

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE; ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services;
HERMAN MCCALL, in his official capacity
as the Executive Director of the Michigan
Children's Services Agency; DANA NESSEL,
in her official capacity as Michigan Attorney
General; ALEX AZAR, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

**STATE DEFENDANTS' RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Plaintiffs' request for injunctive relief must be denied because they cannot establish a likelihood of success on the merits, they have suffered no irreparable injury, and the interests of the public and the Michigan Department of Health and Human Services would suffer if such relief were granted.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Fulton v. City of Philadelphia*, 320 F.Supp.3d 661, 703-04 (E.D. Pa. 2018), aff'd 922 F.3d 140, 165 (3d Cir. 2019).

INTRODUCTION

Plaintiffs St. Vincent Catholic Charities (SVCC), Chad and Melissa Buck, and Shamber Flore request the extraordinary remedy of preliminary injunctive relief, claiming that they will suffer “irreparable” harm absent such relief. In so doing, they challenge a consent decree entered by Judge Borman in another court in *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich.). Plaintiffs intervened in *Dumont*, asserting they needed to protect the rights they now assert in the instant case and retain the right to appeal any settlement. But Plaintiffs asserted no claims and failed to appeal the consent decree. Instead, they filed a new lawsuit in a new forum. They paint long-standing contract provisions, to which SVCC agreed, as a “new” policy and distort the Department of Health and Human Services’ process of contracting, licensing and enforcement beyond all recognition. Their belated claims and request for a preliminary injunction lack merit.

Their claim for injunctive relief must fail. Not only will Plaintiffs suffer no irreparable injury, the relief they request is expressly prohibited by Michigan and federal law. And they fail to state claims against Attorney General Dana Nessel, who was not a party to and played no direct role in *Dumont*. Moreover, Plaintiffs cherry pick out-of-context quotations from Attorney General Nessel that make no mention of religion, let alone Catholicism, and twist them in order to conjure up a baseless claim of anti-Catholic animus. Plaintiffs’ claims lack any merit.

Nor can the Bucks or Ms. Flores establish standing. Plaintiffs cannot show a likelihood of success on the merits. Similarly situated plaintiffs challenged Philadelphia’s non-discrimination policy, making nearly identical claims in *Fulton*

v. City of Philadelphia, 320 F.Supp.3d 661, 703-04 (E.D. Pa. 2018), *aff'd* 922 F.3d 140, 165 (3d Cir. 2019). Both the district court and the Third Circuit wisely rejected those claims, which sought to transform the First Amendment from a shield to protect religious exercise and speech into a sword to strike down facially neutral government policies.

Finally, the public interest and that of the Michigan Department of Health and Human Services (Department) strongly favor upholding state and federal law, the enforcement of contracts, and preventing discrimination. Accordingly, injunctive relief is unwarranted and contrary to law.

STATEMENT OF FACTS

As detailed in State Defendants' Brief in Support of Motion to Dismiss, the present case arises out of *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich.), and the Consent Decree ending it. (Doc.31-5, PageID.721-30.) Pursuant to Fed. R. Civ. P. 10(c), the Statement of Facts from that Brief is incorporated by reference.

The Department's role in foster care and adoption services, contracting and enforcement.

The Department administers Michigan's foster care and adoption services programs that provide placement and supervision of children when a court finds they have been abused or neglected and cannot safely remain in their family homes. Services focus on resolving the problems that necessitated removal, with the goal of reunification. Approximately 13,500 children are in foster care, about 2,000 of whom are available for adoption. Care is provided in foster-family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e). The Department holds 137 contracts with 57 private child placing agencies, or CPAs, to provide foster care or adoption services throughout Michigan, including SVCC. (Goad Aff., ¶¶4-6, Ex.A; Neitman Aff., ¶¶5-6, Ex.B.) The Department is aware of no evidence that faith-based or religiously affiliated CPAs are more effective than other CPAs. (Hoover Aff., at ¶12; Ex.D.)

The Department reviews a CPA's recommendation for foster care licensing and adoption after a CPA performs a home study and assessment. The partnership between the Department and private CPAs allows the Department to better meet its commitments to serve children through timely foster care placements and

adoptions. Contrary to Plaintiffs' assertions, the Department does not require SVCC or any other CPA to endorse or approve of a specific relationship or type of relationship when recommending a family for licensure or adoption. The contracts merely require CPAs to provide foster care and adoption services pursuant to Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq.*, administrative rules, Mich. Admin. Code R. 400.12101 *et seq.*, contracts, and Department policy, as found in the Department's Children's Foster Care Policy Manual¹ and the Adoption Services Policy Manual.² (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶7, 9, 12-13; Bladen Aff., ¶¶12-13, Ex.C.)

Pursuant to contract, CPAs recruit prospective foster and adoptive applicants, complete home studies and assess whether the person or family meets the Department's licensing requirements, as set forth in Act 116 and administrative rules. The Department does not ask or require CPAs providing foster care or adoption services under a contract to endorse or approve of any relationship, including same-sex marriages. Nor does the Department ask or require CPAs to speak in favor of any relationship, including same-sex marriages. The Department's contracts only require the CPA to determine whether the foster applicant meets the minimum licensing requirements mandated by law. CPAs must be licensed in order to provide foster care and adoption services, and only the

¹<http://www.mfia.state.mi.us/OLMWeb/ex/FO/Public/FOM/000.pdf#pagemode=bookmarks>. Last accessed May 29, 2019.

²<http://www.mfia.state.mi.us/OLMWeb/ex/AD/Public/ADM/000.pdf#pagemode=bookmarks>. Last accessed May 29, 2019.

Department can certify a foster home applicant by issuing a license or approving an adoption. (Goad Aff., ¶¶10-11; Neitman Aff., ¶¶8, 12-13.)

CPAs are required by contract and administrative rules to perform a home study on prospective foster or adoptive families, including an on-site inspection of prospective foster homes. (Neitman Aff. at ¶9; DHS-3130 Home Study, Attachment 1.) Completion of a home study merely requires the CPA to check the “yes” or “no” box indicating whether the family meets objective criteria set by statute, rules, and policy. (DHS-3130, p. 9.) The criteria for home studies include a review of several factors, including the “[s]trengths and weaknesses” of the parents and the “[s]trengths of the relationship” between the couple, including “level of satisfaction” and stability of the relationship and their relationship history. Other factors to assess include marital and family status and history, including current and past level of family functioning and relationships, parenting skills and childrearing techniques, values and the role of religion in the family. The Department requires assessment of these criteria by all CPAs, including the Department itself. (Neitman Aff., ¶¶9-10.)

These criteria are used to determine whether and to what extent foster applicants or adoptive families are able to meet the needs of children served by the agency and whether a child may be a good fit for a particular family. A CPA’s assessment of these factors does not constitute an endorsement, recommendation or approval of a specific relationship or a type of relationship. Nor does a CPA’s assessment of these factors constitute an endorsement of any particular religious

faith or the absence of a religious faith. These factors cannot be used as a means of discriminating against prospective foster parents or adoptive families on the basis of their sexual preference or same-sex marital status. Instead, a CPA must assess these factors and determine compliance or noncompliance with administrative licensing rules and statute. (Neitman Aff., ¶¶11-12.)

Under the contracts, the Department pays CPAs for the services they render, including assisting with the licensing of foster families. Other services undertaken by CPAs include: placement and supervision of children who are experiencing or have experienced out of home care; reunification and other permanency planning efforts as appropriate; assessment of needs and progress for children and parents; service referral; and documentation of all case management services. The administrative rate paid to CPAs for foster care and adoption services provides compensation for all services performed under the respective contracts. (Goad Aff., ¶¶10, 12-13; Neitman Aff., ¶9; Hoover Aff., ¶¶6-11.)

When allegations of noncompliance with licensing rules, statute, or contract requirements are made, the Division of Child Welfare Licensing (DCWL) will initiate an investigation. A licensing consultant investigates the allegations to determine compliance with applicable rules, statute, or contract requirements. At the conclusion of the investigation, the licensing consultant conducts an exit meeting with the agency's administrators to discuss preliminary findings. The licensing consultant completes an investigation report, which is reviewed by the consultant's manager. The report details the allegations, investigative activities,

findings of compliance or noncompliance, and includes a recommendation regarding the status of the license and contract. (Neitman Aff., ¶¶14-15.)

If there are findings of noncompliance, a corrective action plan (CAP) to address the noncompliance will be required. Failure to submit an acceptable CAP will result in a recommendation for disciplinary action, which may include revocation of the license and termination of the contract. If a recommendation for disciplinary action on the contract is made, the licensee/contractor can appeal. Unless and until an investigation is complete, the Department does not know whether a statute, rule, policy or contract provision has been violated. (Neitman Aff., ¶¶16-18.)

In the present case, the Department was unaware that SVCC did not follow the non-discrimination clause until the *Dumont v. Lyon* lawsuit was filed. The *Dumont* plaintiffs alleged that they had been denied the opportunity to serve as foster or adoptive parents by SVCC, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing. When that lawsuit was filed, the Department investigated the allegations in the same manner as it investigates other complaints. It opened investigations of SVCC, Bethany Madison Heights and Bethany East Lansing. The Department was required to open these investigations under Mich. Comp. Laws §§ 722.113(1) and 722.120(1), the PAFC Master Contract, p 21, § 2.21; the DCWL Policy and Procedure Manual, Chapter 6 Special Investigation, p 46. (Neitman Aff., ¶¶19-21; Bladen Aff., ¶¶4-5.)

The Department has always enforced an agency contract's non-discrimination clause; the *Dumont* settlement did not result in a "new" policy. It merely reaffirmed the Department's long-standing practice. (Bladen Aff., ¶8.) For instance, in January 2017 and May 2018, the Department opened two investigations of Catholic Charities of West Michigan. In the first case, the Department established violations based on the agency's refusal to complete a child's adoption by a same-sex couple as the placement that the agency determined met the child's best interest. In the second case, the agency failed to place siblings together because the one sibling resided with a same-sex couple. A CAP was submitted by the agency and accepted by the Department. (Neitman Aff., ¶¶22-24; Bladen Aff., ¶7.)

Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of SVCC, Bethany Madison Heights and Bethany East Lansing. Since the *Dumont* case has ended, Bethany Christian Services has agreed that it will comply with its contract requirements, including the non-discrimination clause. (Neitman Aff., ¶¶25-26, Bladen Aff., ¶9.)

Because of the present lawsuit, the Department has not been able to finalize its investigation of SVCC. Should that investigation be completed and a violation found, SVCC would have the opportunity to complete a CAP demonstrating how it would achieve compliance. If SVCC chooses not to comply with the provisions of its contracts with the Department, including the non-discrimination clauses, the Department could take licensing and/or contract action. And if SVCC chooses to cease providing foster care and/or adoption services, the

Department has a process for finding new placements for the children SVCC serves without sacrificing the quality of care received by those children. (Neitman Aff., ¶¶27-30.)

The foster care and adoption contracts

The Department holds contracts with SVCC, a licensed CPA, to provide foster care and adoption services; CPAs must be licensed to provide those services. (Goad Aff. ¶6; Neitman Aff., ¶8.) The Department's foster care and adoption contracts with CPAs include non-discrimination clauses. The Private Agency Foster Care (PAFC) Contract, at § 2.9(b), and the Adoption Contract Section, at § 2.9(c) both state:

The Contractor shall comply with the MDHHS non-discrimination statement:

The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

(Goad Aff., ¶15-16; Neitman Aff., ¶13; Bladen Aff. ¶¶22-24; Doc.6-8,PageID.305; Doc.6-9,PageID.326.)

Since September 8, 2015, the Department's adoption contract with SVCC has included the non-discrimination clause. (SVCC Adoption Contract, at pp 1, 7,Ex.E; Goad Aff. at ¶18; Bladen Aff. at ¶8.) The Department's foster care contract

with SVCC has included the non-discrimination clause since July 8, 2016. (SVCC Foster Care Contract, at pp 1, 5, Ex.F; See also Goad Aff. at ¶19; Bladen Aff. at ¶8.)

ARGUMENT

I. Plaintiffs fail to establish a basis for injunctive relief

Injunctive relief is an extraordinary remedy in which the moving party “bears the burden of justifying such relief.” *McNeilly v. Land*, 684 F.3d 611, 614-15 (6th Cir. 2012). The burden is on Plaintiffs to establish the necessity of this relief, while facing a more stringent burden of proof than what would be required to prevail on summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739-40 (6th Cir. 2000); *Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002).

Plaintiffs’ request for a preliminary injunction must fail because they cannot establish the factors required for this extraordinary remedy under Fed. R. Civ. P. 65:

- 1) the likelihood of success on the merits;
- 2) whether an injunction will save plaintiffs from irreparable injury;
- 3) whether an injunction will harm others;
- 4) whether the public interest will be served.

United States v. Szoka, 260 F.3d 516, 523 (6th Cir. 2001) (citing *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass’n*, 110 F.3d 318, 322 (6th Cir.1997)). See also, *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir.1997).

A. Plaintiffs are not likely to succeed on the merits.

Plaintiffs must show more than a “mere ‘possibility’” of success, but rather, a “strong or substantial *likelihood* or *probability* of success on the merits.” *Mason County Medical Ass’n v. Knebel*, 563 F.2d 256, 261n.4 (6th Cir. 1977) (emphasis in original). Plaintiffs have not met this burden here and cannot establish the necessary elements for injunctive relief under Fed. R. Civ. P. 65.

1. Because Plaintiffs challenge a consent decree entered by Judge Borman, any remedy lies in that Court.

Plaintiffs cannot demonstrate any likelihood—much less a *substantial* likelihood—of success on the merits here because they filed this case in the wrong forum. This litigation follows the *Dumont* case, in which two same-sex couples sued Department officials on grounds that the Department was not enforcing its non-discrimination clause in the standard CPA contract. On March 22, 2019, Judge Borman entered an order dismissing *Dumont* “with prejudice pursuant to the terms of the Settlement Agreement[]” and stated that the “Court retain[ed] jurisdiction over the enforcement of the Settlement Agreement in the Action.” (Doc.31-6, PageID.745-47.)

Judge Borman’s Order constitutes a Consent Decree. He expressly referenced the *Dumont* parties’ “voluntary settlement agreement” which “memorializes the bargained for position of the parties,” and included a “final judicial order” that “compels” the issuing court to retain jurisdiction to protect the integrity of the decree by governing requests for enforcement or modification. *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

The present litigation constitutes a direct challenge to this Consent Decree. From the very beginning of their brief, Plaintiffs claim the Department's successful partnership with faith-based agencies and its work to "accommodate them." Until, according to Plaintiffs, "[t]hree weeks" before this motion was filed, "that all changed." (Doc.6, PageID.171.) The *Dumont* Consent Decree was filed on March 22, 2019, one year after Plaintiffs were granted intervenor status in the case and approximately three weeks before the motion for a preliminary injunction was filed on April 16, 2019.

This Court cannot award the injunctive relief Plaintiffs seek without requiring the Department to violate the Consent Decree. Plaintiffs request this Court maintain a purported "status quo" by ordering the Department to continue its contract with SVCC despite knowledge that SVCC will not provide services to same-sex couples under its CPA contract but will, instead, refer them to another agency. (Doc.6, PageID.186-87.) But the Consent Decree mandates maintaining and enforcing the existing non-discrimination provision in the Department's existing contracts with CPAs, which prohibits referring an otherwise potentially qualified LGBTQ individual or same-sex couple to another agency instead of providing contracted-for services to the child. (Doc.31-5, PageID.721-30.) Thus, Plaintiffs' claims challenging the Consent Decree must be heard by Judge Borman in the Court that retained jurisdiction to enforce the Consent Decree.

2. This Court lacks jurisdiction because the Individual Plaintiffs lack standing and Defendant Nessel is immune from suit.

a. Plaintiffs fail to satisfy the requirements of Article III standing.

SVCC and the Individual Plaintiffs, Chad and Melissa Buck and SVCC volunteer and former foster child Ms. Flore, cannot satisfy the requirements of Article III standing. (Doc.1, ¶¶2-3, 10-12, 21, 70-71, 81, 118-120, 158, PageID.2-3, 6-7, 10, 26-27, 29-30, 41, 49-50.) Nor do they have standing to assert the rights of foster children. (Doc.1, ¶¶4, 22, PageID.4, 10-11.)

Standing is a threshold requirement for invoking federal-court jurisdiction. *Binno v. American Bar Assoc.*, 826 F.3d 338, 344 (6th Cir. 2016). A plaintiff's personal interest in the litigation must exist both at the commencement of the suit and throughout the suit. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 189 (2000). For standing to exist, a plaintiff must show: (1) a "concrete, particularized, and actual or imminent" injury; (2) that is "fairly traceable" to the defendant's alleged conduct; and (3) that the court could redress by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

i. The individual Plaintiffs fail to show an actual or imminent injury.

The Individual Plaintiffs have not demonstrated an invasion of any legally protected interest. *Lujan*, 504 U.S. at 560–61. Plaintiffs assert that the "policies" of State Defendants prevent them from being foster parents or volunteering for a CPA if SVCC is not a state-contracted child placing agency. (Doc.1, ¶¶118-119,

PageID.41.) But, there are numerous other state-contracted agencies throughout Michigan, and there is no right to be a foster care parent. *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844-47 (1977); *Renfro v. Cuyahoga Cty Dep't of Human Servs*, 884 F.2d 943, 944 (6th Cir. 1989). And there is no right to volunteer at a CPA. In any case, the Bucks have not had a license since June 16, 2016. (Neitman Aff, at ¶31.) Nor does serving as a volunteer generally confer standing. *Medalie v. Bayer Corp.*, 510 F.3d 828, 830 (8th Cir. 2007); *Ass'n of Cmty. Org. for Reform Now v. Fowler*, 178 F.3d 350, 367 (5th Cir. 1999).

The policies on which Plaintiffs premise their action are provisions in foster care and adoption contracts that SVCC agreed to follow nearly four years ago and the *Dumont* settlement. Michigan contract law applies to the Consent Decree and the foster care and adoption contracts. *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992); *see also Meijer v. General Star Indemnity Co.*, 826 F.Supp.2d 241, 244 (W.D. Mich. 1993).

The individual Plaintiffs are not parties to the foster care or adoption contracts between the Department and SVCC. Accordingly, their only path to a cognizable right in enforcing them is as third-party beneficiaries, which they fail to even allege. Even had they made such allegations, however, the individual Plaintiffs—former foster parents and a volunteer—are not intended beneficiaries of the contracts.

Under Michigan law, a third party is not a beneficiary of a contract unless “the contract establishes that [it] has undertaken a promise directly to or for that

person.” *Schmalfeldt v. North Pointe Ins. Co.*, 670 N.W.2d 651, 654-55 (Mich. 2003). In making this determination, “a court should look no further than the form and meaning of the contract itself.” *Id.* at 428.

Neither the foster care contracts nor the adoption contracts specifically mention any promise undertaken for the benefit of the individual Plaintiffs or the category of foster parents and volunteers. Similarly, the Consent Decree contains no express creation of rights for the Individual Plaintiffs and certainly not for a party that wishes to violate the non-discrimination clauses of the contracts. The Individual Plaintiffs cannot show any actual or imminent injury as a result of the alleged breach of those contracts and they lack standing to challenge them.

ii. The Individual Plaintiffs fail to allege injuries that are fairly traceable to State Defendants’ conduct.

The injuries alleged by the Individual Plaintiffs are not “fairly traceable” to State Defendants’ alleged conduct. *Lujan*, 504 U.S. 560-61. The individual Plaintiffs base their claims on contract provisions agreed to by SVCC and the *Dumont* defendants’ authority and obligation to maintain and enforce them, including under the settlement agreement. But the Individual Plaintiffs are not parties to the agency contract or the Consent Decree, and they have not otherwise challenged these agreements. (Doc.1, ¶¶89-90, PageID.32.) Thus, their alleged injuries are not “fairly traceable” to State Defendants. To the extent they have suffered any cognizable injury, it is “fairly traceable” to SVCC’s voluntary assent to

the non-discrimination clause in its foster care and adoption contracts with the Department.

The Individual Plaintiffs' alleged injuries have other sources. For the Bucks, they no longer have a foster license. (Neitman Aff., ¶31.) For Ms. Flore, nothing prevents her from volunteering at another CPA. Further, to the extent the Bucks' claimed injury is an inability to adopt the sibling of one of their other children, Doc.1, ¶118, PageID.41, their claim has no merit because they have admitted that they can adopt any child in the state through MARE, Hoover Aff., ¶¶26-27, a fact which they admit. (Doc.1, ¶31, PageID.14.) This would necessarily include a sibling of one of their adopted children. (Hoover Aff., ¶¶26-27.)

iii. The injuries asserted by the Individual Plaintiffs cannot be redressed by a favorable ruling.

An injury is only redressable if a court order can provide “substantial and meaningful relief” to the plaintiff. *Parsons v U.S. D.O.J.*, 801 F.3d 701, 715 (2015). To demonstrate redressability, a plaintiff must show that “a favorable decision will relieve a discrete injury[.]” *Id.* Redressability is difficult to establish “where the prospective benefit to the plaintiff depends on the actions of independent actors.” *Id.*

Here, Individual Plaintiffs request declaratory and injunctive relief, but their Complaint offers only speculation that their proposed remedy will redress their alleged injuries. *Lujan*, 504 U.S. 560-61. For instance, the Bucks will still lack a foster license. In any case, should they desire to foster in the future, any CPA can

license them, providing they meet MDHHS' standards. Similarly, even if SVCC decides to cease providing foster and adoption services, Ms. Flore would still be able to volunteer at another CPA or with SVCC's other services.

iv. Plaintiffs lack standing to assert the claims of foster children.

Plaintiffs claim that the Department's actions "[h]arm . . . the [c]hildren of Michigan." (Doc.1, ¶114, PageID.39.) Essentially, Plaintiffs assert the purported rights of foster children. But none of the named Plaintiffs are foster children. And, they cannot assert the alleged rights of other individuals.³ *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Warth v. Seldin*, 422 U.S. 490, 499-502 (1975); *Smith v. Jefferson County Bd. of School Comm'rs*, 641 F.3d 197, 206 (6th Cir. 2011).

b. Attorney General Nessel is immune from Plaintiffs claims.

Plaintiffs' claims against Attorney General Nessel fail as a matter of law because state attorneys general have absolute immunity as legal advocates for their states. *Brown v. Tennessee Dep't of Labor and Workforce Dev.*, 64 Fed. Appx. 425, 426 (6th Cir. 2003), Doc.31-10, PageID.760-62; *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006). Attorney General Nessel also has qualified immunity. *Palmer*

³ Even if Plaintiffs did have standing to assert the claims of foster children, the Department has a process for finding new placements for the children SVCC serves without any sacrifice in the quality of care received by those children. (Neitman Aff., ¶¶27-30.)

v. Schuette, __ Fed. Appx. __; 2019 WL 1503803 at *3 (6th Cir. 2019), Doc.31-11, PageID.763-69 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

3. Plaintiffs fail to state a RFRA claim against State Defendants and fail to state any claim against Attorney General Nessel.

a. Plaintiffs fail to state a RFRA claim against State Defendants.

Plaintiffs allege that State Defendants violated the RFRA. (Doc.1, ¶¶169-173, PageID.50-51.) But the RFRA cannot be applied to State Defendants because it is unconstitutional “as applied to the states.” *Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 369 (6th Cir. 2016) (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).) Although the RFRA applies to federal agencies, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014), State Defendants are plainly not federal agencies. Accordingly, Plaintiffs have failed to state an RFRA claim against State Defendants.

b. Plaintiffs fail to state claims upon which relief may be granted against Attorney General Nessel.

Plaintiffs base their claims against Attorney General Nessel on two equally flawed premises: (1) statements made by Attorney General Nessel as a private citizen, a candidate for office, or while Attorney General; and (2) that Attorney General Nessel forced the *Dumont* State Defendants into approving the Consent Decree, which Plaintiffs erroneously allege to be a “new” policy. (Doc.1, ¶¶91, 102, PageID.33, 36.) As stated previously, Attorney General Nessel has absolute

immunity for her actions as an advocate for the State of Michigan, its subdivisions and officers. *Brown*, 64 Fed. Appx. at 426; *Skinner*, 463 F.3d at 525.

In addition, Plaintiffs' allegations fail to state actionable claims against Attorney General Nessel because her statements do not even reference, let alone disparage, religious beliefs generally or Catholic beliefs specifically. Those statements are not actionable, have no bearing on policy issues, and her alleged actions fall outside the scope of her powers as Attorney General. The Attorney General serves as the Department's legal counsel. (Bladen Aff., ¶32.). Although she may advise the Department and its staff, she cannot "force" them to settle a case. Indeed, the Department—and only the Department—has the capacity to make decisions in such matters. (*Id.*)

a. Plaintiffs' misapply *Masterpiece Cakeshop* and misconstrue Attorney General Nessel's statements.

Plaintiffs misapply *Masterpiece Cakeshop, Limited v. Colorado Civil Rights Commission*, ___ U.S. __; 138 S.Ct. 1917 (2018). At the outset, *Masterpiece* "has little bearing on this case." *Fulton*, 320 F.Supp.3d at 686. *Masterpiece* involved an adjudication by the Colorado Civil Rights Commission, during which a commissioner disparaged the plaintiff's religion, stating, "religion has been used to justify all kinds of discrimination throughout history, [including] slavery [and] the holocaust," referring to this as "despicable." 138 S.Ct. at 1729. The Court found these statements "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."

Id. The Court concluded that the statements “cast doubt on the fairness and impartiality of the Commission’s adjudication” of the plaintiff’s case. *Id.* at 1730.

Unlike *Masterpiece*, the present case involved no adjudication. Nor do Attorney General Nessel’s statements disparage Plaintiffs’ faith or that of anyone else. Indeed, those statements make no mention of religion and nearly all of them were made while she was a private citizen. (Doc.6, PageID.194-96, 206-07.) Only two statements were made while Attorney General Nessel has been in office. The first concerned letting go of her former outside counsel and has no alleged anti-religious content; the second was merely a description of the Consent Decree in a press release. *Id.* It made no mention of religion. If anything, the statements cited by Plaintiffs show Attorney General Nessel’s commitment to equal rights for all.

The Third Circuit’s decision in *Fulton* is instructive. The Court rejected the contention that mentioning the plaintiffs’ religion created an inference of anti-religious animus, particularly where one of the speakers, the Mayor of Philadelphia, did not play “a direct role, or even a significant one.” *Fulton*, 922 F.3d at 156-58. The same result should follow here. Attorney General Nessel was not a party to *Dumont*. She did not play any role in the drafting or implementation of the non-discrimination clause. Nor could she have because that clause was added three to four years before she became Attorney General. Contrary to Plaintiff’s arguments, Attorney General Nessel was not “in charge of decisionmaking [sic] on these issues” Doc.6, PageID.207, and this Court should reject their strained *Masterpiece* argument.

b. Attorney General Nessel's statements are not actionable.

In any case, Attorney General Nessel's statements, regardless of when made, have no bearing on this action. *Trump v. Hawai'i*, ___ U.S. ___, 138 S.Ct. 2392, 2416-17 (2018). Courts must determine the legality of a facially neutral policy, "not whether to denounce the statements." *Id.* at 2418. *See also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005)(Courts should review policy "without any judicial psychoanalysis of a drafter's heart of hearts.") In *Trump v. Hawai'i*, because the policy directive was within the scope of the President's executive authority, the Court gave no probative value to the President's statements and paid them no further heed in affirming the policy. 138 S.Ct. 2418-2423. *See also Fulton*, 320 F.Supp.3d at 689.

Plaintiffs' claims against Attorney General Nessel are even more tenuous. Unlike the President, Attorney General Nessel does not have the power to initiate or implement the policies at issue. Moreover, her statements have no bearing on her official actions as Attorney General. In fact, some of them are nearly four years old and were made in response to public acts that, as discussed below, Plaintiffs misinterpret. Moreover, her statements are in no way actionable and have no probative value on the issues presented in this case, particularly given the limited scope of her role as counsel for the Department and the limitations imposed on her by Michigan law.

The Attorney General of Michigan is a constitutional executive officer elected by the People of Michigan. Mich. Const. 1963, art V, § 21. The Attorney General's

powers and duties are set by statute, Mich. Comp. Laws § 14.28 *et seq.*, and common law. *Muncy v. McDonald*, 185 N.W. 877, 880 (Mich. 1921); *Michigan State Chiropractic Ass’n v. Kelley*, 262 N.W.2d 676, 677 (Mich. App. 1977). The primary role of the Attorney General is to “prosecute and defend all suits relating to matters connected with” the State of Michigan and its departments. Mich. Comp. Laws § 14.29. The Attorney General may also “intervene in and appear for the people of [Michigan] in any other court or tribunal, in any case or matter, civil or criminal, in which the people of this state may be a party or interested.” Mich. Comp. Laws § 14.28.

Attorney General Nessel was not a party in *Dumont*. The only role played by Attorney General Nessel was serving as legal counsel for those Defendants Gordon and Wrayno. In that capacity, however, she had no ability to “force” them to settle the case. Only Defendants Gordon and Wrayno could enter into the Consent Decree.

To the extent that Attorney General Nessel disagreed with the positions of Director Gordon and Executive Director Wrayno, she could have intervened in the case on her own behalf or on behalf of Michigan’s citizens. Mich. Comp. Laws § 14.28. In so doing, she could have implemented an internal conflict wall and, with the consent of her clients, proceeded to represent both her legal position and that of Director Gordon and Executive Director Wrayno. See, e.g., *Attorney General v. Michigan Public Serv. Comm’n*, 625 N.W.2d 16, 34-35 (Mich. App. 2000). That she did not do this underscores the lack of merit in Plaintiffs’ claims against her.

4. The Non-Discrimination Clause does not violate the Free Exercise Clause of the First Amendment.

The Free Exercise Clause protects “the right to believe and profess whatever religious doctrine one desires” and to perform or abstain from acts like assembling for worship or participating in the sacraments without State interference. *Mount Elliott Cemetery Ass’n v. City of Troy*, 171 F.3d 398, 403 (6th Cir. 1999) (quoting *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595 (1990)).

It does **not** require the Department to alter its standard contract for certain adoption and foster care services to accommodate Plaintiffs’ religious beliefs. And it certainly does **not** require the Department to abandon its commitment to non-discrimination against prospective foster parents—a commitment recognized by the United States Constitution. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604-05 (2015); *Gay v. Cabinet for Health & Family Serv.*, No. 18-5285, 2019 WL 1338524 (E.D. Ky. Jan. 23, 2019), Ex.G. This is the relief that Plaintiffs request here, and they cannot make the requisite showing that they will succeed on the merits.

a. The Non-Discrimination Clause is neutral and generally applicable to faith-based and secular agencies alike.

The Department’s requirement that child placing agencies, including SVCC, comply with the terms of its standard contract is not a violation of the Free Exercise Clause. It is well-settled that “free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes

(or proscribes).” *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 932 (6th Cir. 1991)(quoting *Smith*, 110 S. Ct. at 1600); see also *Braunfeld v. Brown*, 366 U.S. 599, 606-09 (1961). Such laws and policies are presumed valid under the Free Exercise clause.

i. The Department’s anti-discrimination clause is facially neutral and reflects a legitimate purpose of ending invidious discrimination in state-sponsored contracts.

The Department’s anti-discrimination clause is neutral and generally applicable. Neutrality is evaluated, first, by considering the provision’s plain language and, second, by evaluating if the provision’s purpose, “whether overt or hidden, is to infringe upon or restrict practices because of their religious motivation.” *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-34, 113 S.Ct. 2217 (1993); *Mt. Elliott Cemetery Ass’n*, 171 F.3d at 405. Allegations of an adverse impact on a religious practice does necessitate finding a constitutional violation. *Lukumi Babalu Aye*, 508 U.S. at 535. Rather, this two-pronged inquiry “protects against unequal treatment which results ‘when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation.” *Mt. Elliott Cemetery Ass’n*, 171 F.3d at 405 (emphasis added).

The non-discrimination clause’s facial neutrality is undisputed. It prevents contracted agencies from discriminating against prospective foster and adoptive parents on a variety of grounds, including race, religion, gender identify, and sexual

orientation. The non-discrimination clause does not reference any religion, including the Catholic faith or any practice associated therewith, and it appears in every contract the Department enters with CPAs throughout the state, regardless of the CPAs religious affiliation or lack thereof. (Goad Aff., ¶¶15-16; Neitman Aff., ¶13; Bladen Aff. at ¶¶22-24.)

The non-discrimination clause’s neutral object is equally beyond dispute. This provision reflects the Department’s directive that agencies which voluntarily contract to provide services to prospective foster care and adoptive parents cannot discriminate against them based on a variety of factors, including sexual orientation. Unlike the ordinance in *Lukumi Babalu Aye*, which included language and exemptions that led the Supreme Court to the “necessary conclusion that almost the only conduct subject to [the Ordinances] [was] the religious exercise of the Santeria church members[,]” the non-discrimination clause here addresses multiple forms of invidious discrimination. 508 U.S. at 535-36. The fact that sexual orientation is included reflects an increasingly widespread recognition that discrimination on this basis constitutes a social harm. *Obergefell*, 135 S.Ct at 2604; *Romer v. Evans*, 517 U.S. 620, 635-636 (1996).

ii. The Department does not authorize “individualized and discretionary” exemptions to the non-discrimination clause.

Contrary to Plaintiffs’ claims, the Department does not authorize a CPA to refuse to evaluate, license, or otherwise provide a contractual service to a potential foster or adoptive family based on subjective criteria, such as whether the agency

agrees with a family's personal beliefs, or approves of their sexual orientation, marital status or other characteristic encompassed in the non-discrimination clause. (Bladen Aff., ¶26.)

The Department's paramount concern is maximizing the number of qualified foster and adoptive *parents* available for children in care; it benefits from working with CPA's that comply with the law and their contracts. (Bladen Aff., ¶¶13-14.) The Department does not allow any CPA to refuse to evaluate, license or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation, gender identify, or marital status. This is true regardless of the CPA's religious affiliation (which the Department does not track or consider). (Bladen Aff., ¶25.) It is also true for CPA's that have a specialized focus. Plaintiffs' list of private organizations with which the Department allegedly works mischaracterizes the issues at hand. (Doc.6,PageID.203-04.)

While some CPAs may have a specialized focus, all have the same contractual and licensing requirements and all must comply with terms of the contract and license. CPAs performing such work under contract with the Department are prohibited from refusing to assess, recommend licensure, or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation, gender identity, or marital status. (Bladen Aff., ¶¶15-16.) The Department, as a state agency, cannot carve out an exception to allow discrimination based on sexual orientation. *Romer*, 517 U.S. at 627-28 (laws that classify homosexuals for unequal treatment are unconstitutional).

Plaintiffs list several institutions that they mistakenly claim do not follow the non-discrimination clauses. But Boys to Men Group Home and Ruth Ellis Center are child caring institutions, not CPAs. Similarly, MARE and AdoptUsKids are not CPAs. Others listed by Plaintiffs are CPAs: Sault Tribe Binogii Placement Agency;⁴ Homes for Black Children; Wayne Center; Guiding Harbor. Each of these CPAs, however, must follow **the same contract, licensing rules, policies, and non-discrimination clause**. All CPAs are required to follow the non-discrimination clause of their contract with the Department. Accordingly, Plaintiffs' claim that the Department disregards the non-discrimination clause in its foster care and adoption contracts by "contract[ing] with private organizations that specialize in serving" certain children is simply false. (Bladen Aff., ¶¶19-20.)

Plaintiffs also mischaracterize state-contracted agencies' authority with regard to referrals. State law permits agencies to decline a Department referral for providing state-contracted foster care case management or adoption services based on their sincerely held religious beliefs. Mich. Comp. Laws § 722.124(f). However,

⁴ Plaintiffs' reference to this CPA that, apparently, specializes in placing Native American children, presents an inapt comparison to SVCC. Both state and federal law mandate separate procedures and standards to be followed for Native American children in need of foster care or adoptive placements. *In re Williams*, 501 Mich. 289, 294-95 915 N.W.2d 328 (Mich. 2018). Among other things, the federal Indian Child Welfare Law Act's recognizes the Indian tribe's exclusive jurisdiction over decisions related to the custody of the child in many situations and, also, mandates that Native American families be preferred when considering foster care and adoptive placements for a Native American child. 25 USC §§ 1911, 1915; *see also Shelifoe v. Dakota*, No. 92-1086, 1992 US App. LEXIS 14670 (6th Cir. June 16, 1992), Ex.J (Indian tribe has exclusive jurisdiction over custody proceedings due to Indian Child Welfare Act.)

an agency cannot refuse to provide such services for children accepted into care simply because the services conflict with the agency's sincerely held religious beliefs. Mich. Comp. Laws § 722.124(e).

After accepting a referral, a CPA cannot refuse to evaluate, recommend for licensure or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation, gender identify, or marital status. Referrals to another agency are rare and do not allow CPAs to bypass the uniformly enforced non-discrimination clause. (Bladen Aff., ¶¶25-26.). Thus, although CPAs may decline to accept a referral to provide foster care case management or adoption services to a child, once accepted, the CPA must fulfill all of the terms of its contract when providing services to that child and cannot transfer the child's case to another agency absent exceptional circumstances requiring high-level department approval. (Bladen Aff., at ¶¶25, 29, 31.)

Plaintiffs claim that the Department grants individualized exceptions to its policy, pointing to an out-of-context quote: “upon the written approval of the

County Director, the Children’s Services Agency Director, or the Deputy Director.”⁵

Plaintiffs fail to provide the full passage, at §1.1 of the foster care contract, the relevant part of which states:

After acceptance of a foster care referral, the Contractor may not refer the case back to the Department except for the reasons outlined in the Children's Foster Care Manual (FOM) or upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director.

(Ex.F,pp.3-4; Bladen Aff., at ¶28.) This does not allow CPAs to discriminate or object to continue serving a child whose case it already accepted. Instead, it allows for rare and unforeseen circumstances like a natural disaster, enabling the Department to assure that all children under its care and supervision receive services to which they are entitled.⁶ It does not enable an agency to return a child’s case to the Department so that it may discriminate or refuse to serve the child in accordance with the contract and applicable rules and policies. (Bladen Aff., ¶¶27-29.)

Plaintiffs also claim that “State law” has not “prevented same-sex couples from becoming foster parents.” (Doc.6, PageID.213.) This is true—unfortunately, however, SVCC’s practices have. Plaintiffs’ discovery responses in *Dumont* provide

⁵ Plaintiffs similarly twist an out-of-context 2015 statement by Steve Yager, former executive director of the Children’s Services Agency. Mr. Yager’s statement— “We do not compel agencies to accept referrals—never have”—pertained to an agency’s decision to accept a referral to provide foster care case management or adoption services to a child. CPAs can refuse initial referrals but, once accepted, may not discriminate. (Bladen Aff., ¶11.)

⁶ It is in a child’s best interest to maintain stability in care and receive continuity of foster care case management and adoption services. (Bladen Aff., ¶30.)

strong evidence that SVCC discriminated in the provision of services to children in its case by turning away Kristy and Dana Dumont on the basis of their sexual preference and same-sex marriage. The Department does not wish to end its relationship with SVCC, but SVCC must fulfill its agreed-upon contractual obligations to not discriminate in providing state-contracted services to children in care.⁷ (Bladen Aff., ¶¶10, 33.)

Plaintiffs may believe and advocate that same-sex marriage violate their sincerely held religious beliefs. The Department does not prohibit this; it merely requires CPAs to comply with their contractual duties and applicable law, rules, and policy. Likewise, the Constitution and federal regulations do not permit state-sponsored discrimination on the basis of sexual orientation. *Obergefell*, 135 S.Ct. at 2607. Plaintiffs' claim that the Department selectively enforces the non-discrimination clause based on anti-Catholic animus lacks merit. The Department enforces it uniformly, as shown by its investigation of Bethany; it is uncontested that Bethany is not a Catholic CPA. (Bladen Aff., ¶¶9,25; Neitman Aff., ¶¶19-21.) Finally, the Department does not track the religious affiliation of the CPAs with which it contracts. (Bladen Aff., ¶25.)

