

No. 21-7142

In the Supreme Court for the United States

C. HOLMES,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF SOUTH CAROLINA, INC.; J. DOE #1

THROUGH J. DOE #X; SCOTT MCCARTHA; MS. SHIPMAN

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

**APPENDIX TO
BRIEF IN OPPOSITION**

Mary Agnes Hood Craig
COUNSEL OF RECORD for
Blue Cross and Blue Shield of South
Carolina, improperly identified as Blue Cross
Blue Shield of South Carolina, Inc.

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U.S. District Court
District of South Carolina (Charleston)
CIVIL DOCKET FOR CASE #: 2:20-cv-00004-BHH-MHC

Holmes v. Blue Cross Blue Shield of South Carolina, Inc. et al
Assigned to: Honorable Bruce Howe Hendricks
Referred to: Magistrate Judge Molly H Cherry
Cause: 18:1961 Racketeering (RICO) Act

Date Filed: 01/02/2020
Date Terminated: 07/21/2021
Jury Demand: Both
Nature of Suit: 470 Racketeer/Corrupt Organization
Jurisdiction: Federal Question

Plaintiff**C. Holmes**

represented by **C. Holmes**
P.O. Box 187
Sullivans Island, SC 29482
PRO SE

V.

Defendant**Blue Cross Blue Shield of South Carolina, Inc.**

represented by **James B Hood**
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Defendant**J. Doe # 1 Through J. Doe # X****Defendant****Scott McCartha**

represented by **James Whittington Clement**
(See above for address)
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ATTORNEY TO BE NOTICED

Defendant**Ms. Shipman**

Date Filed	#	Docket Text
01/02/2020	1	COMPLAINT against Blue Cross Blue Shield of South Carolina, Inc., John Doe #1, John Doe #2, through John Doe #X (Filing fee \$ 400 receipt number SCX200016864.), filed by C. Holmes. (Attachments: # 1 Supporting Documents) (egra,) (Entered: 01/03/2020)
03/18/2020	8	PROPER FORM ORDER Case to be brought into proper form by 4/8/2020. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. Signed by Magistrate Judge Bristow Marchant on 03/18/2020. (cpeg,) (Entered: 03/19/2020)
03/19/2020	9	***DOCUMENT MAILED 8 Proper Form Order with required documents, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) Modified on 3/20/2020 to add docket text (cpeg,). (Entered: 03/19/2020)
04/30/2020	11	Local Rule 26.01 Answers to Interrogatories by C. Holmes. (Attachments: # 1 Envelope)(cpeg,) (Entered: 04/30/2020)
05/01/2020	13	ORDER authorizing service of process by clerk and directing plaintiff to notify the clerk in writing of any change of address. Signed by Magistrate Judge Bristow Marchant on 05/01/2020. (cpeg,) (Entered: 05/01/2020)
05/01/2020	14	Summons Issued as to Blue Cross Blue Shield of South Carolina, Inc., John Doe #1, John Doe #2, through John Doe #X. Service due by 7/30/2020 (cpeg,) (Entered: 05/01/2020)
05/04/2020	15	***DOCUMENT MAILED 14 Summons Issued, 1 Complaint, 13 Order Service - Non-Inmate placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 05/04/2020)
07/08/2020		Case Reassigned to Magistrate Judge Molly H Cherry. Magistrate Judge Bristow Marchant no longer assigned to the case. (swil,) (Entered: 07/08/2020)
07/13/2020	16	***DOCUMENT MAILED Clerk Notes Case Assign Public placed in U.S. Mail from Charleston Clerks Office to C Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 07/13/2020)
08/19/2020	17	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Blue Cross Blue Shield of South Carolina, Inc.. Response to Motion due by 9/2/2020. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.Motions referred to Molly H Cherry.(Hood, James) (Entered: 08/19/2020)
08/19/2020	18	Local Rule 26.01 Answers to Interrogatories by Blue Cross Blue Shield of South Carolina, Inc..(Hood, James) (Entered: 08/19/2020)

08/20/2020	19	ROSEBORO ORDER directing clerk to forward summary judgment explanation to the opposing party and directing that party to respond in 31 days. Response due to 17 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by 9/21/2020. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Signed by Magistrate Judge Molly H Cherry on 08/20/2020. (cpeg,) (Entered: 08/20/2020)
08/20/2020	20	***DOCUMENT MAILED 19 Roseboro Order, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 08/20/2020)
08/31/2020	21	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by C. Holmes re 19 Roseboro Order. (Attachments: # 1 Certificate of Service, # 2 Envelope) (cpeg,) (Entered: 09/01/2020)
08/31/2020	22	MOTION for DE NOVO Determination by article III Judicial Officer and Motion to hold all time limits in abeyance by C. Holmes. Response to Motion due by 9/14/2020. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Certificate of Service, # 2 Envelope)No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 09/01/2020)
09/04/2020	23	RESPONSE in Opposition re 22 MOTION Motion for DE NOVO Determination by article III Judicial Officer and Motion to hold all time limits in abeyance <i>AND RESPONSE in Opposition RE ECF Entry No. 21 Plaintiff's Appeal of Magistrate Judge Order to District Court</i> Response filed by Blue Cross Blue Shield of South Carolina, Inc..Reply to Response to Motion due by 9/11/2020 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Hood, James) (Entered: 09/04/2020)
09/14/2020	24	REPLY to Response to Motion re 22 MOTION for DE NOVO Determination by article III Judicial Officer and Motion to hold all time limits in abeyance Response filed by C. Holmes. (Attachments: # 1 Certificate of Service, # 2 Envelope)(cpeg,) (Entered: 09/14/2020)
09/14/2020	25	Text Order denying in part Motion for De Novo Determination (ECF No. 22). To the extent Plaintiff objects to assignment of a U.S. Magistrate Judge to her case, the assignment is automatic pursuant to Local Rule 73.02(B)(2)(e), D.S.C., such that her Motion is DENIED. Plaintiffs request to be allowed to file documents with the Court via FAX is also DENIED. However, in light of the current pandemic, and pursuant to Standing Order 3:20-mc-00122, in addition to the U.S. Mail, common carrier courier delivery, and using the drop box at the Court, pro se litigants are temporarily permitted to file documents in Portable Document Format (PDF) by email to pro-se-filings@scd.uscourts.gov. With regard to Plaintiffs request to hold the deadlines in the August 20, 2020 Roseboro Order (ECF No. 19) in abeyance or extended indefinitely, the Motion is DENIED. With regard to Plaintiffs request for an enlargement of time to respond to Defendant Blue Cross Blue Shield of South Carolinas Motion to Dismiss, Defendant has consented to a thirty (30) day extension, ECF Nos. 23 at 5; 24 at 4. Accordingly, Plaintiff is hereby GRANTED thirty (30) days from the date of this Order to file any response to Defendants Motion to Dismiss. Plaintiff's response due 10/14/2020. Entered at the direction of Magistrate Judge Molly H Cherry on 09/14/2020.(cpeg,) Modified on 9/14/2020 to correct docket text (cpeg,). (Entered: 09/14/2020)
09/14/2020	26	***DOCUMENT MAILED 25 Order on Motion for Miscellaneous Relief,,, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 09/14/2020)
10/08/2020	28	APPEAL OF MAGISTRATE JUDGE DECISION to District Court with request to hold all time limits in abeyance in the alternative preliminary response by C. Holmes re 25 Order on Motion for De Novo Determination. (Attachments: # 1 Envelope)(cpeg,) Modified docket text to correct Order on Motion description on 10/9/2020 (hada,). (Entered: 10/08/2020)
11/03/2020	29	RESPONSE by Blue Cross Blue Shield of South Carolina, Inc. to 28 Appeal of Magistrate Judge Decision to District Court, . (Hood, James) Modified on 11/9/2020 to correct event type in docket text (cpeg,). (Entered: 11/03/2020)
11/09/2020	30	REPLY by C. Holmes to 29 Response. (Attachments: # 1 Certificate of Service)(cpeg,) (Entered: 11/09/2020)
11/13/2020	31	REPLY by C. Holmes to 29 Response. (Attachments: # 1 Certificate of Service, # 2 Envelope)(cpeg,) (Entered: 11/13/2020)
12/07/2020	32	IT IS ORDERED that Plaintiff shall have ten days from the date of this Order to file an Amended Complaint. The pending Motion to Dismiss (ECF No. 17) is MOOT. If, however, Plaintiff fails to file her Amended Complaint by the deadline set forth herein, BCBS may petition the Court to restore its Motion to Dismiss (addressing the allegations as set forth in Plaintiffs current Complaint) to the docket for decision by the Court. Signed by Magistrate Judge Molly H Cherry on 12/07/2020.(cpeg,) (Entered: 12/07/2020)
12/07/2020	33	***DOCUMENT MAILED 32 Order on Motion to Dismiss for Failure to State a Claim, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 12/07/2020)
12/11/2020	35	TEXT ORDER denying ECF No. 21 and 28 : Plaintiff has appealed the Magistrate Judge's entry of a Roseboro order and a text order, and she has moved for a de novo determination by an Article III judge. In addition, she has requested that all time limits be held in abeyance. As the Magistrate Judge has previously explained to Plaintiff, however, to the extent she objects to the assignment of a United States Magistrate Judge, such assignment is automatic pursuant to the Local Civil Rules for the District of South Carolina, and the Court finds no merit to Plaintiff's objection. In addition, it appears that Plaintiff has been given sufficient extensions of time in this case, and the Court finds no reason to simply hold all time limits in abeyance indefinitely. Overall, the Court finds no merit to Plaintiff's appeals of the Magistrate Judge's orders, and the Court denies her appeals in full. Entered at the Direction of The Honorable Bruce Howe Hendricks on 12/10/2020. (vdru,) (Entered: 12/11/2020)
12/11/2020	36	***DOCUMENT MAILED 35 TEXT ORDER placed in U.S. Mail from Charleston Clerks Office to C. Holmes at P.O. Box 187 Sullivans Island, SC 29482. (vdru,) (Entered: 12/11/2020)
12/16/2020	37	MOTION for Extension of Time to Amend 1 Complaint by C. Holmes. Response to Motion due by 12/30/2020. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Certificate of Service, # 2 Envelope)No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 12/16/2020)
12/17/2020	38	Text Order- Granting in part and denying in part Plaintiff's Motion for Extension of Time to Amend (ECF No. 37). The Court grants Plaintiff an extension of fourteen (14) days from the date of this Order to file an amended complaint. Plaintiff's second request to file documents with the Court via FAX is DENIED. As noted previously (ECF No. 25), in light of the current pandemic, and pursuant to Standing Order 3:20-mc-00122, in addition to the U.S. Mail, common carrier courier delivery, and using the drop box at the Court, pro se litigants are temporarily permitted to file documents in Portable Document Format (PDF) by email to pro-se-filings@scd.uscourts.gov. Entered at the direction of Magistrate Judge Molly H Cherry on 12/17/2020.(cpeg,) (Entered: 12/17/2020)
12/17/2020	39	***DOCUMENT MAILED 38 Order on Motion for Extension of Time to Amend, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 12/17/2020)
01/04/2021	41	MOTION for Enlargement of time due to Covid-19 by C. Holmes. Response to Motion due by 1/19/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Certificate of Service)No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 01/05/2021)
01/06/2021	42	Text Order granting, in part, and denying, in part, Plaintiff's Motion for Extension of Time (ECF No. 41). The Court grants Plaintiff an extension of fourteen (14) days from the date of this Order to file an amended complaint. Plaintiffs Motion includes a third request to file documents with the Court via FAX, which request is denied. Plaintiff's remaining request for an extension of time to file a Rule 59(e) motion will be addressed by the District Judge.Entered at the direction of Magistrate Judge Molly H Cherry on 01/06/2021.(cpeg,) (Entered: 01/06/2021)
01/06/2021	43	***DOCUMENT MAILED 42 Order on Motion for Extension of Time,, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 01/06/2021)
01/08/2021	45	TEXT ORDER granting 41 Ms. Holmes a 14-day extension of time to file a Rule 59(e) motion regarding the Courts December 11, 2020 order. Entered at the Direction of The Honorable Bruce Howe Hendricks on 1/8/2021. (vdru,) (Entered: 01/08/2021)

