

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

EDEN ROGERS and

BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary
of the UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

LYNN JOHNSON, in her official capacity as
Assistant Secretary of the ADMINISTRATION
FOR CHILDREN AND FAMILIES;

SCOTT LEKAN, in his official capacity as
Principal Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity as
Governor of the STATE OF SOUTH CAROLINA;
and

MICHAEL LEACH, in his official capacity as State
Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-1567-TMC

**PLAINTIFFS' MOTION TO
COMPEL DISCOVERY**

PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Plaintiffs Eden Rogers and Brandy Welch (“Plaintiffs”) respectfully submit this Motion to Compel Discovery from Defendants Henry McMaster and Michael Leach (together, “State Defendants”).

As set forth in greater detail in the attached Memorandum, Plaintiffs served discovery requests on both State Defendants on June 4, 2020. At Defendants’ request and on their representation that they were making “diligent efforts” to collect and review documents, Plaintiffs granted each State Defendant a 30-day extension to respond to the requests. State Defendants then produced document productions on August 4, 2020, that were deficient on their face. From each Defendant, the productions spanned fewer than 400 pages, included no responsive documents to the majority of Plaintiffs’ requests and no draft documents, plainly derived from only a few custodians and rested on a myriad of expansive and unwarranted objections. Plaintiffs’ subsequent efforts to meet and confer with State Defendants regarding their discovery responses were unproductive, as State Defendants refused to provide any information about what was done to search for responsive documents and refused to engage in any fruitful conversation regarding potential next steps. Thus, for the reasons set forth in the attached Memorandum, Plaintiffs respectfully request that the Court order State Defendants to cooperate with Plaintiffs regarding their discovery obligations and to produce all documents that have been improperly withheld.

Pursuant to Local Rule 7.04, all relevant portions of the discovery material are filed with this motion as exhibits to the Declaration of Peter T. Barbur, filed herewith.

October 5, 2020

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**PLAINTIFFS' MEMORANDUM
OF LAW IN SUPPORT OF
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Plaintiffs Eden Rogers and Brandy Welch (“Plaintiffs”) respectfully submit this memorandum of law in support of their Motion to Compel Discovery. Plaintiffs have conferred with opposing counsel in a good faith attempt to resolve the matter herein, but the parties have reached an impasse.

INTRODUCTION

This case implicates the First Amendment, due process and equal protection rights of South Carolina citizens. As to Defendants Henry McMaster and Michael Leach (together, “State Defendants”), in particular, Plaintiffs challenge their authorization of state-contracted, government-funded child placement agencies (“CPAs”) to use religious eligibility criteria when screening potential foster parents for children in state custody and their intentional discrimination against prospective foster parents on the basis of religion and sexual orientation. In light of these significant issues, Plaintiffs served requests for production on State Defendants that are relevant to and commensurate with the claims and defenses in this case.

In response to these requests, State Defendants produced fewer than 700 pages of documents combined. Beyond their small size, the document productions were deficient on their face: they included no draft documents, appeared to derive from only a few custodians per Defendant and were limited in time, topic and scope. Accompanying these document productions was an extensive set of objections, many of which were ambiguous, frivolous or overstated. As a result of these broad objections, State Defendants refused to produce documents in response to nearly two-thirds of Plaintiffs’ discovery requests and, in response to the remaining requests, generally produced documents that have already long been circulating in this case.

Moreover, when counsel for Plaintiffs attempted to meet and confer with counsel for the State Defendants concerning their discovery responses, counsel for the State Defendants refused to provide any information beyond what is in the written responses. In particular, counsel for State Defendants refused to describe in any way what they had actually done to search for and produce responsive documents, and they also refused to negotiate a reasonable list of custodians whose electronic documents might be searched using agreed search terms.

Because State Defendants' responses and objections to Plaintiffs' discovery requests are incompatible with State Defendants' obligations under the federal rules, Plaintiffs now respectfully seek an order requiring State Defendants to cooperate in the discovery process and to produce documents that have been wrongfully withheld.

STATEMENT OF FACTS

Plaintiffs served their First Set of Requests for Production ("Requests") on both State Defendants on June 4, 2020. (Barbur Decl., Exs. 1, 2.) At a high level, the 36 Requests served on Defendant Leach ("Leach Requests") and the 22 Requests served on Defendant McMaster ("McMaster Requests") sought documents related to State Defendants' use of government funds for religious purposes and activities, in preference of certain religious beliefs over others and over nonreligion and with the predominant effect of advancing and endorsing religion, as well as documents related to State Defendants' authorization and funding of Miracle Hill and other child placement agencies' discrimination against lesbian, gay, bisexual and transgender ("LGBT") prospective foster parents. The Requests covered a narrow time frame (generally January 1, 2017, to the present) and, where appropriate, were limited to "documents sufficient to

show” in order to better target relevant materials and minimize State Defendants’ discovery burden.

Both State Defendants requested an extension from the 30-day deadline for serving responses and objections to the Requests. (Barbur Decl., Ex. 3) Plaintiffs initially agreed to a two-week extension, and, at State Defendants’ request and on their representation that they were making “diligent efforts” to collect and review documents, Plaintiffs later agreed to a second two-week extension. (*Id.*) Plaintiffs explained that they were agreeing to the second extension on the understanding that State Defendants and their counsel have been collecting and reviewing documents and would begin producing those documents on August 4, 2020. (*Id.*)

On August 4, 2020, Plaintiffs received State Defendants’ responses and objections to the Requests. (Barbur Decl., Exs. 4, 5.) Defendant Leach’s entire document production spanned 302 pages. Of these 302 pages, 38 pages—more than 10% of the production—are simply correspondence between Plaintiffs’ counsel and Freedom of Information Act (“FOIA”) officers regarding FOIA requests Plaintiffs’ counsel submitted in 2019. Save for 24 newly produced pages, the remainder of Defendant Leach’s production consists of materials the Department of Social Services (“DSS”) previously provided in response to Plaintiffs’ FOIA requests. Some overlap with DSS’s prior FOIA productions is understandable, as Plaintiffs intentionally included several of their prior FOIA requests in their Requests to ensure that the productions responsive to those Requests are or will be complete. But Plaintiffs also served 24 requests on Defendant Leach that are entirely distinct from their earlier FOIA requests.¹ Defendant

¹ Requests 5, 7, 12, 16-36.

Leach produced *no* documents in response to any of these 24 requests. And in response to requests that expanded upon earlier FOIA requests, such as Requests 14 and 15, Defendant Leach simply reproduced DSS's prior FOIA responses, with no efforts to supplement the production to account for the broader scope of the current requests. Defendant Leach's document production also appears to contain no draft versions of documents, and all email correspondence appears to derive from three or four custodians, one of whom is a FOIA officer tracking down responses to Plaintiffs' earlier FOIA requests and is not a true custodian with responsive documents of her own. In addition, Defendant Leach refused to search for, collect or produce any documents created before January 27, 2018, or after January 23, 2019.

Defendant McMaster's document production is similarly limited. To start, the production contains only 394 pages, a sizeable portion of which duplicates materials Plaintiffs have received before. Like Defendant Leach's production, Defendant McMaster's production appears to omit draft versions of any documents, including Governor McMaster's February 27, 2018, letter to Steven Wagner requesting an exemption for South Carolina child placement agencies from 45 C.F.R. § 75.300 and the executive order Governor McMaster issued on March 13, 2018. All email correspondence appears to derive from a few custodians' files. Moreover, Defendant McMaster failed to produce any documents in response to 14 of the 22 requests in Plaintiffs' Requests,² and expressly refused to search for, collect, review or produce materials responsive to 10 of these requests.³ Like Defendant Leach, Defendant

² Requests 6-7, 10-11, 13-22.

³ Requests 10-11, 13-19, 21.

McMaster refused to search for, collect or produce any documents created after January 23, 2019.

Upon receiving State Defendants' productions and responses and objections, Plaintiffs scheduled a meet-and-confer call with State Defendants to address the issues identified above. On this call, which took place on September 1, 2020, Plaintiffs noted that State Defendants' document productions appeared to be incomplete, as evidenced by their small size, significant overlap with prior FOIA productions and State Defendants' objection to running ESI searches with respect to at least some subset of the requests.⁴ Plaintiffs explained that the parties could go a long way toward resolving their disputes if counsel for State Defendants were willing to provide the names and titles of the individuals whose files were searched and what search terms or other criteria were applied. Plaintiffs stated that they would be happy to work with State Defendants to identify a reasonable set of custodians and negotiate a reasonable set of search terms.

In response, State Defendants stood behind their broad objections and limited productions and declined to engage in good-faith discussions regarding the scope of their discovery efforts. In particular, State Defendants refused to provide any information about what was done to look for documents beyond stating that some form of an ESI search was run over "more than one custodian" with respect to some unidentified subset of the Requests. They refused to identify the custodians whose files were searched, the search criteria that were applied or the Requests for which ESI searches were conducted. They refused to explain whether State Defendants are withholding

⁴ See McMaster Requests 9-11, 13-19, 21.

documents on the basis of their various objections beyond pointing Plaintiffs to their written responses. They refused to explain what criteria they applied to determine whether materials were relevant to the case beyond referring Plaintiffs to their complaint. When Plaintiffs asked how they could possibly assess the sufficiency of State Defendants' productions when they would provide no information about what they did or did not do to gather documents, State Defendants told Plaintiffs to "be assured that we took this obligation seriously".

Plaintiffs once again attempted to start a productive discussion by sending State Defendants a letter on September 16, 2020, detailing the main issues on which the parties disagreed, providing the bases for Plaintiffs' positions and offering to have another conversation if State Defendants were willing to cooperate. (Barbur Decl., Ex. 7.) State Defendants responded to Plaintiffs' letter on September 22, 2020, confirming their positions are unchanged. (Barbur Decl., Exs. 8, 9.)

In light of State Defendants' refusal to engage in good faith in the discovery process, Plaintiffs now file the present motion to compel discovery.⁵

⁵ This motion is timely under Local Rule 7.03 because Plaintiffs have brought this issue to this Court's attention "immediately after the issue[] raised thereby [is] ripe for adjudication". See *ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 9:15-cv-00304-DCN-MGB, 2016 WL 11200705, at *8 (D.S.C. Dec. 12, 2016), *report and recommendation adopted by* 273 F. Supp. 3d 607 (D.S.C. 2017), *mandamus granted in part on other grounds sub nom. In re Mt. Hawley Ins. Co.*, 773 F. App'x 771 (4th Cir. 2019). In particular, Plaintiffs learned on September 22, 2020, that State Defendants intend to stand behind their written responses and objections to Plaintiffs' Requests despite being presented with contrary case law, and Plaintiffs filed the present motion within two weeks of receiving this information.

This motion is also timely under Local Rule 37.01(A) because the parties have been actively trying to resolve the discovery dispute since State Defendants served their Responses and Objections on August 4, 2020, including through email correspondence on August 24, 2020, August 25, 2020, and August 26, 2020, (Barbur Decl. Ex. 6), a telephonic meet-and-confer on September 1, 2020, and letter correspondence on

LEGAL STANDARD

In assessing motions to compel, courts are guided by a fundamental principle of civil litigation: “[t]he civil discovery process is to be engaged in cooperatively.” *Mills v. E. Gulf Coal Preparation Co.*, LLC, 259 F.R.D. 118, 130 (S.D.W. Va. 2009). “[C]ourts depend on the parties to exchange documents and information in a manner that is consistent with the Rules and works towards ‘the just, speedy, and inexpensive’ resolution of disputes.” *Johnson v. N. Carolina Dep’t of Justice*, No. 5:16-CV-00679-FL, 2018 WL 5831997, at *1 (E.D.N.C. Nov. 7, 2018) (quoting Fed. R. Civ. P. 1).

Good-faith cooperation among civil litigants is not merely encouraged; it is required under the federal rules. Rule 26(g), in particular, requires counsel to certify that discovery responses are “consistent with [the federal] rules”, Fed. R. Civ. P. 26(g)(1)(B), and it “imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37,” Fed. R. Civ. P. 26(g) advisory committee’s notes to 1983 Amendment. “It cannot

September 16, 2020, and September 22, 2020 (Barbur Decl, Exs. 7, 8, 9). The parties’ correspondence from August 24 to August 26, 2020, evinces the parties’ intent to extend the time to resolve issues related to State Defendants’ Responses and Objections and the “[c]ompleteness of productions” (Barbur Decl., Ex. 6), and Plaintiffs’ September 16, 2020, letter expressly extended the period of time for State Defendants to confirm they would produce complete discovery responses (Barbur Decl., Ex. 7). Plaintiffs did not definitively learn that further negotiations would be unproductive until receiving State Defendants’ September 22, 2020, letter. (Barbur Decl., Exs. 8, 9.) This motion is therefore timely under Rule 37.01. *See East Bridge Lofts Property Owners Ass’n, Inc. v. Crum & Forster Specialty Ins. Co.*, No. 2:14-cv-2567-RMG, 2015 WL 12831731, at *1 (D.S.C. June 18, 2015) (holding motion to compel timely when filed after the close of discovery but within 21 days of confirming that “Defendant did not search the emails of certain employees for information related to Plaintiffs’” claims).

seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs” *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

Ultimately, “the trial court has broad discretion to grant or deny a motion to compel discovery.” *Ethox Chem., LLC v. Coca-Cola Co.*, No. 6:12-CV-01682-TMC, 2014 WL 2719214, at *1 (D.S.C. June 16, 2014) (Cain, J.). In exercising its discretion, however, the court places the “burden of persuasion” on “the party or person resisting discovery, not the party moving to compel discovery”. *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010) (collecting cases).

ARGUMENT

As set forth above, State Defendants’ document productions are facially deficient. Beyond these truncated productions, State Defendants insist they have no additional responsive documents with respect to McMaster Requests 6-7 and 22 and Leach Requests 5, 7, 12, 16-17, 24, 27-28, 30-31, 34 and 36. Moreover, State Defendants explicitly refused to search for, collect or produce documents responsive to McMaster Requests 10-11, 15-17 and 20 and Leach Requests 18-19 and 25-26, and implicitly did the same with respect to Leach Requests 20 and 29.

Given these deficiencies, Plaintiffs respectfully request an order compelling State Defendants to disclose their discovery efforts and to negotiate in good faith concerning a mechanism for compiling supplemental responses, including by agreeing on a reasonable set of search terms to be run over a reasonable set of custodians. In particular, Plaintiffs respectfully request an order compelling production of documents

responsive to McMaster Requests 1-12, 15-17, 20 and 22 and Leach Requests 1-20, 24-31 and 34-36.

I. STATE DEFENDANTS SHOULD BE ORDERED TO DISCLOSE THEIR DISCOVERY EFFORTS TO DATE AND TO NEGOTIATE IN GOOD FAITH CONCERNING CUSTODIANS AND SEARCH TERMS.

The Federal Rules of Civil Procedure contemplate that attorneys will “work cooperatively to conduct discovery”. *Gourdine v. Karl Storz Endoscopy-Am., Inc.*, 225 F. Supp. 3d 428, 430 (D.S.C. 2016) (quoting *Mancia*, 253 F.R.D. at 361 n.3). In particular, Rule 26 “anticipates a sharing of facts and, if necessary, discovery about the sources to be searched for ESI”. *Burnett v. Ford Motor Co.*, No. 3:13-CV-14207, 2015 WL 4137847, at *8 (S.D.W. Va. July 8, 2015), *objections sustained on other grounds sub nom. by Johnson v. Ford Motor Co.*, No. 3:13-6529, 2015 WL 6758234 (S.D.W. Va. Nov. 5, 2015). State Defendants, however, have refused to discuss productively any of their discovery efforts thus far. Instead, when Plaintiffs asked State Defendants to disclose their search criteria and negotiate a reasonable set of search terms and custodians, State Defendants responded with two main objections—each of which is unavailing.

First, State Defendants contend that any agreement among litigants “on search terms, document custodians, and search parameters . . . is almost universally discussed and reached *prior* to the service of discovery requests”. (Barbur Decl., Ex. 8 at 2.) State Defendants both declined to initiate such discussions after they received Plaintiffs’ documents request and insist they have absolutely no obligation to cooperate now. This is contrary to well-established authority. *See, e.g., Burnett*, 2015 WL 4137847, at *8 (explaining that “[w]hen two-way planning does not occur upfront, and questions about the adequacy of the document production subsequently arise, common

sense dictates that the party conducting the search must share information regarding . . . the search terms used in collecting relevant documents and the identities of the custodians from whom the documents were retrieved”). Indeed, it makes perfect sense that the party producing documents must, when requested, share information regarding its search, collection and production process, as “the party responsible for the search and production has the duty to demonstrate its reasonableness”. *Id.* At bottom, the notion that parties must cooperate only at the outset of discovery and never again finds no support in the federal rules or in federal practice.

Second, State Defendants suggest that work product and/or attorney-client privilege prevents them from revealing their efforts to identify responsive materials. Again, well-established authority is directly to the contrary. *See FormFactor, Inc. v. Micro-Probe, Inc.*, No. C-10-03095 PJH (JCS), 2012 WL 1575093, at *7 n.4 (N.D. Cal. May 3, 2012) (“[D]isclosure of search terms . . . is not subject to any work product protection because it goes to the underlying facts of what documents are responsive to Defendants’ document request, rather than the thought processes of Plaintiff’s counsel.”); *see also Burnett*, 2015 WL 4137847, at *10 (same); *Smith v. Life Invs. Ins. Co. of Am.*, No. 2:07-cv-681, 2009 WL 2045197, at *7 (W.D. Pa. July 9, 2009) (same).

Given the importance of cooperation during discovery, federal courts frequently direct parties to negotiate custodians and search terms when parties disagree about the sufficiency of a document production. *See, e.g., Kunneman Props. LLC v. Marathon Oil Co.*, No. 17-CV-456-GKF-JFJ, 2019 WL 5188355, at *4 (N.D. Okla. Oct. 15, 2019) (directing parties to “meet and confer to . . . identify relevant search terms and relevant custodians”); *In re Sampedro*, No. 3:18 MC 47 (JBA), 2018 WL 6264834, at

*3 (D. Conn. Nov. 30, 2018) (same); *Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298-APG-PAL, 2018 WL 3795238, at *51 (D. Nev. Aug. 9, 2018) (same); *Elhannon LLC v. F.A. Bartlett Tree Expert Co.*, No. 2:14-cv-262, 2017 WL 1382024, at *9 (D. Vt. Apr. 18, 2017) (stating that “cooperation among counsel is central to ensuring compliance with discovery obligations” and directing parties to “meet and confer in order to reach an agreement regarding . . . search terms”); *Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of N.M.*, No. CIV 09-0885 JB/DJS, 2010 WL 4338346, at *2 (D.N.M. Sept. 15, 2010) (requiring that the parties “confer in good faith to negotiate search terms”).

In line with these cases, Plaintiffs respectfully request that the Court enter an order: (a) requiring State Defendants to describe in good faith their efforts to collect and produce documents to date, including identifying which custodians files were searched and which search terms were used; and (b) requiring State Defendants to negotiate in good faith with Plaintiffs concerning supplemental responses to their deficient document productions, including by agreeing to a set of custodians over which State Defendants will run an agreed-to set of search terms. Such an order will enable State Defendants to supplement their current documents productions where appropriate and will assure Plaintiffs and this Court of the sufficiency of State Defendants’ productions.