Plaintiffs' reliance on *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), is misplaced. In *Ward*, a student was expelled from a graduate program because she requested that a client seeking counseling about his/her same sex relationship be

⁷ Although State Defendants value their relationship with SVCC, Plaintiff's claims that SVCC is one of the best CPAs in Michigan lacks support. (Hoover Aff., at ¶¶ 13-19.). SVCC is a relatively small and unremarkable provider. *Id.*

referred to someone else. Unlike SVCC, which apparently refuses to work with same-sex couples at all in the context of foster care licensing, this student claimed that she had no problem counseling the client but, because of her religious beliefs, she could not affirm the person's sexual practices as the University required her to do. The Sixth Circuit found the claims sufficient to go forward because "values-based referrals" were authorized by the American Counseling Association Code of Ethics and a reasonable jury could find the university ejected her from the program "because of hostility toward her speech and faith." *Id.* at 730-31, 735-36.

The Department's non-discrimination policy is set forth in the contracts that SVCC signed as part of its agreement to voluntarily provide certain foster care and adoption services for children in care in exchange for public funds. There is no exception that allows agencies to violate the non-discrimination clause, nor is the Department required to provide one. By entering this contract, the Department is not asking SVCC to endorse or affirm same-sex relationships or any sexual practices on moral grounds but, rather, merely determine whether the person meets the State's objective criteria for a foster care license or adoption. (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶12-13; Bladen Aff., ¶¶12-13.)

iii. Plaintiffs' own filings refute their claim(s) of religious hostility or religious targeting.

Plaintiffs' own allegations dispute their claim of religious targeting or hostility on religious beliefs. First, they cite to the Department's long history of contracting with both secular and faith-based private agencies for adoption and

foster care services in Michigan. (Doc.6-5, PageID.281.) SVCC describes itself as “one of the oldest and most effective adoption agencies in Michigan. . . serv[ing] children and families for over 70 years” and that the “State has long been aware of [SVCC’s] religious beliefs and practices.” (Doc.6, PageID.185, 187.)

Further, the Department’s investigation into SVCC began in response to a complaint the Department received against not only SVCC, but also Bethany Madison Heights and East Lansing. (Neitman Aff., ¶¶19-20; Bladen Aff., ¶¶4-5.) The complaint reported that these CPAs violated the non-discrimination clause in their contract, and investigations were conducted. Because *Dumont* was pending and then the instant case was filed, the investigation against SVCC has not been finalized. (Neitman Aff., ¶27; Bladen Aff., ¶9.) Bethany has agreed to follow the non-discrimination clause. (Neitman Aff., ¶26.) The Department’s investigation into alleged contract violations by SVCC and Bethany does not establish or even resemble religious targeting or animus.

Nor is there any basis to find that the Department discriminated against Plaintiffs because of their religious affiliation. The Department does not consider or track the religious affiliation of CPAs because an agency’s religious affiliation is immaterial to their contract responsibilities. (Bladen Aff., ¶25.) SVCC’s relationship with the Department is not as a recipient of a public benefit, nor has it been excluded from participation in these contracts solely on the basis of its religious beliefs. Both factors distinguish this case from *Trinity Lutheran Church of Columbia, Inc. v. Comer*, in which the Supreme Court declared that a state agency’s

policy of offering grant money to fund the purchase of rubber playground surfaces to any nonprofit entity except that “owned or controlled by a church, sect, or other religious entity” violated the Free Exercise Clause. 137 S.Ct. 2012, 2017 (2017). The Court described the state’s policy as “categorically disqualifying churches and other religious organizations” from such grant funds and, therefore, “expressly discriminated against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” *Id.* at 2021-22.

In contrast, SVCC’s contract with the Department is not a public benefit. *Teen Ranch v. Udow*, 389 F.Supp.2d 827 (W.D. Mich. 2005), *aff’d* 479 F.3d 403 (6th Cir. 2007). The Department has not excluded SVCC, or any faith-based agency, from such contracts solely because of its religious beliefs or affiliation. As Plaintiffs acknowledge, the Department has a “long history” of contracting with SVCC while knowing of its religious affiliations. (Doc.6-5, PageID.286-87.) This lawsuit arose because SVCC, apparently, will not comply with the terms of the contract it previously entered with the Department and, instead demands that the Department amend such contract or carve out an exception to accommodate SVCC’s religious beliefs, transforming the Establishment Clause from a shield into a sword to strike policies with which SVCC disagrees. This has no basis in law. Plaintiffs cannot show a substantial likelihood of success to the extent they claim SVCC was hostilely targeting because of its religious affiliation or beliefs.

b. Rational basis review applies.

Given that the non-discrimination clause does not interfere with Plaintiffs' right to exercise their religion because the nondiscrimination clause is a neutral, generally applicable provision without any evidence of targeting a CPA's religious beliefs or nature, rational basis review applies. "Rational basis review is extremely deferential," requiring the provision be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bowman v. United States*, 564 F.3d 765, 775-76 (6th Cir. 2008) (internal quotations and citations omitted). The clause at issue reflects federal requirements and the Department's goal of ending discrimination in the context of foster care and adoption services to this vulnerable population of children, *Bladen Aff.*, ¶8, which is valid under *Fulton*, 320 F.Supp.3d at 703-04, 922 F.3d at 165. Thus, Plaintiffs have not shown a likelihood of success on the merits, and their motion must be denied.

c. Even under the strict scrutiny standard, Plaintiffs' constitutional claim fails.

Notably, even under the strict scrutiny standard, Plaintiffs cannot show a substantial likelihood of success on the merits. Ending invidious discrimination in government contracts is, in itself, a compelling state interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 628-29 (1984); *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 590 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019). And, requiring compliance with a neutral, generally applicable contract is the least restrictive way

to accomplish this compelling interest *Equal Employment Opportunity Comm'n*, 884 F.3d at 593-97 (enforcing Title VII is the least restrictive means to ending discrimination); see also *Fulton*, 922 F.3d at 163 (“It is black-letter law that ‘eradicating discrimination’ is a compelling interest ... [a]nd mandating compliance is the least restrictive means of pursuing that interest.”)(internal citations and quotations omitted).

5. Plaintiffs’ Free Speech Claim fails because if the contract they voluntarily entered with the State constitutes speech, it is the Department’s speech—not SVCC.

Plaintiffs cannot show a substantial likelihood of success on their Free Speech claim because the contract with the Department did not create a forum for speech, and SVCC’s voluntary agreement to it does not constitute SVCC’s protected speech.

a. Voluntarily entering into a contract does not constitute religious speech.

The Department’s decision to contract with private agencies, whether faith-based or not, does not create a forum for protected speech. *Teen Ranch*, F.Supp.2d at 839-40 . These contracts exist to direct state funds to private agencies providing foster care and adoption services to children in the child welfare system. The contract does not create a forum for voicing objections to or support for any prospective foster parent’s sexual practices or religious values. *Fulton*, 320 F.Supp.3d at 696-97. The contracts at issue are for the performance of public services; they do not require SVCC to adopt the Department’s viewpoint. *Fulton*,

922 F.3d at 160-61. Nor does the Department's contract require SVCC to sanction any foster parent's sexual practices or marital status on religious or moral grounds. (Goad Aff., ¶¶7-9; ; Neitman Aff., ¶¶12-13; Bladen Aff., ¶¶12-13.)

By signing the contract, SVCC is not inherently required to engage in or refrain from religious speech. The examples of speech that Plaintiffs present in support of a preliminary injunction demonstrate this, including making a recommendation for licensure or adoption based on factors like the stability of a prospective foster care parents' relationship, the parents' strengths and weaknesses, the role of religion in the homes and parenting styles, which must be evaluated based on the Department's licensing guidelines and without moral judgment or religious opinion. (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶7, 9, 12-13; Bladen Aff., ¶¶12-13.) Moreover, the completion of the home studies is included in the duties that SVCC has agreed to perform when providing services for children in care and for which it is paid. (Goad Aff., ¶¶10-13; Neitman Aff., ¶¶8, 9-10.) And SVCC need only check a box indicating whether a license is recommended. (Neitman Aff. at ¶9, Attachment 1.)

Plaintiffs' own allegations demonstrate a capacity to conduct such evaluations without violating SVCC's religious nature. They state that "[a]doptive and foster families are not expected to share SVCC's faith" and that SVCC "happily services both LGBTQ individuals and children" in other contexts. (Doc.6, PageID.186.) If SVCC is able to recommend a non-Catholic couple for licensing as a foster parent without consideration that such recommendation constitutes speech in

dereliction of its sincerely held Catholic beliefs, it is not clear why the same would not apply to a gay or lesbian individual. Just as SVCC cannot discriminate in providing state-contracted services to children in care by turning away non-Catholic prospective foster and adoptive parents, SVCC cannot discriminate when providing such services to children by turning away same-sex couples and LGBTQ individuals.

b. The Department neither compels speech nor places unconstitutional conditions on SVCC.

Plaintiffs' compelled speech and unconstitutional conditions arguments are misplaced. As argued above, SVCC's contract to perform public services does not create a forum for speech. Nor has SVCC been compelled to speak or adopt the Department's point of view. Rather, SVCC voluntarily assumed contractual obligations—including enforcement of the non-discrimination clauses and the completion of home studies. (Goad Aff., ¶¶15-16; Neitman Aff., ¶¶1-10, 13; Bladen Aff. at ¶¶22-24.) The Department does not ask or require SVCC to endorse or approve of a specific relationship or type of relationship. (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶7, 9; Bladen Aff., ¶¶12-13.) Indeed, the recommendation on the home study merely requires SVCC to check a box. (Neitman Aff. at ¶9, Attachment 1.) Instead, the Department simply requires SVCC to fulfill the commitments to which it agreed in 2015 and 2016 in return for almost \$2 million in public funds. (Ex.F,p.2)

Insisting that an agency—like SVCC—abide by the same rules that apply to other agencies “in the performance of its public function under [a] foster-care contract” does not constitute compelled speech or an unconstitutional condition. *Fulton*, 922 F.3d at 161. This stands in stark contrast to *Agency for Int’l Dev. v. AOSI*, 570 U.S. 205, 219 (2013), in which grant recipients were required to adopt and even promote the grantee’s viewpoint on the legalization of prostitution and sex trafficking, and *FCC v. League of Women Voters of California*, 468 U.S. 364, 375-78 (1984) in which the FCC banned editorials, which constitute a “vital and independent form of communicative activity.” In the present case, the Department has asked that SVCC fulfill the public functions of providing foster care and adoption services pursuant to contract, to which SVCC agreed. And those public functions do not require SVCC to endorse or approve of same-sex marriages.⁸

B. Plaintiffs cannot show that they will suffer irreparable injury or lack an adequate legal remedy.

As discussed above, Plaintiffs’ current claims amount to a collateral attack on the *Dumont* Consent Decree and a dispute over SVCC’s contract with the Department, legal remedies they could have pursued in *Dumont*, where they insisted that intervention was the only way to protect the rights they assert now.

⁸ Because both SVCC’s contracts and licenses with the Department are voluntary, they have no entitlement to them. *See, e.g., Smith*, 431 U.S. at 844-47; *Renfro*, 884 F.2d at 944 (6th Cir. 1989). In such relationships, participants can agree to curtail their rights. *Hall v. Sweet*, 555 F. App’x 469, 476 (6th Cir. 2016), Ex.K (daycare provider’s consent to inspections in her licensing application constituted valid waiver of Fourth Amendment right to be free from warrantless searches.)

Aluminum Workers Int'l Union v. Consol. Aluminum Corp., 696 F.2d 437, 446 (6th Cir. 1982)(courts may not issue injunctive relief to a party with a legal remedy).

With legal remedies available and nevertheless remaining silent, Plaintiffs cannot demonstrate that they are entitled to the extraordinary relief of a preliminary injunction intended to maintain the status quo. The status quo—in place since 2015—requires SVCC to honor the non-discrimination provision of the contract for providing services to children in care or face disciplinary action.

As for irreparable injury, Plaintiffs claim they will be irreparably injured if their First Amendment rights are violated. While such a violation can constitute an irreparable injury, as explained above Plaintiffs have not demonstrated a substantial likelihood of success on the merits for their claims.

Plaintiffs also claim they will be irreparably injured if SVCC ceases to provide state-contracted foster care and adoption services. However, if such a result occurs because SVCC breached the non-discrimination provision of its agreements with the Department, such injury is not the result of conduct by State Defendants. *Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-cv-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001), Ex.H. And, an alleged loss of business opportunity does not constitute irreparable harm. *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991); *Acorn Building Components, Inc. v. Local Union No. 2194 of Int'l Union, United Auto, etc.*, 416 N.W.2d 442, 447 (Mich. App. 1987). Similarly, that some SVCC staff may lose employment or income does not constitute irreparable harm.⁹

⁹ The claim of SVCC staff, who are non-parties, cannot be raised in the present case.

Essroc Cement Corp v. CPRIN, Inc., 593 F.Supp.2d 962, 969 (W.D. Mich. 2008).

Plaintiffs' alleged irreparable injury is not sufficient to justify the extraordinary relief requested here.

C. Both the public interest and that of State Defendants strongly weigh against injunctive relief.

Plaintiffs ask that this Court to excuse SVCC from honoring the terms of the contracts to which SVCC agreed. But it is well-established that the public has a strong interest in the enforcement of voluntary contract obligations. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551 (6th Cir. 2007); *Skurka Aerospace, Inc. v. Eaton Aerospace, L.L.C.*, 781 F.Supp.2d 561, 579 (N.D. Ohio 2011). The public has a similar interest in discrimination-free contracting processes. *B&S Transport, Inc. v. Bridgestone Americas Tire Operations, LLC*, No. 13-2793, 2014 WL 804771, at *9 (N.D. Ohio Feb. 27, 2014), Ex.I. Plaintiffs' proposed remedy—a continuation in perpetuity of SVCC's contract with the Department—hardly comports with the public's interest.

The Department, like all parties to contracts, also has a keen interest that “contractual agreements will be enforced.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*, 67 F.Supp.2d 764, 781 (E.D. Mich. 1999). The very essence of contract law is that the parties to a contract are entitled to the benefit of their bargain. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 239 (6th Cir. 1994). And State Defendants have an interest in ensuring that the citizens of Michigan receive the

benefit of the bargain with regard to foster care and adoption services. *First Nat. Bank of Louisville v. J. W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982).

Moreover, there is a strong public interest in ending discrimination against LGBTQ individuals and promoting tolerance. *Obergefell*, 135 S.Ct at 2604; *United States v. Windsor*, 570 U.S. 744, 775 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003); *Romer*, 517 U.S. at 635-36; *Equal Employment Opportunity Comm'n*, 884 F.3d at 590; *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County, Kentucky*, 258 F.Supp.2d 667, 692-93 (E.D. Ky. 2003); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F.Supp.2d 1135, 1150-51 (C.D. Cal. 2000).

The most analogous case, *Fulton*, found that the public interest strongly weighed against injunctive relief. The district court found that preventing discrimination is “undeniably a legitimate [public] interest.” 320 F.Supp.3d at 704, n.35. In affirming, the Third Circuit held that “[d]eterring discrimination” in the provision of government services “is a paramount public interest.” 922 F.3d at 165. State Defendants share this interest in eradicating discrimination in the provision of government services. *Id.*; *Fulton*, 320 F.Supp.3d at 703-04. *See also*, e.g., *Equal Employment Opportunity Comm'n*, 884 F.3d at 590; *Colin*, 83 F.Supp.2d at 1150-51.

In addition to the interests of the public and State Defendants, this Court must consider the impact on others, including LGBTQ individuals. Plaintiffs ask this Court to allow them to break their contract in order to discriminate against LGBTQ individuals, impermissibly sending the “message . . . that they are outsiders, not full members of the political community.” *Santa Fe Indep. Sch. Dist.*

v. *Doe*, 530 U.S. 290, 309 (2000). In addition, the children whose best placement was same-sex partners would be harmed if this Court grants Plaintiffs' request.

To the extent Plaintiffs' claim that Michigan's foster children will be harmed if injunctive relief is not granted, they are mistaken. If SVCC chooses to cease providing foster care or adoption services, the Department has a process for finding new placements for the children SVCC serves without any sacrifice in the quality of care received by those children. (Neitman Aff., ¶¶27-30.) Accordingly, the interests of the public, State Defendants, and Michigan's children weigh strongly against Plaintiffs' request for injunctive relief.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs fail to establish that they are entitled to the extraordinary remedy of preliminary injunctive relief. In the first place, they challenged a consent decree in the wrong court and lack standing. Second, they have suffered no irreparable injury. Nor can they show a likelihood of success on the merits. Instead, like the plaintiffs in *Fulton*, they seek to use the courts to avoid following their own contractual commitments due to a policy dispute with the Department. Finally, the public interest and that of the Department strongly favor the enforcement of contracts and preventing discrimination. This Court must deny injunctive relief.

Respectfully submitted,

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Dated: May 29, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of W.D. Mich. LCivR 7.2(b)(i) because, excluding the parts exempted by W.D. Mich. LCivR 7.2(b)(i), it contains 10,378 words. The word count was generated using Microsoft Word 2016.

Respectfully submitted,

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Dated: May 29, 2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE; ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services;
HERMAN MCCALL, in his official capacity
as the Executive Director of the Michigan
Children's Services Agency; DANA NESSEL,
in her official capacity as Michigan Attorney
General; ALEX AZAR, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

**INDEX OF EXHIBITS TO
STATE DEFENDANTS' RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION**

<u>EXHIBIT</u>	<u>TITLE/DESCRIPTION</u>
Exhibit A	Affidavit of Sarah Goad
Exhibit B	Affidavit of Patricia Neitman
Exhibit C	Affidavit of Stacie Bladen
Exhibit D	Affidavit of Catherine Hoover

- Exhibit E SVCC Adoption Contract
- Exhibit F SVCC Placing Agency Foster Care Contract
- Exhibit G *Gay v. Cabinet for Health & Family Serv.*, No. 18-5285, 2019 WL 1338524 (E.D. Ky. Jan. 23, 2019)
- Exhibit H *Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-cv-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001)
- Exhibit I *B&S Transport, Inc. v. Bridgestone Americas Tire Operations, LLC*, No. 13-2793, 2014 WL 804771 (N.D. Ohio Feb. 27, 2014)
- Exhibit J *Shelifoe v. Dakota*, No. 92-1086, 1992 US App. LEXIS 14670 (6th Cir. June 16, 1992)
- Exhibit K *Hall v. Sweet*, 666 F. App'x 469, 476 (6th Cir. 2016)

EXHIBIT

A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE; ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services;
HERMAN MCCALL, in his official capacity
as the Executive Director of the Michigan
Children’s Services Agency; DANA NESSEL,
in her official capacity as Michigan Attorney
General; ALEX AZAR, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF SARAH GOAD

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Sarah Goad, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a State Administrative Manager, Office of Child Welfare Policy and Programs.

2. I have served the Department in this capacity for three years and four months, and make this affidavit based on my experience and knowledge of foster care policy, contracts and state and federal laws related to foster care.

3. My job duties include overseeing development and implementation of the children's foster care policies, programs; including integration of federal and state laws into policy and providing bill analysis and leadership on child welfare bills. Additionally, my position oversees the Title IV-E State Plan and resulting Program Improvement Plan. My duties also include interpretation and administration of private provider contracts for foster care and residential placement.

4. The Department is the Title IV-E agency in Michigan responsible for administering Foster Care and Adoption Services programs.

5. The foster care program for children provides placement and supervision of children when a court finds they have been abused and/or neglected and cannot remain in their family homes safely. Services must be focused on resolving the problems which necessitated removal. There are approximately 13,500 children in foster care, about 2,000 of whom are available for adoption. That care is provided in foster-family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e).

6. The department holds 137 contracts with 57 private child placing agencies, or CPAs, to provide foster care or adoption services throughout Michigan, including St. Vincent Catholic Charities located in Ingham County.

7. The Department contracts with CPAs to provide foster and adoption services. In addition, the Department itself is a CPA and may provide foster care services, including licensing foster parents. The Department does not generally provide direct adoption services; most adoption services in Michigan are privatized.

8. The Department does not require St. Vincent or any other CPA to endorse or approve of a specific relationship or type of relationship.

9. The Department contracts with CPAs, including St. Vincent, to provide foster care and adoption services pursuant to the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 et seq., administrative rules, Mich. Admin. Code R. 400.12101 et seq., contracts, and Department policy, as found in the Department's Children's Foster Care Policy Manual

(<http://www.mfia.state.mi.us/OLMWeb/ex/FO/Public/FOM/000.pdf#pagemode=bookmarks>) and the Adoption Services Policy Manual

(<http://www.mfia.state.mi.us/OLMWeb/ex/AD/Public/ADM/000.pdf#pagemode=bookmarks>).

10. Under the Department's contracts, CPAs recruit prospective foster and adoptive applicants, complete home studies and assess whether the person or family meets the Department's licensing requirements. Those licensing requirements are set forth in Act 116 and administrative rules.

11. The Department does not ask or require CPAs providing foster care or adoption services under a contract to endorse or approve of any relationship, including same-sex marriages. Nor does the Department ask or require CPAs

speak in favor of any relationship, including same-sex marriages. The Department's contracts only require the CPA to determine whether the foster applicant meets the minimum licensing requirements mandated by law. And only the Department can certify a foster home applicant by issuing a license.

12. Under the terms of the contracts, the Department pays CPAs for the services they render. One of the many tasks undertaken by government and non-government CPAs is to license foster families. Other services undertaken by CPAs include: placement and supervision of children who are or have experienced out of home care; reunification and other permanency planning efforts as appropriate; assessment of needs and progress for children and parents; service referral; and documentation of all case management services.

13. The administrative rate paid to CPA's for foster care and adoption services is for all services performed under the respective contracts.

14. The Department's foster care and adoption contracts with CPAs include non-discrimination clauses.

15. The Private Agency Foster Care (PAFC) Contract, at § 2.9(b), states:

"The Contractor shall comply with the MDHHS non-discrimination statement:

The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency."

16. Adoption Contract Section, at § 2.9(c), states:

The Contractor shall comply with the MDHHS non-discrimination statement:

The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

17. St. Vincent Catholic Charities is a licensed CPA and the Department holds contracts with St. Vincent Catholic Charities to provide foster care and adoption services.

18. Since September 8, 2015, the Department's adoption contract with St. Vincent has included the non-discrimination clause.

19. Since July 8, 2016, the Department's signed and executed foster care contract with St. Vincent has included the non-discrimination clause.

Sarah Goad
Sarah Goad

Subscribed and sworn to by Sarah Goad before me on the 24th day of May, 2019.

Signature Katherine L. McClain

Printed name Katherine L. McClain
Notary public, State of Michigan, County of Eaton
My commission expires 12/31/19
Acting in the County of: Franklin

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Franklin

EXHIBIT

B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE; ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs,

v

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services;
HERMAN MCCALL, in his official capacity
as the Executive Director of the Michigan
Children's Services Agency; DANA NESSEL,
in her official capacity as Michigan Attorney
General; ALEX AZAR, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

AFFIDAVIT OF PATRICIA NEITMAN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Patricia Neitman, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (DHHS) as a Director, Division of Child Welfare Licensing (DCWL).
2. I have served the Department in this capacity for two months and make this affidavit based on my experience and knowledge of the Child Care

Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq.*, Licensing Rules, and foster care and adoption contract requirements.

3. Prior to my current position I worked in child welfare as a licensing worker, licensing supervisor, clinical therapist, and program manager in private child placing agencies for 12 years; worked as a licensing consultant in the DCWL for 13 years, and as the DCWL program manager for over 2½ years, before assuming the position of DCWL director.

4. My job duties include oversight of the Division of Child Welfare Licensing (DCWL). DCWL staff are responsible for regulation of child placing agencies and child caring institutions licensed in Michigan, including responsibility for monitoring compliance with licensing rules and MDHHS contract requirements.

5. The Department of Health and Human Services administers Michigan's foster and adoption system.

6. This system provides temporary care and custody to children when a court finds that children have no legal guardian or have been neglected or abused. There are approximately 13,000 children in foster care, about 2,000 of whom have a permanency goal of adoption. That care is provided in foster family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e).

7. The Department contracts with CPAs provide foster and adoption services. In addition, the Department itself is a CPA and may provide foster care services, including licensing foster parents. The Department does not provide adoption services; all adoption services are private in Michigan.

8. Child Placing Agencies, or CPAs, including St. Vincent Catholic Charities, must be licensed by the Department in order to provide foster care and adoption services.

9. CPAs are required by contract and administrative licensing rules to perform a home study on prospective foster or adoptive families. Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 et seq., requires that an on-site inspection be completed by the CPA for prospective foster homes. (See DHS-3130 Home Study, Attachment 1.)

10. The Department mandates the criteria for home studies, which include a review of several factors, including the "[s]trengths and weaknesses" of the parents and the "[s]trengths of the relationship" between the couple, including "level of satisfaction" and stability of the relationship and their relationship history. Other factors that must be assessed include marital and family status and history, including current and past level of family functioning and relationships, parenting skills and childrearing techniques, values and the role of religion in the family. The Department requires assessment of these criteria for all CPAs, including the Department itself.

11. These criteria are used to determine whether and to what extent foster applicants or adoptive families are able to meet the needs of children served by the agency or Department. These criteria are also used to determine whether a child may be a good fit for a particular family.

12. A CPA's assessment of these factors does not constitute an endorsement, recommendation or approval of a specific relationship or a type of relationship. Nor does a CPA's assessment of these factors constitute an endorsement of any particular religious faith or the absence of a religious faith. Nor can these factors be used as a means of discriminating against prospective foster parents or adoptive families on the basis of their sexual preference or same-sex marital status. Instead, a CPA must assess on these factors and make a determination of compliance or noncompliance with administrative licensing rules and statute.

13. CPAs must follow the requirements of Michigan law, including Act 116, administrative rules and Department policy. CPAs must also perform their duties under their contracts, including following the non-discrimination clause, which states:

The Contractor shall comply with the MDHHS non-discrimination statement:

The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability. The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

(Private Agency Foster Care (PAFC) Master Contract Template, page 6, 2.9 Compliance Requirements, c)).

14. When allegations of noncompliance with licensing rules, statute, or contract requirements are made, DCWL will initiate an investigation. The investigation is assigned to a DCWL licensing consultant, who will conduct investigatory activities including interviews and review of documents, in order to make a determination of compliance or noncompliance with applicable rules, statute, or contract requirements.

15. At the conclusion of the investigation the licensing consultant will conduct an exit meeting with the agency's administrators to discuss preliminary findings of the investigation. The licensing consultant will complete an investigation report, which is reviewed and approved by the consultant's manager. The report will detail the allegations, investigative activities, findings of compliance or noncompliance, and a recommendation regarding the status of the license and contract.

16. If there are findings of noncompliance, a corrective action plan to address the noncompliance will be required and this will be indicated in the investigation report. The corrective action plan is due within 15 days from receipt of the report by the agency and must be approved by the consultant. Failure to submit an acceptable corrective action plan will result in a recommendation for disciplinary action, which may include revocation of the license and termination of the contract.

17. A recommendation for any disciplinary action on the license is reviewed by the DCWL director and the Child Services Agency (CSA) director. A recommendation for any disciplinary action on the contract is reviewed by the

DCWL director, the CSA director, and the contract administrator. If a recommendation for disciplinary action on the license is made, the licensee has the opportunity to appeal the recommendation, which includes a compliance conference and an administrative hearing. If a recommendation for disciplinary action on the contract is made, the licensee/contractor has the opportunity to appeal this recommendation during a meeting with the contract administrator.

18. Unless and until an investigation is complete, the Department does not know whether a statute, rule, policy or contract provision has been violated.

19. In the present case, the Department was unaware that St. Vincent did not follow the non-discrimination clause it agreed to until the *Dumont v. Lyon* lawsuit was filed. The *Dumont* plaintiffs alleged that they had been denied the opportunity to serve as foster or adoptive parents by St. Vincent, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing.

20. When that lawsuit was filed, the Department investigated the allegations in the same manner as it investigates other complaints. It opened investigations of St. Vincent, Bethany Madison Heights and Bethany Christian East Lansing.

21. The Department was required to open these investigations, as follows:

- a. Mich. Comp. Laws § 722.120 (1): The department may investigate, inspect, and examine conditions of a child care organization and may investigate and examine the books and records of the licensee.
- b. Mich. Comp. Laws § 722.113(1): The rules promulgated by the department under this act shall be used by the department, the

bureau of fire services, and local authorities in the inspection of and reporting on child care organizations covered by this act.

- c. PAFC Master Contract Template, page 21, § 2.21: The Division of Child Welfare Licensing: DCWL shall be responsible for review of the Contractor's compliance with the Contract and any court orders, via an Annual Compliance Review (ACR) and Special Investigations. DCWL may review, analyze, and comment on all activities covered within the terms of the Contract or court order.
- d. DCWL Policy and Procedure Manual, Chapter 6 Special Investigation, page 46: 6-5. Special Investigation: DCWL responds to complaints where it is alleged that the licensee has not complied with the terms of the statute, rules, the Implementation, Sustainability and Exit Plan (ISEP) from *Dwayne B. v. Whitmer*, E.D. Mich. No. 06-13548, Department policy, and contracts. DCWL encourages individuals who want to file a complaint to utilize the public website's online complaint form. DCWL will also accept complaints verbally or in other written formats.
- e. A. Upon receipt of an allegation, the DCWL field consultant will initiate a special investigation (SI). The DCWL field consultant will not dismiss allegations without consultation with the area manager. Intake allegations are logged into the database system by DCWL central office staff or the DCWL field consultant within 24 hours or the next business day.

22. Earlier, in January 2017 and May 2018, the Department opened two investigations of Catholic Charities of West Michigan in (CB610201023), Investigation # 2017C0208001, and Catholic Charities of West Michigan (CB410245705), Investigation # 2018C0223029.

23. The Department found noncompliances in Investigation 2017C0208001 as follows: Adoption Contract 2.9, Mich. Comp. Laws § 722.124e, and CPA Rule 400.12602 (1), for failure to comply with the non-discrimination statement, the agency's refusal to complete adoptions in three assigned contracted cases based on

the sexual orientation and marital status of the identified adoptive applicants, and failure by the agency to follow their own program statement. A corrective action plan was submitted by the agency and accepted by the Department.

24. The Department found noncompliances in Investigation 2018C0223029 as follows: ISEP 6.10, Mich. Comp. Laws § 722.124e, and FOM 722-03, for failure by the agency to place three siblings who were contracted cases assigned to the agency, together into one foster home due to the sexual orientation and marital status of the foster parents. A corrective action plan was submitted by the agency and accepted by the Department.

25. Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of St. Vincent, Bethany Madison Heights and Bethany Christian East Lansing.

26. Since the *Dumont* case has ended, Bethany Christian Services has agreed that it will comply with its legal contract requirements, including the non-discrimination clause.

27. Because of the present lawsuit, the Department has not been able to finalize its investigation of St. Vincent.

28. Should that investigation be complete and a violation found, St. Vincent would have the opportunity to complete a corrective action plan demonstrating how it would achieve compliance.

29. If St. Vincent chooses not to comply with the provisions of its contracts with the Department, including the non-discrimination clauses, the Department could take licensing and/or contract action.

30. And if St. Vincent chooses to cease providing foster care and/or adoption services, the Department has a process for finding new placements for the children St. Vincent serves without any sacrifice in the quality of care received by those children.

31. Plaintiffs Chad and Melissa Buck have not had a foster home license since June 16, 2016.



Patricia Neitman

Subscribed and sworn to by Patricia Neitman before me on the 25th day of May, 2019.

Signature Elisabeth Paurazas

Printed name Elisabeth Paurazas

Notary public, State of Michigan, County of Oakland

My commission expires December 24, 2023

Acting in the County of Washtenaw

Elisabeth Paurazas
Notary Public - State of Michigan
County of Oakland
My Commission Expires December 24, 2023

ATTACHMENT 1

INITIAL FOSTER/ADOPTION HOME EVALUATION

Michigan Department of Health and Human Services

Division of Child Welfare Licensing

Applicant(s) interested in:

Relative Assessment.

If yes, please describe legal relationship: _____

Foster Care

Adoption

AGENCY NAME:

AGENCY LICENSE NUMBER:

Date of Report:

1. FOSTER/RELATIVE/ADOPTIVE HOME INFORMATION:

Home name:

Foster home license number, (CF # or CG#): _____

Address:

Home telephone number:

Other telephone number (s):

Email address:

Driver's license number/State ID number for all adult members of the household; verification of valid driver's license:

MEMBERS OF HOUSEHOLD:

Name	DOB	Relationship to Caregiver	Date of Placement (if applicable)
"Click Here and Type"			

DIRECTIONS TO THE HOME:

"Click Here and Type"

SOCIAL WORK CONTACTS:

Date	Persons	Type of Contact/Place
"Click Here and Type"		

2. CENTRAL REGISTRY:

Michigan Date of Central Registry Check: _____ Has applicant lived in any other states in the last 5 years? Yes No

If yes, identify what states the person lived in. There must be a central registry clearance from that state.

The confidentiality of information in this section of this document is protected by the Michigan Child Protection Law. Anyone who violates this protection is guilty of a misdemeanor and is civilly liable for damages (1975 PA 238, as amended, MCL 722.621 et seq.).

Central Registry Results:

N/A: Not found

Yes, there is a history of child abuse or neglect.

a. Describe the length of time since the substantiation and any services that have been provided to rectify the concern.

b. Address any risk factors that might impact the safety of the child and describe what protective interventions are in place currently.

***If there is any household member who is on Central Registry, THE HOME CANNOT BE LICENSED.**

Are there any rules that are in non-compliance? Yes No

If Yes, list all rules and headings:

Willful Substantial

Supporting documentation:

ART: Yes No

3. COMMUNITY:

Type of community (rural, urban, etc.):

Socio-economic makeup:

Racial/cultural makeup:

Availability of recreational facilities:

School system, including special education:

Hospitals and medical care, noting facility utilized by family:

Availability of churches, noting family's choice of church:

4. DESCRIPTION OF HOME: (R.400.9206, R.400.9301, R.400.9302, R.400.9303, R.400.9304, R.400.9305, R.400.9306, R.400.9307, R.400.9308, R.400.9309, R.400.9401, R.400.9410, R.400.9411, R.400.9414, R.400.9418, R.400.9419)

Description of home and all rooms, noting condition, layout, appearance: (Does the home meet the minimum level of cleanliness necessary to meet the needs of the child to be placed? If not, is the applicant taking action to address the home's deficiencies?)

Description of play space:

Safety considerations, including weapons or pets:

- Are there pets in the home? Yes No Does the pet have current vaccinations? Yes No
- Is the pet friendly or is the pet a safety concern? (Explain what makes the pet a friendly or a safety concern. Describe how does the pet interacts with others.)
- Is the pet well cared for? Yes No
- Are there any water hazards on or near the premises? Yes No If yes, describe how the caregiver plans to safeguard children around them. Any exterior door that leads directly to the area where there is a water hazard needs an alarm. Any pool, spa, hot tub or pond needs rescue equipment available.
- Are there working smoke detectors on each floor and between each sleeping area and the rest of the home?
 Yes No

- Is there a working carbon monoxide detector installed as recommended by the manufacturer? Yes No
- If there are weapons in the home, specify what they are, where they are stored and how they are secured. Document all weapons (rifles, handguns, bow and arrows, air/paint guns, etc.), registrations, trigger locks/inoperable and storage. Weapons must be inoperable and locked in a place separate from ammunition or stored in a locked gun safe.
- Where are medications stored?

Explain the proposed sleeping arrangements for family members and foster/adoptive children.

Is there a CPSC compliant crib if there are children under the age of 2 or the home is to be licensed for children 0-2?

Do all bedrooms have a window and a door than can be used to get out of the house in an emergency? Yes No
If "NO", please explain:

Are there people sleeping in other rooms in the home? Please describe.

Water, sewer, refuse arrangements, health inspection results if applicable:

Water temperature tested 120° Fahrenheit or less? Yes No

Emergency procedures information completed and posted in view of the home telephone:

Adequacy of the house, property, neighborhood, schools and community for the purpose of fostering/adopting as determined by on-site visits:

Means of transportation; i.e. ages and makes of automobiles, reliability, proof of insurance on each vehicle, availability of required safety seats for young children, accessibility of public transportation if needed:

DESCRIBE PLANS FOR DAY CARE AND/OR SUBSTITUTE CARE. (R400.9403(d)(ix), R400.9412)

Routine Day Care:

After hours and emergency substitute care:

Are there any rules that are in non-compliance? Yes No
If Yes, list all rules and headings:

Willful Substantial
Supporting documentation:

Variance requested? Yes No

5. FINANCIAL: (R.400.9201, R.400.9206)

Date family provided with information of Ineligible Grantee Funds, Medicaid, Food Stamps, WIC in DHS-Pub-114 for children in relative care:

Source of income, how this was verified, stability of income, how expenses were verified. Does the family have a plan for any known financial changes that may occur in the future i.e., unemployment payments ending, cash assistance ending?

If income is based on disability, i.e. SSI, Social Security Disability, long term disability payments from a job, workmen's compensation, etc., describe the verification of the physical or mental disability and an assessment of how that impacts the ability to provide foster/adoptive care or be a member of the household.

If child support payments are ordered, are the payments being made and are they current? If there are arrears, how much and what is the plan to bring the payments current? How was this verified?

Detail a financial statement that specifies the amount of net income for the household and identifies all ongoing and routine bills and expenses including, but not limited to, housing (mortgage or rent, insurance, property taxes), utilities, food, clothing, transportation (car payments, insurance, fuel), credit cards, student loans, contributions to religious organizations, savings contributions, etc.

Assess the family's money management skills and ability to meet their needs with their current income. Is the family current on their bills? Can the family meet the financial expenses of having a relative/foster child placed in their home prior to payment starting?

Are there any rules that are in non-compliance? Yes No

If Yes, list all rules and headings:

Willful Substantial

Supporting documentation:

Variance? Yes No

6. SOCIAL HISTORY: (for each adult member of the household, including adult children who live in the home) (R.400.9201, R.400.9202, R.400.9206)

Descriptive information: Age, height, weight, hair color, nationality, race or ethnicity, place of birth. American Indian heritage must be consistent with information on the BCAL-3889 and the BCAL-0120-A. Family of origin description. Include:

- Number of siblings, parents' roles, personalities, expectations, parenting involvement, styles, values.
- Relationship with each parent and siblings (if any) growing up and now.
- Parents'/primary caretakers' childrearing techniques, including discipline.
- How family dealt with losses. Describe family celebrations.
- Parents' substance use and how it affected the family, lasting impact on individual.
- How family dealt with any abuse or victimization issues, continuing impact on individual.
- Role of religion in the family.
- Other significant influences when a child, e.g. grandparents, step parents, aunts, uncles.

Any history of out of home care? This should include any history in non-court-ordered out of home care.

Educational history and any special skills and interests:

Employment history – If the person does not have an employment history or there are large gaps in the employment history, explain how they were supported during that period of time:

Relationship history – Significant relationships prior to current one; how they ended; if previously married, whether divorce has been obtained or considered and whether there is verification.

Any children from previous relationships. Yes No

Note any history of involvement in domestic violence, including as a victim, or absence of history:

Description of personality, personal goals, hobbies, interests

Strengths and weaknesses, worker's assessment in addition to what the applicant tells you:

Are there any rules that are in non-compliance? Yes No

If Yes, list all rules and headings:

Willful Substantial
Supporting documentation:

7. FAMILY LIFE: (R.400.9201, R.400.9202, R.400.9206, R.400.9405, R.400.9418)

Marital and family status and history, including current and past level of family functioning and relationships and any incidents of domestic violence:

Current relationship. Include:

Brief history, including date and place of marriage, if applicable.
Any history of infertility and how that has been dealt with.
Any history of separations or domestic violence.
Strengths of relationship, areas of work or attention.
Common/shared interests or lack thereof.
Roles, division of labor, decision-making process, handling stress or disagreements.
Assess level of satisfaction, stability.
Describe relationship w/parent of children if separated.

