part of Exhibit G and H, respectively, of the Second Cummings Affidavit.

[3] Bollerman and Patterson's Determination denying benefits for failing to conduct an online job search are also included in Exhibits G and H of Cummings Second Affidavit, respectively.

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a claims process to be entitled to receive their benefit. Class members, however have already made this audit form available to SCDEW and have certified twice to SCDEW they were able, available, and actively seeking work. For claimants who are not class members, SCDEW did not conduct a weekly review of the UCB-303 form. In fact, Cummings in his Second Affidavit testified it was impractical for SCDEW to review these forms on a weekly basis.

While all unemployment insurance benefits claimants have a burden to show they are qualified to receive benefits, there is no rational basis to require a greater level of proof for class members who were wrongly denied benefits than from other claimants. Such a requirement would violate plaintiff's rights of equal protection. *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1999). Class members by their initial certification to SCDEW that they were able, available, and actively seeking work have met the burden of proof required of other un employment insurance claimants to receive their benefits.

Moreover, it is unlikely that claimants would still have these forms or be able to recreate them with any accuracy, since many of the claims are more than six-years old. The delays in sending the notice caused by potential appeals, makes it more unlikely that class members could comply with the claims process.[4]

Since class members have already met their burden of proving entitlement to receive their benefit(s), there is no need for further proof from class members regarding their eligibility. While a claims-made process may not be inherently suspect, courts should avoid imposing unnecessary hurdles on potential claimants, since strict eligibility conditions and cumbersome claims are likely to deter class members from obtaining claim benefits. 4 *Newberg on Class*

[4] The Court has already determined, SCDEW's procedure of stopping payment before a determination was made also violated S.C. Code Ann. 41-35-670 (requiring a redetermination or subsequent determination before payments are stopped). Further, SCDEW failed to promulgate any regulations establishing a mode of procedure adjudicate class members claims as required by Article I, Section 22 of the S.C. Constitution. Such structural defects in procedure violate due process and cannot be considered harmless. *McIntyre v. Securities Commissioner of South Carolina*, 2018 WL 5020070 __ S.C. __, __S.E.2d __ (Ct. App. 2018)

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Actions Section 12:21 (5th ed.) Courts should.."[w]atch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained." *DeLeon v. Bank of America, N.A. (USA)* 2012 W.L. 2568142, Not Reported in F. Supp. 2d (2012). The goal is to get the relief into the hands of the class. Therefore, the process that requires the least of the class members should be first priority. The Court should first consider whether it is even necessary to file a claim. 4 *Newberg on Class Actions.* Section 12:18 (5th ed.)

I find a claims-made process is unnecessary, and the most practical way to get the wrongly denied benefits to the class members who do not opt out of the class is simply to mail it to them.

DEFINITION OF THE CLASS

Based upon my findings above, I find the class should be defined as originally set forth in the Class Certification Order, but modified to reflect and ending period for the class of July 1, 2016. Further Claims shall not be paid to persons who were paid the maximum amount of benefits they were entitled to receive on the week they were denied benefits. The Class shall be defined as all persons: (1) who were citizens and residents of South Carolina at the time the action was filed; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search between August 6, 2012, and July 1, 2016; and (5) who did not subsequently exhaust the full amount of benefit they were entitled to receive for the week(s) their benefits were denied.

Class membership can be easily determined in that each class member would have been mailed the "Work Search Verification Failure – Benefits Stopped" (UCM-15B) form notifying

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them their benefits were stopped for failing to conduct the online work search. The amount of benefits SCDEW did not pay and the date they should have been paid can be determined by the "Determination by Claims Adjudicator on Claims for Benefits" (UCB 103) form or from other SCDEW Records.

NOTICE TO THE CLASS

In light of my rulings in this order, I find that the class notice originally submitted by the Plaintiff adequately informs the class of the pendency of the action, the nature of the action, the class member's rights to participate in the action and the class members rights to opt out of the action. While it may be necessary to make some modification to the Notice and this Order to reflect any subsequent appeals or developments, the general form of this notice is hereby approved. A copy of the approved notice (and opt out form) is attached to this Order.

It is Therefore Ordered my Order of February 15, 2019 is amended to conclude:

1. Class members have met their burden of proving they were otherwise entitled to receive unemployment benefits, and a claims-made process is unnecessary;
2. At the appropriate time, the class administrator shall simply mail settlement proceeds to each class member;
3. The class definition set forth above shall be utilized;
4. The Court adopts and approves the attached Class notice;

All other findings and conclusions of my February 15, 2019 Order which are not inconsistent with this Order shall remain in full force and effect.

AND IT IS SO ORDERED.

Honorable Doyet A. Early, III
Judge of the Second Circuit

_____, South Carolina
March _____, 2019

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Barnwell Common Pleas

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

Case Number: 2013CP0600059

Type: Order/Other

So Ordered

s/D.A. Early III 2136

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COURT OF COMMON PLEAS FOR BARNWELL COUNTY, SOUTH CAROLINA

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

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

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

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

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

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BASIC INFORMATION

1. Why is there a notice?

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

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

2. What is this Lawsuit about?

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

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

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

3. What is the status of the Lawsuit?

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

4. Why is this a class action?

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

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

WHO IS IN THE CLASS?

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

If you receive this Notice in the mail, the Court believes you are a member of the Class.

The Court has defined the Class as "all persons: (1) who were citizens and residents of South Carolina at the time this action was filed; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search between August 6, 2012 and July 1, 2016; and (5) and who did not subsequently exhaust the full amount of benefits they were entitled to receive for the week(s) their benefits were denied."

CLASS BENEFITS

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

If you stay in the Class and the Plaintiffs prevail, you will receive the benefit amount you would have received had your benefit not been denied for failing to comply with the online work search requirement. Plaintiffs are also seeking interest on this amount.

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

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

8. How can I get a payment?

If you decide to remain in the Class and the case results in an award of monies to the class, you do not have to do anything to get a payment. Payments will automatically be mailed if the Court's decisions are not reversed after any appeals.

9. When will I get my payment?

If the Court awards monies to the Plaintiffs, this case will not be over. The Defendant has the right to appeal. No payments will be made until all appeals have been resolved, and only if those appeals are resolved in the Plaintiffs' favor. It is not possible to predict what the appellate

courts will decide. Resolving appeals can take time, and its uncertain how long that process will take. Please be patient.

EXCLUDING YOURSELF FROM THE CLASS

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

10. How do I get out of the Class?

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

{insert Class Administrator's address}

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

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

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

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

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

THE LAWYERS REPRESENTING YOU

13. Do I have a lawyer in the case?

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

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

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14. How will the lawyers be paid?

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

IF YOU DO NOTHING

15. What happens if I do nothing at all?

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

GETTING MORE INFORMATION

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

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

{Class Administrator Contact Information}

17. How do I get more information?

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

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

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS
Post Office Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

Daniel W. Williams, Esquire
BEDINGFIELD & WILLIAMS, LLC
Post Office Box 616
Barnwell, SC 29812

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(803) 259-2759

Alex Paterra, Esquire
THE PATERRA LAW FIRM, LLC
104 S. Calhoun Street
Greenville, SC 29601
(864) 232-2776

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

BY ORDER OF THE COURT.

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

_____, South Carolina

Dated: _____

CLASS COUNSEL

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS
PO Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

Daniel W. Williams, Esquire
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PO Box 616
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Adam Protheroe
S.C. APPLESEED LEGAL JUSTICE CENTER
PO Box 7187
Columbia, SC 29202
(803) 779-1113, Ext. 106

ATTORNEYS FOR DEFENDANT SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE

Kenneth P. Woodington
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568
(803) 806-8222

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ELECTION TO OPT OUT OF CLASS ACTION

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

INSTRUCTIONS:

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

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

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

Date: _____ _____
Signature

Please type or print the following information:

Name: _____
FIRST MIDDLE LAST

Former Name(s) (if any): _____

Mailing Address: _____
NUMBER STREET APT. #

_____
CITY STATE ZIP

Telephone Number: _____

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

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

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	Case No.: 2013-CP-06-00059
	)	
ARCHIE PATTERSON AND TAMMIE BOLLERMAN,	)	
	)	
PLAINTIFFS,	)	
	)	ORDER REGARDING DEFENDANT'S
v.	)	MOTION TO VACATE AND BOTH PARTIES'
	)	MOTIONS TO ALTER OR AMEND
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORK FORCE,	)	
	)	
DEFENDANT.	)	
	)	

Defendant moves pursuant to S.C.R.C.P 60 to vacate the (Plaintiff's proposed) Order consisting of 23 pages erroneously filed in this matter on February 15, 2019 at 10:58 am. Plaintiffs do not object and acknowledge this order was filed by mistake. Therefore, Defendant's motion to vacate this order is Granted.

Defendant and Plaintiffs both move pursuant to S.C.R.C.P. 59 to alter or amend this Court's Order filed February 15, 2015 at 2:17pm. After carefully reviewing both motions and after hearing the arguments presented, I find that the Defendant's motion should be denied. As to Plaintiff's motion regarding the notice to the class, the class definition, and the claims made process established in the order, I am taking that matter under advisement. Counsel for both sides shall submit proposed orders to me by March 11, 2019. Otherwise, I reaffirm my previous order.

AND IT IS SO ORDERED.

Honorable Doyet A. Early, III
Judge of the Second Circuit

_____, South Carolina
February _____, 2019

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Barnwell Common Pleas

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

Case Number: 2013CP0600059

Type: Order/Other

So Ordered

s/D.A. Early III 2136

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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SCDEW AND UNEMPLOYMENT BENEFITS

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

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

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

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

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

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

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

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

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

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

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

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

THE NAMED PLAINTIFFS

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

Tami Bollerman's Claim

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

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

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

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

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

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

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Archie Patterson's Claim

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

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

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

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

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LEGISLATIVE AUDIT REPORT

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

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

WHY THE REGULATION PROCESS MATTERS

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

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

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

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

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

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

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

SCDEW MUST PROMULGATE REGULATIONS TO CARRY OUT ITS DUTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDING

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

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

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

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

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

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

EXHAUSTION OF ADMINISTRATIVE REMEDIES

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

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

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

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

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

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in this case – whether SCDEW was required to promulgate regulations prior to implementing its on line work search requirement. Ms. Robinson testified that SCDEW's Appellate panel only has the power to resolve factual disputes. It would not resolve issues of law pertaining to the authority of SCDEW to implement the online work search requirement without first promulgating regulations. (Exhibit 1, 10/31/18 hearing [11/2/16 Transcript, p.78, l.16 – 25]; Exhibit 9, 10/31/18 hearing [Deposition of Romi Robinson, p.10, l13 – p.11, l.22]; Tab 39, Hearing Notebook)

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

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

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

CLASS CERTIFICATION

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

> All persons who are:
>
> (1) citizens and residents of South Carolina;
>
> (2) who were eligible to receive unemployment benefits, through SCDEW;
>
> (3) who made application through SCDEW to receive benefits;
>
> `(4) who were denied a benefit between August 6, 2012, and July 1, 2016, for failure to perform an online work search; and
>
> (1) did not exhaust their benefit allotment for the pertinent period despite the work search ineligibility;
>
> (2) can document that they were actively seeking work during the week or week for which a benefit was denied, by producing a contemporaneously-kept Form UCB-303, or a re-created Form UCB-303 that presents substantial evidence that the four non-online work searches were actually made; and
>
> (3) were otherwise eligible to receive a benefit,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PREJUDGMENT INTEREST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTICE TO THE CLASS

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

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

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

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

ATTORNEY FEES

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

CLASS ADMINISTRATION

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

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

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

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

3. **Attorney fees and costs petition.** Within 30 days of this Order becoming final Plaintiffs counsel shall submit its fee petition, and Defendant shall comply with this Order regarding production of class member information.
4. **Supplemental hearing.** Within 60 days of this Order becoming final, or as soon as practicable, this Court shall conduct a supplemental hearing for the purpose of hearing Plaintiff's counsel's petition for attorney fees and costs, determining the final amount to be paid to each claimant, approving a class administrator, making any modifications to the Class Notice and this Order, and to issue any order necessary for the administration of the class. As soon as practicable after this Order becomes final, the parties shall contact the Chief Judge for Administrative Purposes for this Circuit for the purpose of assigning a judge and conducting a supplemental hearing is this matter.
5. **Notice to Class.** Within 15 days of the order from the supplemental hearing described in Section 4 becoming final (Supplemental Order), or at such later time as Court may direct, the class administrator shall:
    a) mail to each Class Member via first class mail a copy of the Notice as finally approved by this Court. The Administrator shall file an affidavit of mailing with the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supplemental Hearings

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

It is Therefore Ordered that:

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

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

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

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

(d) was otherwise eligible to receive a benefit,

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

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

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

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

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

Plaintiffs have standing to represent the class;

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

AND IT IS SO ORDERED.

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

_____, South Carolina

_____, 2019

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COURT OF COMMON PLEAS FOR BARNWELL COUNTY, SOUTH CAROLINA

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

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

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

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

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

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BASIC INFORMATION

1. Why is there a notice?

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

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

2. What is this Lawsuit about?

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

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

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

3. What is the status of the Lawsuit?

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

4. Why is this a class action?

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

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

WHO IS IN THE CLASS?

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

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

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

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

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

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

CLASS BENEFITS

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

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

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

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

8. How can I get a payment?

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

9. When will I get my payment?

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

EXCLUDING YOURSELF FROM THE CLASS

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

10. How do I get out of the Class?

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

{insert Class Administrator's address}

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

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

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

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

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

THE LAWYERS REPRESENTING YOU

13. Do I have a lawyer in the case?

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

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

14. How will the lawyers be paid?

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

IF YOU DO NOTHING

15. What happens if I do nothing at all?

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

GETTING MORE INFORMATION

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

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

{Class Administrator Contact Information}

17. How do I get more information?

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

ELECTRONICALLY FILED - 2019 Feb 15 2:17 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

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

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS
Post Office Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

Daniel W. Williams, Esquire
BEDINGFIELD & WILLIAMS, LLC
Post Office Box 616
Barnwell, SC 29812
(803) 259-2759

Alex Paterra, Esquire
THE PATERRA LAW FIRM, LLC
104 S. Calhoun Street
Greenville, SC 29601
(864) 232-2776

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

BY ORDER OF THE COURT.

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

_____, South Carolina

Dated: _____

CLASS COUNSEL

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS

ELECTRONICALLY FILED - 2019 Feb 15 2:17 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

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

ATTORNEYS FOR DEFENDANT SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE

Kenneth P. Woodington
DAVIDSON, WREN & PLYLER, P.A.
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568
(803) 806-8222

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ELECTION TO OPT OUT OF CLASS ACTION

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

INSTRUCTIONS:

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

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

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

Date: _____ _____
Signature

Please type or print the following information:

Name: _____
FIRST MIDDLE LAST

Former Name(s) (if any): _____

Mailing Address: _____
NUMBER STREET APT. #

_____
CITY STATE ZIP

Telephone Number: _____

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

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

ELECTRONICALLY FILED - 2019 Feb 15 2:17 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

Barnwell Common Pleas

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

Case Number: 2013CP0600059

Type: Order/Other

So Ordered

s/D.A. Early III 2136

ELECTRONICALLY FILED - 2018 Oct 01 9:09 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	
LORINDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN,	)	CIVIL ACTION NO.: 2013-CP-06-0059
	)	
PLAINTIFFS,	)	
	)	**CONSENT ORDER**
	)	**AND**
v.	)	**NOTICE OF HEARING**
	)	
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE,	)	
	)	
DEFENDANT.	)	

A status conference was held before me on September 24, 2018, for the purpose of determining a path for resolution of this case, according to the Amended Scheduling Order. Discovery was completed in this case on March 16, 2015. All dispositive motions have been heard. This case was certified as a class action on April 29, 2016.

Both parties represent this matter is ready for a merits hearing to resolve all matters. They have agreed and stipulate as follows:

1. Either party may use depositions taken in this case, prior testimony given in this case, prior affidavits submitted in this case, or may call witnesses who have been deposed or disclosed in discovery.

2. Notice to class members has yet to be given. Both parties agree that appeals are likely, and the decision of the appellate court could cause the content of notices to be modified. Therefore, mailing a class notice at this point could cause greater expense. More importantly, it could create confusion among class members regarding who is in the class as well as what relief, if any, they are entitled. Defendant asserts and Plaintiffs agree a practical solution is to withhold

ELECTRONICALLY FILED - 2018 Oct 01 9:09 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

sending the notice until final resolution of this case. See *Tilley v. Pacesetter Corp.* 355 S.C. 361, 381, 585 S.E. 2d 295, 302 (2003) Plaintiffs shall, however, present a proposed notice to be sent in the event they prevail and the matter is not appealed. If the case is appealed the appellate court may determine any issue concerning the notice.

Therefore, a hearing on the merits is hereby scheduled to resolve all matters on October 31, 2018, at 9:30 a.m., at the Bamberg Courthouse, Bamberg, South Carolina.

AND IT IS SO ORDERED.

_____
Honorable Doyet A. Early, III
Judge of the Second Circuit

_____, South Carolina
September _____, 2018

WE CONSENT:

s/ Daniel W. Williams
DANIEL W. WILLIAMS
Bedingfield & Williams, LLC 40 Wall Street
Barnwell, SC 29812
(803) 259-2759
dan@danwilliamslaw.com

C. BRADLEY HUTTO Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
The Paterra Law Firm, LLC
104 S. Calhoun Street
Greenville, S.C. 29601
864-232-2776
alex.paterra@paterralaw.com

ADAM PROTHEROE
South Catalina Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
adam@scjustice.org

ATTORNEYS FOR PLAINTIFFS

I CONSENT:

s/ Kenneth P. Woodington

Kenneth P. Woodington
Davidson & Lindemann, P.A.
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855

ATTORNEYFORDEFENDANT

ELECTRONICALLY FILED - 2018 Oct 01 9:09 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

ELECTRONICALLY FILED - 2018 Oct 01 9:09 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

Barnwell Common Pleas

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

Case Number: 2013CP0600059

Type: Order/Consent Order

So Ordered

s/D.A. Early III 2136

ELECTRONICALLY FILED - 2017 Oct 30 9:52 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN, PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE, DEFENDANT.	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-06-059 ORDER

This matter comes before me on Defendant's Rule 59(e) motion to this Courts May 5, 2016, class certification order an Defendant's Rule 59(e) motion regarding this Court's April 12 2017, Order finding the named plaintiffs' have standing to pursue this matter a class action. Both of these motions are denied.

Procedurally, this court on January 11, 2016, heard cross- motions for summary judgment as well as plaintiffs motion for class certification. The Court denied both parties motions for summary judgment on May 5, 2016, but granted plaintiff's motion to certify the class.

Defendant timely filed a Rule 59(e) motion to alter or amend the class certification order, and a hearing on this motion was held on June 7, 2016. At the hearing, counsel for Defendant argued that the Court did not address his assertion that the named plaintiffs lacked standing and could not adequately represent the class. This hearing concluded with the Defendant reserving all other issues raised in his Rule 59(e) motion and the parties agreeing to confer on a way to address this issue.

As a result, on June 15, 2016, defendant filed a motion for an evidentiary hearing to on the issue of standing. Plaintiffs consented to the motion. Hearings were held on November 2, 2016 and January 11, 2017. As result this court issued its order dated April 27, 2017, finding the remaining named plaintiffs had standing to maintain this action as a class action. No other finding was reached by the court. Defendant timely filed a 59(e) motion to the Standing Order, and on October 2 this court held a hearing on this motion as well as any matter previously raised by the defendant in its 59(e) motion regarding class certification.

After, careful review of both orders and consideration of the arguments of both parties, I respectfully deny both motions. The Class certification order sufficiently sets forth my reasoning for granting class certification and the May 5, 2016, Order regarding the named plaintiffs standing sets fort sufficient findings to conclude the named plaintiffs have standing to maintain this action as a class action. Nothing in either order should be construed as a decision on the merits and all issues raised in the pleadings are preserved.

AND IT IS SO ORDERED.

_____

Honorable Doyet A. Early, III
Judge of the Second Circuit

Barnwell, South Carolina
_____, 2016

ELECTRONICALLY FILED - 2017 Oct 30 9:52 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

ELECTRONICALLY FILED - 2017 Oct 30 9:52 AM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

Barnwell Common Pleas

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

Case Number: 2013CP0600059

Type: Order/Other

So Ordered

s/D.A. Early III 2136

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP0600059

Lorinda A. Robinson, et al **Alexander D. Paterra**	**Elaine Nix** **Tami Bollerman**	**SC Department of Employment & Work Force**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: C. Bradley Hutto

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **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: **Order Finding that Named Plaintiffs Tami Bollerman and Archie Patterson Have Standing to Represent the Putative Class**

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.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ Doyet A. Early, III — **Circuit Court Judge**

2136 — **Judge Code**

5/2/2017 — **Date**

For Clerk of Court Office Use Only

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

This judgment was entered on **April 27, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **May 3, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Daniel Webster Williams PO Box 616 Barnwell, SC 29812
C. Bradley Hutto Williams And Williams PO Box 1084 Orangeburg, SC 29116 (4CS @ filing)
Alexander D. Paterra 104 S. Calhoun St. Greenville, SC 29601
Stephen R. Suggs PO Box 7187 Columbia, SC 29202

Kenneth P. Woodington PO Box 8568 Columbia, SC 29202-8568

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL ARCHIE PATTERSON AND TAMI BOLLERMAN, PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE, DEFENDANT.	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-06-059 ORDER FINDING THAT NAMED PLAINTIFFS TAMI BOLLERMAN AND ARCHIE PATTERSON HAVE STANDING TO REPRESENT THE PUTATIVE CLASS

FILED FOR RECORD
2017 APR 27 PM 2:23
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

PROCEDURAL HISTORY

This matter is before the court on Defendant South Carolina Department of Employment & Workforce's (SCDEW) Motion for Re-Hearing of the Court's Order Certifying Class in the above captioned matter. Named Plaintiffs allege on behalf of themselves, as well as the putative class, that they were wrongfully denied unemployment insurance benefits by SCDEW. SCDEW is a State Agency charged by the South Carolina Legislature with the duty of processing unemployment claims in accordance with the Laws of this State. In order to be eligible to receive unemployment benefits, a claimant must be able to work and be seeking work. On a weekly basis, claimants have to comply with the process established by SCDEW for making claims. On August 6, 2012, without first promulgating regulations, SCDEW changed its method for claimants demonstrating that they were looking for work. SCDEW began to require claimants to file at least one online application seeking employment. The named Plaintiffs were denied benefits because of their inability or failure to properly apply online for employment. No other reason was given for denial of benefits. Plaintiffs assert that SCDEW is required by statute to implement regulations to

establish policies to pay claims for unemployment benefits, in particular South Carolina Code Ann §41-27-510, §41-35-610, and §1-23-10 et. seq., which independently require the agency to promulgate regulations. Alternatively, Plaintiffs assert the new policy constitutes a binding norm which must be implemented by regulation under the APA. *See Joseph, et al v. SCDOL, et al*, Appellate Case No. 2014-001115, Opinion No. 27666. (Heard February 19, 2015 – Filed September 14, 2016).

Named Plaintiffs seek to represent a class defined as all persons who are citizens and residents of South Carolina who are eligible for unemployment insurance (UI) benefits but have not received payment due to Defendant's requirement they make an online application for work as a prerequisite to receiving benefits. Following a hearing on Plaintiffs' Motion to Certify the Class, the Court issued an order on April 29, 2016 certifying the class and finding that the named Plaintiffs had standing to bring the action. Defendant moved for reconsideration. Hearings were held to take testimony, the first on November 2, 2016, and the second on January 11, 2017.

PLAINTIFFS TAMI BOLLERMAN AND ARCHIE PATTERSON HAVE STANDING TO BRING THIS ACTION AND REPRESENT THE PUTATIVE CLASS

Tami Bollerman and Archie Patterson each have individual standing to bring this action. Tami Bollerman lost her job after being put on bed rest during her pregnancy. She began receiving unemployment benefits in August of 2012 and successfully applied for and received those benefits until the week ending October 13, 2012. During that week, SCDEW's computer system indicated that she failed to do one of four work searches online. Ms. Bollerman testified that she did, in fact, do an online search for that week, but speculated that she may have taken a link away from the SCDEW online work search site. Despite this, her claim was still denied. She ultimately received two more weeks of unemployment benefits before finding work. Ms. Bollerman did not exhaust

her unemployment benefits and was still eligible for one or more weeks of benefits when she became employed.

Archie Patterson was terminated from his employment with the South Carolina Department of Corrections on May 28, 2012. On June 12, 2012, he was determined to be eligible for unemployment compensation up to a maximum of $6,520.00. SCDEW determined that he was eligible for benefits and began paying those benefits in August of 2012. In the first week, Mr. Patterson was confronted with the online work search and lost a week of benefits for failing to perform the search. Mr. Patterson explained at the hearing on this matter that he was not proficient with computers and therefore had difficulty with the online application. After losing that week of benefits, he testified that he had his son help him learn to do the online work search. Mr. Patterson continued to receive state benefits until his they were exhausted. Mr. Patterson then received one week of federal unemployment benefits, which a continuation of state benefits and therefore should be paid continuously until exhausted. When he stopped receiving his benefits they had not been exhausted.

In arguing that Plaintiffs lack standing, Defendant asserts that both Tami Bollerman and Archie Patterson did not appeal the adjudication of their benefit loss through administrative channels and have therefore failed to exhaust administrative remedies. SCDEW has an appeals process which eventually leads to the Adminstrative Law Court. A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000)). The Administrative Law Court is part of the executive branch. *See, e.g., Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). Because an

Administrative Law Judge is an agency of the executive branch, "it must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation." *Id.* at 38, 535 S.E.2d at 644. At the hearing, Chief Administrative Hearing Officer Ms. Romi Robinson admitted that a hearing officer would not have the authority to rule on whether requiring on-line searches could be required without SCDEW promulgating regulations regarding on-line searches. Therefore, any appeal concerning whether Plaintiffs were required to complete an online job search would be futile, since by its own admission the hearing officer could not rule on this issue.

The Administrative Law Court has "no authority to rule on the facial validity" of a regulation under state law. In *Drummond*, the Plaintiff filed suit stating that the South Carolina Department of Revenue "improperly promulgated regulations that do not conform to [statute] because the regulations allow the sales tax exemption only for diabetic supplies sold pursuant to a prescription or written authorization, which appellant claims is not required under the statute." *Drummond v. State, Dep't of Revenue*, 378 S.C. 362, 365, 662 S.E.2d 587, 588 (2008). The Court held that: "Although appellant is not challenging the constitutionality of the regulation, he *is* challenging its validity under state law. Because the Administrative Law Court is part of the executive branch, as stated in *Video Gaming*, it has no authority to rule on the facial validity of Reg. 117-332." *Id.* at 370, 662 S.E.2d at 591.

In addition to that, the Court of Appeals, in dicta, recently stated that "[a]nother exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." *Brown v. James*, 389 S.C. 41, 55, 697 S.E.2d 604, 611-12 (Ct. App. 2010). Other courts have held that an exception to the exhaustion of administrative remedies requirement exists when an agency has acted outside its authority. *See, e.g., Grever v. Idaho Telephone Co.*, 499 P.2d 1256, 1259 (Ida.

1972) ("[T]he rule will be departed. . . where the agency acts outside its authority."). Because the plaintiffs are alleging that the SCDEW "acted outside its authority," a court should hold that they did not need to exhaust administrative remedies. By requiring exhaustion of administrative remedies, the court would force a member of the executive branch, the ALC, determine the validity of a policy of another member of the executive branch; thus, it would violate the separation of powers doctrine. *See Ward v. State*, 343 S.C. 14, 20, 538 S.E.2d 245, 248 (2000) (Because an agency is part of the executive branch, "requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.").

The Plaintiffs here are seeking a determination that SCDEW's policy requiring online searches was unlawful. The administrative courts, as a part of the executive branch, cannot determine that issue and therefore the issue can only be addressed in circuit court.

Defendant also argues in the case of Archie Patterson that he has mooted his claims or failed to mitigate his losses by failing to apply for benefits. Even if Mr. Patterson chose not to apply for benefits after he was denied benefits that does not cure or obviate any earlier wrongful denial of benefits. Therefore Mr. Patterson's claim is not moot and he has not failed to mitigate damages.

Even if Mr. Patterson and Ms. Bollerman lacked individual standing as alleged by SCDEW, they still have standing to represent the class under two distinct legal theories. The South Carolina Supreme Court has recognized that even when a plaintiff lacks standing to bring an action, they may still have standing if the harm they suffered is capable of repetition but evading review. *Byrd v. Irmo High School*, 321 S.C. 426 (1996). In that case, a student challenged his suspension from school and Irmo High argued that the case was moot because he was no longer under the suspension by the time the case was heard. The court held that when a case involves an issue that

is capable of being repeated but can become moot before a court can decide it, an exception to the mootness doctrine exists. Here, one of the named Plaintiffs has, according to the Defendant, suffered a loss of benefits in a given week, and later failed to apply for benefits during a week when he might have recovered the lost week.

The design of unemployment benefit (UI) payments in South Carolina causes plaintiffs who are unemployed long enough to exhaust weeks of their benefits and potentially moot their own claims. The maximum length of the UI payment period in South Carolina is technically 20 weeks, but more often than not it is less. Therefore, many individual plaintiffs are incapable of maintaining their standing for the multiple years that such a case can take to complete. The issue in this case is capable of repetition but evading review.

The second exception to the mootness doctrine is the public importance exception. *Sloan v. Greenville County*, 361 S.C. 568, 606 S.E.2d 464 (2004). Under that exception, a case must present "imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters of important public interest.'" *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) (*citing Sloan v. Greenville County*). The exception was established in South Carolina in the case of *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947). In that case, the Supreme Court of South Carolina, having already resolved the controversy between the parties by holding appointments to a board invalid, turned anyway to the matters in the case that it deemed of public importance. *Ashmore* at 96. "Questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest." *Id.* at 96. In a more recent case involving the public importance exception, the Supreme Court found it did not exist in a case involving federal and state preemption of zoning ordinances, applicability of zoning ordinances, and tort

liability because the case presented "no issue of the constitutionality or legality of government action." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). Here, the only question for this Court is whether or not SCDEW is legally entitled to require the online work search as a prerequisite to benefits. This question can be resolved in a class action as already determined by this Court in its Order Certifying Class.

More recently, in *South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), the court found a public importance exception in a case involving the composition of a board which was established by statute. The statute, S.C. Code Ann. § 11-43-140 (2011), places two members of the General Assembly onto the board allegedly in violation of the dual office holding provisions of the South Carolina Constitution. The court held that even where the Plaintiff did not assert a particularized injury he still had standing because the case presented a "colorable claim that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board," and therefore fit into the public importance exception.

Here both individual Plaintiffs testified about the difficulties faced by unemployment insurance recipients in losing even a single week of benefits as a result of the online work search requirement. Similarly, John Ruoff, after being qualified as an expert witness, testified about general hardships faced by recipients of unemployment insurance who are relying on those checks as a sole source of income while they search for employment. Ruoff further testified that the very purpose of Unemployment Insurance is to ameliorate the effects of losing a job.

Here, before this Court, is a matter of great public interest. SCDEW claims, as a matter of law, that a budget proviso of the General Assembly directing it to spend certain monies on implementing an online work search requirement not only entitles, but requires the agency to

design and implement such an online search requirement and to do so without any legislative oversight or input. As argued repeatedly by the Plaintiffs throughout the course of this litigation, that claim is erroneous under both the APA and SCDEW's own enabling legislation. Nonetheless, SCDEW has steadfastly enforced the online search requirement, with brief interruption, since the budget proviso was passed. Even if the court were to decide that the Plaintiffs do not have individual standing, the issue itself is important enough for the court to retain jurisdiction.

However, this Court does find that both Tami Bollerman and Archie Patterson have individual standing. This Court further finds that each of them also has standing on the basis of suffering harm than is capable of repetition but evading review. This Court also finds that each of them has standing based on the public importance exception.

IT IS THEREFORE ORDERED that this case move forward as a class action based on my finding that the named plaintiffs meet the requirements to serve as class representatives.

AND IT IS SO ORDERED.

Honorable Doyet A. Early, III
Judge of the Second Circuit

April 12, 2017
Bamberg, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP0600059

Lorinda A. Robinson, et al *vs.* SC Department of Employment & Work Force

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; ☐ Statement of Judgment by the Court:

Order Certifying Class

Dated at Barnwell, South Carolina, this 29th day of April, 2016.

Court Reporter:

S// Doyet A. Early, III

PRESIDING JUDGE - Doyet A. Early, III

This judgment was entered on the 5th day of May, 2016, and a copy mailed first class this 11th day of May, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

See Attached List of Attorneys

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Constance B. Mansfield – Deputy Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

ATTORNEYS FOR ROBINSON VS. SC DEPT OF EMPLOYMENT AND WORK FORCE

C. BRADLEY HUTTO
PO BOX 1084
ORANGEBURG, SC 29115

DANIEL W. WILLIAMS
BEDINGFIELD & WILLIAMS
PO BOX 616
BARNWELL, SC 29812

ALEXANDER D. PATERRA
104 S. CALHOUN ST.
GREENVILLE, SC 29601

STEPHEN R. SUGGS
PO BOX 7187
COLUMBIA, SC 29202

KENNETH WOODINGTON
PO BOX 8568
COLUMBIA, SC 29202-8568

2CC's
3CS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	
LORINDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN,	)	CIVIL ACTION NO.: 2013-CP-06-059
	)	
PLAINTIFFS,	)	ORDER CERTIFYING CLASS
	)	
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE,	)	
	)	
DEFENDANT.	)	

FILED FOR RECORD
2016 MAY -5 AM 9:32
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

Named Plaintiffs seek certification of a class of individuals who were wrongfully denied unemployment insurance benefits by the South Carolina Department of Employment and Workforce (hereinafter referred to as "SCDEW"). SCDEW is a State Agency charged by the South Carolina Legislature with the duty of processing unemployment claims in accordance with the Laws of this State. A hearing was held in this matter on January 11, 2016. After arguments and review of briefs, affidavits, and other evidence presented, this Motion is granted.

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

Named Plaintiffs define the class as all persons who are citizens and residents of South

MAE #1

Carolina who are eligible for unemployment insurance (UI) benefits but have not received payment because of procedures and policies required of class members by Defendant to make an online application for work as a prerequisite to his/her claim for benefits, this policy having not been promulgated as a regulation as mandated by statute. After applying a vigorous analysis of all five prerequisites for class certification as required by *Gardner v. South Carolina Department of Revenue*, 577 S.E.2d 190 (S.C. 2003), I find that the five (5) prerequisites for class certification have been met.

PREREQUISITES FOR CLASS CERTIFICATION

This action has been brought and may be maintained as a class action pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. Under South Carolina Rules of Civil Procedure 23(a), the proponent of the Class must show:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a) SCRCP.

Class actions are favored in South Carolina. *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 577, 703 S.E.2d 197, 204 (2010). The South Carolina Supreme Court has recognized and endorsed an expansive view and treatment of class actions. *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 523 S.E.2d 781 (2000) ("By omitting the additional requirements [of 23(b) from the Federal Rules of Civil Procedure], Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart."); *see also Grazia,*

MAE #2

id. Suits commonly involving large numbers of plaintiffs, each with a small individual claim, who, without the class action device, might have no practical recourse due to the high costs obligation, are appropriate for class prosecution. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 328 (D.S.C. 1991). In addition, "[t]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23." *Grazia*, 390 S.C. at 576, 703 S.E.2d at 204 (quoting *Califano*, 442 U.S. at 701).

The court has wide discretion in certifying a class action. *Waller v. Seabrook Island Prop. Owners Ass'n*, 388 S.E.2d 799, 801 (S.C. 1990). The focus for class certification is simply whether the prerequisites of Rule 23 have been met. *Tilley v. Pacesetter Corp.*, 508 S.E.2d 16, 21 (1998) (a court may not look to the merits when determining class certification).

1. The Proposed Class is so Numerous that Joinder of All Members is Impracticable.

"There is no requirement . . . that at the pleading stage of the case either the exact number of persons comprising the class be specified or the class members be identified." *McGann v. Mungo*, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986) (citation omitted). A "fluid, changing membership . . . does not render the class action device unsuitable." *Id.* There is no "magic number" necessary to establish numerosity. *See Green v. Cauthen*, 379 F.Supp. 361, 371-72 (D.S.C. 1974).

In *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), the South Carolina Court of Appeals upheld certification of a class of 228 persons. Based upon the Affidavit of John Matthews, this class may very well consist of over 60,000 people whose unemployment benefits were denied. SCDEW employee, Kevin Cummings, in his October 27, 2014 deposition, indicates approximately 50,000 persons were denied benefits

because of a failure to comply with the on-line work search requirement and these persons have not exhausted their benefits. Defendant, in its Memorandum against class certification, notes "that there is a large number of persons who have had claims stopped for a week or more because of failure to comply with the online work search requirement." Using Mr. Cummings estimations, the numerosity prerequisite is clearly satisfied.

2. There are Questions of Law or Fact Common to the Class.

The Class has common questions of law or fact as a result of the Defendant's policy; that is, the members of the class all have had their statutory benefits reduced or suspended because of the policy. Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." The South Carolina Supreme Court has provided guidance in this analysis. In *Gardner v. South Carolina Department of Revenue*, 577 S.E.2d 190 (S.C. 2003), the Court stated that:

> To establish commonality, a party must show that "there are questions of law or fact common to the class." 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. *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991).
>
> Critically, "not every issue in the case must be common to all class members." *O'Connor v. Boeing North Amer., Inc.*, 184 F.R.D. 311, 329 (C.D.Cal. 1998). Commonality is met only where the class shares a determinative issue. *See Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990) ("certification is proper only when a determinative critical issue overshadows all other issues ....").

Id. at 200-01.

In the present case, the Class Members share a common determinative issue. Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy.

MAE #4

The determinative issue for all members of the Class is whether SCDEW was required to enact the new policy as a regulation.

Defendants argue that Plaintiffs have the burden of proving they have met other requirements of receiving unemployment benefits, such as satisfying the four (4) job search requirement, being available for work, and actively seeking work. Therefore, commonality cannot be met. This argument is without merit. Plaintiffs specifically have limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement. They have not sought to certify a class to recover benefits for persons who were denied benefits for any other reason. Therefore, the prerequisite of commonality has been met.

3. The Claims of the Representative Party are Typical of the Claims of the Class Members.

SCRCP Rule 23(a)(3) requires that the claims of the Class Representative be "typical of the claims of the class." The typicality requirement compares the similarity of the named Plaintiff's claim to the claims of the class as a whole.

The proposed class action presents similar claims for each member. The named Representatives, i.e. each member of the class has suffered the same type of harm from the new Policy. Specifically, each member has had his/her unemployment benefits denied for at least one week because of SCDEW's implementation of the online work search requirement policy. Further, each Plaintiff is capable of becoming employed in the future and suffering harm from this policy. Moreover, each named plaintiffs and each class member are seeking the same remedial measures. Each member is seeking damages for the lost benefits and an injunction until the SCDEW enacts the policy as a regulation. Therefore, the typicality requirement is satisfied.

4. The Representative Party will Fairly and Adequately Protect the Interests of the Class.

SCRCP Rule 23(a)(4) requires that the representative party will fairly and adequately protect the interests of the Class. There are two criteria which the Court should examine in determining whether the Class Representative adequately protects the interests of the class. These two criteria are: "(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel." *Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983); *see Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) (*Runion* "sets forth all criteria to be considered in determining whether a particular named plaintiff will adequately represent a proposed class.").

The first element requires the class representative to "not have any significant antagonistic or conflicting interests to the unnamed members of the class." *Runion*, 98 F.R.D. at 317. "The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citation omitted). Since the plaintiffs all have the same economic interests, namely acquiring unemployment compensation, there is no antagonism within this class. The second element should be satisfied because the representative parties have counsel and there is no evidence of close relationships between the representative members and the SCDEW. *Runion*, 98 F.R.D. at 317-18 (denying Mr. Runion as representative because of his close relationship with the defendant). Further, Plaintiffs have supplied the Affidavit of John Freeman indicating Plaintiffs' counsel experiences with class action litigation, as well as their own affidavits outlining their experience. I find that the prerequisite of adequacy has been met.

5. The Amount in Controversy Exceeds One Hundred Dollars for Each Class Member.

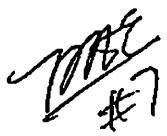
The final prerequisite is that the amount in controversy must exceed one hundred dollars for each member of the class. SCRCP 23(a)(5). This amount is based on the amount claimed by the Plaintiffs if it is apparent that the claim is made in good faith. *See Gardner v. Newsome Chevrolet-Buick*, 404 S.E.2d 200, 201 (S.C. 1991). Here, the amount in controversy is the amount of unemployment compensation denied for each member. The average weekly benefit, according to SCDEW's website, is $236.00. Each of the members of the class has missed at least one week's worth of benefits as a result of SCDEW's arbitrary policy. Further, Plaintiffs have defined the class as those who have more than $100.00 in damages. Therefore, any claim of less than $100.00 is excluded. I find that the prerequisite $100.00 threshold for damages has been met.

CONCLUSION AND CLASS DEFINITION

I find that all five (5) prerequisites of class certification have been met, including the damages threshold, and hereby certify a class consisting of all persons who are: (1) citizens and residents of South Carolina; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; and (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search on or after August 5, 2012.

No part of this Order shall be construed as a decision on the merits of this case.

AND IT IS SO ORDERED.



Honorable Doyet A. Early, III
Judge of the Second Circuit

Bamberg, South Carolina
April 29, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP0600059

Lorinda A. Robinson, et al *vs.* SC Department of Employment & Work Force

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; ☐ Statement of Judgment by the Court:

Consent Order Dismissing Plaintiff Wooten

Dated at Barnwell, South Carolina, this 11th day of January, 2016.