II. STATE DEFENDANTS SHOULD BE ORDERED TO PROVIDE SUPPLEMENTAL DOCUMENT PRODUCTIONS WITH RESPECT TO THE FOLLOWING DISCOVERY REQUESTS.

The cooperation requested above is essential because State Defendants’ productions with respect to nearly all Requests are inadequate. Plaintiffs thus also seek an order directing State Defendants to produce documents in response to McMaster

Requests 1-12, 15-17, 20 and 22 and Leach Requests 1-20, 24-31 and 34-36. These include requests seeking only “documents sufficient to show” (*i.e.*, McMaster Request 20 and Leach Requests 1-3, 8-9, 12, 16, 24, 28 and 34-35) as well as requests seeking a broader group of documents (*i.e.*, McMaster Requests 1-12, 15-17 and 22 and Leach Requests 4-7, 10-11, 13-15, 17-20, 25-27, 29-31 and 36). State Defendants should be directed to supplement their productions by running agreed-upon search terms over an agreed-upon set of custodians. In all cases, State Defendants should be instructed not to withhold or refuse to collect responsive materials based on the improper objections discussed below.

A. State Defendants Should Not Be Permitted To Restrict Their Productions According to a Truncated Date Range and Should Be Required To Supplement Their Productions In Response to McMaster Requests 1-9, 12 and 22 and Leach Requests 1-17, 27-28, 30-31 and 34-36 Accordingly

State Defendants generally object to producing documents dated outside a limited range. In particular, State Defendants refuse to produce materials created after January 24, 2019, or (in the case of Defendant Leach) before January 27, 2018. In support, State Defendants insist that this case arises from “specific, identifiable, enumerated actions” within that time period, such that earlier and later materials are irrelevant. (Barbur Decl., Ex. 4 at 2-3; Barbur Decl., Ex. 5 at 2-3.)

State Defendants’ position is unfounded. “[R]elevancy is not limited by the exact issues identified in the pleadings, the merits of the case, or the admissibility of discovered information”, *Billioni v. Bryant*, No. 0:14-cv-03060-JMC, 2015 WL 9122776, at *1 (D.S.C. Dec. 14, 2015) (quoting *Amick v. Ohio Power Co.*, No. 2:13-cv-06593, 2014 WL 468891, at *1 (S.D.W.Va. Feb. 5, 2014)), nor is it “limited to materials upon which liability can or cannot be founded”, *David v. Alphin*, No. 3:07-cv-11, 2010 WL

1404722, at *6 (W.D.N.C. Mar. 30, 2010). Material that predates or postdates allegedly unlawful conduct may be essential “to understand[ing] the original decision[s] that led to” State Defendants’ unlawful actions, *id.*, and is therefore well within the scope of discoverable materials, *see Billioni*, 2015 WL 9122776, at *1 (“[I]nformation is relevant, and thus discoverable, if it bears on, or . . . reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.” (quoting *Amick*, 2014 WL 468891, at *1)). And in any event, the premise that this case is limited to specific actions between 2018 and 2019 is itself wrong, as evidenced by the allegations of “continuing” violations and requests for injunctive relief in Plaintiffs’ complaint. (Compl. ¶¶ 113, 140, Prayer for Relief C, E.)

Indeed, documents produced by Federal Defendants in this case showcase the impropriety of State Defendants’ approach. For instance, Miles Coleman, counsel for Defendant McMaster here, sent an email on July 6, 2017, to a staffer at the U.S. Department of Health and Human Services (“HHS”) on behalf of Miracle Hill, noting that he believes Miracle Hill’s compliance with the non-discrimination regulations would significantly burden Miracle Hill’s free exercise of its religion and asking “what, if anything, we or HHS could do to alleviate the burden being imposed on my client and on other religious entities providing foster care who are being similarly burdened by this regulation”. The HHS staffer then forwarded the message along to an HHS Office for Civil Rights employee just days after DSS rescinded Miracle Hill’s permanent license. This email—which concerns issues and entities at the heart of this case and indicates that the scope of the problem goes beyond just Miracle Hill—makes clear the relevancy of

documents and communications that predate January 27, 2018 (Defendant Leach's proposed start date).

State Defendants also generally object to Plaintiffs' requests "to the extent they purport to impose obligations that are not proportionate to the needs of this lawsuit or which would result in the imposition of an Undue Burden or Expense". (Barbur Decl., Ex. 4 at 5; Barbur Decl., Ex. 5 at 5.) Yet State Defendants have offered no reason to believe these requests are disproportionate, and no basis for concluding they are unduly burdensome.

Accordingly, the Court should enter an order requiring State Defendants to supplement its productions in response to the subset of Requests where State Defendants produced anything at all (namely, McMaster Requests 1-5, 8-9 and 12; Leach Requests 1-4, 6, 8-11 and 13-15) consistent with the date range specified in Plaintiffs' Requests. Plaintiffs cannot determine based on State Defendants' responses whether they have also improperly withheld documents responsive to any other Requests addressed in this motion based on the artificial date limits discussed above, including with respect to the many requests to which State Defendants asserted they have no documents (or additional documents) in their possession, custody or control (*i.e.*, McMaster Requests 6-7 and 22 and Leach Requests 5, 7, 12, 16-17, 27-28, 30-31 and 34-36). To the extent they have, they should be ordered supplement their document productions for those requests, as well.

B. Defendant Leach Should Be Required To Supplement His Response to Request 29.

In Request 29, Plaintiffs seek “[d]ocuments concerning the practices of Miracle Hill and other-faith CPAs concerning the practices of Miracle Hill and other faith-based CPAs concerning religious instruction or prayer involving youth in their care”. (Barbur Decl., Ex. 2 at 18.) In response, Defendant Leach simply refers Plaintiffs to DSS Regulation 114-550(H)(11), which states that “[r]eligious education shall be in accordance with the expressed wishes of the natural parents, if such wishes are expressed”. (*Id.*) This response in no way sufficiently addresses Plaintiffs’ request for documents in Defendant Leach’s custody, possession or control and should be supplemented by running an ESI search over an agreed-upon set of search terms and custodians. Accordingly, Defendant Leach should be ordered to produce documents responsive to Request 29.

C. State Defendants Should Be Required To Supplement Their Responses to McMaster Requests 10-11, 15-17 and 20 and Leach Requests 18-20 and 25-26.

With respect to each of these Requests, State Defendants either expressly state that they have “not searched for, collected, reviewed, or produced materials responsive to [the] Request”, or else they have raised objections without any accompanying production and without noting that no responsive materials exist in their possession, custody or control. In either case, State Defendants raise a litany of objections in response to each Request, often making it impossible to determine the precise basis on which each Defendant is withholding or refusing to search for documents. Each of the objections made is meritless, and therefore State Defendants

should be ordered to supplement their responses to each of the above Requests without relying on improper objections.

1. Relevance.

State Defendants claim the materials requested in McMaster Requests 10-11, 15-17 and 20 and Leach Requests 18-19 are irrelevant to the claims or defenses in this case. Given the topics addressed in each of these requests (set forth below), State Defendants' objections make little sense:

- Documents sufficient to show any and all steps taken by DSS to prevent discrimination by Miracle Hill or any other CPA against prospective foster parents based on religion or sexual orientation (McMaster Request 20);
- Documents concerning the Proposed Rulemaking (McMaster Request 10; Leach Request 18) and the Nonenforcement Policy (McMaster Request 11, Leach Request 19);⁶
- Documents concerning Miracle Hill's or any other CPA's practice of refusing to accept or approve foster parents who are same-sex couples or LGBT individuals (McMaster Request 15), or who practice a religion other than Protestant Christianity or who practice no religion at all (McMaster Request 16); and

⁶ "Proposed Rulemaking" and "Nonenforcement Policy" are defined terms in Plaintiffs' Requests referring, respectively, to HHS's proposed rulemaking to eliminate the provision in 45 C.F.R. § 75.300(c) that prohibits subgrantees from selecting among prospective foster parents based on religion or sexual orientation and HHS's notification to the public that it would not enforce those provisions pending finalization of the proposed rule change. (Barbur Decl., Ex. 1 at 4; Barbur Decl., Ex. 2 at 4.)

- Documents concerning families who were denied services by Miracle Hill or any other CPA because they do not practice a particular religion or because they are same-sex couples or LGBT individuals (McMaster Request 17).

As the above list demonstrates, each of the requests concern Defendants' and CPAs' discriminatory actions against LGBT individuals and same-sex couples and individuals who do not share the CPA's faith, and each request is therefore central to the claims and defenses in this case. Thus, to the extent any documents were withheld or not collected on the basis of this objection, State Defendants should be ordered to produce responsive documents without relying on the relevancy objections addressed above.

2. Undue Burden.

State Defendants claim that McMaster Requests 10-11, 15-17 and 20 and Leach Requests 25-26 are unduly burdensome and "excessively expansive". This objection, too, is unavailing.

Although it is not entirely clear, Defendant McMaster's "undue burden" objection appears to rest principally on "the technological constraints of the State's information technology system", which apparently only allows one search term to be run at a time. (Barbur Decl., Ex. 4 at 3.) This is not a proper basis for declining to search for responsive documents. A party can decline to produce ESI only if the ESI is "not reasonably accessible because of undue burden or cost". Fed. R. of Civ. P. 26(b)(2)(B). In other words, the party seeking relief from producing ESI must establish that "the burdens and costs of searching for, retrieving and producing documents and information which it holds electronically . . . make the documents and information inaccessible". *F.D.I.C. v. Baldini*, No. 1:12-7050, 2014 WL 1302479, at *7 (S.D. W. Va. Mar. 28,

2014); *Westdale Recap Props., Ltd. v. NP/I & G Wakefield Commons, L.L.C.*, No. 5:11-CV-659-D, 2013 WL 5424844, at *3 (E.D.N.C. Sept. 26, 2013) (party requesting relief from request “has the burden of demonstrating such inaccessibility on a motion to compel or for a protective order”). While the State’s IT system may not be the most efficient, Defendant McMaster has failed to show that the burden of running a search is so great as to make the documents inaccessible.

As to McMaster Requests 15-17 and Leach Requests 25-26, in particular, State Defendants’ burden argument seems to turn on the fact that these requests lack a geographic restriction and/or a limit on the definition of “services” at issue in each request. Under the Instructions, however, State Defendants were required to produce documents “responsive to the part of the Request to which [they] did not object”—*i.e.*, at the very least, documents relevant to South Carolina and to the “services” most obviously at issue in this case (namely, foster care and adoption).

Thus, to the extent either State Defendant failed to search for, collect or produce documents potentially responsive to Plaintiffs’ Requests on “undue burden” grounds, they should be ordered to supplement their productions accordingly.

3. Vague and Ambiguous.

State Defendants also object to McMaster Requests 15-17 and 20 and Leach Requests 20 and 25-26 on the ground that certain terms contained therein are “vague and ambiguous”, including, with respect to McMaster Request 20, that the term “documents sufficient to show” is “undefined” and an improper attempt to seek information rather than documents. As an initial matter, Plaintiffs are unaware of any case law suggesting a request for “documents sufficient to show” is a request for

information rather than, as the Request states, a request for documents. And more broadly, State Defendants are required to give terms their ordinary meanings and to produce documents accordingly. *See Deakins v. Pack*, No. 1:10-1396, 2012 WL 242859, at *12 (S.D. W. Va. Jan. 25, 2012). None of the terms and phrases to which State Defendants object (*i.e.*, “document sufficient to show”, “religious accommodations”, the “practice of refusing to accept or approve” prospective foster parents, or “services”) is a technical term warranting further explication. State Defendants should therefore be directed to produce documents responsive to these requests in accordance with the plain meaning of the words used therein.

4. Documents in the Possession of Other Parties or Third Parties

With respect to Requests 10-11, 15-17 and 20, Defendant McMaster refuses to search for, collect or produce documents purportedly more easily obtainable from non-parties to the suit.⁷ The notion that Plaintiffs should subpoena third parties for documents within Defendant McMaster’s control contravenes basic discovery principles. *See, e.g., U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192-JWL, 2008 WL 2699908, at *1 (D. Kan. July 3, 2008) (rejecting a party’s argument that it didn’t have to comply with a discovery request because the request could have been made to a third party). So, too, does Defendant McMaster’s repeated refusal to search for documents that are

⁷ In his September 22, 2020, letter to Plaintiffs, Defendant McMaster indicated that certain materials are in the sole custody of third parties, “not the Governor”. (Barbur Decl., Ex. 8 at 3.) Plaintiffs obviously do not expect Defendant McMaster to produce documents he does not possess; however, he does have an obligation to search for responsive documents, and if they are in his possession, produce them to Plaintiffs.

purportedly in DSS's control. Even if DSS also has relevant documents, Defendant McMaster still must search for potentially responsive documents held by his office.⁸

Again, to the extent Defendant McMaster withheld or failed to search for responsive materials on these bases, he should be directed to supplement his document production with the missing material.

* * *

The federal rules require that State Defendants cooperate with Plaintiffs during discovery. In the circumstances present here, where State Defendants have provided deficient productions and refused to take reasonable, good faith steps to resolve Plaintiffs' discovery concerns, the only viable next step is to strike State Defendants' baseless objections and direct State Defendants to supplement their productions to McMaster Requests 1-12, 15-17, 20 and 22 and Leach Requests 1-20, 24-31 and 34-36. In gathering responsive materials, State Defendants should be directed to negotiate in good faith with Plaintiffs, including by agreeing on a set of search terms and custodians to apply to McMaster Requests 1-12, 15-17 and 22 and Leach Requests 4-7, 10-11, 13-15, 17-20, 25-27, 29-31 and 36.

⁸ In his responses and objections, Defendant McMaster also seemed to suggest that documents held within the Office of the Governor of South Carolina are not within Governor McMaster's custody or control. This contradicts well-established Supreme Court and federal court precedent. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *see also Tyler v. Suffolk Cnty.*, 256 F.R.D. 34, 37 (D. Mass. 2009); *Green v. Fulton*, 157 F.R.D. 136, 142 (D. Me. 1994). In his September 22, 2020, letter to Plaintiffs, Defendant McMaster disavowed this position and said "the Governor simply objects to a definition in [Plaintiffs'] Request for Documents to the extent that the definition implies that the Office of the Governor—a department of the State—is a party to this suit". (Barbur Decl., Ex. 8 at 3.) Plaintiffs do not imply that the Office of the Governor is a party to this suit. Rather, Plaintiffs simply seek confirmation that Defendant McMaster will produce all relevant documents that are in his custody or control, including those held within the Office of the Governor of South Carolina.

Because of the complexity stemming from the number of Requests at issue and the number of issues relating to them, Plaintiffs have attached a table in Appendix A summarizing the requested relief.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to compel discovery.

LOCAL CIVIL RULE 7.02 (D.S.C.) CERTIFICATION

The undersigned counsel for Plaintiffs hereby certifies that they attempted in good faith to confer with State Defendants' counsel in an effort to resolve the issues raised in this motion prior to its filing as described in greater detail herein above.

October 5, 2020

/s/ Susan K. Dunn

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Attorneys for Plaintiffs

Appendix A: Motion to Compel Discovery – Requested Relief

<u>Defendant</u>	<u>Requests</u>	<u>Requested Relief</u>
Henry McMaster	1-9, 12 and 22	Supplement production consistent with date ranges specified in Plaintiffs' requests.
Michael Leach	1-17, 27-28, 30-31 and 34-36	Supplement production consistent with date ranges specified in Plaintiffs' requests.
Michael Leach	29	Produce documents consistent with date ranges specified in Plaintiffs' requests.
Henry McMaster	10-11, 15-17 and 20	Produce documents consistent with date ranges specified in Plaintiffs' requests and without relying on improper relevance, burden and vagueness objections, and without withholding documents potentially also in the possession, custody or control of other parties or non-parties.
Michael Leach	18-20 and 25-26	Produce documents consistent with date ranges specified in Plaintiffs' requests and without relying on improper relevance, burden and vagueness objections, and without withholding documents potentially also in the possession, custody or control of other parties or non-parties.
Henry McMaster & Michael Leach	All Requests	Describe what State Defendants did to search for responsive documents and negotiate in good faith, including on custodians and search terms.

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

EDEN ROGERS and

BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary
of the UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

LYNN JOHNSON, in her official capacity as
Assistant Secretary of the ADMINISTRATION
FOR CHILDREN AND FAMILIES;

SCOTT LEKAN, in his official capacity as
Principal Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity as
Governor of the STATE OF SOUTH CAROLINA;
and

MICHAEL LEACH, in his official capacity as State
Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-1567-TMC

**DECLARATION OF PETER T.
BARBUR IN SUPPORT OF
PLAINTIFFS' MOTION TO
COMPEL DISCOVERY**

DECLARATION OF PETER T. BARBUR

I, PETER T. BARBUR, declare as follows:

I am a Partner of the law firm Cravath, Swaine & Moore LLP and am admitted *pro hac vice* as counsel to Plaintiffs Eden Rogers and Brandy Welch in the above-captioned action.

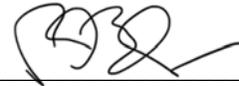
I submit this declaration in support of Plaintiffs' Motion to Compel Discovery dated October 5, 2020.

1. Attached hereto as **Exhibit 1** is a true and correct copy of Plaintiffs' First Set of Requests for Production to Defendant Henry McMaster, dated June 4, 2020.
2. Attached hereto as **Exhibit 2** is a true and correct copy of Plaintiffs' First Set of Requests for Production to Defendant Michael Leach, dated June 4, 2020.
3. Attached hereto as **Exhibit 3** is a true and correct copy of emails between Peter Barbur and Miles Coleman, *et al.*, dated July 1-2, 2020 and July 15-16, 2020.
4. Attached hereto as **Exhibit 4** is a true and correct copy of Defendant Henry McMaster's Objections and Responses to the Plaintiffs' First Set of Requests for the Production of Documents, dated August 4, 2020.
5. Attached hereto as **Exhibit 5** is a true and correct copy of Defendant Michael Leach's Responses and Objections to Plaintiffs' First Set of Requests for the Production of Documents, dated August 4, 2020.
6. Attached hereto as **Exhibit 6** is a true and correct copy of emails between Rebecca Schindel and Miles Coleman, *et al.*, dated August 24-26, 2020.

7. Attached hereto as **Exhibit 7** is a true and correct copy of a letter from Peter T. Barbur to Miles Coleman, *et al.*, dated September 16, 2020.
8. Attached hereto as **Exhibit 8** is a true and correct copy of a letter from Miles Coleman to Peter T. Barbur, *et al.*, dated September 22, 2020.
9. Attached hereto as **Exhibit 9** is a true and correct copy of a letter from Kenneth P. Woodington to Peter T. Barbur, *et al.*, dated September 22, 2020.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 5, 2020.



Peter T. Barbur

Exhibit 1

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

EDEN ROGERS and
BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary
of the UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

LYNN JOHNSON, in her official capacity as
Assistant Secretary of the ADMINISTRATION
FOR CHILDREN AND FAMILIES;

SCOTT LEKAN, in his official capacity as
Principal Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity as
Governor of the STATE OF SOUTH CAROLINA;
and

MICHAEL LEACH, in his official capacity as State
Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-01567-TMC

**PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION
TO DEFENDANT
HENRY MCMASTER**

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs serve their First Set of Requests for Production (collectively, the “Requests” or “RFPs”, and each individually, a “Request” or an “RFP”), dated June 2, 2020, on Henry McMaster, in his official capacity as Governor of the State of South Carolina. Plaintiffs hereby request that the Defendant produce the following documents and tangible things in their possession, custody or control in accordance with the definitions and instructions contained herein to the undersigned attorneys at the offices of Burnette Shutt McDaniel, 912 Lady Street, 2nd Floor, Columbia, SC 29202, within 30 days of service of this First Set of Requests for Production or as otherwise set forth in Rules 26 and 34 of the Federal Rules of Civil Procedure. Each of the document requests is to be read in accordance with the definitions and instructions that follow.