Family:

Activities, goals, values, role of religion, church involvement:

Challenges, stressors, any history of help-seeking:

Losses and how dealt with:

Expected impact of fostering/adopting on all members of the household:

Any individuals other than children of applicants currently living with the family, impact of those individuals on family functioning.

8. CHILDREN: (R.400.9201, R.400.9202, R.400.9206, R.400.9404, R.400.9407)

All children must be interviewed/observed apart from the parents, even adult children no longer living in the home, or the agency must note all attempts to contact them. If unsuccessful, the applicant's explanations as to why you were unable to contact them.

For each child living in the home including relatives/foster children:

Identifiers: name, birth date, race (if different from parents') school and grade, and/or employment. Date of placement for children already placed in the home (relatives).
Parents' description of child's personality, interests, activities.
General adjustment, note if any involvement with law enforcement or the criminal justice system.
Worker's assessment of child's adjustment, development, special needs, relationships with parents and their significant others, and other strengths and weaknesses.
Child's ideas and attitudes about fostering/adopting based on interview with the child.
Child's description of the discipline techniques used in the family.

For children who are grown and/or out of the home:

Identifiers: name, age, where living, marital status.
School and/or employment.
General adjustment: note if any problems with law enforcement or the criminal justice system.
Their opinion of their parents' parenting skills and of their desire to foster/adopt children.
Description of the discipline techniques used when they were a child.
The willingness of the adult child to provide substitute care, if appropriate, or be involved with the foster/adopted children who may be placed into the home.
Any ongoing reliance by the adult child on the applicant for child care, monetary assistance, etc.

Are there any rules that are in non-compliance? Yes No

If Yes, list all rules and headings:

Willful Substantial

Supporting documentation:

Variance? Yes No

9. HEALTH: (For each member of the household, both adult and children): (R.400.9201, R.400.9202, R.400.9206)
Assessment of physical, mental and emotional health and substance use history.

Indicate current health status. (Is anyone in the household prescribed medication? If so, list the medications. How long has he/she been taking these medications/what are the medications prescribed to treat?)

Does anyone in the household have a physical or mental health diagnosis or condition that would make care of the child difficult? If so, describe how it may affect the care of a child.

Describe current substance use patterns, history if indicated. If there is a past substance use problem (including alcohol use) indicate how diagnosed, resolved, and when. What is the current treatment?

Does any member of the household smoke? Yes No If yes, do they smoke in the house? Yes No

Reference a medical statement, completed within the 12 month period before conclusion of the evaluation, for each member of the household that indicated that the member has no known condition which would affect the care of a foster/adoptive child or any other determination if different. Does anyone require special care? Please describe:

Are there any rules that are in non-compliance? Yes No

If Yes, list all rules and headings:

Willful Substantial

Supporting documentation:

Variance requested? Yes No

10. PARENTING: (R.400.9201, R.400.9206, R.400.9306, R.400.9401, R.400.9403, R.400.9404, R.400.9417)
Parenting skills and attitudes toward children:

Parenting values:

Most important things for parents to do, what they will do similarly to their parents, what they hope to improve upon.

Knowledge of child development, appropriateness of expectations of children.

Ability to provide infant care:

Equipment, safety measures in place (e.g. gates, monitor, car seat, play area, pets)

Safe Sleeping requirements have been trained and reviewed

Understanding of infant care:

Capacity and disposition to give a foster child guidance, love and affection and to deal with difficult children with unacceptable behavior, children who are rejecting and/or oppositional, or children with medical needs.

1. What kinds of behaviors require intervention?

2. How will caregiver intervene/handle that type of behavior? How will they be supportive and nurture children?

Methods of discipline. Flexibility and age appropriateness of approaches, willingness to follow the case plan for the child if it differs from their normal approach to discipline.

Awareness of variety of techniques, use of positive and negative methods.

Understanding of agency's discipline policy and willingness to abide by it. If the family has used spanking or other corporal punishment, or was raised with it, document their current attitudes.

Are there any rules that are in non-compliance? Yes No
If Yes, list all rules and headings:

Willful Substantial
Supporting documentation:

11. **MOTIVATION FOR FOSTER CARE/ADOPTION:** (R.400.9201, R.400.9202, R.400.9206, R.400.9403, R.400.9404, R.400.9405, R.400.9411)

Reasons for wanting to provide care for relative/foster/adoptive children, including infertility, if indicated.

Each member's attitude towards accepting a relative/foster/adoptive child.

Previous experience in providing child foster care, child day care, or adult foster care.

Previous adoptive evaluations or placements.

Previous licenses, including applications that did not result in a license. Reference communication with previous agency.

Level of understanding of foster/adoptive care and the potential impact of their family. For example, does the caregiver understand that a social worker will visit the child and relative at least monthly until reunification with parents occurs or permanent custody is achieved?

Evaluation of motivators, (if adoption/relative placement in particular).

Applicant(s) agree to encourage visits and follow health care, religious and discipline policies of this agency

Are there any rules that are in non-compliance? Yes No
If Yes, list all rules and headings:

Willful Substantial
Supporting documentation:

12. **FAMILY'S ATTITUDES TOWARD THE CHILDREN'S PARENTS AND WORKING WITH THE AGENCY:** (R.400.9201, R.400.9202, R.400.9206, R.400.9403)

Understanding of permanency and concurrent planning.

Family's level of understanding of foster/adoption care.

Family's willingness to comply with the child's case plan. If child is in the home, assess current situation.

- The family is willing to cooperate with the supervising agency.

- The family is willing to cooperate with the school system.
- The family is willing to cooperate with the child's therapist.
- The family is willing to cooperate with the parenting time plan outlined in the treatment plan.
- The caregiver is willing and able to protect the child(ren) from further harm.

Attitudes toward the legal parents. How will foster parents discuss legal parents with and around foster/adoptive children?

How will foster parents discuss reasons children entered foster care and/or became available for adoption?

Family understands the goal of the agency in providing foster care and they are willing to support the agency in working toward reuniting a foster child with his or her family.

For Relative Placements:

- Does the family agree to not release the child to anyone, including birth parents, without the supervising agency's approval? Yes No
- Does the family agree they will not allow the foster child(ren)'s parents to live in their home without the supervising agency's approval? Yes No
- Does the family understand they cannot be licensed to care for foster children whose parents live in the home? Yes No

Ability to empathize and work with the parents and children.

Openness to maintaining significant relationships.

Openness to providing permanency to the relative/foster child if needed.

Ability to comply with agency policies and procedures.

Summarize experience of caseworkers for children who have been placed in the home. Assess current compliance.

Are there any rules that are in non-compliance? Yes No
If Yes, list all rules and headings:

Willful Substantial
Supporting documentation:

13. TRAINING NEEDS: A statement of the number of hours the person/couple need to comply with the training rules is not sufficient. (R.400.9415)

Orientation and training hours credited; include topics covered.

Types of training the family believes they could benefit from.

Worker's assessment of additional training needs and the agency's plan to provide the identified training.

Openness to learning.

Are there any rules that are in non-compliance? Yes No
If Yes, list all rules and headings:

Willful Substantial
Supporting documentation:

Variance requested? Yes No

14. TYPE OF CHILDREN DESIRED – INTEREST IN PERMANENCY/ADOPTION PLANNING: (R.400.9201, R.400.9202)

Gender, race, ethnic background and special characteristics of children preferred by applicants.
Types of children the family is willing to consider.

Ability and willingness to care for special needs children, and the problems of the children.

Interest in adoption.

If this evaluation is being completed for an adoption of a specific child, the DHS 612, Adoptive Family Assessment Addendum, must be completed.

15. CROSS CULTURAL PLACEMENT:

Willingness to parent cross-racially or cross culturally and to create an atmosphere that fosters racial identity and culture of a foster child.

Races or cultures requested or that the family does not believe they can effectively parent.

16. REFERENCES: (R.400.9206)

At least three references must be obtained from persons not related to the applicant(s).

Summarize the information received from each reference. If negative information was received, explain how the negative information was resolved.

An agency may choose to obtain additional references from related or unrelated persons, including adult children.

If this is an adoption assessment and there are circumstances that require additional review, include the information provided by the professional reference.

17. RECOMMENDATIONS: (Must be consistent with the information contained in the report.)

Placement with relative is recommended: Yes No

If the recommendation is that placement should not be made, the reason for this must be explained in detail.

Licensure is recommended:
(Licensing workers only) Yes No N/A

Licensure and preliminary approval for
adoption:
(Licensing workers only) Yes No

Approved for adoption:
(Adoption workers only) Yes No

- Summary of strengths and areas of growth, attention.
- Issues to be considered in making placements

- Recommended placement specifications to include characteristics, age, sex, and number of children best served by home and types of children who may not be placed in the home.

Recommendation for License Denial:

- List all rules found to be in non-compliance.
- Summarize facts to support rule non-compliance.
- Reference all supporting documentation.

Recommendation for Adoption Denial:

- Basis for recommendation:
- Supporting documentation.

18. CLOSING:

Licensing/Adoption Assessment Submitted by:

Name:

Signature:

Agency:

Title:

Date:

I certify that I have been trained and am qualified to make this recommendation:

Foster Care Adoption

19. SUPERVISOR'S REVIEW:

Application:

Clearances:

Medical Reports:

References:

Other documentation:

Is the report accurate, factually consistent, unbiased, support by adequate data/information? Yes No

Further Explanation:

Supervisor Name:

Signature:

Agency:

Title:

Date:

I certify that I have been trained and am qualified to make this recommendation.

The Michigan Department of Health and Human Services (MDHHS) does not discriminate against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, genetic information, sex, sexual orientation, gender identity or expression, political beliefs or disability.

EXHIBIT

C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE; ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services;
HERMAN MCCALL, in his official capacity
as the Executive Director of the Michigan
Children’s Services Agency; DANA NESSEL,
in her official capacity as Michigan Attorney
General; ALEX AZAR, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF STACIE BLADEN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Stacie Bladen, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a Deputy Director within the Children’s Services Agency.
2. I have served the Department in this capacity for 5 years and make this affidavit based on my experience and knowledge of child welfare policies and programs.

3. My job duties include oversight of the development of child welfare policies, protocols, and programs, approval of contract development, implementation of applicable state and federal laws and approval of federally required child welfare program and funding plans.

4. The Department was not aware that St. Vincent may have violated the non-discrimination provision in its foster care and adoption contracts with the Department until the filing of the Dumont lawsuit, which alleged that St. Vincent discriminated against Kristy and Dana Dumont on the basis of their sexual preference and same-sex marital status.

5. The Dumont lawsuit contained allegations that St. Vincent, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing had violated the non-discrimination clause of their contracts by refusing to consider same-sex married couples for foster care or adoption. After the Dumont suit was filed, the Department initiated investigation of the allegations in the same manner it responds to other complaints and opened investigations of St. Vincent, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing.

6. I did not initiate these investigations based on the religious beliefs of St. Vincent, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing. I referred the September 2017 complaint allegations to the Division of Child Welfare Licensing (DCWL) for licensing and contractual investigation. Upon receipt of the complaints and determination that they met the

criteria for special investigation, the Department opened each of these investigations. This same process and response applies to any complaint received.

7. Earlier, the Department opened an investigation of Catholic Charities of West Michigan Investigation #2017C0208001. Subsequently, in March 2018, the department opened, Investigation # 2018C0223029. In the first case, the department established violations of rule based on the agency's refusal to complete a child's adoption in the placement that the agency determined met the child's best interest. In the second case, the agency failed to place siblings together because the siblings resided with a same sex couple.

8. The Dumont settlement did not announce a new policy. It reaffirmed the Department's practice of enforcing provisions of the contract, including the non-discrimination clause, which has been in place for several years. St. Vincent signed an amended adoption contract on September 8, 2015, which included the non-discrimination clause and the contract took effect on October 1, 2015. St. Vincent signed it's foster care contract on July 8, 2016; it took effect the same day. The Dumont settlement is consistent with the Department's investigation of Catholic Charities West Michigan back in 2017 and subsequent findings in response to the 2018 complaint. It is also consistent with the Department's investigations of St. Vincent, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing.

9. Due to the then-pending Dumont lawsuit, the Department did not finalize its investigations of St. Vincent, Bethany Christian Services Madison

Heights and Bethany Christian Services East Lansing. Since the Dumont case has ended, Bethany Christian Services has agreed that it will comply with its legal contract requirements, including the non-discrimination clause. Because of the present lawsuit, the Department has not been able to finalize its investigation of St. Vincent and has taken no adverse action against St. Vincent.

10. The Department does not seek to end its relationship with St. Vincent in so far as the agency is willing and able to fulfill the contractual obligations it has voluntarily agreed to, including following the non-discrimination clause, which has been included in St. Vincent's adoption contract since September 8, 2015 and its foster contracts since July 8, 2016.

11. In 2015, Steve Yager, former executive director of the Children's Services Agency, stated "...I would emphasize that we work with agencies based on a contract, not on their belief system, stated or otherwise. We do not compel agencies to accept referrals—never have; rather, we create through contracts a vast array of providers to meet the very diverse needs of the children and families we serve." Mr. Yager's statement pertained to an agency's decision to accept a referral to provide FC case management or adoption services to a child. In this context, when the Department uses the term "make a referral" this means the referral of a child's foster care or adoption case to the agency for the provision of foster care case management or adoption services. Mr. Yager's statement that we "create through contract a vast array of providers" pertains to agency's development of foster homes to meet diverse needs of youth.

12. The public/private partnership between the state and private CPAs is not the result of the state's inability to meet an acute need on its own. Rather, the number of appropriated FTEs would not allow for current caseload restrictions by the ISEP to be met with caseload populations across the state without private agency assistance. For example, the Department was only provided ten FTEs for Adoption.

13. It benefits the Department and Michigan's children who require temporary foster care or adoption services to have as many qualified foster and adoptive parents as possible that can meet the diverse needs of children. It also benefits the Department to work with CPAs that comply with statute, rule, and contract when performing responsibilities as a CPA.

14. The Department can revoke a CPA's license and can terminate its contract(s) with the state. However, it cannot force a non-profit organization to close. Prior to taking adverse action against an agency's license or contract, the Department must investigate complaints that it receives and determine whether a CPA has violated its contract with the Department or has violated a statute, administrative rule or Department policy.

15. The Department rarely encounters circumstances in which an agency would refer a prospective foster or adoptive parent to another child placing agency and there are no typical circumstances in which this occurs. Agencies are rarely inclined to turn away a prospective or adoptive parent because they need those homes in order to take cases and serve children and collect the administrative rate.

The Department does not allow CPAs to refuse to evaluate, license or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or marital status.

16. CPAs may have a specialized focus, however, all have the same contractual and licensing requirements and all must comply with terms of the contract and license. CPAs performing such work under contract with the department are prohibited from refusing to serve, assess, recommend licensure, or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or marital status.

17. CPAs cannot refuse to serve a prospective foster or adoptive parents by referring them to other CPAs based on race, religion, sexual orientation or marital status.

18. Plaintiffs list several institutions, some of which are not CPAs:

- a. The Sault Tribe Binogii Placement Agency is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.
- b. Homes for Black Children is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.
- c. Wayne Center is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.
- d. Guiding Harbor is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.

- e. Boys to Men Group Home is a child caring institution, not a CPA.
- f. Ruth Ellis Center is a child caring institution, not a CPA.
- g. AdoptUsKids is not a CPA.
- h. MARE is not a CPA.

19. Although an agency may focus on providing foster care case management or adoption services to children with certain needs, like those with disabilities, agencies do not exclusively serve those children, nor do they exclude prospective foster and adoptive parents based on race, religion, sexual orientation or marital status.

20. Plaintiffs incorrectly claim that the Department disregards the non-discrimination clause in its foster care and adoption contracts by “contract[ing] with private organizations that specialize in serving” certain children. Plaintiffs incorrectly assert that Homes for Black Children only serves African American children, that the Sault Ste. Marie Tribe of Chippewa Indians only serves Native American children, that Wayne Center only serves children with disabilities.

21. Regardless of any specialization to provide foster care case management or adoption services to children with certain needs, CPAs are required to follow the non-discrimination clause of their contract with the Department. When providing foster care case management and adoption services to any child, including a child with special needs, a CPA may not discriminate against prospective resource parents who identify as members of the LGBTQ community, same-sex couples, or unmarried cohabitating individuals. For instance, St. Vincent

could plausibly specialize in placing children whose parents identify as Catholic, but that specialization would not allow the agency to discriminate against prospective foster and adoptive parents who are members of other faiths. In another scenario, an agency could specialize in serving children from minority populations, but the agency could not discriminate against prospective foster and adoptive parents who are not within the minority population.

22. The non-discrimination clause in St. Vincent's foster care and adoption contracts prohibit discrimination.

23. The Private Agency Foster Care (PAFC) Contract, at § 2.9(b), states:

"The Contractor shall comply with the MDHHS non-discrimination statement:

The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency."

24. The Adoption Contract Section, at § 2.9(c), states:

"The Contractor shall comply with the MDHHS non-discrimination statement:

The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or

relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.”

25. The Department enforces its non-discrimination clause uniformly.

After accepting a referral to provide foster care case management or adoption services, CPAs cannot transfer the child’s case to another agency. This is prohibited. And, the agency may not transfer the child’s case to the department except in exceptional circumstances and with high level department approval. The Department does not consider or track the religious affiliation of CPAs – an agency’s religious affiliation is immaterial to their contract responsibilities.

26. Although CPAs may decline to accept a referral to provide foster care case management or adoption services to a child, once they accept the referral and sign the 3600 Agreement, the CPA must fulfill all of the terms of its contract and cannot discriminate in the provision of services. This means that a CPA cannot refuse to evaluate, recommend for licensure or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or opposite sex or marital status.

27. Plaintiffs’ claim that the Department grants individualized exceptions to its policy with the following language: “upon the written approval of the County Director, the Children’s Services Agency Director, or the Deputy Director.” This out-of-context claim does not provide the full passage, which states:

28. The full passage quoted by Plaintiffs states:

1.1. Client Eligibility Criteria

a. Eligible Clients

Children for whom the family court has issued an order which makes the Michigan Department of Health and Human Services responsible for the child's placement, care and supervision.

OR

Children for whom the family court has authorized a placement in the parental home in a Trial Reunification living arrangement.

The period of time eligible for a Trial Reunification shall not exceed 180 days from the date of the child(ren)'s placement in a parental home. Child(ren) must enter Trial Reunification directly from foster care and the family court must retain jurisdiction with care and custody continuing with MDHHS.

b. Determination of Eligibility

If MDHHS makes a referral to a child placing agency for foster care case management services pursuant to a contract with the child placing agency, the child placing agency must accept or decline the referral within one hour of receipt of the referral. If a need for placement is imminent, MDHHS may make referrals for placement concurrently to other contracted providers. Contractor may not transfer a foster care case to another child placing agency. After acceptance of a foster care referral, the Contractor may not refer the case back to the Department except for the reasons outlined in the Children's Foster Care Manual (FOM) or upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director.

Emphasis added.

29. This exception does not allow CPAs to discriminate for any reason and does not permit an agency to assert a religious objection to continue serving a child, whose case it already accepted. Rather, this provision allows for unexpected

circumstances, whether it be a natural disaster that disallows an agency from providing services, a mass exodus of child placing agency staff, or some other rare and unforeseen circumstance. The language was inserted to enable the Department to assure that all children under its care and supervision receive services they are entitled to and must be provided without harm, delay, or interruption.

30. It is in a child's best interest to maintain stability in care and receive continuity of foster care case management and adoption services. Unnecessary interruption or change of case management responsibility impacts outcomes for the child and the child's family.

31. The quoted language does not enable an agency to return a child's case to the department so that it may discriminate or refuse to serve the child in accordance with applicable policies. Rather, the language assures that in rare unforeseen circumstances, such as a natural disaster or a mass exodus of staff, the Department has a mechanism to prevent harm to the children involved.

32. The Department and its staff are responsible for enforcing the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 et seq., administrative rules, Department policy and its contracts. The Department's uniform enforcement of the provision of statute, rule, and contract preceded the election of the current AG and were in place after her election and assumption of office. Although Attorney General Nessel and the Michigan Department of Attorney General serve as the Department's legal counsel, they do not have decision-making

33. I have reviewed discovery responses obtained during the Dumont lawsuit and there is evidence that St. Vincent discriminated against Kristy and Dana Dumont on the basis of their sexual preference and same-sex marriage. (Pl. Resp. & Obj. to St. Vincent Interrogatories, No. 12.) St. Vincent appears to rely on PA 53, PA 54 and PA 55 in justifying its discrimination against same-sex couples.


Stacie Bladen

Subscribed and sworn to by Stacie Bladen before me on the 28th day of May, 2019.

Signature Katherine L. McClain

Printed name Katherine L. McClain
Notary public, State of Michigan, County of Eaton
My commission expires 12/31/19
Acting in the County of: Ingham

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

EXHIBIT

D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE; ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services;
HERMAN MCCALL, in his official capacity
as the Executive Director of the Michigan
Children's Services Agency; DANA NESSEL,
in her official capacity as Michigan Attorney
General; ALEX AZAR, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF CATHERINE HOOVER

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Catherine Hoover, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a State Administrative Manager, Adoption, Guardianship , Recruitment and Retention Program Manager, Office of Child Welfare Policy and Programs.

2. I have served the Department in this capacity for 8 years and make this affidavit based on my experience and knowledge of adoption policy, adoption contracts, recruitment and retention and state and federal laws related to adoption.

3. My job duties include development, modification and implementation of policies and programs regarding adoption, guardianship, recruitment and retention, analysis and development of state laws regarding adoption and guardianship, administration of adoption contracts with CPAs, and oversight of closed adoption records and the Central Adoption Registry.

4. CPAs provide foster and adoptive services, pursuant to contract, and within the parameters of Michigan law.

5. CPAs must evaluate all families that come to an orientation and complete an application.

6. Payments made by the Department to a CPA, including St. Vincent, for foster care services include the home study, recruitment and placement of foster children. The foster care administrative rate paid to St. Vincent supports the staff who conduct recruitment and licensing activities, including completion of home studies. See PAFC Contract 2.9 Additional Compliance Provisions: "The Contractor shall comply with the provisions of: e. 1973 Public Act 116, as amended, being MCL 722.111 et seq., Michigan Child Care Organization Act."

7. The Adoption Contract states, at § 2.10(b)(1), "The contractor shall develop and implement a plan for adoptive home recruitment, retention and support consistent with the MDHHS DCWL licensing standards specific to the contractors' license specified in section 2.4."

8. The completion of home studies by a CPA is one of the services that the CPA has agreed to complete under its contract with the Department and is an integral part of the foster care and adoption process for which the CPA is compensated. Rule 400.12308 requires an agency to act on a completed and signed foster home application. The completion of a home study by a CPA requires a CPA to evaluate prospective foster families and adoptive families based on criteria set forth under Act 116, administrative rules and Department policy at Rule 400.12310 (foster home), Rule 400.12605 (adoption), and Adoption Services Manual 510 (adoption).

9. Included in the services for which the Department contracts with CPAs is the evaluation of prospective foster families and adoptive families based on the criteria set forth under Act 116, administrative rules and Department policy at Rule 400.12310 (foster home), Rule 400.12605 (adoption), and Adoption Services Manual 510 (adoption). The Department requires CPAs to perform these services under its contract and the administrative rate paid to CPAs compensates them for these services.

10. Part of the adoption process includes the completion of a DHS-612 Adoptive Family Assessment Addendum. The completion of a family assessment by a CPA requires a CPA to evaluate prospective adoptive families based on the criteria set forth in Adoption Services Manual 510 (adoption). (DHS-612, Attachment 1.)

11. Also included in the services for which the Department contracts with CPAs is the recruitment of potential foster parents and adoptive families. Rule 400.12304 requires a CPA to have an ongoing foster home recruitment program to ensure an adequate number of suitable and qualified homes to meet the needs of children

served by the agency. Rule 400.12706 and Adoption Services Manual 400 require a CPA to have an ongoing recruitment program to ensure an adequate number of suitable adoptive parents for the timely placement of all children serviced by the agency who are legally free for adoption with a goal of adoption. The Department requires CPAs to perform these services under its contract and the administrative rate paid to CPAs compensates them for these services.

12. The Department values its relationships with all CPAs. At the same time, the Department is not aware of any information to support the assertion that faith-based or religiously affiliated CPAs are more effective than other CPAs at recruiting families who might otherwise not choose to foster or adopt.

13. The Department is aware of no evidence that St. Vincent recruits homes for children with disabilities at “nearly double the average rate across” Michigan. Nor is the Department aware of any evidence that St. Vincent “recruits more homes for sibling groups than the average agency, and recruits more homes overall than the average agency.”

14. The Department is unaware of any evidence to support the assertion that “[i]n the last eighteen months, St. Vincent has recruited more new foster families total than all of the other private agencies in its tri-county foster area.”

15. While St. Vincent met their overall licensing recruitment goal of 6 in FY 18, their performance does not support the claims being made. St. Vincent licensed 8 of the 63 unrelated foster homes licensed in Clinton, Eaton and Ingham counties in FY18, accounting for 13% of the unrelated foster homes licensed in this tri-county area. Similarly, St. Vincent licensed 16% of the total new homes for children with

disabilities and 11% of the total new homes for sibling groups. St. Vincent did not meet their recruitment and licensing goals for homes for teens, licensing none in FY18. Statewide, St. Vincent licensed only 0.6% of the 1,186 unrelated foster homes licensed in FY 18.

16. These trends are continuing in FY 19. St. Vincent has licensed 5 of the 30 unrelated homes licensed from October 1, 2018 to March 31, 2019 in the tri-county area. In the same time period, they have licensed 5 of the 24 homes that accept children with disabilities and 3 of the 38 homes that accept sibling groups.

17. Overall, St. Vincent has 49 foster homes licensed to accept placement of unrelated children. This accounts for only 0.9% of the statewide total of 4,989 unrelated foster homes and 17% of the tri-county total of 281 unrelated foster homes.

18. St. Vincent's claim, if true, that "in the last four fiscal years, St. Vincent has served an average of 74 children in its foster care program every year, and through its work over 100 adoptions for foster children were finalized" is unremarkable. St. Vincent finalized 18 out of 1,815 adoptions (0.9%) in FY15; 34 out of 2,109 adoptions (2%) in FY16; 30 out of 1,998 adoptions (1.5%) in FY17 and 11 out of 2,002 adoptions (0.5%) in FY18 for a total of 93 adoptions finalized out of 7,924 (1%).

19. The Department values its relationship with St. Vincent, but would not characterize it as "one of the best foster care and adoption agencies in" Michigan.

20. The Department recognizes that CPAs will vary and that not every agency is a good fit for every prospective foster or adoptive family. And the Department encourages families to look for a foster or adoption agency that is a good fit for them.

Foster Care Navigators are experienced foster parents who help guide families through the licensing process.

21. But this does not mean that the Department allows CPAs to turn away otherwise qualified foster applicants and prospective adoptive families on the basis of sexual orientation or same-sex marital status. Although many factors can go into determining which agency works best for foster applicants and prospective adoptive families, that is a decision for the families, not CPAs. And it certainly does not mean that the Department condones or allows a CPA to discriminate against foster applicants and potential adoptive families on the basis of sexual orientation, same-sex marital status or other characteristics.

22. Although some third parties, including the Human Rights Campaign, may acknowledge CPAs based on how well they work with LGBTQ individuals and families, the Department plays no role in such certification. And any such third-party acknowledgment does not mean that a CPA lacking such acknowledgment may discriminate against members of the LGBTQ community, including same-sex couples. All CPAs remain bound by the non-discrimination clause of their foster care and adoption contracts with the Department.

23. If the Human Rights Campaign believes that CPAs should not place children with families that would not be LGBTQ affirming, including for religious reasons, does not mean that CPAs may discriminate against members of the LGBTQ community, including same-sex couples. All CPAs remain bound by the non-discrimination clause of their foster care and adoption contracts with the Department.

24. After a family is licensed to provide foster care, they are on the CPAs roster of eligible families with whom children in foster care may be placed. Before, during and after the licensing process, the CPA remains bound by the non-discrimination clause of its foster care and adoption contracts with the Department

25. The Department may need to place a child very quickly and a CPA may have only one hour to find an appropriate initial placement. If a particular CPA lacks the capacity for an appropriate placement, the Department must find another CPA that is able to make the placement. A child may be placed with a relative or with another unrelated foster family to reunite with a sibling following an initial placement. CPAs, including St. Vincent, must assist and cooperate with the Department in order to find the most appropriate placement for a child.

26. Accordingly, if St. Vincent were to voluntarily cease providing foster or adoptive services under its contract with the Department, a family like the Bucks would still be able to apply to adopt the sibling of one of the children they've adopted. And they would be able to work with any CPA that has an adoption contract.

27. Families, including the Bucks, may also use the Michigan Adoption Resource Exchange (MARE) website to find information about children who are legally free for adoption without an identified adoptive family.

28. Although MARE encourages potential adoptive families to choose a CPA with which they are comfortable and compatible, the Department does not allow a CPA to discriminate against prospective adoptive families based on race, religion, sexual orientation or same-sex marital status.

Catherine Hoover
Catherine Hoover

Subscribed and sworn to before me
this 23 day of May 2019

Katherine McClain
Notary Public, Eaton County.
My comm'n expires:

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Tioga

ATTACHMENT 1

ADOPTIVE FAMILY ASSESSMENT ADDENDUM
 Michigan Department of Health and Human Services
 "Click here to enter agency name and address"

Prospective Adoptive Parent:	Cell Phone Number:
Prospective Adoptive Parent:	Cell Phone Number:
Address:	Home Phone Number:

Adoption Worker:	Agency:	Report Date:
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DATES OF CONTACT

Dates	With whom (include role/position)	Type and reason
"Click here and type"		
Current Household Members:		
Any Changes In Living Arrangements Or Financial Status:		
Current Health Report (include date of exam, any new physical or mental conditions):		
Current References (within 12 months or if family has adopted a child since last assessment):		
Current Record Clearances:		
Other Significant Factors:		
Type of Child Desired:		
1. What are the applicant's expectations of adoption? 2. What are the extended families' attitudes toward adoption? 3. What are the family's plans to discuss adoption with the adopted child(ren)? 4. How will the applicant(s) assist the child(ren) in maintaining relationships with siblings or other significant persons (if appropriate)? 5. For relative adoptions: How has the prospective adoptive family demonstrated the willingness and ability to keep the child safe from continuing physical or emotional harm from the birth parents? 6. If any of the following apply document the family's ability to care for a large sibling group (see ADM 510 for requirements): <ul style="list-style-type: none"> • The total number of children who will be placed in the home will result in more than four adopted children in the home. • Placement of a child will result in more than three children under the age of 3 in the home. • Placement of a child will result in a total of 6 or more children in the home. 		
7. What are the alternate care plans for the permanent care of the child(ren)? Include more extensive details if the applicant(s) age and/or health status are assessed to be a concern. (See ADM 510 for requirements.)		
8. If applicable, summarize the professional references (DHS-610) received for the adoptive family.		
9. If applicable, summarize any Adult Child References (DHS-611) received for the adoptive family.		

10. The following specific child(ren) are identified for adoption by the adoptive family:

11. The following training or support needs have been identified for the adoptive family:

Recommendation:

Adoption Worker Signature:

Date

Adoption Supervisor Signature:

Date

I have received a copy of the Adoptive Family Assessment Addendum.

Prospective Adoptive Parent Signature

Date

Prospective Adoptive Parent Signature

Date

The Michigan Department of Health and Human Services (MDHHS) does not discriminate against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, genetic information, sex, sexual orientation, gender identity or expression, political beliefs or disability.

EXHIBIT

E

AGREEMENT NUMBER: A12-33001
 AMENDMENT NUMBER: 7

Received

SEP - 1 2015

Contracts & Purchasing

Between
THE STATE OF MICHIGAN
DEPARTMENT OF HEALTH & HUMAN SERVICES
 And

CONTRACTOR	St. Vincent Catholic Charities
CONTRACTOR ADDRESS	2800 West Willow, Lansing, MI 48917-1833
CONTRACTOR EMAIL	seykaa@stvcc.org

CONTRACT ADMINISTRATOR	EMAIL
Amanda Doane	doanea@michigan.gov

AGREEMENT SUMMARY			
SERVICE DESCRIPTION	Adoption		
GEOGRAPHIC AREA	Statewide		
INITIAL EFFECTIVE DATE	October 1, 2011	CURRENT EXPIRATION DATE	September 30, 2015
CURRENT AGREEMENT VALUE	\$1,116,000.00		
CONTRACT TYPE	Unit Rate		

AMENDMENT DESCRIPTION			
EXTEND EXPIRATION DATE	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO	NEW EXPIRATION DATE September 30, 2016
AMENDMENT AMOUNT	ESTIMATED REVISED AGGREGATE AGREEMENT VALUE		
\$	<input type="checkbox"/> INCREASE	<input type="checkbox"/> DECREASE	\$1,116,000.00
NATURE OF CHANGE	This amendment will revise the contract language and extend the contract for one year using the second of two option years		

The undersigned have the lawful authority to bind the Contractor and DHHS to the terms set forth in this Agreement.

FOR THE CONTRACTOR:

St. Vincent Catholic Charities
 Contractor

Andrea E. Seyka
 Signature of Director or Authorized Designee

ANDREA E. SEYKA
 Print Name

8/31/15
 Date

FOR THE STATE:

DEPARTMENT OF HEALTH & HUMAN SERVICES

Kim Stephen
 Signature of Director or Authorized Designee

Kim Stephen
 Print Name

9-8-15
 Date

Agreement Number: A12-33001
Amendment Number: 7

<u>Agreement Period</u>	<u>Amount</u>
October 1, 2011 through September 30, 2016	\$1,116,000.00
Total Amount:	\$1,116,000.00

Check all contract years affected by this amendment:

Year 1 Year 2 Year 3
 Year 4 Year 5 Year 6

**STATE OF MICHIGAN
DEPARTMENT OF HEALTH & HUMAN SERVICES**

WHEREAS, the Department of Health & Human Services of the state of Michigan (hereinafter referred to as "DHHS") entered into a contractual Agreement effective October 1, 2011, with St. Vincent Catholic Charities (hereinafter referred to as "Contractor"), having a mailing address of 2800 West Willow, Lansing, MI 48917-1833, for the provision of certain services as set forth therein; and,

WHEREAS, it is mutually desirable to DHHS and to the Contractor to amend the aforesaid Agreement.

THEREFORE, in consideration of the promises and mutual covenants hereinabove and hereinafter contained, the parties hereto agree to the following amendment of said Agreement. This amendment shall be attached to the Agreement, said Agreement being hereby reaffirmed and made a part hereof.

Article I

This amendment shall be effective on the date of DHHS signature or October 1, 2016, whichever is later.

*2015 ZH
9-3-15*

Article II

DHHS will exercise the second of two, one-year options to extend. Therefore, the end date of the Agreement shall be changed from September 30, 2015 to September 30, 2016.

Article III

Section I., CONTRACTOR RESPONSIBILITIES and Section II., DEPARTMENT RESPONSIBILITIES of the aforesaid Agreement will be deleted in their entirety and replaced as follows:

Agreement Number: A12-33001
Amendment Number: 7

I. CONTRACTOR RESPONSIBILITIES

A. Obligations

The Contractor shall comply with all of its obligations pursuant to this Agreement. Failure by the Contractor to cure a breach, if requested in writing by DHHS, will be considered a breach of this Agreement, and DHHS may terminate this Contract pursuant to the provisions of Section III. Q. 3. of this Agreement.

If the Contractor fails to comply with obligations set forth in this Agreement, and within the mutually established period of time, DHHS may, at its discretion, invoke sanctions on the Contractor which may include actions to collect disallowed costs and cancellation or termination of the Agreement under the provisions of Section III. Q. of this Agreement

B. Email Address

The Contractor authorizes DHHS to use the contact information below to send Agreement related communications. The Contractor shall provide DHHS with updated contact information if it changes. The Contractor confirms that this person is either authorized to sign Agreements or is recognized by this organization to assume this responsibility.

Contact email address: seykaa@stvcc.org

C. Requests for Information

The Contractor may be required to meet and communicate with DHHS representatives and from time to time DHHS may require that the Contractor create reports or fulfill requests for information as necessary to fulfill the DHHS' obligations under statute. The Contractor agrees that it will comply with DHHS' requests for information or requests for reports as required in this subsection.

D. Licensing

The Contractor shall ensure that, for the duration of this agreement, it shall maintain a license for those program areas and services that are provided for in this Agreement. If the Contractor fails to comply with this section, DHHS may terminate this Agreement for default.

The Contractor is licensed to provide service under this agreement under the following license number(s): CB330201019

Agreement Number: A12-33001
Amendment Number: 7

E. Geographic Area

The Contractor shall perform activities described herein in the following geographic area: Statewide

F. Location of Facilities

The Contractor shall provide services described herein at the following location(s): 2800 West Willow, Lansing, MI 48917

G. Client Eligibility Criteria

1. Eligible clients

The Contractor shall perform activities for Michigan permanent wards that are Title IV-E funded and Michigan Children's Institute (MCI) wards for which adoption is the plan or for children from a participating Inter-State Compact (ICPC) state's child welfare system that has been referred for adoption services to Michigan through ICPC.

2. Method for Determination of Eligibility

Determination of eligibility will be made by DHHS.

H. Program Statement

The Contractor shall provide DHHS with copies of its program statements for all programs covered under this Agreement. The program statement shall comply with the requirements of DHHS Division of Child Welfare Licensing (DCWL) standards specific to the license listed in Section I(D) and DHHS policy. The Contractor shall inform DHHS of any changes made to the program statement at any point during the term of this Agreement and provide copies of the new statement to DHHS within 60 days.

I. Credentials

The Contractor shall assure that all staff performing functions under this Agreement, including contractor employees and/or subcontractors, are appropriately credentialed or trained.

J. Compliance with DHHS Modified Settlement Agreement and Consent Order

Agreement Number: A12-33001
Amendment Number: 7

The Contractor shall ensure compliance with the applicable requirements of the Dwayne B. v. Rick Snyder Modified Settlement Agreement and Consent Order.

K. Services to be Provided

The Contractor shall comply with all applicable DHHS policy and DHHS policy amendments. Throughout the terms of this Agreement, the Contractor shall ensure that it provides all applicable DHHS policy and DHHS policy amendments to social service staff. The Contractor shall ensure that social service staff complies with all applicable requirements. DHHS policies and DHHS policy amendments are published on the following internet link: <http://www.michigan.gov/dhs>.

The Contractor shall comply with the DHHS non-discrimination statement:

Michigan Department of Health and Human Services (DHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability.

The above statement applies to all applications filed for adoption of DHHS supervised children, including DHHS supervised children assigned to a contracted agency.

If DHHS makes a referral to a child placing agency for adoption services pursuant to a contract with the child placing agency, the child placing agency must accept or decline the referral within seven working days of receipt of the referral from foster care. Reasons for declining a referral must be documented in MiSACWIS.

Additional Requirements:

1. General Adoption Responsibilities

- a. Place the child for adoption under the provisions of this Agreement or assist in the child's placement by another private agency or DHHS local office.
- b. The Contractor that has the identified adoptive family shall be the agency to perform adoptive activities including: placement, case management, supervision and court related requirements.
- c. When the Contractor has an identified adoptive family for a child under supervision of another agency the Contractor shall work

Agreement Number: A12-33001
Amendment Number: 7

cooperatively with the child's agency in coordinating and sharing responsibility for pre- placement activities and associated costs for transportation and other case services.