01/08/2021	46	***DOCUMENT MAILED 45 Order placed in U.S. Mail from Charleston Clerks Office to C. Holmes at P.O. Box 187 Sullivans Island, SC 29482-0187. (vdru,) (Entered: 01/08/2021)
01/19/2021	47	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by C. Holmes re 42 Order on Motion for Extension of Time. (cpeg,) (Entered: 01/19/2021)
01/19/2021	48	MOTION to Hold all time limits in Abeyance by C. Holmes. Response to Motion due by 2/2/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 01/19/2021)
01/21/2021	49	Text Order granting, in part, Plaintiff's Motion to Hold All Time Limits in Abeyance (ECF No. 48) only insofar as it "requests enlargement of time to file [an] amended complaint." ECF No. 48 at 2. The Court grants Plaintiff an extension of fourteen (14) days from the date of this Order to file an amended complaint. Plaintiff's remaining request to hold all time limits in abeyance pending appeal will be addressed by the District Judge. Entered at the direction of Magistrate Judge Molly H Cherry on 01/21/2021.(cpeg,) (Entered: 01/21/2021)
01/21/2021	51	***DOCUMENT MAILED 49 Order on Motion to Stay, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 01/21/2021)
01/22/2021	52	TEXT ORDER re 47 Appeal of Magistrate Judge Decision to District Court filed by C. Holmes and 48 MOTION to Stay filed by C. Holmes : After review of Plaintiff's most recent appeal and motion to hold all time limits in abeyance, the Court denies Plaintiff's requests. Plaintiff has been given sufficient extensions of time in this case; in fact, the Magistrate Judge recently granted Plaintiff an additional fourteen days to file an amended complaint (ECF No. 49). The Court finds no reason to hold all time limits in abeyance indefinitely, and the Court finds no merit to Plaintiff's appeal of the Magistrate Judge's order (ECF No. 42). Accordingly, the Court denies Plaintiff's appeal and motion (ECF Nos. 47 and 48.) Entered at the Direction of The Honorable Bruce Howe Hendricks on 1/22/2021. (vdru,) (Entered: 01/22/2021)
01/22/2021	53	***DOCUMENT MAILED 52 Order, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482. (vdru,) (Entered: 01/22/2021)
01/22/2021	54	MOTION for Reconsideration re 35 Order by C. Holmes. Response to Motion due by 2/5/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Email forwarding Staples Scan. Scanned evening of Friday, 1/22/21.)No proposed order. Motions referred to Molly H Cherry.(vdru,) (Entered: 01/26/2021)
02/05/2021	56	RESPONSE in Opposition re 54 MOTION for Reconsideration re 35 Order,,, Response filed by Blue Cross Blue Shield of South Carolina, Inc..Reply to Response to Motion due by 2/12/2021 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Clement, James) (Entered: 02/05/2021)
02/08/2021	59	AMENDED COMPLAINT against Blue Cross Blue Shield of South Carolina, Inc., J. Doe # 1 Through J. Doe # X, Scott McCartha, Ms. Shipman, filed by C. Holmes. (Attachments: # 1 Certificate of Service)(cpeg,) (Entered: 02/09/2021)
02/09/2021	57	NOTICE of Appearance by James Whittington Clement on behalf of Blue Cross Blue Shield of South Carolina, Inc. (Clement, James) (Entered: 02/09/2021)
02/09/2021	58	MOTION for Reconsideration re 32 Order on Motion to Dismiss for Failure to State a Claim,, AND INCORPORATED MEMORANDUM IN SUPPORT by Blue Cross Blue Shield of South Carolina, Inc.. Response to Motion due by 2/23/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Exhibit 2:17-cv-02949-BHH (D.S.C.) at ECF Entry No. 27-3, # 2 Exhibit 2:17-cv-02949-BHH (D.S.C.) at ECF Entry No. 71 at 1, n. 1)No proposed order.Motions referred to Molly H Cherry.(Clement, James) (Entered: 02/09/2021)
02/10/2021	60	Text order DENYING as MOOT Defendant Blue Cross Blue Shield of South Carolina, Inc.s Motion for Reconsideration (ECF No. 58) . Plaintiff filed her Amended Complaint on February 8, 2021 (ECF No. 59) . Entered at the direction of Magistrate Judge Molly H Cherry on 02/10/2021.(cpeg,) (Entered: 02/10/2021)
02/10/2021	61	***DOCUMENT MAILED 60 Order on Motion for Reconsideration, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 02/10/2021)
02/22/2021	62	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT by Blue Cross Blue Shield of South Carolina, Inc.. Response to Motion due by 3/8/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.Motions referred to Molly H Cherry.(Clement, James) (Entered: 02/22/2021)
02/24/2021	63	ROSEBORO ORDER directing clerk to forward summary judgment explanation to the opposing party and directing that party to respond in 31 days. Response due to 62 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT by 3/29/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Signed by Magistrate Judge Molly H Cherry on 02/24/2021. (cpeg,) (Entered: 02/24/2021)
02/24/2021	64	<p>Text order. Plaintiff is reminded that she is responsible for service of process under Rule 4 of the Federal Rules of Civil Procedure. See ECF No. 13. Plaintiff's attention is directed to Rule 4(b), which provides that a summons "must be issued for each defendant to be served." Thus, Plaintiff, who amended her complaint to add new defendants, is responsible for completing and presenting to the clerk a summons form listing the new defendants, in accordance with Rules 4(a)-(b). Pursuant to Rule 4(c), Plaintiff is responsible for service of that summons and the amended complaint upon any new defendant within the time allowed by Rule 4(m).</p> <p>Rule 4(m) provides that "[i]f a defendant is not served within 90 days after the complaint is filed, the court-on motion or on its own after notice to the plaintiff-must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Accordingly, unless a Defendant is served within 90 days after the filing of the Amended Complaint (i.e., by May 10, 2021), that particular unserved Defendant may be dismissed without prejudice from this case.</p> <p>Once a defendant has been served with process and counsel has made an appearance in the case on behalf of that defendant, service is effected by the court's Electronic Case Filing system through a computer generated notice of electronic filing. See Fed. R. Civ. P. 5(b)(1)(E); ECF No. 13 .</p> <p>Entered at the direction of Magistrate Judge Molly H Cherry on 02/24/2021. (cpeg,) (Entered: 02/24/2021)</p>
02/24/2021	65	***DOCUMENT MAILED 63 Roseboro Order, 64 Order, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 02/24/2021)
03/09/2021	66	MOTION for Protection from due dates April 30, 2021 through May 11, 2021 by C. Holmes. Response to Motion due by 3/23/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Envelope)No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 03/09/2021)
03/10/2021	68	TEXT ORDER re 66 Motion for Protection. The undersigned grants protection to Plaintiff Holmes for the following time period: April 30, 2021 through May 11, 2021. This Order does not afford protection from any appearance required before the District Court Judge assigned to this case, although she may separately grant such protection. AND IT IS SO ORDERED. Entered at the direction of Magistrate Judge Molly H Cherry on 03/10/2021.(cpeg,) (Entered: 03/10/2021)
03/10/2021	69	***DOCUMENT MAILED 68 Order on Motion for Miscellaneous Relief, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 03/10/2021)
03/15/2021	70	Summons Issued as to Scott McCartha, Ms. Shipman. Service due by 6/14/2021 (cpeg,) (Entered: 03/15/2021)
03/15/2021	71	***DOCUMENT MAILED 70 Summons Issued placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 03/15/2021)

03/25/2021	72	TEXT ORDER denying 54 Motion for Reconsideration. *** After review, the Court finds no merit to Ms. Holmes' motion for reconsideration, which simply repeats the same arguments and seeks the same relief the Court previously denied. Nowhere in her motion does Plaintiff point to any intervening change in controlling law, any new facts or evidence not available previously, or any clear error of law or manifest injustice to warrant the extraordinary remedy of Rule 59(e) relief. Accordingly, Plaintiff's motion for reconsideration is denied. Entered at the direction of Honorable Bruce Howe Hendricks on 3/25/2021. (nsw) (Entered: 03/25/2021)
03/25/2021	73	***DOCUMENT MAILED 72 Order on Motion for Reconsideration, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482-0187. (vdru,) (Entered: 03/26/2021)
03/29/2021	74	MOTION to Strike and RESPONSE in Opposition re 62 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT Response filed by C. Holmes. Reply to Response to Motion due by 4/5/2021 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Certificate of Service)(cpeg,) Modified on 4/1/2021 to edit event (cpeg,). (Entered: 04/01/2021)
04/08/2021	76	REPLY to Response to Motion re 74 MOTION to Strike, 62 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT Response filed by Blue Cross Blue Shield of South Carolina, Inc.. (Attachments: # 1 Exhibit Papa v Diamandi, # 2 Exhibit Carter v SNC-Lavalin Constructors)(Clement, James) (Entered: 04/08/2021)
04/14/2021	77	Letter from C. Holmes. (Attachments: # 1 Certificate of Service, # 2 Envelope)(cpeg,) (Entered: 04/15/2021)
04/18/2021	78	SUR REPLY to REPLY to Response to Motion re 74 MOTION to Strike Response filed by C. Holmes. (cpeg,) Modified on 4/19/2021 to correct filing date (cpeg,). (Entered: 04/19/2021)
05/06/2021	79	MOTION for Service by Publication by C. Holmes. Response to Motion due by 5/20/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # 1 Affidavit, # 2 Proposed Order)No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 05/07/2021)
05/19/2021	80	RESPONSE in Opposition re 79 MOTION for Service by Publication Response filed by Blue Cross Blue Shield of South Carolina, Inc..Reply to Response to Motion due by 5/26/2021 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Hood, James) (Entered: 05/19/2021)
06/11/2021	81	NOTICE: Clerk's office mailed plaintiff a copy of 3:21-mc-00331-RBH - Standing Orders - Revocation of Order Regarding District Clerk's Office Operations in Response to COVID-19. (cpeg,) (Entered: 06/11/2021)
06/18/2021	82	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM <i>Joining Blue Cross and Blue Shield of South Carolina's Motion to Dismiss the Amended Complaint, Doc. 62</i> by Scott McCartha. Response to Motion due by 7/2/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.Motions referred to Molly H Cherry.(Clement, James) (Entered: 06/18/2021)
06/18/2021	83	Local Rule 26.01 Answers to Interrogatories by Scott McCartha.(Clement, James) (Entered: 06/18/2021)
06/21/2021	84	ROSEBORO ORDER directing clerk to forward summary judgment explanation to the opposing party and directing that party to respond in 31 days. Response due to 82 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM <i>Joining Blue Cross and Blue Shield of South Carolina's Motion to Dismiss the Amended Complaint, Doc. 62</i> by 7/22/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Signed by Magistrate Judge Molly H Cherry on 06/21/2021. (cpeg,) (Entered: 06/21/2021)
06/21/2021	85	***DOCUMENT MAILED 84 Roseboro Order, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 06/21/2021)
06/28/2021	86	EXPEDITED MOTIONS to Strike and/or MOTION to Exclude Pursuant to Rules 12(f) and 12(d) to be forwarded to the District Court Judge; in the alternative, MOTION for Discovery and Permission to Appeal with Stay Pending Appeal if Denied (Response to Motion due by 7/12/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45.), by C. Holmes. (Attachments: # 1 Affidavit, # 2 Certificate of Service)Motions referred to Molly H Cherry.(hcor,) (Entered: 06/28/2021)
07/06/2021	88	RESPONSE in Opposition re 82 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM <i>Joining Blue Cross and Blue Shield of South Carolina's Motion to Dismiss the Amended Complaint, Doc. 62</i> Response filed by C. Holmes.Reply to Response to Motion due by 7/13/2021 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # 1 Certificate of Service, # 2 Envelope)(cpeg,) (Entered: 07/06/2021)
07/12/2021	89	RESPONSE in Opposition re 86 MOTION to Strike MOTION to Exclude MOTION for Discovery Response filed by Blue Cross Blue Shield of South Carolina, Inc..Reply to Response to Motion due by 7/19/2021 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Hood, James) (Entered: 07/12/2021)
07/21/2021	92	NOTICE of Voluntary Dismissal by C. Holmes (Attachments: # 1 Certificate of Service)(cpeg,) (Entered: 07/22/2021)
07/22/2021	91	DELETION OF DOCKET ENTRY NUMBER 90 MOTION for voluntary dismissal Reason: Deleted to refile and correct event type. Filed 92 Notice of Voluntary Dismissal Modified filing date to that of original filing: 07/21/2021. (cpeg,) (Entered: 07/22/2021)
07/26/2021	93	Motion for Enlargement of time and Motion to Hold all time limits in abeyance (Response to Motion due by 8/9/2021. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45.), by C. Holmes. (Attachments: # 1 Certificate of Service, # 2 Envelope)No proposed order.Motions referred to Molly H Cherry.(cpeg,) (Entered: 07/27/2021)
07/28/2021	94	TEXT ORDER MOOTING Plaintiff's Motion for Enlargement of Time and Motion to Hold All Time Limits in Abeyance (ECF No. 93). Plaintiff filed a Notice of Voluntary Dismissal on July 21, 2021, dismissing this action without prejudice. ECF No. 22 . This case, therefore, has been closed, and Plaintiff's Motion is moot. The clerk of court is directed to mail Plaintiff a copy of the public docket sheet. Entered at the direction of Magistrate Judge Molly H Cherry on 07/28/2021.(cpeg,) (Entered: 07/28/2021)
07/28/2021	95	***DOCUMENT MAILED 94 Order on Motion for Extension of Time, Order on Motion for Miscellaneous Relief, placed in U.S. Mail from Charleston Clerks Office to C. Holmes P.O. Box 187 Sullivans Island, SC 29482 (cpeg,) (Entered: 07/28/2021)
10/04/2021	96	USCA COURT ORDER filed denying Motion for rehearing and rehearing en banc. (cpeg,) (Entered: 10/04/2021)

PACER Service Center			
Transaction Receipt			
03/02/2022 12:20:33			
PACER Login:	dhshelfield	Client Code:	
Description:	Docket Report	Search Criteria:	2:20-cv-00004-BHH-MHC
Billable Pages:	9	Cost:	0.90

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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) CIVIL ACTION NO.:
C. Holmes,) 2:20-cv-00004-BHH-BM
Plaintiff,)
-vs-) COMPLAINT
Blue Cross Blue Shield)
Of South Carolina, Inc.,)
John Doe #1, John Doe #2,)
through John Doe #X,)
Defendants.)

Motion

As a threshold matter, plaintiff respectfully requests permission to proceed with the current caption; in addition, plaintiff does not consent to a magistrate and respectfully makes this motion for no magistrate judge involvement in this matter of great public importance. Accordingly, plaintiff respectfully requests this Court grant this motion.

I. The Parties to This Complaint

A. The Plaintiff

C. Holmes
Plaintiff
PO Box 187
Sullivans Island, Charleston
SC 29482-0187
843.883.3010

B. The Defendants

1. Blue Cross Blue Shield Of South Carolina, Inc. (hereafter Corp.)
Corporation
I-20 East at Alpine Rd.
Columbia, Richland
SC 29219
803.788.0222
2. John Doe #1 through X
To Be Determined (TBD).

II. Basis for Jurisdiction

A. Jurisdiction is proper in this Court according to:

28 U.S.C. § 1331,
18 U.S.C. § 1961 et seq. (Civil RICO),
28 U.S.C. § 2201-2202,
S.C. Code § 39-5-10 *et seq.* (UTPA),
Affordable Care Act (hereafter ACA) and HIPAA,
U.S. Constitution: First, Fifth, Seventh, Eighth, and Fourteenth Amendments,
South Carolina Constitution under Article I, §§ 2, 3, 4, and 9, and/or
Other.

III. Statement of Claims: The factual contentions have evidentiary support and/or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

1. Civil RICO: The Defendant Blue Cross Blue Shield of South Carolina, Inc., is a for-profit corporation registered, licensed, and authorized to do business in the State of South Carolina and does in fact do business in the County of Charleston. The plaintiff is a physician and M.D. practicing in the same location in the County of Charleston, State of South Carolina, since 1994 without complaint. Defendants participated in an on-going pattern of racketeering activity. The pattern consists of at least two acts of racketeering committed within 10 years of each other, including but not limited to, multiple instances of mail fraud, wire fraud, financial institution fraud, and/or wrongdoing, including but not limited to, false/misleading communications to established and prospective patients as well as withholding of monies due and owing to plaintiff for services rendered in good faith in compliance with the usual and customary practices as established over many years without notice or just cause. Plaintiff has provided notice to defendants of objections to defendants' wrongdoing which is on-going. Defendants operate and manage the enterprise and conduct or participate, directly or indirectly, in the conduct of defendants' affairs. Defendant corporation is the instrument of racketeering activity. Defendants engage in or affect interstate commerce. Defendants have caused injury to plaintiff and plaintiff's interests. Defendants' wrongdoing and pattern of racketeering activity caused plaintiff's injuries. Defendants all in concert entered into an illicit agreement to participate in the on-going pattern of racketeering activity and wrongdoing. On information and belief, defendants have engaged in the same or similar wrongdoing and/or unauthorized pattern of racketeering activity against other physicians rendering services in good faith.
2. Defendants' wrongdoing is grossly negligent with willful, wanton, and/or reckless disregard for the plaintiff, the plaintiff's interests, and/or the plaintiff's rights. Defendants owed a duty of due care. Defendants breached that duty causing plaintiff's damages, including but not limited to, special damages. Defendants' wrongdoing is the direct and proximate cause of plaintiff's damages. The defendants have caused and continue to cause damages, including but not limited to, special damages as well as actual and physical harm to the plaintiff and plaintiff's interests. The defendants have caused emotional, mental, and physical pain and suffering and injuries. The defendants are liable to plaintiff for actual damages, special damages, costs of the action, attorneys fees, exemplary damages, and punitive damages according to the law as determined by the trier of fact;
3. Defendants' wrongdoing is a violation of law, including but not limited to, S.C. Code § 39-5-10 *et seq.*, Unfair Trade Practices Act (UTPA). Defendants' wrongdoing adversely affects public interest, including but not limited to, wrongful issuance and administration of healthplan benefits, violation of statutory mandates, and unfair, deceptive acts and misrepresentations regarding established and/or prospective patients. Defendants' wrongdoing is capable of repetition and capable of evading judicial review.
4. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201-2202, that the Affordable Care Act (hereafter ACA) is unconstitutional on its face and as applied herein. Another District Court and Court of Appeals have ruled that the ACA is unconstitutional. The Department of Justice has taken the position that the ACA is unconstitutional.