DEFINITIONS

1. The term “ACF” shall mean the Administration for Children and Families and all of its offices, divisions and departments, including, but not limited to, the Administration on Children, Youth and Families, the Children’s Bureau, and the Office of Regional Operations for Region 4.

2. The term “ACF Letter” shall mean the January 23, 2019 letter from ACF to South Carolina Governor Henry McMaster regarding “Request for Deviation or Exception from HHS Regulations 45 CFR § 75.300(c)”.

3. The terms “and” and “or” as used herein, where the context permits, shall be construed to mean “and/or” as necessary to bring within the scope of these RFPs any information or Documents that might otherwise be construed to be outside their scope.

4. The term “any” is to be understood to include and encompass “all”; the word “all” also includes “each” and vice versa.

5. The term “Communication” means any transmittal and/or receipt of information, whether such was oral or written, and whether such was by chance, prearranged, formal or informal, and specifically includes, but is not limited to, conversations in person, telephone conversations, any Documents relating to any in-person or telephone conversations (including but not limited to any notes thereof), electronic communications (including email, instant messages and text messages), voicemail, letters, memoranda, statements, media releases, magazine and newspaper articles, and video and audio transmissions.

6. The term “concerning” when referring to any given subject matter, shall mean any document that constitutes, comprises, involves, contains, embodies, reflects, relates to, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

7. The terms “Document” and “Documents” shall have the broadest meaning ascribed to them by Federal Rule of Civil Procedure 34. This includes copies that differ from the original in any way, including handwritten notations or other written or printed matter. It also includes information stored electronically, whether in a computer database or otherwise, regardless of whether such documents are presently also in non-electronic form. “Document” or “Documents” shall include, but are not limited to, any “Communication” as defined herein.

8. The term “DSS” shall mean the South Carolina Department of Social Services and all of its offices, divisions and departments.

9. The term “HHS” shall mean the United States Department of Health and Human Services and all of its offices, divisions and departments, including, but not limited to, the Administration for Children and Families, the Executive Secretariat, the Office of Civil Rights,

the Office of the General Counsel, the Office of Intergovernmental and External Affairs and the Office of the Secretary.

10. The term “HHS Grants Rule” shall mean the HHS regulations at 45 C.F.R. § 75.300(c) that prohibit subgrantees from selecting among prospective foster parents on the basis of, *inter alia*, their religion and sexual orientation.

11. The term “LGBT” shall mean individuals and/or couples who identify as lesbian, gay, bisexual and/or transgender.

12. The term “McMaster Executive Order” shall mean Governor McMaster’s Executive Order No. 2018-12, issued on March 13, 2018.

13. The term “McMaster Request” shall mean the February 27, 2018 letter sent by Governor McMaster to the Acting Assistant Secretary of ACF for a “deviation or waiver” from the HHS Grants Rule on the basis that compliance with the HHS Grants Rule would conflict with a subgrantee’s religious exercise.

14. The term “Nonenforcement Policy” shall mean HHS’s Notification of Nonenforcement of Health and Human Services Grants Regulation, published at 84 Fed. Reg. 63,809 (Nov. 19, 2019), notifying the public that HHS would not enforce the HHS Grants Rule pending the finalization of a proposed rule to eliminate the HHS Grants Rule’s provision that prohibits subgrantees from selecting among prospective foster parents on the basis of, *inter alia*, their religion and sexual orientation.

15. The term “Proposed Rulemaking” shall mean HHS’s proposed rulemaking, published at 84 Fed. Reg. 63,831 (Nov. 19, 2019), to modify the HHS Grants Rule by eliminating the HHS Grants Rule’s provision that prohibits subgrantees from selecting among prospective foster parents on the basis of, *inter alia*, their religion and sexual orientation.

16. The terms “relating to” or “related to” shall mean regarding, referring to, concerning, mentioning, reflecting, pertaining to, evidencing, identifying, involving, describing, discussing, commenting on, embodying, responding to, supporting, contradicting, containing or constituting (in whole or in part).

17. The term “RFRA” shall mean the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

18. The terms “You” and “Your” shall mean the Office of the Governor of South Carolina, including all of its employees (including, but not limited to, Governor McMaster), offices, divisions and departments.

19. The singular form of any word shall be interpreted as plural and the plural as singular as necessary to bring within the scope of these RFPs any information or Documents that might otherwise be construed to be outside their scope.

INSTRUCTIONS

1. Each Request shall be construed independently and not with reference to any other Request for the purpose of limitation or exclusion.

2. You are required to produce all responsive Documents in Your possession, custody or control, which includes Documents in the possession, custody or control of Your lawyers, agents and other representatives.

3. Each Document and thing requested shall be produced in its entirety. If a Document or thing responsive to any request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why production of the remainder is not possible.

4. If any part of a Document or thing is responsive to any of the following requests, the entire Document or thing should be produced without deletion or redaction.

5. You shall supplement Your responses in accordance with Rule 26(e) of the Federal Rules of Civil Procedure within a reasonable time if You obtain or become aware of any further Documents and things responsive to these RFPs.

6. If You withhold any Document or thing from discovery on the basis of the attorney-client privilege, work-product protection or other ground of privilege or immunity, You shall describe in accordance with Federal Rule of Civil Procedure 45(e)(2) the nature of the privilege claimed, and provide the information required by Rule 45(e)(2), and describe the nature of the information in a manner that will enable Plaintiffs to assess the applicability of the claimed privilege or immunity.

7. If a Document exists and several copies or additional copies have been made that are non-identical (or are no longer identical by reason of any subsequent additions or notations or other modifications of such copy), each copy is to be construed as a separate Document.

8. If You are aware that a Document or thing once existed but has been destroyed, You shall state when the Document or tangible thing was destroyed, why it was destroyed and the circumstances under which it was destroyed.

9. Definitions or usages of words or phrases in these Requests are not intended to be, and shall not be, construed as admissions as to the meaning of words or phrases at issue in the action, and shall have no binding effect on Plaintiffs in this or in any other proceeding.

10. Unless otherwise stated in a specific Request, these Requests seek responsive information and Documents authored, generated, disseminated, drafted, produced, reproduced, received, obtained or otherwise created or distributed, concerning, or in effect during the period from January 1, 2017 to the present.

11. For the purpose of reading, interpreting or construing the scope of these Requests, the terms used shall be given their most expansive and inclusive interpretation.

12. You must answer each RFP separately and fully, unless it is objected to, in which event the reason for objection should be specifically and separately stated. If You object to part of a Request, You must produce all Documents responsive to the part of the Request to which You did not object.

13. You must produce responsive Documents as they have been kept in the usual course of business or organize or label them to correspond to these enumerated Requests.

14. You must produce responsive Documents in Your control pursuant to Your authority in Your official capacity, including all responsive Documents at the Office of the Governor.

15. If, in answering these Requests, You claim any ambiguity in interpreting either a Request or a definition or instruction applicable thereto, You should not use that claim as a basis for refusing to respond, but rather You shall set forth as part of Your response to such Request the language deemed to be ambiguous and the interpretation chosen to be used in responding to the Request.

REQUESTS FOR PRODUCTION

REQUEST NO. 1: Documents concerning the McMaster Request, including, but not limited to, Communications between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster’s office, including, but not limited to, Governor McMaster.

REQUEST NO. 2: Documents concerning the McMaster Request and/or the granting thereof, including, but not limited to, Communications between any person at Governor McMaster’s office, including, but not limited to Governor McMaster, and any person at HHS regarding the scope of the McMaster Request including, but not limited to, “follow-up telephone calls” clarifying that the McMaster Request sought “an exception from [HHS] regulations at 45 CFR § 75.300(c), prohibiting subgrantees from selecting among prospective foster parents on the basis of religion, to the extent that such prohibition conflicts with a subgrantee's religious exercise”, as referenced in the ACF Letter.

REQUEST NO. 3: Documents concerning the McMaster Executive Order, including, but not limited to, Communications between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster’s office, including, but not limited to, Governor McMaster.

REQUEST NO. 4: Documents referencing the ACF Letter or reflecting Communications concerning the ACF Letter, including, but not limited to, interpretations of the ACF Letter or the scope of the exception granted by it.

REQUEST NO. 5: Documents referencing or reflecting Communications concerning any factual assertions in the ACF Letter regarding the South Carolina foster care program, including, but not limited to, the assertions that (i) there are more than 4,000 children in foster care in South Carolina, (ii) Miracle Hill recruits 15% of the families in the South Carolina foster care program, (iii) South Carolina would have difficulty continuing to place children in need of foster care without the participation of faith-based CPAs in the program and (iv) without the exception requested in the McMaster Request certain faith-based CPAs would have to abandon their religious beliefs or forego licensure and funding, which would cause a hardship to such organizations.

REQUEST NO. 6: Documents reflecting Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and any person at DSS, including, but not limited to, Michael Leach, regarding revisions or additions, including all draft revisions, to the DSS Human Services Policy and Procedure Manual, or any other DSS policy or procedure, made after March 13, 2018 pursuant to the McMaster Executive Order.

REQUEST NO. 7: Documents reflecting Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and any person at DSS, including, but not limited to, Michael Leach, regarding amendments or additions, including all draft revisions, to the South Carolina Code of Regulations with regard to foster care, made after March 13, 2018 pursuant to the McMaster Executive Order.

REQUEST NO. 8: Documents regarding licensing same-sex couples or LGBT people as foster parents, including, but not limited to, Communications among any persons at Governor McMaster's office, including, but not limited to, Governor McMaster; between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and DSS employees, including, but not limited to, Michael Leach; and between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and employees of HHS.

REQUEST NO. 9: Documents regarding DSS actions, including, but not limited to, notifications, letters, complaints, revocations of licenses or any other disciplinary measures, against any child placement agency ("CPA") or other South Carolina beneficiary of HHS funds for failure to abide by federal or state non-discrimination requirements, including the HHS Grants Rule from 2016 to the present. For the elimination of doubt, this RFP includes any and all Documents related to any DSS action against Miracle Hill.

REQUEST NO. 10: Documents concerning the Proposed Rulemaking, including, but not limited to, Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster's office, including, but not limited to, Governor McMaster.

REQUEST NO. 11: Documents concerning the Nonenforcement Policy, including, but not limited to, Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi)

any other person at Governor McMaster's office, including, but not limited to, Governor McMaster.

REQUEST NO. 12: Documents regarding religious accommodations for faith-based foster care or adoption agencies.

REQUEST NO. 13: Documents concerning the impact of the granting of the McMaster Request on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

REQUEST NO. 14: Documents concerning the impact of the granting of the McMaster Executive Order on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

REQUEST NO. 15: Documents concerning Miracle Hill's or any other CPA's practice of refusing to accept or approve prospective foster parents who are same-sex couples or LGBT individuals or to place children in foster care with such families.

REQUEST NO. 16: Documents concerning Miracle Hill's or any other CPA's practice of refusing to accept or approve prospective foster parents who practice a religion other than Protestant Christianity or who practice no religion at all, or to place children in foster care with such families.

REQUEST NO. 17: Documents from January 1, 2015 to the present concerning families who were denied services by Miracle Hill or any other CPA because they do not practice a particular religion or because they are same-sex couples or LGBT individuals, including, but not limited to, complaints made by those families.

REQUEST NO. 18: Documents sufficient to show that “Plaintiffs have knowingly declined to pursue opportunities available to them to seek licensure as foster parents by SCDSS and to serve as foster parents directly with SCDSS or with private agencies near them who are willing to assist them.” (*See* Governor McMaster’s Answer ¶¶ 8, 77.)

REQUEST NO. 19: A copy of Miracle Hill’s written plan of compliance that DSS required as a condition of the temporary CPA license it issued to Miracle Hill on January 27, 2018.

REQUEST NO. 20: Documents sufficient to show any and all steps DSS has taken to prevent discrimination by Miracle Hill or any other CPA against prospective foster parents based on religion or sexual orientation.

REQUEST NO. 21: Documents sufficient to show any and all state and/or federal funding DSS distributed to all faith-based CPAs identified in Your response to RFP No. 1 for their foster care services from 2016 to the present.

REQUEST NO. 22: Documents concerning the requirement that Miracle Hill and any other subgrantee making use of the exception granted in the ACF Letter “refer potential foster parents that do not adhere to the subgrantee’s religious beliefs to other subgrantees in the SC Foster Care Program, or to . . . the SC Foster Care Program staff themselves” (ACF Letter at 4), including, but not limited to, plans and processes for making such referrals, and evidence of such referrals since the exception took effect.



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Attorneys for Plaintiffs

June 4, 2020

Columbia, South Carolina

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

EDEN ROGERS and
BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary
of the UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

LYNN JOHNSON, in her official capacity as
Assistant Secretary of the ADMINISTRATION
FOR CHILDREN AND FAMILIES;

SCOTT LEKAN, in his official capacity as
Principal Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity as
Governor of the STATE OF SOUTH CAROLINA;
and

MICHAEL LEACH, in his official capacity as State
Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-01567-TMC

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the following as indicated herein below, by mailing a copy a copy of same on the date below by First Class U.S. Mail, postage pre-paid, addressed to the following:

DOCUMENT SERVED: PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANT HENRY MCMASTER

PARTIES SERVED:

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Joseph H. Hunt, Esq.
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Tammie R. Jackson
BURNETTE SHUTT & MCDANIEL, PA

June 4, 2020

Columbia, South Carolina

Exhibit 2

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

EDEN ROGERS and
BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary
of the UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

LYNN JOHNSON, in her official capacity as
Assistant Secretary of the ADMINISTRATION
FOR CHILDREN AND FAMILIES;

SCOTT LEKAN, in his official capacity as
Principal Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity as
Governor of the STATE OF SOUTH CAROLINA;
and

MICHAEL LEACH, in his official capacity as State
Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-01567-TMC

**PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION
TO DEFENDANT
MICHAEL LEACH**

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs serve their First Set of Requests for Production (collectively, the “Requests” or “RFPs”, and each individually, a “Request” or an “RFP”), dated June 2, 2020, on Michael Leach, in his official capacity as State Director of the South Carolina Department of Social Services. Plaintiffs hereby request that the Defendant produce the following documents and tangible things in their possession, custody or control in accordance with the definitions and instructions contained herein to the undersigned attorneys at the offices of Burnette Shutt McDaniel, 912 Lady Street, 2nd Floor, Columbia, SC 29202, within 30 days of service of this First Set of Requests for Production or as otherwise set forth in Rules 26 and 34 of the Federal Rules of Civil Procedure. Each of the document requests is to be read in accordance with the definitions and instructions that follow.

DEFINITIONS

1. The term “ACF” shall mean the Administration for Children and Families and all of its offices, divisions and departments, including, but not limited to, the Administration on Children, Youth and Families, the Children’s Bureau and the Office of Regional Operations for Region 4.

2. The term “ACF Letter” shall mean the January 23, 2019 letter from ACF to South Carolina Governor Henry McMaster regarding “Request for Deviation or Exception from HHS Regulations 45 CFR § 75.300(c)”.

3. The terms “and” and “or” as used herein, where the context permits, shall be construed to mean “and/or” as necessary to bring within the scope of these RFPs any information or Documents that might otherwise be construed to be outside their scope.

4. The term “any” is to be understood to include and encompass “all”; the word “all” also includes “each” and vice versa.

5. The term “Communication” means any transmittal and/or receipt of information, whether such was oral or written, and whether such was by chance, prearranged, formal or informal, and specifically includes, but is not limited to, conversations in person, telephone conversations, any Documents relating to any in-person or telephone conversations (including, but not limited to, any notes thereof), electronic communications (including email, instant messages and text messages), voicemail, letters, memoranda, statements, media releases, magazine and newspaper articles, and video and audio transmissions.

6. The term “concerning” when referring to any given subject matter, shall mean any document that constitutes, comprises, involves, contains, embodies, reflects, relates to, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

7. The terms “Document” and “Documents” shall have the broadest meaning ascribed to them by Federal Rule of Civil Procedure 34. This includes copies that differ from the original in any way, including handwritten notations or other written or printed matter. It also includes information stored electronically, whether in a computer database or otherwise, regardless of whether such documents are currently also in non-electronic form. “Document” or “Documents” shall include, but are not limited to, any “Communication” as defined herein.

8. The term “DSS” shall mean the South Carolina Department of Social Services and all of its offices, divisions and departments.

9. The term “HHS” shall mean the United States Department of Health and Human Services and all of its offices, divisions and departments, including, but not limited to, the Administration for Children and Families, the Executive Secretariat, the Office of Civil Rights,

the Office of the General Counsel, the Office of Intergovernmental and External Affairs and the Office of the Secretary.

10. The term “HHS Grants Rule” shall mean the HHS regulations at 45 C.F.R. § 75.300(c) that prohibit subgrantees from selecting among prospective foster parents on the basis of, *inter alia*, their religion and sexual orientation.

11. The term “LGBT” shall mean individuals and/or couples who identify as lesbian, gay, bisexual and/or transgender.

12. The term “McMaster Executive Order” shall mean Governor McMaster’s Executive Order No. 2018-12, issued on March 13, 2018.

13. The term “McMaster Request” shall mean the February 27, 2018 letter sent by Governor McMaster to the Acting Assistant Secretary of ACF for a “deviation or waiver” from the HHS Grants Rule on the basis that compliance with the HHS Grants Rule would conflict with a subgrantee’s religious exercise.

14. The term “Nonenforcement Policy” shall mean HHS’s Notification of Nonenforcement of Health and Human Services Grants Regulation, published at 84 Fed. Reg. 63,809 (Nov. 19, 2019), notifying the public that HHS would not enforce the HHS Grants Rule pending the finalization of a proposed rule to eliminate the HHS Grants Rule’s provision that prohibits subgrantees from selecting among prospective foster parents on the basis of, *inter alia*, their religion and sexual orientation.

15. The term “Proposed Rulemaking” shall mean HHS’s proposed rulemaking, published at 84 Fed. Reg. 63,831 (Nov. 19, 2019), to modify the HHS Grants Rule by eliminating the HHS Grants Rule’s provision that prohibits subgrantees from selecting among prospective foster parents on the basis of, *inter alia*, their religion and sexual orientation.

16. The terms “relating to” or “related to” shall mean regarding, referring to, concerning, mentioning, reflecting, pertaining to, evidencing, identifying, involving, describing, discussing, commenting on, embodying, responding to, supporting, contradicting, containing or constituting (in whole or in part).

17. The term “RFRA” shall mean the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

18. The terms “You” and “Your” shall mean the South Carolina Department of Social Services and all of its employees (including, but not limited to, Michael Leach), offices, divisions and departments as defined herein.

19. The singular form of any word shall be interpreted as plural and the plural as singular as necessary to bring within the scope of these RFPs any information or Documents which might otherwise be construed to be outside their scope.

INSTRUCTIONS

1. Each Request shall be construed independently and not with reference to any other Request for the purpose of limitation or exclusion.