- d. When a placement for adoption disrupts or a finalized adoption dissolves within eighteen (18) months of the date of the order for placement or finalization the Contractor shall be, unless ordered or directed otherwise by the Court or DHHS, responsible to provide full adoption services for the child/youth as detailed in this contract. The responsible contractor is defined as the Contractor that had adoption planning responsibilities for the child when the initial adoption placement occurred. The exception shall be in a contested case where a child is placed in an adoptive home against the recommendation of the contractor.
 - e. Provide guidance to the child's foster parent in preparation of the child for adoption or in facilitating a transfer of the child's attachment to the adoptive parents.
 - f. In instances where the child's agency has performed pre-placement activities for the adoptive family's agency, the adoptive family's agency shall provide the child's agency with a copy of the court order placing the child in the adoptive home within thirty (30) working days, after receipt of said order.
 - g. The Contractor shall develop plans for the effective use of cross- jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children. This shall include photo listing on the MARE website, networking with other private agencies in determining availability of resource families and other recruitment activities that are statewide and national in nature. The Contractor shall respond to and actively work with, prospective adoptive parents outside of the State of Michigan.
 - h. The Contractor shall maintain documentation of completion of the above listed requirements in the child's adoption case file for review by DHHS.
2. Adoption Recruitment, Orientation and Training
- a. The Contractor shall provide adoption recruitment activities in collaboration with other private agencies and DHHS local offices to focus on children registered on Michigan Adoption Resource Exchange (MARE).

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- b. The Contractor shall work cooperatively with other contracted adoption agencies, DHHS and trained adoptive parents to provide orientation and training. It is recommended that adoptive parent peer mentors be matched to prospective and new adoptive parents.
- c. The Contractor shall involve youth in the planning and organizing of adoption recruitment events.
- d. The Contractor shall develop supports for children and youth moving to permanency through adoption. Best practice research indicates that support groups, peer mentors, informational sessions and individual counseling are effective tools. Developing appropriate rituals and recognition for the transitions experienced shall be part of the adoption process.
- e. The Contractor shall be responsible for providing information to the prospective adoptive parent(s) regarding the adoption assistance programs on behalf of all children available for adoption. If the Contractor fails to provide information, fails to apply for adoption assistance or finalizes an adoption prior to the execution of an adoption assistance agreement, and it is later determined that the child was eligible for adoption assistance, the Contractor shall be responsible for providing financial support to the family equal to the adoption assistance amount and eligible Medicaid coverage, from the time the family makes the request for the re-determination of eligibility and the date DHHS determines that an error occurred based on the Contractor's failure to inform or apply for adoption assistance.

3. MARE Related Responsibilities

The Contractor shall cooperate with MARE related activities and responsibilities, as detailed in this document including but not limited to:

- a. The Contractor shall appropriately inform and prepare children concerning the process of photo listing. Children shall be adequately attired and well groomed. Adequately attired is defined as that which a parent would provide for their child in a school photo. The Contractor is responsible for securing photography services and may request coupons or assistance from the MARE office. The Contractor is responsible for facilitating transportation to key photo sites and supervision of the child(ren) during the process.
- b. The Contractor shall, as appropriate to the child's ability, involve

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- youth over age nine (9) in developing individual recruitment materials and narratives for MARE photo listing.
- c. The Contractor must submit a copy of the Order Placing Child after Consent to the MARE office within ten (10) working days of its issuance by the court.
 - d. Upon determination by the Contractor that the MARE potential family 'match' is appropriate, the child and family agencies shall begin the process towards adoption within ten (10) working days.
 - e. The Contractor shall provide a written brochure (developed by MARE) to adoptive families regarding their right to be included in the MARE prospective family registry and provide an explanation of this process during orientation. This brochure and information shall again be provided to the prospective family during the formal training process.
 - f. The Contractor shall ensure all age appropriate youth available for adoption have knowledge of and access to the MARE newsletter for youth.
 - g. The Contractor shall notify MARE no less than quarterly of planned adoption related events, scheduled or tentatively scheduled for the next quarter. These activities shall include but are not limited to orientation, training dates, workshops, adoption fairs, recruitment activities, post adoption support activities and guest speakers. The Contractor will indicate if the events are open to the public or limited to a specific audience and any costs for family participation.
 - h. If the local court is participating, the Contractor shall cooperate with MARE during planning and implementation of National Adoption Day activities and regionally based adoption events.
 - i. The Contractor shall ensure MARE staff has access to case records, the child, child's worker, and other material or persons necessary for the development and updating of the child's MARE file and recruitment material.
 - j. The Contractor shall submit the completed Disruption/Dissolution survey to MARE within thirty (30) days of receipt of the survey from MARE.
 - k. The Contractor shall provide to MARE by October 30th of each year

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the following:

- 1) The address of all offices.
 - 2) Names, telephone numbers and email addresses of all adoption workers and supervisors.
 - 3) Types of services provided by the Contractor.
- I. The Contractor shall ensure that a supervisor attends the regionally based MARE informational session annually. This individual shall then be responsible to disseminate MARE information and material to appropriate agency staff.

L. Performance Outcomes

1. Fewer than 5% of placements for adoption will end in disruption.
2. Fewer than 5% of finalized adoptions will end in dissolution.
3. By September 30, 2016, not less than 80% of children with a goal of adoption that are legally free for adoption on September 30, 2015 shall have adoptions finalized.
4. By September 30, 2016, not less than 80% of the number of children with a goal of adoption that are legally free for adoption on September 30, 2015 will have the adoption petition filed with the court.

M. Unit Definitions

1. Unit Title: Per Diem Payments
For each child where the adoption case is referred to the Contractor by DHHS except for cases in which the Contractor has responsibility for the foster care case, the Contractor shall receive payment of \$20.00 per diem for each day of adoptive services from acceptance of the case to date of the signed documentation from the court (as determined by DHHS) verifying that the court has accepted the adoption petition and support documentation, or for one hundred fifty (150) days, whichever comes first. The maximum per diem payment amount per child is \$3,000.

The total amount paid for the per diem rate will be deducted from the applicable placement rate when the child is placed for adoption.

The Contractor must submit the Individual Service Agreement (DHS-3600) (for Adoption Services) with the date of acceptance indicated and the completed Adoption Payment Voucher (DHS-1582A).

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2. Unit Title: Placement

All unit definitions below are based on the length of time from the receipt of the written order from the court terminating all parental rights or, the date on which the DHS-3600 is fully executed, if the case has been transferred from DHHS to the Contractor, whichever is later; to the date of the signed documentation from the court (as determined by DHHS) verifying that the court has accepted the adoption petition and support documentation.

If the child's goal changes from adoption to another goal and then changes back to the goal of adoption, the Contractor must obtain a new DHS-3600 (or the applicable court orders for cases in which the agency has foster care responsibility) for adoption services for the updated goal of adoption.

The Contractor must submit the Order Terminating Parental Rights, signed and dated documentation from the court (as determined by DHHS) verifying the date that the court has accepted the adoption petition and support documentation, the Adoption Petition documentation and the Acceptance of Case Transfer documents if applicable. The document indicating the date of acceptance must be signed by a DHHS representative as verification. If there was a per diem payment for the case prior to placement the Contractor must denote "per diem billed" in box 13 of the DHS-1582A.

3. Unit Title: Finalization

Unit Definition: One unit equals receipt of an Order of Adoption for a child for whom a Placement rate was paid.

4. Unit Title: Permanency

Unit Definition: One unit equals an adoption that does not end in dissolution within 182 days of the issuance of an Order of Adoption. The Permanency Unit Rate shall be paid at the same time as the Finalization Unit Rate. The Contractor will be responsible for repayment of the Permanency Unit Rate for those cases for which the adoption ended in dissolution as documented in the DHHS annual Child and Family Services Review (CFSR) report.

5. Unit Title: Baseline

Unit Definition: The Adoption Petition documentation or Order Placing Child is signed and dated by the court more than two hundred ten (210) days, but two hundred forty (240) or fewer days after the date of placement as defined in Subsection I. M. 2 above.

6. Unit Title: Early Adoption Incentive - Level 1

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Unit Definition: The Adoption Petition documentation or Order Placing Child is signed by the court more than one hundred fifty (150) but two hundred ten (210) or fewer days after the date of placement as defined in Subsection I. M. 2 above.

7. Unit Title: Early Adoption Incentive - Level 2

Unit Definition: The Adoption Petition documentation or Order Placing Child is signed and dated by the court one hundred fifty (150) or fewer days after the date of placement as defined in Subsection I. M. 2 above.

8. Unit Title: Late Adoption Penalty - Level 1

Unit Definition: The Adoption Petition documentation or Order Placing Child is signed and dated by the court more than two hundred forty (240) days, but three hundred (300) or fewer days after the date of placement as defined in Subsection I. M. 2 above.

9. Unit Title: Late Adoption Penalty - Level 2

Unit Definition: The Adoption Petition documentation or Order Placing Child is signed and dated by the court more than three hundred (300) days, but three hundred sixty (365) or fewer days after the date of placement as defined in Subsection I. M. 2 above.

10. Unit Title: Late Adoption Penalty - Level 3

Unit Definition: The Adoption Petition documentation or Order Placing Child is signed and dated by the court more than three hundred sixty (365) days after the date of placement as defined in Subsection I. M. 2 above.

11. Unit Title: MARE

Unit Definition: The Order Placing Child is signed and dated by the court for a child who has been registered for photo listing on MARE.

The Contractor is not eligible for the MARE rate if the Contractor photo lists the child. The exception to allow for payment of the MARE rate to the supervising agency requires the Contractor to submit a written request verifying that the child was photo listed for six (6) months and documentation must be provided to demonstrate the family is a newly approved recruited family and the following conditions are true:

- a. The identified family is not a relative or foster parent to the adoptive child.
- b. The identified family has not previously provided care for the child.

The Contractor is eligible for the MARE rate if the child's foster care case remains with D H H S and, at the time of referral, there was no

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identified adoptive resource. The Contractor must register the child for photo listing within 30 days of acceptance of the case if no adoptive resource has been identified. If the Contractor applies for the MARE rate there must be a written explanation of why the adoptive family was not identified as a potential adoptive resource within the first 30 days after acceptance of the case.

12. Unit Title: Residential

Unit Definition: The Order Placing Child is signed and dated by the court for a child who has been placed in residential care (defined as staffed institutional care, not including foster group homes) and the child is under the Contractor's supervision for Adoption Services.

13. Unit Title: MARE and Residential Rate with Pre-placement

Unit Definition: When a child photo-listed with MARE or in a Residential facility is placed into a prospective adoptive home through a foster care placement to allow for a period of adjustment and supervision (prior to petition to place for adoption), the reimbursement for the appropriate rate shall be calculated based on the date the pre-placement began.

The MARE, and Residential Rate will be applied when the court signs the Order Placing Child within two hundred seventy (270) days of placing the child in the home for foster care services.

14. Unit Title: In-State Transfer Services

Unit Definition: The Contractor completes satisfactory services requested for pre-placement activities for a child under the supervision of the Contractor and referred for adoptive placement to another contractor or DHHS local office. The DHHS monitor for the foster care case shall define satisfactory services.

15. Unit Title: Interstate Existing Services

Unit Definition: A child under the adoption services supervision of the Contractor is referred for adoptive placement through a private or public agency in the state where the adoptive family resides and the child has previously been placed with the family through Interstate foster/relative care prior to termination of parental rights and assignment of an adoption worker.

16. Unit Title: Interstate New Services

Unit Definition: A child under the adoption services supervision of the Contractor is referred for adoptive placement through a private or public agency in the state where the adoptive family resides and the child

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has not been placed with the family through Interstate foster/relative care prior to termination of parental rights and assignment of an adoption worker.

17. Unit Title: ICPC Referred from Other U.S. States

A child under the child welfare system of another ICPC participating state is referred to Michigan for adoption services through ICPC. DHS-3600 (for Adoption Services) is required from the local Michigan county.

18. Unit Title: Competing Parties

More than one party is interested in adopting a particular child or sibling group and is assessed by the contractor in one of the following formats: Preliminary Adoptive Family Assessment, BCAL 3130 Initial Foster Home/Adoption Evaluation, or DHHS 612, Adoptive Family Assessment Addendum. The rate paid on a competing parties' case shall not fall below the "Baseline" rate category, unless an agency has failed to act according to the timeframes outlined in policy.

N. Adoptive Family Records

The Contractor shall retain in the case record verification of training provided to the adoptive family including but not limited to:

1. Type of training provided.
2. Date training provided.
3. Subject material covered during training.
4. Actual signature of participants at the specified training.

O. Service Documentation

The Contractor agrees to maintain personnel time reporting, accounting and payroll records to document staff activities.

P. Fiscal and Compliance Requirements

1. The Contractor shall maintain a record system that documents the total number of units of service as defined in this Agreement and delivered during the term of this Agreement. These records shall also document the specific units billed to DHHS under this Agreement.
2. The Contractor shall participate in random moment time studies (RMTS). An RMTS is a process where participants are emailed short surveys and asked to indicate what they are doing at an assigned time. The time study is required to determine the amount of time spent on various activities. Based on these results, DHHS determines the amount that can be charged to various funding sources.

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Q. Billing Method

The Unit Rate Billing Method shall be used in claiming reimbursement under this Agreement.

R. Billing Procedure

The Contractor shall submit a DHS-1582A to:

Michigan Department of Health and Human Services
Office of Child Welfare Policy and Programs
Suite 514 PO Box 30037
Lansing, MI
48909

The DHS-1582A shall indicate the title of the service provided and the pre adoptive and adoptive name, case number and date of birth of the child served. The DHS-1582A and any subsequent corrections must be completed and received in the Office of Child Welfare Policy and Programs within 120 days of the date of the placement or finalization, whichever is applicable, as those terms are defined in Section I(M)(2-3) of this Agreement.

1. Billing for all designated services including: per diem, placement, finalization, permanency, immediate confirmation or disruptions require a copy of the Order Terminating Parental Rights (Permanent Court Ward/Commitment), and the signed and dated documentation by the court (as determined by DHHS) verifying the date that the court has accepted the adoption petition and support documentation.
2. The MARE rates require a copy of the MARE photo listing.
3. The Residential rate requires a copy of the discharge summary from the residential facility and a copy of the placement record including placement with the prospective adoptive parent prior to filling the petition.
4. Billing for finalizations requires a copy of the Order of Adoption.
5. Billing for delayed referrals must include a copy of the Contractors acceptance form with the referral date and statement by DHHS that includes the child's commitment date. The referral form must be signed by a DHHS representative and must have "Delayed Referral" designated on the payment voucher.
6. Billing for placement requires a copy of the referral/acceptance form,

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Order Terminating Parental Rights and Order Placing Child.

7. Disruptions require an Ex Parte Order, or order dismissing, a copy of the initial placement order, initial commitment order, documentation verifying the medical condition of the family member if appropriate, a copy of the placement check and agency disruption report.
8. **Legal Risk–Order Placing Child Filed:** In cases where a birth parent, individually or through an attorney, has filed a petition to appeal the termination of parental rights the Contractor shall submit a DHS-1582A requesting payment (placement and finalization). The Contractor must also submit a photocopy of the Claim, filed in conformity with MCR 7.203.
9. When billing for the per diem, each payment voucher shall be child specific. Attached to the initial payment voucher the following documents must be included: the DHS-3600 (for Adoption Services) with the date of acceptance indicated and the signed agreement of intent to adopt by a relative or identified family (for matched cases only). Billings shall be submitted on a monthly basis. The Contractor shall identify in Box 13 of the payment voucher the number of days covered, date range, and the number of per diem billings submitted on behalf of the child.
10. When requesting an exception to the payment rate, it is the responsibility of the Contractor to demonstrate that requests for adoption assistance eligibility determination or MCI consent delayed the adoption placement. If the delay was caused by submission of incomplete paperwork or a lack of response to requests for information, the consideration for exception will be denied. There is a thirty (30) day standard of promptness for adoption assistance eligibility determinations and MCI regular and expedited consent requests and a ninety (90) day standard of promptness for MCI consent requests on competing parties. If information is missing, incomplete, or unclear and needing follow-up, the standard of promptness timeframe will not begin until all needed information is available for review, including legal documents and information needed to fulfill policy requirements. The request for exception must be submitted with the completed DHS-1582A.
11. The ICPC rate(s) require copies of the ICPC referral, DHS-3600 (for Adoption Services), adoptive family home study, adoption supervision reports (if applicable), Order Terminating Parental Rights (Permanent Court Ward/Commitment), Adoption Petition documentation and Order of Adoption, if applicable.
12. Billings for competing parties, in which the case would be eligible for a

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rate less than the Baseline rate and the Contractor is requesting the Baseline rate, requires copies of the case acceptance documentation, dates of the initial inquiry from each competing party and copies of the assessment for each competing party.

S. Criminal Background Check

As a condition of this Agreement, the Contractor certifies that the Contractor shall, prior to any individual performing work under this Agreement, conduct or cause to be conducted for each new employee, employee, subcontractor, subcontractor employee or volunteer who works directly with:

1. Clients under this Agreement, or who has access to client information, an Internet Criminal History Access Tool (ICHAT) check and a National and State Sex Offender Registry check.

Information about ICHAT can be found at <http://apps.michigan.gov/ichat>.

The Michigan Public Sex Offender Registry web address is <http://www.mipsor.state.mi.us>.

The National Sex Offender Public Website address is <http://www.nsopw.gov>.

2. Children under this Agreement, a Central Registry (CR) check.

Information about CR can be found at <http://www.mi.gov/dhs/0,1607,7-124-5452-7119-48330-180331-,00.html>.

The Contractor shall require each employee, subcontractor, subcontractor employee or volunteer who works directly with clients or who has access to client information, under this Agreement to timely notify the Contractor in writing of criminal convictions (felony or misdemeanor) and/or pending felony charges or placement on the Central Registry as a perpetrator.

Additionally, the Contractor shall require each new employee, employee, subcontractor, subcontractor employee or volunteer who works directly with clients under this Agreement or who has access to client information and who has not resided or lived in Michigan for each of the previous ten (10) years to sign a waiver attesting to the fact that they have never been convicted of a felony or identified as a perpetrator, or if they have, the nature and recency of the felony.

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The Contractor further certifies that the Contractor shall not submit claims for or assign to duties under this Agreement, any employee, subcontractor, subcontractor employee, or volunteer based on a determination by the Contractor that the results of a positive ICHAT and/or a CR response or reported criminal felony conviction or perpetrator identification make the individual ineligible to provide the services.

The Contractor must have a written policy describing the criteria on which its determinations shall be made and must document the basis for each determination. The Contractor may consider the recency and type of crime when making a determination. Failure to comply with this provision may be cause for immediate cancellation of this Agreement. In addition, the Contractor must further have a written policy regarding acceptable screening practices of new staff members and volunteers who have direct access to clients and/or client's personal information, which serve to protect the organization and its clients that is clearly defined. The Contractor must also assure that any subcontractors have both of these written policies.

If DHHS determines that an individual provided services under this Agreement for any period prior to completion of the required checks as described above, DHHS may require repayment of that individual's salary, fringe benefits, and all related costs of employment for the period that the required checks had not been completed.

T. Adoptive Homes Recruitment, Retention and Support

The Contractor shall develop and implement a plan for adoptive home recruitment, retention, and support consistent with the DHHS DCWL Licensing Standards specific to the Contractor's license specified in Section I(D) and as detailed in Section VIII, Services and Placement Resources, Development and Utilization of the Modified Settlement Agreement.

U. Additional Provisions

The Contractor shall comply with the provisions of:

1. 1984 Public Act, 114, as amended, being M.C.L. 3.711 *et seq.*, Interstate Compact on the Placement of Children.
2. 1939 Public Act 288, Chapter X, being M.C.L. 710.1 *et seq.*, Michigan Adoption Code.
3. 1984 Public Act 203, as amended, being M.C.L. 722.951 *et seq.*, Michigan Foster Care and Adoption Services Act.
4. The Social Security Act as amended by the Multiethnic Placement Act

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of 1994 (MEPA); Public Law 103-382, and as amended by Section 1808 of the Small Business Job Protection, the Interethnic Adoption Provision (IEAP).

5. The Indian Child Welfare Act (ICWA); Public Law 95-608 being 25 U.S.C. 1901 *et seq.*
6. P.L. 110-351, known as the Fostering Connections to Success and Increasing Adoptions Act of 2008

V. Private Agency MiSACWIS

The Contractor shall ensure that Adoption/Social Service staff has access to the Michigan Statewide Automated Child Welfare Information System (MiSACWIS) through a web-based interface. Requirements for MiSACWIS for CPA Contracts may be found at: http://www.michigan.gov/documents/dhs/Private_Agency_MiSACWIS_for_CPA_Contracts_461044_7.doc?20140701073234

W. Financial Audit Requirements

1. The Contractor shall have an annual financial statement audit conducted by an independent certified public accountant. Audits must be conducted in compliance with Generally Accepted Accounting Principles (GAAP) Auditing Standards (GAAS) and all federal audit requirements.
2. The Contractor shall submit to DHHS – Office of Contracts and Purchasing (OCP), no later than the fifteenth day of the ninth month following the end of the Contractor's fiscal year, copies of:
 - a. Audited financial statements.
 - b. The Independent Auditor's Report to the Contractor.
 - c. A Supplemental Schedule of Expenditures (SSE) completed in accordance with the SSE instructions. The SSE shall identify actual costs incurred for services performed under this Agreement for the period covered in the annual financial audit. Failure to submit the SSE with the annual financial audit may result in delay in payment or non-payment by DHHS for administrative costs incurred or services rendered by the Contractor. Instructions for the SSE can be found at http://www.michigan.gov/documents/dhs/DHS-0573_351803_7.pdf

Reports shall be submitted electronically to DHS-OCP@michigan.gov.

Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

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3. If an OMB-A133a Single Audit is required because of other Federal funding sources, the Contractor is required to provide the Audit report and all opinions and management letters to DHS-OCP@michigan.gov. The Audit must be submitted no later than the fifteenth day of the ninth month following the end of the Contractor's fiscal year.

X. Cost Reporting

The Contractor shall submit annual financial cost reports based on the state's fiscal year which begins October 1 and ends September 30 in the following calendar year. The reports shall contain the actual costs incurred by providers in delivering services required in this agreement to DHHS clients for the reporting period. Costs for non- DHHS children are not to be included. Reports will be submitted using a template provided by DHHS. The financial reports shall be submitted annually, and will be due November 30th of each fiscal year. The Contractor must comply with all other program and fiscal reporting procedures as are or may hereinafter be established by DHHS. Reports shall be submitted electronically to DHS-OCP@Michigan.gov with the subject line: Adoption Actual Cost Report.

II. DEPARTMENT RESPONSIBILITIES

A. Referrals

1. At the time of referral to a private agency, DHHS shall provide that agency with a complete referral packet as prescribed in Section 210 of the Adoption Services Manual (ADM 210).
2. When an eligible child is photo-listed on MARE and the Contractor notifies the local DHHS county office that the Contractor has a studied and approved available family, DHHS shall send a copy of the case file to the Contractor within ten (10) working days of receipt of notification.

B. Payment

DHHS shall make payments to the Contractor pursuant to MCL 17.51-17.57 and State of Michigan Financial Management Guide, Part II- Accounting and Financial Reporting, Chapter 25, Section 100, "Prompt Payment for Goods and Services."

1. DHHS shall make the following payments to the Contractor:

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Rate Category	Placement	Finalization	Permanency
Early Adoption Incentive Level 2	\$6,900	\$3,450	\$1,150
Early Adoption Incentive Level 1	\$6,000	\$3,000	\$1,000
Baseline	\$5,400	\$2,700	\$900
Late Adoption Penalty Level 1	\$4,800	\$2,400	\$800
Late Adoption Penalty Level 2	\$4,200	\$2,100	\$700
Late Adoption Penalty Level 3	\$3,000	\$1,500	\$500
MARE	\$12,240	\$6,120	\$2,040
Residential	\$7,980	\$3,990	\$1,330
In-State Transfer Services	\$1,800		
Inter-State Existing Services	\$1,800		
Inter-State New Services	\$3,500		
Inter-State Transfer from another ICPC participating state through ICPC (non-Michigan ward) – Adoptive Home Study Denial	\$2000		
Inter-State Transfer from another ICPC participating state through ICPC (non-Michigan ward) – Adoptive Home Study Approval	\$2000		
Inter-State Transfer from another ICPC participating state through ICPC (non-Michigan ward) – Adoption Supervision with applicable reports	\$500 at Placement	\$500 at Finalization	

2. Per Diem Payments

For each child where the adoption case is referred to the Contractor by DHHS, except for cases in which the Contractor has responsibility for the

foster care case, the Contractor shall receive payment of \$20.00 per diem for each day of adoptive services from acceptance of the case to the date of the signed documentation from the court (as determined by DHHS) verifying that the court has accepted the petition and support documentation, or for one hundred fifty (150) days, whichever comes first. The maximum per diem payment amount per child is \$3,000.

Payment of the initial placement rate: the total of all per diem payments for each child shall be deducted from the applicable placement rate to be paid as listed in Subsection II. B. 1 above.

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3. Adoption Training Payments

A payment will be made to the Contractor for each staff that completes training and passes competency tests as required in Section VI. Staff Qualifications, Training, Caseloads and Supervision of the Modified Settlement Agreement according to the following schedule:

a. Completion of the Caseworker Training

Payment will be \$6,000 for completion of a DHHS pre-service training that includes a total of nine weeks of competency-based classroom and field training within 16 weeks of hire.

b. Completion of the Child Welfare Certificate (CWC) Training

Payment will be a maximum of \$3,000, calculated on an actual cost reimbursement basis, for completion of the Child Welfare Training Institute (CWTI)-CWC training. This training includes a minimum of five weeks of competency-based classroom, and field training if the caseworker certificate holder passes the competency evaluation.

c. Completion of the Child Welfare Supervisor Training.

Payment will be a maximum of \$1500, calculated on an actual cost reimbursement basis for completion of the Supervisor Training. This includes a minimum of one week of training within 90 days of hire/promotion if the supervisor passes the competency-based evaluation including the written exam through CWTI.

d. Completion of the adoption Program Specific Transfer Training (PSTT) within 6 months of hire.

Payment will be a maximum of \$2,800, calculated on an actual cost reimbursement basis for completion of the adoption PSTT training. This training is the same as the Adoption Core Training for adoption caseworkers. If a supervisor has completed this training as a caseworker since April 1, 2006, the training does not need to be repeated. If a supervisor has not completed this training since April 1, 2006, they need to complete this PSTT Training within 6 months of hire.

4. The Contractor must submit the following with the completed DHS-1582A

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to the Adoption Services Unit in central office:

- a. A copy of the transcript reflecting the completion of the CWTI pre- service training for each adoption worker.
- b. A statement confirming that 50% of the adoption worker's caseload will be children in the DHHS foster care system.

5. Placement Disruption:

Payment after Placement for adoptions ending in disruption will only be made in the following cases:

- a. Disruption Due to Medical Condition of Prospective Family Member: If the adoptive family experiences a documented chronic medical condition requiring long term care or a condition anticipated to result in the death of a family member after the adoptive placement of a child, the Contractor shall be eligible for a per-diem rate. The payment shall be a portion of the appropriate rate for finalization, which shall be established by dividing the duration (number of days) of the adoptive placement until disruption by 182 days. The disruption rate shall not exceed the rate that would have otherwise been paid had finalization occurred.
- b. Death of an Adoptive Child: In cases where a child dies between order placing in the adoptive home and the final order of adoption, the Contractor shall be eligible for a per-diem from the date of placement to the date of death (unless cause of death is determined to be neglect or abuse) not to exceed the rate that would have otherwise been paid had finalization occurred.
- c. Disruption after Order Placing Child in the adoptive home: When the disruption order is issued more than 182 days from the date of the order placing the child in the adoptive home, the Contractor shall be paid the full finalization rate.
- d. Disruption of Placement Determined by MCI Superintendent: In a case where the child is placed in a home based on the decision of the MCI Superintendent, against the recommendation of the Contractor, the Contractor shall be eligible for a per-diem rate. The payment shall be a portion of the appropriate rate for finalization, which shall be established by dividing the duration (number of days) of the adoptive placement until disruption by 182 days. The disruption rate shall not exceed the rate that would have otherwise been paid

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had finalization occurred. Payment for subsequent placements will not reflect a disruption.

6. Adoption Dissolution:

DHHS shall recover, from the Contractor, the Permanency Unit Rate for adoptions that end in dissolution within 182 days of issuance of an Order of Adoption as documented in the Department's annual Child and Family Services Review (CFSR) report.

7. Payment – Re-Placement of Child after Disruption by Same Contractor:

Re-placement of child photo listed on MARE or from a Residential facility:

Subsequent adoptive placement and finalization by the same Contractor (that placed the child in the disrupted/dissolved home) for a child previously reimbursed at one of the MARE rates or the Residential rate, shall not exceed the Baseline rate for a second adoptive placement/finalization. The maximum rate for any re-placement of a child photo listed on MARE or from a Residential facility beyond the second placement shall not exceed the Late Adoption Penalty Level 3 rate if paid to the same Contractor.

Re-placement by the same Contractor of a child under any rate other than a MARE or Residential rate shall not exceed the Baseline rate.

Exceptions may be made to the re-placement rate. The Contractor must submit documentation of efforts that were required to prepare a child for subsequent placement and the recruitment of an adoptive family. Submit request for exceptions to the Adoption Analyst in DHHS Central Office and stipulate the rate requested.

C. Performance Evaluation and Monitoring

The services provided by the Contractor under this Agreement shall be evaluated and assess at least annually by DHHS on the basis of the criteria outlined in Section I. L.

DHHS shall perform contract monitoring through activities such as:

1. Performance reviews at outlined in Section III. U. of this Agreement.
2. Compliance audits as outlined in Section III. G. 2. of this Agreement.

EXHIBIT

F

AGREEMENT NUMBER: PAFC15-33001

AMENDMENT NUMBER: 3

Between

THE STATE OF MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN SERVICES

And



CONTRACTOR	St. Vincent Catholic Charities
CONTRACTOR ADDRESS	2800 W. Willow Street, Lansing, Michigan 48917-1833
CONTRACTOR EMAIL	seykaa@stvcc.org

CONTRACT ADMINISTRATOR	EMAIL
Sarah Goad	GoadS@michigan.gov

AGREEMENT SUMMARY			
SERVICE DESCRIPTION	Placing Agency Foster Care		
GEOGRAPHIC AREA	Statewide		
INITIAL EFFECTIVE DATE	October 1, 2014	CURRENT EXPIRATION DATE	September 30, 2016
CURRENT AGREEMENT VALUE	\$1,790,000.00		
AGREEMENT TYPE	Unit Rate/Per Diem		

AMENDMENT DESCRIPTION			
EXTEND EXPIRATION DATE	<input checked="" type="checkbox"/> YES	NEW EXPIRATION DATE	September 30, 2017
AMENDMENT AMOUNT		ESTIMATED REVISED AGGREGATE AGREEMENT VALUE	
\$895,000.00	<input checked="" type="checkbox"/> INCREASE	\$2,685,000.00	
NATURE OF CHANGE	This amendment extends this Agreement for one year, adds money, changes the Agreement format and changes Agreement language that pertains to MDHHS organizational name changes, Cost Accounting, Financial Audit Requirements and Modified Settlement Agreement.		

The undersigned have the lawful authority to bind the Contractor and the Michigan Department of Health and Human Services (MDHHS) to the terms set forth in this Agreement.

FOR THE CONTRACTOR:	FOR THE STATE:
St. Vincent Catholic Charities	MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES
Contractor	Signature of Director or Authorized Designee
Signature of Director or Authorized Designee	Kim Stephen
ANDREA E. SEYKA	Print Name
Print Name	7/8/16
6/15/16	Date
Date	

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	<u>Agreement Period</u>	<u>Amount</u>
Year 1	October 1, 2014 through September 30, 2015	\$895,000.00
Year 2	October 1, 2015 through September 30, 2016	\$895,000.00
Year 3	October 1, 2016 through September 30, 2017	\$895,000.00
Total Amount:		\$2,685,000.00

Check all agreement years affected by this amendment:
 Year 1 Year 2 Year 3
 Year 4 Year 5 Year 6

**STATE OF MICHIGAN
 DEPARTMENT OF HEALTH & HUMAN SERVICES**

WHEREAS, the Department of Health & Human Services of the state of Michigan (hereinafter referred to as "MDHHS") entered into a contractual Agreement effective October 1, 2014, with St. Vincent Catholic Charities (hereinafter referred to as "Contractor"), having a mailing address of 2800 W. Willow Street, Lansing, Michigan 48917-1833, for the provision of certain services as set forth therein; and,

WHEREAS, it is mutually desirable to MDHHS and to the Contractor to amend the aforesaid Agreement.

THEREFORE, in consideration of the promises and mutual covenants hereinabove and hereinafter contained, the parties hereto agree to the following amendment of said Agreement. This amendment shall be attached to the Agreement, said Agreement being hereby reaffirmed and made a part hereof.

Article I

This amendment shall be effective on the date of MDHHS signature.

Article II

MDHHS will exercise the first of two, one-year options to extend. Therefore, the end date of the Agreement shall be changed from September 30, 2016 to September 30, 2017.

Article III

The maximum dollar amount of the Agreement shall be increased by \$895,000.00 from \$1,790,000.00 to \$2,685,000.00 for the period October 1, 2014, through September 30, 2017.

Article IV

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The following are major language changes in this amendment:

1. The amendment contains updates to the general formatting of the contract, and reflects MDHHS organizational name changes and small programmatic changes.
2. The amendment reflects necessary changes related to Dwayne B. v. Snyder, et al., 2:06-cv-13548. Language containing the term Modified Settlement Agreement is replaced with the term Implementation, Sustainability, and Exit Plan (ISEP).
3. The amendment reflects necessary changes related to the Cost Reporting and Financial Audit Requirements.

Article V

Section I., CONTRACTOR RESPONSIBILITIES, and Section II., MDHHS RESPONSIBILITIES shall be deleted and replaced with Number 1., PROGRAM REQUIREMENTS, Number 2., CONTRACTOR RESPONSIBILITIES, and Number 3., MDHHS RESPONSIBILITIES as follows:

1. PROGRAM REQUIREMENTS

1.1. Client Eligibility Criteria

a. Eligible Clients

Children for whom the family court has issued an order which makes the Michigan Department of Health and Human Services responsible for the child's placement, care and supervision.

OR

Children for whom the family court has authorized a placement in the parental home in a Trial Reunification living arrangement.

The period of time eligible for a Trial Reunification shall not exceed 180 days from the date of the child(ren)'s placement in a parental home. Child(ren) must enter Trial Reunification directly from foster care and the family court must retain jurisdiction with care and custody continuing with MDHHS.

b. Determination of Eligibility

If MDHHS makes a referral to a child placing agency for foster care case management services pursuant to a contract with the child placing agency, the child placing agency must accept or decline the referral within one hour of

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receipt of the referral. If a need for placement is imminent, MDHHS may make referrals for placement concurrently to other contracted providers. Contractor may not transfer a foster care case to another child placing agency. After acceptance of a foster care referral, the Contractor may not refer the case back to the Department except for the reasons outlined in the Children's Foster Care Manual (FOM) or upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director.

1.2. Referrals

- a. The Contractor accepts a referral from MDHHS by doing either of the following:
 - 1) Submitting to MDHHS a written agreement to perform the services related to the particular child or particular individuals that the Department referred to the Contractor; or
 - 2) Engaging in any other activity that results in MDHHS being obligated to pay the Contractor for the services related to the particular child or particular individuals that the Department referred to the Contractor.
- b. Upon placement, MDHHS shall provide the Contractor at minimum, with a court order, a Medical Authorization Card (DHS-3762), the Individual Service Agreement (DHS-3600) and all known information about the child and family.

1.3. Legal or Court Related

MDHHS shall involve the Contractor, to the extent allowed by law, in matters relating to any legal or court activities concerning the child while in the Contractor's care. If the Contractor is to be involved in the court proceedings, MDHHS shall provide the Contractor with written reports for court use upon request, subject to confidentiality requirements imposed by statute.

2. CONTRACTOR RESPONSIBILITIES

2.1. Email Address

The Contractor authorizes MDHHS to use the contact information below to send Agreement related notifications/information. The Contractor shall provide MDHHS with updated contact information if it changes.

Contact email address: seykaa@stvcc.org

2.2. Requests for Information

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The Contractor may be required to meet and communicate with MDHHS representatives and from time to time MDHHS may require that the Contractor create reports or fulfill requests for information as necessary to fulfill the MDHHS' obligations under statute and/or Dwayne B. v. Snyder, et al., 2:06-cv-13548, herein referred to as the Implementation, Sustainability, and Exit Plan (ISEP).

The Contractor shall make available to MDHHS copies of any outside reviews, non-redacted FOIA requests, or audits relating to the contracted program.

2.3. Geographic Area

The Contractor shall provide services described herein in the following geographic area: Statewide

2.4. Licensing Requirements

The MDHHS Division of Child Welfare Licensing (DCWL) is the licensing agency for Child Placing Agencies (CPA). A license is issued to a certain person or organization at a specific location, is non-transferable, and remains the property of the Department. Therefore, a child placing agency must be established at a specific location.

The Contractor shall ensure that, for the duration of this agreement, it shall maintain a license for those program areas and services that are provided for in this Agreement. If the Contractor fails to comply with this section, MDHHS may terminate this Agreement for default.

The Contractor is licensed to provide service under this agreement under the following license number: CB330201019

2.5. Location of Facilities

The Contractor shall provide services described herein at the following location(s):

2800 West Willow
Lansing, MI 48917

Direct foster care services shall be provided in client, relative caregiver, and foster parent homes.

2.6. Program Focus and Name

Placement Agency Foster Care (PAFC) is a program that provides a comprehensive and coordinated set of activities designed to place and supervise children in out of home placement.

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Foster care supervision includes the provision of services as throughout this Agreement and when necessary the referral for additional services that will enhance the child's and the family's functioning and ameliorate the conditions that caused the child's removal from parental custody.

Foster care supervision includes developing and implementing a treatment plan and service agreement to comply with the Foster Care Manual which facilitates permanency planning according to the following guidelines:

- . Reunification
- . Adoption
- . Guardianship
- . Permanent Placement with a Fit and Willing Relative.
- . Another Planned Permanent Living Arrangement (AAPLA)

2.7. Provider Numbers

MISACWIS Provider Number: 10400303

Bridges Provider Number: 6356725

2.8. Credentials

The Contractor shall assure that all staff performing functions under this Agreement, including contractor employees, volunteers and/or subcontractors, are appropriately screened, credentialed, and trained in accordance with licensing rule. Additional staff requirements are identified in Section 2.10 d. of this Agreement.

2.9. Compliance Requirements

Except in subsection (h), the Contractor shall comply with the following requirements:

- a. The Contractor shall comply with all applicable MDHHS policy in the Children's Foster Care (FOM), Guardianship (GDM), Confidentiality (SRM 131), Interstate Compact (ICM), and Adoption (ADM) Manuals and MDHHS policy amendments (including interim policy bulletins).
- b. Throughout the term of this Agreement, the Contractor shall ensure that it provides all applicable MDHHS policy and MDHHS policy amendments (including interim policy bulletins) and applicable Administrative Codes to social service staff. The Contractor shall ensure that social service staff complies with all applicable requirements.

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MDHHS policies, amendments and policy bulletins, are published on the following internet link: <http://www.michigan.gov/dhs>. Administrative Codes are published at on the following internet link: http://michigan.gov/lara/0,4601,7-154-35738_5698-118524-.00.html

- c. The Contractor shall comply with the MDHHS non-discrimination statement:

Michigan Department of Health and Human Services (MDHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.