III. (cont'd)

5. Defendants' wrongdoing is actionable as an equitable cause of action, including but not limited to, unjust enrichment and/or other equitable claims. Defendants wrongfully converted monies due and owing to the plaintiff for services rendered in good faith pursuant to the usual and customary long-standing pattern and practices over many years without prior notice and without just cause. Defendants wrongdoing is inequitable due to unjust enhancement, equitable estoppel, quantum meruit, unclean hands, and/or other equitable claims. The defendants are liable to plaintiff for damages equal to the value of the unjust enrichment or benefit unjustly claimed by defendants as determined by the trier of fact.

IV. Relief

WHEREFORE, the plaintiff prays for the following:

- A) A jury trial;
- B) The plaintiff respectfully requests this Court grant the motion for permission to proceed with the current caption and for no magistrate judge involvement in this matter of great public importance;
- C) The plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201-2202, that the Affordable Care Act (hereafter ACA) is unconstitutional on its face and as applied herein. Another District Court and Court of Appeals have ruled that the ACA is unconstitutional. The Department of Justice has taken the position that the ACA is unconstitutional;
- D) The defendants have caused and continue to cause damages, including but not limited to, special damages as well as actual and physical harm to the plaintiff and plaintiff's interests. The defendants have caused emotional, mental, and physical pain and suffering and injuries. The defendants are liable to plaintiff for actual damages, special damages, costs of the action, attorneys fees, exemplary damages, and punitive damages according to the law and/or damages equal to the value of the unjust enrichment or benefit unjustly claimed by defendants as determined by the trier of fact; and
- E) For such other and further relief as the Court may deem just and proper.

V. Certification and Closing

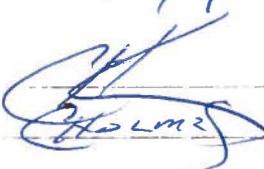
Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

A. For Parties Without an Attorney

I agree to provide the Clerk's Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Date of signing:

12/31/19



Signature of Plaintiff

Printed Name of Plaintiff

B. For Attorneys

Date of signing:

Signature of Attorney

Printed Name of Attorney

Bar Number

Name of Law Firm

Street Address

State and Zip Code

Telephone Number

E-mail Address

UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH CAROLINA
 CHARLESTON DIVISION

C. Holmes,)	C/A No. 2:20-cv-00004-BHH-MHC
)	
Plaintiff,)	MOTION TO DISMISS AND
)	MEMORANDUM IN SUPPORT
Versus)	
)	
Blue Cross Blue Shield of South Carolina, Inc.,)	
John Doe #1, John Doe #2, through John Doe)	
#X,)	
)	
Defendants.)	

The Defendant Blue Cross and Blue Shield of South Carolina (incorrectly identified as Blue Cross Blue Shield of South Carolina, Inc.) (hereinafter “BCBSSC”), hereby moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an Order dismissing the Plaintiff’s Complaint on the grounds that it fails to allege facts sufficient to state a cause of action. Pursuant to Local Civil Rules 7.04 and 7.05, a full explanation of the Motion is contained herein and no separate memorandum is submitted with this Motion.

I. BACKGROUND

Pro se Plaintiff, under the pen name C. Holmes, brings the instant lawsuit against BCBSSC and an unknown number of individuals, whose identity, like her own, she does not disclose but states that they “operate and manage the enterprise,” of which BCBSSC is an “instrumentality.” (See ECF Entry No. 1 at 3). The entire Complaint boils down to essentially two allegations: first, that the Defendants committed “multiple instances of mail fraud, wire fraud, financial institution fraud, and/or wrongdoing, including but not limited to, false/misleading communications to established and prospective patients;” and, second, that the Defendants “. . . withh[eld] . . . monies due and owing to plaintiff for services rendered in good faith in compliance with the usual and

customary practices as established over many years without notice or just cause.” (*Id.*)¹ Based only on these factual allegations, Plaintiff asserts the following claims against all Defendants: (1) violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act; (2) gross negligence; (3) violation of the South Carolina Unfair Trade Practices Act and other unspecified state laws; and (4) unjust enrichment and other unspecified equitable claims. (*Id.* at 3). In addition, Plaintiff seeks a declaration from this Court that the Affordable Care Act (ACA) is unconstitutional. (See id. at 3-4). As shown below, Plaintiff’s Complaint fails state facts sufficient to constitute a cause of action, and her Complaint should be dismissed accordingly.

II. STANDARD OF REVIEW

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. “A court decides whether [the pleading] standard is met by separating the legal conclusion from the factual allegations . . . and then determining whether those allegations allow the court to reasonably infer” that the plaintiff is entitled to the legal remedy sought. A Society Without A Name v. Virginia, 655 F.3d 342, 346 (4th Cir. 2011). The court is “not required to accept as true the legal conclusions set forth in a plaintiff’s complaint.” Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). Indeed, “[t]he presence of a few conclusory legal terms does not insulate a complaint from

¹ As a derivation of the same allegation, Plaintiff asserts that “Defendants wrongfully converted monies due and owing to the plaintiff for services rendered in good faith pursuant to the usual and customary long-standing pattern and practices over many years without prior notice and without just cause.” (ECF Entry No. 1 at 4).

dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support [the legal conclusion].” Young v. City of Mount Ranier, 238 F.3d 567, 577 (4th Cir. 2001).

When fraud or mistake is alleged, a heightened pleading standard applies. See FED. R. CIV. P. 9(b). Such allegations must be pled “with particularity.” Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citing FED. R. CIV. P. 9(b)). To meet this standard, a plaintiff must “state the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” Id. (and cases cited therein). The rationale for Rule 9(b) is multifold:

First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of. . . . Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Id. (citing United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc., 755 F. Supp. 1055, 1056-57 (S.D. Ga. 1990)). Failure to meet the pleading standard of Rule 9(b) serves as grounds for dismissal under Rule 12(b)(6). See Ross v. Hilton Head Island Dev. Co., Civ. A. No. 9:15-2446-SB, 2016 U.S. Dist. LEXIS 197437, at *12 (D.S.C. Mar. 29, 2016).

III. LAW AND ANALYSIS

A. Alleged RICO Violation

The Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1961 *et seq.*, “does not cover all instances of wrongdoing. Rather it is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity.” US Airline Pilots Ass’n v. Awappa, LLC, 615 F.3d 312, 317 (4th Cir. 2010) (internal quotation marks and citations omitted). Accordingly, the United States Court of Appeals for the Fourth Circuit has warned that

caution must be exercised “to ensure that ‘RICO’s extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damage suits are not brought against isolated offenders for their harassment and settlement value; and that the multiple state and federal laws bearing on transactions . . . are not eclipsed or preempted.’” Id. Under the RICO Act, civil liability may be imposed on defendants “who engage in a ‘pattern of racketeering activity.’” GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 548 (4th Cir. 2001)).

1. Plaintiff Lacks Standing to Assert a Civil RICO Claim as She Fails to Allege a Valid RICO Injury by Reason of a RICO Violation

Section 1964(c) states that “any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee. 18 U.S.C. 1964(c) (emphasis added). This causation requirement is viewed as one of standing. See Brandenburg v. Seidel, 859 F.2d 1179, 1187 (4th Cir. 1988), overruled on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996). The Supreme Court of the United States has warned courts not to take an expansive view of proximate cause in civil RICO cases, explaining “a plaintiff who complain[s] of harm flowing merely from misfortunes visited upon a third person by the defendant’s acts [is] generally said to stand at too remote a distance to recover.” Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268-69 (1992). “[A] valid RICO injury must flow from the predicate acts . . . ,” Sadighi v. Daghigfekr, 36 F. Supp. 2d 279, 292 (D.S.C. 1999).

In Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258 (1992), the Supreme Court applied a common law proximate cause test to determine standing. There, a fraudulent scheme injured a securities firm and its clients who purchased artificially inflated securities. Id. at 262-64. The Securities Investor Protection Corp. (“SIPC”) became a receiver and advanced money to protect

the clients. Id. at 262. Through subrogation, SIPC then sued under RICO, but not on the behalf of the customers who had paid too much for the securities. Id. at 270. Rather, it sought to sue on behalf of customers who had been injured when the firm failed and could not meet its obligations. Id. The Court held that SIPC did not have standing to assert RICO claims. Id. at 276. It concluded that those who were directly injured, *i.e.*, the securities firm and the client, were the ones to sue; SIPC's injury was too attenuated, because it arose out of the firm's intervening insolvency. Id. at 271.

In this case, Plaintiff predicates a civil RICO claim, in part, on mail and wire fraud, based on an allegation that the Defendants made false or misleading communications to established and prospective patients. Similar to the indirect injuries of the receiver in Holmes, any injury to Plaintiff injury would be too attenuated from patient communications to bestow standing upon her. The other activity alleged by Plaintiff as predicate acts offer her little solace. As discussed infra, Plaintiff may not predicate a civil RICO claim on bank fraud because she is not a financial institution. She also cannot assert general wrongdoing as a predicate act because it is not a recognized form of racketeering activity under RICO. Therefore, Plaintiff fails to allege sufficient facts showing that she sustained a valid RICO injury by reason of a predicate act. She does not have standing to bring a civil RICO claim, as a result.

2. Plaintiff Failed to State Facts Sufficient to Constitute a Civil RICO Cause of Action under the Pleading Standards of the Federal Rules of Civil Procedure

Plaintiff's Complaint fails to set forth the required elements of a RICO cause of action with the specificity required to plead a fraud claim under Rule 9(b) of the Federal Rules of Civil Procedure. In conclusory fashion, Plaintiff contends that BCBSSC and unidentified John Doe defendants, in a number to be determined,

[have] participated in an on-going pattern of racketeering activity . . . [that] consists of at least two acts of racketeering committed within 10 years of each other, including but not limited to, multiple instances of racketeering committed within 10 years of each other, including but not limited to, multiple instances of mail fraud, wire fraud, financial institution fraud, and/or wrongdoing, including but not limited to false/misleading communications to established and prospective patient as well as withhold monies due and owing to plaintiff for services rendered in good faith in compliance with the usual and customary practices as established over many years without notice or just cause.

(ECF Entry No. 1 at 3). In her Complaint, Plaintiff proceeds to recite legal conclusion, without factual support, that appear to mimic a cause of action under section 1962(c), which makes it unlawful:

for any person employed or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

To state a civil RICO claim under section 1962(c), a plaintiff must allege: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering.” Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). In addition, the plaintiff must plead proximate cause, discussed supra, as well as a RICO pattern consisting of “two or more predicate acts of racketeering [that] must have been committed [by a defendant] within a ten year period.” ePlus Tech., Inc. v. Aboud, 313 F.3d 166, 181 (4th Cir. 2002) (citing 18 U.S.C. § 1961(5)). Financial institution fraud (also known as bank fraud), mail fraud, and wire fraud are considered “racketeering activity.” See id. (citing 18 U.S.C. 1961(1)). The heightened Rule 9(b) pleading standard, which requires particularity, applies to predicate acts of fraud alleged in a civil RICO case. See, e.g., Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir. 1989).

To predicate a RICO claim on mail or wire fraud, a plaintiff must show the following: (1) a scheme disclosing an intent to defraud, and (2) the use of the mails or interstate wires in furtherance of the scheme.” Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 336 (4th Cir. 1996);

see also Morley v. Cohen, 888 F.2d 1006, 1009-11 (4th Cir. 1989) (discussing mail and wire fraud as predicate acts)). As for financial institution fraud as a predicate act, a plaintiff must allege a scheme disclosing an intent “to defraud a financial institution” or “to obtain moneys . . . or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises.” See 18 U.S.C. 1344. Importantly, only financial institutions may claim bank fraud as a predicate act in a civil RICO action. See Wilson v. Chickering, No. 0:15-4166-TMC-PJG, 2015 U.S. Dist. LEXIS 176047, at *11 (D.S.C. Dec. 2, 2015), attached as Exhibit 1; Yesko v. Fell, C/A No. ELH-13-3927, 2014 U.S. Dist. LEXIS 123768, 2014 WL 4406849, at *10-11 (D. Md. Sept. 5, 2014) (collecting cases)), attached as Exhibit 2.

To be liable for participating in or conducting the affairs of an “enterprise,” a defendant must have “participated in the operation or management of the enterprise itself.” Reves v. Ernst & Young, 507 U.S. 170, 183 (1993). A plaintiff must, therefore, show that the defendant “conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just [its] own affairs.” Id. at 185. While RICO defines the term “person” to include corporations, see 18 U.S.C. 1961(3), it is black letter law that the defendant “person” and the “enterprise” must be legally distinct entities. See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001) (“We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’ and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”). In other words, a RICO defendant “person” cannot also be the RICO enterprise. See id.

Here, in conclusory fashion, Plaintiff alleges the existence of a RICO enterprise operated and managed by the Defendants. As for the only defendant identified, Plaintiff asserts that

BCBSSC is an instrument of racketeering activity. She offers no other factual details and fails to allege that BCBSSC and the enterprise are distinct entities. As such, Plaintiff fails to state a claim upon which relief can be granted.

Furthermore, because Plaintiff's civil RICO claim is predicated on alleged fraud, the particularity requirement of Rule 9(b) applies. See, e.g., Bailey v. Atl. Auto. Corp., 992 F. Supp. 2d 560, 584 (D. Md. 2014) (explaining that a "plaintiff must plead circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with sufficient specificity pursuant to Fed.R.Civ.P. 9(b).") (citations and quotation marks omitted). This heightened pleading standard requires disclosure of the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he or she obtained thereby. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999).

In this case, Plaintiff does not meet the heightened pleading standard of Rule 9(b). To show a pattern of racketeering activity, Plaintiff asserts the fraud-based predicate acts of mail fraud, wire fraud, and bank fraud. She offers no supporting allegations, however, other than a vague reference to false or misleading communications made to patients. She does not disclose the time, place, or contents of any representation or provide facts indicating the truth or falsity of the same. Nor does she identify the person who is alleged to have made representation or disclose what he or she obtained thereby. Plaintiff similarly fails to tie the allegedly fraudulent communications to any injury to her business or property. Instead, she claims the Defendants have withheld payment to her for services rendered, which has no apparent connection to mail fraud, bank fraud, or wire fraud. Accordingly, for the foregoing reasons, Plaintiff has failed to state civil RICO claim upon which relief can be granted. Her civil RICO claim must be dismissed, accordingly.