2. You are required to produce all responsive Documents in Your possession, custody or control, which includes Documents in the possession, custody or control of Your lawyers, agents and other representatives.

3. Each Document and thing requested shall be produced in its entirety. If a Document or thing responsive to any request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why production of the remainder is not possible.

4. If any part of a Document or thing is responsive to any of the following requests, the entire Document or thing should be produced without deletion or redaction.

5. You shall supplement Your responses in accordance with Rule 26(e) of the Federal Rules of Civil Procedure within a reasonable time if You obtain or become aware of any further Documents and things responsive to these RFPs.

6. If You withhold any Document or thing from discovery on the basis of the attorney-client privilege, work-product protection or other ground of privilege or immunity, You shall describe in accordance with Federal Rule of Civil Procedure 45(e)(2) the nature of the privilege claimed, and provide the information required by Rule 45(e)(2), and describe the nature of the information in a manner that will enable Plaintiffs to assess the applicability of the claimed privilege or immunity.

7. If a Document exists and several copies or additional copies have been made that are non-identical (or are no longer identical by reason of any subsequent additions or notations or other modifications of such copy), each copy is to be construed as a separate Document.

8. If You are aware that a Document or thing once existed but has been destroyed, You shall state when the Document or tangible thing was destroyed, why it was destroyed and the circumstances under which it was destroyed.

9. Definitions or usages of words or phrases in these Requests are not intended to be, and shall not be, construed as admissions as to the meaning of words or phrases at issue in the action, and shall have no binding effect on Plaintiffs in this or in any other proceeding.

10. Unless otherwise stated in a specific Request, these Requests seek responsive information and Documents authored, generated, disseminated, drafted, produced, reproduced, received, obtained or otherwise created or distributed, concerning, or in effect during, the period from January 1, 2017 to the present.

11. For the purpose of reading, interpreting or construing the scope of these Requests, the terms used shall be given their most expansive and inclusive interpretation.

12. You must answer each RFP separately and fully, unless it is objected to, in which event the reason for objection should be specifically and separately stated. If You object to part of a Request, You must produce all Documents responsive to the part of the Request to which You did not object.

13. You must produce responsive Documents as they have been kept in the usual course of business or organize or label them to correspond to these enumerated Requests.

14. You must produce responsive Documents in Your control pursuant to Your authority in Your official capacity, including all responsive Documents at DSS.

15. If in answering these Requests, You claim any ambiguity in interpreting either a Request or a definition or instruction applicable thereto, You should not use that claim as a basis for refusing to respond, but rather You shall set forth as part of Your response to such Request the language deemed to be ambiguous and the interpretation chosen to be used in responding to the Request.

REQUESTS FOR PRODUCTION

REQUEST NO. 1: Documents sufficient to show (i) the identity of the faith-based child placement agencies (“CPAs”) that serve the South Carolina Region 1 counties of Abbeville, Anderson, Cherokee, Greenville, Greenwood, Laurens, Newberry, Oconee, Pickens and Spartanburg; (ii) whether the activities of any of those CPAs are limited to or focused on serving children with special needs requiring therapeutic foster care; (iii) the age range of the children for whom each of those CPAs recruits, screens and supports prospective foster families; and (iv) the number of foster children who have been placed with families that have been recruited, screened and supported by each of those CPAs over the last two years.

REQUEST NO. 2: Documents sufficient to show the differences between the recruitment, screening and support services provided to prospective foster and adoptive families by Miracle Hill Ministries (“Miracle Hill”), and those provided to prospective foster and adoptive families by DSS and other non-therapeutic CPAs in Region 1.

REQUEST NO. 3: Documents sufficient to show the average length of time for a prospective foster or adoptive family working with each CPA listed in response to Request 1 to become licensed, and the average length of time for a prospective foster or adoptive family working directly with DSS to become licensed.

REQUEST NO. 4: Documents concerning the McMaster Request, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to, Michael Leach.

REQUEST NO. 5: Documents concerning the McMaster Executive Order, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to, Michael Leach.

REQUEST NO. 6: Documents referencing the ACF Letter or reflecting Communications concerning the ACF Letter, including, but not limited to, interpretations of the ACF Letter or the scope of the exception granted thereby.

REQUEST NO. 7: Documents referencing or reflecting Communications concerning any factual assertions in the ACF Letter regarding the South Carolina foster care program, including, but not limited to, the assertions that (i) there are more than 4,000 children in foster care in South Carolina, (ii) Miracle Hill recruits 15% of the families in the South Carolina foster care program, (iii) South Carolina would have difficulty continuing to place children in need of foster care without the participation of faith-based CPAs in the program and (iv) without the exception requested in the McMaster Request certain faith-based CPAs would have to abandon their religious beliefs or forgo licensure and funding, which would cause a hardship to such organizations.

REQUEST NO. 8: Documents sufficient to show revisions or additions to the DSS Human Services Policy and Procedure Manual, or any other DSS policy or procedure, including all draft revisions, made after March 13, 2018 pursuant to the McMaster Executive Order.

REQUEST NO. 9: Documents sufficient to show amendments or additions to the South Carolina Code of Regulations with regard to foster care, made after March 13, 2018 pursuant to the McMaster Executive Order.

REQUEST NO. 10: Copies of DSS Form 1520, Annual Report of Children under Care or Supervision of Licensed Child Placing Agencies, for the years 2019, 2018, 2017 and 2016 for Miracle Hill, Church of God Home for Children, Connie Maxwell Children's Home, Tamassee DAR School and Thornwell Home of Children.

REQUEST NO. 11: Copies of the financial reports certified by a Certified Public Accountant for the fiscal years of 2019, 2018, 2017 and 2016 for Miracle Hill, Church of God Home for Children, Connie Maxwell Children's Home, Tamassee DAR School and Thornwell Home of Children.

REQUEST NO. 12: Documents sufficient to show the amount of state and federal funding received by Miracle Hill, Church of God Home for Children, Connie Maxwell Children's Home, Tamassee DAR School and Thornwell Home of Children for the fiscal years of 2019, 2018, 2017 and 2016.

REQUEST NO. 13: Copy of Miracle Hill's Foster Care Manual.

REQUEST NO. 14: Copies of the current contracts and/or licensing agreements between DSS and all faith-based CPAs identified in Your response to RFP No. 1.

REQUEST NO. 15: Documents regarding CPAs accepting or approving same-sex couples or LGBT people as foster parents, including, but not limited to, Communications between DSS employees, including, but not limited to, Michael Leach; between DSS employees and employees of Governor McMaster's office, including, but not limited to, Governor McMaster; and between DSS employees and employees of HHS.

REQUEST NO. 16: Documents sufficient to identify all CPAs in the State (not limited to Region 1) that do not accept or approve prospective foster families headed by same-sex couples or LGBT individuals or that do not adhere to particular religious beliefs.

REQUEST NO. 17: Documents reflecting DSS actions, including, but not limited to, notifications, letters, complaints, revocations of licenses or any other disciplinary measures, against any CPA or other South Carolina beneficiary of HHS funds for failure to abide by state or federal non-discrimination requirements, including, but not limited to, the HHS Grants Rule, from 2016 to the present. For the elimination of doubt, this RFP includes any and all Documents related to DSS action against Miracle Hill.

REQUEST NO. 18: Documents concerning the Proposed Rulemaking, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to, Michael Leach.

REQUEST NO. 19: Documents concerning the Nonenforcement Policy, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to, Michael Leach.

REQUEST NO. 20: Documents regarding religious accommodations for faith-based foster care and/or adoption agencies.

REQUEST NO. 21: Documents concerning the impact of the granting of the McMaster Request on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

REQUEST NO. 22: Documents concerning the impact of revisions or additions to the DSS Human Services Policy and Procedure Manual, or any other DSS policy or procedure, made after March 13, 2018 pursuant to the McMaster Executive Order on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

REQUEST NO. 23: Documents concerning the impact of amendments or additions to the South Carolina Code of Regulations with regard to foster care, made after March 13, 2018 pursuant to the McMaster Executive Order on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

REQUEST NO. 24: Documents sufficient to show the eligibility requirements each CPA identified in response to RFP No. 1 applies to prospective foster parents seeking assistance in obtaining licenses.

REQUEST NO. 25: Documents concerning Miracle Hill's or any other CPA's practice of refusing to accept or approve prospective foster parents who are same-sex couples or LGBT individuals or to place foster children with such families.

REQUEST NO. 26: Documents concerning Miracle Hill's or any other CPA's practice of refusing to accept or approve prospective foster parents who practice a religion other

than Protestant Christianity or who practice no religion at all, or to place foster children with such families.

REQUEST NO. 27: Documents from January 1, 2015, to the present concerning families who were denied services by Miracle Hill or any other CPA because they do not practice a particular religion or because they are same-sex couples or LGBT individuals, including, but not limited to, complaints made by those families.

REQUEST NO. 28: Documents sufficient to show the role Miracle Hill and other CPAs play in the process of recruiting, screening, and placing children with foster families.

REQUEST NO. 29: Documents concerning the practices of Miracle Hill and other faith-based CPAs concerning religious instruction or prayer involving youth in their care.

REQUEST NO. 30: Documents concerning the practices of Miracle Hill and other faith-based CPAs to protect youth in their care from discrimination based on sexual orientation.

REQUEST NO. 31: Documents concerning Miracle Hill's and other faith-based CPAs' compliance with DSS's Foster Care Bill of Rights.

REQUEST NO. 32: Documents sufficient to show that "Plaintiffs have knowingly declined to pursue opportunities available to them to seek licensure as foster parents by SCDSS and to serve as foster parents directly with SCDSS or with private agencies near them who are willing to assist them." (*See* Governor McMaster's Answer ¶¶ 8, 77.)

REQUEST NO. 33: Copy of Miracle Hill's written plan of compliance that DSS required as a condition of the temporary CPA license it issued to Miracle Hill on January 27, 2018.

REQUEST NO. 34: Documents sufficient to show any and all steps DSS has taken to prevent discrimination by Miracle Hill against prospective foster parents based on religion or sexual orientation.

REQUEST NO. 35: Documents sufficient to show any and all state and/or federal funding DSS distributed to all faith-based CPAs identified in Your response to RFP No. 1 for their foster care services from 2016 to the present.

REQUEST NO. 36: Documents concerning the requirement that Miracle Hill and any other subgrantee making use of the exception granted in the ACF Letter “refer potential foster parents that do not adhere to the subgrantee’s religious beliefs to other subgrantees in the SC Foster Care Program, or to . . . the SC Foster Care Program staff themselves” (ACF Letter at 4), including, but not limited to, plans and processes for making such referrals, and evidence of such referrals since the exception took effect.



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Attorneys for Plaintiffs

June 4, 2020

Columbia, South Carolina

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

EDEN ROGERS and

BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary
of the UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND
FAMILIES;

LYNN JOHNSON, in her official capacity as
Assistant Secretary of the ADMINISTRATION
FOR CHILDREN AND FAMILIES;

SCOTT LEKAN, in his official capacity as
Principal Deputy Assistant Secretary of the
ADMINISTRATION FOR CHILDREN AND
FAMILIES;

HENRY MCMASTER, in his official capacity as
Governor of the STATE OF SOUTH CAROLINA;
and

MICHAEL LEACH, in his official capacity as State
Director of the SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-01567-TMC

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the following as indicated herein below, by mailing a copy a copy of same on the date below by First Class U.S. Mail, postage pre-paid, addressed to the following:

DOCUMENT SERVED: PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANT MICHAEL LEACH

PARTIES SERVED:

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Joseph H. Hunt, Esq.
Christie V. Newman, Esq.
Christopher A. Bates, Esq.
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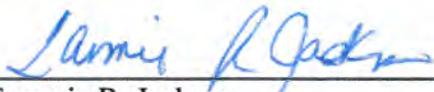
Robert D. Cook, Esq.
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ATTORNEY FOR DEFENDANT HENRY MCMASTER

ATTORNEYS FOR DEFENDANT MICHAEL LEACH



Tammie R. Jackson
BURNETTE SHUTT & MCDANIEL, PA

June 4, 2020

Columbia, South Carolina

Exhibit 3

{In Archive} RE: Rogers v. HHS (DSC) 

Peter Barbur to: Miles Coleman

07/16/2020 12:23 PM

Cc: "Currey Cook", "Newman, Christie (USASC)", "Cristopher Ray", "Daniel Mach", "Powers, James R. (CIV)", "Karen Loewy", "Kenneth P. Woodington", "Leslie Cooper", "mburnette@burnetteshutt.law", "Miranda J. Li", "nshutt@burnetteshutt.law", "Rebecca Schindel", "Susan Dunn"

Archive: This message is being viewed in an archive.

Miles,

I take it from your email that the state defendants and their counsel have been collecting and reviewing documents and thus will be able to begin producing those documents on August 4. With that understanding, we consent to the requested extension.

Peter

"Miles Coleman" Peter, Notwithstanding the diligent efforts by Go... 07/15/2020 04:51:24 PM

From: "Miles Coleman" <Miles.Coleman@nelsonmullins.com>
To: "Peter Barbur" <PBarbur@cravath.com>
Cc: "Newman, Christie (USASC)" <Christie.Newman@usdoj.gov>, "Susan Dunn" <sdunn@aclusc.org>, "Rebecca Schindel" <rschindel@cravath.com>, "Kenneth P. Woodington" <kwoodington@dml-law.com>, "Powers, James R. (CIV)" <James.R.Powers@usdoj.gov>, "Cristopher Ray" <cray@cravath.com>, "Currey Cook" <ccook@lambdalegal.org>, "Daniel Mach" <dmach@aclu.org>, "Karen Loewy" <kloewy@lambdalegal.org>, "Leslie Cooper" <LCOOPER@aclu.org>, "Miranda J. Li" <mjli@cravath.com>, "mburnette@burnetteshutt.law" <mburnette@burnetteshutt.law>, "nshutt@burnetteshutt.law" <nshutt@burnetteshutt.law>
Date: 07/15/2020 04:51 PM
Subject: RE: Rogers v. HHS (DSC)

External (miles.coleman@nelsonmullins.com)

[Report This Email](#) [FAQ](#)

Peter,

Notwithstanding the diligent efforts by Governor McMaster and Director Leach, their staffs, and counsel, we will not be able to respond to Plaintiffs' First Set of RFPs on or before July 21. As noted previously, the combination of remote work arrangements, exigent circumstances related to the pandemic, and the press of other filing deadlines and arguments have slowed governor McMaster's and Mr. Leach's collection of documents and counsel's review of same. Will Plaintiffs consent to an additional two-week extension? If so, by my calculation, the new deadline would be August 4, 2020.

Thank you for your consideration. If we have not received a response by Friday morning, we'll consider that a tacit refusal of the request and will move for an extension of time.

Miles

From: Miles Coleman
Sent: Thursday, July 2, 2020 10:07 PM
To: Peter Barbur <PBarbur@cravath.com>

Cc: Newman, Christie (USASC) <Christie.Newman@usdoj.gov>; Susan Dunn <sdunn@aclusc.org>; Rebecca Schindel <rschindel@cravath.com>; Kenneth P. Woodington <kwoodington@dml-law.com>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Cristopher Ray <cray@cravath.com>; Currey Cook <ccook@lambdalegal.org>; Daniel Mach <dmach@aclu.org>; Karen Loewy <kloewy@lambdalegal.org>; Leslie Cooper <LCOOPER@aclu.org>; Miranda J. Li <mjli@cravath.com>; mburnette@burnetteshutt.law; nshutt@burnetteshutt.law

Subject: RE: Rogers v. HHS (DSC)

Thank you for your response, Peter. Unless I'm mistaken, Miracle Hill requested and received an extension of a bit over four weeks. But if you are not inclined to extend a similar extension to the Governor and Mr. Leach, we'll endeavor to meet the deadline of July 21, and will revisit the topic if and when necessary.

I hope you have a good weekend.

Miles

From: Peter Barbur <PBarbur@cravath.com>

Sent: Thursday, July 2, 2020 4:58 PM

To: Miles Coleman <Miles.Coleman@nelsonmullins.com>

Cc: Newman, Christie (USASC) <Christie.Newman@usdoj.gov>; Susan Dunn <sdunn@aclusc.org>; Rebecca Schindel <rschindel@cravath.com>; Kenneth P. Woodington <kwoodington@dml-law.com>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Cristopher Ray <cray@cravath.com>; Currey Cook <ccook@lambdalegal.org>; Daniel Mach <dmach@aclu.org>; Karen Loewy <kloewy@lambdalegal.org>; Leslie Cooper <LCOOPER@aclu.org>; Miranda J. Li <mjli@cravath.com>; mburnette@burnetteshutt.law; nshutt@burnetteshutt.law

Subject: Re: Rogers v. HHS (DSC)

Miles,

Plaintiffs will agree to a two-week extension, as they did for the Federal Defendants and as Miracle Hill now has as well (we had intended to agree to that extension but replying to Miracle Hill inadvertently fell through the cracks).

That should be sufficient for the state defendants as well.

Regards,

Peter

On Jul 2, 2020, at 4:38 PM, Miles Coleman <Miles.Coleman@nelsonmullins.com> wrote:

Peter — apologies for the follow up email, but I wanted to see if you'd had a chance to consider the request below before I file a motion seeking an extension.

Thanks for considering, and please let me know if Plaintiffs will consent to the requested extension.

Miles

From: Miles Coleman
Sent: Wednesday, July 1, 2020 9:17 PM
To: Kenneth P. Woodington <kwoodington@DML-LAW.com>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Cristopher Ray <cray@cravath.com>; Currey Cook <ccook@lambdalegal.org>; Daniel Mach <dmach@aclu.org>; Karen Loewy <kloewy@lambdalegal.org>; Leslie Cooper <LCOOPER@aclu.org>; Miranda J. Li <mjli@cravath.com>; mburnette@burnetteshutt.law; nshutt@burnetteshutt.law; Peter Barbur <PBarbur@cravath.com>; Susan Dunn <sdunn@aclusc.org>; Rebecca Schindel <rschindel@cravath.com>
Cc: Newman, Christie (USASC) <Christie.Newman@usdoj.gov>
Subject: RE: Rogers v. HHS (DSC)

As Ken anticipated in his email, I'm writing to request a 30-day extension of the deadline for the Governor (and, per Ken's email, Mr. Leach) to respond to Plaintiff's First Set of RFPs. The Governor's staff and I are actively engaged preparing our responses and production, but between remote work arrangements, the exigencies of pandemic-related matters, and the press of other filings and hearings, we would appreciate the additional time. I believe our current deadline is July 7 and, with the extension, the new deadline would be August 6.

Thank you for considering.

Miles

From: Kenneth P. Woodington <kwoodington@DML-LAW.com>
Sent: Wednesday, July 1, 2020 2:30 PM
To: Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Cristopher Ray <cray@cravath.com>; Currey Cook <ccook@lambdalegal.org>; Daniel Mach <dmach@aclu.org>; Karen Loewy <kloewy@lambdalegal.org>; Leslie Cooper <LCOOPER@aclu.org>; Miranda J. Li <mjli@cravath.com>; mburnette@burnetteshutt.law; nshutt@burnetteshutt.law; Peter Barbur <PBarbur@cravath.com>; Susan Dunn <sdunn@aclusc.org>; Rebecca Schindel <rschindel@cravath.com>
Cc: Newman, Christie (USASC) <Christie.Newman@usdoj.gov>; Miles Coleman <Miles.Coleman@nelsonmullins.com>
Subject: Re: Rogers v. HHS (DSC)

◀External Email▶ - From: kwoodington@DML-LAW.com

I believe Miles is also going to request an extension, and I would request whatever Miles requests. The DSS legal staff is working remotely, which adds to the difficulty.