Court Reporter:

S/ Doyet A. Early, III

PRESIDING JUDGE - Doyet A. Early, III

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

This judgment was entered on the 21st day of January, 2016, and a copy mailed first class this 27th day of January, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Daniel Webster Williams PO Box 616 Barnwell, SC 29812
C. Bradley Hutto Williams And Williams PO Box 1084 Orangeburg, SC 29116
Alexander D. Paterra 104 S. Calhoun St. Greenville, SC 29601
Stephen R. Suggs PO Box 7187 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kenneth P. Woodington PO Box 8568 Columbia, SC 29202-8568 (mica filing)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Constance B. Mansfield – Deputy Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson, Tami Bollerman, Fred Alexander and Pamela Wooten	)	Civil Action No. 2013-CP-06-0059
Plaintiffs,	)	**CONSENT ORDER DISMISSING PLAINTIFF WOOTEN**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

FILED
2016 JAN 21 PM 1:26

Plaintiffs' counsel has advised Defendant's counsel that Plaintiff Pamela Wooten no longer wished to appear as a named Plaintiff in this case. Accordingly, with the consent of counsel for both parties, Plaintiff Wooten is dismissed without prejudice.

AND IT IS SO ORDERED.

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

Bamberg, South Carolina

Jan 21, ~~2015~~ 2016

WE CONSENT:

DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812

(803) 259-2759
danwilliams@bellsouth.net

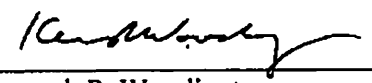
C. BRADLEY HUTTO
Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
Paterra & Osmer, LLC
107 E. Park Avenue
Greenville, S.C. 29601
864-387-6872
alex.paterra@paterralaw.com

STEPHEN R. SUGGS
South Catolina Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

WE CONSENT:



Kenneth P. Woodington
Davidson & Lindemann, P.A.
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855

ATTORNEYS FOR DEFENDANT

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013- CP-06-059

Lorenda Robison, Elaine Nix, Archie Patterson, and Tami Bollerman	South Carolina Department of Employment & Workforce
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ 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; ☐ 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.

FILED
2014 JUN 30 A 11:51
BARNWELL COUNTY CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion for Summary Judgment is DENIED. I find there are issues of fact in dispute that preclude summary judgment.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

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	0136 Judge Code	6-23-14 Date

SCRCP Form 4C (03/2013)

DLSCN 07/03/14

For Clerk of Court Office Use Only

This judgment was entered on the 30th day of June 20 14 and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of June, 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

See attached list

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield
CLERK OF COURT
Deputy

Court Reporter:

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.

DLSCN 07/03/14

ATTORNEYS FOR ROBINSON VS. SC DEPT OF EMPLOYMENT AND WORK FORCE

C. BRADLEY HUTTO
PO BOX 1084
ORANGEBURG, SC 29115

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BEDINGFIELD & WILLIAMS
PO BOX 616
BARNWELL, SC 29812

ALEXANDER D. PATERRA
107 EAST PARK AVENUE
GREENVILLE, SC 29601

STEPHEN R. SUGGS
PO BOX 7187
COLUMBIA, SC 29202

KENNETH WOODINGTON
PO BOX 8568
COLUMBIA, SC 29202-8568

DLSCN 07/03/14

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP0600059

Lorinda A. Robinson, et al *vs.* SC Department of Employment & Work Force

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; ☐ Statement of Judgment by the Court:

Order Denying Change of Venue

Dated at Barnwell, South Carolina, this 23rd day of October, 2013.

Court Reporter:

s/ Doyet A. Early, III

PRESIDING JUDGE - Doyet A. Early, III

This judgment was entered on the 25th day of October, 2013, and a copy mailed first class this 6th day of November, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

SEE ATTACHED LIST

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Constance B. Mansfield – Deputy Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

ATTORNEYS FOR ROBINSON VS. SC DEPT OF EMPLOYMENT AND WORK FORCE

C. BRADLEY HUTTO
PO BOX 1084
ORANGEBURG, SC 29115

DANIEL W. WILLIAMS
BEDINGFIELD & WILLIAMS
PO BOX 616
BARNWELL, SC 29812

(5 cs a filing)

ALEXANDER D. PATERRA
107 EAST PARK AVENUE
GREENVILLE, SC 29601

STEPHEN R. SUGGS
PO BOX 7187
COLUMBIA, SC 29202

KENNETH WOODINGTON
PO BOX 8568
COLUMBIA, SC 29202-8568

5-C

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN, PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE, DEFENDANT.	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-06-059 ORDER DENYING CHANGE OF VENUE

FILED FOR RECORD
2013 OCT 25 AM 11:33
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

Plaintiffs bring this class action on behalf of all persons who lost unemployment benefits after failing to perform or correctly perform online work searches. Defendant, SCDEW (hereinafter referred to as "DEW"), in this action, pursuant to S.C. Code §15-77-50, moves for a change of venue from Barnwell County to Richland County.

Both parties agree that §15-77-50 is controlling.

S.C. Code §15-77-50 provides:

> The circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies ... affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit *where such question, action or controversy shall arise*. (emphasis added)

The question before this Court is of whether the proper venue is in Barnwell or Richland County turns upon where the action or controversy 'arises'. Few cases have interpreted §15-77-50 and none of these cases have focused on the phrase "shall arise". However, *Whetstone v. South Carolina Dept. of Highways and Public Transportation,*

272 S.C. 324, 252 S.E.2d 35 (1979) is instructive. *Whetstone* involved a wreck with a vehicle owned and operated by the Highway Department. Although the wreck occurred in Orangeburg County, suit was filed in Barnwell County. Citing S.C. Code Ann §15-77-50, the Court found that the action arose out of Orangeburg County where the wreck and injury occurred, and that the First Circuit was the proper venue. In other words, the action arises where the facts which give rise to it occur.

Where a cause of action arises has been interpreted in the context of South Carolina's door closing statute (§15-5-150). A cause of action accrues [or arises] when **facts** exist which authorize one party to maintain an action against another. *Cornelius v. Atlantic Greyhound lines, 177 S.C. 93, 180 S.E.2d 791(1935).* 'Arise and accrue' are interchangeable in the context of when a suit comes into existence. *Murphy v. Owens-Corning Fiberglass Corp. 356 S.C. 592, 590 S.E. 2d 479 (2003).* Normally, for a case to be actionable there must be a wrongful act and the act must result in an injury, *id* citing, *Gray v. Southern Facilities, 256 S.C. 558, 183 S.E.2d 438 (1971).*

When an action or controversy arises can also be interpreted in the context of standing to sue. For a case, controversy or cause of action to arise, there must be an injury or harm to that party who brings suit. *Energy Research Foundation v. Waddel, etal, 95 S.C. 100, 367 S.E. 2nd 419 (1988).* The party moving to change venue bears the burden of proving facts sufficient to establish that venue is improper. *Elders v. Parker, 286 S.C. 228,332S.E.2d 563(Ct.App.1985).* Therefore, it is incumbent on Defendant to establish that the action arose in Richland County and venue in Richland County is proper.

To this end, Defendant offers the Affidavit of Kevin Cummings, who is employed by DEW and reviewed information held by DEW regarding Elaine Nix and Lorinda Robinson (¶ 2 & 3). Mr. Cummings' Affidavit does not dispute that Plaintiffs Robinson and Nix live in Barnwell County, became unemployed in the Second Circuit, applied for unemployment benefits in Barnwell County, received benefits in Barnwell County, and attempted on-line job searches in Barnwell County. Instead, Cummings asserts that no "action" was taken by DEW in Barnwell County pertaining to the online work requirement (¶ 4). With regards to Robinson, he asserts a "stop was placed on her benefits the week of August 18, 2012 and August 25, 2012, and that 'action' was taken in Columbia. Then he states...." when such **decisions** are appealed, the appeals are heard at the local office." (¶ 6) (emphasis added). He also states that DEW's actions regarding the general implementation of the online work search request were taken in Columbia.

While Cummings affidavit refers to an "action" to deny or "stop" benefits to Plaintiff Robinson, this does not evidence a factual occurrence. Rather, the "action" referred to is the legal conclusion or decision by the Department that, as a matter of law, Ms. Robinson should be disqualified from receiving benefits. Further, while the policy implementing the online work search requirement may have been made in Columbia, the implementation of a policy by the State does not give rise to a cause of action until an actual injury occurs.

Since most state agencies are located in Richland County, most agency policies are implemented in Richland County and most agency decisions are rendered in Richland County. Taking defendant's position to its logical extreme would mean that all actions filed against a state agency involving its policies or decisions must be brought in

Richland County regardless of where the actual controversy arose. If the legislature had intended this result, it could have easily provided for venue of all actions involving state agencies to be in Richland County. For DEW, it chose not to do so. For other agencies and particular types of actions, the legislature has limited venue to Richland County. (For example, see: S.C. Code Ann. §8-13-1374 -failure to file campaign report deemed to have occurred in Richland County; §37-6-408-declaratory judgment regarding rule of the Department of Consumer Affairs to be filed in Richland County; §38-21-310 – action against insurer for violation of insurance holding company statutes shall be brought by Insurance Director in Richland County; §46-3-170 – Agricultural Commissioner may sue or be sued, and suit may be brought in Richland County or in County where cause of action accrued.)

Defendant conflates factual occurrences with decision of the department and the implementation of the online work search requirement. Consequently, it has failed to meet its burden of proof and its Motion to Change Venue should be denied. Further, I find from Plaintiffs' Affidavits that venue is proper in Barnwell County.

In support of its position that this action or controversy arises out of Barnwell County, Plaintiffs offer the Affidavit of Lorenda Robinson and Elaine Nix. Ms. Robinson's Affidavit asserts that she lives in Barnwell County; became unemployed in the Second Circuit (Bamberg County); applied for unemployment benefits in Barnwell County; received unemployment benefits in Barnwell County; and was denied unemployment benefits in Barnwell County for failure to search for work online and that the online search would have been conducted in Barnwell County.

Similarly, Ms. Nix's Affidavit asserts that she lives in Barnwell County; became unemployed in the Second Circuit; applied for unemployment benefits in Barnwell County; received unemployment benefits in Barnwell County; and was denied unemployment benefits in Barnwell County for failure to search for work online and that the online search would have been conducted in Barnwell County. The facts which give rise to the injury caused by that policy occurred in Barnwell County and the Second Judicial Circuit. Both Nix and Robinson became unemployed, applied for benefits, received benefits, and failed to properly apply online for benefits in the Second Judicial Circuit and mainly in Barnwell County.

But for the failure of the online work search process in Barnwell County, Plaintiffs Robinson and Nix would not have standing to assert any action as a result of the department's failure to promulgate regulations. Therefore, this action and controversy arise out of Barnwell County and the Second Circuit.

COMPLEX CASE DESIGNATION

Plaintiffs also have a pending motion to designate this case as complex. At the hearing held on October 2, 2013, I declined to rule on that motion since, if I granted the change of venue, ruling on complex case designation would be up to another judge in the new venue. Having denied the change of venue motion, and finding this case to be complex since it is a putative class action, I designate the case as complex and appoint D. A. Edmond to hear all matters until such time as the case is concluded.

Barnwell County is a proper venue for this action. Defendant's Motion for Change of Venue is denied and Plaintiff's Motion for Complex Case Designations is granted.

#3

IT IS SO ORDERED.

Honorable Doyet A. Early, III
Judge of the Second Circuit

Oct 23, 2013
Bamberg, South Carolina

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 29, 2018

The Honorable Rhonda Dale McElveen
PO Box 723
Barnwell SC 29812-0723

FILED FOR RECORD
2018 JUL -2 PM 2:29
RHONDA D. MCELVEEN
CLERK OF COURT
BARNWELL, S.C.

REMITTITUR

Re: Lorinda Robinson v. SCDEW
Lower Court Case No. 2013CP0600059
Appellate Case No. 2017-001208

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: William H. Davidson, II, Esquire
Kenneth P. Woodington, Esquire
Daniel Webster Williams, Esquire
C. Bradley Hutto, Esquire
Alexander D. Paterra, Esquire
Stephen R. Suggs, Esquire

The South Carolina Court of Appeals

Lorinda Robinson, Elaine Nix, Archie Patterson, and Tami Bollerman, Plaintiffs,

Of whom Archie Patterson and Tami Bollerman, are the Respondents,

v.

South Carolina Department of Employment and Workforce, Appellant.

Appellate Case No. 2017-001208

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.

C.J.

J.

J.

Columbia, South Carolina

FILED

February 1, 2018

The South Carolina Court of Appeals

Lorinda Robinson, Elaine Nix, Archie Patterson, and Tami Bollerman, Plaintiffs,

Of whom Archie Patterson and Tami Bollerman, are the Respondents,

v.

South Carolina Department of Employment and Workforce, Appellant.

Appellate Case No. 2017-001208

ORDER

Appellant has appealed the circuit court's orders certifying a class, finding the Plaintiffs have standing to represent the class, and denying reconsideration. After careful consideration, Respondents' motion to dismiss is granted because the underlying orders on appeal are not immediately appealable. *See Schein v. Lamar*, 274 S.C. 329, 263 S.E.2d 383 (1980); *Knowles v. Standard Savings and Loan Assoc.*, 274 S.C. 58, 261 S.E.2d 49 (1979) (finding class certification orders are not immediately appealable). Remittitur will be sent as required by Rule 221(b), SCACR.

James E. Lockemy

FOR THE COURT

Columbia, South Carolina

cc:
William H. Davidson, II, Esquire
Kenneth P. Woodington, Esquire
Daniel Webster Williams, Esquire
C. Bradley Hutto, Esquire

FILED
Dec. 8, 2017

Alexander D. Paterra, Esquire
Stephen R. Suggs, Esquire
The Honorable Doyet A. Early, III

The Supreme Court of South Carolina

Lorinda Robinson, Elaine Nix, Archie Patterson, and Tami Bollerman, Plaintiffs,

Of whom Archie Patterson and Tami Bollerman, are the Respondents,

v.

South Carolina Department of Employment and Workforce, Petitioner.

Appellate Case No. 2018-000349
Lower Court Case No. 2013-CP-06-00059

FILED FOR RECORD
2018 JUN 28 PM 11:49
S.C.

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

June 27, 2018

cc:
Daniel Webster Williams, Esquire
C. Bradley Hutto, Esquire

Alexander D. Paterra, Esquire
Stephen R. Suggs, Esquire
William H. Davidson, II, Esquire
Kenneth P. Woodington, Esquire
The Honorable Rhonda Dale McElveen
The Honorable Jenny Abbott Kitchings

MIC

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson, Tami Bollerman, Fred Alexander, and Pamela Wooten,	)	Civil Action No. 2013-CP-06-0059
Plaintiffs,	)	**AMENDED ANSWER TO AMENDED COMPLAINT**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

FILED FOR RECORD
2015 FEB 19 PM 1:14

Defendant South Carolina Department of Employment and Workforce, answering the Amended Complaint herein, alleges and shows the following:

FOR A FIRST DEFENSE

1. The Amended Complaint fails to state facts sufficient to constitute a cause of action.

FOR A SECOND DEFENSE

2. The venue of this action is improper, because the question, action or controversy arose in Richland County, where Defendant's headquarters are located. In addition, S.C. Code Ann. § 41-27-610 provides that actions of the kind complained of in this action are deemed to have been committed in part at the office of the Defendant in Columbia.

FOR A THIRD DEFENSE

3. Any allegation of the Amended Complaint not hereinafter admitted or qualified is denied.

1 KPL

4. Paragraphs 1 through 4 of the Amended Complaint are admitted on information and belief.

5. Answering Paragraph 5, it is admitted that the Defendant SCDEW is an agency of the State of South Carolina. The duties of the agency are as set forth in its governing statutes. Except as expressly admitted, Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 sets forth legal conclusions and/or descriptions of the relief sought, neither of which can be admitted or denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

8. The first sentence of Paragraph 8 is merely descriptive of the class certification relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof. Answering the second and last sentence of Paragraph 8, it is denied that the referenced actions of DEW were required by statute to be the subject of a regulation.

9. Paragraph 9 is denied for lack of information.

10. Paragraphs 10 and 11 are denied.

11. Paragraphs 12 through 14 are denied for lack of information.

12. Paragraph 15 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

13. Answering Paragraph 16, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

14. Answering Paragraphs 17and 18, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 17 and 18 are denied.

15. Paragraph 19 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

16. Answering Paragraph 20, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph and to the law governing the Defendant's operations for the best evidence of the applicable law and practice. Except as expressly admitted, Paragraph 20 is denied.

17. Answering Paragraph 21, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 21 is denied.

18. Answering Paragraphs 22 and 23, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 22 and 23 are denied.

19. Answering Paragraph 24, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 24 is denied.

20. Paragraph 25 is denied.

21. Answering Paragraph 26, Defendant would refer the Court to the documents in the files of the Defendants setting forth the actions referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 26 is denied. It is specifically denied that Plaintiff Nix was ever found to be eligible for unemployment benefits at any time that the online job search policy was in effect, and it is therefore also denied that she was ever denied unemployment benefits for not performing an online work search.

22. Answering Paragraph 27, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

23. Paragraphs 28 through 34 are denied.

24. Paragraph 35 is denied for lack of information. In addition, it is denied that Plaintiffs are entitled to recover attorneys' fees.

25. Paragraph 36 is denied.

26. Paragraph 37 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

27. Answering Paragraph 38, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

28. Paragraph 39 is denied.

29. Paragraph 40 is denied for lack of information.

30. Paragraph 41 is denied.

31. Paragraph 42 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

32. Answering Paragraph 43, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

33. Answering Paragraph 44, Defendant would refer the Court to the pertinent legal authorities and facts of record for the best evidence of Plaintiffs' entitlement to UI benefits. Except as expressly admitted, Paragraph 44 is denied.

34. Paragraph 45 is denied.

35. Paragraph 46 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

36. Any remaining allegations of the Amended Complaint, including Paragraphs 1 through 6 of the prayer for relief, are denied.

FOR A THIRD DEFENSE

37. Plaintiffs are not entitled to relief from this Court, because they did not exhaust administrative remedies.

FOR A FOURTH DEFENSE

38. On information and belief, some or all Plaintiffs lack standing to pursue their present claims. Specifically, Plaintiffs Patterson, Alexander and Wooten have exhausted or will soon exhaust all benefits available to them even without the week or weeks for which they did not receive benefits as a result of not conducting online work searches. In addition, Plaintiff Robinson was disqualified for benefits for the weeks in question for the additional reason that she owed reimbursement to DEW because she collected benefits while employed.

FOR A FIFTH DEFENSE

39. On information and belief, there is no present case or controversy between the Defendant and some or all of the Plaintiffs.

FOR A SIXTH DEFENSE

40. On information and belief, the claims of some or all of the Plaintiffs are not ripe for adjudication.

FOR A SEVENTH DEFENSE

41. On information and belief, some or all Plaintiffs have failed to take steps that could have mitigated any financial losses claimed by them.

FOR AN EIGHTH DEFENSE

42. Some or all Plaintiffs may have consented to the job search conditions of which they now complain.

FOR A NINTH DEFENSE

43. Some or all Plaintiffs may have waived any claim they may have had to challenge the matters of which they complain.

FOR A TENTH DEFENSE

44. Some or all Plaintiffs may be estopped from challenging the matters of which they complain.

FOR AN ELEVENTH DEFENSE

45. If an individual Plaintiff is asserting impossibility of compliance with the challenged policy, such impossibility may also have rendered it impossible for that individual to obtain employment for that week, so that such Plaintiff would not have suffered any detriment as a result of the policy.

FOR A TWELFTH DEFENSE

46. Plaintiffs have unreasonably delayed filing this action, and their claims are accordingly barred by the doctrine of laches.

FOR A THIRTEENTH DEFENSE

47. On information and belief, the claims of at least some of the Plaintiffs are presently moot, or will soon become moot. Specifically, Plaintiffs Patterson, Alexander and Wooten have or will soon exhaust all benefits available to them even without the week or weeks for which they did not receive benefits as a result of not conducting online work searches. In addition, Plaintiff Robinson was disqualified for benefits for the weeks in question for the additional reason that she owed reimbursement to DEW because she collected benefits while employed.

FOR A FOURTEENTH DEFENSE

48. The actions of which the Plaintiffs complain have been authorized by the General Assembly, pursuant to Proviso 67.7 of the Part 1B provisos of the General Appropriations Act for fiscal year 2012-2013 (H. 4813, as ratified by the General Assembly), Proviso 83.6. of the Part 1B provisos of the 2013-2014 General Appropriations Act (H. 3710, as ratified by the General Assembly), and Proviso 83.6 of the Part 1B provisos of the 2014-2015 General Appropriations Act (H. 4701, as ratified by the General Assembly). In addition to any other reasons for regulations to be unnecessary under the facts of this case, those provisos have rendered it unnecessary for the Defendant to promulgate regulations in order to implement and enforce the online job search requirement, including the stoppage of benefits to claimants for weeks in which they do not comply with the online work search requirement.

FOR A FIFTEENTH DEFENSE

49. This Court lacks jurisdiction over this case, because § 41-35-690, S.C. Code Ann., provides that the appeal procedure referenced therein is the sole and exclusive appeal procedure for the kinds of issues involved in this case.

FOR A SIXTEENTH DEFENSE

50. Plaintiffs' claims are barred by the ten-day limitation period set forth in § 41-35-660 for appeals of agency determinations or redeterminations.

FOR A SEVENTEENTH DEFENSE

51. In addition to any other reasons why the claim of Plaintiff Robinson is barred, that claim is also barred because Ms. Robinson claims relief only for the weeks ending August 18, 2012 and August 25, 2012. However, she was specifically disqualified from receiving benefits for those weeks because she was found to have collected unemployment earlier in the year 2012 while actually employed.

WHEREFORE, having fully answered the Amended Complaint, the Defendant prays that the Amended 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.

BY: Ken Woodington / DAD

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
F: 803-806-8855
Email: wdavidson@dml-law.com
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

February 16, 2015

MIC

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 2013-CP-06-0059
Plaintiffs,	)	**ANSWER TO AMENDED COMPLAINT**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

FILED FOR RECORD
2015 FEB -9 PM 1:18
LORINDA B. MCELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

Defendant South Carolina Department of Employment and Workforce, answering the Amended Complaint herein, alleges and shows the following:

FOR A FIRST DEFENSE

1. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A SECOND DEFENSE

2. The venue of this action is improper, because the question, action or controversy arose in Richland County, where Defendant's headquarters are located. In addition, S.C. Code Ann. § 41-27-610 provides that actions of the kind complained of in this action are deemed to have been committed in part at the office of the Defendant in Columbia.

FOR A THIRD DEFENSE

3. Any allegation of the Complaint not hereinafter admitted or qualified is denied.

4. Paragraphs 1 through 4 of the Complaint are admitted on information and belief.

5. Answering Paragraph 5, it is admitted that the Defendant SCDEW is an agency of the State of South Carolina. The duties of the agency are as set forth in its governing statutes. Except as expressly admitted, Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 sets forth legal conclusions and/or descriptions of the relief sought, neither of which can be admitted or denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

8. The first sentence of Paragraph 8 is merely descriptive of the class certification relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof. Answering the second and last sentence of Paragraph 8, it is denied that the referenced actions of DEW were required by statute to be the subject of a regulation.

9. Paragraph 9 is denied for lack of information.

10. Paragraphs 10 and 11 are denied.

11. Paragraphs 12 through 14 are denied for lack of information.

12. Paragraph 15 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

13. Answering Paragraph 16, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

14. Answering Paragraphs 17and 18, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 17 and 18 are denied.

15. Paragraph 19 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

16. Answering Paragraph 20, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph and to the law governing the Defendant's operations for the best evidence of the applicable law and practice. Except as expressly admitted, Paragraph 20 is denied.

17. Answering Paragraph 21, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 21 is denied.

18. Answering Paragraphs 22 and 23, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 22 and 23 are denied.

19. Answering Paragraph 24, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 24 is denied.

20. Paragraph 25 is denied.

21. Answering Paragraph 26, Defendant would refer the Court to the documents in the files of the Defendants setting forth the actions referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 26 is denied. It is

specifically denied that Plaintiff Nix was ever found to be eligible for unemployment benefits at any time that the online job search policy was in effect, and it is therefore also denied that she was ever denied unemployment benefits for not performing an online work search.

22. Answering Paragraph 27, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

23. Paragraphs 28 through 34 are denied.

24. Paragraph 35 is denied for lack of information. In addition, it is denied that Plaintiffs are entitled to recover attorneys' fees.

25. Paragraph 36 is denied.

26. Paragraph 37 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

27. Answering Paragraph 38, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

28. Paragraph 39 is denied.

29. Paragraph 40 is denied for lack of information.

30. Paragraph 41 is denied.

31. Paragraph 42 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

32. Answering Paragraph 43, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

33. Answering Paragraph 44, Defendant would refer the Court to the pertinent legal authorities and facts of record for the best evidence of Plaintiffs' entitlement to UI benefits. Except as expressly admitted, Paragraph 44 is denied.

34. Paragraph 45 is denied.

35. Paragraph 46 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

36. Any remaining allegations of the Complaint, including Paragraphs 1 through 6 of the prayer for relief, are denied.

FOR A THIRD DEFENSE

37. Plaintiffs are not entitled to relief from this Court, because they did not exhaust administrative remedies.

FOR A FOURTH DEFENSE

38. On information and belief, some or all Plaintiffs lack standing to pursue their present claims. Specifically, Plaintiffs Patterson, Alexander and Wooten have exhausted or will soon exhaust all benefits available to them even without the week or weeks for which they did not receive benefits as a result of not conducting online work searches. In addition, Plaintiff Robinson was disqualified for benefits for the weeks in question for the additional reason that she owed reimbursement to DEW because she collected benefits while employed.

FOR A FIFTH DEFENSE

39. On information and belief, there is no present case or controversy between the Defendant and some or all of the Plaintiffs.

FOR A SIXTH DEFENSE

40. On information and belief, the claims of some or all of the Plaintiffs are not ripe for adjudication.

FOR A SEVENTH DEFENSE

41. On information and belief, some or all Plaintiffs have failed to take steps that could have mitigated any financial losses claimed by them.

FOR AN EIGHTH DEFENSE

42. Some or all Plaintiffs may have consented to the job search conditions of which they now complain.

FOR A NINTH DEFENSE

43. Some or all Plaintiffs may have waived any claim they may have had to challenge the matters of which they complain.

FOR A TENTH DEFENSE

44. Some or all Plaintiffs may be estopped from challenging the matters of which they complain.

FOR AN ELEVENTH DEFENSE

45. If an individual Plaintiff is asserting impossibility of compliance with the challenged policy, such impossibility may also have rendered it impossible for that individual to obtain employment for that week, so that such Plaintiff would not have suffered any detriment as a result of the policy.

FOR A TWELFTH DEFENSE

46. Plaintiffs have unreasonably delayed filing this action, and their claims are accordingly barred by the doctrine of laches.

FOR A THIRTEENTH DEFENSE

47. On information and belief, the claims of at least some of the Plaintiffs are presently moot, or will soon become moot. Specifically, Plaintiffs Patterson, Alexander and Wooten have or will soon exhaust all benefits available to them even without the week or weeks for which they did not receive benefits as a result of not conducting online work searches. In addition, Plaintiff Robinson was disqualified for benefits for the weeks in question for the additional reason that she owed reimbursement to DEW because she collected benefits while employed.

FOR A FOURTEENTH DEFENSE

48. The actions of which the Plaintiffs complain have been authorized by the General Assembly, pursuant to Proviso 67.7 of the Part 1B provisos of the General Appropriations Act for fiscal year 2012-2013 (H. 4813, as ratified by the General Assembly), Proviso 83.6. of the Part 1B provisos of the 2013-2014 General Appropriations Act (H. 3710, as ratified by the General Assembly), and Proviso 83.6 of the Part 1B provisos of the 2014-2015 General Appropriations Act (H. 4701, as ratified by the General Assembly). In addition to any other reasons for regulations to be unnecessary under the facts of this case, those provisos have rendered it unnecessary for the Defendant to promulgate regulations in order to implement and enforce the online job search requirement, including the stoppage of benefits to claimants for weeks in which they do not comply with the online work search requirement.

FOR A FIFTEENTH DEFENSE

49. This Court lacks jurisdiction over this case, because § 41-35-690, S.C. Code Ann., provides that the appeal procedure referenced therein is the sole and exclusive appeal procedure for the kinds of issues involved in this case.

FOR A SIXTEENTH DEFENSE

50. Plaintiffs' claims are barred by the ten-day limitation period set forth in § 41-35-660 for appeals of agency determinations or redeterminations.

FOR A SEVENTEENTH DEFENSE

51. In addition to any other reasons why the claim of Plaintiff Robinson is barred, that claim is also barred because Ms. Robinson claims relief only for the weeks ending August 18, 2012 and August 25, 2012. However, she was specifically disqualified from receiving benefits for those weeks because she was found to have collected unemployment earlier in the year 2012 while actually employed.

WHEREFORE, having fully answered the Complaint, 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.

BY: _____

WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
F: 803-806-8855
Email: wdavidson@dml-law.com
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

February 5, 2015

1C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	CIVIL ACTION NO.: 2013-CP-06-059
LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON, TAMI BOLLERMAN, FRED ALEXANDER, AND PAMELA WOOTEN,	)	
PLAINTIFFS,	)	**AMENDED SUMMONS (NON-JURY) (DECLARATORY JUDGMENT/ CLASS ACTION)**
v.	)	
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORK FORCE,	)	
DEFENDANT.	)	

FILED FOR RECORD
2015 FEB 17 AM 9:33

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff at P.O. Box 7187, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

BY: _____

DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812
(803) 259-2759
danwilliams@bellsouth.net

C. BRADLEY HUTTO
Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
Paterra & Osmer, LLC
107 E. Park Avenue
Greenville, S.C. 29601
864-387-6872
alex.paterra@paterralaw.com

STEPHEN R. SUGGS
South Carolina Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
February 3, 2015

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON, TAMI BOLLERMAN, FRED ALEXANDER, AND PAMELA WOOTEN, PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORK FORCE, DEFENDANT.	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-06-059 **AMENDED COMPLAINT** **(NON-JURY)** **(DECLARATORY JUDGMENT/ CLASS ACTION)**

FILED FOR RECORD
2015 FEB 17 AM 9:33
RECEIVED BY EILEEN
CLERK OF COURT
BARNWELL, S.C.

Plaintiffs would respectfully show unto the Court:

PARTIES AND JURISDICTION

1. Named Plaintiffs Lorenda Robinson and Elaine Nix are citizens and residents of Barnwell County, South Carolina.

2. Named Plaintiff Archie Patterson is a citizen and residents of Richland County, South Carolina.

3. Named Plaintiff Tami Bollerman and Fred Alexander are citizens and residents of Spartanburg County, South Carolina.

4. Named Plaintiff Pamela Wooten is a citizen and resident of Lexington County, South Carolina.

5. Defendant South Carolina Department of Employment and Workforce (SCDEW) is a governmental agency of the state of South Carolina and is responsible for paying unemployment benefits.

6. As to Lorenda Robinson and Elaine Nix, all or the most substantial part of the acts or omissions which give right to this cause of action occurred in Barnwell County South Carolina.

7. This Court has jurisdiction to declare rights, status, and other legal relations and to grant injunctive and other relief pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. 15-53-10, *et seq.* Plaintiffs seek this Courts declaration of the parties' rights as set forth herein.

PROPOSED PLAINTIFF CLASS

8. Named Plaintiffs seek certification of a class consisting of all persons who are citizens and residents of South Carolina who are or have been eligible for unemployment insurance (UI) benefits but have not received payment because of procedures and policies required of class members by Defendant to make an online application for work as a prerequisite to his/her claim for benefits. This policy was not promulgated as a regulation as mandated by Statute.

9. The class is so numerous that joinder of all members is impracticable.

10. There are questions of law and/or fact common to the class, including but not limited to whether Class Plaintiffs were wrongfully denied benefits due to Defendant violation of the Administrative Procedures Act and the South Carolina Employment Security Act when defendant began requiring class members to apply online for work without first promulgating the new policy as a regulation and submitting these regulations to the General Assembly for approval.

11. Plaintiffs' claims are typical of the claims of the class as a whole.

12. Plaintiffs will fairly and adequately represent the interest of the class. Plaintiffs know of no conflicts of interest among members of the class.

13. The attorneys representing the Plaintiffs are experienced class action litigators and will adequately represent the interest of the entire class.

14. The amount in controversy for each class member exceeds One Hundred ($100.00) Dollars.

15. A class action is appropriate in this case for one or more of the following reasons:

a. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members who were not parties to the adjudications or substantially impair or impede their ability to protect their interests.

b. Defendant has acted on grounds generally applicable to the class, making appropriate injunctive or declaratory relief with respect to the class as a whole.

BACKGROUND

16. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

17. In enacting the South Carolina Employment Security Act, the Legislature Declared the public policy of the act to be as follows:

> "Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family..."
> SC Code Ann 41-27-20 (1976).

18. Unemployment insurance is a social insurance program established by the Legislature and codified at South Carolina Code Ann 41-27-10 et seq. through 41-35-10 et seq.

19. Under the South Carolina Employment Security Act, the named Plaintiffs and potential class members have a state-created entitlement to received UI benefits so long as they maintain their eligibility for benefits, file claims for those benefits as required by the Department, and do not fail to seek work or refuse any offer of suitable work and are actively seeking work.

20. SCDEW's previous work requirement for UI benefits required the recipient to search for employment while receiving benefits.

21. Recently, SCDEW changed the work requirements by making claims for benefits conditional on the use of the SC Works website and reduced the search week from seven (7) days to five (5). The UI recipient must use the SC Works website and use his/her SC Works user name to conduct job searches or UI benefits will be terminated, even if the recipient conducted job searches that previously would have satisfied the work requirement. This change was not promulgated by regulations. Moreover, if computer records reflect the online job search was not performed, benefits are stopped prior to a determination by adjudication that benefits are not owed.

22. S.C. Code Ann §41-27-510 provides SCDEW...."**must** promulgate regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as the department considers necessary." (emphasis added). More specifically, §41-35-610 provides....."A claim for benefits **must** be made pursuant to regulations the department promulgates." (emphasis added).

23. The South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-

10 *et seq.* sets forth the method all State agencies must follow in implementing regulations. The APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

24. Even if regulations for claims for benefits are not mandatory, SCDEW has treated this policy as a binding norm by which all recipients of UI benefits are bound, without exception to their individualized needs. Because the online application requirement has been treated and applied as a binding norm, SCDEW was required to promulgate this policy as a regulation under the plain terms of the APA. SCDEW has failed to do so.

25. This failure to follow the Employment Security Act and the APA process has harmed many otherwise eligible recipients of UI benefits entitling them to relief as set forth below.

ALLEGATIONS AS TO NAMED PLAINTIFFS

26. As a result of becoming unemployed, Lorenda Robinson, Elaine Nix, Archie Patterson. Tami Bollerman, Fred Alexander and Pamela Wooten timely filed applications for UI benefits. Based upon prior work and satisfaction of the legal requirements to qualify for UI benefits under South Carolina law, he/she was determined eligible for UI benefits by the SC Department of Employment and Workforce and began receiving UI benefits. All named Plaintiffs have continued to look for work and have filed UI claims as required by the South Carolina Department of Employment and Workforce. Despite the fact that each of the named Plaintiffs complied with all legally promulgated regulations and filed a timely claim for benefits, SCDEW denied one or more weeks of benefits. Plaintiffs' benefits were denied because they, according to the Department, did not file an online job application using the department website.

Additionally one or more of the name plaintiffs have been denied benefits because, according to the Department, Plaintiffs did not properly file an online job application under the Department's newly defined search requirements. The Department, in addition to previously discussed changes, also changed the search week definition; such that all job searches had to be performed on a weekday in order to be accepted. Plaintiffs Nix and Robinson applied for benefits in Barnwell County and were denied benefits in Barnwell County.

FOR A FIRST CAUSE OF ACTION
VIOLATION OF THE SC APA & EMPLOYMENT SECURITY ACT

27. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

28. The SCDEW has refused to adhere to its statutory duty to promulgate regulations under the South Carolina Employment Security Act and in accordance with the APA.

29. That the failure to promulgate regulations violates the Employment Security Act and the APA and results in Defendant SCDEW having unfettered decision-making authority, with no opportunity for public participation in the rulemaking process; no review by the General Assembly; and no opportunity for independent judicial review.

30. That such unfettered decision-making authority has marked potential for, and indeed has resulted in, numerous instances of failure by SCDEW to provide statutory benefits of UI.

31. That by failing to promulgate regulations, SCDEW has left the public, the individually named Plaintiffs, potential class members, defendant's employees, the legislature and the courts with no meaningful access to generally applicable standards which can be judicially reviewed.

32. That Plaintiffs are informed and believe they are entitled to a Declaratory

Judgment declaring Defendant's online application procedure and policies requiring class members to apply online for work through its website to be in violation of the South Carolina Employment Security Act and the APA and therefore, null and void, since:

a) they were implemented without being promulgated as regulations as mandated by statute; and,

b) the policy constitutes a binding norm requiring promulgation as a regulation under the APA.

33. As a further ground for relief, Plaintiffs believe they are entitled to a Declaratory Judgment finding payments should not have been stopped prior to a determination of Plaintiffs' rights to their benefits.

34. That Defendant does not have substantial justification for establishing procedures and policies without promulgating them as regulations pursuant to the APA since S.C. Code Ann §41-27-510 specifically requires that SCDEW "...must promulgate regulations applicable to unemployed individuals...".

35. Plaintiffs have incurred attorneys' fees as a result of contesting state action and believe SCDEW should be required to contribute towards those fees.

36. That upon information and belief, there are no special circumstances which would make an award of attorneys' fees and costs unjust.

37. That Plaintiffs are informed and believe they are entitled to an order of this court requiring Defendant to contribute toward Plaintiffs' attorney fees and costs pursuant to S.C. Code Ann. 15-77-300, in such amounts as statutorily allowed.

FOR A SECOND CAUSE OF ACTION
INJUNCTIVE RELIEF

38. Plaintiffs repeat the above allegations and incorporate them herein.

39. Plaintiffs believe the applicable law is clear and that Plaintiffs' likelihood of

success in this action is great. Even when this case is decided on the merits in their favor, Plaintiff class members will suffer irreparable harm if this Court does not enjoin Defendant from requiring online application.

40. Class members live from pay check to pay check and often are without reserve funds to pay weekly expenses and bills, adding to their economic insecurity and thwarting the declared purpose of the Employment Security Act. They may have limited access to computers and internet service and may live a distance from the unemployment office and traveling to the office to use its computer is unduly burdensome.

41. Issuing an injunction will not harm SCDEW since it will not alleviate Plaintiffs' responsibility to apply for work in the manner historically required by the SCDEW. An injunction would merely relieve them of the burden applying online if other methods of seeking employment are more feasible.

42. Plaintiffs are informed and believe this Court should issue its Order temporarily enjoining Defendant from denying benefits for failure to apply online until the matter is decided on its merits.

FOR A THIRD CAUSE OF ACTION
ACCOUNTING

43. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

44. Plaintiffs had a statutorily granted right to UI benefits.

45. Defendant has refused to pay those benefits as required and refused to give them to eligible recipients.

46. Plaintiffs demand an accounting of all benefits denied to each class member for

not applying online for work and for judgment against Defendant in that amount together with prejudgment and post judgment interest.

WHEREFORE, Plaintiffs pray this Court for an Order:

1. For certification of the class alleged above;
2. Declaring that Defendant SCDEW is required to, and that it shall promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings;
3. That Defendant be temporarily enjoined from enforcing its policy requiring online job application;
4. That Defendant be required to account for and pay all benefits denied as a result of its policy of online applications together with prejudgment interest and post judgment interest;
5. For attorney fees and costs; and,
6. For such other and further relief that this Court deems just and proper.

Respectfully submitted,

BY:

DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812
(803) 259-2759
danwilliams@bellsouth.net

C. BRADLEY HUTTO
Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
Paterra & Osmer, LLC
107 E. Park Avenue
Greenville, S.C. 29601
864-387-6872
alex.paterra@paterralaw.com

STEPHEN R. SUGGS
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Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
February 3, 2015

MIC

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	**AMENDED ANSWER**
	)	
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
Defendant.	)	
	)	

FILED FOR RECORD
2013 MAY 23 PM 1:12
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

Defendant South Carolina Department of Employment and Workforce, answering the Complaint herein, alleges and shows the following:

FOR A FIRST DEFENSE

1. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A SECOND DEFENSE

2. The venue of this action is improper, because the question, action or controversy arose in Richland County, where Defendant's headquarters are located. In addition, S.C. Code Ann. § 41-27-610 provides that actions of the kind complained of in this action are deemed to have been committed in part at the office of the Defendant in Columbia.

FOR A THIRD DEFENSE

3. Any allegation of the Complaint not hereinafter admitted or qualified is denied.

4. Paragraphs 1 through 3 of the Complaint are admitted on information and belief.

5. Answering Paragraph 4, it is admitted that the Defendant SCDEW is an agency of the State of South Carolina. The duties of the agency are as set forth in its governing statutes. Except as expressly admitted, Paragraph 4 is denied.

6. Paragraph 5 is denied for lack of information.

7. Paragraph 6 sets forth legal conclusions and/or descriptions of the relief sought, neither of which can be admitted or denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

8. Paragraphs 7 through 12 are denied for lack of information.

9. Paragraph 13 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

10. Answering Paragraph 14, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

11. Answering Paragraphs 15 and 16, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 15 and 16 are denied.

12. Paragraph 17 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

13. Answering Paragraph 18, Defendant would refer the Court to the law governing the Defendant's operations for the best evidence of the applicable law. Except as expressly admitted, Paragraph 18 is denied.

14. Answering Paragraph 19, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 19 is denied.

15. Answering Paragraphs 20 and 21, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 20 and 21 are denied.

16. Answering Paragraph 22, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 22 is denied.

17. Paragraph 23 is denied.

18. Answering Paragraph 24, Defendant would refer the Court to the documents in the files of the Defendants setting forth the actions referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 24 is denied.