B. As to Plaintiff's Negligence-Based Tort Claim

Plaintiff purports to bring a tort claim for negligence against the Defendants. In support thereof, she alleges, “Defendants’ wrongdoing is grossly negligence with willful, wanton, and/or reckless disregard for the plaintiff, the plaintiff’s interests, and/or the plaintiff’s rights.” (ECF Entry No. 1 at 3). Offering no factual detail in her Complaint to support a negligence claim, or any other claim for that matter, this claim cannot withstand a Rule 12(b)(6) challenge under Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Rather than providing factual detail, she merely sets forth legal conclusions that this Court is not required to accept as true. Ultimately, without supporting facts, the Complaint does not reveal the existence of a duty owed by BCBSSC to Plaintiff, a breach of that duty, causation, or damages. Accordingly, Plaintiff has failed to state a plausible claim for relief based in negligence, whether gross or ordinary.

C. As to the alleged UTPA Violation

The South Carolina Unfair Trade Practice Act (SCUTPA) declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . .” S.C. Code § 39-5-20(a). To bring an action under SCUTPA, a plaintiff must prove: “(1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant has an adverse impact on the public interest.” Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir. 1998). Under SCUTPA, only

person[s] who suffer an ascertainable loss of money or property, real or personal, as a result of the use of employment by another person of an unfair or deceptive method, act, or practice declared unlawful [by the Act] may bring an action individually, but not in a representative capacity, to recover actual damages.

S.C. Code § 39-5-140(a). Furthermore, the Act is inapplicable to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina state law.” State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539 (1980).

In this case, Plaintiff asserts that “Defendant’s wrongdoing is a violation of law, including but not limited to S.C. Code § 39-5-10 *et seq.*, Unfair Trade Practices Act.” (ECF Entry No. 1 at 3). In support of her claim, Plaintiff alleges, “Defendants’ wrongdoing adversely affects the public interest, including but not limited to, wrongful issuance and administration of healthplan benefits, violation of statutory mandates, and unfair, deceptive acts and misrepresentations regarding established and/or prospective plaintiffs. Defendant’s wrongdoing is capable of repetition and capable of evading judicial oversight.” (Id. at 3).

As is true for each claim, Plaintiff fails to plead sufficient factual matter to state a claim for relief under SCUPTA that is plausible on its face. Particularly once the legal conclusions are set aside, the Complaint is essentially silent in terms of factual support. Other than the allegations of wrongful issuance and administration of healthplan benefits, Plaintiff does not allege any conduct by BCBSSC that a court could reasonably ascertain to be an unfair or deceptive trade practice or act. Yet, Plaintiff, who purports to be a physician, does not allege any facts revealing that she suffered an ascertainable loss of money or property as a result the issuance or administration of healthplan benefits by BCBSSC. And, as the Act makes clear, she may not bring a SCUPTA claim to recover for losses caused to one other than herself. Finally, to the extent Plaintiff’s allegations involve health insurance plans, any conduct of BCBSSC is covered by the regulatory and statutory exemption of SCUPTA. For these reasons, Plaintiff has failed to state a claim upon which relief can be granted for a violation by BCBSSC of SCUTPA.

D. As to Equitable Relief

In what amounts to a “catch all” claim, Plaintiff alleges that “Defendants’ wrongdoing is actionable as an equitable cause of action, including but not limited to, unjust enrichment and/or other equitable claims.” (ECF Entry No. 4). In support thereof, Plaintiff repackages an earlier allegation, that being, “Defendants wrongfully converted monies due and owing to the plaintiff for services rendered to the plaintiff for services rendered in good faith pursuant to the usual and customary long-standing patter and practices over many years without prior notice and without just cause.” (*Id.*). Plaintiff concludes by citing a laundry list of equitable remedies that she seeks without factual support, including: “unjust enrichment, equitable estoppel, quantum meruit (sic), unclean hands, and/or other equitable claims.” (*Id.*).

As a threshold matter, Plaintiff’s pleading deficiencies continue with respect to her equitable claims. Once the legal conclusions are separated from the factual allegations, there is little left to Plaintiff’s Complaint. Those morsels of factual allegations that can be found are wholly inadequate to allow a court to reasonably infer that Plaintiff is entitled to an equitable remedy. Furthermore, as a matter of law, one may not pursue an equitable claim when there is an adequate legal remedy. See, e.g., Catholic Society of Religious & Literary Educ. v. Madison Cnty., 74 F.2d 848, 850 (4th Cir. 1935) (“[T]he fundamental rule in equity in the federal courts is that a suit will not lie when there is an adequate remedy at law”). In this case, if Plaintiff were able to prove that BCBSSC was legally obligated to pay her for services rendered, and that it failed to do so, then Plaintiff would have an adequate remedy at law, i.e., a breach of contract claim. Therefore, on account of the pleading deficiencies and as a matter of law, Plaintiff has failed to allege a claim for equitable relief that is plausible on its face.

E. As to Declaratory Relief

Plaintiff seeks a declaration from this Court “that the Affordable Care Act (hereafter ACA) is unconstitutional on its face and as applied herein.” (ECF Entry No. 1 at 3). She does not explain how the ACA has been “applied herein.” But, she does allege that “[a]nother District Court and Court of Appeals have ruled that the ACA is unconstitutional,” and that “[t]he Department of Justice has taken the position that the ACA is unconstitutional.”

Pursuant to the Declaratory Judgment Act, a court of the United States, “in a case of actual controversy within its jurisdiction . . . may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). The Declaratory Judgment Act, according to the Supreme Court of the United States, is an “enabling Act, which confers discretion on the courts rather than an absolute right upon the litigant.” Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (internal quotation marks omitted).

Declaratory judgments “define the legal rights and obligations of the parties in the anticipation of some future conduct.” Johnson v. McCuskey, 72 F. App'x 475, 477 (7th Cir. 2003). Section 2201(a) of the Declaratory Judgment Act makes clear that a court’s authority to afford declaratory relief arises “[i]n a case of actual controversy within its jurisdiction, . . . upon the filing of an appropriate pleading.” 28 U.S.C. § 2201(a). Therefore,

under the facts alleged [in a complaint], there must be a substantial continuing controversy between parties having adverse legal interests. The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury. The remote possibility that a future injury may happen is not sufficient to satisfy the ‘actual controversy’ requirement for declaratory judgments.

Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985) (citations omitted). “Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). “Gross overbreadth” is reason alone to dismiss a claim for declaratory judgment. See generally PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 128 (4th Cir. 2011) (“[The Fourth Circuit] will vacate an injunction if it . . . does not carefully address only the circumstances of the case.”); Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993) (“Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.”).

Here, an actual controversy does not exist between the parties. Rather, the lawsuit stems from Plaintiff’s contention that the Defendants owe her money for services rendered and have made false or misleading statements to patients. As BCBSSC has shown, the allegations do not present a real and immediate dispute between the parties capable of being resolved by the Court. Furthermore, even if Plaintiff could establish that BCBSSC violated her legal rights, the parties’ dispute would not be addressed by a declaration as to the constitutionality of the ACA. Therefore, to the extent the Court even has the authority to afford declaratory relief, which is denied, it should exercise its authority to decline Plaintiff’s invitation.

IV. CONCLUSION

WHEREFORE, the Defendant respectfully requests the Court enter an order dismissing with prejudice the Plaintiff’s Complaint for failure to plead sufficient factual matter to state a claim to relief that is plausible on its face.

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172 Meeting Street
Post Office Box 1508
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s/ James B. Hood

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*Attorneys for Defendant
Blue Cross and Blue Shield of South Carolina
(incorrectly identified as Blue Cross Blue Shield of
South Carolina, Inc.)*

August 19, 2020

Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C. Holmes,) C/A No. 2:20-cv-00004-BHH-MHC
)
 Plaintiff,) **CERTIFICATE OF SERVICE**
)
 Versus)
)
Blue Cross Blue Shield of South Carolina, Inc.,)
John Doe #1, John Doe #2, through John Doe)
#X,)
)
 Defendants.)

I, the undersigned of the Hood Law Firm, LLC, hereby certify that on **August 19, 2020**, I have served the *Pro Se* Plaintiff in this action with a copy of the pleading herein below via United States Mail, postage prepaid, at the following address:

PLEADING: MOTION TO DISMISS AND MEMORANDUM IN SUPPORT ON BEHALF OF DEFENDANT BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA (INCORRECTLY IDENTIFIED AS BLUE CROSS BLUE SHIELD OF SOUTH CAROLINA, INC.)

SERVED: C. Holmes, *Pro Se Plaintiff*
Post Office Box 187
Sullivan's Island, SC 29482-0187

s/ James B. Hood

James B. Hood (9130)
James W. Clement (12720)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

C. Holmes,)	
)	C/A No.: 2:20-cv-00004-BHH-MHC
Plaintiff,)	
)	
vs.)	<i>Roseboro</i> Order to Plaintiff
)	
Blue Cross Blue Shield of South Carolina,)	
Scott McCartha, Ms. Shipman, J. Doe # 1,)	
Through J. Doe # X,)	
)	
Defendants.)	
)	

One or more defendants filed a motion to dismiss (pursuant to Fed. R. Civ. P. 12) or a motion for summary judgment (pursuant to Fed. R. Civ. P. 56) asking the court to dismiss your case. Because you are not represented by counsel, this “*Roseboro Order*”¹ is issued to advise you of the dismissal/summary judgment procedures and the possible consequences if you fail to respond adequately to defendant’s motion. Please carefully review this information, including the attached excerpts of the Federal Rules of Civil Procedure regarding motions to dismiss and motions for summary judgment.

You have 31 days from the date of this Order to file any material in opposition to the motion that defendant filed. If you fail to respond adequately, the court may grant the defendant’s motion, which may end your case.

Explanation of Motions to Dismiss

Motions to dismiss can be filed pursuant to Fed. R. Civ. P. 12. Many motions to dismiss are filed under Fed. R. Civ. P. 12(b)(6), in which defendants usually argue that the law does not provide a right to relief for claims that a plaintiff makes in his complaint. Because motions to dismiss usually concern questions of law and not questions of fact, the court presumes as true the plausible facts of the complaint for the purpose of a motion to dismiss.

The court decides a motion to dismiss on the basis of the applicable law and the pleadings, meaning the complaint, defendant’s answer (if any), the exhibits attached to the complaint, documents that the complaint incorporates by reference (provided they are both undisputed and pertinent to the pleaded claims), and materials of which the court may take judicial notice. In some cases, the parties present materials outside of the pleadings, such as affidavits or declarations in support of or in opposition to the motion to dismiss. If the court, in its discretion, considers

¹The court enters this order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (requiring the court provide explanation of dismissal/summary judgment procedures to pro se litigants).

materials outside of the pleadings, the motion to dismiss is converted to a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(d).

Explanation of Motions for Summary Judgment

Motions for summary judgment filed by defendants pursuant to Fed. R. Civ. P. 56 argue that the plaintiff's claims are not supported by the specific facts of the case. For example, in a civil rights case brought under 42 U.S.C. § 1983, a defendant may argue in a motion for summary judgment that the facts in the plaintiff's case do not rise to the level of a constitutional violation that would entitle him to relief. Because motions for summary judgment concern both questions of law and questions of fact, if the court finds that there is not any genuine dispute as to any material fact on a claim, the court will determine which party is entitled to judgment under the law. The court decides a motion for summary judgment on the basis of the applicable law, the pleadings, discovery, affidavits, declarations, and any other properly-submitted evidence.

Your Response to the Defendant's Motion

Your filing in opposition to the defendant's motion should be captioned either as "Response to Motion to Dismiss" or "Response to Summary Judgment," as applicable, and should include the following: (1) an explanation of your version of the facts, if different from defendant's version of the facts; and (2) your legal argument regarding why the court should not grant the motion and end your case. Rule 56(c) requires that you support your version of all disputed facts with material such as depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Your failure to support facts in dispute with such material may result in the court granting the motion. Any affidavits or declarations you file in opposition to summary judgment must be based on personal knowledge, contain facts admissible in evidence, and be signed by a person who would be competent to testify on matters contained in the affidavit or declaration if called to testify about them at trial. The court will not consider affidavits, declarations, or exhibits that are unrelated to this case, nor will it consider affidavits or declarations that contain only conclusory statements or argument of facts or law. If you fail to dispute the defendant's version of the facts with proper support of your own version, the court may consider the defendant's facts as undisputed.

All affidavits, declarations, or other evidence you submit to the court must be made in good faith and the facts sworn to in the affidavit or affirmed in the declaration must be true. All affidavits and declarations submitted in this case are submitted under penalties of perjury or subornation of perjury. 18 U.S.C. §§ 1621 and 1622. If the court finds that a party has presented affidavits, declarations, or other evidence in bad faith or only to delay the action, the court may order sanctions, payment of fees, or hold that party in contempt of court.

IT IS SO ORDERED.

June 21, 2021
Charleston, South Carolina


Molly A. Cherry
United States Magistrate Judge

EXCERPTS OF FEDERAL RULES OF CIVIL PROCEDURE
Rule 12 and Rule 56 (effective December 1, 2010)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions, Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading. [OMITTED]

...

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

- (1) on its own; or
- (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

- (1) **Right to Join.** A motion under this rule may be joined with any other motion allowed by this rule.
- (2) **Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

- (1) **When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:
 - (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
 - (B) failing to either:
 - (i) make it by motion under this rule; or
 - (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.
- (2) **When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
 - (A) in any pleading allowed or ordered under Rule 7(a);
 - (B) by a motion under Rule 12(c); or
 - (C) at trial.
- (3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
- (i) **Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

- (a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

- (b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

- (1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
 - (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,

stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) **Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials in the record.

(4) **Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
- (4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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) CIVIL ACTION NO.: 2:20-4
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APPEAL OF
Plaintiff,) MAGISTRATE JUDGE ORDER
) TO DISTRICT COURT
) AND
) MOTION FOR
) *DE NOVO* DETERMINATION BY
) ARTICLE III JUDICIAL OFFICER
) AND
) MOTION TO HOLD ALL
) TIME LIMITS IN ABEYANCE
Blue Cross Blue Shield)
Of South Carolina, Inc.,)
John Doe #1, John Doe #2,)
through John Doe #X,)
Defendants.)
)

The plaintiff respectfully appeals the magistrate order filed August 20, 2020, to the District Court with abeyance request pending resolution. Without being disagreeable, there is disagreement. The plaintiff respectfully requests *de novo* determination by Article III Judicial Officer without Report & Recommendation (R&R). If denied, the plaintiff respectfully requests permission to appeal these matters of great public importance including but not limited to, denial of substantial rights, to the Fourth Circuit Court of Appeals.