Ken

----- Original message-----

From: Powers, James R. (CIV)
Date: Wed, Jul 1, 2020 1:42 PM
To: Cristopher Ray;Currey Cook;Daniel Mach;Karen Loewy;Leslie Cooper;Miranda J. Li;mburnette@burnetteshutt.law;nshutt@burnetteshutt.law;Peter Barbur;Susan Dunn;Rebecca Schindel;

Cc: Newman, Christie (USASC);Miles Coleman;Kenneth P. Woodington;
Subject:Rogers v. HHS (DSC)

Counsel –

In light of the upcoming holiday weekend and the press of business in some other matters I am handling, would plaintiffs consent to a 2 week extension of our deadline to serve responses and objections to the first RFPs? I believe that would put our deadline at July 21.

Thanks,
Jim

James R. Powers

Trial Attorney
Federal Programs Branch
U.S. Department of Justice, Civil Division

(202) 353-0543 (direct) | james.r.powers@usdoj.gov

Nelson Mullins is continuing to monitor developments related to COVID-19, including guidance from the Centers for Disease Control and various health officials; and federal, state, and local government authorities. The firm has implemented precautionary measures and plans to ensure the continuation of all firm services to clients from both in office and remote work arrangements across our 25 geographically dispersed offices. [Click here to visit the Nelson Mullins Coronavirus Resources page.](#) Information described therein is subject to change.

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Exhibit 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

Eden Rogers et al.,)	
	)	Civil Action No. 6:19-cv-01567-TMC
Plaintiffs,)	
)	
v.	)	<u>DEFENDANT HENRY MCMASTER’S</u>
	)	<u>OBJECTIONS AND RESPONSES TO THE</u>
United States Department of Health and Human Services, et al.,	)	<u>PLAINTIFFS’ FIRST SET OF REQUESTS</u>
	)	<u>FOR THE PRODUCTION OF DOCUMENTS</u>
)	
Defendants.)	

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendant Henry McMaster, in his official capacity as Governor of the State of South Carolina, submits the following responses and objections to Plaintiffs’ First Set of Requests for Production of Documents (“RFPs”) served on June 4, 2020.

As an initial matter, Plaintiffs’ RFPs seem calculated repeatedly to violate and overstep the bounds of the Rules of Civil Procedure in an effort to obtain documents and information that are not relevant to the claims and defenses at issue in this suit, are unlikely to lead to discoverable information, and are outside the scope of discovery articulated by Rules and applicable case law. For the sake of brevity, and to avoid repeating the same lengthy objections every time an additional request commits the same violation, Governor McMaster articulates below certain objections applicable to multiple requests and then incorporates these objections by reference into the specific responses where applicable.

OBJECTION APPLICABLE TO ALL REQUESTS

Plaintiffs’ Complaint challenges the constitutionality of specific actions of the Defendants, including specifically identified actions of Governor McMaster taken in his official capacity as Governor of the State of South Carolina. Plaintiffs’ RFPs, however, seek the production of

materials from January 1, 2017 to the present.¹ *See* RFPs at 6, ¶ 10. Governor McMaster, however, was not the Governor of the State of South Carolina on January 1, 2017, and documents and materials that predate his installation as Governor are not relevant to the claims asserted against him in his official capacity as Governor. For these reasons, Governor McMaster objects to all the Requests to the extent they seek documents prior to his installation as Governor on January 24, 2017. Accordingly, he has not collected, reviewed, or produced documents prior to that date because such documents are not relevant to any claim or defense asserted in the case and are not proportional to the needs of the case.²

Governor McMaster further objects to the RFPs to the extent they seek materials dating “to the present.” *See* RFPs at 6, ¶ 10. The causes of action asserted in this action arise from specific, identifiable, enumerated actions specifically including a letter sent by Governor McMaster on February 27, 2018; an Executive Order issued by Governor McMaster on March 13, 2018; and a response letter sent to Governor McMaster on January 23, 2019. The Complaint claims the alleged constitutional violations arose immediately from and occurred, if at all (which is not conceded), at the time of the challenged actions. Indeed, Plaintiffs specifically claim it was *these actions* that violated the Establishment and Equal Protection Clauses. The nature and effect of the challenged actions are discernable from the face of the documents referenced above, and documents and materials postdating the specific, identifiable, enumerated actions that allegedly violated constitutional provisions are not relevant to Plaintiffs’ claims. Accordingly, such requests are not relevant or proportional to the needs of the case and would impose an undue burden, *see* Rule

¹ Two Requests seek materials from an even earlier date. *See* RFP Nos. 17 and 21 (seeking materials dating from January 1, 2015 and January 1, 2016 to the present, respectively).

² Indeed, the Complaint alleges Governor McMaster’s earliest knowledge of the relevant facts was on or around February 21, 2018, *see* Complaint (ECF No. 1) ¶ 61, and the earliest alleged knowledge or actions by *any* Defendant appears to be late 2017 or early 2018, *see id.* ¶¶ 54–56.

26(b)(1), Fed. R. Civ. P., and Governor McMaster has not collected, reviewed, or produced documents from on or after January 24, 2019.

OBJECTIONS APPLICABLE TO MORE THAN ONE REQUEST

Because certain of the objections asserted below are applicable to multiple Requests, Governor McMaster explains the objections here and, in the interest of efficiency, refers to them in shorthand form in the specific objections and responses to specific Requests that follow.

1. Materials whose collection, review, and production would impose an **“Undue Burden or Expense.”** Governor McMaster objects, in some instances, to specific Requests on the basis that responding to the Request or specific portions thereof would impose an undue burden or expense in violation of Rule 26(b)(1), Fed. R. Civ. P. This objection relates especially, but not exclusively, to the burden and expense involved in searching for, collecting, reviewing, and producing certain electronically stored documents. The undue burden and expense is caused, in some instances, by the extraordinarily broad scope of Plaintiffs’ RFPs. Request 12, for example, seeks “[d]ocuments regarding religious accommodations for faith-based foster care or adoption agencies,” but does not define “religious accommodations” or “faith-based” and does not limit the scope of the Request to licensed Child Placing Agencies (“CPAs”) in South Carolina. The undue burden imposed by these and other excessively expansive Requests is compounded by the technological constraints of the State’s information technology system. Specifically, electronically stored documents may be searched on a system-wide basis³ only by running one search term at a time, rather than by searching for terms in combination or in proximity to each other. Using

³ The State’s IT system can more easily perform searches for potentially responsive Communications. Subject to the objections contained in this Response, Governor McMaster has searched for and reviewed such Communications and has produced those that are responsive and are not privileged.

Request 12 as an example, an attempt to collect potentially responsive documents would require running a search for “foster*,” then a search for “adopt*,” then a search for “accommodate*,” and so on, with each of the searches returning large numbers of documents that are not relevant to the claims and defenses of this case, but which would have to be reviewed at length and at great cost that is not proportional to the needs of the case and the relevance of the information sought. *See* Rule 26(b)(1), Fed. R. Civ. P.

2. Requests seeking “**Documents Sufficient to Show**” an alleged fact. Requests 18, 20, and 21 request “[d]ocuments sufficient to show” certain alleged facts. That phrase is not defined in the RFPs and, further, is vague and ambiguous. In addition, to the extent the Requests appear to seek information as opposed to Documents or Communications, such information (assuming it is relevant and not otherwise objectionable or privileged) should be sought by way of an Interrogatory rather than by a request to produce some unknown quantum of documents “sufficient” to establish an alleged fact.

OBJECTIONS TO DEFINITIONS

Governor McMaster incorporates by reference the Objections to Definitions found in any other Defendants’ Responses and Objections to the RFPs to the extent the definitions to which other Defendants have objected are identical to those found in the RFPs served on the Governor (though in some instances found in different numbered paragraphs of the RFPs’ Definitions), including the definitions found in paragraphs 5, 6, 7, and 16 of the RFPs served on Governor McMaster, to the extent they differ from or purport to impose an obligation broader than that found in Rules 26(b)(1) or 34(a)(1), Fed. R. Civ. P., or any other applicable Rule of Civil Procedure.

The Governor further objects to the definition of the terms “You” and “Your” found in Definition 18 of the RFPs to the extent it implies that the Office of the Governor of South Carolina

is a party in interest to this proceeding or is susceptible to discovery requests or demands. The Office of the Governor of South Carolina is an agency or department of the State and is not a party to this Case. The Governor also objects to the definition of the terms “You” and “Your” to the extent that the definition seek to impose on him any obligation to search for, collect, review, or produce documents in the possession, custody, or control of individuals, offices, departments, and divisions beyond his immediate staff. In particular, Governor McMaster objects to and has not attempted to search for, collect, review, or produce documents in the possession of the South Carolina Department of Social Services, which is a separate State government agency whose Director is a named Defendant in this lawsuit, and whose documents are not in Governor McMaster’s immediate possession, custody, or control.

OBJECTIONS TO INSTRUCTIONS

Governor McMaster incorporates by reference the Objections to Instructions found in any other Defendants’ Responses and Objections to the RFPs to the extent the instructions to which other Defendants have objected are identical to those found in the RFPs served on the Governor, including the instructions found in paragraphs 2, 3, 4, 6, 8, 13, and 14 of the RFPs served on Governor McMaster, to the extent they differ from or purport to impose an obligation broader than that found in Rules 26 or 34, Fed. R. Civ. P., or any other applicable Rule of Civil Procedure, and to the extent they purport to impose obligations that are not proportionate to the needs of this lawsuit or which would result in the imposition of an Undue Burden or Expense.

SPECIFIC RESPONSES AND OBJECTIONS TO THE REQUESTS FOR PRODUCTION

REQUEST NO. 1: Documents concerning the McMaster Request, including, but not limited to, Communications between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii)

any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster's office, including, but not limited to, Governor McMaster.

RESPONSE: Subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection, Governor McMaster produces the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00001 to _00012, _00016 to _00025, _00029 to _00032, _00039 to _00041, _00048, _00079 to _00081, _00086 to _00087, _0317 to _00327, and _00344.

REQUEST NO. 2: Documents concerning the McMaster Request and/or the granting thereof, including, but not limited to, Communications between any person at Governor McMaster's office, including, but not limited to Governor McMaster, and any person at HHS regarding the scope of the McMaster Request including, but not limited to, "follow-up telephone calls" clarifying that the McMaster Request sought "an exception from [HHS] regulations at 45 CFR § 75.300(c), prohibiting subgrantees from selecting among prospective foster parents on the basis of religion, to the extent that such prohibition conflicts with a subgrantee's religious exercise", as referenced in the ACF Letter.

RESPONSE: Subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection, Governor McMaster produces the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00001 to _00012, _00016 to _00025.

REQUEST NO. 3: Documents concerning the McMaster Executive Order, including, but not limited to, Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster's office, including, but not limited to, Governor McMaster.

RESPONSE: Subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection, Governor McMaster produces the materials served concurrently herewith and identified by Bates Numbers

Rogers_McMaster_00007 to _00015, _00042, _00054 to _00075, _00079 to _00081, _00087 to _00087, _00123 to _00197, and _00266 to _00267.

REQUEST NO. 4: Documents referencing the ACF Letter or reflecting Communications concerning the ACF Letter, including, but not limited to, interpretations of the ACF Letter or the scope of the exception granted by it.

RESPONSE: Subject to the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection, Governor McMaster produces the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00007 to _00012, _00025, _00037 to _00038, _00274 to _00286, and _00344.

REQUEST NO. 5: Documents referencing or reflecting Communications concerning any factual assertions in the ACF Letter regarding the South Carolina foster care program, including, but not limited to, the assertions that (i) there are more than 4,000 children in foster care in South Carolina, (ii) Miracle Hill recruits 15% of the families in the South Carolina foster care program, (iii) South Carolina would have difficulty continuing to place children in need of foster care without the participation of faith-based CPAs in the program and (iv) without the exception requested in the McMaster Request certain faith-based CPAs would have to abandon their religious beliefs or forego licensure and funding, which would cause a hardship to such organizations.

RESPONSE: Subject to the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection, Governor McMaster produces the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00007 to _00012, _00025, _00282, and _00356.

REQUEST NO. 6: Documents reflecting Communications between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and any person at DSS, including, but not limited to, Michael Leach, regarding revisions or additions, including all draft revisions, to the DSS Human Services Policy and Procedure Manual, or any other DSS policy or procedure, made after March 13, 2018 pursuant to the McMaster Executive Order.

RESPONSE: Governor McMaster states there are no documents in his custody, possession, or control that are responsive to this Request.

REQUEST NO. 7: Documents reflecting Communications between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and any person at DSS, including, but not limited to, Michael Leach, regarding amendments or additions, including all draft revisions, to the South Carolina Code of Regulations with regard to foster care, made after March 13, 2018 pursuant to the McMaster Executive Order.

RESPONSE: Governor McMaster states there are no documents in his custody, possession, or control that are responsive to this Request.

REQUEST NO. 8: Documents regarding licensing same-sex couples or LGBT people as foster parents, including, but not limited to, Communications among any persons at Governor McMaster’s office, including, but not limited to, Governor McMaster; between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and DSS employees, including, but not limited to, Michael Leach; and between any person at Governor McMaster’s office, including, but not limited to, Governor McMaster, and employees of HHS.

RESPONSE: Governor McMaster objects to this Request because it is overbroad, seeking documents that are irrelevant to the claims and defenses in the Case. Further, the effort required to collect, review, and produce such documents is not proportional to the needs of the Case and, therefore, comprises an Undue Burden or Expense. Governor McMaster further objects to this Request to the extent it seeks documents that may be more easily obtained from other parties (assuming *arguendo* that such documents were relevant, proportionate, not unduly burdensome to the collecting and producing party, and not privileged or protected). Accordingly, and in light of the great time, effort, and expense associated with the system-wide search, collection of, and review of electronically stored documents, Governor McMaster has not performed such a system-wide search for electronically stored documents that may be responsive to this Request. (*See* “Undue Burden or Expense,” *supra*.)

Subject to and notwithstanding these specific objections, the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection, Governor McMaster has searched for any responsive Communications and for any

responsive Documents in his immediate possession, custody, or control or that of his staff, and produces the Communications and Documents contained among the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00040 to _00041, _00202 to _00262, _00287 to _00288, _00302 to _00305, _00328 to _00331.

REQUEST NO. 9: Documents regarding DSS actions, including, but not limited to, notifications, letters, complaints, revocations of licenses or any other disciplinary measures, against any child placement agency (“CPA”) or other South Carolina beneficiary of HHS funds for failure to abide by federal or state non-discrimination requirements, including the HHS Grants Rule from 2016 to the present. For the elimination of doubt, this RFP includes any and all Documents related to any DSS action against Miracle Hill.

RESPONSE: Governor McMaster objects to this request because it is vague and ambiguous. Specifically, the Request does not identify the “federal or state non-discrimination requirements” to which it refers, nor are those terms defined in the RFPs. Governor McMaster further objects that this Request is so overbroad as to be not proportional to the needs of the Case. SCDCSS’ actions, if any, regarding CPAs other than Miracle Hill are not relevant to the claims and defenses asserted in this Case, nor are they likely to lead to discoverable information. Subject to these specific objections, the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection, Governor McMaster produces the Communications contained among the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00268 to _00271. In light of the Undue Burden and Expense imposed by the Request, and in light of the fact that Documents responsive to the Request would be more easily obtained (assuming they are relevant, proportionate, not unduly burdensome, and not privileged or protected) from another party, Governor McMaster has not searched for or produced Documents beyond the Communications contained among the materials served concurrently herewith.

REQUEST NO. 10: Documents concerning the Proposed Rulemaking, including, but not limited to, Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster's office, including, but not limited to, Governor McMaster.

RESPONSE: Governor McMaster objects to this request because it is irrelevant to the claims and defenses of the Case. Plaintiffs' alleged injury predates and does not arise from the Proposed Rulemaking, which postdates and is not mentioned in the Complaint. Further, the Proposed Rulemaking and related documents, if any exist, sought by this Request occurred or were prepared or communicated long after Governor McMaster's or the other Defendants' actions challenged in this Case. In addition, the materials sought by this Request (even assuming *arguendo* that the materials are relevant, proportionate to the needs of the Case, not unduly burdensome, and not privileged or otherwise protected) are in the possession of another party and would be more appropriately obtained from that party.

Because the materials sought by this Request are not relevant to the Case, are not proportional to the needs of the Case, would impose an Undue Burden or Expense, and are more appropriately sought, if at all, from another party, Governor McMaster has not searched for, collected, reviewed, or produced materials in response to this Request.

REQUEST NO. 11: Documents concerning the Nonenforcement Policy, including, but not limited to, Communications between any person at Governor McMaster's office, including, but not limited to, Governor McMaster, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at DSS, including, but not limited to, Michael Leach, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at Governor McMaster's office, including, but not limited to, Governor McMaster.

RESPONSE: Governor McMaster objects to this request because it is irrelevant to the claims and defenses of the Case. Plaintiffs' alleged injury predates and does not arise from the Nonenforcement Policy, which postdates and is not mentioned in the Complaint. Further, the

Proposed Rulemaking and related documents, if any exist, sought by this Request occurred or were prepared or communicated long after Governor McMaster's or the other Defendants' actions challenged in this Case. In addition, the materials sought by this Request (even assuming *arguendo* that the materials are relevant, proportionate to the needs of the Case, not unduly burdensome, and not privileged or otherwise protected) are in the possession of another party and would be more appropriately obtained from that party.

Because the materials sought by this Request are not relevant, are not proportional to the needs of the Case, would impose an Undue Burden or Expense, and are more appropriately sought, if at all, from another party, Governor McMaster has not searched for, collected, reviewed, or produced materials in response to this Request.

REQUEST NO. 12: Documents regarding religious accommodations for faith-based foster care or adoption agencies.

RESPONSE: Governor McMaster objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case. Specifically, the terms “religious accommodations” and “faith-based” are not defined, and the unlimited geographic scope of the information and materials sought by the Request is not proportionate to the needs of the Case and thus imposes an Undue Burden or Expense. Governor further notes that any materials that might be both potentially responsive to this Request *and* relevant to the factual and legal claims of this Case would (if not privileged or otherwise protected) be responsive to Requests 1 through 4. Subject to these specific objections, the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection, Governor McMaster produces the Communications contained among the materials served concurrently herewith and identified by Bates Numbers Rogers_McMaster_00001 to _00027, _00038 to _0048, _00054 to

_00073, _00086 to _00088, _00119 to _00273, _00287 to _00292, _00334, _00341 to _00350, and _00367 to _00377.