19. Answering Paragraph 25, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

20. Paragraphs 26 through 31 are denied.

21. Paragraph 32 is denied for lack of information. In addition, it is denied that Plaintiffs are entitled to recover attorneys' fees.

22. Paragraph 33 is denied.

23. Paragraph 34 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

24. Answering Paragraph 35, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

25. Paragraph 36 is denied.

26. Paragraph 37 is denied for lack of information.

27. Paragraph 38 is denied.

28. Paragraph 39 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

29. Answering Paragraph 40, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

30. Answering Paragraph 41, Defendant would refer the Court to the pertinent legal authorities and facts of record for the best evidence of Plaintiffs' entitlement to UI benefits. Except as expressly admitted, Paragraph 41 is denied.

31. Paragraph 42 is denied.

32. Paragraph 43 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

33. Any remaining allegations of the Complaint, including Paragraphs 1 through 6 of the prayer for relief, are denied.

FOR A THIRD DEFENSE

34. Plaintiffs are not entitled to relief from this Court, because they did not exhaust administrative remedies.

FOR A FOURTH DEFENSE

35. On information and belief, some or all Plaintiffs lack standing to pursue their present claims.

FOR A FIFTH DEFENSE

36. On information and belief, there is no present case or controversy between the Defendant and some or all of the Plaintiffs.

FOR A SIXTH DEFENSE

37. On information and belief, the claims of some or all of the Plaintiffs are not ripe for adjudication.

FOR A SEVENTH DEFENSE

38. On information and belief, some or all Plaintiffs have failed to take steps that could have mitigated any financial losses claimed by them.

FOR AN EIGHTH DEFENSE

39. Some or all Plaintiffs may have consented to the job search conditions of which they now complain.

FOR A NINTH DEFENSE

40. Some or all Plaintiffs may have waived any claim they may have had to challenge the matters of which they complain.

FOR A TENTH DEFENSE

41. Some or all Plaintiffs may be estopped from challenging the matters of which they complain.

FOR AN ELEVENTH DEFENSE

42. If an individual Plaintiff is asserting impossibility of compliance with the challenged policy, such impossibility may also have rendered it impossible for that individual to obtain employment for that week, so that such Plaintiff would not have suffered any detriment as a result of the policy.

FOR A TWELFTH DEFENSE

43. Plaintiffs have unreasonably delayed filing this action, and their claims are accordingly barred by the doctrine of laches.

FOR A THIRTEENTH DEFENSE

44. On information and belief, the claims of at least some of the Plaintiffs are presently moot, or will soon become moot.

WHEREFORE, having fully answered the Complaint, 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.

BY: /s/
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS for Defendant

Columbia, South Carolina

May 20, 2013

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Lorenda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 13-CP-06-059
	)	
Plaintiffs,	)	**ANSWER**
	)	
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
Defendant.	)	
	)	

2013 APR 23 PM 1:03
RHONDA D. MCELVEEN
CLERK OF COURT
BARNWELL, S.C.

Defendant South Carolina Department of Employment and Workforce, answering the Complaint herein, alleges and shows the following:

FOR A FIRST DEFENSE

1. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A SECOND DEFENSE

2. The venue of this action is improper, because the question, action or controversy arose in Richland County, where Defendant's headquarters are located. In addition, S.C. Code Ann. § 41-27-610 provides that actions of the kind complained of in this action are deemed to have been committed in part at the office of the Defendant in Columbia.

FOR A THIRD DEFENSE

3. Any allegation of the Complaint not hereinafter admitted or qualified is denied.

4. Paragraphs 1 through 3 of the Complaint are admitted on information and belief.

DLSCN 04/25/13

5. Answering Paragraph 4, it is admitted that the Defendant SCDEW is an agency of the State of South Carolina. The duties of the agency are as set forth in its governing statutes. Except as expressly admitted, Paragraph 4 is denied.

6. Paragraph 5 is denied for lack of information.

7. Paragraph 6 sets forth legal conclusions and/or descriptions of the relief sought, neither of which can be admitted or denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

8. Paragraphs 7 through 12 are denied for lack of information.

9. Paragraph 13 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

10. Answering Paragraph 14, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

11. Answering Paragraphs 15 and 16, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 15 and 16 are denied.

12. Paragraph 17 sets forth legal conclusions which can neither be admitted nor denied. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

13. Answering Paragraph 18, Defendant would refer the Court to the law governing the Defendant's operations for the best evidence of the applicable law. Except as expressly admitted, Paragraph 18 is denied.

DLSCN 04/25/13

14. Answering Paragraph 19, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 19 is denied.

15. Answering Paragraphs 20 and 21, Defendant would refer the Court to the statutes referenced therein for the best evidence of their contents. Except as expressly admitted, Paragraphs 20 and 21 are denied.

16. Answering Paragraph 22, Defendant would refer the Court to the documents setting forth the requirements referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 22 is denied.

17. Paragraph 23 is denied.

18. Answering Paragraph 24, Defendant would refer the Court to the documents in the files of the Defendants setting forth the actions referenced in that paragraph for the best evidence of what occurred. Except as expressly admitted, Paragraph 24 is denied.

19. Answering Paragraph 25, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

20. Paragraphs 26 through 31 are denied.

21. Paragraph 32 is denied for lack of information. In addition, it is denied that Plaintiffs are entitled to recover attorneys' fees.

22. Paragraph 33 is denied.

23. Paragraph 34 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

DLSCN 04/25/13

24. Answering Paragraph 35, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

25. Paragraph 36 is denied.

26. Paragraph 37 is denied for lack of information.

27. Paragraph 38 is denied.

28. Paragraph 39 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

29. Answering Paragraph 40, Defendant reiterates and realleges each and every paragraph and affirmative defense of this Answer as if set forth herein verbatim.

30. Answering Paragraph 41, Defendant would refer the Court to the pertinent legal authorities and facts of record for the best evidence of Plaintiffs' entitlement to UI benefits. Except as expressly admitted, Paragraph 41 is denied.

31. Paragraph 42 is denied.

32. Paragraph 43 is merely descriptive of the relief sought by Plaintiff, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of the Defendant, Defendant would deny same and demand strict proof thereof.

33. Any remaining allegations of the Complaint, including Paragraphs 1 through 6 of the prayer for relief, are denied.

FOR A THIRD DEFENSE

34. Plaintiffs are not entitled to relief from this Court, because they did not exhaust administrative remedies.

DLSCN 04/25/13

FOR A FOURTH DEFENSE

35. On information and belief, some or all Plaintiffs lack standing to pursue their present claims.

FOR A FIFTH DEFENSE

36. On information and belief, there is no present case or controversy between the Defendant and some or all of the Plaintiffs.

WHEREFORE, having fully answered the Complaint, 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.

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BY: _____

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COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS for Defendant

Columbia, South Carolina

April __, 2013

DLSCN 04/25/13

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORK FORCE, DEFENDANT.	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-06-059 **SUMMONS** **(NON-JURY)** **(DECLARATORY JUDGMENT)** **CLASS ACTION**

FILED FOR RECORD
2013 FEB 14 PM 4:46
RHONDA D. KEITH-KEEN
CLERK OF COURT
BARNWELL, S.C.

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff at P.O. Box 7187, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

BY: _____

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ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
February 14, 2013

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORK FORCE, DEFENDANT.	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.: 2013-CP-06-059 **COMPLAINT** **(NON-JURY)** **(DECLARATORY JUDGMENT/ CLASS ACTION)**

FILED FOR RECORD
2013 FEB 14 PM 4:16
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL, S.C.

Plaintiffs would respectfully show unto the Court:

PARTIES AND JURISDICTION

1. Named Plaintiffs Lorenda Robinson and Elaine Nix are citizens and residents of Barnwell County, South Carolina.

2. Named Plaintiff Archie Patterson is a citizen and residents of Richland County, South Carolina.

3. Named Plaintiff Tami Bollerman is a citizen and resident of Spartanburg County, South Carolina.

4. Defendant South Carolina Department of Employment and Workforce (SCDEW) is a governmental agency of the state of South Carolina and is responsible for paying unemployment benefits.

5. As to Lorenda Robinson and Elaine Nix, all or the most substantial part of the acts or omissions which give right to this cause of action occurred in Barnwell County South Carolina.

6. This Court has jurisdiction to declare rights, status, and other legal relations and to grant injunctive and other relief pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. 15-53-10, *et seq.* Plaintiffs seek this Courts declaration of the parties' rights as set forth herein.

PROPOSED PLAINTIFF CLASS

6. Named Plaintiffs seek certification of a class consisting of all persons who are citizens and residents of South Carolina who are eligible for unemployment insurance (UI) benefits but have not received payment because of procedures and policies required of class members by Defendant to make an online application for work as a prerequisite to his/her claim for benefits. This policy was not promulgated as a regulation as mandated by Statute.

7. The class is so numerous that joinder of all members is impracticable.

8. There are questions of law and/or fact common to the class, including but not limited to whether Class Plaintiffs were wrongfully denied benefits due to Defendant violation of the Administrative Procedures Act and the South Carolina Employment Security Act when defendant began requiring class members to apply online for work without first promulgating the new policy as a regulation and submitting these regulations to the General Assembly for approval.

9. Plaintiffs' claims are typical of the claims of the class as a whole.

10. Plaintiffs will fairly and adequately represent the interest of the class. Plaintiffs know of no conflicts of interest among members of the class.

11. The attorneys representing the Plaintiffs are experienced class action litigators and will adequately represent the interest of the entire class.

12. The amount in controversy for each class member exceeds One Hundred ($100.00) Dollars.

13. A class action is appropriate in this case for one or more of the following reasons:

a. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members who were not parties to the adjudications or substantially impair or impede their ability to protect their interests.

b. Defendant has acted on grounds generally applicable to the class, making appropriate injunctive or declaratory relief with respect to the class as a whole.

BACKGROUND

14. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

15. In enacting the South Carolina Employment Security Act, the Legislature Declared the public policy of the act to be as follows:

> "Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family..."
> SC Code Ann 41-27-20 (1976).

16. Unemployment insurance is a social insurance program established by the Legislature and codified at South Carolina Code Ann 41-27-10 et seq. through 41-35-10 et seq.

17. Under the South Carolina Employment Security Act, the named Plaintiffs and potential class members have a state-created entitlement to received UI benefits so long as they maintain their eligibility for benefits, file claims for those benefits as required by the

Department, and do not fail to seek work or refuse any offer of suitable work and are actively seeking work.

18. SCDEW's previous work requirement for UI benefits required the recipient to search for employment while receiving benefits.

19. Recently, SCDEW changed the work requirements by making claims for benefits conditional on the use of the SC Works website and reduced the search week from seven (7) days to five (5). The UI recipient must use the SC Works website and use his/her SC Works user name to conduct job searches or UI benefits will be terminated, even if the recipient conducted job searches that previously would have satisfied the work requirement. This change was not promulgated by regulations.

20. S.C. Code Ann §41-27-510 provides SCDEW...."**must** promulgate regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as the department considers necessary." (emphasis added). More specifically, §41-35-610 provides....."A claim for benefits **must** be made pursuant to regulations the department promulgates." (emphasis added).

21. The South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-10 *et seq.* sets forth the method all State agencies must follow in implementing regulations. The APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

22. Even if regulations for claims for benefits are not mandatory, SCDEW has treated this policy as a binding norm by which all recipients of UI benefits are bound, without exception

to their individualized needs. Because the online application requirement has been treated and applied as a binding norm, SCDEW was required to promulgate this policy as a regulation under the plain terms of the APA. SCDEW has failed to do so.

23. This failure to follow the Employment Security Act and the APA process has harmed many otherwise eligible recipients of UI benefits entitling them to relief as set forth below.

ALLEGATIONS AS TO NAMED PLAINTIFFS

24. As a result of becoming unemployed, Lorenda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman timely filed applications for UI benefits. Based upon prior work and satisfaction of the legal requirements to qualify for UI benefits under South Carolina law, he/she was determined eligible for UI benefits by the SC Department of Employment and Workforce and began receiving UI benefits. All named Plaintiffs have continued to look for work and have filed UI claims as required by the South Carolina Department of Employment and Workforce. Despite the fact that each of the named Plaintiffs complied with all legally promulgated regulations and filed a timely claim for benefits, SCDEW denied one or more weeks of benefits. Plaintiffs' benefits were denied because they, according to the Department, did not file an online job application using the department website. Additionally one or more of the name plaintiffs have been denied benefits because, according to the Department, Plaintiffs did not properly file an online job application under the Department's newly defined search requirements. The Department, in addition to previously discussed changes, also changed the search week definition; such that all job searches had to be performed on a weekday in order to be accepted. Plaintiffs Nix and Robinson applied for benefits in Barnwell County and were denied benefits in Barnwell County.

FOR A FIRST CAUSE OF ACTION
VIOLATION OF THE SC APA & EMPLOYMENT SECURITY ACT

25. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

26. The SCDEW has refused to adhere to its statutory duty to promulgate regulations under the South Carolina Employment Security Act and in accordance with the APA.

27. That the failure to promulgate regulations violates the Employment Security Act and the APA and results in Defendant SCDEW having unfettered decision-making authority, with no opportunity for public participation in the rulemaking process; no review by the General Assembly; and no opportunity for independent judicial review.

28. That such unfettered decision-making authority has marked potential for, and indeed has resulted in, numerous instances of failure by SCDEW to provide statutory benefits of UI.

29. That by failing to promulgate regulations, SCDEW has left the public, the individually named Plaintiffs, potential class members, defendant's employees, the legislature and the courts with no meaningful access to generally applicable standards which can be judicially reviewed.

30. That Plaintiffs are informed and believe they are entitled to a Declaratory Judgment declaring Defendant's online application procedure and policies requiring class members to apply online for work through its website to be in violation of the South Carolina Employment Security Act and the APA and therefore, null and void, since:

a) they were implemented without being promulgated as regulations as mandated by statute; and,

b) the policy constitutes a binding norm requiring promulgation as a regulation under the APA.

31. That Defendant does not have substantial justification for establishing procedures and policies without promulgating them as regulations pursuant to the APA since S.C. Code Ann §41-27-510 specifically requires that SCDEW "...must promulgate regulations applicable to unemployed individuals...".

32. Plaintiffs have incurred attorneys' fees as a result of contesting state action and believe SCDEW should be required to contribute towards those fees.

33. That upon information and belief, there are no special circumstances which would make an award of attorneys' fees and costs unjust.

34. That Plaintiffs are informed and believe they are entitled to an order of this court requiring Defendant to contribute toward Plaintiffs' attorney fees and costs pursuant to S.C. Code Ann. 15-77-300, in such amounts as statutorily allowed.

FOR A SECOND CAUSE OF ACTION
INJUNCTIVE RELIEF

35. Plaintiffs repeat the above allegations and incorporate them herein.

36. Plaintiffs believe the applicable law is clear and that Plaintiffs' likelihood of success in this action is great. Even when this case is decided on the merits in their favor, Plaintiff class members will suffer irreparable harm if this Court does not enjoin Defendant from requiring online application.

37. Class members live from pay check to pay check and often are without reserve funds to pay weekly expenses and bills, adding to their economic insecurity and thwarting the declared purpose of the Employment Security Act. They may have limited access to computers and internet service and may live a distance from the unemployment office and traveling to the office to use its computer is unduly burdensome.

38. Issuing an injunction will not harm SCDEW since it will not alleviate Plaintiffs' responsibility to apply for work in the manner historically required by the SCDEW. An injunction would merely relieve them of the burden applying online if other methods of seeking employment are more feasible.

39. Plaintiffs are informed and believe this Court should issue its Order temporarily enjoining Defendant from denying benefits for failure to apply online until the matter is decided on its merits.

FOR A THIRD CAUSE OF ACTION
ACCOUNTING

40. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

41. Plaintiffs had a statutorily granted right to UI benefits.

42. Defendant has refused to pay those benefits as required and refused to give them to eligible recipients.

43. Plaintiffs demand an accounting of all benefits denied to each class member for not applying online for work and for judgment against Defendant in that amount together with prejudgment and post judgment interest.

WHEREFORE, Plaintiffs pray this Court for an Order:

1. For certification of the class alleged above;
2. Declaring that Defendant SCDEW is required to, and that it shall promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings;

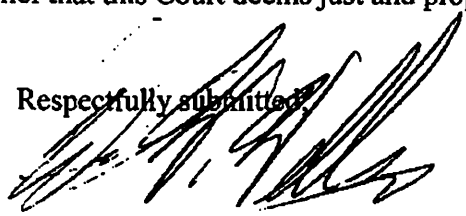
3. That Defendant be temporarily enjoined from enforcing its policy requiring online job application;

4. That Defendant be required to account for and pay all benefits denied as a result of its policy of online applications together with prejudgment interest and post judgment interest;

5. For attorney fees and costs; and,

6. For such other and further relief that this Court deems just and proper.

Respectfully submitted,



BY:

DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812
(803) 259-2759
danwilliams@bellsouth.net

C. BRADLEY HUTTO
Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
Paterra & Osmer, LLC
107 E. Park Avenue
Greenville, S.C. 29601
864-387-6872
alex.paterra@paterralaw.com

STEPHEN R. SUGGS
South Carolina Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
February 14, 2013

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**MEMORANDUM IN SUPPORT OF**
v.	)	
	)	**AMENDED MOTION TO ALTER OR AMEND**
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

This matter is before the Court on the Amended Motion to Alter or Amend, filed on March 29, 2019 by the Defendant South Carolina Department of Employment & Workforce's ("DEW"). That motion is the only matter remaining to be decided in the Court of Common Pleas in this case. Because Judge Newman has not previously been involved with this case, the present Memorandum sets forth, as briefly as possible, the prior history of the case, followed by a discussion of the grounds for present motion.

FACT AND PROCEDURAL HISTORY

1. Background facts.

This action was filed in 2013 as a putative class action. The subject matter of the case concerned the manner in which claimants for unemployment benefits are required to document their eligibility for those benefits.

By way of background, unemployment compensation benefits are paid to "persons unemployed through no fault of their own." S.C. Code Ann. § 41-27-20. From the outset of the

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state's unemployment legislation, the right to receive benefits has always been conditioned on the claimant's being "able to work and available for work" in his usual employment or other similar employment for which the claimant is qualified. § 41-35-110(3). The claimant must also be "actively seeking work." *Id.* A related requirement is found in § 41-35-120(5), which provides for disqualification for benefits for a claimant who has failed to apply for or to accept suitable work when offered. The claimant at all times bears the burden of showing that he or she is available for work, able to work, and actively seeking work. *See, e.g., Hyman v. South Carolina Employment Sec. Commission,* 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959).

Each week of unemployment constitutes a new claim period, for which the claimant bears the burden of showing compliance with the statutory requirements cited above. March 3, 2014, Affidavit of Kevin L. Cummings, ¶ 4. This need for a new showing every week renders the procedure for obtaining unemployment benefits substantially different from such entitlements as Social Security or a permanent disability claim, where an initial showing permits the person to continue to receive the benefit indefinitely as long as there is no change in circumstances.

Prior to a 2012 legislative enactment, DEW's practice in connection with verifying a person's work searches (sometimes referred to herein for simplicity as the "old way") had been to require a person to maintain a paper form (UCB-303) documenting contacts with potential employers each week. Cummings Affidavit, ¶ 7. The form, Exhibit A to the Cummings Affidavit, required the claimant to list a number of details about each job search contact, such as the date of the contact, the employer contacted, the type of work sought, the person contacted, and the results of the contact. Each claimant was required to complete the form weekly. Cummings Affidavit, ¶ 7.

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For claimants who were deemed eligible for benefits but were still unemployed at the beginning of a new weekly claim period, the claimant would renew his or her claim for a benefit on a weekly basis, typically by phone or online. Cummings Affidavit, ¶ 4. When such renewals were made, the claimant was required to provide to DEW a series of statements to the effect that during the week in question, the claimant had not worked or received earnings and was able, available and looking for work. *Id.*, Par. 6.

In practice, the numbers of unemployed persons and the limited staff resources at DEW make it impracticable for DEW to conduct, on a weekly basis, a detailed review of each claimant's efforts each week to comply with the statutory requirements of being able to work, available for work, and actively seeking work. Nevertheless, verifications of this weekly information were made on a periodic basis. Cummings Affidavit, ¶ 10. At those times, the claimants were required to submit to DEW proof of work searches, i.e., the completed Form UCB-303. *Id.* DEW would then randomly conduct verifications of the information provided by the claimant on the form. *Id.*[1] If DEW's review of the job search contact information revealed that a verifiably false claim of a job search contact had been made, DEW required repayment of the claim amount for the period in question. *Id.*

Because this process, that is, the "old way," had obvious limitations in terms of affording DEW a reliable method of verifying the claimants' job search efforts, as discussed in n. 1 above,

[1] In practice, if a claimant listed contacts that the claimant never actually made, it was often difficult for DEW to verify that the contacts were indeed not actually made. *Id.*, ¶ 11. Such verifications would need to come from potential employers, but potential employers were not required to keep records of contacts by jobseekers. *Id.* In addition, employers would not necessarily remember whether or not an individual had contacted them about potential employment. *Id.* As a result, a claimant would not necessarily be required to repay benefits from a past week merely because a listed employer job contact could not confirm that the claimant made contact with that employer during the period in question.

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the General Assembly enacted legislation in 2012 to improve the job search verification process. That legislation took the form of a proviso, first enacted in the Appropriations Act covering fiscal year 2012-2013, which required "that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified." General Appropriations Act for fiscal year 2012-2013 (H. 4813, as ratified by the General Assembly), Proviso 67.7. The language of that proviso, establishing the "one online job search requirement" (referenced herein as the "new way") took effect on July 1, 2012, the first day of that fiscal year. The same language was repeated in the Appropriations Acts for the next three fiscal years, i.e., through June 30, 2016, the only period covered by this lawsuit. After that, the pertinent law was changed.

Accordingly, pursuant to the General Assembly's direction in the proviso, DEW began in August 2012, to implement the "new way," requiring each claimant for unemployment compensation benefits to conduct at least one job search each week using DEW's online work search website. The other three job searches were still required to be documented on the written form UCB-303, as had been the case previously, and the periodic interview process remained unchanged. Cummings Affidavit, ¶ 8.

The new way of verifying job searches led to a number of disqualifications for a given week of benefits if a person failed to perform the online work search for that week. However, it has been documented in the record of the present case that if a person was so disqualified, the benefits that had been denied were often restored after only a minimal showing by the claimant. For instance, some claimants who advised that they were unaware of the online work search requirement (which had nevertheless been highly publicized) were able to get the week's benefit restored simply by so advising DEW through the appeals process. Others were able to get the

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benefit restored by pointing out computer errors, either on their part or on the part of DEW. Even if the benefit was not restored in the first appeal stage, it was often restored in the next stage of the DEW appeal process, which is an uncomplicated process routinely used by laypeople.

After the "new way" had been in effect for about six months, the Complaint in the present action was filed. The original Plaintiffs were four individuals who alleged that they were wrongfully denied one or more weeks of unemployment compensation benefits as a result of DEW's implementation of the new way for verifying job searches. [2] Plaintiffs sought to represent a class of persons who they claimed were similarly situated.

The basis for the Plaintiffs' claim in this case was that the new way had been implemented without the promulgation of regulations. At the time this action was filed, Plaintiffs' counsel were not aware of the legislative proviso that was the basis for DEW's implementation of the new way for verifying job searches. After Plaintiffs' counsel learned of the provisos, they nevertheless continued to argue that regulations were required.

2. Issues in this case and orders concerning those issues.

This case has presented the following issues, of which only (f) below is presently before this Court:

a. The merits of Plaintiffs' claim, that is, whether regulations were required when the "new way" verification requirement was the result of legislation.

b. The standing of the named Plaintiffs to bring this action on their own behalf and on behalf of a class.

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[2] As time went by, the individual claims of two of the four named Plaintiffs were shown to be deficient, leaving only two of the original Plaintiffs. Others were added, but they also were dropped once it became clear that they did not have a live claim for benefits. DEW has maintained, unsuccessfully so far, that the claims of the remaining two Plaintiffs are also moot or otherwise deficient.

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c. The subject matter jurisdiction of this Court to hear this action when S.C. Code Ann. § 41-35-690 provides that the appeal procedure provided in Chapter 35 of Title 41, not followed in this case, "is the sole and exclusive appeal procedure" for appeals of determinations by DEW.

d. The maintainability of this case as a class action even assuming the named Plaintiffs had standing.

e. The question of whether prejudgment interest should be awarded if Plaintiffs' were to prevail.

f. If Plaintiffs ultimately prevail on all other issues, the nature of the showing required to be made by each class member in order to receive payment for the week or weeks in which benefits were stopped.

After numerous motions and evidentiary hearings, the issues referenced above were decided in a series of Orders. For purposes of the present motion, DEW would refer the Court to Judge Early's Order of February 15, 2019, which decided the merits (issue (a) above), and reiterated prior holdings or otherwise discussed issues (b) through (e) above, none of which are still before the Court of Common Pleas. DEW has appealed all issues on which it did not prevail, and Plaintiffs filed a cross appeal with regard to the issue regarding prejudgment interest. The proceedings that followed the February 15, 2019, Order are discussed in the next section.

3. Issues now before the Court.

After Judge Early ruled against DEW on most of the issues above, there still remained an issue as to the nature of the showing necessary to be made by each class member in order to receive a payment. It has been DEW's contention that even if the "new way" is ultimately invalidated, i.e., if Judge Early's rulings on the merits are affirmed, a claimant would nevertheless need to comply

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with the "old way," that is, the claimant would be required to make the same kind of showing about the four weekly job searches that everyone else was required to make at the time. In other words, even if claimants who did not make an online work search are deemed to be excused from making that showing, there is nothing about such a ruling that should also excuse the claimant from making some kind of showing that four non-online job searches were performed during the week in question.

Judge Early's February 15, 2019, Order agreed with DEW on this point, holding that class membership should be limited to

> persons who were otherwise entitled to unemployment benefits for the weeks in which they were denied a benefit for failure to make an online work search. However, in order for a claimant to show that he or she was actually "eligible to receive unemployment benefits, through SCDEW," claimants must still show that they satisfied the requirements to receive benefits for the week or weeks in question, once the disqualification for failure to make an online work search is removed.

2/15/19 Order at 21 (emphasis added). Judge Early's aforementioned Order further ruled that "the class notice should reflect the need for class claimants to make the same showing required of every other claimant for unemployment benefits at the time, including the need to show that for the period in question they were actively seeking work." *Id.* at 25 (emphasis added). That holding by Judge Early came after a detailed discussion in the Order about why this approach to the claims process was mandated both by the DEW statutes and by the law pertaining to class actions in general, including a federal case, *Brown v. Porcher*, 502 F. Supp. 946 (D.S.C. 1980), aff'd in part, 660 F.2d 1001 (4th Cir. 1981), which was a class action involving SCDEW.

On February 20, 2019, Plaintiffs filed a motion to reconsider that part of Judge Early's February 15, 2019 Order. After a hearing on that motion on February 27, 2019, Judge Early on March 21, 2019, issued another Order reversing his earlier Order on the issue of the need for a

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claims made process. The March 21, 2019, Order held instead that class members had "met their burden of proving they were otherwise entitled to receive unemployment benefits, and a claims-made process is unnecessary." 3/21/19 Order at 6.

In addition, that Order contained a holding on a point never previously raised in the case by either party:

> SCDEW failed to promulgate any regulations establishing a mode of procedure adjudicate class members claims as required by Article I, Section 22 of the S.C. Constitution. Such structural defects in procedure violate due process and cannot be considered harmless. *McIntyre v. Securities Commissioner of South Carolina*, 2018 WL 5020070 __ S.C. __, __S.E.2d __ (Ct. App. 2018).

3/21/19 Order at 4 n.4 (emphasis added). Because that conclusion about due process was new to the case, DEW on March 29, 2019 filed the Motion to Alter or Amend which is now before the Court. In addition, since Judge Early had not previously ruled in favor of the Plaintiffs on the absence of a need for a claims made process (but instead had held just the opposite), DEW's Motion to Alter or Amend also challenged that holding by Judge Early. While DEW believes that Judge Early's February 15, 2019 Order correctly set forth the showing that a claimant should be required to make, the DEW's Motion to Alter or Amend, while reserving all rights, suggested an alternative process that would permit a lesser showing by class members.[3] The motion also notes several errors in the March 29, 2019 that may have been inadvertent.

Because of a concern that the filing of the present motion might not stay the time for appeal of the Orders in this case, DEW filed a Notice of Appeal on April 8, 2019, and then moved to have the case remanded for resolution of the present motion. The Court of Appeals granted that motion. After some uncertainty about whether Judge Early could hear the motion after his retirement, and

[3] In so moving, DEW has noted that it reserves all rights to challenge all other Orders and portions of Orders decided unfavorably to Defendant on issues of both substance and procedure.

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then some uncertainty about whether Court Administration would designate a judge, the motion is now before this Court for a determination. The issues presented by the motion are set forth below.

ARGUMENT

1. The Order's reference to due process involved an issue not previously raised by Plaintiffs, and was in error in any event.

Until the March 21, 2019 Order made mention of it, this case has never involved a due process claim. Since the point appears for the first time in an Order, it is an appropriate issue for a Motion to Alter or Amend.

As an initial matter, it should be noted that Plaintiffs never raised a due process claim in their pleadings. Thus, DEW was not on notice that due process was an issue in this case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) ("It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial."); *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

Further, it is axiomatic a party cannot prevail under a theory he failed to plead. A party can neither prevail on a cause of action he failed to plead nor obtain relief he never requested. *See Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375–76, 585 S.E.2d 292, 299 (2003) (finding plaintiffs could not recover under a particular theory when they failed to plead it in their complaint and amended complaint); *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010) (explaining a party "cannot benefit from an affirmative defense that was never pled"). Because Plaintiffs never pled a due process cause of action, this Court should amend the March 21, 2019 Order to remove Footnote 4.

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Even if these issues were properly before the Court, the Order was in error in holding that a due process violation occurred. An additional affidavit of Kevin Cummings, dated April 21, 2014, was executed in order to address a similar contention by Plaintiffs that the "new way" would make it necessary for DEW to establish a procedure or policy regarding the online search requirement. Mr. Cummings, in Paragraphs and 3 of his April 21, 2014 Affidavit, quoted the above contention by Plaintiffs and noted, in addressing that claim, that "When a claimant fails to perform at least one online job search in a given week, the claimant is denied benefits using the same procedures that apply whenever a claimant fails to show that he or she is able to work and available for work. No new procedures were necessary in order to enforce the online job search requirement." (Emphasis added.) As a result, Footnote 4 of the Order of March 21, 2019 was in error because (a) there was no need for a new procedure of any kind (whether implemented through regulations or otherwise) in order for the new way of verifying job searches to be enforced, and (b) Plaintiffs had never previously claimed that any action of DEW violated due process. To the extent that the Court's refusal to require a claims made process was based on the above reasoning, it led to an erroneous result. DEW's Motion to Alter of Amend has asked that the entire Order of March 21, 2019, including Footnote 4, be vacated.

2. The March 21, 2019 Order erred in holding that class members had met their burden of proving they were otherwise entitled to receive unemployment benefits, and that a claims-made process was therefore unnecessary.

For other reasons as well, the March 21, 2019 Order was in error in holding that class members did not need to make any showing at present that they were otherwise entitled to receive unemployment benefits. That holding was based on the erroneous finding that "class members were required to appear at an SCDEW office and were again required to certify they were able, available and actively seeking work. Class members were also required to bring their form UCB-

303 record of work seeking activities to the meeting." 3/21/19 Order at 3. Continuing, the Order held that "Class members, however[,] have already made this audit form [UCB-303] available to SCDEW. . . ." *Id.* at 4.

In fact, though, there was no evidence whatsoever to show that all, or even very many, of the class members actually reported to an SCDEW office, with or without a form UCB-303 and made a showing with regard to the week for which they were denied benefits for failure to make an online work search. To the contrary, if benefits had been denied for a given week because no online job search had been made for that week, and if the claimant did not appeal the denial of benefits for that week, there would have been no reason for DEW to review the form UCB-303 for that week.[4]

The effect of the March 21, 2019 Order would be to require DEW to mail a check to every class member without even the most minimal inquiry into each person's entitlement to a benefit. In so holding, the Order would excuse a potentially vast number of claimants from the requirements that were imposed on all other claimants at the time. While Defendant maintains that Plaintiffs' claims are both procedurally and substantively barred, the absence of a minimal claims made process would wreak a gross injustice on the State and the employers who provide for funding of unemployment insurance claims.

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[4] While the Order correctly holds that "For claimants who are not class members, SCDEW did not conduct a weekly review of the UCB-303 form," id. (emphasis added), that does not mean that DEW never reviewed the UCB-303 form for any weeks previous to the review, as the Order appears to imply. To the contrary, the record indicates that all claimants had their 303 forms subjected to periodic review, as DEW has previously pointed out in previous filings. See, e.g., Paragraphs 7, 8 and 10 of the Cummings affidavit of March 3, 2014; 1/11/17 Tr. at 34-35. Again, however, and as DEW has pointed out repeatedly in this litigation, there was no reason for DEW to have reviewed the part of a form UCB-303 that pertained to a week for which benefits were denied for failure to perform an online work search., because that failure rendered further review unnecessary.

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Instead, Defendant respectfully submits, the Court should have adopted, at a minimum, Defendant's suggestion that a simple claims made process should be followed. Under this simple process, class members would be required only to affirm under penalty of perjury that the class member, to the best of his or her recollection, actively sought work by performing four non-online work searches during the week or weeks for which a benefit was denied for failure to make an online work search, and that the class member was otherwise entitled to a benefit for the week or weeks in question. The Order of March 21 did not consider or address this suggestion by Defendant.

Also, while the Order, p. 4, further holds that "there is no rational basis to require a greater level of proof for class members who were wrongly denied benefits than from other claimants," the simple claims made requirement referenced above would actually require less of class members than had been required of others, so the holding of the Order to the contrary is without foundation. The Order, p. 4, further holds that "it is unlikely that claimants would still have these forms or be able to recreate them with any accuracy, since many of the claims are more than six-years old." However, if the Court were to adopt DEW's suggested alternative claims made procedure discussed above, a claimant would not be required to either to produce the form or to recreate them. Instead, a claimant would only be required to aver that to the best of their recollection, they actively sought work by performing four non-online work searches during the week or weeks for which a benefit was denied for failure to make an online work search, and met all other requirements as well. Such a requirement is a very minimal burden on class members but is at least some attempt to maintain integrity for the unemployment insurance system as contemplated by the entire statutory structure.

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3. Errors in the March 21, 2019, Order that may have been inadvertent.

Even if the Court rejects every contention made above, DEW submits that one other change should be made to the March 21, 2019 Order. That change would pertain to the exhaustion-of-benefits language, as taken from p. 5 of the Order. The change proposed by DEW to that language is indicated below by the use of **boldface** for inserted language and ~~strikeout~~ for language proposed to be deleted:

> Further Claims shall not be paid to persons who were paid the maximum amount of benefits they were entitled to receive **in the claim year of** ~~on~~ the week they were denied benefits. The Class shall be defined as all persons: (1) who were citizens and residents of South Carolina at the time the action was filed; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search between August 6, 2012, and July 1, 2016; and (5) who did not subsequently exhaust the full amount of benefits they were entitled to receive for the ~~week(s)~~ **claim year in which** their benefits were denied.

DEW submits that the language above in its original form in the March 21 Order does not reflect the actual intent of the Court, or even the relief requested by the Plaintiffs, as DEW understands it. The current language would erroneously fail to exclude claimants from receiving benefits for the week in which they were denied, even when restoring the benefit for that week would result in the claimant receiving more in benefits than he or she would be entitled to receive during the claim year. For this reason, Defendant requests that at a minimum, the above change be made, both to the March 21, 2019 Order and to the identical language that currently appears in Paragraph 5(5) of the Notice to Class Members attached to that Order.

CONCLUSION

For these reasons, DEW respectfully requests that the Order of March 21, 2019, and the amended Notice to Class Members filed with it, should be vacated, with the result that the pertinent

parts of the February 15, 2019 Order and its attached Notice to Class Members, as that Order and Notice related to the claims made process, would be reinstated, or that DEW's suggested claims made language referenced above be substituted instead. Alternatively, and at a minimum, Defendant requests that Footnote 4 should be deleted, and that the changes to the exhaustion-of-benefits language set forth above be made in the Order and in the Notice to Class Members.

DAVIDSON WREN & DEMASTERS, P.A.

BY: *Kenneth P. Woodington*
WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

May 29, 2020

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ELECTRONICALLY FILED - 2019 Mar 29 10:21 AM - BARNWELL - COMMON PLEAS - CASE#2013CP060059

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**AMENDED**
v.	)	**MOTION TO ALTER OR AMEND**
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

The undersigned attorney for the Defendant hereby moves to alter or amend the Order dated March 21, 2019.[1] On p. 4 of that Order, note 4, it is stated that "SCDEW failed to promulgate any regulations establishing a mode of procedure [to] adjudicate class members claims as required by Article I, Section 22 of the S.C. Constitution. Such structural defects in procedure violate due process and cannot be considered harmless." This is the first time in this case that any mention has been made of a due process claim regarding the referenced matter, and having appeared for the first time in an Order, is an appropriate issue for a Rule 59(e) motion.

The Order was in error in so holding. The affidavit of Kevin Cummings dated April 21, 2014 addresses this issue, although not in the context of a due process assertion by the Court or the Plaintiffs. Plaintiffs had claimed that it was necessary for DEW to establish a procedure or policy regarding the online search requirement. Mr. Cummings noted, in addressing that claim, that "When a claimant fails to perform at least one online job search in a given week, the

[1] This amended motion adds a request on p. 4 that the "exhaustion of benefits" language be changed in both the Order and the Notice to Class Members. The original motion inadvertently left out a request that the Notice be changed as well as the Order.

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claimant is denied benefits using the same procedures that apply whenever a claimant fails to show that he or she is able to work and available for work. No new procedures were necessary in order to enforce the online job search requirement." In addition, it must be noted that Plaintiffs never raised a due process claim in their pleadings. To the extent that the Court's refusal to require a claims made process was based on the above reasoning, it led to an erroneous result.

Instead, Defendant respectfully submits, the Court should have adopted, at a minimum, Defendant's suggestion that a simple claims made process should be followed. Under this simple process, class members would be required only to affirm under penalty of perjury that the class member, to the best of his or her recollection, actively sought work by performing four non-online work searches during the week or weeks for which a benefit was denied for failure to make an online work search, and that the class member was otherwise entitled to a benefit for the week or weeks in question. The Order of March 21 did not consider or address this suggestion by Defendant.

In addition, the Order erred in relying on its holding that "class members were required to appear at an SCDEW office and were again required to certify they were able, available and actively seeking work. Class members were also required to bring their form UCB-303 record of work seeking activities to the meeting." Order at 3. The Order further holds that "Class members, however have already made this audit form [UCB-303] available to SCDEW. . . ." *Id.* at 4. However, there was no evidence whatsoever to show that all, or even very many, of the class members actually reported to an SCDEW office, with or without a form UCB-303. And while the Order correctly holds that "For claimants who are not class members, SCDEW did not conduct a weekly review of the UCB-303 form," *id.* (emphasis added), that does not mean that DEW never reviewed the UCB-303 form for any weeks previous to the review, as the Order

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appears to imply. To the contrary, the record indicates that all claimants had their 303 forms subjected to periodic review, as DEW has previously pointed out in previous filings. *See, e.g.,* Paragraphs 7, 8 and 10 of the Cummings affidavit of March 3, 2014; 1/11/17 Tr. at 34-35.

By requiring DEW to mail a check to every class member without even the most minimal inquiry into each person's entitlement to a benefit, the Order would excuse a potentially vast number of claimants from the requirements that were imposed on all other claimants. While Defendant maintains that Plaintiffs' claims are both procedurally and substantively barred, the absence of a minimal claims made process would wreak a gross injustice on the State and the employers who provide for funding of unemployment insurance claims.

Also, while the Order, p. 4, further holds that "there is no rational basis to require a greater level of proof for class members who were wrongly denied benefits than from other claimants," the simple claims made requirement referenced above would actually require less of class members than had been required of others, so the holding of the Order to the contrary is without foundation. The Order, p. 4, further holds that "it is unlikely that claimants would still have these forms or be able to recreate them with any accuracy, since many of the claims are more than six-years old," but neither would be required if the Court were to adopt DEW's alternative claims made procedure discussed above.

Even if the Court rejects every contention made above, Defendant submits that one other change should be made to the March 21, 2019 Order. That change would pertain to the exhaustion-of-benefits language, as taken from p. 5 of the Order. The change proposed by DEW to that language is indicated below by the use of **boldface** for inserted language and ~~strikeout~~ for language proposed to be deleted:

> Further Claims shall not be paid to persons who were paid the maximum amount of benefits they were entitled to receive **in the**

> **claim year of** ~~on~~ the week they were denied benefits. The Class shall be defined as all persons: (1) who were citizens and residents of South Carolina at the time the action was filed; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search between August 6, 2012, and July 1, 2016; and (5) who did not subsequently exhaust the full amount of benefits they were entitled to receive for the ~~week(s)~~ **claim year in which** their benefits were denied.

Defendant submits that the language above in its original form in the March 21 Order does not reflect the actual intent of the Court, or even the relief requested by the Plaintiffs, as Defendant understands it. The current language would not exclude claimants from receiving benefits for the week in which they were denied, even when restoring the benefit for that week would result in the claimant receiving more in benefits than he or she would be entitled to receive during the claim year. For this reason, Defendant requests that at a minimum, the above change be made, both to the March 21, 2019 Order and to the identical language that currently appears in Paragraph 5(5) of the Notice to Class Members attached to that Order.