. INTRODUCTION

In February 2019, the Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in 2019, what did we do to make sure we kept our democracy intact?" Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unremitting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our state and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both state and Federal constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch, government official, or magistrate shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review.

In the instant case, plaintiff timely requests the substantial right of *de novo* determination by an Article III Judicial Officer without Report & Recommendation

(R&R). There are examples of pro se hard copy filings subjected to a magistrate dispensing separate second class so-called justice, without consent, with impermissible delegation, without statutory authority, and/or without meaningful judicial review, gleefully and cavalierly used as a trap for the unwary pro se litigant. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. The acknowledged systemic institutional biases against minorities and/or pro se litigants threaten our democracy and feed the appearance of the proverbial “rigged” system. In the pro se setting, this issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and uncertain times. Judge J. Waties Waring, the renowned crafter of divine dissents lying in repose in Charleston, is turning over in his grave at the historically persistent lawlessness of the courthouse bearing his name.

I. Fax Transmission

As a threshold matter, plaintiff respectfully requests permission to fax at the previously used fax number 843.579.1402 (or other fax number) due to the indefinite duration of COVID-19 and the affiliated economic and other emergencies, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of court personnel. Currently, the clerk’s office is closed to the public. Timely filing via the drop box located outside the clerk’s office in another matter was not timely entered into the record to the plaintiff’s

extreme prejudice. As such, the drop box located outside the clerk's office has been less than reliable, which supports this request for permission to fax. For substantial justice affecting substantial rights, permission to fax with hard copy available upon request is respectfully requested.

II. Appeal for *De Novo* Determination by Article III Judicial Officer.

Significantly and materially, the differences between an Article III Judicial Officer and magistrate are evident, even to the casual observer. The Constitutional right to request Article III Judicial Officer without fear of retaliation is a substantial right akin to the right to a particular mode of trial. The plaintiff herein timely and respectfully submits motion for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R. The plaintiff hereby appeals to the District Court for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to a magistrate. Jurisdiction cannot be waived. 28 U.S.C. § 636. Further, there is no consent for referral to a magistrate and without consent, there is no jurisdiction for R&R. To the extent a litigant's right to an Article III judicial officer is thwarted/denied by impermissible delegation and/or unauthorized R&R, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster.

It is respectfully submitted that the framers of the Constitution intended litigants to be the beneficiaries of the substantial right to an Article III judicial officer. Conflict

with 28 U.S.C. § 636 is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. It is respectfully submitted that the substantial right to *de novo* disposition by an Article III judicial officer is not forfeited nor voluntarily and expressly waived but is hereby expressly reserved and not waived.

Wimmer v. Cook, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003).

Pursuant to 28 U.S.C. § 636, a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for *de novo* disposition by an Article III Judicial Officer is inconsistent with the Constitution and laws of the United States. “The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion.

O'Donoghue v. United States, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933).

A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)).

“*De novo* review of a magistrate judge's determinations by an Article III judge is not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980).” *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished).

Particularly in the pro se setting, this issue is of exceptional importance, it is capable of repetition, it is capable of evading judicial review, and incapable of adequate remedy on appeal.

In addition, the recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, “core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995).” *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017)). Moreover, the 9th Circuit has ruled that without the party’s consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). Accordingly, plaintiff timely submits there is no consent to and no jurisdiction for involvement by the magistrate including but not limited to, magistrate’s R&R. See *Coleman v. Labor & Indus. Review Comm’n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot “resolve the case finally” “unless all parties to the action have consented to the magistrate judge’s authority.” The Seventh Circuit remanded: A plaintiff’s consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)).

III. Magistrate's Order

For substantial justice affecting substantial rights and/or due to the indefinite duration of COVID-19 and the affiliated emergencies, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of court personnel, the plaintiff respectfully requests the magistrate's order dated August 20, 2020, be held in abeyance pending resolution of the matters herein.

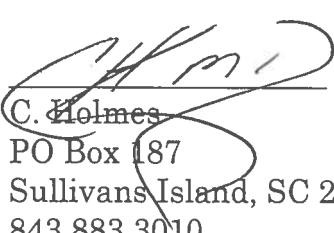
IV. Enlargement of Time

The Court has broad discretion under Rule 6(b)(1), Fed. R. Civ. P. *See Lonestar Steakhouse & Saloon v. Alpha of Va., Inc.*, 43 F.3rd 922, 929 (4th Cir. 1995). "[A]n application under Rule 6(b)(1) normally will be granted in the absence of bad faith or prejudice to the adverse party." *Mickalis Pawn Shop, LLC, v. Bloomberg*, 465 F.Supp.2d 543, 545 (D.S.C. 2006) (citations omitted). There is no bad faith and no legal prejudice to the other side. In consideration of the unprecedented circumstances surrounding this national emergency with unforeseen, substantial, and material restrictions, including but not limited to, adverse impacts, plaintiff respectfully requests enlargement of time pending resolution of the issues herein.

CONCLUSION

For substantial justice affecting substantial rights, the plaintiff respectfully requests this Court grant this appeal to the District Court of magistrate order, grant permission to fax, grant *de novo* determination by Article III Judicial Officer without R&R, and grant abeyance and enlargement of time pending resolution. In the alternative, permission is hereby requested to appeal these matters of great public importance including but not limited to, denial of substantial rights, to the United States Fourth Circuit Court of Appeals.

Respectfully submitted,



C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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) CIVIL ACTION NO.: 2:20-4
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APPEAL OF
Plaintiff,) MAGISTRATE JUDGE ORDER
) TO DISTRICT COURT
) AND
) MOTION FOR
) *DE NOVO* DETERMINATION BY
) ARTICLE III JUDICIAL OFFICER
) AND
) MOTION TO HOLD ALL
) TIME LIMITS IN ABEYANCE
Blue Cross Blue Shield)
Of South Carolina, Inc.,)
John Doe #1, John Doe #2,)
through John Doe #X,)
)
)
Defendants.)
)

The plaintiff respectfully appeals the magistrate order filed August 20, 2020, to the District Court with abeyance request pending resolution. Without being disagreeable, there is disagreement. The plaintiff respectfully requests *de novo* determination by Article III Judicial Officer without Report & Recommendation (R&R). If denied, the plaintiff respectfully requests permission to appeal these matters of great public importance including but not limited to, denial of substantial rights, to the Fourth Circuit Court of Appeals.

. INTRODUCTION

In February 2019, the Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in 2019, what did we do to make sure we kept our democracy intact?" Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unremitting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our state and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both state and Federal constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch, government official, or magistrate shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review.

In the instant case, plaintiff timely requests the substantial right of *de novo* determination by an Article III Judicial Officer without Report & Recommendation

(R&R). There are examples of pro se hard copy filings subjected to a magistrate dispensing separate second class so-called justice, without consent, with impermissible delegation, without statutory authority, and/or without meaningful judicial review, gleefully and cavalierly used as a trap for the unwary pro se litigant. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. The acknowledged systemic institutional biases against minorities and/or pro se litigants threaten our democracy and feed the appearance of the proverbial “rigged” system. In the pro se setting, this issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and uncertain times. Judge J. Waties Waring, the renowned crafter of divine dissents lying in repose in Charleston, is turning over in his grave at the historically persistent lawlessness of the courthouse bearing his name.

I. Fax Transmission

As a threshold matter, plaintiff respectfully requests permission to fax at the previously used fax number 843.579.1402 (or other fax number) due to the indefinite duration of COVID-19 and the affiliated economic and other emergencies, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of court personnel. Currently, the clerk’s office is closed to the public. Timely filing via the drop box located outside the clerk’s office in another matter was not timely entered into the record to the plaintiff’s

extreme prejudice. As such, the drop box located outside the clerk's office has been less than reliable, which supports this request for permission to fax. For substantial justice affecting substantial rights, permission to fax with hard copy available upon request is respectfully requested.

II. Appeal for *De Novo* Determination by Article III Judicial Officer.

Significantly and materially, the differences between an Article III Judicial Officer and magistrate are evident, even to the casual observer. The Constitutional right to request Article III Judicial Officer without fear of retaliation is a substantial right akin to the right to a particular mode of trial. The plaintiff herein timely and respectfully submits motion for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R. The plaintiff hereby appeals to the District Court for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to a magistrate. Jurisdiction cannot be waived. 28 U.S.C. § 636. Further, there is no consent for referral to a magistrate and without consent, there is no jurisdiction for R&R. To the extent a litigant's right to an Article III judicial officer is thwarted/denied by impermissible delegation and/or unauthorized R&R, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster.

It is respectfully submitted that the framers of the Constitution intended litigants to be the beneficiaries of the substantial right to an Article III judicial officer. Conflict

with 28 U.S.C. § 636 is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. It is respectfully submitted that the substantial right to *de novo* disposition by an Article III judicial officer is not forfeited nor voluntarily and expressly waived but is hereby expressly reserved and not waived.

Wimmer v. Cook, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003).

Pursuant to 28 U.S.C. § 636, a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for *de novo* disposition by an Article III Judicial Officer is inconsistent with the Constitution and laws of the United States. “The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion.

O'Donoghue v. United States, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933).

A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). “*De novo* review of a magistrate judge's determinations by an Article III judge is not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980).” *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished).

Particularly in the pro se setting, this issue is of exceptional importance, it is capable of repetition, it is capable of evading judicial review, and incapable of adequate remedy on appeal.

In addition, the recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, “core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995).” *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017)). Moreover, the 9th Circuit has ruled that without the party’s consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). Accordingly, plaintiff timely submits there is no consent to and no jurisdiction for involvement by the magistrate including but not limited to, magistrate’s R&R. See *Coleman v. Labor & Indus. Review Comm’n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot “resolve the case finally” “unless all parties to the action have consented to the magistrate judge’s authority.” The Seventh Circuit remanded: A plaintiff’s consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)).

III. Magistrate's Order

For substantial justice affecting substantial rights and/or due to the indefinite duration of COVID-19 and the affiliated emergencies, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of court personnel, the plaintiff respectfully requests the magistrate's order dated August 20, 2020, be held in abeyance pending resolution of the matters herein.

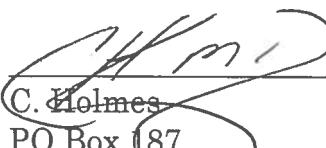
IV. Enlargement of Time

The Court has broad discretion under Rule 6(b)(1), Fed. R. Civ. P. *See Lonestar Steakhouse & Saloon v. Alpha of Va., Inc.*, 43 F.3rd 922, 929 (4th Cir. 1995). "[A]n application under Rule 6(b)(1) normally will be granted in the absence of bad faith or prejudice to the adverse party." *Mickalis Pawn Shop, LLC, v. Bloomberg*, 465 F.Supp.2d 543, 545 (D.S.C. 2006) (citations omitted). There is no bad faith and no legal prejudice to the other side. In consideration of the unprecedented circumstances surrounding this national emergency with unforeseen, substantial, and material restrictions, including but not limited to, adverse impacts, plaintiff respectfully requests enlargement of time pending resolution of the issues herein.

CONCLUSION

For substantial justice affecting substantial rights, the plaintiff respectfully requests this Court grant this appeal to the District Court of magistrate order, grant permission to fax, grant *de novo* determination by Article III Judicial Officer without R&R, and grant abeyance and enlargement of time pending resolution. In the alternative, permission is hereby requested to appeal these matters of great public importance including but not limited to, denial of substantial rights, to the United States Fourth Circuit Court of Appeals.

Respectfully submitted,



C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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CIVIL ACTION NO.: 2:20-4

C. Holmes,

Plaintiff,

v.

Blue Cross Blue Shield
Of South Carolina, Inc.,
John Doe #1, John Doe #2,
through John Doe #X,

Defendants.

APPEAL OF
MAGISTRATE JUDGE ORDER
TO DISTRICT COURT
WITH
REQUEST TO HOLD ALL
TIME LIMITS IN ABEYANCE;
IN THE ALTERNATIVE,
PRELIMINARY RESPONSE

The plaintiff respectfully appeals the magistrate order entered September 14, 2020, to the District Court with abeyance request pending resolution. Without being disagreeable, there is disagreement. Importantly, the plaintiff respectfully requests *de novo* determination by Article III Judicial Officer without Report & Recommendation (R&R) on dispositive motion to dismiss (mtd). If denied, the plaintiff respectfully requests permission to appeal with stay these matters of great public importance including but not limited to, denial of substantial rights to the United States Court of Appeals for the

Fourth Circuit. In the alternative, if this appeal to the district court is denied, including but not limited to, request for *de novo* determination by Article III Judicial Officer without R&R on dispositive motion, Preliminary Response in opposition to motion to dismiss (mtd) is timely submitted.

INTRODUCTION

In February 2019, the Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in 2019, what did we do to make sure we kept our democracy intact?" Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unremitting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our state and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both state and Federal constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch, government official, or magistrate shall have absolute authority over a

citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review.

In the instant case, plaintiff timely requests the substantial right of *de novo* determination by an Article III Judicial Officer without Report & Recommendation (R&R). There are examples of pro se hard copy filings subjected to a magistrate dispensing separate second class so-called justice, without consent, with impermissible delegation, without statutory authority, and/or without meaningful judicial review, gleefully and cavalierly used as a trap for the unwary pro se litigant. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. The acknowledged systemic institutional biases against minorities and/or pro se litigants threaten our democracy and feed the appearance of the proverbial "rigged" system. In the pro se setting, this issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and uncertain times. Judge J. Waties Waring, the renowned crafter of divine dissents lying in repose in Charleston, is turning over in his grave at the historically persistent lawlessness of the Four Corners of Law in the courthouse bearing his name.

I. Fax Transmission

As a threshold matter, plaintiff respectfully requests permission to fax at the previously provided fax number 843.579.1402 (or other fax number) due to the indefinite

duration of COVID-19 and the affiliated economic and other emergencies unfolding, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of court and other personnel. Currently, the clerk's office is closed to the public. Timely filing via the drop box located outside the clerk's office in another matter was not timely entered into the record to the plaintiff's extreme prejudice. As such, the drop box located outside the clerk's office has been less than reliable, which supports this request for permission to fax. Defendants' method of filing is not so limited or restricted to delayed delivery due to Covid-19 by the USPS and other carriers or to drop box filing with the risk of unexplained disappearance of timely filed documents. What more compelling emergency circumstances and good cause could there be to grant permission for facsimile transmission? For substantial justice affecting substantial rights, permission to fax during the emergency with hard copy available upon request is respectfully requested.