REQUEST NO. 13: Documents concerning the impact of the granting of the McMaster Request on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

RESPONSE: Governor McMaster objects to this request on the basis of the Objection Applicable to All Requests; also because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case; and because it would impose an Undue Burden or Expense. It is unclear what is sought by, or what would be responsive to, this request for “Documents concerning the impact” of the cited agency action. In addition, Governor McMaster objects to the Request as seeking information not relevant to the claims made in the Case, because the alleged “impact” of the cited agency action is not relevant to the claims asserted. Further, to the extent this request asks Governor McMaster to analyze documents to answer a question regarding the “impact” of a federal agency action, Governor McMaster objects that this request is in essence an interrogatory that is beyond the scope of Rule 34, Fed. R. Civ. P. In addition, the materials Plaintiffs may be seeking by this Request (even assuming *arguendo* that they are relevant, proportionate to the needs of the Case, not unduly burdensome, and not privileged or otherwise protected) are in the possession of other parties and would be more appropriately obtained from those parties. Accordingly, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 14: Documents concerning the impact of the granting of the McMaster Executive Order on (i) the availability of foster families, (ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

RESPONSE: Governor McMaster objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. It is unclear what is sought by this request for “Documents concerning the impact” of the Executive Order on various topics. In addition, Governor McMaster objects to the Request as seeking information not relevant to the claims made in the Case, because the alleged “impact” of the cited agency action is not relevant to the claims asserted. Further, to the extent this request asks Governor McMaster to analyze documents to answer a question regarding the “impact” of an Executive Order, Governor McMaster objects that this request is in essence an interrogatory that is beyond the scope of Rule 34, Fed. R. Civ. P. In addition, the materials sought by this Request (even assuming *arguendo* that the materials are relevant, proportionate to the needs of the Case, not unduly burdensome, and not privileged or otherwise protected) are in the possession of other parties or third parties and would be more appropriately obtained from them. Accordingly, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 15: Documents concerning Miracle Hill’s or any other CPA’s practice of refusing to accept or approve prospective foster parents who are same-sex couples or LGBT individuals or to place children in foster care with such families.

RESPONSE: Governor McMaster objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. First, the Request incorrectly implies that Miracle Hill or any other CPA can “accept” or “approve” a prospective foster parent’s application for licensure as a foster parent in South Carolina. Not so. The Request is also premised on an incorrect assumption or implication that Miracle Hill or any other CPA can “place” a foster child with a licensed foster family. Again, this assumption or implication is incorrect. In addition, the Request is overbroad

and seeks materials not relevant to the claims or defenses of this Case by requesting documents relating to the practices of “any” CPA without geographic restriction, thus the Request is not proportionate to the needs of the Case and is, therefore, unduly burdensome. Further, it is unclear what is meant by the “practice of refusing to accept or approve” certain prospective foster parents. As noted above, a private CPA cannot accept or approve an application for licensure as a foster parent. If what the Request really means is Miracle Hill’s alleged practice of politely referring inquiries from prospective foster parents who do not share its religious beliefs to other nearby providers who can assist them, documents concerning Miracle Hill’s practices are in the possession of Miracle Hill, which Plaintiffs have served with a subpoena *duces tecum* seeking such documents. Accordingly, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 16: Documents concerning Miracle Hill’s or any other CPA’s practice of refusing to accept or approve prospective foster parents who practice a religion other than Protestant Christianity or who practice no religion at all, or to place children in foster care with such families.

RESPONSE: Governor McMaster objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. First, the Request incorrectly implies that Miracle Hill or any other CPA can “accept” or “approve” a prospective foster parent’s application for licensure as a foster parent in South Carolina. Not so. The Request is also premised on an incorrect assumption or implication that Miracle Hill or any other CPA can “place” a foster child with a licensed foster family. Again, this assumption or implication is incorrect. In addition, the Request is overbroad and seeks materials not relevant to the claims or defenses of this Case by requesting documents relating to the practices of “any” CPA without geographic restriction, thus the Request is not proportionate to the needs of the Case and is, therefore, unduly burdensome. Further, it is unclear what

is meant by the “practice of refusing to accept or approve” certain prospective foster parents. As noted above, a private CPA cannot accept or approve an application for licensure as a foster parent. If what the Request really means is Miracle Hill’s alleged practice of politely referring inquiries from prospective foster parents who do not share its religious beliefs to other nearby providers who can assist them, documents concerning Miracle Hill’s practices are in the possession of Miracle Hill, which Plaintiffs have served with a subpoena *duces tecum* seeking such documents. Accordingly, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 17: Documents from January 1, 2015 to the present concerning families who were denied services by Miracle Hill or any other CPA because they do not practice a particular religion or because they are same-sex couples or LGBT individuals, including, but not limited to, complaints made by those families.

RESPONSE: Governor McMaster objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. First, it incorrectly assumes or implies that Miracle Hill or any other private CPA can prevent a foster parent or prospective foster parent from obtaining “services” necessary to seek or obtain licensure as a foster parent or to serve as a foster parent. Not so. Further, the Request is unclear and, relatedly, overbroad in that it neither limits the scope of the inquiry to the provision of foster care, which is the only social service relevant to this Case, nor defines the “services” about which it inquires. The Request is further overbroad and seeks materials not relevant to the claims or defenses of this Case by requesting documents relating to the practices of “any” CPA without geographic restriction, thus the Request is not proportionate to the needs of the Case and is, therefore, unduly burdensome. In addition, Governor McMaster objects to the chronological range contemplated by this Request for the reasons articulated in the Objection Applicable to All Requests. Further, documents concerning Miracle Hill’s practices are in the

possession of Miracle Hill, which Plaintiffs have served with a subpoena *duces tecum* seeking such documents. Accordingly, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 18: Documents sufficient to show that “Plaintiffs have knowingly declined to pursue opportunities available to them to seek licensure as foster parents by SCDSS and to serve as foster parents directly with SCDSS or with private agencies near them who are willing to assist them.” (*See* Governor McMaster’s Answer ¶¶ 8, 77.)

RESPONSE: Governor McMaster objects to this request because “sufficient to show” is undefined, vague, and ambiguous. In addition, the information or materials sought by this Request are more properly in the possession of other parties, including Plaintiffs themselves, from whom it could be obtained without the Undue Burden or Expense that the retrieval and production of such information or materials would impose on Governor McMaster. In any event, Plaintiffs’ own pleadings and other filings in this Case indicate they were aware of other opportunities to seek licensure as foster parents and to serve as foster parents but have not taken advantage of those opportunities. Such documents, which are already in Plaintiffs’ possession, may suffice to show Plaintiffs knowingly declined such opportunities. Accordingly, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 19: A copy of Miracle Hill’s written plan of compliance that DSS required as a condition of the temporary CPA license it issued to Miracle Hill on January 27, 2018.

RESPONSE: Governor McMaster objects to this Request because the materials requested would be in the possession of SCDSS rather than the Governor, and such materials have, in fact, been requested in the RFPs served on Defendant Leach. Governor McMaster further objects to this Request in that the material sought is not relevant to any claim or defense in this Case. In light of that irrelevance, and in light of the Undue Burden and Expense that would result from retrieving

and producing a document in the possession of another party, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request.

REQUEST NO. 20: Documents sufficient to show any and all steps DSS has taken to prevent discrimination by Miracle Hill or any other CPA against prospective foster parents based on religion or sexual orientation.

RESPONSE: Governor McMaster objects to this request because “sufficient to show,” “steps,” and “discrimination” are undefined, vague, and ambiguous. Governor McMaster further objects because the materials apparently sought by this Request are not relevant to the claims and defenses of this Case, which concern only the constitutionality of specific of Defendants’ actions, and which do not challenge or concern the supposed adequacy of SCDSS’ general efforts to “prevent discrimination.” In addition, Governor McMaster objects to this Request because the materials requested would be in the possession of SCDSS rather than the Governor, and directing such Request (even assuming it were relevant) to the Governor imposes an Undue Burden or Expense that is not proportionate to the needs of the Case.

REQUEST NO. 21: Documents sufficient to show any and all state and/or federal funding DSS distributed to all faith-based CPAs identified in Your response to RFP No. 1 for their foster care services from 2016 to the present.

RESPONSE: This Request appears to be a typographical error, seeking documents related to information that was not, in fact, sought in Request 1. Accordingly, Governor McMaster cannot and has not attempted to search for, collect, review, or produce materials in response to this Request. Further, to the extent the Request seeks “Documents sufficient to show” an alleged fact, such term and request are undefined, vague, and ambiguous. Governor McMaster further objects because the materials that may be sought by this Request are not relevant to the claims and defenses of this Case, which concern only the constitutionality of specific of Defendants’ actions, regardless

of whether, when, and in what amounts specific CPAs have been the recipients of state and/or federal funds.

In addition, even assuming such materials or information were relevant to the claims and defenses of the Case, Governor McMaster objects to the Request as overbroad in that it does not limit its scope to funds received by CPAs from SCDSS for tasks and services fundable by Title VI-E and related specifically to the private agencies' work as CPAs (as opposed to other tasks or services they may provide and for which they may receive payment from SCDSS).⁴ Finally, Governor McMaster objects to this Request because the materials requested would be in the possession of SCDSS rather than the Governor, and directing such Request (even assuming it were relevant) to the Governor imposes an Undue Burden or Expense that is not proportionate to the needs of the Case. Accordingly, and for the foregoing reasons, Governor McMaster has not searched for, collected, reviewed, or produced materials responsive to this Request

REQUEST NO. 22: Documents concerning the requirement that Miracle Hill and any other subgrantee making use of the exception granted in the ACF Letter “refer potential foster parents that do not adhere to the subgrantee’s religious beliefs to other subgrantees in the SC Foster Care Program, or to . . . the SC Foster Care Program staff themselves” (ACF Letter at 4), including, but not limited to, plans and processes for making such referrals, and evidence of such referrals since the exception took effect.

RESPONSE: Governor McMaster notes that at least some of the information or materials sought by this Request are more properly in the possession of other parties, including Plaintiffs, whose pleadings and other filings in this Case indicate they were themselves referred to other subgrantees in the SC Foster Care Program to SCDSS itself as contemplated in the ACF Letter. In any event, subject to the “Objection Applicable to All Requests,” the “Objections to Definitions

⁴ Some CPAs in South Carolina also provide other services for which they may receive state or federal reimbursements, including, for example, residential foster care services, transportation services, vocational training, continued support and services for youths who age out of foster care, adult literacy programs, alcohol and drug rehabilitation programs, and more.

and Instructions,” and any applicable privilege or protection, Governor McMaster states there are no materials in his possession, custody, or control that are responsive to this Request.

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Greenville, South Carolina
August 4, 2020

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

Eden Rogers et al.,)	
	)	Civil Action No. 6:19-cv-01567-TMC
Plaintiffs,)	
)	
v.)	
	)	<u>CERTIFICATE OF SERVICE</u>
United States Department of Health and)	
Human Services, et al.,)	
)	
Defendants.)	

I hereby certify that I have served a copy of Defendant Henry McMaster’s Objections and Responses to Plaintiffs’ First Set of Requests for Production by electronic mail on the following:

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s/ Miles E. Coleman

Miles E. Coleman

Counsel for Governor Henry McMaster

Exhibit 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

Eden Rogers et al.,)	
	)	Civil Action No. 6:19-cv-01567-TMC
Plaintiffs,)	
)	
v.	)	DEFENDANT MICHAEL LEACH’S
	)	RESPONSES AND OBJECTIONS TO
United States Department of Health and Human Services, et al.,	)	PLAINTIFFS’ FIRST SET OF REQUESTS
	)	FOR THE PRODUCTION OF DOCUMENTS
)	
Defendants.)	

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendant Michael Leach, in his official capacity as State Director of the South Carolina Department of Social Services, submits the following responses and objections to Plaintiffs’ First Set of Requests for Production of Documents (“RFPs”) served on June 4, 2020. This Defendant will be referred to herein as “DSS.”

As an initial matter, Plaintiffs’ RFPs seem calculated repeatedly to violate and overstep the bounds of the Rules of Civil Procedure in an effort to obtain documents and information that are not relevant to the claims and defenses at issue in this suit, are unlikely to lead to discoverable information, and are outside the scope of discovery articulated by Rules and applicable case law. For the sake of brevity, and to avoid repeating the same lengthy objections every time an additional request commits the same violation, DSS articulates below certain objections applicable to multiple requests and then incorporates these objections by reference into the specific responses where applicable.

OBJECTIONS APPLICABLE TO ALL REQUESTS

Plaintiffs’ Complaint challenges the constitutionality of specific actions of the Defendants, including specifically identified actions of DSS. Plaintiffs’ RFPs, however, seek the production

of materials from January 1, 2017 to the present.¹ *See* RFPs at 6, ¶ 10. However, the actions of DSS which are challenged in this action occurred no earlier than January 27, 2018, if then. For this reason, DSS objects to all the Requests to the extent they seek documents prior to January 27, 2018, except to the extent such documents have already been provided pursuant to prior FOIA requests. Accordingly, DSS has not collected, reviewed, or produced documents prior to that date because such documents are not relevant to any claim or defense asserted in the case and are not proportional to the needs of the case.²

DSS further objects to the RFPs to the extent they seek materials dating “to the present.” *See* RFPs at 6, ¶ 10. The causes of action asserted in this action arise from specific, identifiable, enumerated actions specifically including a letter sent by Governor McMaster on February 27, 2018); an Executive Order issued by Governor McMaster on March 13, 2018; and a response letter sent to Governor McMaster on January 23, 2019. The Complaint claims the alleged constitutional violations arose immediately from and occurred, if at all (which is not conceded), at the time of the challenged actions. Indeed, Plaintiffs specifically claim it was *these actions* that violated the Establishment and Equal Protection Clauses. The nature and effect of the challenged actions are discernable from the face of the documents referenced above, and documents and materials postdating them are not relevant to Plaintiffs’ claims. Accordingly, such requests are not relevant or proportional to the needs of the case and would impose an undue burden, *see* Rule 26(b)(1), Fed. R. Civ. P., and except to the extent such documents have already been provided

¹ Two Requests seek materials from an even earlier date. *See* RFP Nos. 17 and 21 (seeking materials dating from January 1, 2015 and January 1, 2016 to the present, respectively).

² Indeed, the earliest alleged knowledge or actions by *any* Defendant appears to be late 2017 or early 2018, *see* Complaint, ¶¶ 54–56. One could argue that documents and materials predating any Defendants’ knowledge of the facts alleged in the Complaint are not relevant to the claims and defenses in this litigation nor are they likely to lead to discoverable information.

pursuant to prior FOIA requests, DSS has not collected, reviewed, or produced documents from on or after January 24, 2019.

OBJECTIONS APPLICABLE TO MORE THAN ONE REQUEST

Because certain of the objections asserted below are applicable to multiple Requests, DSS explains the objections here and, in the interest of efficiency, refers to them in shorthand form in the specific objections and responses to specific Requests that follow.

1. Materials prepared, sent, received, or memorializing information prepared or communicated **“In Anticipation of Litigation.”** The likelihood of litigation relating to the interpretation or enforcement of 45 C.F.R. § 75.300 was apparent to Governor McMaster and his staff from the time they first became aware of the regulation. DSS was equally aware of this likelihood of litigation. Accordingly, documents and communications among and between the Director of DSS, his or her staff, and other State officers and employees relating to that regulation that were prepared for or which memorialize deliberations and communications made in anticipation of such litigation are exempt from discovery pursuant to Rule 23(b)(3), Fed. R. Civ. P., even if such documents or communications would not otherwise be independently protected by the attorney-client privilege. DSS objects to the production of such documents on that basis.

2. Materials whose collection, review, and production would impose an **“Undue Burden or Expense.”** DSS objects, in some instances, to specific Requests on the basis that responding to the Request or specific portions thereof would impose an undue burden or expense in violation of Rule 26(b)(1), Fed. R. Civ. P. This objection relates especially, but not exclusively, to the burden and expense involved in searching for, collecting, reviewing, and producing certain electronically stored documents. The undue burden and expense is caused, in

some instances, by the extraordinarily broad scope of Plaintiffs' RFPs. Request 20, for example, seeks "[d]ocuments regarding religious accommodations for faith-based foster care or adoption agencies," but does not define "religious accommodations" or "faith-based" and does not limit the scope of the Request to licensed Child Placing Agencies ("CPAs") in South Carolina.

3. Requests seeking "**Documents Sufficient to Show**" a fact. Requests 1, 2, 3, 8, 9, 12, 24, 28, 32 and 34 request "[d]ocuments sufficient to show" certain facts. That phrase is not defined in the RFPs and, further, is vague and ambiguous. In addition, to the extent the Requests appear to seek information as opposed to Documents or Communications, such information (assuming it is relevant and not otherwise objectionable or privileged) should be sought by way of an Interrogatory rather than by a request to produce some unknown quantum of documents "sufficient" to establish a fact.

OBJECTIONS TO DEFINITIONS

DSS incorporates by reference the Objections to Definitions found in any other Defendants' Responses and Objections to the RFPs to the extent to which the definitions to which other Defendants have objected are identical to those found in the RFPs served on the Governor (though in some instances found in different numbered paragraphs of the RFPs' Definitions), including the definitions found in paragraphs 5, 6, 7, and 16 of the RFPs served on DSS, to the extent they differ from or purport to impose an obligation broader than that found in Rules 26(b)(1) or 34(a)(1), Fed. R. Civ. P., or any other applicable Rule of Civil Procedure.

DSS further objects to the definition of the terms "You" and "Your" found in Definition 18 of the RFPs served on Defendant Leach to the extent that the definition would impose on DSS any obligation to search for, collect, review, or produce documents in the possession, custody, or

control of individuals, offices, departments, and divisions beyond the immediate employees of DSS.

OBJECTIONS TO INSTRUCTIONS

DSS incorporates by reference the Objections to Instructions found in any other Defendants' Responses and Objections to the RFPs to the extent to which the instructions to which other Defendants have objected are identical to those found in the RFPs served on the Governor, including the instructions found in paragraphs 2, 3, 4, 6, 8, 13, and 14 of the RFPs served on DSS, to the extent they differ from or purport to impose an obligation broader than that found in Rules 26 or 34, Fed. R. Civ. P., or any other applicable Rule of Civil Procedure, and to the extent they purport to impose obligations that are not proportionate to the needs of this lawsuit or which would result in the imposition of an Undue Burden of Expense.

RESPONSES

1. Documents sufficient to show (i) the identity of the faith-based child placement agencies ("CPAs") that serve the South Carolina Region 1 counties of Abbeville, Anderson, Cherokee, Greenville, Greenwood, Laurens, Newberry, Oconee, Pickens and Spartanburg; (ii) whether the activities of any of those CPAs are limited to or focused on serving children with special needs requiring therapeutic foster care; (iii) the age range of the children for whom each of those CPAs recruits, screens and supports prospective foster families; and (iv) the number of foster children who have been placed with families that have been recruited, screened and supported by each of those CPAs over the last two years.

RESPONSE #1: This request is identical or substantially identical to Request 1 in the January 31, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and

identified by Bates Numbers 10545-B-001 through -265, subject to the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection.

2. Documents sufficient to show the differences between the recruitment, screening and support services to show the differences provided to prospective foster and adoptive families by Miracle Hill Ministries (“Miracle Hill”), and those provided to prospective foster and adopted families by DSS and other non-therapeutic CPAs in Region 1.

RESPONSE #2: This request is identical or substantially identical to Request 2 in the January 31, 2019 FOIA letter sent by one of Plaintiff’s counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection.

3. Documents sufficient to show the average length of time for a prospective foster or adoptive family working with each CPA listed in response to Request 1 to become licensed and the average length of time for a prospective foster or adoptive family working directly with DSS to become licensed.

RESPONSE #3: This request is identical or substantially identical to Request 3 in the January 31, 2019 FOIA letter sent by one of Plaintiff’s counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the “Objection Applicable to All Requests,” the “Objections to Definitions and Instructions,” and any applicable privilege or protection.

4. Documents concerning the McMaster Request, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any person at DSS, including, but not limited to, Michael Leach.