For these reasons, Defendant respectfully requests that the Order of March 21, 2019, and the amended Notice to Class Members filed with it, should be vacated, with the result that the pertinent parts of the February 15, 2019 Order and its attached Notice to Class Members, as that Order and Notice related to the claims made process, would be reinstated. Alternatively, and at a minimum, Defendant requests that the changes to the exhaustion-of-benefits language set forth above be made in the Order and in the Notice to Class Members.

This motion is made reserving all rights to challenge all other Orders and portions of Orders decided unfavorably to Defendant on issues of both substance and procedure.

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DAVIDSON WREN & PLYLER, P.A.

BY: *Kenneth P. Woodington*
WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

March 29, 2019

ELECTRONICALLY FILED - 2019 Mar 28 2:47 PM - BARNWELL - COMMON PLEAS - CASE#2013CP060059

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**MOTION TO ALTER OR AMEND**
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

The undersigned attorney for the Defendant hereby moves to alter or amend the Order dated March 21, 2019. On p. 4 of that Order, note 4, it is stated that "SCDEW failed to promulgate any regulations establishing a mode of procedure [to] adjudicate class members claims as required by Article I, Section 22 of the S.C. Constitution. Such structural defects in procedure violate due process and cannot be considered harmless." This is the first time in this case that any mention has been made of a due process claim regarding the referenced matter, and having appeared for the first time in an Order, is an appropriate issue for a Rule 59(e) motion.

The Order was in error in so holding. The affidavit of Kevin Cummings dated April 21, 2014 addresses this issue, although not in the context of a due process assertion by the Court or the Plaintiffs. Plaintiffs had claimed that it was necessary for DEW to establish a procedure or policy regarding the online search requirement. Mr. Cummings noted, in addressing that claim, that "When a claimant fails to perform at least one online job search in a given week, the claimant is denied benefits using the same procedures that apply whenever a claimant fails to show that he or she is able to work and available for work. No new procedures were necessary in

order to enforce the online job search requirement." In addition, it must be noted that Plaintiffs never raised a due process claim in their pleadings. To the extent that the Court's refusal to require a claims made process was based on the above reasoning, it led to an erroneous result.

Instead, Defendant respectfully submits, the Court should have adopted, at a minimum, Defendant's suggestion that a simple claims made process should be followed. Under this simple process, class members would be required only to affirm under penalty of perjury that the class member, to the best of his or her recollection, actively sought work by performing four non-online work searches during the week or weeks for which a benefit was denied for failure to make an online work search, and that the class member was otherwise entitled to a benefit for the week or weeks in question. The Order of March 21 did not consider or address this suggestion by Defendant.

In addition, the Order erred in relying on its holding that "class members were required to appear at an SCDEW office and were again required to certify they were able, available and actively seeking work. Class members were also required to bring their form UCB-303 record of work seeking activities to the meeting." Order at 3. The Order further holds that "Class members, however have already made this audit form [UCB-303] available to SCDEW. . . ." *Id.* at 4. However, there was no evidence whatsoever to show that all, or even very many, of the class members actually reported to an SCDEW office, with or without a form UCB-303. And while the Order correctly holds that "For claimants who are not class members, SCDEW did not conduct a weekly review of the UCB-303 form," *id.* (emphasis added), that does not mean that DEW never reviewed the UCB-303 form for any weeks previous to the review, as the Order appears to imply. To the contrary, the record indicates that all claimants had their 303 forms

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subjected to periodic review, as DEW has previously pointed out in previous filings. *See, e.g.,* Paragraphs 7, 8 and 10 of the Cummings affidavit of March 3, 2014; 1/11/17 Tr. at 34-35.

By requiring DEW to mail a check to every class member without even the most minimal inquiry into each person's entitlement to a benefit, the Order would excuse a potentially vast number of claimants from the requirements that were imposed on all other claimants. While Defendant maintains that Plaintiffs' claims are both procedurally and substantively barred, the absence of a minimal claims made process would wreak a gross injustice on the State and the employers who provide for funding of unemployment insurance claims.

Also, while the Order, p. 4, further holds that "there is no rational basis to require a greater level of proof for class members who were wrongly denied benefits than from other claimants," the simple claims made requirement referenced above would actually require less of class members than had been required of others, so the holding of the Order to the contrary is without foundation. The Order, p. 4, further holds that "it is unlikely that claimants would still have these forms or be able to recreate them with any accuracy, since many of the claims are more than six-years old," but neither would be required if the Court were to adopt DEW's alternative claims made procedure discussed above.

Even if the Court rejects every contention made above, Defendant submits that one other change should be made to the March 21, 2019 Order. That change would pertain to the exhaustion-of-benefits language, as taken from p. 5 of the Order. The change proposed by DEW to that language is indicated below by the use of **boldface** for inserted language and ~~strikeout~~ for language proposed to be deleted:

> Further Claims shall not be paid to persons who were paid the maximum amount of benefits they were entitled to receive **in the claim year of** ~~on~~ the week they were denied benefits. The Class shall be defined as all persons: (1) who were citizens and residents

> of South Carolina at the time the action was filed; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search between August 6, 2012, and July 1, 2016; and (5) who did not subsequently exhaust the full amount of benefits they were entitled to receive for the ~~week(s)~~ **claim year in which** their benefits were denied.

Defendant submits that the language above in its original form in the March 21 Order does not reflect the actual intent of the Court, or even the relief requested by the Plaintiffs, as Defendant understands it. The current language would not exclude claimants from receiving benefits for the week in which they were denied, even when restoring the benefit for that week would result in the claimant receiving more in benefits than he or she would be entitled to receive during the claim year. For this reason, Defendant requests that at a minimum, the above change be made.

For these reasons, Defendant respectfully requests that the Order of March 21, 2019, and the amended Notice to Class Members filed with it, should be vacated, with the result that the pertinent parts of the February 15, 2019 Order and its attached Notice to Class Members, as that Order and Notice related to the claims made process, would be reinstated. Alternatively, and at a minimum, Defendant requests that the changes to the exhaustion-of-benefits language set forth above be made.

This motion is made reserving all rights to challenge all other Orders and portions of Orders decided unfavorably to Defendant on issues of both substance and procedure.

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DAVIDSON WREN & PLYLER, P.A.

BY: *Kenneth P. Woodington*
WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

March 28, 2019

ELECTRONICALLY FILED - 2019 Feb 26 3:55 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**DEFENDANT'S RESPONSE IN**
v.	)	**OPPOSITION TO PLAINTIFFS' MOTION**
	)	**TO ALTER**
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

Defendant submits the following by way of return to Plaintiffs' Motion to Alter, filed February 20, 2019.

Plaintiffs assert that the class is limited to "all persons who were denied benefits because of the failure to comply with the online work search requirement." Motion at 1. However, limiting the class to such persons does not mean that any person who was denied benefits because of the failure to comply with the online work search requirement is otherwise entitled to benefits. Any person so denied benefits for failure to conduct an online work search must still make the separate showing that he or she was otherwise entitled to benefits. As the Order of February 15, 2019, pp. 20-21, held, the class consists of persons "(2) who were eligible to receive unemployment benefits, through SCDEW" and "(4) who were denied a benefit between August 6, 2012, and July 1, 2016, for failure to perform an online work search." (Emphasis added.) The Order further held "that item (2) above, properly read, correctly limits class membership to persons who were otherwise entitled to unemployment benefits for the weeks in which they were denied a benefit for failure to make an online work search" Order at 21 (emphasis added). The Order further held that "There is nothing

about this case that would excuse the named Plaintiffs and plaintiff class members from complying with the statutory requirements applicable to all claimants for DEW benefits that they were 'able to work and available for work' in their usual employment or other similar employment for which the claimants were qualified. § 41-35-110(3)." *Id.*[1]

Plaintiffs claim that "DEW only randomly checked work seeking activities forms for any given week." Pl. Motion at 2. However, while DEW did not check claimants' work search forms (UCB-303) every week, DEW did periodically require claimants to produce that form, as the Order in this case correctly requires. Paragraph 10 of the Cummings affidavit of March 3, 2014 states that "The clamant is required to periodically submit to DEW proof of work searches." (Emphasis added.) Paragraphs 7 and 8 of the same affidavit also make it clear that a claimant is required to complete a Form UCB-303 weekly. See also, 1/11/17 Tr. at 34-35 as indicating the mandatory nature of the form. (DEW has asked the Court to reconsider any implications to the contrary in its February 15, 2019 Order.)[2] Paragraph 10 of the Cummings Affidavit states that "DEW then randomly conducts verifications of the information claimant has provided on Form UCB-303, regarding job search contacts." In other words, while DEW randomly checks with the listed

[1] Plaintiffs also argue on p. 2 that the Order "requires discovery of the class members that is unnecessary and unduly burdensome," but in fact the Order did not require discovery, but only the verification by class members of their eligibility.

[2] Ms. Robinson's testimony was similar:

Q. Let me ask you what happens if a person comes in and is called in to say what they've done to show their entitlement to unemployment benefits for a given period of time. Let's say somebody comes in and they don't have that 303. What are their chances of -- this has nothing to do right now with the issue of the computer error. But let's say somebody comes in, has made all the searches, has been deemed eligible for benefits, collected benefits and then they're called in a little bit after the fact and they don't bring a 303. What happens then?

A. They would be given the opportunity to recreate it if they say they've made a work search.

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employers, there is no indication that DEW was random in requiring claimants to produce their Forms UCB-303 on a regular basis. Plaintiffs' assertion that DEW "would randomly require claimants to appear and produce their record of work search activities" is therefore incorrect and without evidentiary support. By requiring each class member to produce either an original Form UCB-303 or a reconstructed form for the week or weeks in question, the Order has not required those class members to do anything they and all other claimants were required to do. Plaintiffs are therefore incorrect in stating that the Order requires a higher level of scrutiny for these class members. Class members are being required to make the same showing as every other claimant for benefits. As the Order, p. 22, correctly holds, there is no basis for excusing compliance with those requirements applicable to all claimants for benefits. Likewise, requiring compliance with the law does not violate due process or equal protection, as Plaintiffs claim in passing and for the first time.

Plaintiffs next argue that "SCDEW had the opportunity to review Class members' record of work seeking activities after it stopped payment." Pl. Motion at 3. However, and as the Order correctly holds at p. 23, "Having found no evidence that online work searches were made, DEW had no need to consider anything else." The Order, P. 23, further holds that

> There was no need for DEW to consider or decide anything else, because the determination that there was no evidence of an online search was dispositive of the individuals' claims. Nor is there anything in the record to indicate that DEW actually reviewed or decided any other issue. The situation is analogous to that in the frequently-cited case, *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), which holds that an "appellate court need not address remaining issues when disposition of prior issue is dispositive."

Moreover, this argument by Plaintiffs assumes that every potential class member reported to a local DEW office and presented DEW with their Form UCB-303 when their benefits were stopped for failure to do an online work search. Such an assumption is unwarranted, and there is no

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evidence in the record to support it. In the absence of any evidence on the issue, the Court should refrain from accepting Plaintiffs' argument based on pure speculation and unsupported assumptions.

Further, even if we assume that DEW "had the opportunity" to review some of the potential class members' records, that fact is immaterial, because there was no need for DEW to have done so. The notice form quoted on p. 3 of Plaintiffs' motion was a notice pertaining only to the showing needed for the restoration of benefits for weeks after the week in which benefits were stopped. Plaintiffs argue that this requirement amounted to one that pertained to the week for which benefits were stopped, but by its terms, the notice clearly did not apply to that week, but instead to the re-establishment of benefits for subsequent weeks.[3] There is accordingly nothing in the record to support Plaintiffs' claim that "SCDEW had the record of work search activities form when it issued its Determination."

Plaintiffs' next contention is a broad policy argument that the claims process "should be designed to get the benefits of the judgment into the hands of the class members." For this

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[3] Plaintiffs' contention in n. 1 that DEW stopped payment in violation of § 41-35-670 has been addressed at pp. 25-26 of Defendants' Rule 59(e) motion, which notes that that holding does not appear to be a basis on which the Order intended to grant relief to the plaintiff class and that § 41-35-670, which requires benefits to be paid to claimants during the pendency of administrative determinations, has no applicability to this case.

To the extent that the contentions made in footnote 2 of Plaintiffs' motion seek to challenge the requirement of four non-online work searches, this is a challenge that Plaintiffs have previously expressly disavowed. Pls. Mem. in Opp. to Defendants' Second Motion for Summary Judgment, p. 15 ("no one has challenged the agency's policy with regard to four job contacts").

Plaintiffs' assertion in that footnote that there are no regulations for the adjudication process is incorrect, because the adjudication process is set forth in statutes. S.C. Code Ann. §§ 41-35-620, -640-700, and that is why it is not to be found in a regulation. See DEW's Rule 59(e) motion at pp. 4, 26. In any event, this is not an issue presented in this case.

Finally, footnote 2 contains a reiteration of Plaintiffs' claims on the merits pertaining to the online work search, an issue on which the Court ruled favorably to Plaintiffs. Those contentions are irrelevant to the issue of the need to show that a person was otherwise qualified to receive a benefit.

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argument, Plaintiffs cite a statement in *De Leon v. Bank of Am., N.A. (USA)*, 2012 WL 2568142 (M.D. Fla. Apr. 20, 2012) about the need to "Watch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained." While quoting that language, that case followed a different track, with the court noting that "When the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms." Here, however, as has already been made plain, DEW does not hold the information in the class members' UCB-303 forms, unlike the bank in the cited case, which obviously held the credit card statements of the class members in that case. Moreover, the Order in the present case does not contain an absolute requirement that the Form UCB-303 be produced, but instead permits the claimant to reconstruct the contents of the form. In this way, the Order affords claimants the same degree of flexibility that all other claimants have.

Finally, Plaintiffs argue that the Order should be modified to "conform with the definition of the class in the class certification order" by eliminating the requirement that each class member show that he or she is otherwise entitled to benefits. However, as already discussed above, there is no inconsistency between the class definition in the two Orders. The first Order defines the class as persons who "(2) who were eligible to receive unemployment benefits, through SCDEW." The second Order held that "that item (2) above, properly read, correctly limits class membership to persons who were otherwise entitled to unemployment benefits for the weeks in which they were denied a benefit for failure to make an online work search." That is a fair reading of the first Order. As the second Order further holds, citing *Brown v. Porcher*, 502 F. Supp. 946 (D.S.C. 1980), aff'd in part, 660 F.2d 1001 (4th Cir. 1981), a procedure that required an affirmative response by unemployment benefit claimants that permitted DEW's predecessor agency to contest the claim

made by any class member was a procedure which would ensure that the only persons who receive unemployment compensation are those who are fully qualified for it, and then only in the amount they are eligible to receive. While DEW has contended that the need to examine numerous individual claims is a reason for denying class certification altogether, the *Porcher* case shows that at least one court has concluded that the need for individual showings was not inconsistent with the continuation of a class action.

Similarly, the class certification order filed May 5, 2016, was limited to deciding the five factors in Rule 23(a), SCRCP, needed for class certification. It had no applicability beyond deciding those five factors and therefore did not limit or inhibit the Court when ruling on other issues, such as the claims made process and how to define the class.

CONCLUSION

For the foregoing reasons, DEW respectfully submits that Plaintiffs' motion to alter or amend should be denied.

DAVIDSON WREN & PLYLER, P.A.

BY: *Kenneth P. Woodington*
WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

February 26, 2019

ELECTRONICALLY FILED - 2019 Feb 26 3:55 PM - BARNWELL - COMMON PLEAS - CASE#2013CP060059

ELECTRONICALLY FILED - 2019 Feb 25 2:14 PM - BARNWELL - COMMON PLEAS - CASE#2013CP060059

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**SUPPLEMENT TO MOTION TO ALTER, AMEND OR CORRECT PURSUANT TO RULES 52 and 59(e), SCRCP**
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

The undersigned attorney for the Defendant hereby supplements the Defendants' Motion to Alter or Amend, filed February 21, 2018, by noting that any ground or contention set forth in that motion applies to each and every reference to such ground in any of the three Orders mentioned in the motion, that is, the Order dated February 15, 2019, the Order on standing dated April 27, 2017, and the Order on class certification dated May 5, 2016.[1]

This supplement includes, but is not limited to, the reference on p. 5 of the February 15, 2017 Order to a "violation of S.C. Code Ann. 41-35-670." That reference also appears on p. 13 of that same Order, and was challenged on p. 25 of Defendant's Motion to Alter or Amend filed February 21, 2019, but without specific reference to the same holding on p. 5 of the Order. This Supplement is filed in part to make it clear that Defendant makes the same challenge to the point on p. 5 of the Order as to the point on p. 13 of the Order, and likewise for any similar occurrence where a point in the Order is challenged in the motion.

[1] Because there is no e-filing category for a filing of this type, this Supplement is being filed under the category "Motion/Other," but it supplements and does not supersede the motion filed by Defendant on February 21, 2019.

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Along the same lines, Defendant would also note that the February 14, 2019 Order, in finding that there was "a causal connection between this injury and the conduct complained of," Order p. 17, overlooked the point previously made by Defendant and reiterated at p. 29 of the Motion to Alter or Amend that there was no causal connection between Mr. Patterson's loss and the online work search requirement. The reason for this is that he could have recovered the one week's benefit he now claims to have lost if he had simply continued to apply for benefits during the summer of 2013. His loss is therefore solely attributable to his failure to mitigate it. Similarly, Ms. Bollerman's loss was caused, in whole or in part, by her failure to appeal the denial of benefits, rather than by the online work search requirement. Also, because there was no proof of four job search contacts by her for the week in question, the online work search requirement made no difference to her ability to claim benefits for that week..

DAVIDSON WREN & PLYLER, P.A.

BY: *Kenneth P. Woodington*
WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

February 25, 2019

ELECTRONICALLY FILED - 2019 Feb 21 2:12 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**NOTICE OF MOTION AND MOTION TO**
v.	)	**ALTER, AMEND OR RECONSIDER**
	)	**JUDGMENT PURSUANT TO RULES 52 and**
South Carolina Department of Employment & Workforce,	)	**59(e), SCRCP**
	)	
	)	
Defendant.	)	
	)	
	)	

TO: DANIEL W. WILLIAMS, C. BRADLEY HUTTO, ALEX PATERRA, AND ADAM PROTHEROE, ATTORNEYS FOR THE PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant will move before the Honorable Doyet A. Early, III, at such time and place as the Court may direct, for an order pursuant to Rules 52 and 59(e), S.C.R.C.P., and altering or amending those portions of the Order filed February 15, 2019, which hold that (1) DEW was required to promulgate regulations before it began requiring online work searches; (2) Plaintiffs have standing to maintain this action; (3) Plaintiffs were not required to follow sole and exclusive statutory procedures, including the exhaustion of administrative remedies, before bringing the action, and (4) the Court's previous order certifying the class is reaffirmed.[1] In addition, the motion seeks alteration or amendment of the Order insofar as it made no reference to § 41-35-690, and held that there was no jurisdictional bar to the Court's consideration of this case. Finally

[1] If this motion were to be granted with regard to class certification, the consequence of a such a ruling would be that the Class Notice would be eliminated.

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this motion seeks reconsideration of certain findings of fact in the Order, as set forth in detail herein.

The Order was received electronically on February 15, 2019. Copies of that Order, and the two others reaffirmed by it, filed with this motion, as is a copy of Defendant's November 20, 2018 letter to Judge Early attaching Defendant's proposed order and additional order language. The grounds for this motion are set forth under separate headings below.

1. Findings of fact by the Court.

DEW respectfully submits that the findings of fact in the Order erred or overlooked certain aspects of the undisputed facts of this case.

a. Facts regarding Tami Bollerman.

The Order notes that Ms. Bollerman testified that that on a weekly basis she made the required work searches and filled out forms required by SCDEW to show she was making the requisite work searches. Order at 6. To the extent that this may be read as holding that Ms. Bollerman actually made the required non-online work searches, it overlooked the fact and DEW's contention that Ms. Bollerman did not provide the Court, much less DEW, a Form UCB-303 indicating that she made four non-online work searches for the week in question, and that a claimant seeking to prove that work searches were made by non-online means could only do so by presenting DEW with a completed Form UCB-303. As Mr. Cummings testified:

> Q. This 303, this Form 303, the Defendant's No. 3, if anybody comes in and just says, yeah, I made the searches but they don't produce this document, do you win if you do that or do you -- or does DEW just accept you just coming in and saying you did searches without this form?
>
> A. No. You have to -- that's our verification method, the 303.

Tr. of 1/11/17 hearing at 34-35. Another DEW employee, Romi Robinson, testified that if a person does not bring in a Form UCB-303, "[t]hey would be given the opportunity to recreate it

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if they say they've made a work search." Tr. 11/2/16 hearing at 77. Accordingly, if the Order intended to hold that Ms. Bollerman was eligible to receive a benefit in the absence of such proof of non-online work searches for the week in question, such a holding was in error [2]

Finally, the Order, p. 7, also holds that "The [October 15, 2012 "Work Search Verification"] form makes no mention that one outcome of the meeting will be to issue a ruling (determination) on whether she complied with the online work search requirement." However, this has never been an issue for which Plaintiffs have sought relief in this case, and in any event, that form was a notice concerning her need to restore future benefits. Ms. Bollerman was advised of appeal procedures in another form sent about a week later. *See* Document Nos. 9168-001-003, Exhibit G to Cummings Affidavit of 3/3/14. Moreover, Document No. 9168-003 sets forth the facts which were reviewed by the DEW interviewer at the meeting with Ms. Bollerman.

b. Facts regarding Archie Patterson.

In holding that Mr. Patterson "made the job contacts required of him," Order at 8, the Order reached a conclusion that has no support in the record. The Order also did not address Defendant's contention that while Mr. Patterson submitted a Form UCB-303, which is in the record as 1/11/17 hearing, Def. Ex. 3, he represented on the form that he conducted only three job search contacts and one SCWOS job search contact during the week of disqualification (August 19, 2012, through August 25, 2012). It was not disputed that DEW has no record of the

[2] The Order, p. 3. notes that "SCDEW does not review [the UCB-303 forms] weekly, but may periodically review them for compliance." In fact, however, Paragraph 10 of the Cummings affidavit cited in the Order does not say that DEW "may" review these forms for compliance, but instead states that "The clamant is required to periodically submit to DEW proof of work searches." (Emphasis added.) Paragraphs 7 and 8 of the same affidavit also make it clear that a claimant is required to maintain a Form UCB-303. The Order was therefore in error in holding that periodic reviews of the UCB-303 form were anything other than mandatory. *See also,* 1/11/17 Tr. at 34-35 as indicating the mandatory nature of the form.

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alleged online SCWOS job search. Therefore, like Ms. Bollerman, Mr. Patterson did not present evidence that he actually made four work searches for the period in question, and the Order was in error in so holding.[3]

The Order, p. 6, also states that "The adjudication procedure used by SCDEW in issuing its rulings (determinations) is set forth in department guidelines and is not promulgated by regulation. (Exhibit 6 [10/27/14 30(b)(6) Deposition of SCDEW {Cummings}] p.36 l.25 – p.38 l.11; Tab 13, Hearing Notebook)." In fact, however, the adjudication process is set forth in statutes. S.C. Code Ann. §§ 41-35-620, -640-700, and that is why it is not to be found in a regulation. In any event, this is not issue presented in this case.

2. The holdings (or omissions of holdings) regarding the exclusive statutory procedures for filing appeals from denials of claims.

While DEW contends that this case fails on its merits in any event, the first issue to be addressed, taking the issues in logical order, pertains to the Plaintiffs' failure to comply with S.C. Code § 41-35-690, which provided that the appeal procedure, including exhaustion of remedies set forth in that chapter is the "sole and exclusive appeal procedure." In addition, Plaintiffs did not comply with the statutory procedures in a timely manner. The Order overlooked, or contains erroneous conclusions of law with regard to several of its holdings in this regard.

a. Administrative review is the exclusive means for Plaintiffs' challenges.

The Order also erred in not considering the statute, S.C. Code Ann. 41-35-690, which provides that the appeal procedure referenced therein is the "sole and exclusive appeal

[3] Mr. Patterson's personal work search records indicate that he did indeed conduct an online job search at SC Works on August 19, 2012. Robinson Affidavit Paragraph 13; Exhibit 5. Because Mr. Patterson never presented that information to DEW and did not appeal, the only information available to the agency was that he "forgot" to do his online work search in SCWOS. If Mr. Patterson had appealed and presented his personal work search records, he might have obtained a reversal. *Id.*

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procedure" for the kinds of issues involved in this case. Specifically, the statute provides in its entirety as follows:

> **SECTION 41-35-690. Exclusive procedure for appeals.**
>
> The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the Department of Employment and Workforce Appellate Panel, as established by Section 41-29-300, and afterward to the administrative law court, pursuant to Section 41-29-300(C)(1), is the sole and exclusive appeal procedure.

Section 41-35-740 in turn provides that a decision by DEW, "in the absence of an appeal from [the decision] as provided [by the statute], becomes final." The language of the Order, p. 20, holding that "this is not an appeal," actually underscores the reason why a circuit court can never review a denial of benefits by DEW.

The courts of South Carolina have often given effect to the plain language of statutes providing for administrative remedies to be exclusive. *See, e.g., B & A Dev., Inc. v. Georgetown Cnty.*, 372 S.C. 261, 269, 641 S.E.2d 888, 893 (2007)(applying statute which provided that the administrative remedies under the statute were exclusive); *Unisys Corp. v. S. Carolina Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 177, 551 S.E.2d 263, 273 (2001), citing and quoting *Southern Ry. Co. v. Order of Ry. Conductors*, 210 S.C. 121, 41 S.E.2d 774 (1947)(exhaustion of remedies will preclude original resort to courts where statute by express terms gives exclusive jurisdiction to administrative agency).

The Order instead concluded that the doctrine of exhaustion is "not jurisdictional." Order at 17. In so holding, the Order cites *Adamson v. Richland Cty. Sch. Dist. One*, 332 S.C. 121, 503 S.E.2d 752 (Ct. App. 1998), but that case instead supports DEW's position. The Order cites *Byrd v. Irmo High School,* 321 S.C. 426, 468 S.E.2d 861 (1996) as indicating that the exhaustion doctrine is not jurisdictional, but as *Adamson* itself notes, *Byrd* held that "under applicable

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statutes . . . the circuit court did not have subject matter jurisdiction . . . [because] in *Byrd,* the statute did not permit the appeal of a ten-day school suspension of a pupil." 332 S.C. at 124–25, 503 S.E.2d at754 (emphasis added). The Supreme Court of South Carolina has specifically held that the vesting of exclusive jurisdiction in a specified agency or tribunal deprived the circuit court of subject matter jurisdiction. *See, e.g., Berry v. S.C. Dep't of Health & Envtl. Control,* 402 S.C. 358, 742 S.E.2d 2 (2013)(agency, then ALC); *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013)(legislature); *Hunt v. Avondale Mills, Inc.*, 385 S.C. 616, 686 S.E.2d 190 (2009)(Public Service Commission).

Section 41-35-690, providing that the "the sole and exclusive appeal procedure" is for appeals to be taken through DEW and then through the ALC, is identical in effect to the statute in *Berry.* Because Plaintiffs are not seeking judicial review via an appeal from an administrative decision, as § 41-35-690 solely and exclusively requires, and because such judicial review would need to proceed through the ALC in any event, there is no legislative authorization for bringing this case in the circuit court. This case should therefore have been dismissed for that jurisdictional reason alone, and the Order was in error in holding that Plaintiffs' noncompliance with § 41-35-690 was "not jurisdictional."

b The statutory exhaustion of remedies is mandatory, and not a discretionary rule.

On p. 17, the Order holds that "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law" and that "Whether administrative remedies must be exhausted is a matter within the circuit court's sound discretion and this decision will not be disturbed absent an abuse of discretion." In so holding, the Court erred in not applying S.C. Code Ann. § 41-35-740, which specifically provides that "judicial review is permitted only after a party claiming to be aggrieved by [a

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decision of the department] has exhausted his administrative remedies as provided by Chapters 27 through 41 of this title." (Emphasis added.) In addition, as already discussed above, § 41-35-690 provides that the appeal procedure provided in Chapter 35 of Title 41 "is the sole and exclusive appeal procedure" for appeals of determinations by DEW (emphasis added). In holding that the exhaustion requirement is a discretionary "rule of policy, convenience, and discretion," Order at 17, the Order overlooked the holding of the Supreme Court of South Carolina that "the general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few." *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000)(emphases added). Here, the exhaustion requirement is not judicially imposed, but rather is written into § 41-35-740, quoted above.[4]

The Order next holds that

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

Order at 18. It is undisputed that neither of the Plaintiffs appealed the determinations they received to the Appeal Tribunal, much less any farther than that. The Order then concludes that exhaustion would have been futile because the issue of whether DEW was required to

[4] As the Supreme Court has explained, exhaustion is required so that:

> the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644-645 (2000). *See also, e.g., Bone v. U.S. Food Service*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012)(the "statutory [APA] mandate for the exhaustion of administrative remedies serves (1) to protect the administrative agency's authority and (2) to promote efficiency. . . .").

promulgate regulations was one, the Order holds, that would not have been addressed in DEW's appeals process. *Id.* at 18-19. In so holding, the Order erroneously relied on the testimony of DEW official Romi Robinson. Ms. Robinson agreed, 11/2/16 Tr. at 47, that at the initial appeal level within DEW, i.e., the appeal tribunal, the issue of whether the agency should or should not promulgate a regulation to establish policy by regulation was not "within the purview of what a fact finder would determine. . . ." However, Ms. Robinson also testified that such an issue had never been raised before an appeal tribunal to her knowledge, and that as a result, she did not know what would happen if the issue were to have been raised at the level. *Id.* at 48. She further testified that a claimant "would certainly be able to preserve that on the record for appeal. . . ." *Id.* It should also be noted that there is nothing in the statute providing for appeals to DEW appeal tribunals which limits the scope of the tribunals' review. Section 41-35-680 provides that "an appeal tribunal, after affording the parties reasonable opportunity for a fair hearing, after notice of not less than seven days, must make findings and conclusions. . . ." The term "conclusions," in this context, normally refers to conclusions of law. Similarly, the regulations governing the Appeal Tribunal authorize hearing officers to "consider all issues affecting the claimant's right to benefits" and that "[a]ll issues relevant to the appeal shall be considered and passed upon." S.C. Code Ann. Regs. R. 47-51(C)(1), -(E)(1)(a). Beyond that, though, the Order does not hold that either the Appellate Panel, which is separate and distinct from DEW, or the Administrative Law Court, are limited in any way to hear the challenge brought in this case. To the contrary, appeals from DEW to the Administrative Law Court are available under S.C. Code Ann. § 1-23-600. That section refers to the grounds for review set forth in § 1-23-380, which specifically provides that agency action can be challenged on the grounds that it is "(a) in violation of constitutional or statutory provisions," or "in excess of the statutory authority of the

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agency," or "made upon unlawful procedure." § 1-23-380(5)(a), -(b), -(c). Thus, even interpreting Ms. Robinson's testimony the way the Order does would not mean that futility has been shown.

The Order. p. 19, cites *Ex parte Allstate Ins. Co.*, 248 S.C. 550, 151 S.E.2d 849 (1966). There it was held that "[t]he issue was solely one of law as to the statutory authority or jurisdiction of the Commissioner." 248 S.C. at 567, 151 S.E.2d at 855. However, *Allstate* is distinguishable for several reasons. First, in *Allstate,* there was no statutory provision for exhaustion at all, much less a statute providing that the administrative remedy is the "sole and exclusive appeal procedure. . . ." § 41-35-690. Secondly, the most that could be argued regarding the alleged failure to promulgate regulations would be that it involves an erroneous decision of the agency, rather than an absence of authority or jurisdiction. In other words, a person denied benefits for not making an online work search could argue that the agency was in error in finding that such a requirement was necessary in order to show that the person was actively seeking work, at least in the absence of a regulation to that effect. The alleged failure to promulgate regulations simply does not translate into a jurisdictional argument or a challenge to the authority of the agency. The Order also cites *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010), but that case held that futility was present only because the agency, a school board, had already decided against the plaintiff. No such decision was made by DEW's appeal tribunal or its Appellate Panel in the case of either of the named Plaintiffs.

In addition, the rule in *Allstate*, which involved only a legal issue, and similar cases should not apply in cases such as this, where the use of administrative procedures could lead to the claimants obtaining reversals on some fact-specific aspect of their claims. In such instances, it would not be futile for the claimant to follow the prescribed administrative procedures. It

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likewise would be unnecessary in such instances for administrative tribunals even to address the issue of whether a regulation was needed or whether it was otherwise erroneous to require an online work search. In other words, there is a significant chance that if either or both of the Plaintiffs had presented their claims through the DEW administrative process, those claims could have been resolved in their favor in a matter of weeks, and on fact-specific grounds. For these reasons, the Order also erred in holding that "the legislature would not require exhaustion of administrative remedies when the agency is acting outside its authority," Order at 19, and § 41-35-690 contains no such exception even if the concept of acting outside of agency authority applied here, which it did not.

In the case of Ms. Bollerman, who alleged that her benefit was stopped solely because of a computer error, an appeal by her of that determination would not have been futile, because persons in similar situations obtained reversals. 11/2/16 Tr. at 76. If that had happened, there would have been no need for the intervention of a court. Likewise, the reasons why Mr. Patterson might have been able to obtain a reversal via administrative proceedings have been set forth above, in the discussion of the fact that his Form UCB-303 shows an online work search for the week in question.

Even if an administrative appeal asserting the need for regulations could be read as involving a challenge to DEW's authority to enforce the online work search requirement, which DEW denies, the exhaustion requirement would still apply in this situation. This is illustrated by a U.S. Supreme Court case of long standing, *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752, 772–73 (1947). There it was held that where there was a likelihood that a claimant might prevail in an administrative proceeding for reasons not involving the agency's power to act or constitutional issues, then exhaustion was required, because resolution on such alternative

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grounds could render those other issues moot. *See also, e.g., Ledford v. West*, 136 F.3d 776, 782 (Fed. Cir. 1998)(exhaustion required even though one issue pertained to lack of agency authority, because the administrative proceeding might have "provided [the plaintiff] with the remedy he sought, and the need [courts] to rule on the merits of Ledford's APA and constitutional challenges might have been obviated"). For the same reasons, the court in *Ledford* rejected the plaintiff's argument that it would have been futile to go through the administrative process. The same result follows here because Plaintiffs' claims could have been resolved in their favor on other grounds. In any event, though, the exclusivity requirement of § 41-35-690 admits of no exception and should be held to bar this action.

3. Statute of Limitations.

Plaintiffs' claims are also barred by the ten-day limitation period set forth in § 41-35-660 for appeals of agency determinations or redeterminations. No administrative appeal was filed by any Plaintiff within that timeframe. The Order holds that "[s]ince this action is not an appeal from an initial determination, redetermination or subsequent determination this section is not applicable." Order at 20. However, that holding was in error for the same reason that it was error not to hold that § 41-35-690 bars this action.

4. The holding that DEW was required to promulgate regulations before it began requiring online work searches.

Even if Plaintiffs' claims were not barred for the reasons set forth above, their claims still fail on their merits. The simplest reason for so holding, even assuming there is at least one Plaintiff whose individual claim is not precluded for other reasons, is that the legislative provisos preclude Plaintiffs' claim that a regulation was required in order to implement the online work search requirement.

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a. The budget provisos.

The Order concluded that each of four the budget provisos cited by DEW and in the Order was a "funding mechanism," but the Order did not state why that would permit DEW to disregard the language of the provisos which provide for online work searches. Order at 13. The Order accordingly overlooks the fact that legislation can both provide for an action to be taken, and provide for funding of that action. That is what the provisos involved in this case did. The language of all four provisos stated that

> Thirty percent of the funds appropriated through the contingency assessment funds. . . shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via [certain mechanisms] and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified.

E.g., Proviso 67.7 of 2012-2013.

The Order quotes at length from *Amisub of South Carolina v. South Carolina Department of Health and Environmental Control*, 407 S.C. 583, 757 S.E.2d 408 (2014) on the subject of when a proviso can suspend permanent legislation. Order at 14. The Order then holds the provisos "did not suspend the operation of [certain listed DEW] statutes and [do] not absolve SCDEW of the requirement to promulgate regulations." Order at 15. However, the provisos did in fact supersede or suspend any statutory requirement for regulations regarding the required online work search, although DEW denies that such a requirement exists. The provisos are legislative acts that accomplish the very thing Plaintiffs claim should be done by regulation, that is, they authorize DEW to require that a claimant conduct at least one job search requirement using SCWOS.

It has long been the rule in South Carolina that the claimant bears the burden of proving that he or she is able, available, and actively seeking work. *Hyman v. South Carolina*

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Employment Sec. Commission, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959)("[w]here a claimant files an application for unemployment compensation benefits, the burden is upon such claimant to show that he has met the benefit eligibility conditions"). The provisos provide additional direction from the General Assembly for this principle, establishing a statutory requirement that in order for claimants to prove that they are actively seeking work, they must perform four job searches per week and that one of them must "be conducted through [SCWOS] . . . ." *See, e.g.,* Proviso 67.7 of 2012-2013.

There is no need for a regulation in order to implement and enforce the provisos' requirement that the claimant make one job search using SCWOS. The provisos are complete as well as unambiguous in themselves. They provide that DEW's "enforcement of Section 41-35-110(3) and Section 41-35-120(5)" shall occur by certain listed methods, one of which is the online work search requirement. Proviso 67.7 of 2012-2013. In addition, the provisos identify the website to use (SCWOS), the total number of job searches to be made (four), the number of SCWOS searches to be made (one), the funding source to fund this initiative (contingency assessment funds), [5] and the statutes whose enforcement is the subject of the provisos (Sections 41-35-110(3) and 120(5)). The use of the term "enforcement" in the provisos, coupled with the provisos' references to the applicable statutes, demonstrates the intent of the General Assembly to require that benefits be stopped in the absence of proof that the online job search requirement has been satisfied. Such enforcement was performed through the usual procedures for disqualifying claimants who have not made the requisite weekly showing that they were able to work and available for work. *See* Affidavit of Kevin Cummings dated April 21, 2014.

[5] The parties stipulated at the October 31, 2018, hearing that funding was used as directed in the provisos.

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The Order accordingly was incorrect in concluding that "regulations are necessary to implement these five items [set forth in the provisos], including the SCWOS work search requirement."[6] *Id.* However, regulations are not in fact necessary for implementing the SCWOS work search requirement, because the provisos are clear enough in themselves.

In concluding that

> The Proviso does not define the 5 items. Nor does it give instruction on their implementation or establish any mode of procedure for their enforcement[,]

Order at 15, the Order overlooked the fact that the term "requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS)" was sufficiently clear in itself so as to need no further amplification via a regulation. As the Supreme Court held in *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006),

> An agency is not required to enact a companion or explanatory regulation in order to enforce a statute.

370 S.C. at 476, 636 S.E.2d at 611. The Court further concluded as follows:

> To hold otherwise would lead to the absurd result that, before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail and its intention of enforcing it. The agency would be required to return to the Legislature seeking approval of a regulation which interpreted the legislative pronouncement and permission to enforce it. Neither the APA's rule-making provisions for regulations nor our precedent requires such a step.

Id., 370 S.C. at 475, 636 S.E.2d at 610. Here, as in *Sloan*, the statutory language in the provisos, coupled with existing procedures that are unchallenged, set forth everything that was needed in order for enforcement of the requirements of the provisos.

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[6] There was no need for the Order to opine on the need for regulations to implement any requirement of the provisos other than the SCWOS requirement.

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In addition, in relying on positions taken by DEW officials in depositions, characterizing the provisos as "funding mechanisms," the Order cites no precedent to show that a distinction between "funding mechanism" provisos and other provisos (through which the legislature directs the spending of funds to accomplish a designated purpose) exists in our law. Moreover, the Order overlooked the fact that there is nothing to show why such testimony, which does not reflect the agency's actual practice, should be given weight. Likewise, although the Order holds that DEW was "inconsistent" in implementing the proviso, Order at 16, it cites no precedent for the proposition that so-called inconsistent enforcement of a statute strips the statute of the force of law.[7] If DEW was in error in not performing all of the activities referenced in the provisos, that might have supported an effort by the legislature or other interested persons to require DEW to perform all such activities, but it would not affect the validity of the agency's performance of the activities mentioned in the provisos which it did perform.

The Order further overlooked the fact that the provisos provided the General Assembly's direction for the principle that the claimant bears the burden of proving that he or she is able, available, and actively seeking work. S.C. Code Ann. §41-35-110(3) contains the "able and available" requirement and § 41-35-120(5) contains the corresponding "failure to accept work" requirement. *See Hyman v. South Carolina Employment Sec. Commission,* 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959)("[w]here a claimant files an application for unemployment

[7] The Order also incorrectly summarizes DEW's response to the LAC report. Ms. Stanton's letter of May 20, 2014, which responded to the LAC report, denied the statement in the report that DEW had discontinued eligibility reviews. (Exhibit 7, 5/24/14 Stanton letter, p. 4; Tab 12 Hearing Notebook).The Order (p. 16) erroneously states that "SCDEW took the position that the proviso was merely a 'laundry list' of potential integrity initiatives." That was not what DEW said in response to the specific point about eligibility reviews. While this issue should be immaterial to the issue of whether the provisos authorized the required online work searches, the holding with regard to it is based on assertions of fact contradicted by the undisputed evidence in the record.

compensation benefits, the burden is upon such claimant to show that he has met the benefit eligibility conditions").

The provisos added details to the existing statutes by establishing an additional statutory requirement that in order for claimants to prove that they are actively seeking work, they must perform four job searches per week and that one of them must "be conducted through [SCWOS] . . . ." *See, e.g.,* Proviso 67.7 of 2012-2013. The provisos also direct that funds are to be spent for "enforcement of Section 41-35-110(3) and Section 41-35-120(5)." The use of the term "enforcement," and the references to the two code sections, demonstrate the intent of the General Assembly to require that benefits be stopped in the absence of proof that the online job search requirement has been satisfied. After all, "enforcement," in this context, can only mean that a person who does not comply with the requirement must be deemed ineligible for benefits for the week in question. Although the Order characterized the provisos as budgetary mechanisms that do not permit substantive action on DEW's part, the Order did not suggest any other view of the term "enforcement," short of disqualification for benefits.