The above statement applies to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

- d. The Contractor shall provide services within the framework of Michigan's Child Welfare Practice Model, MiTEAM. The Contractor shall utilize the skills of engagement, assessment, teaming and mentoring in partnering and building relationships with families and children by exhibiting empathy, professionalism, genuineness and respect. Treatment planning shall be from the perspective of family/child centered practice.
- e. The contractor shall ensure all directives and services ordered by the court are completed to the satisfaction of the court within the timeframes ordered.
- f. The Contractor shall participate in random moment time studies (RMTS). An RMTS is a process where participants are emailed short surveys and asked to indicate what they were doing at an assigned time. The time study is required to determine the amount of time spent on various activities. Based on these results, MDHHS determines the amount that can be charged to various funding sources.
- g. The Contractor shall assure the coordination of all services based on an assessment of the parent's needs. The Contractor shall assure the coordination and provision of all treatment services required based on an assessment of each child's needs. Treatment services include, but are not limited to the provision of counseling/therapy for each child. The Contractor shall ensure the provision of all medical, dental and behavioral health services required based on an assessment of each child's needs. The Contractor may utilize Medicaid (or private insurance) reimbursable services to comply with this requirement. If a counseling or therapy service is not available or accessible for each child, the Contractor is responsible for the direct provision of the service.

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h. Under 1973, PA 116, as amended by 2015 PA 53, the Contractor has the sole discretion to decide whether to accept or not accept a referral from MDHHS. Nothing in this Agreement limits or expands the application of this Public Act.

i. Compliance with MDHHS Implementation, Sustainability, and Exit Plan

The Contractor shall ensure compliance with all applicable provisions and requirements of *Dwayne B. v. Snyder, et al.*, 2:06-cv-13548, Implementation Sustainability and Exit Plan.

j. Prudent Parent Expectations

The Contractor shall ensure prudent parent expectations are followed as outlined in FOM 722-11, Prudent Parent Standard & Delegation of Parental Consent.

Additional Compliance Provisions

The Contractor shall comply with the provisions of:

- a. 1984 Public Act, 114, as amended being M.C.L. 3.711 *et seq.*, Interstate Compact on the Placement of Children.
- a. 1975 Public Act 238, as amended, being M.C.L. 722.621 *et seq.*, Child Protection Law.
- c. 1982 Public Act 162, as amended, being M.C.L. 450.2101 *et seq.*, Michigan Nonprofit Corporation Act.
- d. 1994 Public Act 204, as amended, being M.C.L. 722.921 *et seq.*, Michigan Children's Ombudsman Act.
- e. 1973 Public Act 116, as amended, being M.C.L. 722.111 *et seq.*, Michigan Child Care Organization Act.
- f. 1939 Public Act 288, Chapter X, being M.C.L. 710.1 *et seq.*, Michigan Adoption Code.
- g. 1984 Public Act 203, as amended, being M.C.L. 722.951 *et seq.*, Michigan Foster Care and Adoption Services Act.
- h. The Social Security Act as amended by the Multiethnic Placement Act of 1994 (MEPA); Public Law 103-382, and as amended by Section 1808 of the Small Business Job Protection, the Interethnic Adoption Provision (IEAP).
- i. The Indian Child Welfare Act (ICWA); Public Law 95-608 being 25 U.S.C. 1901 *et seq.*
- j. 1976 Public Act 453, as amended, being M.C.L. 37.2101 *et seq.*, Elliott-Larsen Civil Rights Act.
- k. Fostering Connections to Success Act of 2008
- l. Preventing Sex Trafficking and Strengthening Families Act, Federal PL 113-183

Compliance with ICWA Requirements

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The Contractor shall provide case management services in accordance with the "Active Efforts" requirements established in the ICWA; Public Law 95-608 being 25 U.S.C 1901 *et seq.* These requirements include but are not limited to the following:

- a. Establish an American Indian child as a member of a Tribe in accordance with ICWA and as defined in the MDHHS Native American Affairs (NAA) manual.
- b. Provide "Active Efforts" case management services in with in accordance with ICWA and as defined in the NAA manual.
- c. Provide placement of American Indian children in accordance with "Placement Priorities" as established in ICWA and defined in the NAA manual.
- d. Provide "Expert Witness" testimony in accordance with ICWA and as defined in the NAA manual.
- e. Provide services to American Indian families within the context of their culture and ethnicity. Maintaining knowledge in the following:
 - 1) How culture and rituals influence parenting decisions.
 - 2) Determine what services and supports will be most effective.
 - 3) Knowledge and respect of tribal practices.

2.10. Services to be Provided

a. Foster Home Licensing Data Entry

The Contractor shall document all recruitment and licensing activities into the tracking system identified by MDHHS.

b. Caseload Tracking and Reporting

The Contractor shall report to MDHHS caseload ratios for social services supervisors, social service staff and licensing staff in a format and within timeframes as determined by MDHHS.

c. Service Standards for Trial Reunification

Trial Reunification is a court-ordered placement where the child is returned from an out-of-home placement to the care of the parent or guardian from whom he or she was removed. The child remains under court supervision during the Trial Reunification period with the MDHHS retaining placement care and custody

- 1) The Contractor shall provide the following services to children in trial reunification:

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- a) Assist in preparing the parent, child, and caregiver for the transition to trial reunification. See FOM 722-7B.
- b) A Family Team Meeting prior to placement of a child in the parental home to develop a transition plan with the parent, caregiver and child, if age appropriate. The Contractor shall have Family Team Meetings quarterly until case closure. See FOM 722-06B.
- c) Complete a new Family Assessment of Needs and Strengths, Child Assessment of Needs and Strengths, and Safety Assessment and Safety Plan. See FOM 722-8A, 722-8B and 722-9B.
- d) Continue case worker visit expectations as required in FOM 722-6H.
- e) Maintain support services until case closure. The Contractor shall document services needed to continue to meet the child's needs and identified providers for such services to provide continuity of services. See FOM 722-7B.
- f) Continue assessing and monitoring of the case plan and safety plan.

d. Staff Training

1) Child Welfare Training Institute: Requirements

The Contractor shall ensure that staff transferring to a foster care social service position from another children's services position that has successfully completed the Child Welfare Training Institute (CWTI) Pre-Service Institute (PSI) training in that program, shall attend and complete CWTI-Foster Care Private Agency Program Specific Transfer Training (PSTT) within six months of assuming the foster care position.

2) Child Welfare Training Institute: Registration Process

- a) The Contractor shall register all staff required to attend CWTI training by each individual staff member using the preferred method of CWTI by going directly to the CWTI web site at <http://www.michiganchildwelfaretraining.com/>.
- b) The Contractor supervisor and/or the Contractor training facility coordinator can register Contractor staff online for any training. To cancel or change training registration, the Contractor will need to directly contact CWTI by telephone or email.
- c) Confirmations, with specific details on times and locations, will be emailed to the Contractor/trainee by MDHHS at least seven days before the training commences.

3) Foster Home Certification Supervisory Staff: Training Requirements

The Contractor shall ensure that all foster home certification supervisors successfully complete certification training, prior to assuming supervisory

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responsibility for social service workers who perform foster home licensing functions.

4) Training Documentation

The Contractor shall maintain training documentation which verifies registration and successful completion of CWTI training and DCWL Certification Training. Additionally, the Contractor shall maintain documentation of the completion of required in-service training for both social service staff and social service supervisory staff.

e. Relative Licensing

The Contractor may elect to facilitate the licensure of relative caregivers providing care to children in out-of-home placements that are under the direct care and supervision of MDHHS. Facilitation of licensure includes but is not limited to the following activities:

- 1) Accept referrals of unlicensed relative caregivers from MDHHS, for possible licensure as a foster family home, based on the Contractor's capacity to complete the licensing process as outlined in foster care policy.
- 2) On forms provided by MDHHS, and when requested by MDHHS, the Contractor shall report to MDHHS monthly on the number and characteristics of unlicensed relative homes and the children in those homes, and on progress in licensing the homes.

f. Adoption and Foster Care Analysis Reporting System Requirements

The Contractor shall enter all child and family information into the Michigan Statewide Automated Child Welfare System (MISACWIS) to enable MDHHS to comply with Federal Adoption and Foster Care Analysis and Reporting System (AFCARS) reporting requirements. Failure to comply with this reporting requirement shall result in a penalty for the Contractor as specified in Section 3.1 f. of this Agreement.

2.11. Expected Program Performance Outcomes

During the period of this Agreement, the Contractor shall work toward the achievement of the performance measures listed below.

MDHHS shall obtain data from its systems on a quarterly basis to be determined by MDHHS, in the format specified by MDHHS. If, based on an evaluation of submitted data, there is a gap between the performance of a Contractor and the

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performance objective, the Contractor shall within 90 days of receiving the data from MDHHS develop a plan to eliminate the performance gap.

a. Placement Stability

Children supervised by the Contractor shall have no more than two placement settings while supervised by the individual Contractor's program, using the following minimum acceptable standards:

- 1) 0-365 days = 86% or more will have no more than two placement settings.
- 2) 366-730 days = 73% or more will have no more than two placement settings.
- 3) 731 + days = 45% or more will have no more than two placement settings.

b. Timeliness of Reunification

No fewer than 43% of children supervised by the Contractor for 30 days or more shall be discharged from foster care to the home of a parent or legal guardian within 12 months of removal.

c. Permanency of Reunification

No more than 4% of children supervised by the Contractor who were discharged from foster care to the home of a parent or legal guardian within 12 months of removal.

d. Timeliness of Adoptions

No fewer than 36.6% of children supervised by the Contractor for 30 days or more shall be discharged from foster care to a finalized adoption within 24 months of removal.

e. Discharge to Permanency for Children in Foster Care for Long Periods of Time

No fewer than 29.1% of children supervised by the Contractor for the most recent 24 months shall be discharged to a permanent placement prior to their 18th birthday. Permanent placement is defined as Adoption, Guardianship or Reunification.

f. Legally-Free Children in Foster Care for Long Period of Time Who Are Discharged to Permanency

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No fewer than 98% of children supervised by the Contractor for the most recent 12 months and legally free for adoption shall be discharged to a permanent placement prior to their 18th birthday. Permanent placement is defined as Adoption, Guardianship or Reunification. (A discharge to Reunification for children "legally free" occurs when they are placed with a relative for 6 months or longer. This is for AFCARS reporting purposes by MDHHS.)

g. Sibling Placement

No fewer than 90% of children supervised by the Contractor shall be placed with all members of their sibling group (out of home minor siblings only) unless it has been determined that the placement with the siblings is contrary to the best interests of the children. Contrary to the best interests of the children is defined as:

- 1) Placement together is harmful to one or more of the siblings; or
- 2) One of the siblings has exceptional needs that can only be met in a specialized program or facility; or
- 3) The size of the sibling group makes such placement impractical, notwithstanding diligent efforts to place the group together.

2.12. Audit Requirements

Contractor/Vendor Relationship

This Agreement constitutes a contractor/vendor relationship with MDHHS. The Contractor must immediately report to the MDHHS Bureau of Audit any audit findings of a Going Concern or accounting irregularities, including noncompliance with provisions of this Agreement.

2.13. Financial Audit Requirements

a. Required Audit or Notification Letter

Contractors must submit to the Department either a Single Audit, Financial Statement Audit, or Audit Status Notification Letter as described below. If submitting a Single Audit or Financial Statement Audit, Contractors must also submit a Corrective Action Plan for any audit findings that impact MDHHS-funded programs, and management letter (if issued) with a response.

1) Single Audit

Contractors that are a non-profit organization and that expend \$750,000 or more in federal awards during the Contractor's fiscal year, must submit a Single Audit to the Department, regardless of the amount of funding received from the Department. The Single Audit must comply with the requirements of Title 2 Code of Federal Regulations, Subpart F.

2) Financial Statement Audit

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Contractors exempt from the Single Audit requirements with fiscal years that receive \$500,000 or more in **total funding** from the Department in State and Federal grant funding must submit to the Department a Financial Statement Audit prepared in accordance with generally accepted auditing standards (GAAS).

3) Audit Status Notification Letter

Contractors exempt from the Single Audit and Financial Statement Audit requirements (1 and 2 above) must submit an Audit Status Notification Letter that certifies these exemptions. The template Audit Status Notification Letter and further instructions are available at <http://www.michigan.gov/mdhhs> by selecting Inside MDHHS menu, then MDHHS Audit, then Audit Reporting.

b. Due Date and Where to Send

The required audit and any other required submissions (i.e. Corrective Action Plan and management letter with a response), or Audit Status Notification Letter must be submitted to the Department within nine months after the end of the Contractor's fiscal year by e-mail to the Department at MDHHS-AuditReports@michigan.gov. The required submissions must be in PDF files and compatible with Adobe Acrobat (read only). The subject line must state the agency name and fiscal year end. The Department reserves the right to request a hard copy of the audit materials if for any reason the electronic submission process is not successful.

c. Penalty

Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

d. Other Audits

The Department or federal agencies may also conduct or arrange for "agreed upon procedures" or additional audits to meet their needs.

2.14. Cost Reporting

The Contractor shall submit annual financial cost reports based on the state's fiscal year which begins October 1 and ends September 30 in the following calendar year. The reports shall contain the actual costs incurred by providers in delivering services required in this agreement to MDHHS clients for the reporting period. Costs for non-MDHHS children are not to be included. Reports will be submitted using a template provided by MDHHS. The financial reports shall be submitted annually, and will be due November 30 of each fiscal year. The Contractor must comply with all other program and fiscal reporting procedures as are or may hereinafter be established by MDHHS. Reports shall be submitted electronically to MDHHS-Foster-Care-Audits@michigan.gov with the subject line: PAFC Actual Cost Report. Failure to meet reporting responsibilities as identified in this agreement may result in delay or withholding of future payments.

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2.15. Service Documentation

The Contractor agrees to maintain program records required by MDHHS, program statistical records required by MDHHS, and to produce program narrative and statistical data at times prescribed by, and on forms furnished by, MDHHS.

2.16. Private Agency MiSACWIS

The Contractor shall ensure that private agency payment staff has access to the Michigan Statewide Automated Child Welfare Information System (MiSACWIS) through a web-based interface, henceforth referred to as the "MiSACWIS application." Requirements for MiSACWIS for CPA contracts may be found at http://www.michigan.gov/mdhhs/0,5885,7-339-71551_7199--,00.html

For all agency assigned cases in MiSACWIS, the Contractor shall enter all case management activities, including payments and all required documentation per policy in MiSACWIS.

2.17. Billing

The Contractor shall submit through the MiSACWIS system the bi-weekly roster for any child in the Contractor's care per the instructions within the MiSACWIS system. The billing shall indicate the units of service provided by the Contractor and shall be submitted to MDHHS within 30 days from the end of the billing period.

No original request for payment submitted by the Contractor more than three years after the close of the two week billing period during which services were provided shall be honored for payment.

When the Contractor's financial records reveal that payment for a child has not been provided by MDHHS within 90 days of the date of service, the Contractor will seek payment resolution by contacting the direct supervisor of the assigned MDHHS worker in writing. Any concerns over a payment authorization or issuance that cannot be resolved within 60 days of the written notice must be reported to the MDHHS County Director for immediate resolution. The Contractor will apprise MDHHS of any ongoing, unresolved payment concerns.

2.18. Fees and Other Sources of Funding

The Contractor guarantees that any claims made to MDHHS under this Agreement shall not be financed by any source other than MDHHS under the terms of this Agreement. If funding is received through any other source, the Contractor agrees to deduct from the amount billed to MDHHS the greater of either the fee amounts, or the actual costs of the services provided.

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The Contractor may not accept reimbursement from a client unless the Agreement specifically authorizes such reimbursement in the "Contractor Responsibility" Section. In such case, a detailed fee scale and criteria for charging the fee must be included. If the Contractor accepts reimbursement from a client in accordance with the terms of the Agreement, the Contractor shall deduct these fees from billings to MDHHS.

Other third party funding sources, e.g., insurance companies, may be billed for contracted client services. Third party reimbursement shall be considered payment in full unless the third party fund source requires a co-pay, in which case MDHHS may be billed for the amount of the co-pay. No supplemental billing is allowed.

2.19. Recoupment of Funding and Repayment of Debts

a. Recoupment of Funding

If the Contractor fails to comply with requirements as set forth in this Agreement, or fails to submit a revised payment request within allotted time frames established by MDHHS in consultation with the Contractor, MDHHS may, at its discretion, recoup or require the Contractor to reimburse payments made under this Agreement which MDHHS has determined that the Contractor has been overpaid. The Contractor is liable for any cost incurred by MDHHS in the recoupment of any funding.

Upon notification by MDHHS that repayment is required, the Contractor shall make payment directly to MDHHS within 30 days or MDHHS may withhold current or future payments made under this or any other agreements, current or future, between MDHHS and the Contractor.

If the Contractor fails to: (1) correct noncompliance activities identified by MDHHS, (2) submit revised billings as requested as part of a Corrective Action Plan when required; or (3) remit overpayments or make arrangements to have the overpayments deducted from future payments within 30 days, such failure shall constitute grounds to terminate immediately any or all of MDHHS' agreements with the Contractor. MDHHS shall also report noncompliance of the Contractor to Michigan's Department of Technology, Management and Budget. Such report may result in the Contractor's debarment from further contracts with the state of Michigan.

b. Repayment of Debts and Other Amounts due MDHHS

By entering into this Agreement, the Contractor agrees to honor all prior repayment agreements established by MDHHS with the Contractor or Contractor's predecessors. If the Contractor has an outstanding debt due to MDHHS but does not have a repayment agreement, the Contractor agrees to

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make monthly payments to MDHHS at an amount not less than 5% of any outstanding balance and to begin on the date this Agreement is executed.

If the Contractor fails to honor prior repayment agreements, or the Contractor fails to begin repayment on an obligation due MDHHS that is not subject to a repayment agreement, MDHHS will initiate the administrative process to reduce payments to the Contractor under this Agreement to recoup the debt. The payment reduction will be made at the amount originally established in the repayment agreement or at an amount not less than 5% of any outstanding balance effective on the date this Agreement is executed.

2.20 Child Protection Law Reporting Requirements

- a. The Contractor shall ensure that all employees who have reasonable cause to suspect child abuse or neglect shall report any suspected abuse or neglect of a child in care to MDHHS for investigation as required by Public Acts of 1975, Act Number 238.
- b. Failure of the Contractor or its employees to report suspected abuse or neglect of a child to MDHHS shall result in an immediate investigation to determine the appropriate corrective action up to and including termination of the contract.
- c. Failure of the Contractor or its employees to report suspected child abuse or neglect two or more times within a one-year period shall result in a review of the contract agency's violations by a designated Administrative Review Team, which shall include the Director of CSA and the Director of DCWL or its successor agency, that shall consider mitigating and aggravating circumstances to determine the appropriate corrective action up to and included license revocation and contract termination.

2.21 The Division of Child Welfare Licensing (DCWL)

DCWL shall be responsible for review of the Contractor's compliance with the Agreement and any court orders, via an Annual Compliance Review (ACR) and Special Investigations. DCWL may review, analyze and comment on all activities covered within the terms of the Agreement or court order. If the ACR or Special Investigation reveals that the Contractor has not complied with the requirements of this Agreement or court order, the following procedures shall be implemented:

- a. DCWL shall notify the Contractor of the Agreement or court noncompliance. This notification shall occur verbally during an exit conference, and be followed with a written report of the findings. The Contractor may request a meeting to discuss and examine the identified Agreement or court noncompliance.

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- b. Following the identification of the Agreement or court noncompliance, DCWL will request the Contractor submit a Corrective Action Plans (CAP) to DCWL within 15 days of receiving the written report of findings.
- c. After the Contractor's CAP has been reviewed and approved by DCWL, the Contractor's compliance with the CAP shall be reviewed in accordance with time frames established by DCWL in the written notification of acceptance of the CAP.
- d. Based on the severity or repeated nature of cited violations, a recommendation may be made by DCWL at any time to place a moratorium on new placements with the contractor or to cancel the contract. If either recommendation is made, a meeting will be convened with the director of the contracted agency, the division director of DCWL and the CSA director or designee to provide the contractor with the opportunity to provide documented information on why the moratorium or cancellation of the contract should not occur.
- e. If a moratorium on new placements is put into place, it shall be for a minimum of 90 days to allow the contractor to remedy cited violations and comply with any agreed on CAP. If the cited violations are not corrected during the period of the moratorium or additional serious violations are cited, consideration shall be given to cancellation of the agency's contract. Final decisions regarding the cancellation of a contract shall be made by the CSA director.

2.22 Corrective Action Requirements

If a program review by MDHHS reveals a lack of compliance with the requirements of this Agreement, the Contractor shall:

- a. Meet with MDHHS to discuss the noncompliance.
- b. Prepare a corrective action plan within 30 days of receiving MDHHS' written findings.
- c. Achieve compliance within 60 days of receipt of MDHHS' approval of the corrective action plan (unless other time frames are agreed to in writing by MDHHS) or MDHHS may terminate this Agreement, subject to the standard contract terms.

3. MDHHS RESPONSIBILITIES

3.1. Payments

MDHHS shall open and process payment within 30 days of placement, with payment authorization effective the date of the child's placement with the Contractor.

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- a. The entire rate paid to the Contractor for board and care, clothing and allowance shall be paid by the Contractor to the foster families providing the family foster care.
- b. The Contractor's administrative rate(s) for services provided under this Agreement shall be:

Bridges Provider Number 6356725
 MiSACWIS Provider Number 10400303

<u>Service Code</u>	<u>Per Diem Rate</u>	<u>Effective Date</u>
780	\$40.00	06/01/15
782	\$28.00	10/01/13
TR	\$37.00	10/01/13
0838	*\$2.50	10/01/13

*The above rate is only to be used for American Indian Children

If the Contractor has an adoption agreement with MDHHS and fails to register a child on the Michigan Adoption Resource Exchange (MARE) as required in that agreement, the Contractor's Foster Care administrative rate for that child shall be reduced by 20% until the child is registered.

The contractor will receive reimbursement subject to appropriations for relative licensure as outlined in that years State fiscal appropriation.

If a Contractor does not submit the financial cost reports as described in Section 2., CONTRACTOR RESPONSIBILITIES, the per diem administrative rate shall be reduced by \$3.00 until contractor becomes compliant with the reporting requirements.

- c. The Contractor shall be paid for family foster care services specified in this Agreement at a board and care rate established by MDHHS. A determination of care rate may be established by MDHHS in accordance with the FOM when extraordinary care or expense is required of the foster parent. Special rates must have the approval of the Director of MDHHS' local office responsible for the supervision of the child for whom foster care is provided.
- d. Payment for additional service costs not included in the per diem rate may be authorized in accordance with the FOM.

When the Contractor's financial records reveal that a payment for a child has not been provided by MDHHS within 90 days of their acceptance of the child for case management services, the Contractor will contact the MDHHS County Director in writing seeking payment resolution. The Contractor shall

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advise MDHHS of any concerns over a payment amount that cannot be reconciled at the staff level within 90 days.

- e. Upon placement, MDHHS shall ensure that the child(ren) has adequate clothing as defined by the Clothing Inventory Checklist (DHS-3377) or shall reimburse the Contractor up to the approved limit allowed for clothing.
- f. Inability of MDHHS to comply with the federal reporting requirements of AFCARS due to failure of the Contractor to fulfill AFCARS related reporting requirements shall result in a three percent reduction in the Contractor's administrative rate for the six month period subsequent to the due date of the AFCARS report to the Federal government.
- g. Foster Care Training Payments

Payments will be made for eligible training which commenced after January 1, 2012.

A payment will be made to the Contractor for each staff that completes training and passes competency tests as required in the Implementation, Sustainability and Exit Plan according to the following schedule:

1) Completion of the Child Welfare Caseworker Training

Payment will be \$6,000.00 total, calculated on a per diem basis, for completion of CWTI-PSI that includes a minimum of 9 weeks of competency-based classroom and field training if the caseworker passes the competency evaluation within 16 weeks of hire.

2) Completion of the Child Welfare Certificate (CWC) Training

Payment will be \$3,000.00 total, calculated on a per diem basis, for completion of the CWTI-CWC that includes a minimum of five weeks of competency-based classroom and field training if the caseworker certified certificate holder passes the competency evaluation.

3) Completion of the Child Welfare Supervisor Training

Payment will be \$1,500.00 total, calculated on a per diem basis, for completion of the Supervisor Training that includes a minimum of one week within 90 days of hire/promotion, if the supervisor passes the competency evaluation.

4) Completion of the Child Welfare Transfer Training

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The two week foster care PSTT shall be completed within six months of hire.

Payment will be \$2,800.00 for the completion of the foster care PSTT training. The training is the same as the Foster care Core Training for Foster Care caseworkers. If a supervisor has completed this training as a caseworker since April 1, 2006, the training does not need to be repeated.

- h. For all Contractor staff hired on or after May 1, 1998 attending required CWTI-PSI, PSTT, and supervisor training, MDHHS-CWTI shall reimburse the Contractor at the Contractor's normal rate of reimbursement or State rates, whichever is less for staff trainee expenditures incurred as part of CWTI attendance. MDHHS-CWTI does not cover travel reimbursement for in-service training. Travel reimbursement shall be limited to lodging, mileage and parking with the following conditions:
- 1) For each trainee who attends the training session, MDHHS shall reimburse the Contractor up to five nights lodging per week if lodging expense is incurred. If training continues for two consecutive weeks or longer and the cost of lodging is less than the mileage cost to travel to and from the Contractor's facility over the intervening weekend, the Contractor may request the director of Office of Workforce Development and Training in advance for a travel exception for weekend lodging.
 - 2) For each mile of travel to a CWTI training session closest to the Contractor's site, MDHHS shall reimburse the Contractor for mileage to and from the training and the trainee's assigned work location or home, whichever is closer. The applicable State rate for mileage shall be the lesser of the Contractor's prevailing rate or the State's standard rate.
 - 3) Parking shall be reimbursed at actual cost, documented with a receipt.
 - 4) MDHHS shall not reimburse travel costs for Contractor staff who attend more than one session (i.e., are required to repeat attendance due to absence or failure to successfully complete a session) without prior approval from DCWL. Refer to the CWTI web site for current reimbursement information for CWTI training at <http://www.michiganchildwelfaretraining.com/Training/Travel.aspx>

Classroom Training Payment

- 1) The Contractor must submit a signed and dated agency letterhead memo attached to the DHS-1582 Payment Voucher that includes the following information:

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- a) Worker name
 - b) Training, type, i.e. PSST, PSI etc.
 - c) Training dates (time span in training)
 - d) Amount of reimbursement requested.
 - e) A copy of the transcript reflecting the completion of the training for each foster care worker and supervisor covered by the payment voucher. This is required before accounting will issue payment.
 - f) Memo signed by senior management; not the individual who attended training.
- 2) The information must be submitted electronically to: MDHHS-FederalComplianceDivision@michigan.gov. The subject line shall read: Training Payment.

Training Travel Reimbursement

- 1) The Contractor must submit:
 - a) Certification letter on agency letterhead signed and dated by senior management to include:
 - Agency Federal ID Number
 - Exact trainee name as registered in OmniTrack Plus (formerly JJOLT)
 - Exact class name
 - Beginning and ending travel dates
 - Amount of reimbursement requested
 - b) DHS-1582 Payment Voucher.
 - c) DHS-1582 TV-NSE for each trainee.
 - d) MapQuest (or equivalent) printouts for each travel route.
 - e) All original receipts.
 - f) Transcripts showing the training completed.
- 2) Please submit the above information to:

Ingham County MDHHS/OWDT
Attention: Travel Reimbursement
PO Box 30088
5303 S. Cedar Street
Lansing, MI 48911
- i. The Contractor shall be paid for Trial Reunifications services specified in the agreement not to exceed 180 days from the child's placement in the parental home.
- 1) The Contractor must submit the following on a monthly basis:
 - a) A completed DHS-1582 CS Payment Voucher

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- b) A case listing that contains the following child identifying information:
- Placing Agency Provider ID
 - Agency Name
 - MISACWIS log ID if known
 - Child last name
 - Child first name
 - Recipient ID
 - Foster Care case number
 - Billing start date
 - Billing end date
 - Number of days to pay
 - American Indian Y/N
 - Date of court order commencing the Trial Reunification
 - Date the foster care case was dismissed by the court and/or
 - Date the child reentered a foster care placement

2) The information must be submitted electronically to: MDHHS-trialreunificationpayments@michigan.gov.

j. The costs of all services provided under this Agreement are included in the above rate(s) unless otherwise noted in this Agreement.

3.2. Performance Evaluation and Monitoring

The services provided by the Contractor under this Agreement shall be evaluated and assessed at least annually by MDHHS on the basis of the criteria outlined in Section 2.11.

MDHHS shall perform contract monitoring through activities such as:

- a. Auditing expenditure reports.
- b. Conducting on-site monitoring.
- c. Reviewing and analyzing reports.

Article VI

In Section III GENERAL PROVISIONS – PRIVATE, NON-PROFIT AND PRIVATE PROPRIETARY, shall be renamed Section 4 and C., Subcontracts and W., Indemnification, shall be deleted and replaced with:

C. Subcontracts

Contractor may not delegate any of its obligations or subcontract under this Agreement without the prior written approval of MDHHS. Contractor must

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notify MDHHS prior to the proposed delegation, and provide MDHHS any information it requests to determine whether the delegation is in its best interest. If approved, Contractor must:

- a. Be the sole point of contact regarding all contractual matters, including payment and charges for all Agreement Activities;
- b. Make all payments to the subcontractor; and
- c. Incorporate the terms and conditions contained in this Agreement in any subcontract with a subcontractor.

Contractor remains responsible for the completion of the Agreement Activities, compliance with the terms of this Agreement, and the acts and omissions of the subcontractor. MDHHS, in its sole discretion, may require the replacement of any subcontractor.

W. General Indemnification

Contractor must defend, indemnify and hold the State, its departments, divisions, agencies, offices, commissions, officers, and employees harmless, without limitation, from and against any and all actions, claims, losses, liabilities, damages, costs, attorney fees, and expenses (including those required to establish the right to indemnification), arising out of or relating to:

- a. Any breach by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable) of any of the promises, agreements, representations, warranties, or insurance requirements contained in this Agreement;
- b. Any infringement, misappropriation, or other violation of any intellectual property right or other right of any third party;
- c. Any bodily injury, death, or damage to real or tangible personal property occurring wholly or in part due to action or inaction by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable); and
- d. Any acts or omissions of Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable).

MDHHS will notify Contractor in writing if indemnification is sought; however, failure to do so will not relieve Contractor, except to the extent that Contractor is materially prejudiced. Contractor must, to the satisfaction of MDHHS, demonstrate its financial ability to carry out these obligations.

MDHHS is entitled to: (i) regular updates on proceeding status; (ii) participate in the defense of the proceeding; (iii) employ its own counsel; and to (iv) retain control of the defense if MDHHS deems necessary. Contractor will not, without

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MDHHS's written consent (not to be unreasonably withheld), settle, compromise, or consent to the entry of any judgment in or otherwise seek to terminate any claim, action, or proceeding. To the extent that any State employee, official, or law may be involved or challenged, MDHHS may, at its own expense, control the defense of that portion of the claim.

Any litigation activity on behalf of the State, or any of its subdivisions under this Section, must be coordinated with the Department of Attorney General. An attorney designated to represent MDHHS may not do so until approved by the Michigan Attorney General and appointed as a Special Assistant Attorney General.

EXHIBIT

G

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Only the Westlaw citation is
currently available.
United States Court of Appeals,
Sixth Circuit.

Tiniqua GAY; Felicia Gay,
Plaintiffs-Appellants,
v.
CABINET FOR HEALTH AND
FAMILY SERVICES
DEPARTMENT FOR
COMMUNITY BASED
SERVICES, et al.,
Defendants-Appellees.

No. 18-5285

FILED January 23, 2019

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
KENTUCKY

Attorneys and Law Firms

H. Wayne Roberts, Law Office,
Lexington, KY, for
Plaintiffs-Appellants

David Brent Irvin, Kentucky Cabinet
for Health & Family Services Office of
Legal Services, Frankfort, KY,
Defendants-Appellees

Before: KEITH, MOORE, and
GIBBONS, Circuit Judges.

ORDER

*1 The Plaintiffs, Tiniqua and Felicia Gay, appeal a district court's judgment dismissing their civil rights complaint filed pursuant to 42 U.S.C. § 1983 and state law. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons that follow, we **REVERSE**.

I. BACKGROUND

The parties dispute some of the following facts, but because the case is at the motion to dismiss stage, we draw from the complaint, *see* R. 1 (Compl.) (Page ID # 1-16), and view the facts in the light most favorable to the Plaintiffs. The Plaintiffs name the following Defendants in their Complaint: the Kentucky Cabinet for Health and Family Services Department for Community Based Services ("Cabinet"), Kristy Kidd, Lesley Spencer, and Emily Sergent.¹ The three individual Defendants are employees (supervisors or social workers) of the Cabinet.

¹ The Plaintiffs spell Emily's last name as "Sergeant" in their complaint. But the

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Defendants use *Sergent*, and we adopt that spelling.

The Plaintiffs are an African-American lesbian couple. In 2013, they each received their foster-parent certification. *Id.* at ¶¶ 23, 25 (Page ID # 5–6). The Plaintiffs allege that on November 2, 2016, they married, but the Cabinet “never acknowledged or recognized [the] marriage and did not update [Cabinet] records to reflect” the marriage. *Id.* at ¶ 31 (Page ID # 6).

Eventually, the Plaintiffs made plans with the Cabinet to adopt two white baby girls from a biological mother whose parental rights were set to be terminated. On April 12, 2017, Felicia Gay and the biological mother had a verbal altercation. *Sergent* was present and witnessed these events (though the Defendants dispute some of the underlying facts). Felicia observed the biological mother feeding one of the babies pizza, which concerned Felicia because the baby had a tomato allergy. Felicia thus approached the mother and *Sergent* and inquired about the ingredients in the pizza. The mother then responded by calling Felicia “a fuc*ing n[*****]” and asked *Sergent*, “why is the Cabinet letting her kids be raised by two (2) n[*****] lesbian bitc*es?” *Id.* at ¶ 33 (Page ID # 7). Felicia alleges that she said nothing in response, but she later confronted *Sergent* as to why *Sergent* stood by and did nothing to diffuse the situation. *Id.*

Then on April 25, 2017, the Plaintiffs

contacted the Cabinet and made a formal complaint against *Sergent*, alleging that the Plaintiffs were treated differently because of their race and sexual orientation. *Id.* at ¶ 36 (Page ID # 7–8). Two days later, Kidd called the Plaintiffs and informed them that the Plaintiffs would not be the babies’ foster parents “because the Cabinet could not ‘allow a situation to exist that is not in the best interest of the children.’ ” *Id.* at ¶ 37 (Page ID # 8). On May 2, the Plaintiffs were informed that their foster home was being closed, and then Plaintiffs responded by sending the Cabinet a letter that stated they would not close their home. *Id.* at ¶¶ 38–39. Finally, on May 11, the Plaintiffs received a letter from the Cabinet that stated that their foster home would be closed because the Cabinet “could not ‘allow a situation to exist that is not in the best interest of the children.’ ” *Id.* at ¶ 40. The letter states that the closure would be effective May 25, 2017. R.1-3 (Page ID # 21) (attachment to the Complaint). Kristy Kidd signed the letter. The Cabinet further determined that the Plaintiffs would not receive any future foster-care placements. R. 1 (Compl. at ¶ 41) (Page ID # 8); R. 1-4 (Page ID # 22) (Corrective Action Plan signed by Kidd and Spencer).

*2 The Plaintiffs also attached to their complaint an April 26 email from Spencer. R. 1-6 (Page ID # 25). Spencer outlines *Sergent*’s version of the altercation. The email concludes: “The foster home is being notified today that the kids are moving. This is

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a plan that has been in the works since last Thursday [i.e., about April 20].” *Id.*

As relevant to this appeal, the Plaintiffs bring § 1983 claims for racial and sexual-orientation discrimination, alleging violations of their Fourteenth Amendment Equal Protection rights. In Counts I and II, for example, the Plaintiffs state that, “[the babies] were removed from Plaintiffs’ home and placed with a family of the preferred race, which is Caucasian.... The so-called [bad] situation that existed [for the babies] is the fact that the children are white and the foster parents are African-American.” R. 1 (Compl. at ¶¶ 44, 46) (Page ID # 9–10); *see also id.* at ¶¶ 52–53 (Page ID # 10) (“The fact that the Plaintiffs are lesbians was a motivating factor in the removal of [the babies] from the Plaintiffs’ foster home,” as well as “in the closing of the Plaintiffs’ foster home.”). The Plaintiffs also brought various state-law claims based upon alleged family status and racial discrimination, as well as claims of intentional infliction of emotional distress and retaliation. *See id.* at ¶¶ 57–85 (Page ID # 11–15). For relief, the Plaintiffs sought an injunction, money damages, a state review of all complaints within the last five years where a child allegedly was removed from a foster home due to race, sexual orientation, or family status, and mandatory sensitivity classes for the individual Defendants.

The Plaintiffs’ counsel sued the individual Defendants only in their

official capacities, even though the Plaintiffs sought money damages in addition to the injunction.² The Defendants then moved to dismiss the complaint, for judgment on the pleadings, or, alternatively, for summary judgment. *See* R. 9 (Mot. to Dismiss) (Page ID # 72–98). The Defendants also moved to stay discovery. *See* R. 12 (Mot. to Stay Discovery) (Page ID # 133–43). This caused the Plaintiffs’ counsel to file a motion for leave to amend the complaint to sue the individual Defendants in only their individual capacities, *see* R. 13 (Mot. for Leave to File Am. Compl.) (Page ID # 145–46), even though the Plaintiffs still sought an injunction. (We note that this pleading method is odd and perhaps the result of some confusion: usually, plaintiffs sue state officials in their *official* capacities for *injunctions*, but in addition, plaintiffs sue those same officials in their *individual* capacities for *money damages*.) Further, the Plaintiffs opposed the motion to stay discovery. *See* R. 19 (Pls.’ Resp.) (Page ID # 217–18).

² Confusingly, the Plaintiffs’ counsel did list the Defendants as being sued in their individual capacities on only the HED claim. Also, the phrase “individual capacity” was followed by each individual Defendant’s official title.

The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and granted the Defendants’ motion for judgment on the pleadings pursuant to Rule 12(c). The district court noted that, under the Eleventh Amendment,

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sovereign immunity barred a suit against the Cabinet in federal court, as well as the § 1983 official-capacity claims for money damages against Kidd, Spencer, and Sergeant. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015); *Sefa v. Ky. Cabinet for Health & Family Servs.*, 510 F. App'x 435, 437 (6th Cir. 2013). Moreover, the Plaintiffs' request for injunctive relief (at least as originally styled) did not implicate a threat of future injury. *See Grendell v. Ohio Sup. Ct.*, 252 F.3d 828, 832–33 (6th Cir. 2001). The district court further ruled that qualified immunity barred § 1983 individual-capacity claims for money damages against Kidd, Spencer, and Sergeant because, the district court reasoned, the Plaintiffs did not identify any specific action taken by the Defendants that violated clearly established federal rights. *See Peatross v. City of Memphis*, 818 F.3d 233, 240 (6th Cir. 2016). Finally, the district court declined to exercise supplemental jurisdiction over the state-law claims, denied the motion to amend the complaint as futile, and denied the motion to stay discovery as moot. *See generally Gay v. Cabinet for Health and Family Servs.*, No. 5:17-cv-258-JMH, 2018 WL 934880 (E.D. Ky. Feb. 16, 2018).

*3 The core of the Plaintiffs' appeal is that the district court erred in granting

the individual Defendants qualified immunity, erred in denying the Plaintiffs' motion to amend their complaint, and erred in refusing to allow discovery. The Plaintiffs do not challenge the dismissal of the Cabinet from the case.