II. Lack of Jurisdiction

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The September 14, 2020, order on appeal to the District Court herein lacks jurisdiction. Specifically, that September 14, 2020, order addresses a litigant's appeal to the district court of a prior magistrate order. Respectfully, there is no jurisdiction for an appeal of a magistrate order to the district court to be decided by the magistrate who signed the order. Moreover, the definition of appeal requires meaningful independent judicial review, in this case by the district court and by a neutral decision-maker who is an Article III Judicial Officer

without R&R on dispositive motion. The following Fourth Circuit case outlines the principle from this oft-cited case that is well stated, sound, and universally accepted as logical and fair: "There is another way to look at the case, however: as one in which the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered improper--indeed is an express ground for recusal, see 28 U.S.C. Sec. 47--in modern American law for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, .890 F.2d 947 (7th Cir. 1989) (emphasis supplied). Accordingly, the efficacy and propriety of appeal of a magistrate order to the district court regarding a dispositive motion which is decided by that same magistrate without consent is in question, including but not limited to, it is outside the scope of the magistrate's statutory authority, it is inconsistent with the letter and spirit of appeal to the district court, it is inconsistent with the letter and spirit of the Constitution, statutory and case law, and/or jurisdiction is lacking.

Moreover, there is no consent for magistrate's Report & Recommendation (R&R) on the dispositive mtd, therefore, jurisdiction is lacking for R&R. Jurisdiction cannot be waived. Accordingly, *de novo* disposition by neutral decision-maker and Article III Judicial Officer without R&R is hereby respectfully requested. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Shiraz*, (4th Cir., filed August 13, 2019); *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995); *Brown v. Felsen*, 442 U.S. 127,131 (1979). See *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot

"resolve the case finally" "unless all parties to the action have consented to the magistrate judge's authority." The Seventh Circuit remanded: A plaintiff's consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)). Accordingly, without Constitutional and statutory authority and without consent, jurisdiction for the magistrate order entered September 14, 2020, is lacking.

III. Appeal for *De Novo* Determination by Article III Judicial Officer Without R&R on Dispositive Motion

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Assuming there is jurisdiction, which is denied, the propriety of a non-Article III Judicial Officer denying a party's request for the substantial right of *de novo* determination by Article III Judicial Officer without R&R is questioned. Significantly and materially, the differences between an Article III Judicial Officer and magistrate are evident, even to the casual observer. The Constitutional right to request *de novo* determination by Article III Judicial Officer on dispositive motion without R&R without fear of retaliation is a substantial right akin to the right to a particular mode of trial. The plaintiff herein timely and respectfully

submitted motion for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R on the dispositive motion which the magistrate unreasonably denied. The plaintiff hereby appeals to the District Court for the substantial right to the Constitutional protection of *de novo* disposition by an Article III Judicial Officer without R&R on a dispositive motion. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003).

There is no consent, much less express, voluntary consent to a magistrate, therefore, jurisdiction is lacking. Jurisdiction cannot be waived. 28 U.S.C. § 636. Further, to the extent the record contains purported consent, that consent is falsified. There is no consent for referral to a magistrate and without consent, there is no jurisdiction for R&R. To the extent a litigant's right to an Article III judicial officer is thwarted/denied by impermissible delegation and/or unauthorized R&R, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster. Magistrate R&R without consent jeopardizes/impairs litigants' substantial rights including but not limited to, full and fair meaningful appellate review. To the extent a substantial right, including meaningful appellate review, is or could be diminished for pro se litigants by magistrate R&R, and the record reflects that it is diminished, magistrate R&R without consent cannot pass Constitutional muster.

It is respectfully submitted that the framers of the Constitution intended litigants to be the beneficiaries of the substantial right to an Article III Judicial Officer without R&R. Overworked and underpaid district court judges may not be neutral decision-makers on requests for the substantial right of *de novo* determination by an Article III Judicial Officer without R&R. Conflict with, including but not limited to, 28 U.S.C. § 636

is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. It is respectfully submitted that the substantial right to *de novo* disposition by an Article III judicial officer on dispositive motion is not forfeited nor voluntarily and expressly waived but is hereby expressly reserved and not waived.

Wimmer v. Cook, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003).

Pursuant to 28 U.S.C. § 636, a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for *de novo* disposition by an Article III Judicial Officer without R&R on dispositive motion is inconsistent with the Constitution and laws of the United States. "The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O'Donoghue v. United States*, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). "De novo review of a magistrate judge's determinations by an Article III judge is not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980)." *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992)

(unpublished). Particularly in the pro se setting, this issue is of exceptional importance, it is capable of repetition, it is capable of evading judicial review, and incapable of adequate remedy on appeal.

In addition, the recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, “core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995).” *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017)). Moreover, the 9th Circuit has ruled that without the party’s consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). See *Coleman v. Labor & Indus. Review Comm’n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot “resolve the case finally” “unless all parties to the action have consented to the magistrate judge’s authority.” The Seventh Circuit remanded: A plaintiff’s consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)). Accordingly, plaintiff timely submits there is no consent to and no jurisdiction for magistrate R&R on dispositive motion.

IV. Magistrate's Order

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Plaintiff's appeal to the district court is grounded in the Constitutional guarantee and protection of the substantial right to *de novo* determination by Article III Judicial Officer without Report & Recommendation (R&R) on dispositive motion. Moreover, plaintiff has shown there is no consent to a magistrate, therefore, the magistrate order is contrary to law. Further, defendants fail to appreciate or address the fact that magistrate R&R without consent jeopardizes/impairs litigants' substantial rights including but not limited to, full and fair meaningful appellate review. To the extent a substantial right, including meaningful appellate review, is diminished for pro se litigants by magistrate R&R on dispositive motions, and the record reflects that it is diminished, magistrate R&R without consent cannot pass Constitutional muster. For substantial justice affecting substantial rights and in the interest of fairness, transparency, and judicial economy, resolution herein is pertinent to the magistrate's order which should be held in abeyance pending resolution. In addition, the plaintiff requests reversal of the magistrate order for R&R on dispositive motion due to, including but not limited to, lack of jurisdiction, lack of consent, and/or based on timely request for Constitutional guarantee and protection of the substantial right of *de novo* determination by Article III Judicial Officer without Report & Recommendation (R&R) on dispositive motion. Accordingly, reversal of the magistrate order is respectfully requested.

V. Abeyance

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. For substantial justice affecting substantial rights and/or due to the indefinite duration of COVID-19 and the affiliated emergencies, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of court and other personnel, the plaintiff respectfully requests the magistrate's order entered September 14, 2020, be held in abeyance pending resolution of the matters herein.

VI. Enlargement of Time

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The Court has broad discretion under Rule 6(b)(1), Fed. R. Civ. P. *See Lonestar Steakhouse & Saloon v. Alpha of Va., Inc.*, 43 F.3rd 922, 929 (4th Cir. 1995). "[A]n application under Rule 6(b)(1) normally will be granted in the absence of bad faith or prejudice to the adverse party." *Mickalis Pawn Shop, LLC, v. Bloomberg*, 465 F.Supp.2d 543, 545 (D.S.C. 2006) (citations omitted). There is no bad faith and no legal prejudice to the other side. In consideration of the unprecedented circumstances surrounding this national emergency with unforeseen, substantial, and material restrictions, including but not limited to, adverse impacts, plaintiff respectfully requests enlargement of time pending resolution of the issues

herein.

VII. Permission to Appeal

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. If appeal of the magistrate order including but not limited to, the substantial right to request *de novo* determination by Article III Judicial Officer without R&R on dispositive motion is denied, the plaintiff respectfully requests permission to appeal with stay to the United States Court of Appeals for the Fourth Circuit these matters of great public importance. To the extent a substantial right, including meaningful appellate review, is diminished for pro se litigants by magistrate's R&R on dispositive motions, and the record reflects that it is, magistrate R&R without consent cannot pass Constitutional muster. Particularly in the pro se setting, this issue is of exceptional importance, it is capable of repetition, it is capable of evading judicial review, and incapable of adequate remedy on appeal.

VIII. In the Alternative, Preliminary Response

INTRODUCTION

In the alternative, Preliminary Response is timely submitted in opposition to mtd. For substantial justice affecting substantial rights, plaintiff respectfully requests the motion to dismiss be denied. Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

A. Motion to Dismiss Should Be Denied

As set forth more fully herein, defendant corporation's motion to dismiss (mtd) is without merit and should be denied. As a threshold matter, defendant corporation's motion acknowledges notice of the claims which is sufficient to withstand mtd. The complaint specifies a valid injury proximately caused by defendants for defendants' financial gain resulting in harm to the business of plaintiff and similarly-situated small practitioners. In the instant case, the wrongdoing adversely affects the public interest including but not limited to, denial of patient access to continuity of care, denial of access to patients' established physician, and denial of access to patients' physician of choice and small practice of choice. Small practices are disproportionately affected by defendant corporation's and defendants' ongoing wrongdoing for financial gain without notice and without just cause in these uncertain times.

This matter is a dispute between private parties. Defendant corporation's mtd raises factual issues requiring discovery. To the extent defendant corporation's and defendants' wrongdoing amounts to the proverbial "knee-capping" of small practices for defendants' financial gain, and plaintiff asserts a jury could and would find it is, the allegations of an ongoing pattern and practice by defendant corporation and defendants of misappropriation of property and professional fees which injures small practitioners disproportionately including the plaintiff is a matter of survival for small practitioners and the allegations are sufficient to deny summary dismissal. Equitable claims including but not limited to, unjust enrichment, failure to correct wrongdoing despite notice, and failure to make amends as promised are sufficient to defeat summary dismissal.

Alternate theories of recovery are allowed. Rule 8(a), Fed. R. Civ. P. Defendant corporation's mtd raises factual issues and confirms the need for discovery, which is hereby requested. Accordingly, mtd should be denied. See *Bell Atlantic Corp. v Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

B. Standing Pursuant to 18 U.S.C. 1964(c)

Plaintiff has standing to sue pursuant to 18 U.S.C. 1964(c). Specifically, defendant corporation's and defendants' pattern and practice of willfull, wrongful withholding despite notice of monies due and owing to small providers including the plaintiff, without notice and without just cause is the direct and proximate cause of harm to the plaintiff and plaintiff's "business and property." 18 U.S.C. 1964(c). Accordingly, "a valid RICO injury" directly and proximately flows from defendant corporation's and defendants'

enterprise and acts. Plaintiff has standing. *Sadighi v. Daghighfeker*, 36 F. Supp. 2d 279, 292 (D.S.C. 1999). Moreover, the securities case of *Securities Investor Protection Corp.* (SIPC), 503 U.S. 258 (1992) is inapposite and provides no sanctuary for defendant corporation's and defendants' scheme. Defendant corporation and defendant engage in an ongoing pattern and practice of violation of 18 U.S.C. 1964(c) causing injuries to plaintiff's "business and property" and that of similarly-situated small practitioners.

Specifically, on defendant's page six (6) of the mtd, Defendant admits the complaint contains the following allegations:

- a) ongoing, unauthorized pattern and practice of misappropriation of property and monies due and owing for services rendered without notice and without just cause,
- b) that unauthorized pattern and practice foreseeably, directly, and proximately caused, and is causing, disproportionate economic loss and injury to plaintiff and plaintiff's business due to including but not limited to, loss of monies due, owing, and reasonably relied upon by plaintiff and similarly-situated small practitioners for ongoing, operating, and business expenses in the unfolding Covid-19 and affiliated economic emergencies,
- c) false/misleading communications via mail, wire, and internet directly, proximately, and negatively interfering with established and/or prospective patients causing 18 U.S.C. 1964(c) injuries to plaintiff's business,
- d) to the extent defendants may be requesting confidential, privileged information, that information will be provided with permission in a protected and timely manner with the need to be sealed and otherwise protected; defendants are requesting discovery and the mtd should be denied,

e) on defendant's page six (6), defendant admits the complaint alleges the following specific facts and elements:

1. conduct – A pattern and practice exists of multiple ongoing episodes of unauthorized misappropriation of property and monies due and owing to plaintiff for services rendered in good faith in compliance with the usual and customary practices as established over many years without notice or just cause;

2. of an enterprise – According to §1961(4), an enterprise includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity. It is noted that there is no definition of "enterprise." Instead, Congress provided a list of legal and non-legal entities that inclusively describe an enterprise. To the extent that individuals inside or outside such business organization subvert the legitimate purposes and engage in RICO violation(s), those individuals, and whatever structure they form to pursue their illegal acts, are an enterprise. Defendant corporation admits the complaint alleges this type of enterprise consisting of defendant corporation and defendants associated in fact;

3. through a pattern – On page six (6), defendant corporation admits the complaint alleges an ongoing pattern of multiple acts of racketeering within at least a three-year period;

4. of racketeering – Defendant corporation admits the complaint alleges racketeering including but not limited to, operating a business with illegally-derived income and/or using a business operation to commit illegal acts, including misappropriation of property and professional fees and causing injury to plaintiff's business.

Accordingly, defendant corporation's mtd admits the complaint contains allegations establishing the elements of a civil RICO claim.

Moreover, on page 6, defendant corporation admits the complaint alleges mail and wire fraud in the form of including but not limited to, false/misleading communications to established and/or prospective patients through the mail and over the internet causing valid RICO injuries to plaintiff's business. Plaintiff herein has shown a scheme to wrongfully withhold reimbursements for defendants' financial gain to the extreme prejudice of disproportionately affected small practitioners including the plaintiff.

Chisolm v. TranSouth Fin. Corp., 85 F.3d 331 (4th Cir. 1996). Exhibit 1 And Exhibit 2, referenced on defendant's page seven (7), were not attached to plaintiff's copy of the mtd and should be stricken or disregarded. Accordingly, summary dismissal should be denied.

C. Negligence

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. On page 6 of the mtd, defendant corporation admits the complaint contains allegations establishing the elements of negligence:

1. the duty of good faith established in the usual and customary manner for claim submission over many years,
2. breach of that duty by, including but not limited to, withholding monies due and owing to plaintiff for services rendered in good faith without notice and without just cause,

3. foreseeably, directly and proximately causing economic harm to the plaintiff and plaintiff's business, and
4. damages including but not limited to, loss of fees for medical services rendered in good faith to established and new patients which defendants' withheld for financial gain to the extreme prejudice of disproportionately affected small practitioners including the plaintiff without notice and without just cause.

Accordingly, defendant's motion should be denied.

D. SCUTPA

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. On page six (6), defendant corporation's mtd admits the complaint contains the following allegations of violations of SCUTPA, S.C. Code § 39-5-20(a):

- 1) defendant engaged in the unlawful trade practice of, including but not limited to, withholding reimbursement and/or misappropriation of property and fees for services rendered in good faith and submitted in compliance with the usual and customary practice over many years without notice and without just cause;
- 2) damages including but not limited to, loss of reimbursement for medical services provided to patients which is withheld for defendants' financial gain to the extreme prejudice of disproportionately affected small practitioners including the plaintiff without notice and without just cause. Defendants admit on page six (6) that the complaint contains allegations of withholding of monies due and owing to plaintiff for services

rendered. Defendant corporation's denial of reimbursement and/or false, misleading communications to established and prospective patients directly and proximately caused plaintiff damages, economic injury, loss of money, and injury to plaintiff's property and business;

3) adverse impact to the public interest includes but is not limited to, denial of patient access to continuity of care, denial of access to patients' established physician, denial of access to patients' physician of choice and small practice of choice and violation of Congressional intent as well as the letter and spirit of the laws designed to protect small practitioners including the plaintiff.