RESPONSE #4: This request is identical or substantially identical to Request 4 in the January 31, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection. In addition, see Bates Numbers 10545-C-001 through 020, -025 through -028, -033 through -035, and 039 through 048.

5. Documents concerning the McMaster Executive Order, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMasters, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to, Michael Leach.

RESPONSE #5: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

6. Documents referencing the ACF Letter or reflecting Communications concerning the ACF

Letter, including, but not limited to, interpretations of the ACF Letter of the scope of the exception granted thereby.

RESPONSE #6: This request is identical or substantially identical to Request 5 in the January 31, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

7. Documents referencing or reflecting Communications concerning any factual assertions in the ACF Letter regarding the South Carolina foster care program, including, but not limited to, the assertions that (i) there are more than 4,000 children in foster care in South Carolina, (ii) Miracle Hill recruits 15% of the families in the South Carolina foster care program, (iii) South Carolina would have difficulty continuing to place children in need of foster care without the participation of faith-based CPAs in the program and (iv) without the exception requested in the McMaster Request certain faith-based CPAs would have to abandon their religious beliefs or forgo licensure and funding, which would cause a hardship to such organizations.

RESPONSE #7: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

8. Documents sufficient to show revisions or additions to the DSS human Services Policy and procedure, including all draft revisions, made after March 13, 2018 pursuant to the McMaster Executive Order.

RESPONSE #8: This request is identical or substantially identical to Request 1 in the July 11, 2019

FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

9. Documents sufficient to show amendments or additions to the South Carolina Code of Regulations with regard to foster care, made after March 13, 2018 pursuant to the McMaster Executive Order.

RESPONSE #9: This request is identical or substantially identical to Request 2 in the July 11, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

10. Copies of DSS Form 1520, Annual Report of Children under Care or Supervision of Licensed Child Placing Agencies, for the years 2019, 2018, 2017 and 2016 for Miracle Hill, Church of God Home for Children, Connie Maxwell Children's Home, Tamassee DAR School and Thornwell Home of Children.

RESPONSE #10: This request is identical or substantially identical to Request 3 in the July 11, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

11. Copies of the financial reports certified by a Certified Public Accountant for the fiscal years

of 209, 2018, 2017 and 2016 for Miracle Hill, Church of God Home for Children, Connie Maxwell Children's Home, Tamassee DAR School and Thornwell Home of Children.

RESPONSE #11: This request is identical or substantially identical to Request 4 in the July 11, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

12. Documents sufficient to show the amount of state and federal funding received by Miracle Hill, Church of God Home for Children, Connie Maxwell Children's Home, Tamassee DAR School and Thornwell Home of Children.

RESPONSE #12: DSS objects to this request. First, the Request seeks "Documents sufficient to show" an alleged fact, such term and request are undefined, vague, and ambiguous. DSS further objects because the materials that may be sought by this Request are not relevant to the claims and defenses of this Case, which concern only the constitutionality of specific of Defendants' actions, regardless of whether, when, and in what amounts specific CPAs have been the recipients of state and/or federal funds.

In addition, even assuming such materials or information were relevant to the claims and defenses of the Case, DSS objects to the Request as overbroad in that it does not limit its scope to funds received by CPAs from DSS for tasks and services fundable by Title VI-E and related specifically to the private agencies' work as CPAs (as opposed to other tasks or services they may

provide and for which they may receive payment from DSS).³

Finally, DSS states that there are no additional documents in its custody, possession, or control that are responsive to this Request.

13. Copy of Miracle Hill's Foster Care Manual.

RESPONSE #13: This request is identical or substantially identical to Request 5 in the July 11, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

14. Copies of the current contracts and/or licensing agreements between DSS and all faith-based CPAs identified in Your response to RFP. 1.

RESPONSE #14: This request is identical or substantially identical to Request 6 in the July 11, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

15. Document regarding CPAs accepting or approving same-sex couples or LGBT people as foster parents, including, but not limited to, Communications between DSS employees, including, but not limited to, Michael Leach; between DSS employees and employees of Governor

³ Some CPAs in South Carolina also provide other services for which they may receive state or federal reimbursements, including, for example, residential foster care services, transportation services, vocational training, continued support and services for youths who age out of foster care, adult literacy programs, alcohol and drug rehabilitation programs, and more.

McMaster's office, including but not limited to, Governor McMaster; and between DSS employees and employees of HHS.

RESPONSE #15: This request is identical or substantially identical to Request 7 in the July 11, 2019 FOIA letter sent by one of Plaintiff's counsel to DSS. The documents supplied by DSS in response to that request are included in the document set served concurrently herewith and identified by Bates Numbers 10545-B-001 through -265, subject to the "Objection Applicable to All Requests," the "Objections to Definitions and Instructions," and any applicable privilege or protection.

16. Documents sufficient to identify all CPAs in the State (not limited to region 1) that do not accept or approve prospective foster families headed by same-sex couples of LGBT individuals or that do not adhere to particular religious beliefs.

RESPONSE #16: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

17. Documents reflecting DSS actions, including, but not limited to, notifications, letters, complaints, revocations of licenses or any other disciplinary measures against any CPA or other South Carolina beneficiary of HHS funds for failure to abide by state or federal non-discrimination requirements, including, but not limited to, the HHS Grants Rule, from 2016 to the present. For the elimination of doubt, the RFP includes any and all Documents related to DSS action against Miracle Hill.

RESPONSE #17: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

18. Documents concerning the Proposed Rulemaking, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to Michael Leach.

RESPONSE #18: DSS objects to this request because it is irrelevant to the claims and defenses of the Case. Plaintiffs' alleged injury predates and does not arise from the Proposed Rulemaking, which postdates and is not mentioned in the Complaint. Further, the Proposed Rulemaking and related documents, if any exist, sought by this Request occurred or were prepared or communicated long after any Defendants' actions challenged in this Case.

19. Documents concerning the Nonenforcement Policy, including, but not limited to, Communications between any person at DSS, including, but not limited to, Michael Leach, and (i) any person at Miracle Hill, (ii) any person at HHS, (iii) any person at Governor McMaster's office, including, but not limited to, Governor McMaster, (iv) any person at the office of any state or federal elected officials, (v) any member of the public or (vi) any other person at DSS, including, but not limited to Michael Leach.

RESPONSE #19: DSS objects to this request because it is irrelevant to the claims and defenses of the Case. Plaintiffs' alleged injury predates and does not arise from the Nonenforcement Policy, which postdates and is not mentioned in the Complaint. Further, the Nonenforcement Policy and related documents, if any exist, sought by this Request occurred or were prepared or communicated long after any Defendants' actions challenged in this Case.

20. Documents regarding religious accommodations for faith-based foster care and/or adoption

agencies.

RESPONSE #20: DSS objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case. Specifically, the terms “religious accommodations” and “faith-based” are not defined, and the unlimited geographic scope of the information and materials sought by the Request is not proportionate to the needs of the Case and thus imposes an Undue Burden or Expense. DSS further notes that any materials that might be both potentially responsive to this Request *and* relevant to the factual and legal claims of this Case would (if not privileged or otherwise protected) be within the responses to other Requests.

21. Documents concerning the impact of the granting of the McMaster Request on (i) the availability of foster families(ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

RESPONSE #21: DSS states there are no documents in its custody, possession, or control that are responsive to this Request.

22. Documents concerning the impact of revisions or additions to the DSS Human Services policy and Procedures Manual, or any other DSS policy or procedure, made after March 13, 2018 pursuant to the McMaster Executive Order on (i) the availability of foster families(ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

RESPONSE #22: DSS states there are no documents in its custody, possession, or control that are responsive to this Request.

23. Documents concerning the impact of amendments or additions to the South Carolina Code of Regulations with regard to foster care, made after March 13, 2018 Pursuant to the McMaster

Executive Order on (i) the availability of foster families(ii) the diversity of eligible, willing and able foster families, (iii) the ability of non-Christian and/or LGBT families to serve as foster parents and (iv) individual exercise of religious freedom.

RESPONSE #23: DSS states there are no documents in its custody, possession, or control that are responsive to this Request.

24. Documents sufficient to show the eligibility requirements each CPA identified in response to RFP No. 1 applies to prospective foster parents seeking assistance in obtaining licenses.

RESPONSE #24: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

25. Documents concerning Miracle Hill's or any other CPA's practice of refusing to accept prospective foster parents who are same-sex couples or LGBT individuals or to place foster children with such families.

RESPONSE #25: DSS objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. First, the Request incorrectly implies that Miracle Hill or any other CPA can "accept" or "approve" a prospective foster parent's application for licensure as a foster parent in South Carolina. Not so. The Request is also premised on an incorrect assumption or implication that Miracle Hill or any other CPA can "place" a foster child with a licensed foster family. Again, this assumption or implication is incorrect. In addition, the Request is overbroad and seeks materials not relevant to the claims or defenses of this Case by requesting documents relating to the practices of "any" CPA without geographic restriction, thus the Request is not proportionate to the needs of the Case and is, therefore, unduly burdensome. Further, it is unclear

what is meant by the “practice of refusing to accept or approve” certain prospective foster parents. As noted above, a private CPA cannot accept or approve an application for licensure as a foster parent. If what the Request really means is Miracle Hill’s alleged practice of politely referring inquiries from prospective foster parents who do not share its religious beliefs to other nearby providers who can assist them, documents concerning Miracle Hill’s practices are in the possession of Miracle Hill, which Plaintiffs have served with a subpoena *duces tecum* seeking such documents. Accordingly, DSS has not collected, reviewed, or produced materials responsive to this Request.

26. Documents concerning Miracle Hill’s or any other CPA’s practice of refusing to accept or approve prospective foster parents who practice a religion other than Protestant Christianity or who practice no religion at all, or to place foster children with such families.

RESPONSE #26: DSS objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. First, the Request incorrectly implies that Miracle Hill or any other CPA can “accept” or “approve” a prospective foster parent’s application for licensure as a foster parent in South Carolina. Not so. The Request is also premised on an incorrect assumption or implication that Miracle Hill or any other CPA can “place” a foster child with a licensed foster family. Again, this assumption or implication is incorrect. In addition, the Request is overbroad and seeks materials not relevant to the claims or defenses of this Case by requesting documents relating to the practices of “any” CPA without geographic restriction, thus the Request is not proportionate to the needs of the Case and is, therefore, unduly burdensome. Further, it is unclear what is meant by the “practice of refusing to accept or approve” certain prospective foster parents. As noted above, a private CPA cannot accept or approve an application for licensure as a

foster parent. If what the Request really means is Miracle Hill's alleged practice of politely referring inquiries from prospective foster parents who do not share its religious beliefs to other nearby providers who can assist them, documents concerning Miracle Hill's practices are in the possession of Miracle Hill, which Plaintiffs have served with a subpoena *duces tecum* seeking such documents. Accordingly, DSS has not collected, reviewed, or produced materials responsive to this Request.

27. Documents from January 1, 2015 to the present concerning families who were denied services by Miracle Hill or any other CPA because they do not practice a particular religion or because they are same-sex couples or LGBT individuals, including but not limited to, complaints made by those families.

RESPONSE #27: DSS objects to this request because it is vague, ambiguous, and so overbroad as to be not proportional to the needs of the Case and, therefore, would impose an Undue Burden or Expense. First, it incorrectly assumes or implies that Miracle Hill or any other private CPA can prevent a foster parent or prospective foster parent from obtaining "services" necessary to seek or obtain licensure as a foster parent or to serve as a foster parent. Not so. Further, the Request is unclear and, relatedly, overbroad in that it neither limits the scope of the inquiry to the provision of foster care, which is the only social service relevant to this Case, nor defines the "services" about which it inquires. The Request is further overbroad and seeks materials not relevant to the claims or defenses of this Case by requesting documents relating to the practices of "any" CPA without geographic restriction, thus the Request is not proportionate to the needs of the Case and is, therefore, unduly burdensome. In addition, DSS objects to the chronological range contemplated by this Request for the reasons articulated in the Objection Applicable to All Requests. Further, documents concerning Miracle Hill's practices are in the possession of Miracle Hill, which

Plaintiffs have served with a subpoena *duces tecum* seeking such documents.

Without waiving any objection herein made, however, DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

28. Documents sufficient to show the role Miracle Hill and other CPAs play in the process of recruiting, screening, and placing children with foster families.

RESPONSE #28: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

29. Documents concerning the practices of Miracle Hill and other faith-based CPAs concerning religious instruction or prayer involving youth in their care.

RESPONSE #29: *See* DSS Regulation 114-550(H)(11)(Religious education shall be in accordance with the expressed wishes of the natural parents, if such wishes are expressed.)

30. Documents concerning the practices of Miracle Hill and other faith-based CPAs to protect youth in their care from discrimination based on sexual orientation.

RESPONSE #30: DSS states that other than any statutes or regulations that may apply, there are no documents in its custody, possession, or control that are responsive to this Request. To the extent that this Request asks DSS to perform uncompensated legal research with regard to publicly available legal requirements, DSS objects to this Request, because the rules of discovery do not require such information from a party in response to a discovery request.

31. Documents concerning Miracle Hill's and other faith-based CPAs' compliance with DSS's Foster Care Bill of Rights.

RESPONSE #31: Aside from the Foster Care Bill of Rights itself, DSS states that other than any

documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

32. Documents sufficient to show that “Plaintiffs have knowingly declined to pursue opportunities available to them to seek licensure as foster parents by SCDSS and to serve as foster parents directly with SCDSS or with private agencies near them who are willing to assist them.” (see Governor McMaster’s Answer ¶¶ 8, 77.)

RESPONSE #32: DSS objects to this request because “sufficient to show” is undefined, vague, and ambiguous. In addition, the information or materials sought by this Request are more properly in the possession of other parties, including Plaintiffs themselves, from whom it could be obtained. In any event, Plaintiffs’ own pleadings and other filings in this Case indicate they were aware of other opportunities to seek licensure as foster parents and to serve as foster parents but have not taken advantage of those opportunities. Such documents, which are already in Plaintiffs’ possession, may show that Plaintiffs knowingly declined such opportunities. Accordingly, DSS has not collected, reviewed, or produced materials responsive to this Request.

33. Copy of Miracle Hill’s written plan of compliance that DSS required as a condition of the temporary CPA license it issued to Miracle Hill on January 27, 2018.

RESPONSE #33: Because subsequent developments made it unnecessary for Miracle Hill to submit that plan of compliance, there are no documents in its custody, possession, or control that are responsive to this Request.

34. Documents sufficient to show any and all steps DSS has taken to prevent discrimination by Miracle Hill against prospective foster parents based on religion or sexual orientation.

RESPONSE #34: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or

control that are responsive to this Request.

35. Documents sufficient to show any and all state and/or federal funding DSS distributed to all faith-based CPAs identified in Your response to RFP No 1 for their foster care services from 2016 to present.

RESPONSE #35: See Response to Request No. 12, which is substantially identical to this Request.

36. Documents concerning the requirement that miracle Hill and any other subgrantee making use of the exception granted in the ACF Letter “refer potential foster parents that do not adhere to the subgrantee’s religious belief to other subgrantees in the SC Foster Care Program, or to...the SC Foster Care Program staff themselves: (ACF Letter as 4), including, but not limited to, plans and process for making such referrals, and evidence of such referrals since the exception took place.

RESPONSE #36: DSS states that other than any documents produced pursuant to other Requests that may contain such information, there are no additional documents in its custody, possession, or control that are responsive to this Request.

DAVIDSON, WREN & DEMASTERS P.A.

s/Kenneth P. Woodington

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Counsel for Defendant Leach

Columbia, South Carolina

August 4, 2020

Exhibit 6

From: Rebecca Schindel/NYC/Cravath
To: "Miles Coleman" <Miles.Coleman@nelsonmullins.com>
Cc: "bcook@scaq.gov" <bcook@scaq.gov>, "Currey Cook" <CCook@lambdalegal.org>, "Cristopher Ray" <crav@cravath.com>, "Daniel Mach" <dmach@aclu.org>, "Jay Thompson" <Jay.Thompson@nelsonmullins.com>, "kwoodington@DML-LAW.com" <kwoodington@DML-LAW.com>, "Leslie Cooper" <LCOOPER@aclu.org>, "M. Malissa Burnette (mburnette@burnetteshutt.law)" <mburnette@burnetteshutt.law>, "Mika Madgavkar" <mmadgavkar@cravath.com>, "Nekki Shutt, Esq. (nshutt@burnetteshutt.law)" <nshutt@burnetteshutt.law>, "Peter Barbur" <PBarbur@cravath.com>, "Susan Dunn" <sdunn@aclusc.org>
Date: 08/26/2020 04:25 PM
Subject: RE: Rogers v. HHS -- Meet and Confer

Miles,

Those times work for us. We propose discussing the topics below. Please let us know your thoughts on this proposal and if there is anything else you would like to discuss.

Both State Defendants

- Completeness of productions;
- Efforts made to identify responsive documents;
- Your objections regarding conducting ESI searches;
- Your objections regarding searching for materials to the present;
- Your objections to requests seeking "documents sufficient to show";
- Your claims that no responsive documents (or no additional responsive documents) exist in response to certain requests;
- Your objections to certain requests as "irrelevant" or "disproportional" to the needs of the case;
- Your claims that certain documents are easier to obtain from Miracle Hill than the parties to the case.

Defendant McMaster Only

- Clarification on response to Request No. 18;
- Your objection to our seeking documents from the Office of the Governor of South Carolina;
- Your objection to producing documents that predate Governor McMaster's time as Governor.

Defendant Leach Only

- Clarification on responses to Request Nos. 32 and 33;
- Your objection to producing documents created before January 27, 2018;
- Your objection that a number of our document requests are identical or substantively identical to prior FOIL requests.

Regards,

Rebecca

Rebecca J. Schindel
Cravath, Swaine & Moore LLP
825 Eighth Avenue | New York, NY 10019
T: (212) 474-1459
rschindel@cravath.com

▼ "Miles Coleman" ---08/25/2020 04:55:14 PM---Good afternoon, Rebecca. Counsel for Governor McMaster and Director Leach can speak with you togeth

From: "Miles Coleman" <Miles.Coleman@nelsonmullins.com>
To: "Rebecca Schindel" <rschindel@cravath.com>, "Jay Thompson" <Jay.Thompson@nelsonmullins.com>, "bcook@scag.gov" <bcook@scag.gov>, "kwoodington@DML-LAW.com" <kwoodington@DML-LAW.com>
Cc: "Peter Barbur" <PBarbur@cravath.com>, "Mika Madgavkar" <mmadgavkar@cravath.com>, "Cristopher Ray" <cray@cravath.com>, "Currey Cook" <CCook@lambdalegal.org>, "Leslie Cooper" <LCOOPER@aclu.org>, "M. Malissa Burnette" <mburnette@burnetteshutt.law> <mburnette@burnetteshutt.law>, "Nekki Shutt, Esq." <nshutt@burnetteshutt.law> <nshutt@burnetteshutt.law>, "Susan Dunn" <sdunn@aclusc.org>, "Daniel Mach" <dmach@aclu.org>
Date: 08/25/2020 04:55 PM
Subject: RE: Rogers v. HHS -- Meet and Confer



External (miles.coleman@nelsonmullins.com)

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Good afternoon, Rebecca. Counsel for Governor McMaster and Director Leach can speak with you together if that suits. I'm afraid we won't be able to arrange for it this week due to various scheduling conflicts, but we could be available to speak with you on Tuesday, September 1, 2020 at either 10:00 a.m. or 1:00 p.m. Please let us know if one of those times is agreeable, or, alternatively, if there is another time that day that would be preferable.