II. STANDARD OF REVIEW

We review a district court's decision on a Rule 12(c) motion for judgment on the pleadings "using the same de novo standard of review employed for a motion to dismiss under Rule 12(b)(6)." *Hitchcock v. Cumberland Univ.* 403(b) DC Plan, 851 F.3d 552, 558 (6th Cir. 2017) (quoting *Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 999–1000 (6th Cir. 2015)). We construe all facts in the light most favorable to a plaintiff: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Furthermore, pursuant to Federal Rule of Civil Procedure 15(a)(2), a "court should freely give leave" to amend a complaint "when justice so requires." Here, the district court denied the

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Plaintiffs' motion to amend as futile. *Gay*, 2018 WL 934880, at *10. We review this determination de novo. *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

III. QUALIFIED IMMUNITY & THE MOTION TO AMEND THE COMPLAINT

State officials are entitled to qualified immunity from suits against them in their personal capacity for civil damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

The sequence of events in this case, taken in the light most favorable to the Plaintiffs, raises concern as to the Defendants' motivation for removing the babies and closing the Plaintiffs' foster home. In short, the Plaintiffs presented to the biological mother a concern about a food allergy; the mother then lashed out in a racial tirade against the Plaintiffs, which Sergeant observed; Sergeant relayed her version of events to Spencer around the same time that the Plaintiffs lodged a complaint against Sergeant; Spencer and

Kidd then signed off on the various documents or were involved in various communications with the Plaintiffs, all of which led to the closure of the Plaintiffs' foster home. The purported reason for the closure: a "situation" existed that was "not in the best interest of the child." But again, given the sequence of events, the Plaintiffs have a plausible claim that the "situation" was that they are African-American lesbians and the children are white. *See* R. 1 (Compl. at ¶ 46, 56) (Page ID # 9–11). In sum, the Plaintiffs have a plausible claim that the Defendants acted because of the Plaintiffs' race and sexual orientation.

In qualified immunity cases, although "the clearly established right must be defined with specificity[.]" *City of Escondido v. Emmons*, 586 U.S. —, —, 139 S.Ct. 500, 202 L.Ed.2d 455, slip op. at 4 (2019), the Supreme Court has also repeatedly stated that "general statements of the law are not inherently incapable of giving fair and clear warning to officers," so long as "pre-existing law" makes the "unlawfulness [of an action] apparent." *White v. Pauly*, — U.S. —, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (internal quotation marks omitted); *see also Kisela v. Hughes*, — U.S. —, 138 S.Ct. 1148, 1153, 200 L.Ed.2d 449 (2018) (further explaining that in an "obvious case" general rules can create clearly established law). "It is not necessary, of course, that 'the very action in question has previously been held unlawful.'" *Ziglar v. Abbasi*, — U.S. —, 137 S.Ct. 1843, 1866–67,

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198 L.Ed.2d 290 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)); see also *District of Columbia v. Wesby*, — U.S. —, 138 S.Ct. 577, 590, 199 L.Ed.2d 453 (2018) (stating that there are some “ ‘obvious case[s],’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.”); *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034 (“The contours of the right must be sufficiently clear that a reasonable [state official] would understand that what [s]he is doing violates [a constitutional] right.”).

*4 The question here then becomes: if the individual Defendants closed the Plaintiffs’ foster-home and denied the Plaintiffs future foster-care placements because of the Plaintiffs’ race, is the unlawfulness of such actions apparent? The answer is obvious and the law is clear: Yes. If the Defendants impermissibly relied on race to revoke custody and close their foster-care home, the Equal Protection Clause plainly prohibits such an action. See *Palmore v. Sidoti*, 466 U.S. 429, 434, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (“Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917.”); *Loving v. Virginia*, 388 U.S. 1, 10, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (“The clear and central purpose of the Fourteenth

Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”); *Drummond v. Fulton Cty. Dep’t of Family and Children’s Servs.*, 547 F.2d 835, 851 (5th Cir. 1977) (“[A] ... state policy that every child having mixed black and white parentage could not be adopted by a white family could not be countenanced under the United States Constitution.”), accord *Reisman by Reisman v. State of Tenn. Dep’t of Human Servs.*, 843 F.Supp. 356, 364–65 (W.D. Tenn. 1993) (concluding “that the practice and procedure whereby the Department officials assign a black heritage to a bi-racial child and place the child for adoption in a black home instead of a white home” violated the Equal Protection Clause); *Tallman v. Tabor*, 859 F.Supp. 1078, 1086 (E.D. Mich. 1994) (citing *Palmore* and *Drummond* and describing their principles as “well-settled in the case law”). To suggest that such an action by state officials would not violate a clearly established right under the Equal Protection Clause would be absurd.

Viewed in this light, the underlying merits of this claim turn on whether the Defendants had an impermissible discriminatory purpose. The Defendants cite a facially neutral Kentucky statute in their letter that notified the Plaintiffs of their foster-home closure. See R. 1-3 (Page ID # 21). But the law is clearly established that a state actor cannot apply a neutral statute with a purpose to discriminate invidiously on the basis

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of race. *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)); *Hidden Vill., LLC v. City of Lakewood*, 734 F.3d 519, 527 (6th Cir. 2013) (“Rationality may be a low bar. But the government flunks even that test when it tries to prevent a landlord of any race from renting to tenants based on their race.”). To determine whether there was an impermissible racial motive, courts look to the *Arlington Heights* factors. See *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); see also *id.* at 267, 97 S.Ct. 555 (“The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purpose.”); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016). Simply put, that a state actor cannot invidiously rely on race in applying a neutral statute is a bedrock principle of Equal Protection. That is exactly what the Plaintiffs allege happened here.

The upshot is that the crux of this dispute is a factual issue. The law is clear. Whether the Defendants were, in fact, impermissibly motivated by race, and consequently whether the Defendants, in fact, violated a constitutional right, is less clear—discovery of further facts will help uncover an answer. But at this stage of litigation, the court must view the facts in the light most favorable to the plaintiff. See *Peatross*, 818 F.3d at

240; *id.* at 246–47 (holding that the officer was not entitled to qualified immunity at the motion-to-dismiss stage). The Plaintiffs’ counsel here may not have drafted the cleanest complaint, but it “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).

Indeed, at this stage, “[t]he specific sequence of events leading up to the challenged decision” to close the Plaintiffs’ foster home and revoke custody “shed[s] light some light on the decisionmaker’s [potential] purposes.” *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. Again, a white parent lashed out at black foster-parents, an outburst to which Felicia reacted calmly and then later raised her grievance about Sergeant’s lack of intervention. Yet despite that calm response to a pernicious racial tirade, the Plaintiffs suffered the consequences; the State closed their foster home and revoked custody over the babies, whom the Plaintiffs sought to protect by ensuring that one of the babies was not being fed food that could trigger an allergic reaction. At this point in the litigation, it is certainly plausible that the individual Defendants were worried about perceived “problems” that a mixed-race household could pose and, therefore, that the Defendants took the action at issue predominantly based on the Plaintiffs’ race or because the biological mother expressed prejudice

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toward the Plaintiffs' race. *See Palmore*, 466 U.S. at 433, 104 S.Ct. 1879 ("The Constitution cannot control [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Drummond*, 547 F.2d at 851; *Tallman*, 859 F.Supp. at 1086 (stating that race must be "at least the predominant factor in" a decision to remove child "in order to make out an equal protection claim"); *Reisman*, 843 F.Supp. at 364–65; *cf. Hidden Vill., LLC*, 734 F.3d at 529–30 (holding that individual defendants were not entitled to state-law immunity at the summary-judgment stage because a reasonable jury could conclude that city officials inspected tenants' homes because of the tenants' race and for the purpose of intimidating those tenants).

*5 Moreover, *Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), establishes that a state cannot act with animus against individuals based on their sexual orientation. *See also id.* at 634–35, 116 S.Ct. 1620 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (citation omitted). Part of the sequence of events leading up to the Defendants' actions here was their apparent lack of recognition of the Plaintiffs' same-sex marriage. *See* R. 1 (Compl. at ¶ 31) (Page ID # 6). Again, this fact and

others "raise the inevitable inference that the disadvantage imposed [i.e., the Defendants prohibiting the Plaintiffs from receiving future foster-care placements] is born of animosity toward" the Plaintiffs' sexual orientation. *See Romer*, 517 U.S. at 634, 116 S.Ct. 1620. As the Supreme Court has stated, "[m]arriage ... affords the permanency and stability important to children's best interests." *Obergefell v. Hodges*, — U.S. —, 135 S.Ct. 2584, 2600, 192 L.Ed.2d 609 (2015). For that reason, "[e]xcluding same-sex couples from marriage ... conflicts with a central premise of the right to marry." *Id.* And "[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life." *Id.* Therefore, the individual Defendants cannot use the Cabinet's failure to recognize the Plaintiffs' marriage as part of the foundation for the conclusion that it would not be "in the best interest of child" for the two babies to stay with the Plaintiffs. *See id.* ("[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. *This provides*

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powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”) (emphasis added) (citations omitted).

Thus, as with the race-based claim, at least at this stage in the litigation, the Plaintiffs have stated a plausible claim to relief.

Accordingly, we **REVERSE** the district court’s judgment that the individual Defendants are entitled to qualified immunity. We further **REVERSE** the district court’s denial of the Plaintiffs’ motion to amend their complaint because, in light of this opinion, an amendment would not be futile; the Plaintiffs should be allowed the opportunity to amend their complaint to sue the individual Defendants in their personal, rather than official, capacity for money damages. We also note that, because of our ruling, some federal claims will be reinstated, and consequently, the district court could choose to assert supplemental jurisdiction over the Plaintiffs’ various state-law claims.

IV. DISCOVERY

The district court denied the Defendants’ motion to stay discovery as moot in light of its dismissal of the case on immunity grounds. *Gay*, 2018 WL 934880, at *10. But because this

case turns on a factual dispute and the individual Defendants are not entitled to qualified immunity, we disagree. Discovery is appropriate. We **REMAND** for the district court to rule on this motion in light of this opinion.

V. INJUNCTIVE RELIEF

The district court dismissed the Plaintiffs’ claims for injunctive relief for lack of standing. *Id.* at *6–8. Because of the way the Plaintiffs’ counsel styled this claim in the Complaint, the district court reached the correct result. But, because some of the Plaintiffs’ claims will now move forward, the Plaintiffs should be allowed the liberal opportunity, if they wish, to amend their complaint, which may include amending how they style their request for an injunction. We again note that the individual Defendants can be sued in their *individual* capacity for *money damages*, and additionally, the individual Defendants can be sued in their *official* capacity as to the *injunction* (because injunctions run against the office, not the individual). *See Kentucky v. Graham*, 473 U.S. 159, 166 & n.11, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). An injunction could, in fact, remedy the particular harm suffered by the Plaintiffs—i.e., the Defendants are keeping them from running a foster home and from

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obtaining custody of the babies—if the Plaintiffs ask for appropriate injunctive relief to undo that harm.

Accordingly, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

All Citations

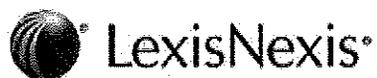
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EXHIBIT

H



User Name: Elizabeth Briggs

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Document (1)

1. *Shuttle Packaging Sys. v. Tsonakis, 2001 U.S. Dist. LEXIS 21630*

Client/Matter: -None-

Search Terms: 2001 U.S. Dist. LEXIS 21630

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
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 Caution
As of: May 28, 2019 7:07 PM Z

Shuttle Packaging Sys. v. Tsonakis

United States District Court for the Western District of Michigan, Southern Division

December 17, 2001, Decided

Case No. 1:01-CV-691

Reporter

2001 U.S. Dist. LEXIS 21630 *; 2001 WL 34046276

SHUTTLE PACKAGING SYSTEMS, L.L.C., Plaintiff, v. JACOB TSONAKIS, INA S.A., a Greek corporation doing business in the United States, and INA PLASTICS CORPORATION, jointly and severally, Defendants.

Disposition: [*1] Plaintiff's Motion for Preliminary Injunction was denied.

Core Terms

non-competition, manufacturing, purchase agreement, pots, parties, machinery, buyer, email, customers, training, preliminary injunction, Exhibits, Plastics, seller, lines, non-payment, documents, alleges, breach of contract, attachments, terms, likelihood of success, installation, irreparable, complaints, delivery, compete, shipped, specify, double

Case Summary

Procedural Posture

Plaintiff buyer moved for a preliminary injunction restraining defendant sellers from soliciting customers in North America for the purpose of selling equipment subject to a noncompetition agreement contained in a purchase contract between the parties. The buyer alleged breach of the non-competition agreement, and the sellers alleged breach of the purchase contract for failing to make timely payments.

Overview

The buyer purchased a supply thermoforming line equipment from the sellers and alleged various deficiencies in the equipment and support for it. The purchase contract between the parties contained a non-competition agreement which prevented the sellers from selling their equipment and processes in any jurisdiction where the buyer was located. The jurisdiction was not specified, but the evidence showed that the parties

believed it to be in the United States. The court denied the buyer's motion for a preliminary injunction, and found that the substance of the dispute was whether the parties were bound by the noncompetition agreement. The court first ruled that the United Nations Convention on Contracts for the International Sale of Goods (Convention), 19 I.L.M. 671 (May 1980), governed the controversy except for the issue of the enforcement of the non-competition agreement. The court then ruled that the buyer was not likely to succeed in its case against the sellers because, consistent with the Convention, the sellers could avoid the whole contract because the buyers were in fundamental breach of it for failing to make timely payments due to the sellers.

Outcome

The court denied the buyer's motion for a preliminary injunction against the sellers to enjoin the sellers from soliciting customers to purchase equipment that was covered by a noncompetition agreement.

LexisNexis® Headnotes

Civil

Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1  **Injunctions, Preliminary & Temporary Injunctions**

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In reviewing a preliminary injunction motion under *Fed. R. Civ. P. 65*, the court is required to consider four factors: (1) Plaintiff's likelihood of success on the merits; (2) the irreparable harm that could result to Plaintiff if the injunction is not issued; (3) the possibility of substantial harm to others caused by the requested injunction; and (4) the impact on the public interest.

Business & Corporate Compliance > ... > Sales of Goods > Readjustments > Modification, Rescission & Waiver

Contracts Law > ... > Discharge & Payment > Defenses > Failure of Consideration

International Law > Sources of International Law

HN2 [v] Readjustments, Modification, Rescission & Waiver

Under the United Nations Convention on the Contracts for the International Sale of Goods, a contract for the sale of goods may be modified without consideration for the modification.

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

International Law > Dispute Resolution > General Overview

International Law > Sources of International Law

International Law > Treaty Interpretation > Intent > General Overview

International Law > Treaty Interpretation > Particular Treaties > General Overview

HN3 [v] Documentary Evidence, Parol Evidence

Given the wording of the United Nations Convention on the Contracts for the International Sale of Goods (Convention), federal courts have determined that international sales agreements under the Convention are not subject to the parol evidence rule and are to be interpreted based on the "subjective intent" of the parties based on their prior and subsequent statements and conduct. Convention, arts. 8 and 9.

Mergers & Acquisitions Law > Sales of Assets > General Overview

HN4 [v] Mergers & Acquisitions Law, Sales of Assets

Under Michigan law, a non-competition clause relating to the sale of a business is generally enforceable provided that it is reasonable in scope, considering the duration, product and geography of the restriction. The party challenging the non-competition clause bears the burden of establishing its unreasonableness.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Guaranty Contracts

International Law > Sources of International Law

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Product Standards

HN5 [v] Types of Contracts, Guaranty Contracts

The United Nations Convention on Contracts for International Sale of Goods (Convention), arts. 38 and 39 require the buyer to examine the goods within as short a period as is practicable in the circumstances and which further state the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time. The Convention, art. 39 also provides a two-year time period as the outer limit of time for a buyer to notify the seller of a lack of conformity (unless the goods are subject to a longer contractual period of guarantee).

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Installment Contracts

2001 U.S. Dist. LEXIS 21630, *1

Contracts Law > Breach > General Overview

International Law > Sources of International Law

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Contracts Law > ... > Secured Transactions > Installment Contracts > General Overview

HN6 Types of Contracts, Installment Contracts

The United Nations Convention on Contracts for the International Sale of Goods (Convention), art. 25 defines a fundamental breach of contract as one which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. This is a significant definition in that the Convention, art. 64 provides the seller a right to declare the contract avoided due to a fundamental breach of contract. The Convention affords the buyer a right to avoid the contract under the Convention, art. 49 for a fundamental breach. It likewise affords both buyer and seller the right to suspend or avoid an installment contract due to fundamental breach under the Convention, arts. 71-73. The Convention, art. 64 is also specifically worded to give the implication that non-payment of the purchase price is the most significant form of a fundamental breach by a buyer, since, as to a serious non-payment, no additional notifications are required for avoidance of the contract.

Counsel: For Shuttle Packaging Systems, L.L.C., Plaintiff: Valerie P. Simmons, Warner, Norcross & Judd LLP, Grand Rapids, MI.

For Jacob Tsonakis, INA S.A., Defendant: Ronald G. DeWaard, Varnum, Riddering, Schmidt & Howlett, Grand Rapids, MI.

Judges: RICHARD ALAN ENSLEN, United States District Judge.

Opinion by: RICHARD ALAN ENSLEN

Opinion

This matter is before the Court on Plaintiff's Motion for

Preliminary Injunction, which was heard on December 11, 2001. The Court now enters this written decision for the purpose of summarizing and publishing its previous findings.

I. PROCEDURAL BACKGROUND

Plaintiff Shuttle Packaging Systems, L.L.C. ("Plaintiff") filed this action against Defendants Jacob Tsonakis, INA S.A. ("INA") and INA Plastics Corp. ("INA Plastics") on October 24, 2001. Plaintiff's sole member is Calvin Diller, who is a citizen of Michigan. This decision refers in many parts to East Jordan Plastics, Inc. ("EJP"), which company is related to Plaintiff by its ownership and operation.

On October 24, 2001, Plaintiff filed motions for a temporary restraining order and preliminary injunction. By Order of October 25, 2001, this [*2] Court denied the Motion for Temporary Restraining Order on the ground that Plaintiff had not shown that it was likely to sustain irreparable harm before the Motion for Preliminary Injunction could be heard. The Order also set the Motion for Preliminary Injunction for hearing on December 6, 2001. Due to scheduling problems, the date was later scheduled for December 11, 2001 at 2:30 p.m. Briefing of the Motion was somewhat delayed owing to the fact that Defendant INA is a Greek corporation with its principal place of business in Athens, Greece. (See Stip. and Order of Dec. 5, 2001, allowing delayed briefing). As such, some of the legal materials mentioned below were not received until December 10, 2001, the last of them being submitted at 5:00 p.m. Nevertheless, the Court thoroughly reviewed the materials in advance of the hearing by reading them through midnight December 10, 2001.

II FACTUAL BACKGROUND

A. Allegations of Complaint and Answer

Plaintiff's Verified Complaint alleges that on November 1, 2000, it agreed to a purchase agreement with Defendants. Plaintiff alleges that under the purchase agreement Defendants were required to supply thermoforming line equipment [*3] for the manufacture of plastic gardening pots together with the technology and assistance to use the equipment. (Plaintiff's Complaint at P 8.) The equipment included a "double line" having an annual output capacity of 1,800,000 lbs.

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and a "trade gallon line" having an annual output capacity of 3,270,000 lbs. (*Id.* at P 9.) The aggregate purchase price for the equipment was \$ 1,200,000 for the double line and \$ 1,800,000 for the trade gallon line. (*Id.* at 10.) The Contract also included other terms relating to payment schedules, non-competition, warranties, notices, expenses, interest, and an integration clause. (*Id.*, Exhibit A--purchase agreement.) The non-competition term did not include the specific terms for non-competition, but required the further execution of a non-competition agreement. (*Id.*) Although it was not alleged in the Complaint, the Court notes for clarification sake that, based on other exhibits filed by the parties and their briefing, the trade gallon line was intended to manufacture 2.5 liter pots and the double line was intended to manufacture 11 centimeter pots on one line and 4 inch pots on the other line.

According to the Complaint, on November 2, 2000, the [*4] parties entered into a non-competition agreement which contained various covenants of the seller not to engage in selling its equipment and processes within the "Restricted Area," not to disclose its technical manufacturing processes to others, and not to disclose or use trade information and customer lists of the buyer. (See Complaint, Exhibit B--Non-competition Agreement.) The non-competition agreement contained no covenants for the buyer, but listed the payment of the purchase price under the purchase agreement as the consideration. (*Id.*) The "Restricted Area" was defined as "any jurisdiction throughout the world where the Company is, or in which Seller has reason to know the Company expects to engage in, the Business. The jurisdictions included in the Restricted Area as of the date of this Agreement are listed on Schedule I hereto." (*Id.* at P 1a.) No Schedule I was attached to the document. Plaintiff interprets the "Restricted Area" as North America. The non-competition agreement also stated that it was to be interpreted and enforced in accordance with the laws of the State of Michigan. (*Id.* at P 11.)

Plaintiff's Complaint is stated in three state law counts, each [*5] premised on diversity jurisdiction. Count One alleges breach of the non-competition agreement and specifically that Defendants are soliciting customers of Plaintiff in North America for the purpose of selling equipment subject to the agreement. Count Two alleges breach of the purchase agreement and more specifically both that Defendants have not provided all of the services required under the agreement and that the equipment has not performed as promised. Count Three alleges a breach of warranty as to the equipment in that

the equipment was not in good working order, did not manufacture to the contract specifications and failed to meet industry standards for manufacturing. Count One is pertinent to the request for Preliminary Injunction since it includes the request that the Court temporarily and permanently enjoin violation of the non-competition agreement.

Defendants have also answered the Complaint. The Answer contests most of the factual allegations, but admits jurisdiction and venue. The Answer also contends that Defendant INA Plastics has dissolved and is no longer in business. Plaintiff, during hearing, further clarified that jurisdiction was proper in that Plaintiff had only [*6] one member, Calvin Diller, who is a citizen of Michigan.

B. Plaintiff's Affidavits and Exhibits

Plaintiff's Complaint was verified by Calvin Diller, the President and CEO for Plaintiff. Nevertheless, the Complaint does not contain many specific factual allegations which are helpful to understand the factual background for this controversy. Plaintiff has, however, filed other affidavits, including the affidavits of Gary Gurizzian, Mark Lercel, Wayne DeCamp, and Alan Druskin. The affidavits include other attachments.

Gary Gurizzian is the CFO for Plaintiff and the Financial Projects Manager at EJP. (Gurizzian Aff. at P 1.) EJP is located in East Jordan, Michigan, which is also Plaintiff's principal place of business. (Complaint at P 3.) Gurizzian states in his affidavit that Jacob Tsonakis, the President of INA, made representations to him, Calvin Diller and Al Druskin concerning the plastic technology manufacturing equipment sold by his company in July 2000. (*Id.* at PP 3 and 4.) Gurizzian further states that EJP then provided a loan or advance of funds of \$ 600,000 with the idea that the parties, EJP and INA, would form a joint venture. (*Id.* at P 5.) The joint venture [*7] did not occur, but Shuttle was formed in place of EJP as a possible participant in the joint venture. (*Id.* at PP 5-6.) The parties eventually settled on a purchase agreement for the equipment instead of a joint venture. (*Id.* at P P 6-8.) At the time of the purchase agreement, a contract term requiring non-competition was critical to Plaintiff. (*Id.* at P 9.) Plaintiff has made payments on the equipment consistent with the payment schedule in the contract. (*Id.* at P 17.) The double line was delivered on January 25, 2001, which was after its scheduled date of December 18, 2000. (*Id.* at P 19a.) Upon delivery, Plaintiff discovered that the

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equipment had been damaged in shipping. (*Id.* at P 19b.) These circumstances required Plaintiff to order pots from INA for sale to its customers instead of manufacturing the pots itself. (*Id.* at P 19c-d.) Due to constant failure of the equipment, Plaintiff suspended payment to INA. (*Id.* at P 20-21.) Gurizzian believes (for unspecified reasons) that INA is competing in the North American market and underselling Plaintiff, so as to cause Plaintiff an undeterminable financial loss and so as to threaten Plaintiff's business [*8] viability. (*Id.* at P 23-28.)

Mark Lercel is the manufacturing engineer for EJP and has served as a consultant for Plaintiff relating to the performance of the purchased equipment. (Lercel Affidavit at PP 1-2.) In his Affidavit, Lercel catalogs a long list of problems concerning the equipment. He lists and describes problems in some 19 sub-paragraphs concerning the trade gallon line's installation, delivery, documentation, tooling, working condition and performance. (*Id.* at P 3.) He lists and describes problems in some 13 sub-paragraphs relating to the double line's design, working condition, guarding, tooling, documentation and performance. (*Id.* at P 4.) He lists and describes problems in 7 sub-paragraphs relating to the training and instructions provided as to both lines. (*Id.* at P 5.)

Wayne DeCamp was the Director of Manufacturing at EJP and is now the Director of Manufacturing for Plaintiff. (DeCamp's Affidavit at 1.) Like Lercel, DeCamp provides a catalog of the problems experienced by Plaintiff with the equipment. (*Id.*) This catalog, for the most part, reiterates the problems described by Lercel in his Affidavit. (*See id.* at PP 3-5.)

Alan Druskin is [*9] the Vice President of Marketing of EJP and by an administrative agreement also manages the marketing of Plaintiff. (Druskin Affidavit at P 1.) Druskin worked with Jacob Tsonakis to solicit sales for Plaintiff. (*Id.* at P 2.) Druskin claims "on information and belief" that Tsonakis solicited customers of Plaintiff for his own business beginning in February 2001 and made his products available to these customers at prices which undercut Plaintiff's prices. (*Id.* at PP 4-6.) According to Druskin, he has been told by his customers that they will buy from INA instead of Plaintiff because of the cost difference. (*Id.* at P 9.)

C. Defendants' Affidavit and Exhibits

Defendants have filed the very lengthy Affidavit of Jacob Tsonakis, which includes some 185 numbered

paragraphs and some 67 attachments. The attachments are mostly either documents pertinent to the case or email communications between the corporate actors involved in this case. Paragraphs 1-9 of the Affidavit give Tsonakis' general education and background and describe his development of the thermoforming technology and its use by INA to make gardening pots at more competitive prices. (Tsonakis Affidavit at [*10] PP 1-9.) Paragraphs 10-26 of the Affidavit describe the manner in which Tsonakis has developed thermoforming manufacturing lines for the production of the pots, including descriptions of the equipment used in the lines. (*Id.* at PP 10-26.) Paragraphs 27 through 33 describe the events giving rise to the approval of the purchase agreement. Those paragraphs describe those events in a similar manner to Plaintiff's representatives' descriptions. However, one important difference is that Defendant indicates that he engaged in tele-facsimile correspondence with Calvin Diller on September 28, 2000 in which he indicated that the lines might not be completed until January 15, 2001. (*Id.* at P 32 and Exhibit 1.) The January date was used because much of the described equipment, which was quite large, needed to be shipped by container ship from Greece to the port of Charleston and then shipped by truck to the Plaintiff's plant in Forest City, North Carolina.

Paragraphs 34 through 44 of the Affidavit provide Tsonakis' version of events relating to the approval of the purchase agreement. Most notably Tsonakis attaches a copy of the purchase agreement which he approved, initialed and telefaxed [*11] to Plaintiff. Tsonakis' version consists of 9 nine pages, including a Schedule A and C. Tsonakis asserts that Plaintiffs' version of the Agreement, which included replacement pages, was not approved by him as indicated by his failure to initial the replacement pages. Tsonakis also asserts that there never was agreement as to a Schedule B (which Tsonakis did not want to approve) nor as to a Schedule D (which was not created at that time). (*Id.* at PP 34-44 and Exhibit 2.)

Paragraphs 45 through 54 of the Affidavit describe the approval of the non-competition agreement. According to Tsonakis, he inquired of Gurizzian why the balance of the down payment of \$ 450,000 had not been sent. When he asked this question, Gurizzian told him that the balance would not be paid until he agreed to the terms of a non-competition agreement. When he reviewed the proposed agreement, he told Gurizzian that the term relating to the "Restricted Area" was unreasonable because it referred to any jurisdiction in the whole world. Gurizzian responded that he should not

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be concerned since the document was "simply something for the file." Tsonakis then faxed a signed and initialed copy to Gurizzian. The copy [*12] referenced did not include a Schedule I, the schedule describing more particularly the jurisdictions referenced in the agreement. After receiving the balance of the down payment from Plaintiff, Tsonakis turned over his customers in the United States to Plaintiff (though he did not deem himself required to do so). (*Id.* at PP 45-54 and Exhibit 3.)

Paragraphs 55 through 66 of the Affidavit provides Tsonakis' version of events relating to the delivery of the trade gallon line in the Forest City plant in early 2001. (*Id.* at PP 55-66.) Paragraphs 67 through 74 also relate to the installation of the trade gallon line. According to those paragraphs, certain accessory equipment was not part of the contract and Tsonakis advised Plaintiff of this, without objection, upon his arrival to install the equipment. According to Tsonakis, the only defect in the machinery, a bent cabinet from damage in shipping, was quickly repaired. (*Id.* at P 64-74.)

Paragraphs 75 to 91 of the Affidavit relate to the negligent operation of the trade gallon line, which Tsonakis claims to have witnessed during his assistance at the plant. According to Tsonakis, the machinery was unsafe and inefficient due [*13] to Plaintiff's refusal to purchase necessary accessories for the machinery. (*Id.* at P 75.) Also, according to Tsonakis, Plaintiff attempted to use the machinery without a mixer by having employees attempt to manually mix 700 pounds per hour of molten plastic with a shovel over the hot extruder of the line. (*Id.* at PP 78-81.) These compromises caused problems with the homogeneity of the plastic, lack of quality control, and other production problems. (*Id.* at PP 75-91.) Plaintiff's production also suffered from high turnover of the work force and the drug addiction of one key employee who operated the lines. (*Id.* at PP 85-89.) According to Tsonakis, there was a shortage of employees to operate the second line when it arrived in March 2001. (*Id.* at P 90.) Tsonakis also explained in paragraphs 92 through 99 that Plaintiff had some production problems because its workers ignored his production engineer's advice to use some virgin material in mixtures and to avoid contaminants. (*Id.* at PP 92-99 and Exhibits 17-22.)

Paragraphs 100 to 115 of the Affidavit describe the training by INA. This training included the employment of two Greek engineers in the Forest City plant [*14] for a five-month period. (*Id.* at P 100.) Tsonakis includes in his various statements relating to training references to

email by employees of Plaintiff, which email acknowledge the adequacy of the training. (*Id.* at PP 104-114 and Exhibits 26-29.) Tsonakis also offered more training, though the offer was not accepted. (*Id.* at P 115.)

Paragraphs 116-120 contain Tsonakis' complaint that Plaintiff wrongly deducted repair costs for the machinery from contract payments due his company. Tsonakis communicated with Plaintiff on this subject and instructed Plaintiff that the deductions were wrongful in light of paragraph 11 of the purchase agreement--which allocated the buyer's "expenses" to the buyer.

Paragraphs 121 to 137 contain Tsonakis' complaint that Plaintiff failed to make timely payments for pots Plaintiff ordered from INA for Plaintiff's customers. Tsonakis claims that Plaintiff has not made payments when due and now owes \$ 116,344.51 for the pots sold. (*Id.* at P 38.) Tsonakis also claims in paragraphs 138-171 that Plaintiff, after the last equipment line was delivered in April 2001, stopped making the progress payments required under the Purchase Agreement despite [*15] his many requests for payment. According to Tsonakis, Gary Gurizzian sent an email to him on July 6, 2001 which requested that there be a 90-day moratorium on progress payments in light of issues concerning performance. (*Id.* at P 172 and Exhibit 60.) Tsonakis responded by email, requesting full payment, which was past due by three months. (*Id.* at PP 173-174 and Exhibits 61 and 62.) Tsonakis sent other email requesting payment which were not heeded. This prompted Tsonakis to send Gurizzian an email in early August 2001 advising Gurizzian that since Gurizzian had not made timely payment according to the agreement Tsonakis did not feel bound by the non-competition agreement. (*Id.* at P 181 and Exhibit 66.) Tsonakis also points out that this lawsuit was filed at the deadline for Plaintiff to respond to a letter from the Trade Commissioner relating to the non-payment by Plaintiff. (*Id.* at P 183.) The remainder of the Tsonakis' Affidavit seeks to discount the statements made by Plaintiff's affiants for various reasons including that the statements made were untrue, that the complaints were not premised on duties of INA under the Purchase Agreement, and that the problems were [*16] caused by negligence of Plaintiff or third-parties. (*Id.* at PP 184-185.)

D. Defendants' Supplementary Evidence

Defendants have filed supplementary evidence for the

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purpose of establishing that performance payments were due on the 11 centimeter line. Defendants have also filed the depositions of Plaintiff's affiants for the purpose of cross-examining and testing their testimony.

An examination of the SPS performance documents (and email documents) generally shows that the 11 centimeter line had been twice successfully tested by Plaintiff such that the second performance payment of \$ 90,000 was due under P 2(b)(ii) of the Purchase Agreement. (See Defendants' Attachments B and C.) The documents also reiterate that the standard for successful testing was not complete 8 hour shifts of production (which rarely occurred). Rather, the apparent standard was performance meeting or exceeding the performance of the trade gallon lines, which standard had been previously approved in an email by Gary Gurizzian. (See Defendants' Attachments B and C.).

An examination of Plaintiff's affiants' testimonies show them to be generally consistent with the affidavits, but also contain [*17] many admissions helpful to the Defendants. Wayne DeCamp admitted that the high degree of manual labor associated with Plaintiff's operation of the lines made training difficult. (DeCamp Dep. at 99-100.) He also admitted that the line operated inefficiently due to employee breaks (*id.* at 101-106) and that the four inch line had not been set up and run by Plaintiff (which was required because of Defendants' expectation of the additional performance payment) and that the necessary part to set up the line (the extruder) had been warehoused (*id.* at 162). DeCamp also confirmed his authoring the email attributed to him by Tsonakis, relating to the adequacy of the line training.

Gary Gurizzian's deposition is also somewhat helpful to Defendants' position. He admitted that he had not complained about late delivery or about the failure to include accessory equipment with the lines. (Gurizzian Dep. at 71-74, 22-23.) Gurizzian's credibility on other points is also undermined by his deposition testimony. For instance, his explanation of his spreadsheet analysis concerning the operation of the lines shows it to be mistaken in significant parts. This spreadsheet analysis appears to bill [*18] Defendants for the ordinary operation of the machinery, including repair costs, and accessories which were not included within the Purchase Agreement.

E. Hearing Evidence

Parties to this matter were provided an opportunity to present additional evidence and testimony at hearing.

However, no witnesses were called at hearing. In fact, the only additional evidence consisted of four exhibits, two by Plaintiff and two by Defendants. Two of these exhibits, Plaintiff's Exhibit 1 and Defendant's Exhibit 1, were admitted only as demonstrative exhibits--to summarize the testimony of witnesses. The remaining two exhibits were documents pertinent to the case. Plaintiff's Exhibit 2 contains equipment purchase terms and related correspondence between the parties near the time of the purchase agreement. Defendant's Exhibit 2 is an email sent to Baucom's Nurseries by Jacob Tsonakis on March 20, 2001, which tends to prove that he had assigned this former customer to Plaintiff. The Court believes that these documents, when read in context, support the Court's factual conclusions concerning this case.

III. LEGAL ANALYSIS

HN1 [↑] In reviewing a preliminary injunction motion under Federal [*19] Rule of Civil Procedure 65, this Court is required to consider four factors: (1) Plaintiff's likelihood of success on the merits; (2) the irreparable harm that could result to Plaintiff if the injunction is not issued; (3) the possibility of substantial harm to others caused by the requested injunction; and (4) the impact on the public interest. Basiccomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992); Performance Unlimited v. Questar Publishers, Inc., 52 F.3d 1373 (6th Cir. 1995). This evaluation allows the factors to be balanced and focuses on all four factors--rather than any particular factor. In re De Lorean Motor Co., 755 F.2d 1223, 1228-30 (6th Cir. 1985).

A. Likelihood of Success

The first factor, likelihood of success, in this case relates to the likelihood of success of the merits of its claim for injunctive relief to enjoin the violation of the non-competition agreement and, more specifically, to enjoin competition in places in North America wherein Plaintiff is active in selling greenhouse pots. Jacob Tsonakis has not denied that his companies are competing in North America and his email of August 2001 [*20] indicated his intent to compete in North America because of Plaintiff's non-payment. Thus, the Court regards that the substance of this dispute is not over whether Defendants are competing, but whether they are bound by the terms of non-competition agreement to not compete in North America.

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To begin this discussion, the Court must make an initial and preliminary assessment of the likely source of law to be applied to this controversy. The Court's preliminary assessment is that this controversy is governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), 19 I.L.M. 671 (May 1980), with one exception. The exception is the legal question of the enforcement of the non-competition agreement, which is governed by Michigan law under the parties' forum selection clause. This assessment is based on the several pertinent facts. The United States and Greece are signatories to the Convention. (See Defendants' Brief, Exhibit B.) The goods sold in this case are commercial goods of the type subject to the Convention. While the purchase agreement does not specify the application of any body of law as to the purchase, the non-competition agreement [*21] specifies the application of Michigan law, but only as to the enforcement of the non-competition agreement. Also, given the law cited by the parties, they are in apparent agreement as to this choice of law.

With this backdrop, the Court must assess whether Defendants now have a legal right to compete for this business in North America. Defendants make several arguments in opposition to the Motion. One argument made by Defendants is that the non-competition agreement is ineffective because of lack of consideration for the agreement. This argument fails. First of all, the non-competition agreement was made part and parcel with the purchase agreement and assumed that the consideration for the non-competition agreement was the consideration for the purchase agreement. Second, HN2 under the Convention, a contract for the sale of goods may be modified without consideration for the modification. See CISG, Art. 29; Michael Van Alstine, 37 Va. J. Int. Law 1 & n.47 (Fall 1996) (reaching this conclusion based on the U.N. Secretariat's Commentary on the Draft Convention, U.N. Doc. A/Conf. 97/5 (1979)).

Another argument made by Defendant is that the non-competition agreement is unenforceable [*22] because the document failed to specify the jurisdictions in which seller was required not to compete. This argument is not apt in the context of the Convention and the facts of this case. Although the meaning of the non-competition agreement was confused because the parties never attached the schedule describing the extent of the restrictions, the parties' subsequent conduct and discussions revealed an intent to apply this restriction to the United States' market. (See Tsonakis Affidavit P 54, stating that Tsonakis turned over United States'

customer list in consequence of the agreement.) Furthermore, HN3 given the wording of the Convention, federal courts have determined that international sales agreements under the Convention are not subject to the parol evidence rule and are to be interpreted based on the "subjective intent" of the parties based on their prior and subsequent statements and conduct. CISG, Articles 8 and 9; MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d' Agostino, S.p.A., 144 F.3d 1384, 1387-1391 (11th Cir. 1998). In this case, the statements and conduct of the parties reveal an intent to require Defendants not to compete as to the United States' [*23] market. As such, the failure to specify the precise jurisdiction does not render the agreement invalid.

Defendants also make the related argument that the agreement is invalid because the extent of the non-competition clause was too broad. HN4 Under Michigan law, a non-competition clause relating to the sale of a business is generally enforceable provided that it is reasonable in scope, considering the duration, product and geography of the restriction. See Woodward v. Cadillac Overall Supply Co., 396 Mich. 379, 240 N.W.2d 710, 714 (Mich. 1976) (J. Williams, dissenting) (describing general, common law rules); Vogue Cleaners & Dyers, Inc. v. Berkowitz, 292 Mich. 575, 291 N.W. 12 (1940). The party challenging the non-competition clause bears the burden of establishing its unreasonableness. Alders v. AFA Corp. of Florida, 353 F. Supp. 654, 657 (D. Fla. 1973), aff'd, 490 F.2d 990 (5th Cir. 1976). In this case, Defendants have scarcely argued this point and have made no real showing that the case law and facts of this case requires a conclusion that the non-competition clause is unreasonably broad. The scope of the clause [*24] is five years. The territory of the clause, as interpreted, is the United States. The clause relates to the sale of a unique product--a plastics manufacturing line for specialized horticultural products. The clause is typical of agreements of this type, which by their nature intend the sale of the goodwill of the business in addition to the manufacturing machinery. The person to be enjoined--INA--is also a foreign corporation with a lesser interest in competing in the United States than a corporation chartered in the United States. Under somewhat similar facts, the Fifth Circuit in the Alders case affirmed a five-year restriction on competition in the United States, Canada and Mexico. Under these circumstances, this defense is unlikely to prevail.