Accordingly, defendant's motion should be denied.

E. Equitable Relief.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Defendant corporation admits on page six (6) of the mtd that the complaint alleges an ongoing pattern and practice of multiple episodes of unauthorized misappropriation of property and monies due and owing to plaintiff for services rendered in good faith in compliance with the usual and customary practices as established over many years without notice or just cause for defendants' financial gain. As such, defendants have been unjustly enriched and "to the extent of that enrichment the law imputes to it, as an implied contract, the obligation to pay the plaintiff." *Hunter v. Hyder*, 236 S.C. 378, 394, 114 S.E.2d 493 (1960); Hubbard and Felix, *So. Car. Law of Torts, Fourth Edition* (2011), p. 753. Unjust enrichment is

based upon society's interest in preventing the injustice of a person's retaining a benefit for which no payment has been made to the provider. On defendant's page eleven (11), "quantum meruit (sic)"(sic) is an equitable remedy that provides restitution for unjust enrichment. Damages are awarded in an amount considered reasonable to compensate a person who has provided the services. Alternate theories of recovery are allowed. Rule 8(a), Fed. R. Civ. P.

Importantly, on page 11, defendant corporation recites and relies on *Catholic Society of Religious & Literary Educ. v. Madison Cnty.*, 74 F.2d 848, 850 (4th Cir. 1935), quoting, "(T)he fundamental rule in equity in the federal courts is that a suit will not lie when there is an adequate remedy at law." To the extent defendant corporation denies legal obligation to pay for services rendered, equitable claims provide remedy. Accordingly, defendant corporation's mtd should be denied.

F. Declaratory Relief

The letter and spirit of the ACA as well as Congressional intent mandate protections for small practices. Defendants wrongfully construe and/or apply the ACA to cause economic harm to small practices including the plaintiff and plaintiff's practice for defendants' financial gain. Defendants and defendant corporation operate an ongoing pattern and practice of, including but not limited to, withholding and/or misappropriation of property and monies due and owing to plaintiff and similarly-situated small practitioners for services rendered in good faith without notice or just cause for defendants' financial gain. To the extent defendants' scheme uses the ACA to, including

but not limited to, engage in an on-going pattern and practice of misappropriation of professional property and fees without notice or just cause for defendants' financial gain, the ACA cannot pass Constitutional muster. Accordingly, declaratory relief is respectfully requested.

G. Leave to Amend

Leave to amend a pleading "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). "[L]eave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." *Laber v. Harvey*, 438 F.3d 404, 426–27 (4th Cir.2006) (citations omitted). There is no legal prejudice, bad faith, or futility. Accordingly, leave to amend is respectfully requested.

H. Without Prejudice

To the extent defendant corporation's mtd is deemed sufficient, which is denied, summary dismissal should be without prejudice. "The principle underlying these cases is that a dismissal on a procedural ground is not a determination by the court that the plaintiff cannot maintain a cause of action; rather, it is a defect in practice, procedure, or form that may be corrected." *North American v. Boston Medical*, 906 A.2d 1042, 170 Md. App. 128 (Md. App. 2006). Accordingly, summary dismissal under these facts should be without prejudice.

CONCLUSION

For substantial justice affecting substantial rights and due to the indefinite duration of COVID-19 and the affiliated economic and other emergencies unfolding, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to the internet, and/or in consideration of the extraordinary and unprecedented emergency circumstances unfolding, the plaintiff respectfully requests this Court grant this appeal to the District Court of magistrate order entered September 14, 2020, and grant:

- a. permission to fax during the emergency with hard copy available upon request;
- b. *de novo* determination by Article III Judicial Officer without R&R on mtd;
- c. abeyance pending resolution;
- d. enlargement of time pending resolution;
- e. leave to amend;
- f. and, if denied, permission to appeal with stay;
- e. in the alternative, permission with stay is hereby requested to appeal to the United States Fourth Circuit Court of Appeals these matters of great public importance including but not limited to, denial of substantial rights which is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal.

Respectfully submitted,


C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorney of record for the defendant by regular first class mail postage pre-paid on this date at this address: Jamie Hood, 172 Meeting St., Charleston, SC 29401.

Dated 10/8/2020


C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 2:20-00004

C. Holmes,

Plaintiff,

v.

Blue Cross Blue Shield
Of South Carolina, Inc.,
John Doe #1, John Doe #2,
through John Doe #X,

Defendants.

RULE 59(e), FED. R. CIV. P., MOTION TO ALTER OR AMEND
INCLUDING PERMISSION TO APPEAL WITH STAY PENDING APPEAL OF THE
REQUEST FOR THE SUBSTANTIAL RIGHT OF DE NOVO DETERMINATION BY AN
ARTICLE III JUDICIAL OFFICER WITHOUT R&R ON DISPOSITIVE MATTERS

C. Holmes
PO Box 187
Sullivans Island, SC
29482-0187
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Plaintiff respectfully submits Rule 59(e), Fed. R. Civ. P., Motion to Alter or Amend the Order filed December 11, 2020, including permission to appeal with stay pending appeal of the request for the substantial right of de novo determination by Article III Judicial Officer without R&R (Report & Recommendation) on dispositive matters and other relief with abeyance pending resolution. As set forth more fully below, the opinion misapprehends or overlooks material fact and law and contains internal inconsistencies regarding key portions of the appeal to the District Court in ECF Numbers 21 and 28 which are incorporated in full by reference. Accordingly, reconsideration is respectfully requested.

Standard of Review

In *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396 (4th Cir., 1998), the Fourth Circuit affirmed the district court's reversal of the prior order on Rule 59(e), Fed. R. Civ. P., motion in that case which provides the following guidance:

Although Rule 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, we have previously recognized that there are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir.1997); *Hutchinson v. Staton*, 994 1076, 1081 (4th Cir.1993). Thus, the rule permits a court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of GMC*, 51 F3d 746, 749 (7th Cir.1995). From *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (emphasis supplied).

One or more of these and/or additional grounds support this motion.

Discussion

I. Permission to appeal with stay pending appeal of the request for the substantial right of de novo determination by Article III Judicial Officer without R&R (Report & Recommendation) on dispositive matters.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Plaintiff respectfully requests permission to appeal with stay pending appeal of the request for the substantial right of de novo determination by Article III Judicial Officer without R&R (Report & Recommendation) on dispositive matters. This issue is capable of repetition, it is capable of evading judicial review, and it is incapable of adequate remedy on appeal. Moreover, to the extent the rules of court could be used as a trap for the unwary, case law favors determination on the merits for the most vulnerable: the poor, the powerless, and those disproportionately affected in the pro se setting. Accordingly, permission is respectfully requested.

Without being disagreeable, the record reflects there is no consent to a magistrate or to Report & Recommendation (R&R) on dispositive matters. The record also reflects timely denial of consent. The propriety of a magistrate ruling on request for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters is challenged. Additionally, the order under reconsideration should be reversed due to, including but not limited to, lack of adequate explanation for meaningful appellate review.

As a threshold matter, the plaintiff has had no access to the record and to the extent the record appears to contain consent to a magistrate, that consent is falsified. Significantly and materially, the differences between an Article III Judicial Officer and a magistrate are evident, even to the casual observer. The Constitutional right to request Article III Judicial Officer without fear of retaliation is a

substantial right akin to the right to a particular mode of trial. The magistrate herein issued evasive, non-responsive filing to plaintiff's motion for the substantial right to the Constitutional protection of de novo determination by an Article III Judicial Officer without R&R on dispositive matters. Moreover, plaintiff challenges the propriety of the magistrate ruling on and/or denying the substantial right to the constitutional protection of de novo determination by an Article III Judicial Officer without R&R on dispositive matters. Plaintiff respectfully requests permission to appeal non-responsive, arbitrary, and/or capricious denial of that substantial right. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to a magistrate. Jurisdiction cannot be waived. 28 U.S.C. § 636(b)(3). As such, without consent, there is no jurisdiction for R&R on dispositive matters. To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or unauthorized R&R, the interpretation and/or application of the statute and/or local rule, which the magistrate cited, cannot pass constitutional muster.

The framers of the constitution intended litigants to be the beneficiaries of the substantial right to an Article III Judicial Officer. Conflict between 28 U.S.C. § 636(b)(1) and 28 U.S.C. § 636(b)(3) is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. The substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive matters is not forfeited nor voluntarily and expressly waived but is expressly reserved and not waived. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). It is respectfully submitted that overworked and underpaid district court judges subconsciously may not be neutral decision-makers on the request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters.

Pursuant to 28 U.S.C. § 636(b)(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely

express request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters is inconsistent with the Constitution and laws of the United States. “The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O'Donoghue v. United States*, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). “De novo review of a magistrate judge's determinations by an Article III judge is not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980).” *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished). Even before de novo review, the district court has stated that the outcome would be the same as the magistrate's with or without de novo review suggesting undue influence by magistrate R&R and/or predetermined outcome. Predetermined outcome and/or lack of adequate de novo review is corroborated by a pattern and practice of lack of adequate explanation for meaningful review. Predetermined outcome and/or lack of adequate de novo review is corroborated further by a pattern and practice of adopting R&R's citing little, if any, case law on the merits. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020). Plaintiff is prejudiced thereby and asserts prejudicial error because the outcome should and would be different with de novo determination by Article III Judicial Officer without R&R on dispositive matters. Adequate explanation for adequate record facilitates meaningful appellate review. The substantial right of de novo determination, as opposed to de novo review, by an Article III Judicial

Officer without magistrate R&R on dispositive matters is respectfully requested.

II. Overworked and underpaid district court judges subconsciously may not be neutral decision-makers on requests for the substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive matters.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Many of us agree, the workload for district court judges is burdensome and we sincerely appreciate the demands and the public service. To the extent a substantial right, including de novo determination by Article III Judicial Officer and/or meaningful appellate court review, is diminished for pro se litigants by R&R, and the record reflects that it is, there can be no jurisdiction without consent. To the extent pro se litigants are subjected to a second class, non-Article III, system of so-called justice without consent, separate is never equal. The dispositive factor is and should be: separate is never equal which is definitively decided by an abundant body of law. To the extent reasonable men and women should and would question the neutrality of the decision-maker under the circumstances, plaintiff respectfully requests permission to appeal with stay pending appeal of the request for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters.

III. The opinion misconstrues the abeyance request which is not indefinite and which expressly states abeyance request pending resolution of the substantial rights herein, which are incapable of vindication on appeal.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. It is respectfully submitted that the opinion misconstrues the express request for abeyance pending resolution. There is no indefinite abeyance

request. Denial of the substantial rights requested herein is incapable of vindication on appeal, therefore, abeyance pending resolution is respectfully requested.

IV. The opinion acknowledges plaintiff's motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters but the opinion fails to provide adequate explanation for meaningful appellate review which is hereby requested.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The opinion acknowledges plaintiff's motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters but the opinion fails to provide adequate explanation for meaningful appellate review, which is hereby requested. As set forth in the first item above, case law supports plaintiff's motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters. Further, the record reflects there is express denial of consent for magistrate R&R, therefore, there is no jurisdiction for magistrate R&R. The opinion misapprehends, overlooks, and/or fails to adequately address plaintiff's motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters. Accordingly, plaintiff respectfully requests reconsideration.

V. Reliance on a local rule is misplaced.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Reliance on a local rule to deny motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters is clear error. Pursuant to 28 U.S.C. § 636, a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. It is respectfully submitted the

denial of a litigant's timely express request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters is inconsistent with the Constitution and laws of the United States. Accordingly, the motion should be granted.

VI. To the extent the opinion interprets a local rule as preventing, prohibiting, or impairing the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, it clearly errs.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Pursuant to 28 U.S.C. § 636, a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. To the extent the opinion interprets a local rule as preventing, prohibiting, or impairing the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, that interpretation cannot pass constitutional muster. Because, including but not limited to, R&R diminishes the substantial right of full and fair meaningful appellate court review, there is no jurisdiction for magistrate R&R without consent. Accordingly, reconsideration is respectfully requested based on clear error.

VII. To the extent a substantial right, including meaningful appellate court review, is diminished for pro se litigants by magistrate R&R, and the record reflects that it is, magistrate R&R without consent on dispositive matters cannot pass constitutional muster.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. To the extent a substantial right, including meaningful appellate court review, is diminished for pro se litigants by R&R on dispositive matters, and the record

reflects that it is, magistrate R&R without consent on dispositive matters cannot pass constitutional muster. The record reflects there is no consent. Plaintiff's motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters should be granted.

It is well established that the Federal Rules of Appellate Procedure (FRAP) have long been interpreted to provide for panel review of decisions by a single judge for preservation of the integrity of the process and for the Court's self-preservation as well as other reasons. See Local Rule 27(e), FRAP. See *Griffin v. State*, 763 N.E.2d 450 (Ind.2002) (citing 5 Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). It is respectfully submitted that the Constitution provides for the substantial right of meaningful appellate review of the order of a single non-Article III Judicial Officer. The substantial right of meaningful appellate court review is diminished for pro se litigants by R&R on dispositive matters. The unauthorized magistrate R&R, essentially the order of a single non-Article III Judicial Officer, without consent on dispositive matters deprives and/or diminishes the substantial right of full and fair meaningful appellate review on the merits without consent. Accordingly, plaintiff's motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters should be granted.

VIII. Lack of jurisdiction is clear error and jurisdiction cannot be waived.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, “core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995).” *United States v. Shiraz*, (4th Cir., filed August 13, 2019), p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017)). Moreover, the 9th Circuit has ruled that without the party’s consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). Accordingly, plaintiff timely submits there is no consent to and no jurisdiction for magistrate’s R&R. See *Coleman v. Labor & Indus. Review Comm’n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot “resolve the case finally” “unless all parties to the action have consented to the magistrate judge’s authority.” The Seventh Circuit remanded: A plaintiff’s consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that **something as important as the choice** between a state court and a federal court, or **between an Article I and an Article III judge**, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)). To the extent a litigant’s right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or unauthorized, nonconsensual magistrate R&R on dispositive matters, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster. Magistrate R&R without consent jeopardizes/impairs litigants’ substantial rights

including but not limited to, full and fair meaningful judicial review. To the extent a substantial right, including meaningful judicial review, is diminished for pro se litigants by R&R on dispositive matters, and the record reflects that it is, magistrate R&R without consent cannot pass constitutional muster. Without Constitutional and/or statutory authority, the magistrate order lacks jurisdiction, it is null and void, and it should not in good faith be adopted. Jurisdiction cannot be waived. Accordingly, plaintiff timely submits there is no consent and therefore, no jurisdiction for magistrate R&R on dispositive matters and the substantial right of de novo determination, as opposed to de novo review, by an Article III Judicial Officer without magistrate R&R on dispositive matters is respectfully requested.