The Order also was in error in declining to address the issue of the effect of the re-enactment of statutory language after it has been construed by the agency in charge of applying it. By re-enacting such language, the legislature is deemed to have been aware of and to have adopted the construction it has been accorded by an administrative agency. *See, .e.g, Helvering v. Reynolds Co.,* 306 U.S. 110, 114-115 (1939); *Hotel Association v. Weaver,* 144 N.E.2d 14, 18-19 (N.Y. 1957); 2B Sutherland Statutory Construction § 49:8 (7th ed.)("a legislature is familiar with a contemporaneous interpretation, especially by the agency or executive officer charged to administer or enforce a statute, and therefore impliedly adopts the interpretation upon reenactment"). In the present case, the General Assembly re-enacted the proviso three times after

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its initial adoption, using identical language. It is reasonable to assume that the General Assembly had knowledge of the manner in which DEW was applying the provisos. First, as already discussed, the language of the provisos is unambiguous, and DEW could not have applied it any way other than to enforce the statutes listed in the provisos by requiring the four job searches, including one online. Secondly, the May 2014 Legislative Audit Council Report, along with the May 20, 2014 letter of DEW Executive Director Stanton attached to it (both placed in the record by Plaintiffs) would have alerted the General Assembly to the fact that DEW was requiring one online job search as a precondition to receiving without a regulation to that effect, because as Ms. Stanton's letter pointed out, DEW was relying on the provisos as the authorization for doing so. Thus, while the provisos were so clear that they required no interpretation by DEW, if there was any doubt at all about whether DEW was applying the provisos correctly, any such doubt was removed by the General Assembly's repeated re-enactment of the provisos with no change to the language.

Moreover, the legislative activity surrounding the 2016-2017 fiscal year budget provides further clear evidence that the legislature intended the provisos to authorize DEW to require the online work search through SCWOS. The proposed Proviso 83.5 of the 2016-2017 Appropriations Act submitted for Governor Haley's signature was amended to remove the mandatory online job search requirement:

> Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3).... Job searches may be conducted and will be accepted if done by the applicant in person or through SC Works Online System (SCWOS). Searches completed through SCWOS will be electronically verified; all others will be verified through methods currently used by SCDEW.

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In her veto message to the legislature, Governor Haley described the clear understanding of the work search proviso that had been in effect since 2013:

> Since 2013, a proviso has required that at least one of the four required weekly job search contacts be conducted through the SC Works Online System (SCWOS), so that it can be electronically verified by the Department of Employment and Workforce. This anti-fraud provision helped provide an objective verification method of an unemployment beneficiary's job searches.
>
> Unfortunately this year, the proviso was amended to remove the requirement that at least one job search be conducted online, now allowing individuals to perform job searches in any manner they choose. Because verification of these searches is extremely difficult, the effect of this amendment will be to make the job search process less accountable and more open to fraud."

See June 8, 2016, letter from Governor Haley to Speaker James Lucas, Veto 28.[8] In summary, the provisos clearly state that online job searches are required for the four fiscal years to which they apply. By so providing, they take the place of any need for regulations on that subject during those four fiscal years. Promulgating regulations to the same effect would amount to the kind of needless and duplicative agency action that the Court held to be unnecessary in *Sloan, supra.*

5. The holdings (or omissions of holdings) regarding statutory requirements for regulations, or absence of such requirements.

Even if the provisos did not require DEW to require one online work search per week, the Order additionally erred in holding (pp. 11-13) that existing statutes required DEW to promulgate regulations in this situation. To the contrary, the statutes pertaining to DEW contain no such requirement applicable here.

[8]www.scstatehouse.gov/sess121_2015-2016/appropriations2016/gmbvto16.pdf.

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First, the Order cites and quotes only general language from several different statutes that make mention of regulations. Order at 11-12. The Order does not discuss their applicability to the present situation. As DEW has previously contended in this case, no statute requires the promulgation of regulations under the facts of this case.

The Supreme Court of South Carolina has recognized the distinction between statutes mandating the promulgation of regulations and other statutes merely permitting regulations to be promulgated. In *Captain's Quarters Motor Inn, Inc., v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991), the Court held that the Coastal Council's enabling statute, by providing that "[t]he Council shall . . . publish final rules and regulations," imposed a mandatory duty. 306 S.C. at 491, 413 S.E.2d 13, at 14 (emphasis added). On the other hand, the enabling act for the Department of Natural Resources (DNR) provided only that that agency "may promulgate regulations to effectuate the provisions of this chapter." (Emphasis added). Accordingly, the Court in *Edisto Aquaculture Corp. v. South Carolina Wildlife and Marine Resources Dept.*, 311 S.C. 37, 426 S.E.2d 753 (1993), held that DNR was under no mandatory duty to promulgate regulations:

> The simple answer here is that the [DNR] Commission may promulgate regulations, since there is no mandatory language in § 50-16-50. This difference in underlying statutes allows the [DNR] Commission a level of discretion that the Coastal Council does not have.

311 S.C. at 40, 426 S.E.2d at 755. The DEW statutes contain the same absence of mandatory language in connection with the subject areas of which Plaintiffs complain. Each statute cited in the Order -is discussed below:

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a. Section 41-29-110.

Section 41-29-110 provides as follows:

> **SECTION 41-29-110. Duties and powers of Department.**
>
> The department must promulgate regulations necessary to carry out the provisions of Chapters 27 through 41 of this title, employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations **or** take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title.

(Emphasis added.) The Order errs in quoting only the first two lines above ending with "title,", rather than the statute's entire sentence. That sentence in its entirety lists, in the disjunctive, several alternative options by which DEW may carry out the provisions of Chapters 27 through 41 of title 41, rather than the one option (regulations) for which it is quoted. The Supreme Court has often held that the "use of the word 'or' in a statute is a disjunctive particle that marks an alternative." *K & A Acquisition Group, LLC v. Island Pointe*, LLC, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009)(emphasis added). As applied to the present case, the statute provides DEW with several different alternatives to enforce the "able, available and actively seeking work" requirement of the statues. These include, but are not limited to, the option to proceed by regulation. If DEW were to decide to proceed without promulgating regulations, § 41-29-110 expressly authorizes this, by providing that the agency may alternatively "take other action as it deems necessary." That part of the statute is not mentioned or addressed in the Order.

b. Section 41-27-510.

The Order, p. 11, next cites § 41-27-510. That statute provides as follows:

> **SECTION 41-27-510. Promulgation of regulations regarding unemployed individuals.**
>
> The department must promulgate regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial

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> unemployment of the individuals attached to their regular jobs and other forms of short-time work as the department considers necessary

By its terms, this statute pertains solely to regulations that would define what constitutes full or partial unemployment. As such, it bears no relationship to the issue of online job searches or any other aspect of seeking work or being available for work.

c. Section 41-35-610.

The Order also cites § 41-35-610, which provides as follows:

> **SECTION 41-35-610. Procedures must be pursuant to department regulations; duties of employers.**
>
> A request for determination of insured status, a request for initiation of a claim series in a benefit year, a notice of unemployment, a certification for waiting-week credit, and a claim for benefits must be made pursuant to regulations the department promulgates. An employer must post and maintain in places readily accessible to individuals in his service printed statements concerning regulations or related matters the department prescribes by regulation. An employer must supply those individuals copies of the printed statements or materials the department prescribes by regulation. These statements or materials must be supplied by the department to an employer without cost to the employer.

This statute simply sets forth the requirement that claimants, in making claims or other filings with DEW, must make claims or filings "pursuant to regulations the department promulgates." This establishes a duty on the part of claimants to comply with any DEW regulations that may exist, but it does not, in and of itself, specify the areas in which DEW must promulgate regulations. As a result, it lends no support to Plaintiffs' claims.[9]

[9] It should also be noted that §§ 41-35-110 and -120, which pertain to being able and available to work and actively seeking work, do not contain a requirement for the promulgation of regulations in that context, which is the context of the present case.

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d. The APA.

The last statute referenced by the Order (pp. 11-12) is § 1-23-10(4) of the APA. However, the Supreme Court of South Carolina has held that "[w]e do not interpret section 1-23-110 as being the source for which [plaintiffs] have a right to have a regulation promulgated. Rather, the statute merely provides for the procedures that must be followed whenever a regulation is otherwise mandated." *South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n*, 389 S.C. 380, 390, 699 S.E.2d 146, 152 (2010)(emphasis added). While that holding mentioned only § 1-23-110, there is nothing about § 1-23-10(4) that would require a different result. Accordingly, the APA offers no support for Plaintiffs' claims.

6. The holding with regard to the binding norm issue.

The Order, p. 12, also holds that the online work search requirement improperly creates a "binding norm." In *Sloan v. South Carolina Bd. of Physical Therapy Examiners, supra,* the Court described the "binding norm" theory as follows:

> [C]ourts have held that whether an agency's action or statement amounts to a rule—which must be formally enacted as a regulation—or a general policy statement—which does not have to be enacted as a regulation—depends on whether the action or statement establishes a "binding norm." When the action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation. But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm. *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369, 1377–78 (11th Cir.1983) (citing cases).

370 S.C. 452, 475-476, 636 S.E.2d 598, 610 (2006)(emphasis added). *See also, e.g., National Min. Ass'n v. Secretary of Labor,* 589 F.3d 1368, 1372 (11th Cir. 2009)(no binding norm existed

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where mine operators were required to follow certain operating procedures, but in practice, enforcement officials "can-and regularly do-grant exceptions").

The records of the agency make it clear that DEW elected "to follow or not follow the policy" in many individual cases. Contrary to cases in which binding norms were found to exist, the failure to complete an online job search did not automatically lead to the loss of benefits for the week in which no online search was registered. During the time period in question, 4,250 appeals related to the online job search requirement were filed, of which 2,618 were resolved on their merits. Romi Robinson testimony, 11/2/16 tr. at 67, and Ex. 3 at that hearing. In those appeals, there were approximately 728 reversals of disqualifications, *id.*, meaning that the agency restored the benefit to the claimants, even though in some cases, the claimant's records did not show that the claimant actually performed an online work search. Robinson affidavit, ¶ 7. Some of the reasons for claimants to have obtained reversals are summarized in Paragraph 6 of the Romi Robinson affidavit and in Ms. Robinson's testimony at the November 2, 2016 hearing. In addition, the agency has waived compliance with the policy for several different periods in which the agency's computer system was undergoing maintenance that resulted in the online work search function being unavailable. *Id.*, ¶ 8. For all of these reasons, it is readily apparent that the online work search requirement, even if not authorized (much less mandated) by the provisos, does not create a binding norm in the sense that that term is used in the pertinent South Carolina cases.[10]

[10] The Order, p. 12, also refers to language in Procedure Transmittal Letter 1267-3, which states: "Warnings are NOT acceptable for SCWOS searches." However, the same paragraph of that letter states that "If the UI Supervisor or Regional Manager determines that the claimant has a valid reason for failing to make a search in SCWOS, remove the issue as entered in error and make a note on the Note (NT) screen." It is therefore clear that the letter itself provides for

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7. Other holdings pertaining to the merits of Plaintiffs' claims

a. Procedure Transmittal Letter 1267-3.

The Order refers to DEW's Procedure Transmittal Letter 1267-3, dated August 10, 2012, and states that that letter "indicates SCDEW [c]hanged its work search procedure in March of 2012, before enactment of the Budget Proviso." Order at 9. *See also,* Order at 4 ("According to its Procedure Transmittal Letter 1267-3, dated August 10, 2012 SCDEW, in March of 2012, revised its work search policy to require all claimants to make a minimum of four (4) job contacts per week. At least one of the job contacts must be made through SC Works Online Services (SCWOS)"). However, it is undisputed that benefits were not stopped for any person until August 2012, after the budget provision for FY 2012-2013 took effect. Indeed, Procedure Transmittal Letter 1267-3 was dated August 10, 2012, again after the proviso took effect. A letter from DEW to claimants, Exhibit B to Cummings affidavit dated 3/3/14, advised that "Beginning August 6, 2012 at least one (1) of your four (4) weekly job searches MUST be made through SC Works Online Services (SCWOS) ,https://jobs.scworks.org." (Emphasis added.) If the provisos had not been enacted, DEW might well have declined to proceed with the new policy, but the statement about a change in March of 2012 is immaterial to any issue in this case, because it is undisputed that no change was actually made until the proviso for Fiscal Year 2012-13 was enacted and in effect. To the extent that the Order relied on Letter 1267-3 to support any of its conclusions, DEW respectfully submits that such reliance was in error.

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exceptions to the mandatory nature of the requirement, and this practice of recognizing exceptions was actually applied in hundreds of cases, as discussed above.

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b. The 2014 Legislative Audit Council Report.

At pp. 9-10, the Order cites a Legislative Audit Council (LAC) Report dated May 2014. To the extent that the Order quotes that report on the need for regulations, Order at 10, the Order overlooked the fact that there is no recognized authority for according any particular weight to statements by the LAC with regard to legal issues. Moreover, the Order should also not have given the LAC's statements any weight, for the reason that the LAC report did not mention the existence of the budget provisos which provided unquestioned authority for DEW to require at least one SCWOS search. To the contrary, the LAC report erroneously stated that the online work search requirements were "internal rules set by DEW that can be changed at any time." LAC Report at 35. The policy goals stated at p. 35 of the LAC report and quoted in the Order, as well as those quoted elsewhere on p. 10 of the Order are all met by having the online work search requirement created by legislation, as was the case here. The Order was therefore in error in according weight to the LAC report and in overlooking the numerous incorrect statements found in the cited pages of that report.

c. References to other procedural requirements.

On p. 13, the Order states in passing that "the procedure SCDEW used to notify and adjudicate class members claims for failing to conduct an online search was not by a mode of procedure prescribed by the General Assembly as required by Article I, Section 22 of the S.C. Constitution. Further, SCDEW's procedure of stopping payment before a determination was made violated S.C. Code Ann. 41-35-670 (requiring a redetermination or subsequent determination before payments are stopped)." This statement does not appear to be a basis on which the Order intended to grant relief to the plaintiff class. In any event, S.C. Code Ann. § 41-35-670, which requires benefits to be paid to claimants during the pendency of administrative

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determinations, has no applicability to this case. It would only be of benefit to Plaintiffs if any of them still had a pending appeal of an administrative determination and was not being paid benefits in the interim, which is not the case. The reference to Article I, Section 22 of the Constitution is even less in point, because the DEW statutes contain numerous details about the procedures to be followed when claims are denied. *See* § 41-35-660 through -750 (Supp. 2018) (explaining the sole and exclusive procedure for disputing a denied claim for benefits is to appeal the denial to the Tribunal, then to the Panel, the ALC, Court of Appeals, and Supreme Court).

8. Standing.

At pp. 16-17, the Order reaffirms the holding of an Order dated April 27, 2017, finding that both named Plaintiffs had standing. DEW in turn restates the grounds set forth in its Amended Rule 59(e) motion addressed to that order and dated May 1, 2017, as follows:

a. The April 27, 2017, Order did not address the legal principles that are applied in South Carolina in determining whether a party has standing to sue. The Supreme Court of South Carolina uses the same test for standing as is found in federal law. As that court has held,

> [The] "irreducible constitutional minimum of standing," . . . consists of the following three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

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Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992).[11]

In addition, the April 27, 2017 Order does not discuss the Supreme Court's holdings that "[b]efore any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996), as reiterated in *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998)("South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached").

b. It was held on p. 3 of the April 27, 2017 Order that "[i]n arguing that Plaintiffs lack standing, Defendant asserts that both Tami Bollerman and Archie Patterson did not appeal the adjudication of their benefit loss through administrative channels and have therefore failed to exhaust administrative remedies." This point is discussed at pp. 3-5 of the Order. However, the Court overlooked that fact that the Defendant did not argue that the failure to appeal the issue related to the merits of this case via the administrative process deprived Plaintiffs of standing. Rather, in arguing that Ms. Bollerman's claim is not "typical" for purposes of class representation, DEW argues she was required to pursue an administrative appeal of her argument that her denial of benefits resulted from a computer error by DEW. This issue is certainly one for which a claimant must exhaust administrative remedies.

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[11] The February 15, 2019 Order, pp. 16-17, did mention the tests of standing in South Carolina law, and held that "there is a causal connection between [Plaintiffs'] injury and the conduct complained of." Order at 17. However, the Order was in error in holding that "a favorable decision by this Court would compensate for the injury." *Id.* That holding overlooked the contention under (c) and (d) herein that a favorable order would not redress Plaintiffs' injury unless they could show that they were otherwise qualified to receive benefits. That holding also overlooked DEW's contention in (e) herein that the only reason Mr. Patterson did not collect the amount he claims was that he did not continue to exhaust the balance of funds available to him in 2013, for reasons of his own making.

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c. The April 27, 2017 Order did not address Defendant's contention that Ms. Bollerman did not provide the Court, much less DEW, a Form UCB-303 indicating that she made four non-online work searches for the week in question. She was held by DEW to have been disqualified for benefits for the week of October 7, 2012 through October 13, 2012, because she did "not have the specified number of verifiable contacts" for that period. 11/2/16 hearing, Pl. Ex. 3. This absence of documentation showing that Ms. Bollerman actually made four job contacts is fatal to her ability to claim standing to challenge the online work search requirement, and to the existence of a justiciable controversy, because in the absence of proof of four job search contacts for the week in question, the online work search requirement made no difference to her ability to claim benefits for that week. Her claim therefore fails the third prong of the *Lujan* test adopted by *Sea Pines Ass'n., supra,* which requires it to be likely that "that the injury will be redressed by a favorable decision." 345 S.C. at 601, 550 S.E.2d at 291. It is not only unlikely, it is affirmatively impossible for Ms. Bollerman's claim to be redressed by a favorable decision regarding the online work search requirement, because even if that requirement were invalidated, she still would not prevail, because she did not otherwise show an entitlement to the benefit for the week in question.

d. Similarly, the April 27, 2017 Order did not address Defendant's contention that Mr. Patterson submitted a Form UCB-303, which is in the record as 1/11/17 hearing, Def. Ex. 3. He represented on the form that he conducted only three in-person job search contacts and one online job search contact during the week of disqualification (August 19, 2012, through August 25, 2012), and that DEW has no record of the alleged online job search. Therefore, like Ms. Bollerman, Mr. Patterson did not present evidence that he actually made four work searches for the period in question, and a favorable decision on the merits of this case would therefore not

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redress his claim of injury from the online work search requirement. Accordingly, there is also no justiciable case or controversy as regards Mr. Patterson's claim.

e. In holding that "[e]ven if Mr. Patterson chose not to apply for benefits after he was denied benefits that does not cure or obviate any earlier wrongful denial of benefits," the April 27,2017 Order overlooked or misapprehended the legal effects of the fact that Mr. Patterson could have recovered the one week's benefit he now claims to have lost if he had simply continued to apply for benefits during the summer of 2013. This failure on his part to mitigate his loss means that he lacks standing to pursue this claim for the additional reason that there is no "causal connection between the injury and the conduct complained of." *Sea Pines, supra.* 345 S.C. at 601, 550 S.E.2d at 291. The only reason he did not collect the amount he claims was that he did not continue to exhaust the balance of funds available to him in 2013, for reasons of his own making. In addition, because he could have collected the total amount of benefits to which he was entitled, effectively making up for the benefits he did not collect during the week of August 19, 2012, but did not, his claim is moot. A class action cannot be maintained by a plaintiff with a moot claim. *Ferguson v. Charleston Lincoln Mercury, Inc.* 349 S.C. 558, 564 S.E.2d 94 (2002).

f. In holding that the claims of Ms. Bollerman and Mr. Patterson, were "capable of repetition, yet evading review," the April 27, 2017 Order overlooked or misapprehended that the claims are no longer "capable of repetition," because DEW terminated the program as of July 1, 2016. 1/11/17 hearing, Def. Ex. 7. Moreover, even if the program had still been in effect, a person with four non-online work searches and who did not exhaust benefits could seek review for as long as the claim was not time-barred, so there is no question of proper claims evading review.

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g. In holding that the public importance exception is applicable in this case, the April 27, 2017 Order overlooked or misapprehended that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)(emphasis added). As noted in the above paragraph, DEW terminated the program effective July 1, 2016. Future guidance is therefore no longer needed for this issue, and the public importance exception therefore does not apply.

h. To the extent, if any, that the April 27, 2017 Order held on p. 8 that DEW's claim on the merits "is erroneous under both the APA and SDEW's own enabling legislation," (as opposed to simply reiterating Plaintiffs' argument to that effect), the Order overlooked or misapprehended that the merits of the case were not before the Court in connection with that Order. Defendant therefore respectfully requests that that sentence, if not deleted altogether, should be modified to make clear that it did not represent a holding of the Court, but instead was a paraphrase of Plaintiffs' argument on the merits of the case.

9. Class certification.

On p. 20, the February 15, 2019 Order holds that "this action should remain certified as a class action and re-affirm this Court's previous order." That previous order was dated May 5, 2016. DEW reiterates the grounds set forth in its Rule 59(e) motion addressed to that Order and dated May 12, 2016. Those grounds were as follows:

a. The May 5, 2016 Order did not address Defendant's contention that in order to be a class representative, the named plaintiff or plaintiffs must themselves have typical claims that are not precluded by such factor as a lack of standing or mootness. *See* Def. Mem. in Opp. to Class Certification, p. 6. It is axiomatic that "an individual or group must have standing to proceed in either a derivative or class action suit." *Berry v. McLeod*, 328 S.C. 435, 447 n.2, 492

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S.E.2d 794, 800 n.2 (Ct. App. 1997). Indeed, as the Supreme Court of South Carolina has held, "[i]n an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Bodman v. State*, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2013). In addition, if the named representative's claim becomes moot, as has happened here, class certification is not appropriate, absent a new intervenor who has a live claim. *Ferguson v. Charleston Lincoln Mercury, Inc.* 349 S.C. 558, 564 S.E.2d 94 (2002). The present case was filed over three years ago, which is more than enough time for a plaintiff to have surfaced who might have standing and otherwise qualify to present the merits claim in this case. The fact that no such individual has sought to enter this case should be viewed as meaning that there is no interest in pursuing this claim by any potential plaintiff who is qualified to pursue it, and should result in denial of class certification.

The reasons why neither of the remaining two named Plaintiffs has a current and valid claim may be summarized as follows:

1. Mr. Patterson's claim for benefits became moot once he received everything to which he was entitled, or declined to seek everything to which he was entitled. In addition, as already discussed, he did not show evidence that he had completed four non-online work searches, and did not exhaust administrative remedies as required by statute.
2. Ms. Bollerman's one-week denial of benefits was the result of a computer error, rather than a failure on her part to conduct an online job search, and she did not pursue the administrative appeal which could have led to the reversal of her denial of benefits. In addition, as already discussed, she did not show evidence that she

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had completed four non-online work searches, and did not exhaust administrative remedies as required by statute.

The May 5, 2016 Order Certifying Class did not discuss standing or mootness at all, and it likewise did not discuss the claims of any of the individual Plaintiffs. However, for the reasons summarized above, no Plaintiff is able to present a claim that would be typical of the showing that a representative of the proposed class would need to make in order to prevail.

b. The May 5, 2016 Order, p. 5, held that "The named Representatives, i.e. each member of the class has suffered the same type of harm from the new Policy [because] each member has had his/her unemployment benefits denied for at least one week because of SCDEW's implementation of the online work search requirement policy." This overlooks the fact that for the reasons discussed above, any losses were later mooted by subsequent payments for named Plaintiff Patterson. In addition, this holding appears to conclude that if some unnamed persons who are not class representatives have had benefits denied, then that would make up for any failure of the named Plaintiffs to show a real, non-moot injury. However, the analysis works in the other direction: the named Plaintiffs must themselves show real and not moot injuries, rather than simply alleging that there may be someone else, not a named plaintiff, who might be able to show such injuries. Similarly, the May 5, 2016 Order concludes (p. 4) that "Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." However, the Order does not specifically hold that any of the named Plaintiffs, as opposed to some other unnamed persons, "would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." The absence of such a holding means that class certification should not be granted.

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c. On the same page, the May 5, 2016 Order concludes that the existing Plaintiffs have standing because "each Plaintiff is capable of becoming employed in the future and suffering harm from this policy." This conclusion, however, is foreclosed by such cases as *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 634 S.E.2d 664, (Ct. App. 2006). *Commander Health Care* holds as follows:

> An "injury in fact" has been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291; *see also Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (finding one must suffer an actual injury in fact, not a concern of future harm, in order to satisfy the *Lujan* test).

370 S.C. at 302, 634 S.E.2d at 666-67 (emphases added). The named Plaintiffs in this case are the least likely of all possible future unemployment benefit claimants to fail to perform online job searches, because they have found out what happens when such searches are not performed. As a result, their claims are merely "conjectural or hypothetical," and amount to nothing more than "a concern of future harm," neither of which is a showing that will establish standing.

d. The May 5, 2016 Order also held that "each named plaintiff[] and each class member are seeking the same remedial measure." This conclusion overlooks the fact that most of the named Plaintiffs are not pursuing a remedy at all, either because they never had a right to a remedy, or their claims are no longer being pursued because they received all the benefits to which they were entitled.

e. In citing a portion of *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), May 5, 2016 Order at 4, that Order overlooked the holding of *Gardner*, which was that

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> 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. See *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978) ("The very 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.").

353 S.C. at 22, 577 S.E.2d at 201. In the present case, the nature of the claims made "require[e] each member of the class to prove the elements of the cause of action," because each class member would need to prove that:

1. The claimant made four job searches for the week of weeks for which the claim was made.
2. The claimant has not in the meantime received all the benefits to which he or she is entitled (i.e., the claimant has not "exhausted" the right to receive benefits).
3. There are no other specific reasons that would disqualify the claimant from receiving a benefit for the week in question. For instance, former Plaintiff Lorinda Robinson was disqualified for the weeks in question because she actually owed DEW money for other weeks of benefits wrongfully collected by her.[12]

These considerations could cause a claimant to be denied a benefit for reasons other than a failure to perform an online job search and, therefore illustrate a paradigm situation in which the requisite commonality is absent. The May 5, 2016 Order holds (p. 5) that "Plaintiffs specifically have limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement. They have not sought to certify a class to recover benefits for persons who were denied benefits for any other reason."

[12] The February 15, 2019 Order included these requirements as ones that must be satisfied by each class member.

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Again, however, Plaintiffs' counsel cannot define the class by reference to the claims of persons other than the named Plaintiffs. Plaintiff Bollerman, for example, is a person whose benefits were denied because of a computer error which she did not seek to have corrected.

f. While this point is probably now moot in light of subsequent Orders, Defendant also pointed out that the May 5, 2016 Order should be amended in order to change all references to "damages." There is one such reference on p. 5 of the Order, and there are three other references to "damages" on p. 7. The Amended Complaint characterizes this action as one for declaratory relief, injunctive relief, and for the equitable remedy of an accounting. Damages, as such, were not sought. As a result, even if the Court declines to change other parts of the Order, all references to "damages" should be changed to "monetary relief." (This ground is probably now moot.)

g. While this point is also probably now moot in light of subsequent Orders, Defendant would also ask that the May 5, 2016 Order be amended to delete any references that might indicate a view of the merits. This request is made for clarification, even though the last sentence of the Order, p. 7, notes that "No part of this Order shall be construed as a decision on the merits of this case."

In the first sentence of the May 5, 2016 Order, it is stated that "Named Plaintiffs seek certification of a class of individuals who were wrongfully denied unemployment insurance benefits . . . ." Defendant would request that the first sentence of the Order be amended by adding the word "allegedly," to state that "Named Plaintiffs seek certification of a class of individuals who were **allegedly** wrongfully denied unemployment insurance benefits . . . ."

Also, the second sentence of the second paragraph of the Order (p. 1) states that "The named Plaintiffs were denied benefits because of their inability or failure to properly apply

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online for employment." Defendant requests that this be changed to "The named Plaintiffs **allege that they** were denied benefits because of their inability or failure to properly apply online for employment." (This ground is also probably now moot.)

h. Finally, Defendant would also ask that even if the Court should decide not to vacate the May 5, 2016 Order, the class definition on p. 7 should be clarified by noting that "Nothing in this Order prohibits DEW from requiring each class member to make the same showing of eligibility required of any other claimant who has had benefits denied, including the requirement that administrative remedies be exhausted where appropriate." (This ground is also probably now moot.)

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court reconsider and vacate its Order filed on February 15, 2019, as well as the other Orders reaffirmed therein, and hold instead that this action should be dismissed in its entirety, or in the alternative, that class certification should be denied.

DAVIDSON WREN & PLYLER, P.A.

BY: *Kenneth P. Woodington*
WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

February 21, 2019

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	2013-CP-06-00059
	)	
ARCHIE PATTERSON AND TAMMIE BOLLERMAN,	)	
	)	
PLAINTIFFS,	)	
	)	Plaintiff's Motion to Alter
v.	)	Pursuant to S.C.R.C.P. 59 (e)
	)	
	)	
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORK FORCE,	)	
	)	
DEFENDANT.	)	
	)	

In its Order Certifying the Class, filed May 5, 2016, this Court found "... the Class Members share[d] a common determinative issue. Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy. [The on-line research work search requirement.] The determinative issue for all members of the Class is whether SCDEW was required to enact the new policy as a regulation." Class Certification Order, Page 5.

Defendant has resurrected its argument against class certification in asserting Class members have to present their record of work search activities in order to prove they have met other requirements of receiving unemployment benefits. This argument is inconsistent with this Court's Order Certifying the Class which found this argument to be without merit. Plaintiffs specifically have limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement. They have not sought to certify a class to recover benefits for persons who were denied benefits for any other reason. The Class as previously defined by the Court is easily identifiable, since each class member would have

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received the Work Search Verification Failure – Benefits Stopped notice set forth fully below. Further, the claims made process which SCDEW proposed and the Court adopted in its February 15, 2019 order requires discovery of the class members that is unnecessary and unduly burdensome.

Plaintiffs therefore move pursuant to S.C.R.C.P 59 (e) to alter or amend this Court's Order filed February 15, 2019. Plaintiffs would show this Court that Plaintiff's proposed notice and limited claims process are in line with this Court's previous rulings regarding class certification and its findings that SCDEW was required to promulgate regulations to implement its on line work search requirement. In contrast, SCDEW's assertion that class members have the burden of proof to prove they made four job contacts per week during a period occurring, in many cases, more than six years ago is unduly burdensome, unfair and calculated to ultimately defeat class certification.

1. <u>But for the illegal work search requirement, class members benefits would not have been stopped.</u>

DEW only randomly checked work seeking activities forms for any given week. According to Kevin Cummings SCDEW would randomly require claimants to appear and produce their record of work search activities. SCDEW found it to be impractical to review weekly each claimant's record of work search activities. Second Cummings Affidavit, dated March 3, 2014, Paragraphs 10-15. (see also Ex B to Second Cummings affidavit "Your work searches and accompanying documentation are subject to random audit and verification....") Therefore, but for the illegal online work search requirement, class members benefits would not have been stopped.

Now SCDEW seeks to require every class member to produce a record of work seeking activities. SCDEW seeks to treat class members differently from other claimants of benefits.

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There is no rational basis for this disparate treatment. To satisfy equal protection, an agency's interpretation of a statute must bear a reasonable relation to the legislative purpose sought to be achieved; members of the class must be treated alike under similar circumstances; and the classification must rest on some rational basis. *Littlefield v. S.C. Forestry Com'n.*, 337 S.C. 348, 523 S.E.2d. 781 (1999). SCDEW cannot require a higher level of scrutiny for a class member, than for other claimants whom it only randomly checked.

2. SCDEW had the opportunity to review Class members' record of work seeking activities after it stopped payment.

When SCDEW's online system detects that a claimant did not perform the online work search, it automatically, and without a determination hearing, stops payment to the class member in violation of S.C. Code Ann. 41-35-670.[1] Then, the system automatically sent the following notice to the class member:

WORK SEARCH VERIFICATION FAILURE - BENEFITS STOPPED

YOU ARE REQUIRED TO MAKE AT LEAST ONE (1) OF YOUR FOUR (4) WEEKLY JOB CONTACTS USING THE DEPARTMENTS JOB SERVICE WEBSITE: SC WORKS ONLINE SERVICES (JOBS.SCWORKS.ORG). OUR RECORDS INDICATE THAT YOU FAILED TO MAKE AN SC WORKS JOB SEARCH CONTACT FOR THE CLAIM WEEK ENDING 08/18/12. THEREFORE, YOUR BENEFITS HAVE BEEN STOPPED.

PLEASE REPORT TO YOUR LOCAL SC WORKS CENTER IMMEDIATELY IF YOU WOULD LIKE TO RECEIVE FUTURE BENEFITS. BRING THIS NOTICE AND YOUR FORM UCB-303, REPORT OF WORK SEEKING ACTIVITIES, WHEN YOU REPORT

[1] The Court at page 5 of it's February 15, 2019 order, found that SCDEW stopped payment in violation of 41-35-670.

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While the notice references future benefits, Kevin Cummings in his 30(b)(6) deposition stated the reason for the notice was to get the claimant to come in and give a statement about why they did not conduct the online work search. [2] 30 (b)(6) Deposition of Kevin Cummings, dated 10/27 14, pages 34-35. In an attempt to comply with S.C. Code. Ann. 41-35-650,[3] the notice required class members to appear and produce their record of work seeking activities. Whether the class member had in the past complied with the job contact requirement would have no bearing on future compliance. The only plausible purpose for requiring class member to bring their form UCB 303 would be to verify past job contacts. Therefore, if class members have any burden to prove work search activities, they have met their burden.

Plaintiffs believe a substantial number of class member's claims are over 6 years old. As a practical matter, it is highly unlikely they still have these forms. It is also highly unlikely they can recreate work seeking activities for a specific week six years ago. SCDEW had the record of work search activities form when it issued its Determination. To now require the class member to present it again deprives the class member of due process and the ability to present evidence in their favor.

[2] SCDEW failed to promulgate regulations regarding the online work search requirement, including establishing a mode of procedure for stopping payments as a result of the failure to comply with the requirement. Further, SCDEW has not promulgated regulations for its adjudication process. Nor has SCDEW promulgated regulations for its work search requirement, including that the claimant must conduct four searches per week. Cummings10/27/14 30 (b)(6) deposition, p. 30, l. 6-16.

[3] S.C. Code Ann. 41-35-650 requires the Department when issuing a determination denying benefits to give prompt notice of the denial "and the reasons therefor." SCDEW, comparing itself to an appellate court, asserts it only has to give one reason for its determination. However, its claims adjudicators are finders of fact. The statute is designed to avoid duplicitous review by requiring the fact finder to give all reasons for denial of benefits.

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3. Any claims process used by the court should be designed to get the benefits of the judgment into the hands of the class members.

Courts should avoid imposing unnecessary hurdles on potential claimants, since strict eligibility conditions and cumbersome claims are likely to deter class members from obtaining claim benefits. *4 Newberg on Class Actions* Section 12:21 (5th ed.) Courts should ... "[w]atch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained." *DeLeon v. Bank of America, N.A.* WL 2568142, Not Reported in F. Supp. 2d (2012). The goal is to get the relief into the hands of the class. Therefore, the process that requires the least of the class members should be first priority. The Court should first consider whether it is even necessary to file a claim. *4 Newberg on Class Actions,* Section 12:18 (5th ed.)

4. The Class definition should be altered to conform with the definition of the class in the Class Certification Order.

The altered class definition suggested by SCDEW and adopted by the Court in it's February 15, 2019 order, requires proof from class members that they otherwise have actively searched for work when such proof is not necessary. SCDEW cannot treat class members differently from other claimants. Further, SCDEW cannot for a second time require class members produce their record of work seeking activities. To do so would be unfair, especially since many denied claims are 6 years old. Plaintiffs do not seek to alter the ending period of the class, nor do they seek to alter the limitation of the class to persons who have not exhausted the maximum benefit allotted to them as set forth on their UCB-103. (SCDEW has argued exhaustion in broader terms in the past.)

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Relief Sought/Conclusion

For the reasons above this court should reconsider its February 15, 2019 Order; reinstate the original definition of the class as set forth in its May 5, 2016 Order Certifying the Class and adopt the Notice to Class Members and claims procedures suggested by Plaintiffs in its proposed order.

Respectfully submitted,

s/Daniel W. Williams

C. BRADLEY HUTTO
Williams & Williams
P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
cbhutto@williamsattys.com

DANIEL W. WILLIAMS
Bedingfield & Williams
P.O. Box 616
Barnwell, SC 29812
Phone: 803-259-2759
dan@danwilliamslaw.com

ADAM PROTHEROE
SC Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
Phone: (803) 779-1113, ext. 106
adam@scjustice.org

ALEX PATERRA
The Paterra Law Firm
104 S. Calhoun Steet
Greenville, SC 29601
Phone: (864) 232-2776
alex.paterra@paterralaw.com

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
February 20, 2019

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Archie Patterson and Tami Bollerman	)	
	)	Civil Action No. 13-CP-06-059
Plaintiffs,	)	
	)	**DEFENDANT'S MEMORANDUM**
v.	)	**REGARDING COLLATERAL ISSUES**
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

The Court recently announced that an order would be forthcoming that decided the merits of this case in Plaintiff's favor. The Court had previously advised that a hearing would take place on February 5, 2019, with regard to the issues described by the parties in this case as "collateral issues." This memorandum sets forth the Defendant's position with regard to those collateral issues, and in doing so, responds to the Plaintiffs' proposed Order which also addresses collateral issues. The Defendant, of course, reserves all rights to appeal the Court's previous Orders and the forthcoming Order regarding the merits and procedural defenses.

1. Prejudgment interest is barred by sovereign immunity.

Plaintiffs have made a claim for prejudgment interest, but such claims are barred by sovereign immunity. There is no South Carolina case which holds that the State or any of its agencies may be ordered to pay prejudgment interest. While the issue has not directly arisen in any case decided after the enactment of the Tort Claims Act in 1986, there is every indication,

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both in that Act and in at least one judicial opinion, that sovereign immunity continues to bar the payment of prejudgment interest by the State or its agencies.

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

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

391 S.C. at 556, 707 S.E.2d at 402 (Pleicones, J., concurring). Plaintiffs argue (proposed Order at 21-22) that the two cases on which Justice Pleicones relied were overruled by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). However, Justice Pleicones himself anticipated and addressed any such contention, noting that

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

391 S.C. at 557, 707 S.E.2d at 402.

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

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

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

In addition, the system for the payment of unemployment insurance is entirely created and governed by statute. The statutes do not authorize the payment of interest on unlawfully withheld benefits. Moreover, it remains the Defendant's position that S.C. Code Ann. § 41-35-690 provides that the appeal procedure referenced therein is the "sole and exclusive appeal procedure" for the kinds of issues involved in this case. This means that the only way for Plaintiffs to have access to the courts for their claims is pursuant to that statute, which does not provide for prejudgment interest and likewise does not waive sovereign immunity for prejudgment interest.

Plaintiffs argue that "The legislature has not precluded the recovery of prejudgment or post judgment interest in claims not sounding in tort." Proposed Order at 22. That is incorrect,

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because as quoted above, the Act expressly preserves "[a]ll other immunities applicable to a governmental entity. . . ." This includes the established sovereign immunity from the payment of prejudgment interest.

2. The class should only include individuals who can establish an entitlement to a benefit despite their not having performed an online work search.

Plaintiffs proposed Order, p. 20, would define the class as "all persons. . . (2) who were eligible to receive unemployment benefits, through SCDEW . . . and (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search on or after August 5, 2012." While continuing to object to class certification for reasons set forth in prior filings, Defendant submits that item (2) above, properly read, correctly limits class membership to persons who were otherwise entitled to unemployment benefits for the weeks in which they were denied a benefit for failure to make an online work search. If that language was not so intended, Defendant requests that it be modified to read "who were otherwise eligible to receive unemployment benefits, through SCDEW, but for their failure to conduct an online work search for the week or weeks in which they were denied benefits." Moreover, item (4) above must be amended to include an end date in order to reflect that (a) as of July 1, 2016, DEW stopped disqualifying claimants from receiving benefits for one or more weeks as a result of their failure to conduct an online job search, until (b) effective May 26, 2017, when a regulation was promulgated by the DEW and approved by the Legislature requiring claimants to perform online work searches through SCWOS each week. *See* S.C. Code Ann. Regs. 47-104, effective May 26, 2017. Also, item (4) should have additional language, set forth in the attachment, to the effect that the class does not include any person who has exhausted his or her benefit allotment for the pertinent period despite the work search ineligibility. The attached proposed Class Notice with

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Defendant's changes sets forth the changes in the class notice that would be necessary to conform to this definition of the class.

Defendant opposes certain language in Plaintiffs' proposed notice to class members, because even if the Court were to rule in Plaintiffs' favor on the merits, there is nothing about this case that would excuse the named Plaintiffs and plaintiff class members from complying with the statutory requirements applicable to all claimants for DEW benefits that they were "able to work and available for work" in their usual employment or other similar employment for which the claimants were qualified. § 41-35-110(3). The claimant class members are also required, like all other claimants for unemployment benefits, to make a weekly showing that they were "actively seeking work." *Id.*

The claimant at all times bears the burden of showing that he or she is available for work, able to work, and actively seeking work. *See, e.g., Hyman v. South Carolina Employment Sec. Commission,* 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). The Court of Appeals has held that "compliance with benefit eligibility requirements . . . includes a duty to show availability for work and a reasonable effort to obtain employment." *Wellington v. S.C. Employment Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984). *Wellington* further holds that "Whether a claimant is available and actively seeking work is an issue of fact to be determined by the administrative agency [i.e., DEW] in accordance with the facts and circumstances of each case." 281 S.C. at 117, 314 S.E.2d at 39 (emphasis added). In reviewing the factual question of whether the claimant was available and actively seeking work, a court must apply the "substantial evidence" test of the Administrative Procedures Act. *Id.* citing the provision of the APA now codified as S.C. Code Ann. § 1-23-380(5)(e). *Accord, e.g., Murphy v. S.C. Employment Sec. Comm'n,* 328 S.C. 542, 492 S.E.2d 625 (Ct. App. 1997).