Defendants have also made equitable arguments based upon laches and unclean hands. These arguments,

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which are not supported by case authority cited, are not persuasive. There has been no extensive delay in the filing of this suit and the Plaintiff's alleged misconduct, principally non-payment, is not such as to warrant the label of "unclean hands." For instance, in Cleveland Newspaper Guild v. Plain Dealer Pub. Co., 839 F.2d 1147, 1155 (6th Cir. 1988), [*25] the Sixth Circuit Court of Appeals rejected both defenses and described the "unclean hands" defense as limited to instances of "bad faith." In the Court's judgment, these defenses simply do not apply on the facts of this case.

Defendants' final argument relating to likelihood of success is that the Plaintiff committed the first material breach of the contract and, as such, Defendants are no longer bound by the terms of the non-competition agreement. Defendants also make a related argument that because Plaintiff delayed in complaining about the performance of the equipment, it is not entitled to suspend payment of money owed under the purchase agreement.

This related argument concerns HNS Articles 38 and 39 of the Convention, which require the buyer to "examine the goods . . . within as short a period as is practicable in the circumstances" and which further state the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time . . ." Article 39 also provides a two-year time period as the outer limit of time for a buyer to notify the seller of a lack of conformity [*26] (unless the goods are subject to a longer contractual period of guarantee).

This related argument fails. The wording of the Convention reveals an intent that buyers examine goods promptly and give notice of defects to sellers promptly. However, it is also clear from the statute that on occasion it will not be practicable to require notification in a matter of a few weeks. For this reason, the outer limit of two years is set for the purpose of barring late notices. In this case, there was ample reason for a delayed notification. The machinery was complicated, unique, delivered in installments and subject to training and on-going repairs. The Plaintiff's employees lacked the expertise to inspect the goods and needed to rely on Defendants' engineers even to use the equipment. It is also wrong to say, in light of this record, that notification did not occur until July 6, 2001. Long before the July 6 correspondence, there was a steady stream of correspondence between the parties relating to the functioning of the equipment which may have

constituted sufficient notice of the complaints. The international cases cited by Defendants are not apposite to this discussion because they concern [*27] the inspection of simple goods and not complicated machinery like that involved in this case.

Nevertheless, the Court does accept Defendants' contention that the Plaintiff's non-payment of progress payments on the machinery did constitute a "fundamental breach of contract." HNG Article 25 of the Convention defines a "fundamental breach of contract" as one "which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. . . ." See Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1028 (2nd Cir. 1995) (discussing definition). This is a significant definition in that Article 64 provides the seller a right to declare the contract avoided due to a "fundamental breach of contract." The Convention affords the buyer a right to avoid the contract under Article 49 for a fundamental breach. It likewise affords both buyer and seller the right to suspend or avoid an installment contract due to fundamental breach under Articles 71-73. Article 64 is also specifically worded to give the implication that non-payment of the purchase price is the most significant form of a fundamental breach by a buyer, since, as to a [*28] serious non-payment, no additional notifications are required for avoidance of the contract.

In this case, the buyer has had some legitimate complaints concerning the machinery throughout the delivery and training process. However, on the whole, the Court concludes that the evidence submitted best supports the proposition that these complaints did not constitute either a fundamental or even a substantial breach of the contract by the seller. This is particularly true since the context for this dispute--namely, the machinery has been successfully operated with Defendants' assistance and Plaintiff is a cash-strapped business raising performance questions only after formal inquiries have been made as to non-payment--tends to show that complaints about performance were opportunistic and not genuine in character. On the other hand, the Court determines that it is likely that non-payment of the large sums due for the performance payments was a fundamental breach of contract and that it excused Defendants' performance of non-competition obligations under the purchase agreement and non-competition agreement. As such, the Court concludes that Plaintiff is unlikely to succeed on the merits.

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injunction motion.

[*29] B. Irreparable Harm to Plaintiff

Plaintiff has cited cases for the proposition that loss of goodwill and loss of business opportunities are the kinds of losses which are irreparable because they cannot later be sufficiently quantified for damage purposes. See, e.g., *Basiccomputer v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992). While the Court agrees with that legal proposition, it finds it inapplicable here. Because the Plaintiff had, most likely, committed a fundamental breach of the contract by nonpayment, it has also most likely surrendered its right to seek enforcement of the non-competition agreement. As such, on the present record, the Court does not find that Plaintiff is likely to suffer irreparable harm because of Plaintiff's own fundamental non-performance of its duties under the contract.

C. Harm to Others

This factor focuses on the harm to Defendants caused by a possible wrongful injunction. The Court believes that this factor sorts out like the other factors above. Namely, since the Plaintiff has, most likely, wrongfully failed to pay amounts due under the contract, the Defendants should not be expected to honor obligations for which [*30] they have not been paid. As such, the Court determines that this factor disfavors granting relief.

D. Public Interest

Of course, the public, in the abstract, cares very little concerning which group of manufacturers should manufacture pots in the United States during the course of this lawsuit. However, the public does have an interest in seeing that these pots, which are produced at a more cost-efficient basis than other agricultural pots, are readily available in the market. Thus, the public's interest is best supported by a resolution which would cause both the parties to manufacture pots in the market pending the resolution of this suit. This is particularly true since the Plaintiff's manufacturing abilities have proven suspect such that the market might be jeopardized by licensing the market solely to Plaintiff-a producer who operates its manufacturing on a shoestring budget. Although, as Plaintiff points out, this resolution might threaten its long-term viability, it seems apparent that there are ample threats to Plaintiff's long-term viability even absent denial of this preliminary

IV. CONCLUSION

Accordingly, an Order shall issue denying [*31] the Motion for Preliminary Injunction.

DATED in Kalamazoo, MI:

December 17, 2001

/s/ Richard Alan Enslin

United States District Judge

ORDER

In accordance with the Opinion of this date and the Court's previous findings upon hearing of this matter on December 11, 2001;

IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction (Dkt. No. 4) is **DENIED**.

Dated in Kalamazoo, MI:

December 17, 2001

/s/ Richard Alan Enslin

United States District Judge

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EXHIBIT

I

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2014 WL 804771
Only the Westlaw citation is
currently available.
United States District Court,
N.D. Ohio,
Eastern Division.

B & S TRANSPORT, INC., et al.,
Plaintiffs,
v.
BRIDGESTONE AMERICAS
TIRE OPERATIONS, LLC, et al.,
Defendants.

No. 5:13-cv-2793.
|
Feb. 27, 2014.

OPINION AND ORDER

SARA LIOI, District Judge.

*1 This matter is before the Court on plaintiffs' motion styled as a motion for temporary restraining order, preliminary injunction, and permanent injunction. (Doc. No. 4.) Defendants filed a response (Doc. No. 17), and plaintiffs filed a reply. (Doc. No. 19.) The Court has already denied plaintiffs' motion for temporary restraining order. (Minute Order, Jan. 15, 2014.) Plaintiffs subsequently

submitted their motion for preliminary injunction without any further evidence or arguments in support. (Doc. No. 24.) Likewise, defendants offered no additional evidence or arguments in support of their opposition to the motion. (Doc. No. 29.) Accordingly, the Court construes the motion as a motion for preliminary injunction and the same is DENIED.

I. Factual Background

Plaintiff Ronnie Harris is the founder and majority shareholder of plaintiff B & S Transport, Inc. ("B & S") (Doc. No. 4 at 35.) B & S, a self-described African-American company, became an authorized dealer of Firestone tires sometime between 1977 and 1979 and of Bridgestone tires after Bridgestone acquired Firestone. (*Id.* at 36.) B & S primarily serves government entities. (*Id.* at 41.) Plaintiffs allege the parties' relationship is governed by a 1988 or 1990 contract (exact year unknown¹) of indefinite duration that, by its own terms and through the parties' course of performance, provided for termination only for good cause. (Doc. No. 1 at 5.) The contract also allowed B & S to seek tires sales without geographical restrictions, unlike most dealer agreements. (*Id.*) Allegedly partly written and partly oral, this contract has not been produced by either party.

¹ Compare Doc. No. 4-2 at 65 ("In close

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proximity to Firestone's acquisition" by Bridgestone in 1988, "B & S Transport entered into an agreement with Firestone, which was partly in writing and partly oral [.]") with Doc. No. 1 at 5 ("[O]n or about February, 1990, a written contract was entered into between B & S and Firestone[.]").

Defendants dispute these terms, but admit that no written contract exists between B & S and Bridgestone. (Doc. No. 17 at 192.) After Bridgestone acquired Firestone, well after the creation of the parties' contract, Bridgestone sought to have Harris and B & S enter into Bridgestone's authorized dealer agreement, which provided for termination by either party without cause on 30 days' notice. Harris and B & S pointedly and repeatedly refused to sign it.² (*Id.* at 193; Doc. No. 18 at 211³.)

² Defendants have submitted a copy of Bridgestone's standard authorized dealer agreement. (Doc. No. 18.) It provides for termination "at any time, by either party, without cause, upon 30 days prior written notice to the other party[.]" (*Id.* at 224.)

³ The exact date of Bridgestone's first request to Harris and B & S to sign the agreement is unknown. In his affidavit, Landers Gaines states that Bridgestone made multiple such requests in the eight years in which Gaines had direct dealings and contacts with Harris and B & S. (Doc. No. 18 at 211.) Gaines does not precisely pinpoint those eight years, but, in the context of his affidavit, they likely were 2005–2013.

On January 11, 2011, Bridgestone sent B & S an email containing pricing information requested by B & S in connection with B & S's bids for government contracts. (Doc. No. 4 at 37.) In accordance with its prior

dealings with B & S as well as its general business practices, Bridgestone stated that its pricing information pertained only to the individual government contracts and did not constitute a "guarantee to supply" or a "commitment to supply" any product therein. (*See, e.g.*, Doc. No. 4–3 at 76.) Based on that information, throughout 2011, plaintiffs bid on and won six government contracts with the Defense Logistics Agency, all of which consisted of two base years with one possible option year, to be exercised at the discretion of the government. (Doc. No. 4 at 38.)

On February 28, 2013, Harris received a letter from Kurt A. Danielson, President, Bridgestone Commercial Solutions, informing Harris "that Bridgestone has decided to terminate B & S Transport as an Authorized Dealer of all Bridgestone and Firestone brand product lines[.]" (Doc. No. 4–8 at 107.) The letter further clarified that B & S would remain an "Authorized Dealer" until December 31, 2013. (*Id.*) Beginning January 1, 2014, Bridgestone would cease shipping tires to B & S. Though plaintiffs claim that the letter came from a company official with whom plaintiffs had never done business, the letter clearly indicates that it "follow[ed] up to [Harris's] meeting on February 28, 2013 with Mr. Gary Clark and Mr. Landers Gaines to discuss the end of the longstanding relationship between [the parties.]" (*Id.*) Gaines submitted an affidavit, providing that he "had direct business dealing and contacts with B & S

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Transport, Inc. and its owner, Ronnie Harris, for about eight years.” (Doc. No. 18 at 211.) Gaines further stated that he met with Harris on February 28, 2013, and personally delivered the termination letter to him. (*Id.* at 212.)

*2 In October 2013, nearly eight months after B & S received the termination letter, the government exercised the third optional year on all six of the above-described contracts. (Doc. No. 4–5.) All six contracts now run through October 2014. Harris subsequently contacted defendants about the February 2013 termination letter and received a letter on November 14, 2013, from Jon A. Stanley, Associate General Counsel, in response. (Doc. No. 4–10 at 114.) Noting that defendants “provided B & S Transport, Inc. with almost ten (10) months notification of its decision[,]” Stanley reaffirmed defendants’ termination of B & S as a Bridgestone supplier. (*Id.*)

Plaintiffs claim that, after Bridgestone received the February 2013 letter, it lost contract awards to Pomp’s Tire Service, Inc. (“Pomp’s”), a non-minority tire distributor. (Doc. No. 4 at 40.) Specifically, plaintiffs claim that Pomp’s received pricing information from Bridgestone that enabled it to bid \$301.11 per tire on a Defense Logistics Agency contract, while plaintiffs’ pricing information required it to submit a much higher bid: \$352.12 per tire. (*Id.*) Unsurprisingly, B & S lost that contract, and allegedly three other contracts, to Pomp’s. (*Id.*)

Plaintiffs filed their complaint on December 19, 2013. The complaint asserts the following causes of action: (1) violation of 42 U.S.C. § 1981; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; (4) promissory estoppel; (5) tortious interference with contract; and (6) fraud. (Doc. No. 1 at 8–23.)⁴ That same day, plaintiffs filed a motion for temporary restraining order, preliminary injunction, and permanent injunction. (Doc. No. 4.) Plaintiffs asked the Court to: (1) enjoin defendants from terminating B & S as a supplier; (2) order defendants to reinstate B & S as an Authorized Dealer of Bridgestone tires; (3) order defendants to fill B & S’s tire orders; (4) order defendants to make their tires available to B & S at same prices as other suppliers; (5) enjoin defendants from preventing delivery of Bridgestone tires to B & S and its customers; (6) enjoin defendants from soliciting business from B & S clients; and (7) prevent defendants from providing non-minority companies with more advance notice of defendants’ pricing. (Doc. No. 4 at 45–46.)

⁴ The sixth and seventh claims for relief-specific performance and injunctive relief-are remedies, not causes of action. (Doc. No. 1 at 23–24.)

The Court conducted a hearing on plaintiffs’ motion for temporary restraining order on January 14, 2014, and, after hearing from counsel for both parties, denied the motion.

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(Minute Order, Jan. 15, 2014.) Plaintiffs continue to assert their motion for preliminary injunction.

applied only in the limited circumstances which clearly demand it.” *Id.* (internal quotation marks and alterations omitted). It is against this legal backdrop that the Court evaluates plaintiff’s motion and considers the four factors.

II. LAW AND ANALYSIS

In considering preliminary injunctive relief, the district court must weigh the following four factors:

- (1) the plaintiff’s likelihood of success on the merits;
- (2) whether the plaintiff will suffer irreparable harm without the injunction;
- (3) whether granting the injunction will cause substantial harm to others; and
- *3 (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir.1998). No single factor is determinative. Rather, the Court must balance the factors to determine whether they weigh in favor of granting the injunction. *Id.*

The proof required to obtain a preliminary injunction is “much more stringent than the proof required to survive a summary judgment motion.” *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir.2000). “[P]reliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be

1. Likelihood of Success on the Merits

Under the first factor, likelihood of success on the merits, plaintiffs must demonstrate “more than a mere possibility of success[;]” however, “if the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation,” an injunction may issue. *Am. Standard, Inc. v. Meehan*, 517 F.Supp.2d 976, 982 (N.D. Ohio 2007) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985)). When plaintiffs assert multiple claims, they need only demonstrate “a likelihood of success on the merits on the ‘central issue’ of [their] claims” to satisfy the substantial likelihood of success prong. *Skurka Aerospace, Inc. v. Eaton Aerospace, L.L. C.*, 781 F.Supp.2d 561, 565–67 (N.D. Ohio 2011) (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir.1997)). Addressing each claim in turn, plaintiffs have shown a *possibility* of success on some claims, but no *likelihood* of success on any claim.

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a. § 1981 Claim

Plaintiffs provide the following facts in support of their § 1981 claim. Plaintiffs allege that B & S was, at the time it received the termination letter, the only African-American supplier of Bridgestone tires to the government.⁵ (Doc. No. 1 at 9–10.) Because Bridgestone terminated B & S but did not terminate Pomp’s, which plaintiffs allege is the sole (non-minority) supplier authorized to sell to the government, plaintiffs claim that they will succeed on the merits of their § 1981 claim. Plaintiffs also claim that, in April 2013, Pomp’s received “lower pricing that was neither known to B & S Transport nor ‘valid’ for another four (4) months to come.” (Doc. No. 4 at 40.) Specifically, Pomp’s received pricing information of \$301.12 per tire for a government contract, while B & S received \$352.12 per tire. (*Id.*) As a result, B & S lost at least three contract awards to Pomp’s.

⁵ In his affidavit, Gaines stated that Bridgestone “has dealership agreements with other minority-owned businesses[,]” but does not allege that those businesses are government suppliers. (Doc. No. 18 at 212.)

In opposition, defendants claim that Bridgestone terminated B & S because the latter lacked both warehouse capabilities for inventory storage and full tire-related services for its customers, both of which Bridgestone actively sought in its suppliers. (Doc.

No. 18 at 212–13.) Indeed, B & S was rare, perhaps unique, among Bridgestone suppliers in lacking those services. (Doc. No. 17 at 194–95.) Defendants also argue that B & S’s failure to adhere to Bridgestone policies, as well as Harris’s unpleasant and difficult manner, prompted Bridgestone to terminate B & S as a supplier. (*Id.* at 195–96.) Finally, defendants allege that Pomp’s received the same pricing information as all Bridgestone suppliers. Pomp’s price of \$301.12 per tire reflected the price “available to all [Bridgestone] dealers, including B & S, as long as the customer met certain size requirements[,]” while B & S’s price of \$352.12 per tire reflected “a 2012–2013 GSA contract that wasn’t renewed when it expired in April 2013.” (*Id.* at 200.) Quite simply, defendants explain, comparing the 2013 price quote to a particular 2012 contract “is comparing apples to oranges.” (*Id.*)

*4 Section 1981 “prohibits intentional race discrimination in the making and enforcing of contracts involving both public and private actors.” *Amini v. Oberlin Coll.*, 440 F.3d 350, 358 (6th Cir.2006). To make a valid claim under the statute, plaintiff “must plead and prove that (1) he belongs to an identifiable class of persons who are subject to discrimination based on their race; (2) the defendant intended to discriminate against him on the basis of race; and (3) the defendant’s discriminatory conduct abridged a right enumerated in section 1981(a).” *Id.* A

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plaintiff can prove discriminatory intent—the second requirement—by inference, using the *McDonnell Douglas* burden-shifting framework. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973)). Under that framework, plaintiff “must present a *prima facie* case, at which point the defendant must come forward with a legitimate, non-discriminatory reason for its action. If the defendant can respond with such a reason for the [] action, the plaintiff has the burden of offering evidence that the defendant’s justification is a pretext that masks its true discriminatory intent.” *Id.* at 359–60. A pretextual reason has no basis in fact, did not actually motivate the defendant’s challenged conduct, or was insufficient to warrant the challenged conduct. *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003). The parties do not dispute the first prong of plaintiffs’ § 1981 claim, but vigorously contest defendants’ discriminatory intent and defendants’ proffered non-discriminatory reason for the termination.

In a similar contract termination case, a district court found a high likelihood of success on the § 1981 claim. There, the state of Ohio hired plaintiff, a minority-owned company, to conduct a predicate study. *D.J. Miller & Assocs., Inc. v. Ohio Dep’t of Admin. Svcs.*, 115 F.Supp.2d 872, 874 (S.D. Ohio 2000). Plaintiff’s primary researcher left the company, and the state of Ohio rejected the qualified replacement candidate plaintiff submitted for approval. The

state of Ohio instead awarded the predicate study to a majority-owned company. The court ruled that defendant’s “legitimate, non-discriminatory reason for terminating” plaintiff—that the replacement researcher was unqualified—was “a pretext for unlawful discrimination.” *Id.* at 881. The court found the replacement researcher easily met the contract’s requirements for a qualified principal researcher and plaintiff had, accordingly, shown a high likelihood of success on the merits. On the other hand, when the minority-owned business has clearly defined deficiencies when compared to the non-minority company, there is no violation of § 1981 in choosing another company for a contract. *See Baseball at Trotwood, LLC v. Dayton Prof’l Baseball Club, LLC*, 204 F. App’x 528, 537 (6th Cir.2006) (awarding contract to non-minority group had legitimate, non-discriminatory justification when non-minority group offered more stability and better financing); *see also Brown v. Am. Honda Motor Co., Inc.*, 939 F.2d 946, 951 (11th Cir.1991) (no § 1981 claim when non-minority group received Honda dealership because they were sole group with prior relationship with Honda to propose selling Hondas exclusively).

*5 Unlike *D.J. Miller*, the § 1981 claim does not present a high likelihood of success on the merits. In the February 2013 letter, Bridgestone cited its “change in distribution and go to market solutions strategies” to justify terminating B & S as a supplier.

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Specifically, Bridgestone now desires its suppliers to stock Bridgestone inventory in warehouses and provide full tire-related services to customers, neither of which B & S was or is equipped to do. Plaintiffs do not allege that B & S provides such services. Rather, they argue that B & S has provided exemplary services as a Bridgestone supplier for nearly three decades and Bridgestone had no nondiscriminatory reason to terminate B & S. For purposes of the Court's analysis at this stage, Bridgestone has offered a legitimate, non-discriminatory reason for terminating B & S while retaining Pump's: Pump's offered better services and, thus, plaintiffs have not shown a likelihood of success as to this issue. Nor, at this stage, have plaintiffs shown a likelihood of success in establishing discrimination in the prices offered to B & S versus Pump's. Instead, defendants have explained that the price discrepancy cited by plaintiffs resulted from comparing a 2012 contract price to a 2013 price quote. (Doc. No. 17 at 200.) Given the facts as presented at this early stage of the proceedings, plaintiffs have failed to show a substantial likelihood of success on their § 1981 claim.

b. Breach of Contract Claim

Plaintiffs further allege that B & S's contract with Bridgestone provided for termination only upon good cause. In

Ohio, “[a] breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach.” *Lawrence v. Lorain Cnty. Cmty. Coll.*, 127 Ohio App.3d 546, 549, 713 N.E.2d 478 (Ohio Ct.App.1998). Ohio law further provides, “a distributorship agreement with no express provision as to duration is generally *terminable at will* by either party after a reasonable duration and on reasonable notice.” *Miller v. Wikel Mfg. Co., Inc.*, 46 Ohio St.3d 76, 79, 545 N.E.2d 76 (1989) (emphasis added).

Whether plaintiff has demonstrated substantial likelihood of success on the breach of contract claim depends wholly on which termination clause applies to the parties. Plaintiffs assert that Bridgestone could only terminate the contract for good cause, relying on Harris's affidavit, wherein Harris states, per the partly written and partly oral contract between Bridgestone and B & S, the contract could not be terminated without good cause. (Doc. No. 4-2 at 65.) According to plaintiffs, that contract, now lost, still controls. According to plaintiffs, the essential terms of the contract⁶ provided that: (1) B & S would aggressively pursue government and minority set-aside business; (2) B & S was not geographically restricted; (3) B & S

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would submit sales on a deal-by-deal basis; (4) B & S would receive the same prices as every other dealer; (5) B & S would make timely payments; (6) the contract was of indefinite duration;⁷ (7) the contract would not be terminated without good cause; and (8) the parties would abide by the contract in good faith. (Doc. No. 1 at 14.) Plaintiffs do not indicate which contract provisions were written and which were oral. According to plaintiffs, the February 2013 letter and November 2013 follow-up letter terminated the contract without good cause, constituting breach of contract.

⁶ Plaintiffs claim this contract was “in effect a franchise agreement.” (Doc. No. 4–2 at 65.)

⁷ Though plaintiffs allege a contract of indefinite duration, the Statute of Frauds does not govern this case. Ohio law requires certain agreements to be in writing, including “an agreement that is not to be performed within one year from the making thereof.” Ohio Rev.Code § 1335.05. The party seeking to enforce such a contract must produce “some memorandum or note thereof [] in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.” *Id.* The Ohio Supreme Court has held, however, that “where the time for performance under an agreement is indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds.” *Sherman v. Haines*, 73 Ohio St.3d 125, 127 (1995). The version of the contract that plaintiffs allege is indefinite. Moreover, the contract alleged by plaintiffs is dependent upon good cause to terminate, which may or may not happen within a year. Thus, the Statute of Frauds does not require a writing.

*6 In opposition, defendants claim that they could terminate the relationship with or without cause, but admit that they cannot produce a written contract

to that effect. Defendants instead argue that the Court should not infer a “good cause” contract absent a writing. *See Miller v. Wikel Mfg. Co., Inc., supra; Excello Wine Co. v. Monsieur Henri Wines, Ltd.*, 474 F.Supp. 203, 208 (S.D. Ohio 1979) (“When a distributorship agreement such as this has no express term [of duration], the persuasive authority holds that it is terminable without cause after a reasonable period of existence and upon reasonable notice.”).

Considering the parties’ evidence to date, plaintiffs have shown that no *specific* termination-without-cause contract applied, but they have offered only the Harris affidavit in support of an indefinite, termination-for-cause contract. Without a writing or a more definite expression that the parties assented to an indefinite “good cause” contract, it may be difficult for plaintiffs to overcome the general rule that indefinite contracts are terminable at will. *Miller*, 46 Ohio St.3d at 78 (“[A] distributorship agreement with no express provision as to duration is generally terminable at will by either party after a reasonable duration and on reasonable notice.”); *Consun Food Indus., Inc. v. Fowkes*, 81 Ohio App.3d 63, 68, 610 N.E.2d 463 (1991) (“Where parties to a contract express no period for its duration ..., the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either party upon the giving of reasonable notice [.]”). Even assuming that an indefinite “good cause” term applies,

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plaintiffs must also show that defendants breached by lacking “good cause” to terminate. Defendants have offered compelling reasons why Bridgestone terminated B & S: B & S’s lack of warehousing capabilities and full tire-related services. Plaintiffs have not yet shown that these reasons (amongst others) do not constitute “good cause.” Plaintiffs have not, therefore, shown the requisite likelihood (1) that a termination-for-cause contract existed or (2) that defendants breached. Depending on the contractual evidence produced in this case, plaintiffs *might* succeed, but the Court cannot determine that plaintiffs are *likely* to succeed based on the evidence currently before it.

c. Promissory Estoppel Claim

Plaintiffs allege that they reasonably relied on defendants’ promise to supply tires when making the six Defense Logistics Agency contracts. Though Bridgestone’s communications with B & S provided pricing information, not promises to supply, Bridgestone knew that the contracts lasted three years. Plaintiffs claim they reasonably relied on the prices provided in Bridgestone’s communications, as well as their prior, multi-decade relationship with Bridgestone, in entering into multiple three-year contracts. In opposition, defendants rely on the uniform and repeated statements by Bridgestone

that the pricing emails did not guarantee supply or evince commitment to supply. According to defendants, any reliance on Bridgestone’s “promise,” by way of pricing quotes, to supply tires in 2014 in the face of such disclaimers, not to mention the February 2013 letter, was unreasonable.

*7 To assert a claim for promissory estoppel, plaintiffs must “establish the existence of a clear and unambiguous promise upon which it would be reasonable and foreseeable to rely and actual reliance on the promise to the detriment of one who relied.” *Loadman Grp., L.L. C. v. Banco Popular N. Am.*, No. 4:10cv1759, 2013 WL 1150125, at *9 (N.D. Ohio Mar. 19, 2013) (citations omitted). “[T]he party who asserts the promissory-estoppel claim bears the burden to prove by clear and convincing evidence all the elements of the claim.” *Dailey v. Craigmyle & Son Farms, L.L.C.*, 177 Ohio App.3d 439, 446–47, 894 N.E.2d 1301 (Ohio Ct.App.2008). Courts do not look kindly on plaintiffs who rely on “promises” despite written disclaimers to the contrary. In the employment context, for example, courts have ruled that oral promises of job security do not override employee handbooks specifying that employment is at-will. These oral “promises” do not provide a basis for reasonable reliance. *Hagan v. Solideal Tire, Inc.*, No. 1:10 CV 241, 2011 WL 3444265, at *10 (N.D. Ohio Aug. 8, 2011) (collecting cases); *Lake v. Wolff Bros. Supply, Inc.*, No. 63959, 1993 WL 462866, at *6 (Ohio Ct.App.

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Nov. 10, 1993).

The Ohio Supreme Court has recognized, however, that the parties' "course of dealing" can modify the at-will nature of an employment agreement. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 101, 483 N.E.2d 150 (1985) (syllabus). Even course of dealing arguments have their limits. For example, a dispute involving a similar "ongoing" relationship foretells, perhaps, the unlikelihood of plaintiffs' success on a promissory estoppel claim. *Book Dog Books, LLC v. Cengage Learning, Inc.*, No. 2:12-cv-1165, 2013 WL 65465 (S.D. Ohio Jan. 4, 2013). Seeking a TRO to force defendants to provide books to plaintiff bookstore for the winter 2013 semester, the bookstore alleged a "course of dealing whereby the Bookstores have always been able to use their accounts with the defendants to order books." *Id.* at *3. The bookstore relied on that course of dealing in running its business, though the bookstore owner could not "identify any specific promise made to him by defendants that they would supply books to the Bookstores on a going-forward basis." *Id.* at *4. The court concluded that plaintiff, for purposes of a TRO and/or preliminary injunction, did not demonstrate the requisite likelihood of success on its promissory estoppel claim. Though similar to this case, *Book Dog Books'* facts were more damning to plaintiff. There, defendant had previously frozen the bookstore's account and refused to ship books when it "lost confidence" in

the bookstore, weakening the course of dealing argument. *Id.*

Here, no clear and unambiguous promise to supply tires appears in the records submitted by the parties. Indeed, each piece of correspondence regarding tire pricing contained the following language: "This is not a guarantee to supply [,]" and "This is not a commitment to supply any of these tires." (*See* Doc. No. 4-3 at 76.) As in the employment cases cited above, defendants here have provided repeated written statements that they do not guarantee the supply of tires and do not promise to sell. Further weakening the reasonableness of any reliance on Bridgestone supplying tires for the duration of the government contracts, defendants, in February 2013, told plaintiffs in no uncertain terms that they would not supply tires after December 31, 2013. For plaintiffs to continue to rely on a purported promise to supply tires in 2014 in the face of both the written disclaimers and the termination letter weighs against plaintiffs at this stage. At the very least, plaintiffs have not established the requisite likelihood of success on the merits.

d. Remaining Claims

*8 In support of their remaining claims—breach of implied covenant of good faith and fair dealing, tortious interference with contract, and

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fraud-plaintiffs offer the same proofs of success on the merits as set forth above. A separate analysis of these claims is unnecessary; moreover, the three claims examined above are the “central claims” in this case. The Court points out, however, that defendants sent the termination letter in February 2013, long before the government exercised the third-year option on its contracts with B & S. In the end, this may foreclose any claim that defendants tortiously interfered with these contracts or fraudulently induced plaintiffs into entering into these contracts. At the time the government exercised the third-year option, the evidence appears to show that plaintiffs knew that they could not sell Bridgestone tires in 2014.

e. Summary

In total, plaintiffs have not carried their burden of showing likelihood of success on any central claim. Plaintiffs have not “raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp.*, 119 F.3d at 402. Though failure to show substantial likelihood of success alone is sufficient to deny the preliminary injunction, the Court shall nonetheless examine the remaining three factors. *See Pritchard v. Dent Wizard Int’l Corp.*, 275 F.Supp.2d 903, 920 (S.D.Ohio 2003).

2. Irreparable Harm

Under the second factor, plaintiffs must demonstrate irreparable harm, should the Court fail to grant the motion for preliminary injunction. “It is well settled that ‘a plaintiff’s harm is not irreparable if it is fully compensable by money damages.’ “ *Bearing D istr ib., Inc. v. Rockwell Automation, Inc.*, No. 1:06CV831, 2006 WL 1174279, at *7 (N.D.Ohio Apr. 28, 2006) (quoting *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992)). When, for example, impending contract termination forces plaintiff to locate product on the secondary market at higher cost or find replacement product, money damages fully compensate plaintiff’s loss without the aid of an injunction. *See id.* “[L]oss of customer goodwill[,]” however, “often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.” *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir.2007) (citation omitted). Moreover, “[t]he Sixth Circuit has recognized ... possible business failure as irreparable harm.” *Interstate Safety & Serv. Co., Inc. v. City of Cleveland*, No. 1:11 CV 1181, 2011 WL 5873108, at *2 (N.D.Ohio Nov. 18, 2011)

Plaintiffs allege the following irreparable harms: (1) ruination of B & S’s relationship with its customers,

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particularly its government customers; (2) destruction of B & S's reputation; (3) inability to honor current B & S contracts or obtain new ones; and (4) termination of B & S employees. Given that plaintiffs mainly sell Bridgestone products and have no relationship with other major tire providers, plaintiffs have, pursuant to the case law cited above, demonstrated irreparable harm upon losing Authorized Dealer status.⁸ This factor weighs in favor of the injunction; however, plaintiffs' long delay in bringing this lawsuit lessens the importance of the irreparable harm factor. See *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir.1995) ("Though such delay may not warrant the denial of ultimate relief, it may standing alone, ... preclude the granting of preliminary injunctive relief.") (citation omitted). Plaintiffs could have used any part of the last ten months of 2013 to repair or mitigate the harm they currently suffer.

⁸ Defendants point out that B & S does not deal exclusively in Bridgestone tires, so its termination as a Bridgestone supplier will not irreparably harm the company. (Doc. No. 17 at 204-05.) Bridgestone tires represent 75% of plaintiffs' sales. (*Id.*) Courts have found irreparable harm in cases in which the defendant's products accounted for no more than 20-25% of plaintiff's sales. *Am. Standard, Inc. v. Meehan*, 517 F.Supp.2d 976, 989 (N.D. Ohio 2007) (citing *Beaute Craft Supply Co. v. Revlon, Inc.*, 402 F.Supp. 385 (E.D. Mich. 1975)).

3. Substantial Harm to Others and Impact on Public Interest

*9 Because the final two factors require balancing of the interests and harms to various parties, they can be addressed together. The harm to others factor mainly focuses on the harm to defendants. When plaintiffs have "successfully sold" defendants' products "for many years" without complaint, one court agreed that little harm would come to defendants "by being required to continue to do business for a few more weeks in the manner in which they have been conducting business for years." *Tri County Wholesale Distrib., Inc. v. Labatt USA Operating Co., LLC*, No. 2:13-CV-317, 2013 WL 5657564, at *15 (S.D. Ohio Oct. 16, 2013). Continuation of a prior business relationship is less harmful, such courts conclude, than "requiring, most of, if not nearly all, [the customers] to find new [products or services.]" *Barron v. Vision Serv. Plan*, 575 F.Supp.2d 825, 837 (N.D. Ohio 2008).

As to the public's interest, granting or denying a preliminary injunction can serve the public interest in enforcement of "voluntarily assumed contract obligations." *Certified Restoration*, 511 F.3d at 551; see also *Skurka*, 781 F.Supp.2d at 579 ("[P]ublic's interest in upholding contract provisions supports granting Plaintiff's Motion for Preliminary Injunction."). On the other hand, "it is beyond responsible debate that the public interest is served when core societal values-in this case, a discrimination-free contracting process-are vindicated." *D.J. Miller*, 115 F.Supp.2d at 884.

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Under the final factors, plaintiffs claim that a preliminary injunction would harm neither Bridgestone nor any other party, noting that B & S always pays its invoices and Bridgestone would thus turn a profit from the sales the injunction would force it to make. Plaintiffs further argue that the public interest is served by preventing discrimination against minority business owners. (Doc. No. 4-1 at 61.) Finally, plaintiffs claim that denying the injunction would cause “a severe problem for the military because these tires are used on vehicles used for transporting heavy equipment throughout war zones.” (Doc. No. 4 at 42.)

In opposition, defendants note that, while the public has little interest in the specific contract between Bridgestone and B & S, the public has an interest in general freedom of contract. (Doc. No. 17 at 208.) Forcing Bridgestone to continue contractual relations with B & S through an injunction would jeopardize this principle. Defendants also argue that no race discrimination occurred (after all, B & S was an authorized dealer for Bridgestone and its predecessors for decades); thus, the public’s interest in preventing such discrimination is not at risk. Nor is the public’s interest in an adequately equipped military at issue B & S could contract with any number of other tire manufacturers to honor its government contracts. (*Id.*) Additionally, Bridgestone claims that the military has not expressed any concern over the

possibility that B & S may no longer be able to supply it with Bridgestone tires. (*Id.* at 197.)

*10 The substantial harm factor favors plaintiffs. Defendants have been conducting business with plaintiffs for 28 years. No substantial harm would result by continuing the relationship for a few more weeks or months. The public interest factor is murkier. The public’s interest in enforcing valid contracts does not favor either plaintiffs or defendants because neither party has produced an unassailable contract. Plaintiffs have not shown any likelihood of success on the § 1981 claim, so the public’s interest in a discrimination-free contracting process is not implicated. Finally, allowing the plaintiffs to wait ten months before bringing this action also implicates the public interest. Granting a preliminary injunction after this enormous delay encourages parties to sit on their rights. While inconclusive, the public interest factor slightly favors defendants.

III. CONCLUSION

Considering all the factors, plaintiffs have not shown a substantial likelihood of success on any central claim.⁹ While plaintiffs have shown that neither defendants nor any third party would be substantially harmed by a preliminary injunction, this factor is not controlling. Additionally, while plaintiffs have shown that they will be

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irreparably harmed, their long delay lessens the severity of this factor. The public interest factor, though inconclusive, slightly favors defendants. What drives the Court's decision, however, is that plaintiffs have failed to show the most important factor likelihood of success. As such, plaintiffs are not entitled to the extraordinary relief of a preliminary injunction and plaintiffs' motion for preliminary injunction is, therefore, DENIED.

- 9 The Court's conclusion and foregoing analysis reflect only the Court's judgment with respect to the requirements for a preliminary injunction, not the eventual resolution of plaintiffs' claims on the merits.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 804771

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EXHIBIT

J

Shelifoe v. Dakota, 966 F.2d 1454 (1992)

966 F.2d 1454
Unpublished Disposition
NOTICE: THIS IS AN
UNPUBLISHED OPINION.
(The Court's decision is referenced
in a "Table of Decisions Without
Reported Opinions" appearing in
the Federal Reporter. Use FI CTA6
Rule 28 and FI CTA6 IOP 206 for
rules regarding the citation of
unpublished opinions.)
United States Court of Appeals,
Sixth Circuit.

Kelly M. SHELIFOE,
Petitioner–Appellant,
v.
Bradley DAKOTA, Chief Tribal
Judge of the Keweenaw Bay
Indian Community Tribal Court,
Baraga, Michigan,
Respondent–Appellee.

No.

92

1086

June 16, 1992.

W.D.Mich., No. 91–60298; Hillman,
D.J.

Synopsis
W.D.Mich.

AFFIRMED.

Before KEITH and SUHRHEINRICH,
Circuit Judges, and CONTIE, Senior
Circuit Judge.

ORDER

*1 This pro se Michigan petitioner
appeals the district court's order
dismissing her petition for a writ of
habeas corpus filed under 25 U.S.C. §
1303. She has filed motions for
appointment of counsel, for damages
and clarification, and for remand. The
appeal has been referred to a panel of
the court pursuant to Rule 9(a), Rules
of the Sixth Circuit. Upon examination,
this panel unanimously agrees that oral
argument is not needed. Fed.R.App.P.
34(a).

Kelly M. Shelifoe challenges the
decision of the Keweenaw Bay Indian
Community Tribal Court to remove her
son from her custody and to place him
in foster care. She maintains that the
district court has jurisdiction to review
her claims under the Indian Civil
Rights Act, 25 U.S.C. § 1301 et seq.
She further asserts that the tribal court
erred by placing her son in foster care.

Upon review, we conclude that the
district court correctly determined that
it lacked jurisdiction to review the

Shelifoe v. Dakota, 966 F.2d 1454 (1992)

petition. See *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F.Supp. 294, 295–96 (D.Mont.1985).

Shelifoe and her son are enrolled members of the Keweenaw Bay Indian Community. The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., gives Indian tribes exclusive jurisdiction to determine custody of Indian children. See *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 (8th Cir.1989).