In addition, our discussion that day may be more efficient and productive if you're able to give us a preview of the matters you'd like to discuss. To the extent you're able, please let us know that subjects and positions about which you'd like to confer, and that may allow us to make substantive use of our telephone conversation next week.

Miles



From: Rebecca Schindel <rschindel@cravath.com>
Sent: Monday, August 24, 2020 7:14 PM
To: Miles Coleman <Miles.Coleman@nelsonmullins.com>; Jay Thompson <Jay.Thompson@nelsonmullins.com>; bcook@scag.gov; kwoodington@DML-LAW.com
Cc: Peter Barbur <PBarbur@cravath.com>; Mika Madgavkar <mmadgavkar@cravath.com>; Cristopher Ray <cray@cravath.com>; Currey Cook <CCook@lambdalegal.org>; Leslie Cooper <LCOOPER@aclu.org>; M. Malissa Burnette <mburnette@burnetteshutt.law> <mburnette@burnetteshutt.law>; Nekki Shutt, Esq. <nshutt@burnetteshutt.law> <nshutt@burnetteshutt.law>; Susan Dunn <sdunn@aclusc.org>; Daniel Mach <dmach@aclu.org>
Subject: Rogers v. HHS -- Meet and Confer

◀ **External Email** ▶ - From: prvs=4505e67e36=rschindel@cravath.com

Counsel:

We would like to schedule a meet and confer this week to discuss the State Defendants' responses and objections to Plaintiffs' First Set of RFPs. We are happy to talk as a group or to have separate meet and confers with counsel for Defendant McMaster and counsel for Defendant Leach, whichever you prefer.

We are available Wednesday other than 1-2 pm, Thursday other than 12-2 pm and anytime on Friday. Please let us know what day and time works best for you.

Regards,

Rebecca

Rebecca J. Schindel
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Exhibit 7

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September 16, 2020

State Defendants' Document Productions

Counsel:

We write on behalf of Plaintiffs Eden Rogers and Brandy Welch to address deficiencies in Defendant Leach's and Defendant McMaster's (together, "State Defendants") Responses and Objections to Plaintiffs' First Set of Requests for Production ("RFPs"), which we attempted to discuss with you on a meet-and-confer call on Tuesday, September 1, 2020.

As we stated on the parties' meet-and-confer call, State Defendants' productions in response to our RFPs appear incomplete. Defendant Leach's document production spans only 302 pages, and Defendant McMaster's production is only 394 pages. Both productions are largely duplicative of documents previously produced in response to Plaintiffs' earlier FOIA requests, even though the vast majority of the RFPs are new. The productions contain no draft versions of documents, and all email correspondence appears to come from three or four custodians per Defendant. Defendant Leach produced no documents in response to 23 of the 36 requests in Plaintiffs' RFPs, and expressly refused to collect, review or produce materials responsive to three of these requests. Similarly, Defendant McMaster failed to produce any documents in response to 14 of the 22 requests in Plaintiffs' RFPs, and expressly refused to search for, collect, review or produce materials responsive to 11 of these requests.

During our meet and confer, we identified the apparent deficiencies in State Defendants' productions and asked for a description of what Defendants did to search for responsive documents, including the details of any electronic searches. You refused to provide the requested information. In particular, you refused to explain your efforts to locate relevant documents beyond stating that some form of an ESI search was run over "more than one custodian" with respect to some unidentified subset of the requests. You refused to identify the custodians whose files were searched, the search criteria that were applied or the requests for which ESI searches were conducted. You

refused to explain whether State Defendants are withholding documents on the basis of their various objections beyond pointing us to your written responses. And you refused to explain what criteria you applied to determine whether materials were relevant to the case beyond referring us back to the complaint. When we asked how we could possibly assess the sufficiency of State Defendants' productions without information about what you did or did not do to gather documents, you told us to "be assured that we took this obligation seriously".

State Defendants' stance is incompatible with counsels' obligations under the Federal Rules of Civil Procedure. See *Gourdine v. Karl Storz Endoscopy-Am., Inc.*, 225 F. Supp. 3d 428, 430 (D.S.C. 2016). Among other things, "Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37," Fed. R. Civ. P. 26(g) advisory committee's note to 1983 amendment, and thereby "require[s] attorneys to conduct discovery in a cooperative fashion", *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010).

As you acknowledged on our meet-and-confer call, parties in federal court litigation routinely share and agree on a list of custodians for electronic searches, as well as search terms. You suggested that such cooperation is warranted only if search terms and custodians are discussed before service of RFPs, but that position is not supported by the case law:

When two-way planning does not occur upfront, and questions subsequently arise, common sense dictates that the party conducting the search must share information regarding the universe of potentially relevant documents being preserved, and those that no longer exist, as well as the search terms used in collecting relevant documents and the identities of the custodians from whom the documents were retrieved. After all, the party responsible for the search and production has the duty to demonstrate its reasonableness.

Burnett v. Ford Motor Co., No. 3:13-cv-14207, 2015 WL 4137847, at *8 (S.D.W. Va. July 8, 2015), *objections sustained on other grounds sub nom. by Johnson v. Ford Motor Co.*, No. 3:13-6529, 2015 WL 6758234 (S.D.W. Va. Nov. 5, 2015). Federal courts thus frequently direct parties to negotiate custodians and search terms when parties disagree about the sufficiency of a document production. See, e.g., *Kunneman Props. LLC v. Marathon Oil Co.*, No. 17-CV-456-GKF-JFJ, 2019 WL 5188355, at *4 (N.D. Okla. Oct. 15, 2019); *In re Sampedro*, No. 3:18 MC 47 (JBA), 2018 WL 6264834, at *3 (D. Conn. Nov. 30, 2018); *Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298-APG-PAL, 2018 WL 3795238, at *51 (D. Nev. Aug. 9, 2018); *Elhannon LLC v. F.A. Bartlett Tree Expert Co.*, No. 2:14-cv-262, 2017 WL 1382024, at *9 (D. Vt. Apr. 18, 2017); *Radian Asset Assurance, Inc. v. Coll. of the Christian Brothers*, No. CIV 09-0885 JB/DJS, 2010 WL 4338346, at *2 (D.N.M. Sept. 15, 2010).

Moreover, State Defendants' assertions of work product and/or attorney client privilege as a basis for not providing information on your efforts to identify

responsive materials are baseless. We are not aware of any authority to support this contention. Indeed, every case we have identified on the issue has reached the opposite conclusion. *See, e.g., Burnett*, 2015 WL 4137847, at *10; *FormFactor, Inc v. Micro-Probe, Inc.*, No. C-10-03095 PJH (JCS), 2012 WL 1575093, at *7 n.4 (N.D. Cal. May 3, 2012) (collecting cases); *Smith v. Life Invs. Ins. Co. of Am.*, No. 2:07-cv-681, 2009 WL 2045197, at *7 (W.D. Pa. July 9, 2009).

State Defendants' position is all the more inappropriate when so many of State Defendants' stated objections are improper. For instance:

- Both State Defendants refuse to produce documents created after January 23, 2019, and Defendant Leach refuses to produce documents created before January 27, 2018, on the ground that this case arises from “specific, identifiable, enumerated actions”. But “relevancy is not limited by the exact issues identified in the pleadings, the merits of the case, or the admissibility of discovered information”. *Billioni v. Bryant*, No. 0:14-cv-03060-JMC, 2015 WL 9122776, at *1 (D.S.C. Dec. 14, 2015) (quoting *Amick v. Ohio Power Co.*, No. 2:13-cv-06593, 2014 WL 468891, at *1 (S.D.W.Va. Feb. 5, 2014)). “[I]nformation is relevant, and thus discoverable, if it bears on, or . . . reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.” *Id.* (quoting *Amick*, 2014 WL 468891, at *1)). And in any event, the premise that this case is limited to specific actions between 2018 and 2019 is itself wrong, as evidenced by the allegations of “continuing” violations and requests for injunctive relief in Plaintiffs’ complaint. (Compl. ¶¶ 113, 140, Prayer for Relief C, E.)
- State Defendants object to requests seeking “documents sufficient to show” as “undefined” and an improper attempt to seek information rather than documents. Litigants “should exercise reason and common sense to attribute ordinary definitions to terms and phrases” used in discovery requests, *Deakins v. Pack*, Civil Action No. 1:10-1396, 2012 WL 242859, at *12 (S.D.W. Va. Jan. 25, 2012) (quoting *McCoo v. Denny’s Inc.*, 192 F.R.D. 675, 694 (D. Kan. 2006)), and we are unaware of any case law suggesting a request for “documents sufficient to show” is a request for information rather than, as the RFP states, a request for documents.
- State Defendants object to a number of requests on the ground that we should instead seek the materials from Miracle Hill, a non-party to the action. The notion that Plaintiffs should seek documents from a third-party that are as easily obtainable from a party to the case is contrary to basic discovery principles. *See, e.g., U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192-JWL, 2008 WL 2699908, at *1 (D. Kan. July 3, 2008).
- Defendant McMaster suggests that documents held within the Office of the Governor of South Carolina are not within Governor McMaster’s custody or control. This contradicts well-established Supreme Court and federal court precedent. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *see also Tyler v.*

Suffolk Cnty., 256 F.R.D. 34, 37 (D. Mass. 2009); *Green v. Fulton*, 157 F.R.D. 136, 142 (D. Me. 1994).

- Defendant Leach objects to requests that are purportedly “identical or substantially identical” to prior FOIA requests. To the extent Defendant Leach is withholding documents on this basis, we are aware of no authority authorizing a defendant to withhold documents in litigation simply because those documents were previously requested and not produced during the FOIA process.

In light of the authority we have cited above, we ask State Defendants to reconsider the positions taken in their objections and on our call. We are willing to engage in further meet-and-confer calls if it would be productive, but we are not interested in further discussions if State Defendants intend to stand behind their position that they will say nothing beyond what is stated in their written responses to the RFPs. If State Defendants intend to adhere to their positions, we will file a motion to compel.

Please let us know by Tuesday, September 22, 2020, how you wish to proceed.

Sincerely,



Peter T. Barbur

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Exhibit 8



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September 22, 2020

Via electronic mail

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RE: *Rogers et al. v. U.S. Dept. of Health and Human Servs. et al.*
Civil Action No. 6:19-cv-01567-TMC (D.S.C.)
Our File No. 059326/01501

Mr. Barbur:

I write in response to your letter dated September 16, 2020 in the above-referenced matter. Your letter seems either to misapprehend or to mischaracterize the positions taken in the Governor’s Objections and Responses served on August 4, 2020, and the statements made by the Governor’s counsel in the parties’ meet-and-confer call on September 1, 2020. I write to correct those characterizations and to articulate again the Governor’s position regarding your document requests.

In counsels’ meet-and-confer call earlier this month to discuss the Governor’s Objections and Responses, you raised certain questions, and we directed you to specific language in our written responses where those questions had already been answered. So too, it seems that some of the assertions in your recent letter rest on incomplete information or mistaken assumptions, which I hope this response can illumine.

Your letter states, for example, that you assume Governor McMaster’s document production is incomplete because it is “largely duplicative of documents previously produced in response to Plaintiffs’ earlier FOIA requests, even though the vast majority of the RFPs are new.” This assertion, however, is simply inaccurate. Before this lawsuit was filed, your co-counsel—Susan Dunn, Legal Director of the ACLU, South Carolina—submitted two FOIA requests to the Governor. The first was submitted on May 1, 2018, and the Governor’s staff responded on May 30, producing 15 pages of responsive materials. The second was submitted on July 24, 2018, and the Governor’s staff responded on September 4, producing 14 pages of responsive material. In total, then, the Governor has previously produced 29 pages in response to FOIA requests from

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Plaintiffs' counsel. By contrast, in response to your requests for production in this lawsuit, we produced more than thirteen times this amount. Accordingly, it is incorrect to characterize the Governor's recent 394-page production in this litigation as "largely duplicative" of his prior FOIA responses, and it is similarly incorrect to assert that this supposed redundancy somehow demonstrates that his document production is incomplete.

You further state in your letter that Governor McMaster's responses and document production are presumed incomplete because he possessed no documents responsive to some of your requests and because he declined to search for and produce documents in response to other of your requests. The Governor's declining to respond to certain of Plaintiffs' requests, however, reveals more about the extraordinarily broad fishing expedition Plaintiffs have undertaken than it does about the Governor's fulfillment of his discovery obligations under Rule 26. The scope of discovery is expressly limited by Rule 26(b)(1) to information "that is relevant to any party's claim or defense." It should come as no surprise then that we declined to respond to requests seeking documents related to HHS's actions that (a) postdate the Complaint, (b) are not mentioned in the Complaint and, therefore, (c) are not relevant to any claim or defense in the suit. A party's ability to obtain discovery is further limited by "the parties' relative access to relevant information," Rule 26(b)(1), and thus it is neither improper nor surprising that the Governor declined to search for documents that are in Plaintiffs' own possession or in the possession of other parties on whom you have served requests for that information. Indeed, the burden of showing the relevance and proportionality of a given request is on the *requesting* party—a burden you have thus far failed to carry.

You state also in your letter that, during our meet-and-confer call, the Governor's counsel supposedly "refused" to provide you with information regarding our document production. Yet again, this assertion is not true. The crux of our statements was that we had already responded to your discovery requests, and we were not in a position to change our responses or volunteer additional information. In keeping with procedural expectations and customary practice, we offered to consider any information you may provide, but you did not attempt to provide a basis for us to change our responses. Your letter fails fully and accurately to recount counsel's statements, and it omits or fails to recognize the information already described in the Governor's Objections and Responses regarding the process, scope, and limitations on the Governor's search for and production of documents.

As we also stated during the meet-and-confer call, while it is not unusual for litigants to agree on search terms, document custodians, and search parameters, such an agreement is almost universally discussed and reached *prior* to the service of discovery requests, and it is not the responding party's burden to initiate such discussions. Again, you did not make any attempt to initiate such discussions. We are unaware of any binding authority for the proposition that when (as here) the requesting party failed to request or seek such agreement ahead of time, the producing party is obliged subsequently to agree to such demands merely because the requesting party assumes—on bases that are factually incorrect and legally specious—that the production might be incomplete.

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Finally, a number of other assertions in your letter warrant brief correction here. For example, the Governor does not, as you claim, “suggests that documents held within the Office of the Governor of South Carolina are not within Governor McMaster’s custody or control.” In fact, neither the Governor nor his counsel have said any such thing. Rather, as articulated in Governor McMaster’s Objections and Responses, the Governor simply objects to a definition in your Request for Documents to the extent that the definition implies that the Office of the Governor—a department of the State—is a party to this suit. You also assert incorrectly that the Governor has objected to certain requests because documents he supposedly possesses are also available from a third party. Again, incorrect. Rather, the Governor objected to your request for documentation of private third parties’ practices—documentation that they, not the Governor, possess, and which you have, in fact, already requested from such a third party.

In conclusion, we refer you again to the positions succinctly stated in and throughout Governor McMaster’s Objections and Responses. In keeping with the obligations imposed by Rule 26(g), Governor McMaster performed a thorough and complete search for, review of, and production of documents responsive to Plaintiffs’ Request for Documents, limited only by the legal objections and technological restrictions explained and asserted in the Governor’s Objections and Responses. If, however, you believe further discussion of this matter would be profitable, or if you wish to propose what you believe would be suitable parameters for the parties’ discovery responses, we are willing to entertain such discussion or suggestions, and will wait to hear from you.

Very truly yours,



Miles E. Coleman

CC: (by electronic mail):
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Bob Cook
Currey Cook
Leslie Cooper
Susan Dunn
Miranda J. Li
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Exhibit 9

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September 22, 2020

Via electronic mail

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RE: Rogers, et al. v. United States Department of Health and Human Services, et al.
Civil Action Number: 6:19-cv-01567-TMC
Our File Number: 79.10545

Dear Mr. Barbur:

On behalf of the Defendant Leach (hereinafter "DSS"), I am writing in response to your letter dated September 16, 2020 in the above-referenced matter, and specifically to address the points in that letter that apply to Leach, that is, to the South Carolina Department of Social Services.

As I noted during the parties' meet-and-confer call, Ms. Dunn of the ACLU, starting in January 2019, submitted several different FOIA requests to DSS. As far as I am aware, DSS produced all responsive and disclosable documents in response. Of the first 15 of Plaintiffs' Requests for Production to DSS, 12 of the requests were identical or substantially identical to the FOIA requests. As a result, the documents produced in response to those duplicative requests were, unsurprisingly, the same as those produced in response to the FOIA requests. Nevertheless, you now complain that DSS's production is "largely duplicative of documents previously produced in response to Plaintiffs' earlier FOIA requests. . . ." It is difficult to see how Plaintiffs could have expected anything other than the same documents in response to requests that were essentially the same as the FOIA requests. However, I did speak with Ms. Dunn while the requests for production were pending, and asked her whether she was aware of anything that had not been produced by DSS in response to the FOIA requests. She said she would check with Plaintiffs' counsel team, but I heard nothing further from her.

Your letter further states that "the vast majority of the RFPs are new." Leaving aside the

Peter Barbur
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issue of whether the 24 “new” requests qualitatively comprise the “vast majority” of a total of 36, it does not logically follow that counsel’s ability to formulate an additional 24 requests will result in DSS possessing documents referenced in those requests, or which were not already responsive to other requests. As I stated on the call, the ACLU’s FOIA requests “got it right the first time,” that is, those requests described the likely universe of relevant documents, which DSS produced. And while your letter states that “Defendant Leach produced no documents in response to 23 of the 36 requests,” your letter does not provide the reasons why, which were (a) that for 10 of the “new” requests, DSS possessed no documents other than those previously produced, (b) that for 5 of the “new” requests, DSS possessed no responsive documents at all, and (c) that DSS objected to 8 of the 24 “new” requests.

Your letter erroneously states that “Defendant Leach objects to requests that are purportedly ‘identical or substantially identical’ to prior FOIA requests. To the extent Defendant Leach is withholding documents on this basis, we are aware of no authority authorizing a defendant to withhold documents in litigation simply because those documents were previously requested and not produced during the FOIA process.” In fact, however, no such objection was made by Defendant Leach. As noted above, DSS is not aware that there are any documents that “were previously requested and not produced during the FOIA process,” except perhaps for privileged documents listed on DSS’s privilege log.

With regard to the matters set forth in the three full paragraphs on p. 2 of Mr. Coleman’s letter to you of this date, the position of DSS is the same, and I adopt by reference the points made in those paragraphs.

I also adopt the last paragraph of that letter, as modified: In conclusion, we refer you again to the positions succinctly stated in and throughout DSS’s Objections and Responses. In keeping with the obligations imposed by Rule 26(g), DSS performed a thorough and complete search for, review of, and production of documents responsive to Plaintiffs’ Request for Documents, limited only by the legal objections and technological restrictions explained and asserted in DSS’s Objections and Responses. If, however, you believe further discussion of this matter would be profitable, or if you wish to propose what you believe would be suitable parameters for the parties’ discovery responses, we are willing to hear and evaluate such suggestions, and will wait to hear from you.

Sincerely yours,

DAVIDSON, WREN & DEMASTERS, P.A.

s/Kenneth P. Woodington

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September 22, 2020
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