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

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

Plaintiffs' proposed Order, pp. 23-24, argues in effect that any determination to deny benefits for failure to conduct an online work search also reflected a conclusion by DEW that all other requirements had been met. This argument, however, is completely fallacious. The denials of benefits to Patterson and Bollerman were made solely because they either did not make an online job search, or because there was no record of it. (Tabs 9 and 10, 10/31/18 hearing). There

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was no need for DEW to consider or decide anything else, because the determination that there was no evidence of an online search was dispositive of the individuals' claims. Nor is there anything in the record to indicate that DEW actually reviewed or decided any other issue. The situation is analogous to that in the frequently-cited case, *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), which holds that an "appellate court need not address remaining issues when disposition of prior issue is dispositive." Having found no evidence that online work searches were made, DEW had no need to consider anything else.[1]

It has been held that "there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011). *See also, e.g., Milliron v. T–Mobile*, 2009 WL 3345762, *6 (D.N.J.2009)("the Court finds it perfectly appropriate to require Class members to submit certain information proving they are entitled to collect the relief awarded in this case"); In fact, "claims-made" procedures would appear to be the general rule. *See, e.g., Gascho v. Glob. Fitness Holdings*, LLC, No. 2:11-CV-436, 2014 WL 1350509, at *29 (S.D. Ohio Apr. 4, 2014), *report and recommendation adopted*, No. 2:11-CV-00436, 2014 WL 3543819 (S.D. Ohio July 16, 2014), *aff'd*, 822 F.3d 269 (6th Cir. 2016)(class action administration expert testified that "in his experience with 3,000 class action settlements, most settlements are claims-made and "relatively

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

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few [of the settlements that he has been involved in]—... maybe less than ten or 20—[provide for] direct payments" [;] only 'a handful,' including three consumer cases, provided for checks to be sent without a claims process.") Requiring a claims process is particularly warranted in this case where a claimant may be ineligible to receive benefits for a particular week for a variety of reasons other than a failure to perform an online work search (e.g., other availability issues or a disqualification due to the claimant's separation from employment).

Defendant therefore submits that if Defendant does not prevail on the merits and a class notice is promulgated, the notice should be changed in the portions noted in the attachment to this memorandum. The changes set forth in that version of the notice are intended to reflect the need for class claimants to make the same showing required of every other claimant for unemployment benefits at the time, including the need to show that for the period in question they were actively seeking work. Several other changes are set forth in the attachment, primarily to avoid confusion between any possible holding by the Court and Plaintiffs' assertions.

3. Attorneys fees.

Assuming that the provision on p. 24 of the proposed order regarding attorneys' fees would not apply until all appeals have been resolved, and that that provision expresses no opinion regarding the merits of an attorney fee claim, Defendant does not oppose it, subject to Defendant's reserving the right to appeal all orders in this case.

4. Prejudgment interest calculation.

Defendant opposes Paragraph 4 on p. 25 of the proposed order for the same reasons as its opposition to the payment of prejudgment interest set forth above.

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5. Supplemental hearing.

Assuming that the provision on pp. 25 of the proposed order regarding a supplemental hearing would not apply until all appeals have been resolved, Defendant does not oppose it, subject to Defendant's reserving the right to appeal all orders in this case.

6. Notice to Class.

Subject to the same reservations expressed above, and subject to its objections to the content of the Class Notice as set forth above, Defendant does not object to the procedural aspects of class notice as set forth in Paragraph 6 on p. 26, should the case ever reach the point where such notice needs to be given.

7. Opt outs.

8. Objections.

9. Final hearing.

Subject to the same reservations expressed above, Defendant does not object to Paragraphs 7 through 9 on pp. 26-27 of the proposed order, should the case ever reach the point where such actions need to be taken.

10. Payments to class members.

Subject to the same reservations expressed above, Defendant does not object to Subparagraphs (a) through (k) of Paragraphs 10 on pp. 27-30 of the proposed order, should the case ever reach the point where such actions need to be taken.

On the other hand, Defendant strenuously objects to Paragraph 10(l) on p. 30 of the proposed Order, which pertains to the distribution of "residual funds" under S.C.R. Civ. P. 23(e), added effective April 27, 2016. At the time the amendment to the Rule was added, almost all of the complained-of acts in this case had occurred, with only about two month (May-June 2016)

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remaining until DEW ceased stopping benefits, the proviso not having been re-enacted for 2016-17. Defendant's counsel is unaware of any South Carolina case in which a court has ordered the distribution of unclaimed funds in a manner akin to the *cy pres* doctrine, and it appears that no such cases exist. To apply Rule 23(e) to this case would be (except for possibly two months in 2016) an impermissible retroactive award.

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

For several reasons, it is most appropriate that any unclaimed funds remain with the Defendant. First, any unclaimed funds would effectively remain with DEW for the payment of unemployment claims to others, which is similar or identical to the purpose sought to be served by the distribution of funds proposed by Plaintiffs. Secondly and similarly, the Defendant is a state agency charged with expending its funds for the public benefit. Unlike a private defendant in a class action DEW would not retain funds in a way that would be comparable to permitting a private defendant to profit. Third, even if DEW should ultimately not prevail on the merits, DEW's actions were nevertheless prompted by a good faith effort to comply with the expressed will of the General Assembly as DEW understood it, and the General Assembly re-enacted the provisos with ample reason to have known the manner in which DEW was applying them. In other words, there is no need in this situation to regard DEW's actions as something that is necessary in order to deter DEW from similar conduct in the future. Nothing along the lines of

the present case has ever happened before, and the situation is so unique that there is no likelihood of recurrence of a similar situation. Also, and as noted above, it is reasonable to require each class member to make some proof that he or she has a valid claim, and there is no reason for DEW to be required to make a payment to anyone who cannot make such proof. As one commentator has noted, "it could be argued that in an adversary system premised on a notion of private rights adjudication, unless and until the plaintiff actually claims the award, it remains the property of the defendant. . . ."). Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 665 (2010).

DEW therefore submits that Plaintiffs' proposed Paragraph 10(l) should be replaced with the following language: "(l) Unclaimed funds. All funds that are not claimed by a Class Member shall remain in the possession of DEW."

DAVIDSON, WREN & PLYLER, P.A.

BY: *s/ Kenneth P. Woodington*
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina

February 4, 2019

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ATTACHMENT:

Defendant's proposed changes to Plaintiffs' proposed class notice

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COURT OF COMMON PLEAS FOR BARNWELL COUNTY, SOUTH CAROLINA

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

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

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

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

The Court in charge of this case still has to decide several issues. Payments will not be made unless ~~after~~ the Court issues ~~its~~ final rulings in favor of Plaintiffs, and ~~unless~~ only if any such ~~those~~ rulings, if made, are not reversed on appeal. Please be patient.

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[DEFENDANT HAS NO PROPOSED CHANGES TO MAKE TO P. 2, WHICH IS A TABLE OF CONTENTS]

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BASIC INFORMATION

1. Why is there a notice?

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

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

2. What is this Lawsuit about?

Plaintiffs seek to recover money for class members who claim they were wrongfully denied unemployment benefits because they claim that ~~as a result of~~ the Defendant~~'s~~ failed~~ure~~ to comply with South Carolina law.

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

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

3. What is the status of the Lawsuit?

By Order dated April 29, 2016, the Court ruled that the Lawsuit should be maintained as a class action. A merits hearing was held on October 31 , 2018. After the hearing the Court issued its Order finding _____.

4. Why is this a class action?

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

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

WHO IS IN THE CLASS?

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

If you receive this Notice in the mail, the Court has reason to believes you may be ~~are~~ a member of the Class.

The Court has defined the Class as ". . .all persons who are: (1) citizens and residents of South Carolina; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; and (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search on or after August 5,2012 and before July 1, 2016, and who did not exhaust his or her benefit allotment for the pertinent period despite the work search ineligibility."

CLASS BENEFITS

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

If you stay in the Class and the Plaintiffs prevail, and if you can make the showing referenced below, you will receive the benefit amount you would have received had your benefit not been denied for failing to comply with the online work search requirement. Plaintiffs are also seeking interest on this amount. However, before you can collect the benefit amount, you will be required to document that you were actively seeking work during the week or weeks for which the benefit would have been paid. DEW requires this documentation to be made by a Form UCB-303, kept by you at the time the benefit was sought. DEW will also accept a re-created Form UCB-303 for the period in question, but DEW will review any such forms, whether original or re-created, to determine whether they present substantial evidence that the four non-online work searches were actually made.

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

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

8. How can I get a payment?

If you decide to remain in the Class and the case results in an ~~Court~~ awards of monies to the class after all appeals have been resolved, you will be notified of that result, and advised how to submit your proof of four non-online work searches for the period in question. ~~do not have to do any1hing to get a payment. Payments will automatically be mailed if the Court's deci sions are~~

~~not reversed after any appeals.~~

9. When will I get my payment?

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

[DEFENDANT HAS NO PROPOSED CHANGES TO THE REMAINDER OF THE NOTICE]

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 13-CP-06-059
	)	
Plaintiffs,	)	**DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFFS' PROPOSED NOTICE TO CLASS MEMBERS**
	)	
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	

Defendant submits the following response to Plaintiffs' Motion to Approve Class Notice. Defendants oppose certain language in the proposed notice, because even if the Court were to rule in Plaintiffs' favor on the merits, there is nothing about this case that would excuse the named Plaintiffs and plaintiff class members from complying with the statutory requirements applicable to all claimants for DEW benefits that they were "able to work and available for work" in their usual employment or other similar employment for which the claimants were qualified. § 41-35-110(3). The claimant class members, are also required, like all other claimants for unemployment benefits, to make a weekly showing that they were "actively seeking work." *Id.*

The claimant at all times bears the burden of showing that he or she is available for work, able to work, and actively seeking work. *See, e.g., Hyman v. South Carolina Employment Sec. Commission,* 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). The Court of Appeals has held that "compliance with benefit eligibility requirements . . . includes a duty to show availability for

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work and a reasonable effort to obtain employment." *Wellington v. S.C. Employment Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984). *Wellington* further holds that "Whether a claimant is available and actively seeking work is an issue of fact to be determined by the administrative agency [i.e., DEW] in accordance with the facts and circumstances of each case." 281 S.C. at 117, 314 S.E.2d at 39 (emphasis added). In reviewing the factual question of whether the claimant was available and actively seeking work, a court must apply the "substantial evidence" test of the Administrative Procedures Act. *Id.* citing the provision of the APA now codified as S.C. Code Ann. § 1-23-380(5)(e). *Accord, e.g., Murphy v. S.C. Employment Sec. Comm'n,* 328 S.C. 542, 492 S.E.2d 625 (Ct. App. 1997).

Plaintiffs' proposed Class Notice would eliminate the need for class members to comply with those requirement applicable to all claimants for benefits, with no legal basis for excusing such compliance. The class members to whom DEW denied weekly benefits were denied those benefits because they did not make at least one online work search in the South Carolina Works Online Services system ("SCWOS") for the week in question. However, that does not mean the class members have otherwise established an entitlement to benefits for the weeks in question, i.e., that they were able, available, and actively seeking work.

During the years in question, DEW enforced the legislatively-enacted proviso that individuals must perform one online job search in SCWOS each week as a condition of receiving benefits. In the event this Court rules DEW was legally compelled to ignore the proviso (or that a regulation was needed for the proviso to take effect), each class member would still need to meet their burden of showing they are able, available, and actively seeking work. To hold otherwise would circumvent the availability requirements set forth in the law.

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

Defendant therefore submits that if Defendant does not prevail on the merits and a class notice is promulgated, the notice should be changed in the portions noted in the attachment to this response. The changes set forth in that version of the notice are intended to reflect the need for class claimants to make the same showing required of every other claimant for unemployment benefits at the time, including the need to show that for the period in question they were actively seeking work. Several other changes are set forth in the attachment, primarily to avoid confusion between any possible holding by the Court and Plaintiffs' assertions.

DAVIDSON, WREN & PLYLER, P.A.

BY: *s/ Kenneth P. Woodington*
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina

October 25, 2018

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COURT OF COMMON PLEAS FOR BARNWELL COUNTY, SOUTH CAROLINA

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CLASS BENEFITS

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

If you stay in the Class and the Plaintiffs prevail, and if you can make the showing referenced below, you will receive the benefit amount you would have received had your benefit not been denied for failing to comply with the online work search requirement. Plaintiffs are also seeking interest on this amount. However, before you can collect the benefit amount, you will be required to document that you were actively seeking work during the week or weeks for which the benefit would have been paid. DEW requires this documentation to be made by a Form UCB-303, kept by you at the time the benefit was sought. DEW will also accept a re-created Form UCB-303 for the period in question, but DEW will review any such forms, whether original or re-created, to determine whether they present substantial evidence that the four non-online work searches were actually made.

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

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

8. How can I get a payment?

If you decide to remain in the Class and the case results in an ~~Court~~ awards of monies to the class after all appeals have been resolved, you will be notified of that result, and advised how to submit your proof of four non-online work searches for the period in question. ~~do not have to do anything to get a payment. Payments will automatically be mailed if the Court's decisions are not reversed after any appeals.~~

9. When will I get my payment?

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

[DEFENDANT HAS NO PROPOSED CHANGES TO THE REMAINDER OF THE NOTICE]

ELECTRONICALLY FILED - 2018 Oct 25 3:16 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

ELECTRONICALLY FILED - 2018 Oct 12 2:48 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN, PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORK FORCE, DEFENDANT.	CIVIL ACTION NO.: 2013-CP-06-00059 NOTICE OF MOTION AND MOTION TO APPROVE CLASS NOTICE

TO: THE DEFENDANT AND ITS ATTORNEY, KENNETH P. WOODINGTON, ESQUIRE:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs will move before this Court on October 31, 2018, or as soon as counsel may be heard, for an Order approving a class notice for distribution to the class members at the appropriate time. This motion is made pursuant to Rule 23 S.C.R.C.P. and any other applicable Rule of Civil Procedure. (A copy of the proposed notice to class members is attached.

You are invited to attend or participate in the hearing as you deem proper.

Respectfully submitted,

s/ Daniel W. Williams
DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812
(803) 259-2759
dan@danwilliamslaw.com

C. BRADLEY HUTTO
Williams & Williams

1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
The Paterra Law Firm, LLC
104 S. Calhoun Street
Greenville, S.C. 29601
864-232-2776
alex.paterra@paterralaw.com

ADAM PROTHEROE
S. C. Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
adam@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
October 12, 2018

ELECTRONICALLY FILED - 2018 Oct 12 2:48 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

ELECTRONICALLY FILED - 2018 Oct 12 2:48 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

COURT OF COMMON PLEAS FOR BARNWELL COUNTY, SOUTH CAROLINA

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

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

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

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

- The Court in charge of this case still has to decide several issues. Payments will be made after the Court issues its final rulings, unless those rulings are reversed on appeal. Please be patient.

ELECTRONICALLY FILED - 2018 Oct 12 2:48 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

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ELECTRONICALLY FILED - 2018 Oct 12 2:48 PM - BARNWELL - COMMON PLEAS - CASE#2013CP0600059

BASIC INFORMATION

1. Why is there a notice?

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

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

2. What is this Lawsuit about?

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

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

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

3. What is the status of the Lawsuit?

By Order dated April 29, 2016, the Court ruled that the Lawsuit should be maintained as a class action. A merits hearing was held on October 31, 2018. After the hearing the Court issued its Order finding _____

_____.

4. Why is this a class action?

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

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

WHO IS IN THE CLASS?

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

If you receive this Notice in the mail, the Court believes you are a member of the Class.

The Court has defined the Class as "...all persons who are: (1) citizens and residents of South Carolina; (2) who were eligible to receive unemployment benefits, through SCDEW; (3) who made application through SCDEW to receive benefits; and (4) who did not receive benefits for one or more weeks as a result of their failure to conduct an online job search on or after August 5, 2012."

CLASS BENEFITS

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

If you stay in the Class and the Plaintiffs prevail, you will receive the benefit amount you would have received had your benefit not been denied for failing to comply with the online work search requirement. Plaintiffs are also seeking interest on this amount.

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

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

8. How can I get a payment?

If you decide to remain in the Class and the Court awards monies to the class, you do not have to do anything to get a payment. Payments will automatically be mailed if the Court's decisions are not reversed after any appeals.

9. When will I get my payment?

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

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EXCLUDING YOURSELF FROM THE CLASS

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

10. How do I get out of the Class?

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

{insert Class Administrator's address}

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

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

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

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

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

THE LAWYERS REPRESENTING YOU

13. Do I have a lawyer in the case?

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

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

14. How will the lawyers be paid?

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

IF YOU DO NOTHING

15. What happens if I do nothing at all?

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

GETTING MORE INFORMAITON

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

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

{Class Administrator Contact Information}

17. How do I get more information?

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

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

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS
Post Office Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

Daniel W. Williams, Esquire
BEDINGFIELD & WILLIAMS, LLC
Post Office Box 616
Barnwell, SC 29812
(803) 259-2759

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Alex Paterra, Esquire
THE PATERRA LAW FIRM, LLC
104 S. Calhoun Street
Greenville, SC 29601
(864) 232-2776

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

BY ORDER OF THE COURT.

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

_____, South Carolina

Dated: _____

CLASS COUNSEL

C. Bradley Hutto, Esquire
WILLIAMS & WILLIAMS
PO Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

Daniel W. Williams, Esquire
BEDINGFIELD & WILLIAMS
PO Box 616
Barnwell, SC 29812
(803) 259-2759

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PO Box 7187
Columbia, SC 29202
(803) 779-1113, Ext. 106

ATTORNEYS FOR DEFENDANT SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE

Kenneth P. Woodington
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568
(803) 806-8222

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ELECTION TO OPT OUT OF CLASS ACTION

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

INSTRUCTIONS:

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

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

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

Date: _____ _____
Signature

Please type or print the following information:

Name: _____
FIRST MIDDLE LAST

Former Name(s) (if any): _____

Mailing Address: _____
NUMBER STREET APT. #

_____
CITY STATE ZIP

Telephone Number: _____

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

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

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 2013-CP-06-059
Plaintiffs,	)	**AMENDED NOTICE OF MOTION AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(e), SCRCP**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.
2017 MAY -4 AM 11:09
FILED FOR RECORD

TO: THE HONORABLE DOYET A. EARLY, III

DANIEL W. WILLIAMS, C. BRADLEY HUTTO, ALEX PATERRA, AND STEPHEN SUGGS, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant will move before the Honorable Doyet A. Early, III, at such time and place as the Court may direct, for an order altering or amending the Order Finding that Named Plaintiffs Tami Bollerman and Archie Patterson Have Standing to Represent the Putative Class, dated April 12, 2107. A copy of the Order is attached to this motion. The Order was received electronically from Plaintiff's counsel on April 26, 2017. Specifically, Defendant seeks a ruling vacating that Order, denying class certification and dismissing this action for lack of a plaintiff with standing and lack of a justiciable controversy.

The grounds for this motion are as follows:

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a. The Order does not address the legal principles that are applied in South Carolina in determining whether a party has standing to sue. The Supreme Court of South Carolina uses the same test for standing as is found in federal law. As that court has held,

> [The] "irreducible constitutional minimum of standing," . . . consists of the following three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992).

In addition, the Order does not discuss the Supreme Court's holdings that "[b]efore any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996), as reiterated in *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998)("South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached").

b. It is held on p. 3 of the Order that "[i]n arguing that Plaintiffs lack standing, Defendant asserts that both Tami Bollerman and Archie Patterson did not appeal the adjudication of their benefit loss through administrative channels and have therefore failed to exhaust administrative remedies." This point is discussed at pp. 3-5 of the Order. However, the Court overlooked that fact that the Defendant did not argue that the failure to appeal the issue related to the merits of this case via the administrative process deprived Plaintiffs of standing. Rather, in arguing that Ms. Bollerman's claim is not "typical" for purposes of class representation, DEW

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argues she was required to pursue an administrative appeal of her argument that her denial of benefits resulted from a computer error by DEW. This issue is certainly one for which a claimant must exhaust administrative remedies.

c. The Order did not address Defendant's contention that Ms. Bollerman did not provide the Court, much less DEW, a Form UCB-303 indicating that she made four non-online work searches for the week in question. She was held by DEW to have been disqualified for benefits for the week of October 7, 2012 through October 13, 2012, because she did "not have the specified number of verifiable contacts" for that period. 11/2/16 hearing, Pl. Ex. 3. This absence of documentation showing that Ms. Bollerman actually made four job contacts is fatal to her ability to claim standing to challenge the online work search requirement, and to the existence of a justiciable controversy, because in the absence of proof of four job search contacts for the week in question, the online work search requirement made no difference to her ability to claim benefits for that week. Her claim therefore fails the third prong of the *Lujan* test adopted by *Sea Pines Ass'n., supra,* which requires it to be likely that "that the injury will be redressed by a favorable decision." 345 S.C. at 601, 550 S.E.2d at 291. It is not only unlikely, it is affirmatively impossible for Ms. Bollerman's claim to be redressed by a favorable decision regarding the online work search requirement, because even if that requirement were invalidated, she still would not prevail, because she did not otherwise show an entitlement to the benefit for the week in question.

d. Similarly, the Order did not address Defendant's contention that Mr. Patterson submitted a Form UCB-303, which is in the record as 1/11/17 hearing, Def. Ex. 3. He represented on the form that he conducted only three in-person job search contacts and one online job search contact during the week of disqualification (August 19, 2012, through August

DISCN 05/08/17

25, 2012), and that DEW has no record of the alleged online job search. Therefore, like Ms. Bollerman, Mr. Patterson did not present evidence that he actually made four works searches for the period in question, and a favorable decision on the merits of this case would therefore not redress his claim of injury from the online work search requirement. Accordingly, there is also no justiciable case or controversy as regards Mr. Patterson's claim.

e. In holding that "[e]ven if Mr. Patterson chose not to apply for benefits after he was denied benefits that does not cure or obviate any earlier wrongful denial of benefits," the Order overlooked or misapprehended the legal effects of the fact that Mr. Patterson could have recovered the one week's benefit he now claims to have lost if he had simply continued to apply for benefits during the summer of 2013. This failure on his part to mitigate his loss means that he lacks standing to pursue this claim for the additional reason that there is no "causal connection between the injury and the conduct complained of." *Sea Pines, supra.* 345 S.C. at 601, 550 S.E.2d at 291. The only reason he did not collect the amount he claims was that he did not continue to exhaust the balance of funds available to him in 2013, for reasons of his own making. In addition, because he could have collected the total amount of benefits to which he was entitled, effectively making up for the benefits he did not collect during the week of August 19, 2012, but did not, his claim is moot. A class action cannot be maintained by a plaintiff with a moot claim. *Ferguson v. Charleston Lincoln Mercury, Inc.* 349 S.C. 558, 564 S.E.2d 94 (2002).

f. In holding that the claims of Ms. Bollerman and Mr. Patterson, were "capable of repetition, yet evading review," the Order overlooked or misapprehended that the claims are no longer "capable of repetition," because DEW terminated the program as of July 1, 2016. 1/11/17 hearing, Def. Ex. 7. Moreover, even if the program had still been in effect, a person with four

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non-online work searches and who did not exhaust benefits could seek review for as long as the claim was not time-barred, so there is no question of proper claims evading review.

g. In holding that the public importance exception is applicable in this case, the Order overlooked or misapprehended that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)(emphasis added). As noted in the above paragraph, DEW terminated the program effective July 1, 2016. Future guidance is therefore no longer needed for this issue, and the public importance exception therefore does not apply.

h. To the extent, if any, that the Order holds on p. 8 that DEW's claim on the merits "is erroneous under both the APA and SDEW's own enabling legislation," (as opposed to simply reiterating Plaintiffs' argument to that effect), the Order overlooked or misapprehended that the merits of the case were not before the Court in connection with the present Order. Defendant therefore respectfully requests that that sentence, if not deleted altogether, should be modified to make clear that it did not represent a holding of the Court, but instead was a paraphrase of Plaintiffs' argument on the merits of the case.

Defendant also submits that the following issues, which were raised in Defendant's May 12, 2016 Rule 59(e) motion, were not addressed in the April 12, 2017 Order, and therefore still need to be addressed by the Court.

a. The May 5, 2016 Order, p. 5, holds that "The named Representatives, i.e. each member of the class has suffered the same type of harm from the new Policy [because] each member has had his/her unemployment benefits denied for at least one week because of SCDEW's implementation of the online work search requirement policy." This overlooks the fact that Ms. Nix did not have benefits denied at all, and that for the reasons discussed above, any

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losses were later mooted by subsequent payments for named Plaintiffs Robinson, Patterson and Alexander. In addition, this holding appears to conclude that if some unnamed persons who are not class representatives have had benefits denied, then that would make up for any failure of the named Plaintiffs to show a real, non-moot injury. However, the analysis works in the other direction: the named Plaintiffs must themselves show real and not moot injuries, rather than simply alleging that there may be someone else, not a named plaintiff, who might be able to show such injuries. Similarly, the Order concludes (p. 4) that "Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." However, the Order does not specifically hold that any of the named Plaintiffs, as opposed to some other unnamed persons, "would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." The absence of such a holding means that class certification should not be granted.

b. On the same page, the May 5, 2016 Order concludes that the existing Plaintiffs have standing because "each Plaintiff is capable of becoming employed in the future and suffering harm from this policy." This conclusion, however, is foreclosed by such cases as *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 634 S.E.2d 664, (Ct. App. 2006). *Commander Health Care* holds as follows:

> An "injury in fact" has been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291; *see also Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (finding one must suffer an actual injury in fact, not a concern of future harm, in order to satisfy the *Lujan* test).

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370 S.C. at 302, 634 S.E.2d at 666-67 (emphases added). The named Plaintiffs in this case are the least likely of all possible future unemployment benefit claimants to fail to perform online job searches, because they have found out what happens when such searches are not performed. As a result, their claims are merely "conjectural or hypothetical," and amount to nothing more than "a concern of future harm," neither of which is a showing that will establish standing.

c. The May 5, 2016 Order also holds that "each named plaintiff[] and each class member are seeking the same remedial measure." This conclusion overlooks the fact most of the named Plaintiffs are not pursuing a remedy at all, either because they never had a right to a remedy, or their claims are not longer being pursued because they received all the benefits to which they were entitled.

d. In citing a portion of *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), Order at 4, the May 5, 2016 Order overlooked the holding of *Gardner*, which was that

> 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. See *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978) ("The very 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.").

353 S.C. at 22, 577 S.E.2d at 201. In the present case, the nature of the claims made "require[e] each member of the class to prove the elements of the cause of action," because each class member would need to prove that:

1. The claimant made four job searches for the week of weeks for which the claim was made.

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2. The claimant has not in the meantime received all the benefits to which he or she is entitled (i.e., the claimant has not "exhausted" the right to receive benefits).

3. There are no other specific reasons that would disqualify the claimant from receiving a benefit for the week in question. For instance, Ms. Robinson was disqualified for the weeks in question because she actually owed DEW money for other weeks of benefits wrongfully collected by her.

These considerations could cause a claimant to be denied a benefit for reasons other than a failure to perform an online job search and, therefore illustrate a paradigm situation in which the requisite commonality is absent. The May 5, 2016 Order holds (p. 5) that "Plaintiffs specifically have limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement. They have not sought to certify a class to recover benefits for persons who were denied benefits for any other reason." Again, however, Plaintiffs cannot define the class by reference to the claims of persons other than the named Plaintiffs. Plaintiff Boilerman, for example, is a person who contends she complied with the online work search requirement but did not receive benefits because of a computer error which she did not seek to have corrected.

e. Defendant also argued in its May 12, 2016 Motion that the May 5, 2016 Order should be amended in order to change all references to "damages." There is one such reference on p. 5 of the Order, and there are three other references to "damages" on p. 7. The Amended Complaint characterizes this action as one for declaratory relief, injunctive relief, and for the equitable remedy of an accounting. Damages, as such, were not sought. As a result, even if the

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Court declines to change other parts of the Order, all references to "damages" should be changed to "monetary relief."

g. Defendant also asserts that the May 5, 2016 Order should be amended to delete references that might indicate a view of the merits. This request is made for clarification, even though the last sentence of the Order, p. 7, notes that "No part of this Order shall be construed as a decision on the merits of this case."

In the first sentence of the May 5, 2016 Order, it is stated that "Named Plaintiffs seek certification of a class of individuals who were wrongfully denied unemployment insurance benefits . . . ." Defendant would request that the first sentence of the Order be amended by adding the word "allegedly," to state that "Named Plaintiffs seek certification of a class of individuals who were **allegedly** wrongfully denied unemployment insurance benefits . . . ."

Also, the second sentence of the second paragraph of the May 5, 2016 Order (p. 1) states that "The named Plaintiffs were denied benefits because of their inability or failure to properly apply online for employment." Defendant requests that this be changed to "The named Plaintiffs **allege that they** were denied benefits because of their inability or failure to properly apply online for employment."

i. Finally, Defendant submits that even if the Court should decide not to otherwise amend the May 5, 2016 Order, the class definition on p. 7 should be clarified by noting that "Nothing in this Order prohibits DEW from requiring each class member to make the same showing of eligibility required of any other claimant who has had benefits denied, including the requirement that administrative remedies be exhausted where appropriate."

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CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court reconsider and vacate its Order filed on May 5, 2016 and its Order dated April 12, 2017, and hold instead that (a) class certification should be denied for the reasons set forth above and in previous filings regarding class certification, and (b) that this action should be dismissed for lack of a plaintiff with standing and lack of a justiciable controversy.

DAVIDSON & LINDEMANN, P.A.

BY: _____

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Defendant

Columbia, South Carolina

May 1, 2017

DLSCN 05/08/17

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 2013-CP-06-059
Plaintiffs,	)	**NOTICE OF MOTION AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(e), SCRCP**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

FILED FOR RECORD
2017 MAY -3 PM 1:44
RECEIVED
CLERK OF COURT

TO: THE HONORABLE DOYET A. EARLY, III

DANIEL W. WILLIAMS, C. BRADLEY HUTTO, ALEX PATERRA, AND STEPHEN SUGGS, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant will move before the Honorable Doyet A. Early, III, at such time and place as the Court may direct, for an order altering or amending the Order Finding that Named Plaintiffs Tami Bollerman and Archie Patterson Have Standing to Represent the Putative Class, dated April 12, 2107. A copy of the Order is attached to this motion. The Order was received electronically from Plaintiff's counsel on April 26, 2017. Specifically, Defendant seeks a ruling vacating that Order and denying class certification.

The grounds for this motion are as follows:

a. The Order does not address the legal principles that are applied in South Carolina in determining whether a party has standing to sue. The Supreme Court of South Carolina uses the same test for standing as is found in federal law. As that court has held,

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> [The] "irreducible constitutional minimum of standing," . . . consists of the following three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992).

In addition, the Order does not discuss the Supreme Court's holdings that "[b]efore any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996), as reiterated in *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998)("South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached").

b. It is held on p. 3 of the Order that "[i]n arguing that Plaintiffs lack standing, Defendant asserts that both Tami Bollerman and Archie Patterson did not appeal the adjudication of their benefit loss through administrative channels and have therefore failed to exhaust administrative remedies." This point is discussed at pp. 3-5 of the Order. However, the Court overlooked that fact that the Defendant did not argue that the failure to appeal the issue related to the merits of this case via the administrative process deprived Plaintiffs of standing. Rather, in arguing that Ms. Bollerman's claim is not "typical" for purposes of class representation, DEW argues she was required to pursue an administrative appeal of her argument that her denial of benefits resulted from a computer error by DEW. This issue is certainly one for which a claimant must exhaust administrative remedies.

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c. The Order did not address Defendant's contention that Ms. Bollerman did not provide the Court, much less DEW, a Form UCB-303 indicating that she made four non-online work searches for the week in question. She was held by DEW to have been disqualified for benefits for the week of October 7, 2012 through October 13, 2012, because she did "not have the specified number of verifiable contacts" for that period. 11/2/16 hearing, Pl. Ex. 3. This absence of documentation showing that Ms. Bollerman actually made four job contacts is fatal to her ability to claim standing to challenge the online work search requirement, and to the existence of a justiciable controversy, because in the absence of proof of four job search contacts for the week in question, the online work search requirement made no difference to her ability to claim benefits for that week. Her claim therefore fails the third prong of the *Lujan* test adopted by *Sea Pines Ass'n., supra,* which requires it to be likely that "that the injury will be redressed by a favorable decision." 345 S.C. at 601, 550 S.E.2d at 291. It is not only unlikely, it is affirmatively impossible for Ms. Bollerman's claim to be redressed by a favorable decision regarding the online work search requirement, because even if that requirement were invalidated, she still would not prevail, because she did not otherwise show an entitlement to the benefit for the week in question.

d. Similarly, the Order did not address Defendant's contention that Mr. Patterson submitted a Form UCB-303, which is in the record as 1/11/17 hearing, Def. Ex. 3. He represented on the form that he conducted only three in-person job search contacts and one online job search contact during the week of disqualification (August 19, 2012, through August 25, 2012), and that DEW has no record of the alleged online job search. Therefore, like Ms. Bollerman, Mr. Patterson did not present evidence that he actually made four works searches for the period in question, and a favorable decision on the merits of this case would therefore not

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redress his claim of injury from the online work search requirement. Accordingly, there is also no justiciable case or controversy as regards Mr. Patterson's claim.

e. In holding that "[e]ven if Mr. Patterson chose not to apply for benefits after he was denied benefits that does not cure or obviate any earlier wrongful denial of benefits," the Order overlooked or misapprehended the legal effects of the fact that Mr. Patterson could have recovered the one week's benefit he now claims to have lost if he had simply continued to apply for benefits during the summer of 2013. This failure on his part to mitigate his loss means that he lacks standing to pursue this claim for the additional reason that there is no "causal connection between the injury and the conduct complained of." *Sea Pines, supra.* 345 S.C. at 601, 550 S.E.2d at 291. The only reason he did not collect the amount he claims was that he did not continue to exhaust the balance of funds available to him in 2013, for reasons of his own making. In addition, because he could have collected the total amount of benefits to which he was entitled, effectively making up for the benefits he did not collect during the week of August 19, 2012, but did not, his claim is moot. A class action cannot be maintained by a plaintiff with a moot claim. *Ferguson v. Charleston Lincoln Mercury, Inc.* 349 S.C. 558, 564 S.E.2d 94 (2002).

f. In holding that the claims of Ms. Bollerman and Mr. Patterson, were "capable of repetition, yet evading review," the Order overlooked or misapprehended that the claims are no longer "capable of repetition," because DEW terminated the program as of July 1, 2016. 1/11/17 hearing, Def. Ex. 7. Moreover, even if the program had still been in effect, a person with four non-online work searches and who did not exhaust benefits could seek review for as long as the claim was not time-barred, so there is no question of proper claims evading review.

g. In holding that the public importance exception is applicable in this case, the Order overlooked or misapprehended that "[t]he key to the public importance analysis is whether

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a resolution is needed for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)(emphasis added). As noted in the above paragraph, DEW terminated the program effective July 1, 2016. Future guidance is therefore no longer needed for this issue, and the public importance exception therefore does not apply.

h. To the extent, if any, that the Order holds on p. 8 that DEW's claim on the merits "is erroneous under both the APA and SDEW's own enabling legislation," (as opposed to simply reiterating Plaintiffs' argument to that effect), the Order overlooked or misapprehended that the merits of the case were not before the Court in connection with the present Order. Defendant therefore respectfully requests that that sentence, if not deleted altogether, should be modified to make clear that it did not represent a holding of the Court, but instead was a paraphrase of Plaintiffs' argument on the merits of the case.

Defendant also submits that the following issues, which were raised in Defendant's May 12, 2016 Rule 59(e) motion, were not addressed in the April 12, 2017 Order, and therefore still need to be addressed by the Court.

a. The May 5, 2016 Order, p. 5, holds that "The named Representatives, i.e. each member of the class has suffered the same type of harm from the new Policy [because] each member has had his/her unemployment benefits denied for at least one week because of SCDEW's implementation of the online work search requirement policy." This overlooks the fact that Ms. Nix did not have benefits denied at all, and that for the reasons discussed above, any losses were later mooted by subsequent payments for named Plaintiffs Robinson, Patterson and Alexander. In addition, this holding appears to conclude that if some unnamed persons who are not class representatives have had benefits denied, then that would make up for any failure of the named Plaintiffs to show a real, non-moot injury. However, the analysis works in the other

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direction: the named Plaintiffs must themselves show real and not moot injuries, rather than simply alleging that there may be someone else, not a named plaintiff, who might be able to show such injuries. Similarly, the Order concludes (p. 4) that "Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." However, the Order does not specifically hold that any of the named Plaintiffs, as opposed to some other unnamed persons, "would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." The absence of such a holding means that class certification should not be granted.

b. On the same page, the May 5, 2016 Order concludes that the existing Plaintiffs have standing because "each Plaintiff is capable of becoming employed in the future and suffering harm from this policy." This conclusion, however, is foreclosed by such cases as *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 634 S.E.2d 664, (Ct. App. 2006). *Commander Health Care* holds as follows:

> An "injury in fact" has been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291; *see also Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (finding one must suffer an actual injury in fact, not a concern of future harm, in order to satisfy the *Lujan* test).

370 S.C. at 302, 634 S.E.2d at 666-67 (emphases added). The named Plaintiffs in this case are the least likely of all possible future unemployment benefit claimants to fail to perform online job searches, because they have found out what happens when such searches are not performed. As a result, their claims are merely "conjectural or hypothetical," and amount to nothing more than "a concern of future harm," neither of which is a showing that will establish standing.

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c. The May 5, 2016 Order also holds that "each named plaintiff[] and each class member are seeking the same remedial measure." This conclusion overlooks the fact most of the named Plaintiffs are not pursuing a remedy at all, either because they never had a right to a remedy, or their claims are not longer being pursued because they received all the benefits to which they were entitled.

d. In citing a portion of *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), Order at 4, the May 5, 2016 Order overlooked the holding of *Gardner*, which was that

> 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. See *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978) ("The very 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.").

353 S.C. at 22, 577 S.E.2d at 201. In the present case, the nature of the claims made "require[e] each member of the class to prove the elements of the cause of action," because each class member would need to prove that:

1. The claimant made four job searches for the week of weeks for which the claim was made.
2. The claimant has not in the meantime received all the benefits to which he or she is entitled (i.e., the claimant has not "exhausted" the right to receive benefits).
3. There are no other specific reasons that would disqualify the claimant from receiving a benefit for the week in question. For instance, Ms. Robinson was disqualified for the weeks in question because she actually

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owed DEW money for other weeks of benefits wrongfully collected by her.

These considerations could cause a claimant to be denied a benefit for reasons other than a failure to perform an online job search and, therefore illustrate a paradigm situation in which the requisite commonality is absent. The May 5, 2016 Order holds (p. 5) that "Plaintiffs specifically have limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement. They have not sought to certify a class to recover benefits for persons who were denied benefits for any other reason." Again, however, Plaintiffs cannot define the class by reference to the claims of persons other than the named Plaintiffs. Plaintiff Bollerman, for example, is a person who contends she complied with the online work search requirement but did not receive benefits because of a computer error which she did not seek to have corrected.

e. Defendant also argued in its May 12, 2016 Motion that the May 5, 2016 Order should be amended in order to change all references to "damages." There is one such reference on p. 5 of the Order, and there are three other references to "damages" on p. 7. The Amended Complaint characterizes this action as one for declaratory relief, injunctive relief, and for the equitable remedy of an accounting. Damages, as such, were not sought. As a result, even if the Court declines to change other parts of the Order, all references to "damages" should be changed to "monetary relief."

g. Defendant also asserts that the May 5, 2016 Order should be amended to delete references that might indicate a view of the merits. This request is made for clarification, even though the last sentence of the Order, p. 7, notes that "No part of this Order shall be construed as a decision on the merits of this case."

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In the first sentence of the May 5, 2016 Order, it is stated that "Named Plaintiffs seek certification of a class of individuals who were wrongfully denied unemployment insurance benefits . . . ." Defendant would request that the first sentence of the Order be amended by adding the word "allegedly," to state that "Named Plaintiffs seek certification of a class of individuals who were **allegedly** wrongfully denied unemployment insurance benefits . . . ."

Also, the second sentence of the second paragraph of the May 5, 2016 Order (p. 1) states that "The named Plaintiffs were denied benefits because of their inability or failure to properly apply online for employment." Defendant requests that this be changed to "The named Plaintiffs **allege that they** were denied benefits because of their inability or failure to properly apply online for employment."

i. Finally, Defendant submits that even if the Court should decide not to otherwise amend the May 5, 2016 Order, the class definition on p. 7 should be clarified by noting that "Nothing in this Order prohibits DEW from requiring each class member to make the same showing of eligibility required of any other claimant who has had benefits denied, including the requirement that administrative remedies be exhausted where appropriate."

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CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court reconsider and vacate its Order filed on May 5, 2016 and its Order dated April 12, 2017, and hold instead that class certification should be denied for the reasons set forth above and in previous filings regarding class certification.

DAVIDSON & LINDEMANN, P.A.

BY: _____

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Defendant

Columbia, South Carolina

April 28, 2017

DISCN 05/08/1.

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 13-CP-06-059
	)	
Plaintiffs,	)	**MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JOHN C. ROUFF, PH.D.**
	)	
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
Defendant.	)	
	)	

FILED FOR RECORD
2016 SEP 22 PM 2:02
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

Defendant hereby moves in limine for an Order excluding the testimony of John C. Rouff, Ph.D., at the September 26, 2016, evidentiary hearing on the issue of the standing of the individual Plaintiffs, as well as at any subsequent hearing in this case. Counsel for Defendant believes that consultation with counsel for Plaintiffs on the subject matter of this motion would serve no useful purpose.