Shelifoe argues that the district court has jurisdiction to review her claims under the Indian Civil Rights Act, 25 U.S.C. § 1302. She alleged that she was denied due process in child custody proceedings. Her argument is unavailing. A writ of habeas corpus under 25 U.S.C. § 1303 does not provide a remedy for an alleged violation of § 1302 in a civil domestic matter. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978). Section 1302 does not authorize actions

against either the tribe or its officers. *Id.* Nevertheless, a writ of habeas corpus under 25 U.S.C. § 1303 is not available to test the validity of a child custody decree. See *Weatherwax*, 619 F.Supp. at 295–96. Although the remedy may be available to challenge the jurisdiction of the tribal court in limited circumstances, see *DeMent*, 874 F.2d at 513, the district court lacks jurisdiction to review a challenge to the propriety or wisdom of a tribal court's decision. See *Weatherwax*, 619 F.Supp. at 295–96.

Accordingly, all pending motions are denied and the district court's order is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

All Citations

966 F.2d 1454 (Table), 1992 WL 133065

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EXHIBIT

K

Hall v. Sweet, 666 Fed.Appx. 469 (2016)

666 Fed.Appx. 469

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.

United States Court of Appeals,
Sixth Circuit.

Angie HALL; Matthew Hall,
Plaintiffs-Appellees,

v.

Katrice SWEET; Kathleen Sinnamon; Jim Gale; Maura D. Corrigan, in their individual and official capacities,
Defendants-Appellants.

Nos. 14-2595/15-2326

Filed December 16, 2016

Synopsis

Background: Owner of group child care home brought § 1983 claim against employees of Michigan's Department of Health and Human Services (DHHS), alleging that employees' search of home violated Fourth Amendment. The United States District Court for the Western District of Michigan denied defendants' motion to dismiss. Defendants appealed.

Holdings: The Court of Appeals, McKeague, Circuit Judge, held that:

^[1] renewal application for license to own and operate group child care home was proper consideration for courts;

^[2] consent to searches provided on renewal application was effective for entire home, not just portions approved for child care; and

^[3] searches did not violate a clearly established right.

Reversed.

Helene N. White, Circuit Judge, filed opinion

concurring in part and dissenting in part.

West Headnotes (3)

^[1] **Federal Civil Procedure**

☞Matters considered in general

Renewal application for license to own and operate group child care home was proper consideration for courts, on motion to dismiss, in determining whether owner stated claim against employees of Michigan's Department of Health and Human Services (DHHS) for violating owner's rights under Fourth Amendment when employees searched group home; renewal application's provision regarding consent to searches was referred to in and central to complaint, attached as exhibit to defendants' motion to dismiss, and fully quoted in exhibits attached to complaint. U.S. Const. Amend. 4; Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

^[2] **Civil Rights**

☞Employment practices

Consent to searches provided on renewal application for license to own and operate group child care home was effective for entire home, not just portions approved for child care, and thus employees of Michigan's Department of Health and Human Services (DHHS) were entitled to qualified immunity from claim that they violated owner's right to be free from unreasonable searches and seizures when they searched unapproved portions of home; consent to inspections of her group child care "facility" reasonably provided consent to inspections of entire residence, and search to ensure conformity with ratio and capacity rules fell within scope

Hall v. Sweet, 666 Fed.Appx. 469 (2016)

of consent. U.S. Const. Amend. 4; Mich. Comp. Laws Ann. § 722.111(1)(i)(iv); Mich. Admin. Code r. 400.1908.

BEFORE: KEITH, McKEAGUE, and WHITE, Circuit Judges.

Cases that cite this headnote

OPINION

[3]

Civil Rights

◆ Employment practices

Warrantless searches of group child care home by employees of Michigan’s Department of Health and Human Services (DHHS) following reports that home was over-ratio, overcapacity, and hiding children during inspections did not violate a clearly established right, and thus employees were entitled to qualified immunity, although case from same district had held that social workers conducting warrantless search of home violated Fourth Amendment; single district court opinion was not enough to pronounce right clearly established, and it was not unreasonable for employees to believe that owner’s consent to onsite inspection of her facility and services in licensing renewal for home provided consent for full scope of searches, including areas of facility that were not approved for group child care. U.S. Const. Amend. 4.

McKEAGUE, Circuit Judge.

This case arises out of investigations of a group child care home. On two separate occasions, once in 2010 and once in 2011, employees of Michigan’s Department of Health and Human Services, Katrice Sweet and Kathleen Sinnamon, responded to complaints that Angie Hall’s group child care home was in violation of her license. On both occasions, one or both employees searched the Halls’ home looking for children Ms. Hall may have hidden from inspectors. During the 2010 search, children were found hidden in a private room behind a locked door. Ms. Hall’s license was subsequently revoked.

The Halls brought suit under 42 U.S.C. § 1983, in part claiming that the searches of their home violated the Fourth Amendment. The district court denied defendants’ motion to dismiss based on qualified immunity on the claim, holding that the complaint adequately alleged a colorable claim in avoidance of qualified immunity. However, Ms. Hall consented to searches of this nature in her 2008 license renewal application, and such consent undercuts the Fourth Amendment claim. Moreover, plaintiffs failed to allege conduct that violated their rights under clearly established law at the time of the investigations. Therefore, we reverse the district court’s order denying defendants Sweet and Sinnamon qualified immunity.

Cases that cite this headnote

***470 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN**

I

Attorneys and Law Firms

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Beginning in 2006, Angie Hall operated a licensed “group child care home” in Middleville, *471 Michigan in the house she owned with her husband. The Halls’ living space was on the upper level and approved child care space was on the lower level. The entrance to the living area on the first floor was also the entrance to the day care space on the lower level. The group child care home was subject to many rules under Michigan’s child care licensing regulations, including a

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maximum capacity of twelve children and a maximum child-to-caregiver ratio of 6 to 1. *See* Mich. Admin. Code, R. 400.1908, R. 4001.1910.

In 2008, Ms. Hall applied for renewal of her license. As part of the one-page renewal application, Ms. Hall checked a box agreeing to an inspection of her facility. She signed the application and her license was renewed without restrictions or limitations.

In 2010, authorities received an anonymous complaint that Ms. Hall's group child care home was over-capacity and that she was hiding children during inspections.¹ In response, Katrice Sweet, a licensing consultant with the State of Michigan's Department of Health and Human Services (DHHS) Bureau of Children and Adult Licensing, conducted an unannounced on-site inspection of the child care home.

¹ Hall had previously been found to be both over-capacity and over-ratio. Hall signed a Corrective Action Plan in 2007 admitting to being over-capacity and over-ratio and agreeing to future compliance.

On the day of the inspection, Sweet entered the house without knocking and without a warrant. She went directly to the lower level where Ms. Hall was supervising children with an assistant. Sweet demanded that Ms. Hall show her the entire home. Together with Ms. Hall, Sweet looked throughout the home for hidden children, including in bedrooms, closets, and cabinets on the upper level. Eventually, she found four children hiding behind a locked door in the lower level in space used by the Halls as a workout room not approved for child care. With those four children counted, the child care home was supervising fifteen children, and was thus over-capacity and over-ratio. Sweet's subsequent report led to an administrative hearing and contributed to the eventual revocation of Hall's license.

The 2011 inspection took place while the administrative process was playing itself out. Following a complaint that the group child care home was operating without an assistant caregiver, Sweet, along with her supervisor Kathleen Sinnamon, returned to the house to investigate, without a warrant. Sweet again searched the entirety of the home. Unlike the 2010 investigation,

however, the 2011 investigation uncovered no violations. *Id.* In January of 2012, a Michigan appeals court affirmed the Administrative Law Judge's decision to revoke Hall's license.

Following the revocation of Ms. Hall's license, Angie and Matthew Hall filed a complaint, under 42 U.S.C. § 1983 in the United States District Court for the Western District of Michigan, alleging that DHHS employees had committed various constitutional violations during the two investigations and the administrative proceedings against Angie Hall. Plaintiffs' complaint named DHHS Bureau of Children and Adult Licensing directors Maura Corrigan and Ismael Ahmed,² bureau director Jim Gale, Sweet, and Sinnamon as defendants.

² Plaintiffs stipulated to the dismissal of Defendant Ismael Ahmed. R. 57, Dist. Ct. Op. PID 1230, n.1.

In place of an answer, the defendants filed a motion to dismiss that raised several grounds for dismissal, including a qualified immunity defense. R. 57, Dist. Ct. Op. *472 PID 1234. Following subsequent briefing, the district court issued its order granting the defendants' motion on all counts against all defendants except one: the claim that Sweet and Sinnamon's warrantless searches of the Halls' residence during the 2010 and 2011 investigations violated the Fourth Amendment.³ *Id.* at 1238, 1274.

³ The district court dismissed the claims against Corrigan and Gale relating to the two investigations because plaintiffs failed to state a claim against them in their individual capacities. R. 57, Dist. Ct. Op. PID 1249–50, 1271, n.6. On appeal, defendants again raise a defense for Corrigan and Gale. Plaintiffs do not respond to this defense. However, reading the district court opinion as having dismissed the claims against Corrigan and Gale and the plaintiffs as having waived any objection to that dismissal, the issue of Gale and Corrigan's liability is not before this court. All that remain are the claims against defendants Sweet and Sinnamon for the searches of plaintiffs' home.

In the district court, defendants argued that the 2010 and 2011 investigations fell within an exception to the Fourth Amendment warrant

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requirement. *Id.* at 1259–60. The district court disagreed. *Id.* at 1262. The court held that a warrantless search of a home is presumptively unreasonable, that the warrant requirement was clearly established law, and that the pleadings did not support defendants’ position that a warrant exception applied here. *Id.* at 1259.

The district court rejected all three theories asserted by defendants that would have made out exceptions to the warrant requirement. *Id.* Defendants first argued that consent for the searches flowed from the license renewal application signed by Ms. Hall on which she checked a box agreeing to a reasonable onsite inspection of her group child care home. *Id.* The district court did not consider this application—it considered the document to be outside the pleadings—and so concluded that the consent exception did not apply. *Id.* at 1259–60. The court also rejected defendants’ argument that Michigan statutes and regulations gave them authority for the searches. *Id.* at 1260. The court held that the regulations defendants cited were inapplicable because “[t]o the extent that on-site inspections are authorized, they are authorized for situations and circumstances other than what occurred here.” *Id.* Finally, the court found defendants’ argument that the closely-regulated business exception applies to group child care homes was unpersuasive and unsupported by authority. *Id.* at 1261.

Defendants, Sweet and Sinnamon, now appeal the district court’s denial of their motion to dismiss based on qualified immunity.⁴

⁴ This is a consolidated appeal. Defendants first filed an interlocutory appeal of the district court’s initial denial of qualified immunity for the Fourth Amendment claim, which this court held in abeyance until the district court issued an order fully resolving the motion to dismiss. The district court’s subsequent order again denied qualified immunity for the Fourth Amendment claim, which was also appealed, and which this court consolidated with the first appeal.

subject-matter jurisdiction over plaintiffs’ claims for violations of the Fourth and Fourteenth Amendments of the U.S. Constitution, actionable under the provisions of 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331. Defendants’ appeal challenges an interlocutory ruling that would not ordinarily be subject to immediate review. However, a pretrial order denying qualified immunity is immediately appealable under the collateral order doctrine insofar as it implicates only questions of law. *473 *Plumhoff v. Rickard*, — U.S. —, 134 S.Ct. 2012, 2018–19, 188 L.Ed.2d 1056 (2014); *McDonald v. Flake*, 814 F.3d 804, 812–13 (6th Cir. 2016).

This appeal boils down to three pure issues of law. First, defendants challenge the district court’s determination that the 2008 license renewal application is not part of the pleadings for purposes of the motion to dismiss. Second, when considering whether there was a constitutional violation, defendants appeal implicates the scope of consent provided by that renewal application, on which Ms. Hall marked that she agreed to an investigation by DHHS officials. *See Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) (scope of consent is a question of objective reasonableness). Third, if necessary, this court considers whether the alleged wrongful conduct by defendants violated clearly established rights at the time of the searches. *See Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (there is appellate jurisdiction for “[t]he purely legal issue of what law was ‘clearly established’ ”) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

Because these three issues raise only pure questions of law, we have appellate jurisdiction under the collateral order doctrine to consider the district court’s denial of qualified immunity. *See Plumhoff*, 134 S.Ct. at 2018–19 (deciding a qualified immunity defense as to whether conduct violated the Fourth Amendment or violated clearly established law is “a core responsibility of appellate courts”).

II

The district court had federal question

A

A district court’s denial of a motion to dismiss that raises a qualified immunity defense is reviewed de

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nov. *Johnson v. Moseley*, 790 F.3d 649, 652 (6th Cir. 2015). The court accepts the complaint's factual allegations as true and construes the complaint in the light most favorable to the plaintiff. *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005). To survive a motion to dismiss, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). However, "a legal conclusion couched as a factual allegation" need not be accepted as true. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

¹⁴The threshold issue is whether the district court evaluated the motion to dismiss based on a too-restrictive view of the pleadings. As part of her 2008 license renewal application, Ms. Hall checked a box next to the following consent provision:

[i]n order to permit proper determination of conformity with the rules, I give permission to the Michigan Department of Human Services to make a necessary and reasonable investigation of activities and standards of care, and to make an onsite inspection of my facility and services.

Brief for Defendants-Appellants, Exhibit 1, PID 81. The district court refused to consider the license renewal application because it was "outside the pleadings" and not "central to the complaint." R. 57, Dist. Ct. Op. PID 1259-60. Defendants assert the district court should have considered the application.

As this court has held, when a court "is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred *474 to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletics Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

Here, the 2008 renewal application's consent provision was referred to in and central to the complaint, attached as an exhibit to defendants' motion to dismiss, and fully quoted in exhibits attached to the complaint. The 2008 renewal was Ms. Hall's final renewal before her license was revoked and covered the time period at issue here. Plaintiffs refer to renewal of her license in 2008 throughout their complaint, including, in paragraph 75 of the complaint, a direct reference to the consent provision taken from the transcript of the administrative hearing. This specific reference to the application was central to plaintiffs' claims that DHHS had an unconstitutional policy permitting searches of a group child care home in its entirety.⁵ In support of these claims, plaintiffs attached exhibits to their amended complaint, records from Ms. Hall's administrative hearing, directly quoting the application and confirming that Ms. Hall signed it. Moreover, defendants attached a signed copy of the signed 2008 renewal application as an exhibit to their motion to dismiss.

⁵ These claims were dismissed by the district court and are not revived here. *See* R. 57, Dist. Ct. Op. PID 1247-50.

Taking all of this together, and as conceded by plaintiffs' counsel at oral argument, the court can and should consider the 2008 renewal application and its language when evaluating de novo the denial of the Rule 12(b)(6) motion to dismiss. *See Bassett*, 528 F.3d at 430; *see also MacDonald v. Thomas M. Cooley Law Sch.*, 724 F.3d 654, 657-58 (6th Cir. 2013) (deriving facts, on a motion to dismiss, from five exhibits attached to the complaint); *Northampton Rest. Grp., Inc. v. FirstMerit Bank, N.A.*, 492 Fed.Appx. 518, 522 (6th Cir. 2012) (considering copies of contracts attached to defendant's motion to dismiss that were referenced in and central to plaintiff's complaint). Thus, the district was permitted to consider the 2008 renewal application when considering this motion and we may consider it now.

B**1. Qualified Immunity Framework**

Government officials may raise qualified immunity as a defense to a § 1983 action. Once raised, the

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plaintiff bears the ultimate burden of demonstrating that the defendant is not entitled to qualified immunity. *Rodriguez v. Passinault*, 637 F.3d 675, 689 (6th Cir. 2011). We follow a two-part inquiry to determine when a grant of qualified immunity is proper. *Austin v. Redford Twp. Police Dept.*, 690 F.3d 490, 496 (6th Cir. 2012) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). To survive a qualified immunity defense, the facts as alleged must show that the defendant violated a constitutional right and that the right at issue was “clearly established” at the time of the event. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). If either requirement is unmet, qualified immunity shields the official from civil damages. *Austin*, 690 F.3d at 496 (citing *Pearson*, 555 U.S. at 236, 129 S.Ct. 808). The court may make the two necessary determinations in either order, but need not reach both. *Id.*

2. Whether a Constitutional Right was Violated

We begin with the first step in the qualified immunity analysis: whether, as pleaded, the 2010 and 2011 investigations violated *475 plaintiffs’ Fourth Amendment rights. The Fourth Amendment protects against unreasonable searches and seizures. The Supreme Court has recognized that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). For that reason, “searches and seizures inside a home without a warrant are presumptively unreasonable.” *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). Thus, a warrantless search inside a home by a government official violates the Fourth Amendment unless an exception to the warrant requirement applies. *See Andrews v. Hickman Cty., Tenn.*, 700 F.3d 845, 854, 858 (6th Cir. 2012).

The parties do not dispute that both the 2010 and 2011 investigations of the Halls’ home were conducted without a warrant. Therefore, defendants must demonstrate that an exception to the warrant requirement applied to each search in order to prevail on this prong of their qualified immunity defense.

Defendants assert that Ms. Hall consented to the searches of her entire home, which, if true, would

be enough to show there was no constitutional violation. It is well settled that “a person may waive his Fourth Amendment rights by consenting to a search.” *United States v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004) (en banc).

To support their position, defendants rely on Ms. Hall’s 2008 license renewal application on which she agreed that:

[i]n order to permit proper determination of conformity with the rules, I give permission to the Michigan Department of Human Services to make a necessary and reasonable investigation of activities and standards of care, and to make an onsite inspection of my facility and services.

Brief for Defendants-Appellants, Exhibit 1, PID 81. Defendants argue that this signed permission gave consent for the full scope of the 2010 and 2011 searches—including the search of portions of plaintiffs’ home that were not approved for child care. Plaintiffs do not dispute that Ms. Hall signed the application and checked the box giving consent to search or, as conceded at oral argument, that it gave consent for searches of approved child care space. Their challenge implicates the scope of consent, not the fact of consent.⁶

⁶ In paragraph 78 of their amended complaint, plaintiffs allege, with regard to the 2011 search, that neither plaintiff “gave consent for this search” but instead “complied to this search because under the licensing rules and regulations, failure to cooperate with the licensing consultant during an investigation is a violation.” This allegation speaks only to the occasion of the search—not the 2008 renewal application’s consent provision—and is rendered immaterial if that consent provision provided consent for the search. We do not require both written and oral consent for it to be effective. *Cf. United States v. Frost*, 521 Fed.Appx. 484, 489 (6th Cir. 2013) (oral consent to search was not rendered equivocal by refusal to sign written consent form).

The scope of a warrantless search is limited by the scope of consent. *United States v. Gant*, 112 F.3d

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239, 242 (6th Cir. 1997). The scope of consent is determined by objective reasonableness. See *United States v. Garrido-Santana*, 360 F.3d 565, 576 (6th Cir. 2004) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251–52, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)). “The scope of a search is generally defined by its expressed object.” *Jimeno*, 500 U.S. at 252, 111 S.Ct. 1801 (citing *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). Thus, a search is not beyond the scope of consent when it was reasonable given its expressed object. See *id.* (finding consent to search a car for *476 drugs included consent to search a paper bag in the trunk); see also *Garrido-Santana*, 360 F.3d at 576 (search of a gas tank fell within scope of suspect’s consent when he knew officers were searching his car for drugs).

¹²Reading the consent provision on Ms. Hall’s license renewal application in light of the relevant regulatory scheme reveals that she agreed to a search of her entire home. The renewal application provided consent for an inspection of Ms. Hall’s “facility” for the purpose of ensuring “conformity with the rules.” Although neither “facility” nor “rules” was expressly defined on the form, reading the language in context shows it was objectively reasonable to understand the language as providing consent for the full scope of the challenged searches. As conceded at oral argument, the “rules” were Michigan’s child care regulations and the application was signed to renew Ms. Hall’s license to operate the “group child care home” she ran out of her home. From this, it follows that the “facility” referenced on the form was the “group child care home” for which she was renewing her license. Notably, the “rules” included Michigan’s Child Care Licensing Act, which defined “group child care home” as a private residence:

(i) “Private home” means a *private residence* in which the licensee or registrant permanently resides as a member of the household, which residency is not contingent upon caring for children or employment by a licensed or approved child placing agency. Private home includes a full-time foster family home, a full-time foster family group home, a *group child care home*, or a family child care home, as follows:

...

(iv) “Group child care home” means a *private home* in which more than 6 but not more than 12

minor children are given care and supervision for periods of less than 24 hours a day unattended by a parent or legal guardian, except children related to an adult member of the family by blood, marriage, or adoption. Group child care home includes a home in which care is given to an unrelated minor child for more than 4 weeks during a calendar year.

Mich. Comp. Laws § 722.111(1)(i)(iv) (emphasis added). Thus, Ms. Hall’s consent to inspections of her group child care “facility” reasonably provided consent to inspections of her entire residence. The two are one and the same. And plaintiffs make no claim that they withdrew or limited the scope of this consent before or during either search.

Nor did the two searches wander beyond their express object: to ensure conformity with the ratio and capacity rules governed by Mich. Admin. Code R. 400.1908. The searches followed reports that Ms. Hall was violating these rules and hiding children in space not approved for child care during inspections, and were limited to spaces where children might actually be hidden. Thus, the searches fell fully within the scope of consent provided by the 2008 license renewal application signed by Ms. Hall.

Finally, it cannot be said that the consent provision was invalid simply because agreeing to its terms may have been a condition of receiving the child care operating license. We recognize that “conditions can lawfully be imposed on the receipt of a benefit—conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures—provided the conditions are reasonable.” *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000) (collecting cases); see also *477 *Knox Cty. Educ. Ass’n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361, 366–67, 384 (6th Cir. 1998) (finding no constitutional violation for requirement that school employees agree to suspicionless urinalysis as a condition of job offer). Here, Ms. Hall was operating a child care business out of a home under a license that, upon renewal, asked her to agree to inspections intended to ensure her home complied with child safety requirements.

If this consent provision is read as a condition of the license, it is a reasonable one. For one thing, the state has an overwhelming justification in ensuring child wellbeing is adequately protected at the locations it licenses for child care. For another,

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homeowners voluntarily operating a child care business out of their home—knowingly subjecting that home to related regulatory oversight—have a reduced expectation of privacy there. Under these circumstances, and weighing the state’s interest in protecting child safety against the privacy interest of child care licensees, it is reasonable for these licenses to be conditioned on consent to investigations of the houses where the child care homes are operated. *Cf. Knox Cty. Educ. Ass’n*, 158 F.3d at 379, 384 (drug testing of school employees was reasonable given the public’s “very strong” interest in ensuring child safety through testing and because the employees’ privacy interest was “significantly diminished by the level of regulation of their jobs and by the nature of the work itself”). Conditioning a group child care home license on consent to search that home is distinguishable from unreasonably conditioning a license on consent to search areas unrelated to that license and with no similarly compelling childcare interests at stake. *See, e.g., Anobile v. Pelligrino*, 303 F.3d 107, 121, 124–25 (2d. Cir. 2002) (state horse racing license was impermissibly conditioned on consent to search dormitories). In sum, the condition here, that the group child care home license would issue only if the state could inspect the home for regulatory compliance, was a reasonable one. The consent to search was therefore effective.

Accordingly, the court finds defendants’ conduct was not a violation of the Fourth Amendment because Ms. Hall had consented to the searches and plaintiffs did not withdraw or otherwise limit that consent.

3. Whether the Right was Clearly Established

However, even if we were to assume, *arguendo*, that the pleadings are sufficient to show a constitutional violation; defendants remain entitled to qualified immunity unless plaintiffs have also shown that defendants’ conduct violated a clearly established statutory or constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Plaintiffs fail to do so.

A right is clearly established when “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. “Qualified immunity ordinarily applies unless the contours of the asserted right were sufficiently clear that every

reasonable official would have understood that what he was doing violated that right.” *Johnson v. Moseley*, 790 F.3d 649, 654 (6th Cir. 2015) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). Accordingly, qualified immunity “gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.” *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)) (internal quotations omitted). Thus, qualified immunity applies irrespective of whether the official’s error was a mistake of law or a mistake of fact, or a mistake based on *478 mixed questions of law and fact. *Pearson*, 555 U.S. at 231, 129 S.Ct. 808.

The burden of showing that a right was clearly established at the time of an alleged injury falls to the plaintiff. *T.S. v. Doe*, 742 F.3d 632, 635 (6th Cir. 2014). To determine “whether a right was clearly established, we look first to decisions of the Supreme Court, then to our own precedents, and then to decisions of other courts of appeal, to ask whether these precedents ‘placed the ... constitutional question beyond debate.’” *Hearing v. Sliowski*, 712 F.3d 275, 280 (6th Cir. 2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)); *see also Andrews*, 700 F.3d at 853.

¹³Here, we consider the decision by DHHS licensing consultants, responsible for ensuring child care homes are compliant with child safety rules, to conduct warrantless searches of plaintiffs’ home following reports that Ms. Hall’s group child care home was over-ratio, overcapacity, and that she was hiding children during inspections and knowing she had given consent to a reasonable search of her facility. Plaintiffs have failed to show this discretionary conduct violated a clearly established right.

Plaintiffs cite to *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) to show that it has long been established that “administrative” searches require a warrant. In *Camara*, the Court concluded that “administrative searches,” conducted there to ensure compliance with the city’s housing code, were “significant intrusions upon the interests protected by the Fourth Amendment.” 387 U.S. at 534, 87 S.Ct. 1727. Thus, the Court held that the Fourth Amendment

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warrant requirement applied to “administrative searches” of private residences. *Id.* Plaintiffs point to several other cases derived from *Camara*’s holding that show other “administrative searches” found to violate the Fourth Amendment. *See Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (entry of a burned building by firefighters and detectives to look for the fire’s cause required a warrant); *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (provisions under OSHA permitting warrantless searches of a business to ensure compliance with workplace safety rules were unconstitutional).

Plaintiffs’ rely on these cases for the proposition that a government search of a home to check for compliance with a regulatory code—no matter who searches or what the regulatory code covers—is an “administrative search” that must comport with the Fourth Amendment warrant requirement and that this is clearly established. In other words, plaintiffs argue that, because the searches here were to ensure plaintiffs’ compliance with (child care) regulations, they were “administrative” searches and therefore violated clearly established Fourth Amendment rights because they lacked a warrant.

This position is untenable. Qualified immunity requires plaintiffs “to plead facts making out a violation of a constitutional right clearly established in a particularized sense. That is, the right said to have been violated must be defined in light of the specific context of the case, not as a broad general proposition.” *Johnson v. Moseley*, 790 F.3d at 654 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)). Plaintiffs draw the right here in a much too generalized way and ignore the specific context of the case. *Camara* and its progeny provide only a broad generalization on which officials in defendants’ shoes could rely to discern whether their conduct was unlawful: that the searches were related to suspected *479 regulatory violations. Showing conduct violates a clearly established right requires more particularized context than plaintiffs provide through their cited cases. *See id.* Indeed, this was the district court’s error as well.

Most importantly, plaintiffs fail to consider the essential contextualizing fact that Ms. Hall agreed to an onsite inspection of her facility and services in her licensing renewal. Even assuming, *arguendo*, that this consent provision did not

provide *actual* consent for the full scope of the searches, it cannot be said it was objectively unreasonable for the DHHS employees to *believe* it did. While the form did not explicitly define “facility” anywhere, the relevant regulations defined private home and group child care home as one and the same *and* regulated space not approved for child care,⁷ making it reasonable for the DHHS employees to believe Hall had given consent for a search of the entire home by agreeing to a search of her “facility” in order “to ensure conformity with the rules.” Indeed, defendant Sweet indicated that this was her understanding of the provision when, during the administrative proceedings against Ms. Hall, she said that “I believe ... it states on the [license] application that they will give us access to their whole entire home.” R. 43, Amd. Compl., PID 629. In light of the relevant regulations and the provision’s language, a belief that the form gave consent for the full scope of both searches is a reasonable one.

⁷ *See, e.g.*, Mich. Admin. Code R. 400.1944 (requiring smoke detectors installed and maintained “on each floor of the home”); Mich. Admin. Code R. 400.1935 (regulating the storage and sale of firearms on the premises).

In short, because of the consent provision from the license renewal application, it cannot be said that defendants Sweet and Sinnamon were plainly incompetent or in knowing violation of the law when they searched space in the home not approved for child care. Theirs was precisely the kind of reasonable discretionary conduct—even if based on a mistaken understanding of fact or law—that the doctrine of qualified immunity protects. *See, e.g., Pearson*, 555 U.S. at 231, 129 S.Ct. 808.

Plaintiffs’ argument that the law was clearly established is further undermined by the close resemblance of the investigations here to that at issue in *Andrews v. Hickman Cty., Tenn.*, 700 F.3d 845, 854, 858 (6th Cir. 2012). *Andrews* involved the warrantless search of a house in 2008, conducted by social workers investigating allegations of child abuse. *Id.* at 850. In response to a complaint, the social workers entered the home and conducted a walk-through, checking for food and ensuring any weapons were properly stored. *Id.* at 850–51. They did not find any violations. *Id.* at 851. The court, considering a qualified immunity

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defense, held the entry and search violated the Fourth Amendment, but went on to consider whether it was clearly established at the time whether the Fourth Amendment warrant requirement applied to “social workers carrying out investigations regarding the welfare of children.” *Id.* at 860. The court held it was not. *Id.* Since then, this circuit has continued to hold that it was not clearly established that the warrant requirement applied to social workers conducting similar investigations prior to the *Andrews* decision, at least through 2011. See *Brent v. Wenk*, 555 Fed.Appx. 519 (6th Cir. 2014) (holding a social worker’s 2010 investigation relating to child wellbeing did not violate clearly established law); *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015) (a social worker’s 2011 investigation relating to child wellbeing did not violate clearly established law).⁸

⁸ Another case of this circuit also dealt with an alleged Fourth Amendment violation by social workers investigating child welfare. *Kovacic v. Cuyahoga Cty. Dep’t of Children & Family Servs.*, 724 F.3d 687 (6th Cir. 2013). *Kovacic* considered the 2002 removal of children from a home by social workers without a warrant. *Id.* at 692. The court found that seizures of children by social workers, if not searches related to them, violated clearly established Fourth Amendment rights. *Id.* *Sweet* and *Sinnamon* did not remove any children, so this case is irrelevant here.

In light of both *Andrews* and *Camara*, it cannot be said that defendants violated clearly established law. At the time of the challenged searches, either one of these competing Fourth Amendment case lines potentially applied—defendants’ conduct arguably resembled that of the social workers granted qualified immunity in *Andrews* as much as that of the administrative searchers in *Camara*. And no decision of this court or the Supreme Court had addressed, even generally, whether a warrant was required for the search of a home out of which a state-regulated day care was operated. Given this lack of certainty in Fourth Amendment’s applicability to the circumstances faced by defendants, reasonable officials in their shoes would not have been on clear notice whether their conduct violated the law.

Plaintiffs attempt to undermine any similarity of the facts here to those in *Andrews* by citing to a

2004 opinion from the Western District of Michigan which had held, prior to *Andrews*, that social workers conducting a warrantless search of a home violated the Fourth Amendment. *O’Donnell v. Brown*, 335 F.Supp.2d 787, 827 (W.D. Mich. 2004) (noting that “government officers [including social workers] cannot enter a home without either prior court approval, consent, or exigent circumstances”). Plaintiffs point out that this opinion was from the same district court where the instant case was filed and therefore it should have put the defendants on notice that their conduct was unlawful to the extent it resembled child welfare investigations by social workers.

Plaintiffs find support for their position—that the district court decision is enough on its own to clearly establish law in that district—in a footnote from the *Andrews* opinion. In finding there was no precedent in either the Supreme Court or the Sixth Circuit clearly establishing whether social workers were required to comport with the Fourth Amendment, the *Andrews* court used a footnote to dispose of a lower court decision to the contrary. *Andrews*, 700 F.3d at 862, n.7. That decision came out of the United States District Court for the Northern District of Ohio and held not only that social workers were constrained by the Fourth Amendment, but that this right was clearly established. *Id.* (citing *Walsh v. Erie Cnty. Dep’t of Job & Family Serv.*, 240 F.Supp.2d 731 (N.D. Ohio 2003)). However, the *Andrews* court said this lower court opinion was not enough for the purposes of the case before it because “[t]he instant case was heard in the Middle District of Tennessee” and therefore the *Walsh* decision, out of the Northern District of Ohio, was “not sufficient to put the State Defendants on notice that the right was clearly established.” *Andrews*, 700 F.3d at 862, n.7. In the same footnote, the *Andrews* court seemed to imply that—had the earlier district court been the same one out of which the instant appeal arose—it might have been enough to put the defendants on notice. *Id.* (“to find a clearly established right, absent extraordinary circumstances, a district court looks to ‘binding precedent by the Supreme Court, its court of appeals or itself’”) (quoting *481 *Ohio Civil Serv. Employees Ass’n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)) (emphasis added).

Plaintiffs read this footnote too broadly. A single district court opinion is not enough to pronounce a right is clearly established for purposes of qualified

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immunity. While a district court opinion may be *persuasive* in showing there is a clearly established right—perhaps by exposing a trend in non-precedential case law—it is not *controlling* on its own.⁹

⁹ The same is true in other circuits. *See, e.g., Estate of Escobedo v. Bender*, 600 F.3d 770, 781 (7th Cir. 2010) (“to determine whether a right is clearly established at the time of the violation, we look first to controlling precedent on the issue from the Supreme Court and to precedent from this Circuit. In the absence of controlling precedent, we must broaden our survey to include all relevant case law in order to determine whether there was *such a clear trend in the caselaw* that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time”) (internal quotations omitted) (emphasis added); *Cortez v. McCauley*, 478 F.3d 1108, 1114–15 (10th Cir. 2007) (“for a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains”) (internal quotations omitted). Indeed, in several circuits, district court opinions are not considered whatsoever in determining clearly established law. *Moore v. Pederson*, 806 F.3d 1036, 1047 (11th Cir. 2015) (“to determine qualified immunity, an Eleventh Circuit court looks to decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state”) (internal quotations omitted); *Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) (“When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit”); *but see Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014) (“[i]n the absence of binding precedent clearly establishing the constitutional right, we look to whatever decisional law is available including decisions of state courts, other circuits, and district courts”) (internal quotations removed).

Further, even were we to consider *O'Donnell*, the proposition for which plaintiffs cite the case was extinguished by this circuit's directly contrary holding in *Andrews*. It cannot be said *O'Donnell* placed a constitutional question “beyond debate” when later, in *Andrews*, this circuit found the very same question did not have a clear answer. In short,

decisions from this court stand for the proposition that, between 2008 and 2011, it was not clearly established in any district of this circuit that the Fourth Amendment applied to social workers conducting a search of a home relating to the wellbeing of children. *See Barber*, 809 F.3d at 846–47. This uncertainty in whether the Fourth Amendment applies to investigations related to child wellbeing contributes to a finding that defendants were not on clear notice whether their conduct violated the law.

In sum, considering the circumstances of the two searches as pleaded in light of then-established law, it was not clearly established that Sweet and Sinnamon were violating the Fourth Amendment when they searched plaintiffs' home without a warrant in 2010 and 2011. A reasonable investigator “faced with the circumstances of this case could not ascertain from clearly established law the legality of her conduct.” *Andrews*, 700 F.3d at 862. Plaintiffs have therefore failed in their burden to establish in the pleadings that defendants violated a clearly established right. Accordingly, defendants are entitled to qualified immunity.

VI

For the reasons above, we **REVERSE** the district court's order denying Sweet *482 and Sinnamon's motion to dismiss based on the qualified immunity defense.

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's decision to reverse the district court's order denying Sweet and Sinnamon's motion to dismiss with regard to the first search. Sweet and Sinnamon were entitled to qualified immunity for this search because it was objectively reasonable for Sweet to construe Hall's consent as encompassing the first challenged search. As to the second search, I disagree with the majority's conclusions that the search was reasonable and that the law was not clearly established at the time of the searches.

The majority correctly observes that Michigan has

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a strong interest in ensuring child safety in child care facilities, and I agree that the first search—conducted pursuant to a report that Hall was hiding children in rooms unlicensed for child care—was permissible. It was objectively reasonable for Sweet to believe that Hall’s consent to an “onsite inspection of [her] facility” to determine “conformity with the rules” authorized the search for hidden children.

I disagree with the majority, however, insofar as it implies that the second search was authorized under the license renewal application’s consent provision because of Hall’s past violation of Michigan’s child care rules. Assuming arguendo that the majority correctly interprets the consent provision to apply by its terms to the entire house, the second search fails to meet the provision’s own reasonable and necessary standard. Under the majority’s reading of the provision, Hall’s February 18, 2010, violation justified a warrantless, on-demand search of the entirety of Hall’s private residence *over a year later*, on May 24, 2011—even though there was no allegation that Hall was hiding children at this time. The implication of this broad reading is that Hall’s initial violation of the rules would justify any subsequent warrantless search for hidden children, no matter how removed from the original complaint. As “searches and seizures inside a home without a warrant are presumptively unreasonable,” *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), such a broad construction of the consent provision is objectively unreasonable.

Unlike the first search, the second search followed an anonymous complaint that Hall was operating her group child care home without an assistant caregiver; the complaint did not include an allegation that Hall was hiding children or was out of ratio. Upon entering the child care home, Sweet and Sinnamon observed that, contrary to the complaint, there was an assistant caregiver present. Despite Hall’s apparent compliance with the rules, Sweet and Sinnamon conducted a second inspection of the Hall family’s private residence areas searching for hidden children. The majority’s approval of this search based on the consent provision suggests that the consent provision authorizes DHHS employees to conduct warrantless searches of the private areas of a child care home so long as a licensee has ever been in violation of the licensing rules. In other words,

because Hall was once found to be over-capacity, DHHS employees were free to search her private residence areas whenever they wanted. This construction of the consent provision is not reasonable. Thus, the warrantless search cannot be justified under the consent provision, and was not reasonable under the Fourth Amendment.

Further, I disagree with the majority’s conclusion that the law was not clearly established as to whether social workers are subject to the Fourth Amendment’s *483 warrant requirements. The majority correctly identifies *Andrews* as the controlling precedent on this issue. There, this court reaffirmed that to determine whether there was a clearly established right, “a district court looks to binding precedent by the Supreme Court, its court of appeals or itself.” *Andrews v. Hickman Cty., Tenn.*, 700 F.3d 845, 862 n.7 (6th Cir. 2012). “[W]e look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal.” *Id.* at 853. As the majority notes, the Western District of Michigan, where this case originated, held in 2004 that “ ‘the Fourth Amendment applies to [social workers], as it does to all other officers and agents of the state[.] ... There is ... no social worker exception to the strictures of the Fourth Amendment.’ ” *O’Donnell v. Brown*, 335 F.Supp.2d 787, 802 (W.D. Mich. 2004) (internal quotation marks omitted). Since *O’Donnell* predated the challenged searches, it is sufficient to create a clearly established constitutional right in this context. This is especially true considering many other circuits had already decided that social workers are not exempt from the Fourth Amendment. *See, e.g., Gates v. Texas Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008) (“We begin by noting that it is well established in this circuit that the Fourth Amendment regulates social workers’ civil investigations.”); *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003) (“Thus, the strictures of the Fourth Amendment apply to child welfare workers, as well as all other governmental employees.”); *Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (“Measured against this parental interest, the state’s interest in protecting children does not excuse social workers from the warrant requirement of the Fourth Amendment.”); *Calabretta v. Floyd*, 189 F.3d 808, 816 (9th Cir. 1999) (“[Precedent] does not hold that the social worker may enter the home despite the absence of consent or exigency.”); *Lenz v. Winburn*, 51 F.3d

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1540 (11th Cir. 1995); *Wildauer v. Frederick Cty.*, 993 F.2d 369, 372 (4th Cir. 1993) (applying the Fourth Amendment to social workers but adding that lesser scrutiny applies to non-criminal “investigative home visits”). This large body of circuit authority, coupled with at least one case from the Western District of Michigan, clearly established at the time of the searches that social workers are subject to the Fourth Amendment’s strictures.

established Fourth Amendment rights, I would affirm the district court’s denial of qualified immunity as to that search and remand for further proceedings.

All Citations

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Because the second search violated Hall’s clearly

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