The date for the evidentiary hearing on standing of the Plaintiffs in this case was set in late July, almost two months ago. By letter dated September 9, 2016, approximately ten working days prior to the scheduled hearing, Plaintiffs' counsel sent a letter to Defendant's counsel, stating that Plaintiffs wished to add a witness, John Rouff, Ph.D, who would testify "regarding the importance of the unemployment insurance system and the harm likely caused by the denial of benefits."

Defendant objects to this proposed testimony for two reasons:

First, the notification regarding this expert witness is extremely untimely, and has come too late for Defendant's counsel to depose the witness prior to the hearing, given counsel's other

commitments during those few days, including a Fourth Circuit argument in Richmond thist week. Defendant's counsel advised Plaintiff's counsel of these scheduling difficulties by letter dated September 13, 2016.

Secondly, and more importantly, Dr. Rouff's testimony would not be relevant to establish standing in any event. As indicated above, as well as in an affidavit of Dr. Rouff which was just served on Defendant's counsel on September 15, 2016, it appears that Dr. Rouff would testify in a very vague and general sense concerning the alleged harm from a denial of unemployment benefits. Such testimony would be irrelevant to the issue of whether any of the Plaintiffs in this case have standing. Nothing in Dr. Rouff's credentials or the essay (affidavit) that he prepared for Plaintiffs indicates he has experience calculating unemployment benefits or that he has reviewed the individuals Plaintiffs' unemployment cases to determine if they have received all potential benefits, as SCDEW argues. Instead, Dr. Rouff's proposed testimony would be limited to a generalized summary of the importance of unemployment benefits – a public policy question that is simply not at issue in this litigation, much less at issue in the September 26th hearing on standing.

As the Court may or may not be aware, as of July 1, 2016, the General Assembly removed the language in budget provisos which had specifically authorized the online work search requirement.[1] As a result, DEW discontinued the online work search requirement,

[1] The proviso which formerly authorized the online work search requirement reads as follows in the 2016-17 Appropriations Act:

> 83.5. (DEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those

effective July 1, 2016, and there is not currently a requirement to conduct an online job search in effect. *See* Exhibit 1, attached. As a result, there is no need for the Court to enjoin the continuation of the online work search requirement, because that requirement has already been discontinued. It is well settled that in order for a person to have standing, "it must be likely. . . that the injury will be redressed by a favorable decision." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). If Plaintiffs are trying to claim that an injunction is needed to prevent even one week's denial of benefits in the future, expert testimony on this point is unnecessary. There is no longer any risk of the alleged "irreparable" harm of not receiving unemployment benefits for failure to conduct an online job search because that requirement is not currently in effect. As for persons who lost the one-week benefit but later exhausted their right to weekly benefits, such as Plaintiff Patterson, they have received (or could have received) all the benefits due to them. There is accordingly no possibility that a favorable order would redress their injuries, which became moot once they exhausted the right to benefits (i.e., received all benefits available to them in a claim year), and a result, Plaintiffs lack standing.

For these reasons, Defendant respectfully requests that the testimony of Dr. Rouff be excluded.

> weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants. Job searches may be conducted and will be accepted if done by the applicant in person or through SC Works Online System (SCWOS). Searches completed through SCWOS will be electronically verified; all others will be verified through methods currently used by SCDEW. The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the department to verify compliance with laws administered by the agency.

DAVIDSON & LINDEMANN, P.A.

BY: /s/
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina

September 19, 2016

Exhibit 1 to Motion in Limine (DEW memo)

P.O. Box 995
1550 Gadsden Street
Columbia, SC 29202
dew.sc.gov

Nikki R. Haley
Governor

Cheryl M. Stanton
Executive Director

June 30, 2016

Procedure Transmittal Letter Number - 1367

To: All Department of Employment and Workforce Employees

From: Policies & Procedures – Unemployment Insurance

Subject: Legislative Changes to Claimant Work Search Requirements

Purpose

The purpose of this PTL is to inform staff of legislative changes to work search requirements and to provide instructions on handling work search issues that arise on and after July 1, 2016. PTLs 1267 and 1349-1 are rescinded. The portions of PTL 1349 regarding work search and documentation requirements are superseded by this PTL. Section 5 of the Claims Taking Manual has been updated.

Background

A budget proviso has existed since 2013 that required claimants to make at least four job contacts per week, one of which must be made through the SC Works Online System (SCWOS). The legislature eliminated that proviso in the budget effective July 1, 2016. As a result, effective July 1, 2016, there is no longer a legislative or regulatory requirement for claimants to perform a specified number of contacts each week, or to perform a search online via SCWOS.

Policy

I. **Online Job Searches**

Effective July 1, 2016, Claimants are not required to perform a weekly job search through SCWOS, and the system will no longer place 74 issues on claims. A claimant must not be disqualified from benefits for a week solely for failing to perform an online work search. Forms, messaging, and automated outreach efforts regarding an online search requirement have been updated accordingly.

All 74 issues established prior to July 1, 2016, will be adjudicated according to the proviso that required an online job contact. Because no 74 issues will be created after June 30,

2016, the Appeals Division must decide appeals involving a 74 issue according to the proviso that required an online job contact.

II. Active Search for Work

Effective July 1, 2016, claimants will no longer be required to make four job contacts per week, and will no longer be required to submit a Record of Work Seeking Activities (Form UCB-303) when responding to or reporting for an eligibility review. All online/automated eligibility reviews that are "Pending Review" or received on or after July 1, 2016, must be reviewed and finalized without consideration of the UCB-303, and staff must not disqualify a claimant for failing to provide sufficient work search documentation. Staff must handle all able and available issues arising from the eligibility review questionnaire as usual.

Pursuant to S.C. Code Ann. § 41-31-110, a claimant must actively search for suitable work each week that they file a claim for unemployment benefits. Suitable work includes any trade, occupation, or business in which the claimant is qualified based on their training or experience. Effective July 1, 2016, a work search issue will not exist unless the claimant indicates on either a weekly certification or an Eligibility Review (UCB-276) that they have not actively sought suitable work. Forms, messaging, and automated outreach efforts regarding the required number of weekly job contacts have been updated accordingly.

III. Benefits Accuracy Management (BAM) Audits

BAM will continue to perform weekly audits of selected claims. Claimants selected for a BAM audit will be asked to submit proof of an active search for work during the week under review. The proof may be communicated to a BAM auditor over the phone, or submitted as part of a written log. Though no longer required, the Form UCB-303 is being retained as a resource for claimants to track their weekly work searches, and is available to download from the DEW website. BAM auditors may use the claimant's SCWOS searches, if any, or weekly certification as evidence of their job search in the event the claimant does not respond to the BAM audit. BAM auditors will apply this policy to all audits beginning with the key week ending July 2, 2016.

Questions should be directed to Policies & Procedures – Unemployment Insurance at 803-737-3071 or UITech@dew.sc.gov.

UI-8

PF: dm

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 13-CP-06-059
	)	
Plaintiffs,	)	**MOTION FOR THE TAKING OF EVIDENCE CONCERNING PLAINTIFFS' STANDING**
	)	
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	

FILED FOR RECORD
2016 JUN 20 PM 4:07
BARNWELL COUNTY, S.C.
CLERK OF COURT

Defendant hereby moves for an evidentiary hearing on the issue of the standing of the individual Plaintiffs. Defendant also moves that any ruling on its 59(e) motion to alter, amend or reconsider the Court's May 5, 2016 class certification order be held in abeyance until the issue of the named plaintiff's standing is determined.

Counsel for Defendant has discussed this motion with counsel for Plaintiffs, who agree and consent to the motion.

DAVIDSON & LINDEMANN, P.A.

BY: /s/

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina
June 15, 2016

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
	)	
	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 13-CP-06-059
	)	
Plaintiffs,	)	**NOTICE OF MOTION AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(e), SCRCP**
	)	
v.	)	
	)	
South Carolina Department of Employment & Workforce,	)	
	)	
	)	
Defendant.	)	
	)	

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RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

TO: DANIEL W. WILLIAMS, C. BRADLEY HUTTO, ALEX PATERRA, AND STEPHEN SUGGS, ATTORNEYS FOR THE PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant will move before the Honorable Doyet A. Early, III, at such time and place as the Court may direct, for an order altering or amending the Order Certifying Class, filed May 5, 2016. A copy of the Order is attached to this motion. The Order was received electronically from Plaintiff's counsel on May 5, 2016. Specifically, Defendant seeks a ruling vacating that Order and denying class certification.

The grounds for this motion are as follows:

a. The Order did not address Defendant's contention that in order to be a class representative, the named plaintiff or plaintiffs must themselves have typical claims that are not precluded by such factor as a lack of standing or mootness. *See* Def. Mem. in Opp. to Class Certification, p. 6. It is axiomatic that "an individual or group must have standing to proceed in either a derivative or class action suit." *Berry v. McLeod*, 328 S.C. 435 n.2, 447, 492 S.E.2d 794,

800 n.2 (Ct. App. 1997). Indeed, as the Supreme Court of South Carolina has held, "[i]n an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Bodman v. State*, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2013). In addition, if the named representative's claim becomes moot, as has happened here, class certification is not appropriate, absent a new intervenor who has a live claim. *Ferguson v. Charleston Lincoln Mercury, Inc.* 349 S.C. 558, 564 S.E.2d 94 (2002). The present case was filed over three years ago, which is more than enough time for a plaintiff to have surfaced who might have standing and otherwise qualify to present the merits claim in this case. The fact that no such individual has sought to enter this case should be viewed as meaning that there is no interest in pursuing this claim by any potential plaintiff who is qualified to pursue it, and should result in denial of class certification.

Defendant's Memorandum in Opposition to Class Certification, pp. 6-9, along with other filings cited therein, spells out why none of the five named Plaintiffs has a current and valid claim. Those reasons may be summarized as follows:

1. Ms. Nix was never disqualified, and therefore never has had standing.
2. Ms. Robinson's alleged disqualification for failure to do an online job search became immaterial once fraud on her part disqualified her from receiving benefits for the weeks involved in her claim.
3. Mr. Patterson's claim for benefits became moot once he received everything to which he was entitled, or declined to seek everything to which he was entitled.

4. Ms. Bollerman's one-week denial of benefits was the result of a computer error, rather than a failure on her part to conduct an online job search, and she did not pursue the administrative appeal which could have led to the reversal of her denial of benefits.

5. Mr. Alexander admitted that his claim became moot, because he exhausted his benefit amount and was not owed anything.

The Order Certifying Class in the present case does not discuss standing or mootness at all, and it likewise does not discuss the claims of any of the individual Plaintiffs. However, for the reasons summarized above, no Plaintiff is able to present a claim that would be typical of the showing that a representative of the proposed class would need to make in order to prevail.

b. The Order, p. 5, holds that "The named Representatives, i.e. each member of the class has suffered the same type of harm from the new Policy [because] each member has had his/her unemployment benefits denied for at least one week because of SCDEW's implementation of the online work search requirement policy." This overlooks the fact that Ms. Nix did not have benefits denied at all, and that for the reasons discussed above, any losses were later mooted by subsequent payments for named Plaintiffs Robinson, Patterson and Alexander. In addition, this holding appears to conclude that if some unnamed persons who are not class representatives have had benefits denied, then that would make up for any failure of the named Plaintiffs to show a real, non-moot injury. However, the analysis works in the other direction: the named Plaintiffs must themselves show real and not moot injuries, rather than simply alleging that there may be someone else, not a named plaintiff, who might be able to show such injuries. Similarly, the Order concludes (p. 4) that "Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they

failed to meet the requirements of the new policy." However, the Order does not specifically hold that any of the named Plaintiffs, as opposed to some other unnamed persons, "would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy." The absence of such a holding means that class certification should not be granted.

c. On the same page, the Order concludes that the existing Plaintiffs have standing because "each Plaintiff is capable of becoming employed in the future and suffering harm from this policy." This conclusion, however, is foreclosed by such cases as *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 634 S.E.2d 664, (Ct. App. 2006). *Commander Health Care* holds as follows:

> An "injury in fact" has been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291; *see also Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (finding one must suffer an actual injury in fact, not a concern of future harm, in order to satisfy the *Lujan* test).

370 S.C. at 302, 634 S.E.2d at 666-67 (emphases added). The named Plaintiffs in this case are the least likely of all possible future unemployment benefit claimants to fail to perform online job searches, because they have found out what happens when such searches are not performed. As a result, their claims are merely "conjectural or hypothetical," and amount to nothing more than "a concern of future harm," neither of which is a showing that will establish standing.

d. The Order also holds that "each named plaintiff[] and each class member are seeking the same remedial measure." This conclusion overlooks the fact most of the named Plaintiffs are not pursuing a remedy at all, either because they never had a right to a remedy, or

their claims are not longer being pursued because they received all the benefits to which they were entitled.

e. In citing a portion of *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), Order at 4, the Order overlooked the holding of *Gardner*, which was that

> 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. See *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978) ("The very 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.").

353 S.C. at 22, 577 S.E.2d at 201. In the present case, the nature of the claims made "require[e] each member of the class to prove the elements of the cause of action," because each class member would need to prove that:

1. The claimant made four job searches for the week of weeks for which the claim was made.
2. The claimant has not in the meantime received all the benefits to which he or she is entitled (i.e., the claimant has not "exhausted" the right to receive benefits).
3. There are no other specific reasons that would disqualify the claimant from receiving a benefit for the week in question. For instance, Ms. Robinson was disqualified for the weeks in question because she actually owed DEW money for other weeks of benefits wrongfully collected by her.

These considerations could cause a claimant to be denied a benefit for reasons other than a failure to perform an online job search and, therefore illustrate a paradigm situation in which

the requisite commonality is absent. The Order holds (p. 5) that "Plaintiffs specifically have limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement. They have not sought to certify a class to recover benefits for persons who were denied benefits for any other reason." Again, however, Plaintiffs' counsel cannot define the class by reference to the claims of persons other than the named Plaintiffs. Plaintiff Bollerman, for example, is a person whose benefits were denied because of a computer error which she did not seek to have corrected.

f. Defendant also would point out that the Order should be amended in order to change all references to "damages." There is one such reference on p. 5 of the Order, and there are three other references to "damages" on p. 7. The Amended Complaint characterizes this action as one for declaratory relief, injunctive relief, and for the equitable remedy of an accounting. Damages, as such, were not sought. As a result, even if the Court declines to change other parts of the Order, all references to "damages" should be changed to "monetary relief."

g. Defendant would also ask that the Order be amended to delete any references that might indicate a view of the merits. This request is made for clarification, even though the last sentence of the Order, p. 7, notes that "No part of this Order shall be construed as a decision on the merits of this case."

In the first sentence of the Order, it is stated that "Named Plaintiffs seek certification of a class of individuals who were wrongfully denied unemployment insurance benefits . . . ." Defendant would request that the first sentence of the Order be amended by adding the word "allegedly," to state that "Named Plaintiffs seek certification of a class of individuals who were **allegedly** wrongfully denied unemployment insurance benefits . . . ."

Also, the second sentence of the second paragraph of the Order (p. 1) states that "The named Plaintiffs were denied benefits because of their inability or failure to properly apply online for employment." Defendant requests that this be changed to "The named Plaintiffs **allege that they** were denied benefits because of their inability or failure to properly apply online for employment."

h. Finally, Defendant would also ask that even if the Court should decide not to vacate the Order, the class definition on p. 7 should be clarified by noting that "Nothing in this Order prohibits DEW from requiring each class member to make the same showing of eligibility required of any other claimant who has had benefits denied, including the requirement that administrative remedies be exhausted where appropriate."

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court reconsider and vacate its Order filed on May 5, 2015, and hold instead that class certification should be denied for the reasons set forth above and in previous filings regarding class certification.

DAVIDSON & LINDEMANN, P.A.

BY: /Kenneth Woodington

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina

May 12, 2016

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson and Tami Bollerman	)	Civil Action No. 2013-CP-06-0059
Plaintiffs,	)	**MEMORANDUM IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

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Defendant, the South Carolina Department of Employment and Workforce, submits the following in opposition to Plaintiffs' Motion for Class Certification.

As a preliminary matter, Defendants would show first that the Court should defer consideration of class certification until the dispositive motions submitted by both sides on April 1, 2015, are resolved. It is well settled that consideration of the issue of class certification can properly be deferred until after dispositive motions have been decided. Thus, for instance, in *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir.1984), it was held that "[i]t is reasonable to consider a Rule 56 motion first [(before ruling on a motion for class certification)] when early resolution of a motion for summary judgment seems likely to protect both the parties and the court from needless and costly further litigation." As in *Wright v. Schock, supra*, there is no need for either the parties or the Court to have to spend time and resources on the class certification issue when summary judgment motions are still pending. Accordingly, Defendant submits that the consideration and decision of class certification issues should be deferred. However, even if the issue is reached, Defendant submits that the case is not appropriate for class certification, for the reasons set forth below.

ARGUMENT

There are five individual Plaintiffs left in this case. As shown below, one of those five Plaintiffs has no claim at all, because she was never denied an unemployment benefit for the reasons on which Plaintiffs' claims are based. As for the claims of the four other Plaintiffs, if it ever becomes necessary to decide Plaintiffs' class certification motion, such certification should be denied. For each of those four Plaintiffs, their ability to receive a weekly benefit for the week or weeks in question will turn not only on the issue raised by Plaintiffs in this case, but also on the specific facts necessary to support each person's individual claim. As a result, the facts concerning each individual's claims predominate over any common issues that might exist. In addition, and for many of the same reasons, the claims of those remaining four Plaintiffs are not typical of the putative class members they seek to represent.

1. Plaintiffs cannot satisfy the prerequisites for certification of a case as a class action.

In *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (S.C.,2003), the Supreme Court held that "[p]roponents of class certification bear the burden of proving five prerequisites under South Carolina law." Those prerequisites, as set forth in *Gardner* and Rule 23(a), SCRCP are that:

1) the class must be "so numerous that joinder of all members is impracticable;"

2) there must be "questions of law or fact common to the class;"

3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;"

4) "the representative parties [must] fairly and adequately protect the interests of the class;" and

5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class." Rule 23(a), SCRCP.

As the Supreme Court further summarized in *Gardner*, "[t]he first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation." *Id. Gardner* also holds that "[i]n deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Id.* (emphasis added). As will be shown below, Plaintiffs' claims are governed by individualized issues, which means that commonality is not present. For many of the same reasons, Plaintiffs' claims are atypical. Quite simply, Plaintiffs have failed to meet their burden on such issues as commonality and typicality, as they have filed only a conclusory motion that lacks any factual detail demonstrating that the factors for class certification are present here.

a. Commonality.

First and foremost, Plaintiffs cannot establish commonality, because individualized issues pertaining to each possible class member predominate over the allegedly-common issue of whether such individuals were improperly denied benefits for not conducting an online job search. The Defendant has previously pointed out that the right to receive benefits is conditioned on each claimant's being "able to work and available for work" in the claimant's usual employment or other similar employment for which the claimant is qualified. § 41-35-110(3). The claimant must also be "actively seeking work." *Id.* Thus, the claimant at all time bears the burden of showing that (1) he or she is available for work, (2) able to work, and (3) actively seeking work. *See, e.g., Hyman v. South Carolina Employment Sec. Commission,* 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). This burden of showing compliance with the statutory requirements must be met anew every week, because each week of unemployment constitutes a new claim period. If DEW's review of the job search contact information for a given week

reveals that a verifiably false claim of a job search contact has been made, DEW will require repayment of the claim amount for the period in question.

The existence of all of these requirements, as applied to the facts of this case, means that even if the Court were to hold that DEW should not have stopped a Plaintiff's benefit for a given week because that each Plaintiff did not conduct an online job search for that week, it does not automatically follow that a Plaintiff would then be entitled to benefits for the week in question. Each Plaintiff would still need to show, individually and on a week-by-week basis, that he or she conducted the required four weekly job searches in some fashion, was available for work, and was able to work. It therefore cannot be presumed that each Plaintiff would otherwise have been eligible for benefits for a given week, but for the failure to comply with the online work search requirement.

Applying this burden of proof to the entire class means that the Court would need to make an individualized determination for each of the thousands of putative class members that for the week claimed, the claimant was in fact available for work, able to work, and actively seeking work. In this regard, the present case is completely different from a case in which there is a continuing entitlement to a benefit, such as Social Security. In that situation, the Social Security beneficiary only has to prove entitlement at the outset; after that, the benefit continues until some event occurs to cause the benefit to be terminated. In the case of unemployment benefits, however, the claimant must re-establish a right to the benefit each and every week.

The individualized nature of each claimant's situation therefore prevents a holding that commonality exists. As the Supreme Court has held:

> Commonality is met only where the class shares a determinative issue. *See Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir.1990) ("certification is proper only when a determinative critical issue overshadows all other issues; and "question[s] [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 under Rule 23(a)(2), FRCP); *see also Peoples v. Wendover Funding Inc.*, 179 F.R.D. 492, 498 (D.Md.1998) ("a representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff's individual claim.").

Gardner, supra, 353 S.C. at 21-22, 577 S.E.2d at 200-201 (emphasis added). Continuing, the Court held in *Gardner* that in that case,

> the factual differences . . . 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. See *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978) ("The very 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.").

353 S.C. at 22, 577 S.E.2d at 201.

In the present case, it is apparent that "the court must investigate each plaintiff's individual claim," and that class certification would not eliminate "the necessity of requiring each member of the class to prove the elements of the cause of action." Each claimant whose benefits ceased due to the failure to conduct an online job search would still need to prove that:

a. The claimant made four job searches for the week of weeks for which the claim was made.

b. The claimant has not in the meantime received all the benefits to which he or she is entitled (i.e., the claimant has not "exhausted" the right to receive benefits).

c. There are no other specific reasons that would disqualify the claimant from receiving a benefit for the week in question. For instance, Ms. Robinson was disqualified for the weeks in question because she actually

owed DEW money for other weeks of benefits wrongfully collected by her.

These considerations could cause a claimant to be denied a benefit for reasons other than a failure to perform an online job search and, therefore illustrate a paradigm situation in which the requisite commonality is absent.

b. Typicality.

Even if commonality had been present in this case, class certification should still be denied, because the claims of the five Plaintiffs are not typical of the claims of the proposed plaintiff class. While commonality cannot be satisfied in any event, a "typical" claim would involve a situation in which an individual could prove that:

- He or she made four job searches in a given week, but none of the four were made online and therefore had benefits stopped for that week.
- He or she has standing,
- The claim was not moot, and
- All administrative remedies were exhausted.

As will be shown, none of the five named Plaintiffs can show that their claims were typical.

In order for the claim of a named plaintiff to be typical, it cannot involve claims or defenses that are unique to the named plaintiff. *See generally,* Wright & Miller, *Federal Practice and Procedure,* § 1764. As shown below, the factual situation of each individual Plaintiff contains one or more aspects that could be unique, or nearly unique, to each Plaintiff. For these reasons, none of the named Plaintiffs can show that his or her claim is sufficiently typical as to warrant class certification.

1. Elaine Nix.

As has been shown in previous filings, Ms. Nix was never disqualified for a weekly unemployment benefit based on the online work search requirement. Cummings Affidavit dated March 3, 2014, Paragraph 32. For this reason, she can obviously be ruled out as a person with a typical claim.

2. Lorinda Robinson.

Ms. Robinson's claim is based on a stoppage of benefits for the weeks ending August 18, 2012 and August 25, 2012. Cummings Affidavit dated March 3, 2014, Paragraph 33. However, she was specifically disqualified from receiving benefits for those weeks for a completely separate reason (she collected unemployment earlier in the year 2012 while actually employed).[1] Fourth Cummings Affidavit at 2, ¶¶ 7-9 and Ex. 3. This disqualification for those two weeks renders it immaterial whether or not she made an online job search for those weeks, because she had no right to payment of claims for those weeks regardless. As a result, her claim is foreclosed by the facts of her individual case and thus is not typical of the claims of any class members who may have had benefits stopped as a result of the online job search requirement.[2]

3. Archie Patterson.

Mr. Patterson's claim is also atypical, because it is moot. Mr. Patterson's benefits were stopped for the week starting August 19, 2012, because he did not show that he had made an online work search. Cummings Affidavit dated March 3, 2014, Paragraph 36. Subsequent to that, his right to benefits ended in the summer of 2013. However, he did not actually file claims for the last seven or eight weeks in the summer of 2013, although he could have received benefits

[1] The total amount overpaid to her was $1,365.00, or seven weeks of unemployment at $195.00 per week. She did not repay that amount until some months later.

[2] Also, even if she had not been disqualified to receive benefits for the weeks in question, Ms. Robinson did not exhaust administrative remedies. The exhaustion issue is discussed below.

for those weeks if he had established eligibility for them. *Id.*, Paragraph 37. *See also,* Fourth Cummings Affidavit at 2-3, ¶¶ 9-12 and Ex. 6 (indicating Plaintiff Patterson's eligibility for benefits in June 2013 and following months.) Because he could have collected the total amount of benefits to which he was entitled, irrespective of not collecting the benefit for the week of August 19, 2012, his claim is moot.[3] In addition, it fails because he failed to mitigate any damage to him by not using alternative means to collect the full amount of unemployment benefits that he might have collected.

d. Tami Bollerman.

Ms. Bollerman was denied benefits for the week of October 7, 2012, apparently because of a computer error. She sought an adjudication from a claims adjudicator for the one week of stoppage that was made in her case. Cummings Affidavit, of March 3, 2014, Paragraph 36. She claimed that she "did do my weekly job search through SC Works . . ., but must have taken a link away from the computer which is why my job search wasn't documented." *Id.*, Ex. G. The claims adjuster rendered an adverse determination, based on the absence of a documented online work search and the absence of the specified number of verifiable contacts for the week in question. *Id.* If Ms. Bollerman had elected to file an administrative appeal, that appeal may have resulted in a reversal, because DEW has routinely restored benefits that were stopped due to apparent computer-related errors, such as the one indicated by Ms. Bollerman. Romi Robinson Affidavit, ¶ 11. Because Ms. Bollerman is claiming her denial of benefits resulted from a computer error, not a failure to conduct the online job search, her claim too is atypical.

[3] Any issue about whether he can still claim those benefits from the summer of 2013 at this late date does not affect the fact that his right to benefits was indeed exhausted. In addition, like Ms. Robinson and Ms. Bollerman, Mr. Patterson did not exhaust administrative remedies, as discussed below.

In addition, Ms. Bollerman indicated in her deposition that she had not retained her written records showing work searches for the week in question. Ex. 2 to R. Robinson affidavit (Bollerman deposition at 13-14). As a result, she essentially admits that she is not able to prove that she made the requisite four job searches for the week in question.

e. Fred Alexander.

Finally, Mr. Alexander's claim is also atypical because it is moot. Like Mr. Patterson, Mr. Alexander exhausted his right to benefits, even without the two weeks for which benefits were stopped because of his failure to perform an online work search. Mr. Alexander's total entitlement to benefits through the benefit year ending date of May 31, 2015, was $5,300, and he received 20 payments totaling that amount as of November 9, 2014. Fourth Cummings affidavit, ¶ 12. He received this total even though his benefits were stopped for two separate weeks, as a result of failure by him to conduct online work searches. Mr. Alexander has therefore exhausted the unemployment benefits to which he is entitled, and the two weeks of stopped benefits did not ultimately reduce the total amount of his benefits. In fact, at his deposition, Mr. Alexander acknowledged that "I didn't lose any money," and that there was nothing that the Court could award him in this case. Attachment 3, Alexander deposition, pp. 21, 22.

c. Numerosity.

Defendant would note that there is large number of persons who have had claims stopped for a week or more because of failure to comply with the online work search requirement. However, this prerequisite to class certification is immaterial, because of the absence of commonality and typicality, as well as the other contentions set forth herein.

d. Adequacy of representation.

With respect to the adequacy of the representation of Plaintiffs by the existing counsel for Plaintiffs, Defendant take no position on the ability of Plaintiffs' counsel to provide adequate representation.

CONCLUSION

For the foregoing reasons, DEW respectfully submits that Plaintiffs' Motion for Class Certification should be denied, or in the alternative, deferred, until after the Court rules on any dispositive motions filed by the parties on April 1, 2015.

DAVIDSON & LINDEMANN, P.A.

BY: _____

WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
F: 803-806-8855
Email: wdavidson@dml-law.com
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

January 1, 2016

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson, Tami Bollerman and Fred Alexander	)	Civil Action No. 2013-CP-06-0059
Plaintiffs,	)	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

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Defendant DEW files this reply memorandum in order to respond to certain contentions made by Plaintiffs in their memorandum in opposition to Defendant's Second Motion for summary Judgment but which were not argued by Plaintiffs in support of their own summary judgment motion. Defendant incorporates by reference the contentions made in prior summary judgment briefings. For the most part, this reply memorandum is limited to addressing contentions made by Plaintiffs in their memorandum in opposition that DEW has not previously addressed.

1. **No individual Plaintiff has a live claim.**

   a. **The declaratory judgment statute does not create standing where it does not already exist.**

Plaintiffs first argue in effect that a plaintiff in a declaratory judgment action need not satisfy the normal requirements for (1) a case or controversy, (2) standing to sue, and (3) injury

in fact. Pl. Mem. at 1.[1] However, it is well settled in South Carolina that parties seeking declaratory relief still must "demonstrate a justiciable controversy," which exists when, among other things, "a concrete issue is present." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). *See also, e.g.*, 26 C.J.S. Declaratory Judgments § 134 ("A court will not render a declaratory judgment for a complaint who lacks standing to maintain the claim for relief."); 22A Am. Jur. 2d Declaratory Judgments § 203 ("Since a declaratory judgment statute generally does not expand the interests of the parties, it does not relieve a party from showing that it has standing to bring a declaratory judgment action based on the underlying action.")

Plaintiffs' Memorandum cites no authority to the contrary. Plaintiffs note that the Declaratory Judgment Act, S.C. Code Ann. § 15-53-30, provides that a declaratory judgment may be sought by "[a]ny person . . . whose rights, status or other legal relations are affected by a statute. . . ." However, this provision of the Declaratory Judgment Act actually confirms the need for standing. Plaintiffs have not shown that their rights are affected by the subject matter of this case, so they are not aided by the fact that the Amended Complaint refers to the Declaratory Judgment Act.

b. This case does not involve an issue that is "capable of repetition, yet evading review.

Plaintiffs next make the claim that this case involves an issue that is "capable of repetition, yet evading review. Pl. Mem. at 2. This is simply not the case. If an individual had been denied benefits for failure to comply with the online work search requirement, and then had exhausted all administrative remedies and did not use up (i.e., exhaust) the weeks of benefits in the meantime, such an individual would presumably still have standing to make the present

[1] Unless otherwise indicated, all references herein to "Pl. Mem." are intended to refer to Plaintiffs' Memorandum in Opposition to Defendant's Second Motion for Summary Judgment.

claim. There are presumably many other claimants who might have standing to assert the claims asserted by the five Plaintiffs in this case, but no such other claimants have elected to participate in this case.

c. The possibility of a future recurrence of a denial of benefits does not confer standing on these Plaintiffs.

Plaintiffs next contend, Pl. Mem. at 3, that "each individual may become unemployed in the future and will still be subject to SC DEW's failure to promulgate regulations. . . ." However, the kind of interest that will confer standing is one "which is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 302, 634 S.E.2d 664, 666 (Ct. App. 2006)(internal quotation marks omitted). On the other hand, "a prospective concern of future harm is not sufficient." *Id.*, 370 S.C. at 302, 634 S.E.2d at 667. The assertion that one or more Plaintiffs may become unemployed in the future and subject to the online work search requirement is precisely the kind of "conjectural or hypothetical" claim of future harm that does not suffice to shown standing. Plaintiffs have made nothing more than the kind of insufficient "prospective concern of future harm" discussed in *Commander Health* and the cases cited therein. The likelihood that any of them might lose benefits for failure to comply is not "actual or imminent," but instead is "conjectural or hypothetical." Indeed, there was no evidence to suggest that any of the Plaintiffs anticipated filing a future claim for unemployment benefits. And if they ever seek unemployment benefits in the future, these Plaintiffs can defeat any possibility that the online work search requirement would cause them harm in the future by simply performing one online job search per week.

d. Plaintiffs' memorandum mischaracterizes the facts concerning several of the individual Plaintiffs.

Plaintiffs assert that DEW has admitted that Plaintiffs Bollerman and Patterson have not exhausted their benefits. Pl. Mem. at 2. While this is true for Plaintiff Bollerman, whose claim is instead barred for other reasons, it is not true for Plaintiff Patterson. Mr. Patterson could have exhausted his benefits if he had continued to claim them for several weeks after the middle of June 2013. For reasons unknown to DEW, he left several weeks of benefits unclaimed, as DEW has previously detailed. In effect, then, he did exhaust all available benefits, or alternatively, failed to mitigate the alleged harm to himself, and therefore cannot be heard to complain.

Another inaccuracy in Plaintiffs' memorandum is the statement that "Ms. Robinson, Ms. Nix and Mr. Alexander have exhausted their benefits." Pl. Mem. at 3. This statement is true only with respect to Mr. Alexander. Ms. Robinson did not exhaust her benefits, but instead has no standing because she was disqualified for the weeks in question for the separate reason of receiving fraudulent overpayments. As discussed in DEW's prior filings, Ms. Nix was never affected at all by the online work search requirements, since she was not eligible for benefits at any time after that requirement took effect.

2. Plaintiffs' contention about there being no need to exhaust administrative remedies in cases involving claims of lack of agency authority is unavailing for several different reasons.

a. The Plaintiffs who should have exhausted administrative remedies (Bollerman and Patterson) may well have prevailed on grounds other than lack of authority.

As DEW has already pointed out (Def. Mem. in Support of Second Motion for Summary Judgment at 9-10), if Plaintiffs Bollerman and Patterson had actually pursued administrative remedies within DEW, which they were statutorily required to do, they had a good probability of succeeding without the need for the administrative tribunal even to reach the issue of whether

DEW acted within its authority by requiring online work searches. As a result, as applied to these Plaintiffs, it is unavailing for them to claim that the administrative process would not have led to a favorable result for them.[2]

b. Application of the exhaustion of remedies doctrine in this case is not discretionary, because exhaustion is governed by statute.

Plaintiffs' discussion of the exhaustion of remedies requirement is seriously flawed, because it does not refer in any way to § 41-35-690, the statute which provides that the administrative procedure set forth in Chapter 35 of Title 41 "is the sole and exclusive appeal procedure."[3] Nor do Plaintiffs mention § 41-35-740, which specifically provides that "judicial review is permitted only after a party claiming to be aggrieved by [a decision of the department] has exhausted his administrative remedies as provided by Chapters 27 through 41 of this title." Plaintiffs cite several cases in which exhaustion is generally described as discretionary, Pl. Mem. at 3, but they ignore *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000), which holds that "the general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few." (emphases added).

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[2] Plaintiffs claim that the Affidavit of Romi Robinson conflicts with her deposition testimony, Pl. Mem. at 8-9, but this is manifestly incorrect. Contrary to what Plaintiffs' memorandum implies, but does not state, Ms. Robinson's Affidavit does not say that Plaintiffs Patterson and Bollerman may have prevailed administratively on the basis of lack of authority of the agency. Instead, the Affidavit states that those two Plaintiffs might have prevailed on other grounds which were specific to them individually. Robinson Aff., ¶¶ 11, 13. Moreover, also contrary to an argument made by Plaintiffs, the Robinson Affidavit does mention her deposition, and discusses what was and what was not referenced in that deposition. *Id.* at ¶¶ 9, 10.

[3] Plaintiff claims that DEW "waived" its right to argue exhaustion of remedies, Pl. Mem. at 9, but the defense was in fact raised in DEW's initial Answer and every subsequent Amended Answer, as well as in DEW's original Motion for Summary Judgment, filed in April 2014. In addition, none of the cases cited on p. 9 of Plaintiff's memorandum involved a situation in which exhaustion of remedies was raised and argued throughout the case, as has occurred here.

c. Plaintiffs' challenge to agency authority does not eliminate the need for exhaustion of administrative remedies where, as here, the administrative process could provide the relief Plaintiffs seek.

Plaintiff cites several cases holding that exhaustion is not required when the challenge goes to the agency's authority, Pl. Mem. at 4-7. However, most of those cases did not involve the situation present in this case, in which Mr. Patterson and Ms. Bollerman have an alternative basis for challenging the agency action on grounds other than the absence of agency authority. To the contrary, in *Ward v. State*, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000), "[a]s stated in *Video Gaming*,[4] "if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling . . . ." 343 S.C. at 19, 538 S.E.2d at 247 (emphasis added). In this case, however, DEW has raised another, separate, issue, which is whether the claims of certain individual Plaintiffs could have been resolved in their favor via the administrative process, and for reasons not related to the question of agency authority. (Of course, DEW's exhaustion of remedies defense only applies to Plaintiffs Bollerman and Patterson; the claims of the other three Plaintiffs, precluded for other reasons, do not even reach the stage where it is necessary to consider whether they should have exhausted administrative remedies.) Accordingly, the cases cited by Plaintiffs do not apply for reasons set forth in those cases themselves.[5]

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[4] *Video Gaming Consultants, Inc. v. S. C. Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642, (2000), also cited by Plaintiffs in the present case.

[5] In the other cases cited by Plaintiffs on this point, there was no suggestion that there was an alternative ground on which the case could have been resolved via the administrative process. Those cases are *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006); *Drummond v. State, Dep't of Revenue*, 378 S.C. 362, 662 S.E.2d 587 (2008). *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010) involved only dicta, as Plaintiffs acknowledge; the same is true for an Idaho case cited by Plaintiffs, *Grever v. Idaho Telephone Co.*, 499 P.2d 1256, 1259 (Ida. 1972).

In the one case cited by Plaintiffs in which, as here, alternative relief was available to the plaintiff in the case via the administrative process, and a timely administrative appeal had been commenced. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009), The Court of Appeals held that the proper approach was to hold the challenge to the agency's authority in abeyance until the administrative process had concluded. In so holding, the Court of Appeals recognized that that practice permitted the conservation of judicial resources. 382 S.C. at 104-05, 674 S.E.2d at 531. DEW has pointed out in its initial memorandum, pp. 14-15, that case law supports the conservation of judicial resources by requiring exhaustion of administrative remedies for those issues which were capable of being so exhausted.

d. It would not have been futile for Plaintiffs Bollerman and Patterson to have exhausted administrative remedies.

Plaintiffs have contended, Pl. Mem. at 6, that it would have been "futile" for them to be required to exhaust administrative remedies. However, as DEW has already pointed out in pp. 9-10 of DEW's initial brief, the records of both Ms. Bollerman and Mr. Patterson contain grounds that could have led to reversals of the stoppage of benefits in their particular cases. Even assuming, as Plaintiffs argue, that the "agency authority" issue could not have been resolved in the administrative process, these other grounds could well have led to reversals, and as a result, exhaustion would not have been futile.

Plaintiffs briefly argue that the initial determinations of ineligibility for Plaintiffs Patterson and Bollerman were not made by a claims adjudicator. Pl. Mem. at 7-8. Plaintiffs do not address the meaning of the term "initial determination," nor do they indicate how they were prejudiced. In any event, the record indicates that determinations were indeed made by claims adjudicators for both Patterson and Bollerman. Those determinations, both entitled "Determination by Claims Adjudicator on claim for benefits," were made within several days

after the day on which the one-week stoppages of benefits occurred, and after the adjudicators had heard from Mr. Patterson and Ms. Bollerman. Second Affidavit of Kevin Cummings, Attachments G and H. The determinations included advice concerning appeal rights. *Id.* Neither of these two Plaintiffs filed appeals from those determinations by claims adjudicators.

4. Plaintiffs' contention about "suspension" of statutes by the provisos is irrelevant.

Plaintiffs argue, Pl. Mem. 12-15, that the provisos cited by DEW did not "suspend" any existing statutory requirement that DEW promulgate regulations. Plaintiffs' Memorandum at 4-8. That claim is beside the point. The provisos are legislative acts that accomplish the very thing that Plaintiffs claim should be done by regulation, that is, they authorize DEW to require that a claimant conduct at least one job search requirement using DEW's online work search website.

The provisos are unambiguous. They provide that DEW's "enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code," shall occur by certain listed methods. General Appropriations Act for fiscal year 2012-2013 (H. 4813, as ratified by the General Assembly), Proviso 67.7. These include "requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified." *Id.* (emphasis added).[6]

Plaintiffs claim that something else needs to be added to this unambiguous requirement in order to effectuate its enforcement. Pl. Mem. 14. However, as DEW has noted in its initial Memorandum in Support, the use of the term "enforcement" in the provisos, coupled with the provisos' references to the two code sections, demonstrate the intent of the General Assembly to require that benefits be stopped in the absence of proof that the online job search requirement has

[6] The same language is also in the Appropriations Act for the present (2013-2014) fiscal year. General Appropriations Act for fiscal year 2013-2014 (H. 3710, as ratified by the General Assembly), Proviso 83.6.

been satisfied. The term "enforcement," in this context, can only mean that a person who does not comply with the requirements in the provisos must be deemed ineligible for benefits for the week in question. Such enforcement is performed through the usual procedures for disqualifying claimants who have not made the requisite weekly showing that they were able to work and available for work. Nothing more was needed. As stated in Paragraph 3 of the Affidavit of Kevin Cummings dated April 21, 2014, "[n]o new procedures were necessary in order to enforce the online job search requirement." Instead, "[w]hen a claimant fails to perform at least one online job search in a given week, the claimant is denied benefits using the same procedures that apply whenever a claimant fails to show that he or she is able to work and available for work." *Id.*

The Supreme Court of South Carolina rejected a contention very similar to Plaintiffs' present contention in *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), holding that

> An agency is not required to enact a companion or explanatory regulation in order to enforce a statute.

370 S.C. at 476, 636 S.E.2d at 611. The Court further concluded as follows:

> To hold otherwise would lead to the absurd result that, before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail and its intention of enforcing it. The agency would be required to return to the Legislature seeking approval of a regulation which interpreted the legislative pronouncement and permission to enforce it. Neither the APA's rule-making provisions for regulations nor our precedent requires such a step.

Id., 370 S.C. at 475, 636 S.E.2d at 610. Plaintiffs in the present case are making the same argument rejected in *Sloan*. Here, as in *Sloan*, the statutory language in the provisos, coupled with existing procedures that are unchallenged, set forth everything that was needed in order for enforcement of the requirements of the provisos. There was nothing that needed to be set forth in regulations.

Plaintiffs also quote very general language about statutory construction from *Amisub of S. Carolina, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 407 S.C. 583, 597-98, 757 S.E.2d 408, 415-16 (2014). Pl. Mem. at 13-14. However, Plaintiffs never discuss how the holding of *Amisub* might apply to this case. In *Amisub*, DHEC argued that the General Assembly must have intended to suspend the Certificate of Need program for one fiscal year, because the funding for that program was deleted for that year. The Court, however, held that the failure to fund the program for one year did not negate the legislative directive requiring DHEC to administer the Certificate of Need program.

In the present case, on the other hand, it is immaterial whether the provisos could be said to "suspend" any need for regulations to cover this situation, even assuming such a need for regulations existed, which DEW does not concede. If the provisos did away with the need for regulations in the two subject fiscal years, they did so only because the provisos themselves served the function that would have been served by the promulgation of regulations, that is, giving legislative approval to the requirement that one weekly job search must be performed online. For those two years, promulgating regulations to the same effect would amount to the kind of needless and duplicative agency action that the Court held to be unnecessary in *Sloan, supra.*

The only part of *Amisub* that is instructive for purposes of this case is the Court's reiteration of the longstanding rule that "[a]n appropriations act, though generally temporary in duration, "has equal force and effect as a permanent statute. . . ." Slip op. at 10. The provisos clearly state that online job searches are required for the two fiscal years to which they apply. By so providing, they take the place of any need for regulations on that subject during those two fiscal years.

5. The online work search requirement does not result in a "penalty," as that term is used in statutory construction.

Plaintiffs also argue that the provisos should be strictly construed as being "penal in nature." Pl. Mem. at 15-16. However, the rule of construction there cited applies only to criminal or penal statutes. It is generally applied only in cases involving criminal prosecutions or proceedings for civil fines. The case of *Lewis v. Gaddy*, 254 S.C. 66, 173 S.E.2d 376 (1970), cited by Plaintiffs, is an example of a case involving a civil fine.

The definition of a "penalty" is that it is "an exaction imposed by statute as punishment for an unlawful act." *U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). In the present case, the withholding of benefits for failure to meet statutory requirements is most accurately referred to as a refusal to grant a benefit, rather than as a punishment for the claimant's failure. The claimant is not fined or imprisoned for failure to prove entitlement to benefits for a given week. Instead, he or she is simply denied the benefit for that week. In any event, and as held by *Lewis v. Gaddy, supra,* the rule cited by Plaintiffs does not apply where, as here, the legislative intent is clear.

6. Plaintiffs' arguments pertaining to the U.S. Department of Labor have not been raised by the pleadings or articulated in Plaintiff's memorandum, and in any event, Plaintiffs have made no showing of a violation of federal law.

Plaintiffs also make a vague contention that the Department of Labor has not approved the provisos enacted by the South Carolina legislature and implemented by DEW. Pl. Mem. at 16. This contention was not made in the Amended Complaint, and for that reason alone, should not be considered. *See, e.g., Bryan v. Bryan,* 282 S.C. 506, 508, 319 S.E.2d 360, 360 (Ct. App. 1984)(reversing judgment because based on an unpled issue: "Due process requires that litigants be placed on notice of the issues which a court is to consider").

In addition, Plaintiffs never actually argue how the cited federal statutes might have been violated. The Supreme Court of South Carolina has held that courts need not consider claims for which a party fails to provide arguments or supporting authority. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). For this additional reason, this Court need not and should not consider this issue.

7. The statutes cited by Plaintiffs do not mandate the promulgation of regulations.

In previous filings, DEW has already shown the lack of merit in Plaintiffs' claim that the statutes cited by Plaintiffs require the promulgation of regulations. In their Memorandum in Opposition, Plaintiffs raise one new claim. They assert that DEW's reading of § 41-29-110 is "ridiculous." Pl. Mem. 16-17. Again, however, Plaintiffs' contention that that section mandates the promulgation of regulations is based on a reading that only refers to one part of the sentence they quote. To reiterate, § 41-29-110 provides in full as follows:

> **SECTION 41-29-110. Duties and powers of Department.**
>
> The department must promulgate regulations necessary to carry out the provisions of Chapters 27 through 41 of this title, employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title.

(Emphases added.) As the emphasized language indicates, this statute accords a wide degree of discretion to take actions in the course of "administer[ing] its duties and exercise[ing] its powers. . . ." That discretion includes the power to promulgate regulations, but the statute expressly provides that the promulgation of regulations is simply one alternative method for carrying out the agency's duties, not the sole method. Again, however, the existence of the provisos makes it unnecessary to consider what § 41-29-110 might have required if the provisos had not existed.

CONCLUSION

For the foregoing reasons, DEW respectfully submits that its Second Motion for Summary Judgment should be granted, and that this case should be dismissed with prejudice.

DAVIDSON & LINDEMANN, P.A.

BY: /s/

WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
F: 803-806-8855
Email: wdavidson@dml-law.com
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

January 4, 2016

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	
LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN,	)	CIVIL ACTION NO.: 2013-CP-06-059
	)	
PLAINTIFFS,	)	
	)	MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION
v.	)	
	)	
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORKFORCE,	)	
	)	
DEFENDANT.	)	

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Named Plaintiffs seek certification of a class of individuals who were wrongfully denied unemployment insurance benefits by the South Carolina Department of Employment and Workforce (hereinafter referred to as "SCDEW"). SCDEW is a State Agency charged by the South Carolina Legislature with the duty of processing unemployment claims in accordance with the Laws of this State.

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

Named Plaintiffs define the class as all persons who are citizens and residents of South Carolina who are eligible for unemployment insurance (UI) benefits but have not received

payment because of procedures and policies required of class members by Defendant to make an online application for work as a prerequisite to his/her claim for benefits, this policy having not been promulgated as a regulation as mandated by Statute. Plaintiffs submit the five (5) prerequisites for class certification have been met and the case is proper for class certification.

PREREQUISITES FOR CLASS CERTFICATION

This action has been brought and may be maintained as a class action pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. Under this rule, the proponent of the Class must show:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a) SCRCP.

Class actions are favored in South Carolina, *Grazia v South Carolina State Plastering, LLC*, 390 S.C. 562, 577, 703 SE2d 197, 204 (2010). The South Carolina Supreme Court has recognized and endorsed an expansive view and treatment of class actions. *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 523 S.E.2d 781 (2000) ("By omitting the additional requirements [of 23(b) from the Federal Rules of Civil Procedure], Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart."); *see also Garzia, id.* Class actions serve an important function in our system of civil justice as they promote "judicial economy and efficiency," because they permit plaintiffs to "vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in

which the optimum result might be more than consumed by costs." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003). Suits commonly involving large numbers of plaintiffs, each with a small individual claim, who, without the class action device, might have no practical recourse due to the high costs obligation, are appropriate for class prosecution. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 328 (D.S.C. 1991). In addition, "[t]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23." *Garzia*, 390 S.C. at 576, 703 S.E.2d at 204 (quoting *Califano*, 442 U.S. at 701).

The court has wide discretion in certifying a class action. *Waller v. Seabrook Island Prop. Owners Ass'n*, 388 S.E.2d 799, 801 (S.C. 1990). The focus for class certification is simply whether the prerequisites of Rule 23 have been met. *Tilley v. Pacesetter Corp.*, 508 S.E.2d 16, 21 (1998) (court may not look to the merits when determining class certification).

1. **The Proposed Class is so Numerous that Joinder of All Members is Impracticable.**

This class consists of all South Carolina residents who are eligible for unemployment insurance but who have not received payment because of the new Department of Employment and Workforce policy. "There is no requirement . . . that at the pleading stage of the case either the exact number of persons comprising the class be specified or the class members be identified." *McGann v. Mungo*, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986) (citation omitted). A "fluid, changing membership . . . does not render the class action device unsuitable." *Id.* There is no "magic number" necessary to establish numerosity. *See Green v. Cauthen*, 379 F. Supp. 361, 371-72 (D.S.C. 1974).

In *Pope v Heritage Communications, Inc.*, 395 S.C. 404, 717 SE2nd 765 (Ct. Appl. 2011), the South Carolina Court of Appeals upheld certification of a class of 228

persons. Based upon the Affidavit of John Matthews, this class may very well consist of over 60,000 people whose unemployment benefits were denied. DEW employee, Kevin Cummings, in his October 27, 2014 deposition, indicates approximately 50,000 persons were denied benefits because failing to comply with the on-line work search requirement who have not exhausted their benefits. Using Mr. Cummings estimations, the Numerosity Requirement is therefore satisfied.

2. There are questions of law or fact common to the Class.

The Class has common questions of law or fact as a result of the Defendant's policy; that is, the class has all had their statutory benefits reduced or suspended because of the policy. Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." The South Carolina Supreme Court has provided guidance in this analysis. In *Gardner v. South Carolina Department of Revenue*, 577 S.E.2d 190 (S.C. 2003), the Court stated that:

> To establish commonality, a party must show that "there are questions of law or fact common to the class." 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. *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991).
>
> Critically, "not every issue in the case must be common to all class members." *O'Connor v. Boeing North Amer., Inc.*, 184 F.R.D. 311, 329 (C.D.Cal. 1998). Commonality is met only where the class shares a determinative issue. *See Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990) ("certification is proper only when a determinative critical issue overshadows all other issues ....").

Id. at 200-01.

In the present case, the Class Members share a common determinative issue. Each member of the Class would be eligible for unemployment benefits under the regulations and statute, but were denied benefits because they failed to meet the requirements of the new policy.

The determinative issue for all members of the Class is whether SCDEW was required to enact the new policy as a regulation.

3. The claims of the Representative Party are Typical of the Claims of the Class Members.

Rule 23(a)(3) requires that the claims of the Class Representative be "typical of the claims of the class." SCRCP. The typicality requirement compares the similarity of the named Plaintiff's claim to the claims of the class as a whole.

The proposed class action presents similar claims for each member. The named Representatives, i.e. each member of the class has suffered the same type of harm from the new policy; specifically each member has had his/her unemployment benefits denied for at least one week because of the policy. Further, each Plaintiff is capable of becoming employed in the future and suffering harm from this policy. Named plaintiffs and each class member is seeking the same remedial measures. Each member is seeking damages for the lost benefits and an injunction until the SCDEW enacts the policy as a regulation. Therefore, the typicality requirement is satisfied.

4. The Representative Party will Fairly and Adequately Protect the Interests of the Class.

Rule 23(a)(4) requires that the Representative Party will fairly and adequately protect the interests of the Class. SCRCP. There are two criteria which the Court should examine in determining whether the Class Representative adequately protects the interests of the class. These two criteria are: "(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel." *Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983); *see Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) (*Runion* "sets forth all criteria to be considered in determining whether a

particular named plaintiff will adequately represent a proposed class.").

The first element requires the class representative to "not have any significant antagonistic or conflicting interests to the unnamed members of the class." *Runion*, 98 F.R.D. at 317. "The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citation omitted). Since the plaintiffs all have the same economic interests, namely acquiring unemployment compensation, there is no antagonism within this class. The second element should be satisfied because the representative parties have counsel and there is no evidence of close relationships between the representative members and the SCDEW. *Cf Runion*, 98 F.R.D. at 317-18 (denying Runion as representative because of his close relationship with the defendant). Further, Plaintiffs have supplied the Affidavit of John Freeman indicating Plaintiffs counsel expreriences with class action litigation.

5. The Amount in Controversy Exceeds One Hundred Dollars for Each Class Member.

The final prerequisite is that the amount in controversy must exceed one hundred dollars for each member of the class. SCRCP 23(a)(5). This amount is based on the amount claimed by the Plaintiffs if it is apparent that the claim is made in good faith. *See Gardner v. Newsome Chevrolet-Buick*, 404 S.E.2d 200, 201 (S.C. 1991). Here, the amount in controversy is the amount of unemployment compensation denied for each member. The average weekly benefit, according to SCDEW's website, is $236.00. Each of the members of the class has missed at least one week's worth of benefits as a result of SCDEW's arbitrary policy. Further, Plaintiffs have defined the class as those who have more than $100.00 in damages. Therefore, any claim of less than $100.00 is excluded.

CONCLUSION

Plaintiffs respectfully request that this Honorable Court grant their Motion and certify the Class since all requirements of the South Carolina Rules of Civil Procedures have been met.

DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812
(803) 259-2759
danwilliams@bellsouth.net

C. BRADLEY HUTTO
Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

ALEX PATERRA
Paterra & Osmer, LLC
107 E. Park Avenue
Greenville, S.C. 29601
864-387-6872
alex.paterra@paterralaw.com

STEPHEN R. SUGGS
South Carolina Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina
_____, 2016

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STATE OF SOUTH CAROLINA COUNTY OF BARNWELL LORENDA ROBINSON, ELAINE NIX, ARCHIE PATTERSON AND TAMI BOLLERMAN PLAINTIFFS, v. SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT & WORK FORCE, DEFENDANT.	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO.:2013-CP-06-0059 **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

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ARGUMENT

A. All of the named Plaintiffs claims are valid.

The individual named Plaintiffs are all interested person who have had valid claims for unemployment compensation, have applied for unemployment and/or will apply for unemployment benefits in the future. Further, each of the named individual Plaintiffs have been either denied benefits or will be denied benefits on the basis of SC DEW failure to promulgate regulations regarding the online job search requirements. Plaintiffs' are entitled, as a matter of law, to a summary judgment declaring that the Defendants must promulgate regulations pursuant to SC DEW's own enabling statute. *See* S.C. Code § 41-29-110 (2010) "Any person whose rights, status or other legal relations are affect by statute may have determined any question of validity arising under... statute... and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann § 15-53-30 (2005). The Plaintiffs are all individuals whose rights have been effected by SCD EW's failure to promulgate regulations pursuant to its enabling

legislation. Plaintiffs have raised a question of validity of the Defendants acts to institute the online job search requirement without first promulgating regulations. Had SC DEW promulgated regulations under the APA and it own enabling statute, Plaintiff would be able to present public comment and have access to legal remedies which are currently unavailable. *See* S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005).

Additionally, Plaintiffs claims are not moot. The South Carolina Supreme Court has held that questions of statutory interpretation that are otherwise moot qualify for review if it is one capable of repletion yet evading review. *Nelson v. Ozmint*, 702 S.E.2d 369, 390 S.C. 432 (S.C. 2010)(Although defendant had completed his sentence, other inmates affected by interpretation of sentencing statute governing CDV 3rd offenses would, like defendant, serve the one year mandatory term before the lawfulness of the interpretation could be reviewed)

Similarly to *Nelson*, Plaintiffs are currently not collecting unemployment benefits, yet all unemployed individuals in the state of South Carolina are still affected by SC DEW's failure to promulgate regulations regarding the online job search. Therefore a declaratory judgment by this Court finding that the online job search is invalid is appropriate at this time, as that Defendant's actions are in violation of the APA and SC DEW enabling statute.

Tami Bollerman and Archie Patterson:

Defendant has readily admitted in its motion for summary judgment and memorandum in support that Ms. Bollerman and Mr. Patterson have not exhausted their benefits. Kevin Cummings, in his 30(b)(6) deposition, admitted neither Ms. Bollerman nor Mr. Patterson had exhausted either their state granted unemployment benefits or their federal unemployment benefit. Bollerman Dep. at 25, Patterson Dep. at 20. Further both Ms. Bollerman and Mr. Patterson have testified that they met all other requirement as set forth by SC DEW and were

actively searching for work at the time they were disqualified by the implementation of the online job search. Bollerman Aff., Patterson Aff.

LORENDA ROBINSON, ELAINE NIX and Fred Alexander:

For the purpose of this motion Plaintiffs will not contest that Ms. Robinson, Ms. Nix and Mr. Alexander have exhausted their benefits. Although they have exhausted their benefits this does not exclude them from having a valid claim. Specifically each individual may become unemployed in the future and will still be subject to SC DEW's failure to promulgate regulations concerning its change in the claim process for benefits; it "overstepped its statutory authority in formulating and applying this [new policy for unemployment benefits] without formalizing it by regulation." *See Captain's Quarters Motor Inn, Inc., 306 S.C. at 491, 413 S.E.2d at 14 ("[T]he legislature has expressly mandated Coastal Council promulgate regulations to govern the evaluation of permit applications.").*

B. Plaintiffs Are Not Required to Exhaust Administrative Remedies Regarding Actions Taken by Defendant Outside its Authority.

SC DEW contends that none of the current Plaintiffs have exhausted administrative remedies. "Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." *Garris v. Governing Board of South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819 (1995). The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law. *Adamson v. Richland County School Dist. One*, 332 S.C. 121, 503 S.E.2d 752, (Ct.App.1998). Plaintiffs' are not required to exhaust administrative remedies in the instant case.

Where a state agency acts outside of its authority a plaintiff is not required to exhaust administrative remedies before challenging that authority. In *Ex Parte Allstate Insurance Co.*, 248 S.C. 550, 151 S.E. (2d) 849 (1966), two insurance companies sought to influence legislation that would affect their business in South Carolina. In response, the Insurance Commissioner began investigations into each company. Both companies filed cases against the Insurance Commissioner alleging, in part, that his actions were without statutory authority. The lower court entered judgment in favor of the insurance companies and the Commissioner appealed arguing, in part, that the companies failed to exhaust administrative remedies. The Supreme Court held that the case was premised:

> upon the ground that the Insurance Commissioner was without authority to proceed with the investigation into purely political activities of the companies and their agents. The issue was solely one of law as to the statutory authority or jurisdiction of the Commissioner. The facts in regard to that issue were undisputed. Under the undisputed facts, the Commissioner was obviously without such authority. These circumstances afforded a sound basis for the action of the lower court in excusing the failure of the companies to first seek relief in the administrative proceedings and in granting injunctive relief.
>
> *Id.* at 567, 568

Furthermore "a party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000)). The Administrative Law Court is part of the executive branch. *See, e.g., Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). Because an Administrative Law Judge is an agency of the executive branch, "it must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation." *Id.* at 38, 535 S.E.2d at 644.

For that same reason, the Administrative Law Court has "no authority to rule on the facial validity" of a regulation under state law. In *Drummond*, the plaintiff filed suit stating that the South Carolina Department of Revenue "improperly promulgated regulations that do not conform to [statute] because the regulations allow the sales tax exemption only for diabetic supplies sold pursuant to a prescription or written authorization, which appellant claims is not required under the statute." *Drummond v. State, Dep't of Revenue*, 378 S.C. 362, 365, 662 S.E.2d 587, 588 (2008). The Court held that: "Although appellant is not challenging the constitutionality of the regulation, he *is* challenging its validity under state law. Because the Administrative Law Court is part of the executive branch, as stated in *Video Gaming*, it has no authority to rule on the facial validity of Reg. 117-332." *Id.* at 370, 662 S.E.2d at 591.

In addition to that, the Court of Appeals, in dicta, recently stated that "[a]nother exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." *Brown v. James*, 389 S.C. 41, 55, 697 S.E.2d 604, 611-12 (Ct. App. 2010). Other courts have held that an exception to the exhaustion of administrative remedies requirement exists when an agency has acted outside its authority. *See, e.g., Grever v. Idaho Telephone Co.*, 499 P.2d 1256, 1259 (Ida. 1972) ("[T]he rule will be departed. . . where the agency acts outside its authority."). Because the plaintiffs are alleging that the SC DEW "acted outside its authority," a court should hold that they did not need to exhaust administrative remedies. By requiring exhaustion of administrative remedies, the court would be having a member of the executive branch, the ALC, determine the validity of a policy of another member of the executive branch; thus, it would violate the separation of powers doctrine. *See Ward v. State*, 343 S.C. 14, 20, 538 S.E.2d 245, 248 (2000) (Because an agency is part of the executive branch,

"requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.").

Although this case deals with an agency's policy and not an agency's "regulation," the policy is still coming from part of the executive branch. The plaintiffs are challenging the authority of a member of the executive branch to create a policy for unemployment benefits. Because the Administrative Law is part of the executive branch, it does not have authority to decide whether a policy is beyond the SC DEW's statutory authority.

Since the administrative law court lacks jurisdiction, requiring the plaintiffs to exhaust remedies would be a futile act. *See Ward*, 343 S.C. at 19, 538 S.E.2d at 247 ("Requiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act."). "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." *Brown*, 389 S.C. at 54, 697 S.E.2d at 611 (citations omitted). "Futility . . . must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Id.* (quoting *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006)). Here, the action would have been futile because the Administrative Law Court does not have the authority to decide this case on its merits. Thus, it would be futile to have the plaintiffs exhaust administrative remedies where the Administrative Law Court has not authority to adjudicate the case.

Additionally, requiring plaintiffs to go to exhaust administrative remedies would be inadequate because of the type of claims that each will be raising. *See Storm M.H.*, 400 S.C. at 487, 735 S.E.2d at 497 (stating that inadequate remedies is a factor to consider for determining whether a plaintiff needs to exhaust administrative remedies). Judicial economy is also promoted

by the plaintiffs bringing the suit directly in the circuit court rather than in the Administrative Law Court. *See Id.* (stating that "promot[ing] judicial economy" is a reason for addressing the merits of an appeal without exhausting administrating remedies). Each person whose benefits are denied because of the new policy would need to renew his/her claim after it is denied each week. This Court can address all the claims in one class action and stop the future claims by an injunction. If the Administrative Law Court addresses this claim, each plaintiff will need to bring his/her claims each week. Because of the promotion of judicial economy, the plaintiffs were not required to exhaust administrative remedies.

In the present case, Plaintiffs have argued extensively that SC DEW exceeded the scope of its legislative authority in enacting the online work search requirement without promulgating regulations. Plaintiffs are not asking this court to determine whether or not they complied with the online work search requirement. Plaintiffs are asking this court to decide whether or not SC DEW has the authority, as a matter of law, to penalize claimants for failing to perform an online work search during a given claim week.

SC DEW's lack of authority in this case goes even further than a determination of whether they had the authority under the proviso to withhold benefits. In Kevin Cummings March 3rd Affidavit on page 7, paragraph 36, he states that: "Mr. Patterson's benefits were disqualified for the week starting August 19, 2012. Mr. Patterson, like Ms. Bollerman, sought adjudication from a claims adjudicator for the one week of disqualification that was made in his case. ... Mr. Patterson did not appeal the claims adjudicator's determination." In paragraph 34, on the same page, Cummings indicates that Ms. Bollerman likewise sought adjudication from a claims adjudicator and did not appeal. "Section 41-35-610 of the South Carolina Code (Supp. 2013) provides that "a claim for [unemployment] benefits must be made pursuant to regulations

the department promulgates." According to those regulations, the department's initial determination regarding unemployment benefits is made by a claims adjudicator. S.C. Code Ann. Regs. 47-51 (2011)." *Stubbs v. SC DEW*, Opinion No. 5202 (Ct. App. March 5, 2014). Cummings indicates in paragraph 22, on page 5 of the affidavit that "if a claimant is deemed out of compliance with eligibility requirements for a given week, including failure to do an online job search, DEW takes a statement from the claimant on the reason for non-compliance. After taking the claimant's statement into consideration, either a disqualification or a determination of eligibility is issued by a claims adjudicator." The initial determination in these cases were not made by a claims adjudicator. In fact, both Mr. Patterson and Ms. Bollerman only got a determination from a claims adjudicator by calling to protest the loss of benefits. SC DEW failed to comply with existing regulations in administering penalties for the online work search requirement. Additionally in Ms. Robinson's deposition she indicated that SC DEW Tribunal and SC DEW Appellate panel had no authority to rule on whether SC DEW had the ability to implement the online job search as Plaintiff have extensively argued. Ms. Robinson's testimony during her deposition contradicts her affidavit which she now states Ms. Bollerman and Mr. Patterson both would have been successful had they appealed the determination. R. Robinson Dep. at 14. This Court should disregard Ms. Robinson's testimony as it is an attempt by Defendant to alter the sworn testimony of Ms. Robinson in an effort to establish that Plaintiffs Bollerman and Patterson did not exhaust their administrative remedies. The affidavit presented by Defendant provides no explanation and makes no reference to the contrary statements in Ms. Robinson's previous deposition. *Cothran v. Brown*, 592 S.E.2d 629, 357 S.C. 210 (S.C., 2004); *Torres v. E.I.De Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. 2000) (a subsequent affidavit is a

"sham," that is, as not creating an issue of fact for purposes of summary judgment. by submitting the subsequent affidavit to contradict that party's own prior sworn statement.)

Plaintiffs fall into a recognized exception to the requirement that they exhaust administrative remedies.

C. SC DEW has Waived its Affirmative Defense of Failure to exhaust Administrative Remedies.

Other courts have held that the administrative exhaustion requirement does not affect a court's subject matter jurisdiction, and a defendant waives the affirmative defense by failing to raise it in a timely manner. *Capital City Ins. Co. v. Bp Staff, Inc.*, 674 S.E.2d 524, 382 S.C. 92 (S.C. App., 2009) *Jones v. Chagrin Falls, 674 N.E.2d 1388, 77 Ohio St.3d 456, 1997-Ohio-253 (Ohio 1997)* In the present case Defendant has waived the right to argue that Plaintiffs have failed to exhaust their administrative remedies because a substantial length of time has passed, the parties engaged in extensive discovery, and the parties have availed themselves of the Court of Common Pleas assistance. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011). (finding that Defendant had waived a mandatory arbitration clause when it had litigated a matter for 18 months, conducted discovery and availed itself to the court system which substantially prejudiced Plaintiff.) To allow them to now argue in the final stages of litigation that Plaintiffs needed to go to the administrative law court greatly prejudices Plaintiffs.

D. SC DEW is Required to Promulgate Regulations to Carry out its Powers and Duties.

Title 41 of the S.C. Code contains South Carolina's laws regarding labor and unemployment. Chapters 27 through 41 contain statutes specific to the South Carolina Department of Employment and Workforce. In at least five separate code sections, Title 41 requires SC DEW to promulgate regulations in order to carry out its duties as an agency. In

addition, the South Carolina Administrative Procedures Act requires all state agencies to promulgate regulations in order to carry out their statutory authority.

In 2010, the South Carolina legislature rewrote South Carolina's unemployment laws. By legislative Act 146 the legislature replaced the Employment Security Commission with the Department of Employment and Workforce. In addition to changing the name of the department and reorganizing the internal structure, the legislature added mandatory language requiring the Department to promulgate regulations. For example, S.C. Code § 41-29-110, titled "Duties and Powers of Commission" was changed from:

> The Commission shall administer Chapters 27 through 41 of this Title and **it may adopt, amend or rescind such rules and regulations,** employ such persons, make such expenditures, require such reports as are not otherwise provided for in such chapters, make sure such investigations take place **as it deems necessary or suitable to that end.**
>
> To:
>
> **The department must promulgate regulations necessary to carry out the provisions of Chapters 27 through 41 of this title,** employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title. *S.C. Code § 41-29-110*

Other chapters of Title 41 received similar treatment. *See e.g. S.C. Code §§ 41-35-110, 41-35-610 and 41-35-760.* The clear intent of the legislature was that SC DEW only carry out the powers and duties of the agency pursuant to regulations properly promulgated. As recently as March of 2014, the South Carolina Court of Appeals has cited the statutory mandate that the agency promulgate regulations. In *Stubbs v. SC DEW,* Opinion No. 5202 (Ct. App. March 5, 2014), Judge Few wrote, "Section 41-35-610 of the South Carolina Code (Supp. 2013) provides that "a claim for [unemployment] benefits must be made pursuant to regulations the department promulgates."

Defendant contends that Section 4-29-110 does not require them to promulgate regulations by interpreting the statute to provide DEW with several different alternatives to implementing its actions. Reading the statute in this manner makes the meaning of the word "must" within the statute meaningless. Rather, Plaintiffs argue and the South Carolina Court of Appeals have ruled that claims for unemployment benefits must be made pursuant to regulations the department promulgates. Therefore the meaning of "or take such action as it considers necessary... " means it must promulgate regulations not only to 1) carry out the provisions of chapter 27-35; 2) employ personnel; 3) make expenditures; 4) require reports not otherwise provides for in these chapters or 5) take other such action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title..

Stated another way, reading the statute as the Defendant argues makes absolutely no sense as it allows SC DEW to circumvent the first four requirements of the statute and allows them to act without promulgating regulation in any situation in which it considers it necessary.

The South Carolina Administrative Procedures Act, in *S.C. Code § 1-23-10(4)*, defines "Regulation" as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." It goes on to specifically state, "Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." In interpreting the federal Administrative Procedure Act, South Carolina's District Court said it was "intended to insure that the process of legislative rule-making in administrative agencies is infused with openness, explanation, and participatory democracy which is essential to minimize the dangers of arbitrary and irrational decision-making." *State of S.C. ex rel. Patrick v. Block*, 558 F. Supp. 1004, 1015 (D.S.C. 1983). Similar concerns with agency authority and

decision-making are reflected in the legislature's repeated requirements that SC DEW promulgate regulations in order to carry out its duties and responsibilities.

"As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council*, 413 S.E.2d 13, 14 (S.C. 1991). In *Captain's Quarters*, the SC Supreme Court struck down a damage assessment test created by the SC Coastal Council. The Court held that the Council was required by statute to promulgate its criteria for granting permits to repair damaged seawalls. *Id.* The Coastal Council refused to allow property owners in coastal areas to rebuild damaged seawalls based on a damage assessment test created internally. The test itself was based on the agency's interpretation of an existing statute.

In the present case, plaintiffs have been denied unemployment insurance benefits pursuant to criteria set by Defendants which should have been promulgated as regulations. Similarly to *Captain's Quarters*, the Defendants here cite a legislative enactment as authority for altering the way the agency goes about determining who is eligible to receive the agency's favor. Like the Coastal Counsel, SC DEW has misinterpreted and overstepped the legislative grant of authority.

E. Budget Proviso 67.7 Does Not Suspend South Carolina Permanent Statutes Requiring Promulgation of Regulations.

SC Budget Proviso 67.7 provides:

> 67.7. (DEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and

> to ensure seated meetings with Unemployment Insurance claimants and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified. The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with laws administered by the agency.

SC DEW argues that Budget Proviso 67.7 of the 2012-2013 appropriations act authorizes the agency to 1) ignore its statutory mandates to promulgate regulations and 2) to withhold benefits from any claimant who fails to perform an online job search during the weekly claim period. On April 14, 2014, the Supreme Court addressed the effect of budget provisos on permanent statutes in South Carolina, the case of *Amisub v. SCDHEC*, Opinion No. 27382:

> There is no question that the General Assembly has the power, where there is no constitutional prohibition, to temporarily suspend a statute's operation. *McLeod [v. McInnis]*, 256 S.C. at 26, 180 S.E.2d at 640. An appropriations act, though generally temporary in duration, "has equal force and effect as a permanent statute" and may suspend the operation of a permanent statute during the time the appropriation act is in force. *Plowden v. Beattie*, 185 S.C. 229, 236, 193 S.E. 651,654 (1937) (citations omitted).
>
> "When such intention is clearly manifest[,] this [C]ourt has no choice but to give force and effect thereto." *McLeod*, 256 S.C. at 26, 180 S.E.2d at 640. The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). It is well established that this Court will not construe a statute by concentrating on an isolated phrase. *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."); see also *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Joiner ex rel. Rivas v. Rivas*, 342

> S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citations omitted). (emphasis added)

Budget Proviso 67.7 is nothing more than an appropriation of funds from a particular tax to be spent on enforcement of S.C. Code Ann 41-35-110(3) (ability to work and seeking work) and 41-35-120(5) (accepting appropriate work). The Proviso does list various methods of enforcement including the phrase "...and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified...." However, no other guidance as to this method of enforcement of 41-35-110(3) and 120(5) is given, necessitating the establishment by DEW of a procedure and policy regarding the online work search requirement. Kevin Cummings in his affidavit gives at least some of the details of the implementation of that procedure. However, it is undisputed this procedure was not promulgated by regulation.

DEW in its memorandum points to no conflict whatsoever between the Budget Proviso and the permanent statutes which require DEW to promulgate regulations. Since it did establish a procedure, it cannot credibly argue that the procedure was not necessary, nor can it argue that establishing the procedure was in conflict with the Budget Proviso. It just ignored the requirements that the agency "must promulgate regulations necessary to carry out the provisions of Chapters 27 through 41 of this title" *S.C. Code § 41-29-110*, including enforcement of 41-35-110(3) and 41-35-120(5).

The work search requirement in the department's enabling statutes requires that unemployed individuals actively seek work. *S.C. Code § 41-35-110(3)* "Seeking work" is not defined anywhere in the statute or in regulations promulgated by SC DEW or its predecessor, the

Employment Security Commission. SC DEW's policy, nonetheless, has been to require four job contacts per week by individuals in order to continue receiving unemployment benefits. Prior to the online job search requirement, an applicant only had to provide a list of employers contacted during a random job verification meeting. Although no one has challenged the agency's policy with regard to four job contacts, it has not been rigorously enforced in the past. Kevin Cummings was deposed by the plaintiffs prior to submitting his affidavit in support of Summary Judgment. In his deposition, he stated clearly that SC DEW did not penalize a claimant when a job contact was unverified during a random verification of job contacts search. (Cummings p. 57, l. 3)

Here the two statutes stand together by reasonable construction only if SC DEW promulgates regulations to carry out the legislative intent of the budget proviso. SC DEW's treatment of the proviso as a mandate (p. 8 Defendant's Memorandum in Support of Motion for Summary Judgment) by the General Assembly to penalize unemployment claimants by withholding benefits creates absurd results. For example, a claimant who makes ten in person inquiries about work, fills out six separate job applications and receives two separate call back interviews in a week would be denied benefits for that week if they failed to make one of those ten job inquiries online. Requiring regulation does not thwart any legislative intent to establish an online work requirement. It merely establishes a framework to advise everyone how it is to be implemented by filling in the details that the legislature left out

F. **Withholding Benefits is a Penalty and Therefore the Proviso Must Be Strictly Construed Against the State.**

SC DEW asserts in its Memorandum that the stoppage of benefits for failing to seek work is not a penalty. Nonetheless, the facts suggest otherwise. The "Explanation of Determination," a form document sent to Tami Bollerman, (Exh. G to Kevin Cummings Affidavit) purporting to explain the decision of SC DEW to withhold benefits, indicates that the "South Carolina Code

provides varying penalties for a claim deemed not meeting the requirements of the law." (emphasis added) The South Carolina Supreme Court has held that "Statutes which are criminal or penal in nature are strictly construed against the state." *Lewis, et al v. Gaddy*, 254 S.C. 66, 173 S.E.2d 376 (1970). If the Statute is being used to confer what SC DEW clearly considers a penalty, then it must be strictly construed against the state.

G. The Legislature Failed to have the Department of Labor Approve the Budget Proviso Prior to Enactment.

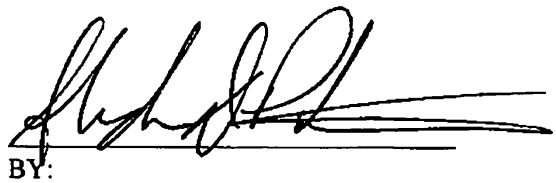
Federal tax statutes seem to indicate laws relating to unemployment must be approved by the Department of Labor before funding for federal funds but more importantly before unemployment taxes are deductible. *See* 26 U.S.C. §§ 3302, 3304 (2012) and 42 U.S.C. § 503 (2012). The South Carolina Legislature did not submit SC Budget Proviso 67.7 for approval by the DOL. Therefore the legislatures failure may affect taxes for South Carolina businesses. Reading the Proviso as a legislative enactment, as the Defendant request this Court to now do, could result in South Carolina businesses losing significant tax breaks and also may require them to pay back to the United State Government millions of tax breaks which were not authorized. This result could not have been intended by the Legislature when they issued SC Budge Proviso 67.7.

H. Defendant Adopts a Ridiculous Reading of S.C. Code Ann. § 41-29-110

S.C. Code Ann. § 41-29-110 provides that "The department **must promulgate regulations** necessary to carry out the provisions of Chapters 27 through 41 of this title, employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title." This statute, titled "Duties and Powers of the

Commission" is clearly a mandate by the legislature that SC DEW promulgate regulations to accomplish the items included in the statute. Nonetheless, the defendant argues that the final phrase, beginning "or take other action" is a blanket endorsement by the legislature for SC DEW to take any action it wants to accomplish any of the things in the statute. SC DEW contends that the legislature intended this statute to mean, in effect, "SC DEW must promulgate regulations, except when they don't feel like it."

Respectfully submitted,



BY:

ALEX PATERRA
Paterra & Osmer, LLC
107 E. Park Avenue
Greenville, S.C. 29601
864-387-6872
alex.paterra@paterralaw.com

DANIEL W. WILLIAMS
Bedingfield & Williams, LLC
40 Wall Street
Barnwell, SC 29812
(803) 259-2759
danwilliams@bellsouth.net

C. BRADLEY HUTTO
Williams & Williams
1281 Russell Street, P.O. Box 1084
Orangeburg, SC 29115
Phone: 803-380-4099
Fax: 803-928-5190
cbhutto@williamsattys.com

STEPHEN R. SUGGS
South Carolina Appleseed Legal Justice Center
P.O. Box 7187
Columbia, SC 29202
(803) 779-1113, ext. 106
(803) 779-5951 (facsimile)
ssuggs@scjustice.org

ATTORNEYS FOR PLAINTIFFS

Greenville, South Carolina
April 16, 2015

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BARNWELL	)	
Lorinda Robinson, Elaine Nix, Archie Patterson, Tami Bollerman and Fred Alexander	)	Civil Action No. 2013-CP-06-0059
Plaintiffs,	)	**DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
v.	)	
South Carolina Department of Employment & Workforce,	)	
Defendant.	)	

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Defendant submits the following in response to Plaintiffs' Motion for Summary Judgment, filed on April 1, 2015.

1. Plaintiffs' motion and memorandum in support do not discuss the facts pertinent to their individual situations. For reasons previously set forth by Defendant, no Plaintiff has been affected by the online work search requirement in such a way as to entitle them to argue the merits of the claim set forth in the Amended Complaint.[1]

2. Plaintiff's first argument (Pl. memo at 4-7) asserts that various statutes pertaining to DEW create a requirement that DEW must promulgate regulations in the situation involved in this case. Essentially, Plaintiffs maintain that the statutes require virtually all of DEW's processes and procedures to be promulgated through regulations. These statutes were thoroughly

[1] Defendant reserves the right to file a reply memorandum addressing this and any other issues that Plaintiffs may argue in response to Defendant's Motion for Summary Judgment. Plaintiffs have argued that each of them "was determined eligible for UI benefits by the SCDEW and began receiving IU benefits." Pl. memo at 2. However, as DEW has previously pointed out, the right to receive benefits for a given week must be established anew every week.

discussed in Defendant's memorandum at pp. 22-25. As discussed therein, none of the cited statutes require the promulgation of regulations in the present situation.

Plaintiffs cite *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1992), which held that the specific statute in that case required the promulgation of regulations. That statute, S.C. Code Ann. § 48–39–130(B) (1987), specifically provided that:

> Within sixty days of July 1, 1977, the Council shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating and granting or denying all permit applications until such time as the final rules and regulations are adopted . . . . The Council shall . . . publish final rules and regulations.

(Emphases added.) The *Captain's Quarters* case specifically involved rules that the Coastal Council was trying to apply to evaluating and granting permit applications -- the precise subject of the statutory requirement that such permit reviews must be performed according to regulations. In contrast, there is no statute in the present case that requires the promulgation of regulations for DEW eligibility decisions about whether a person has made a showing that he or she is able to work, available for work, and actively seeking work. Plaintiffs are unable to quote any such language in the statutes pertaining to DEW, because no such language is to be found in those statutes.

Plaintiffs' only mention of the provisos which DEW has cited as showing legislative authorization for current practice is a one-sentence bare assertion that "the budget proviso is neither as clear in its purpose nor as exhaustive in its explanation of the law." Pl. Mem. at 7. To the contrary, as DEW has already discussed in its initial memorandum, the provisos very clearly state that "enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code" should occur "via . . . requiring that one of the four job search contacts required per week be

conducted through SC Works Online System (SCWOS), so that it can be electronically verified." This requirement is very "clear" and "exhaustive" in providing that DEW must require online job searches.

3. Plaintiff's second and final argument (Pl. memo at 7-9) asserts that if the provisos did not authorize the online work search requirement, the agency's use of the requirement created a prohibited "binding norm." DEW has also addressed this issue, discussing it at pp. 25-26 of its initial memorandum in support. There, it was shown that while the online job search is the usual rule, it is one which the agency in practice has been "free to follow or not follow the policy in an individual case." *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 476, 636 S.E.2d 598, 610 (2006), citing *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369, 1377–78 (11th Cir.1983).

CONCLUSION

For the foregoing reasons and those set forth in prior filings, DEW respectfully submits that Plaintiffs' Motion for Summary Judgment should be denied, DEW's Second Motion for Summary Judgment should be granted, and that this case should be dismissed with prejudice.

DAVIDSON & LINDEMANN, P.A.

BY: /s/

WILLIAM H. DAVISON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
T: 803-806-8222
F: 803-806-8855
Email: wdavidson@dml-law.com
Email: kwoodington@dml-law.com

Counsel for Defendant

Columbia, South Carolina

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