IX. The opinion overlooks or misapprehends change of circumstances supporting reconsideration.

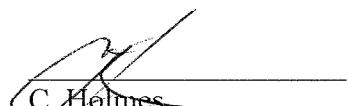
Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Specifically, the opinion overlooks or misapprehends change of circumstances, including but not limited to, those supporting reconsideration of denial of permission to use the dedicated emergency fax number 843.579.1402 in the extraordinary and unprecedented ever increasing public health and affiliated economic emergencies surrounding us and still unfolding. Change in circumstances includes, but is not limited to, Covid death in the family and Covid illness in family members, the indefinite duration of COVID-19 with surge upon surge and the affiliated economic and other emergencies, due to the at-risk age and occupational groups involved, in consideration of the fact that this office does not have access to email, and/or in consideration of staff, employees, and/or essential workers. Currently, the clerk's office is closed to the public. Timely filing via the drop box located outside the clerk's office apparently was not timely entered into the record to the plaintiff's extreme prejudice. It is respectfully submitted the Court overlooked and failed to address a change in the law and/or circumstances cited in support of the request which supports reconsideration

of permission to fax at the dedicated emergency district court fax number 843.579.1402 or other fax number upon timely notice with hard copy available on request. Of note, on December 21, 2020, a third amended order of the U.S. District Court for the District of South Carolina was filed providing emergency adjustments to court operations for an additional three months due to COVID-19. In consideration of the extraordinary and unprecedeted public health and affiliated economic emergencies and in consideration of staff, including court personnel, we submit this motion. Moreover, as the Court noted in another matter, the drop box in the division is demonstrably unreliable due to manifest documented “inadvertent oversight” with mislaid/misplaced filings. Citation available on request. Further, SCDHEC reports that Covid-19 cases continue to rise in anticipated surge upon surge and with recent positivity rate reported at over 27% and alarmingly increasing. It is respectfully submitted current change in circumstances and/or law warrant emergency use of the dedicated emergency fax number at 843.579.1402 which is respectfully requested. Denial of emergency use of the dedicated emergency fax number in these unprecedeted and extraordinary emergencies under these emergency circumstances is without adequate explanation for meaningful appellate review which is hereby requested.

Conclusion

Important public health issues including, but not limited to, wrongful denial of patient access to continuity of care, denial of patient access to their physician of choice, and/or strong-arming small practices are raised. For substantial justice affecting substantial rights, plaintiff respectfully requests reconsideration.

Respectfully submitted,

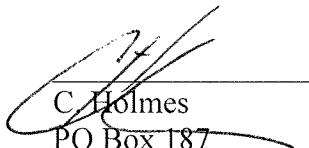


C. Holmes
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Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorney of record for the defendant by regular first class mail postage pre-paid on this date at this address: Jamie Hood, 172 Meeting St., Charleston, SC 29401.

Dated January 22, 2021



C. Holmes
PO Box 187
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2:20-cv-00004-BHH-MHC Holmes v. Blue Cross Blue Shield of South Carolina, Inc. et al / FW: Scan from Staples

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CIVIL ACTION NO.: 2:20-4

C. Holmes,

Plaintiff,

v.

Blue Cross Blue Shield
Of South Carolina, Scott
McCartha, Ms. Shipman,
J. Doe # 1, Through
J. Doe #X,

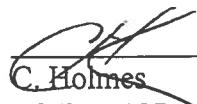
Defendants.

NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO RULE 41(a)(1)(A)(i), FED. R. CIV. P.,
AND MOTION TO HOLD ALL TIME LIMITS IN ABEYANCE PENDING RESOLUTION

Pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, the plaintiff(s)

C. Holmes and or their counsel(s), hereby give notice that the above-captioned action is voluntarily dismissed, without prejudice against the defendant(s) BCBS - SC, SCOTT MCCARTHA, MS. SHIPMAN, JUDGE #1 THROUGH J. DUE #X.

Date: 7/20/2021


C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

**General Docket
United States Court of Appeals for the Fourth Circuit**

Court of Appeals Docket #: 21-155 C. Holmes v. Blue Cross Blue Shield of South Carolina, Inc. Appeal From: United States District Court for the District of South Carolina at Charleston Fee Status: na	Docketed: 04/06/2021 Termed: 06/29/2021
Case Type Information: 1) Permission to Appeal-DCT 2) 1292(b) 3) null	
Originating Court Information: District: 0420-2 : 2:20-cv-00004-BHH-MHC Presiding Judge: Bruce H. Hendricks, U. S. District Court Judge Date Order/Judgment: 12/11/2020 03/25/2021	
Date Rec'd COA: 04/05/2021	

Prior Cases: None				
Current Cases:				
Related	Lead	Member	Start	End
	21-153	21-155	04/06/2021	
	21-153	21-181	05/17/2021	
	21-153	21-1470	04/27/2021	
	21-153	21-1712	06/25/2021	

C. HOLMES Petitioner	C. Holmes [NTC Pro Se] P. O. Box 187 Sullivans Island, SC 29482-0187
v.	
BLUE CROSS BLUE SHIELD OF SOUTH CAROLINA, INC. Respondent	James Whittington Clement Direct: 843-727-2224 Email: clement@wglfirm.com [COR NTC Retained] WALKER GRESSETTE & LINTON, LLC P. O. Box 22167 Charleston, SC 29413
MS. SHIPMAN Respondent	James B. Hood Direct: 843-577-4435 Email: james.hood@hoodlaw.com [COR NTC Retained] HOOD LAW FIRM 172 Meeting Street P. O. Box 1508 Charleston, SC 29402-0000
J. DOE #1 THROUGH J. DOE #X Respondent	
SCOTT MCCARTHA Respondent	

04/05/2021	<input type="checkbox"/> 2 21 pg, 535.43 KB	Petition for permission to appeal filed by C. Holmes. [21-155] CH [Entered: 04/06/2021 03:13 PM]
04/06/2021	<input type="checkbox"/> 1 1 pg, 56.18 KB	Permission to appeal case docketed. Originating case number: 2:20-cv-00004-BHH-MHC. Case manager: CHalupa. [21-155] CH [Entered: 04/06/2021 03:03 PM]
04/06/2021	<input type="checkbox"/> 3 6 pg, 145.53 KB	RULE 5 NOTICE issued to Blue Cross Blue Shield of South Carolina, Inc. requesting response to petition. Mailed to: C. Holmes. [21-155] CH [Entered: 04/06/2021 03:17 PM]
04/16/2021	<input type="checkbox"/> 4 1 pg, 113.7 KB	APPEARANCE OF COUNSEL by James B. Hood for Blue Cross Blue Shield of South Carolina, Inc.. [1000935635] [21-155] James Hood [Entered: 04/16/2021 04:10 PM]
04/16/2021	<input type="checkbox"/> 5 1 pg, 115.22 KB	APPEARANCE OF COUNSEL by James W. Clement for Blue Cross Blue Shield of South Carolina, Inc.. [1000935636] [21-155] James Clement [Entered: 04/16/2021 04:11 PM]
04/16/2021	<input type="checkbox"/> 6 2 pg, 6.48 KB	MOTION by Blue Cross Blue Shield of South Carolina, Inc. to extend filing time for Response to Petition until April 23, 2021.. Date and method of service: 04/16/2021 US mail. [1000935644] [21-155] James Clement [Entered: 04/16/2021 04:16 PM]
04/16/2021	<input type="checkbox"/> 7 1 pg, 53.34 KB	ORDER filed granting Motion to extend filing time [6] Number of days granted: 7. Response due 04/23/2021. Copies to all parties. Mailed to: Cynthia Holmes. [1000935652] [21-155] DL [Entered: 04/16/2021 04:27 PM]
04/19/2021	<input type="checkbox"/> 8 4 pg, 80.44 KB	DISCLOSURE STATEMENT by C. Holmes. Was any question on Disclosure Form answered yes? No [1000935984] [21-155] CH [Entered: 04/19/2021 10:27 AM]
04/19/2021	<input type="checkbox"/> 9 4 pg, 11.63 KB	RESPONSE/ANSWER by Blue Cross Blue Shield of South Carolina, Inc. to Motion for permission to appeal [2], notice requesting response [3]. [21-155] James Hood [Entered: 04/19/2021 03:23 PM]
04/20/2021	<input type="checkbox"/> 10 2 pg, 12.44 KB	DISCLOSURE STATEMENT by Blue Cross Blue Shield of South Carolina, Inc.. Was any question on Disclosure Form answered yes? No [1000936909] [21-155] James Clement [Entered: 04/20/2021 10:42 AM]
04/20/2021	<input type="checkbox"/> 11 1 pg, 3.67 KB	CERTIFICATE OF SERVICE/SERVICE LIST by Blue Cross Blue Shield of South Carolina, Inc.. Related documents: [10] disclosure statement [21-155] James Clement [Entered: 04/20/2021 10:43 AM]
04/26/2021	<input type="checkbox"/> 12 12 pg, 244.31 KB	REPLY by C. Holmes to response [9]. [21-155] CH [Entered: 04/27/2021 08:44 AM]
06/29/2021	<input type="checkbox"/> 13 2 pg, 110.33 KB	UNPUBLISHED PER CURIAM OPINION filed. Motion disposition in opinion--denying Motion for permission to appeal [2]. Originating case number: 2:20-cv-00004-BHH-MHC. Copies to all parties and the district court/agency. Mailed to: C. Holmes. [21-155]--[Edited 07/01/2021 by JJQ] CH [Entered: 06/29/2021 09:32 AM]
07/06/2021	<input type="checkbox"/> 14 13 pg, 360.26 KB	PETITION for rehearing and rehearing en banc by C. Holmes. [21-155] CH [Entered: 07/06/2021 10:41 AM]
10/04/2021	<input type="checkbox"/> 15 1 pg, 53.74 KB	COURT ORDER filed denying Motion for rehearing and rehearing en banc [14] Copies to all parties. Mailed to: C. Holmes. [1001034526] [21-155] DL [Entered: 10/04/2021 09:31 AM]
02/17/2022	<input type="checkbox"/> 16 1 pg, 53.78 KB	SUPREME COURT REMARK--petition for writ of certiorari filed. 02/08/2022. 21-7142. [1001113575] [21-155] EB [Entered: 02/18/2022 03:50 PM]

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

U.S.D.C. - S.C. C/A NO.: 2:20-CV-00004

C. Holmes,

Petitioner,

v.

Blue Cross Blue Shield
Of South Carolina, Inc., Scott
McCartha, Ms. Shipman,
J. Doe # 1 Through
J. Doe # X,

Respondent.

PETITION FOR PERMISSION TO APPEAL

C. Holmes
PO Box 187
Sullivans Island, SC
29482-0187
843.883.3010
For Petitioner

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PETITION FOR PERMISSION TO APPEAL

The petitioner respectfully requests permission to appeal from the order entered on December 11, 2020, and March 25, 2021, attached as Exhibit A, denying Rule 59(e), Fed. R. of Civ. P., Motion.

INTRODUCTION

Petitioner respectfully requests that this Court exercise its jurisdiction to grant review of the orders entered on December 11, 2020, and March 25, 2021. The December 11, 2021, opinion acknowledges plaintiff's motion for the substantial right of de novo determination by an Article III Judge without (R&R) on dispositive matters, but the opinion fails to provide adequate explanation for meaningful appellate review.

FACTUAL BACKGROUND

The factual background in a concise statement as it relates to the matter before the

Court for ruling is as follows. The undersigned timely requested the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters which impermissibly diminishes the substantial right of full and fair judicial review without consent. Like request, in another matter, was declined for lack of timeliness and to avoid duplicative efforts, however, in the instant case, the first filing in the record documents the timely request herein.

Further, the lower court's reliance on a Local Rule is misplaced. Moreover, the request for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters which impermissibly diminishes the substantial right of full and fair judicial review without consent (for ease of reference designated "compulsory R&R") is closely related to the right to a particular mode of trial, a well-established substantial right. It is noted that the right to a particular mode of trial, and the undersigned submits the right to decline compulsory R&R, should be asserted without fear of retaliation. To the extent these substantial rights could be waived, denial must be immediately appealed. The denial of substantial rights herein has evaded review, is capable of repetition, has been repeated, is incapable of vindication on appeal, and/or could determine the action and prevent a judgment from which a full and fair appeal might be taken without diminished appeal rights by compulsory R&R without consent. The undersigned timely requested, in the lower court, permission to appeal with stay pending appeal. The lower court failed to address and denied without comment the timely request for stay, thereby denying adequate explanation for meaningful review. The lower court's failure to exercise discretion under these facts is an abuse of discretion.

In what can only be described as impermissible delegation and/or judicial

overreach, the impropriety of a non-Article III judicial officer ruling on and/or denying motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters is challenged as well as its resulting application of the improper legal standard to that request. But for application of the improper legal standard, the result should and would be different in the plaintiff's favor. The undersigned respectfully submits timely request for permission to appeal denial of substantial rights.

QUESTION PRESENTED

Under these facts, is the lower court's reliance on a Local Rule misplaced, i.e., reliance on Local Rule 73.02(B)(2)(e) to deny timely request for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters which impermissibly diminishes the substantial right of full and fair judicial review without consent?

RELIEF SOUGHT

Relief sought is a determination that the district court's reliance on a Local Rule under these facts is misplaced. Specifically, the district court relied on Local Rule 73.02 (B)(2)(e) to deny timely request for the substantial right of de novo determination by

Article III Judicial Officer without R&R on dispositive matters which impermissibly diminishes the substantial right of full and fair judicial review without consent.

REASONS FOR APPEAL

For the reasons stated below, permission to appeal is proper under 28 U.S.C. § 1292(b), the collateral order doctrine, and/or discretionary review.

1. 28 U.S.C. § 1292(b)

Section 1292(b) applies to orders that involve (1) a controlling question of law, (2) about which there is substantial ground for difference of opinion, and (3) for which an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. 28 U.S.C. § 1292(b).

For the reasons stated herein, 28 U.S.C. § 1292(b) supports this petition.

- a. First, the order involves a controlling question of law. Specifically, reliance under these facts on a Local Rule is internally inconsistent. Under these facts, compulsory R&R without consent cannot pass constitutional muster and this Court should so find.

- b. Second, there is conflict with decisions of other courts and the U.S. Supreme Court which calls for review herein. Specifically, petitioner respectfully requests permission to appeal unauthorized, non-responsive, arbitrary, and/or capricious denial of substantial rights in the district court. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to compulsory R&R. Jurisdiction cannot be waived. 28 U.S.C. § 636(b)(3). Further, without consent, there is no jurisdiction for R&R on dispositive matters. To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or unauthorized R&R, the interpretation and/or application of the statute and/or the Local Rule cited, cannot pass constitutional muster.

The framers of the constitution intended litigants to be the beneficiaries of the substantial right to an Article III Judicial Officer. Conflict between 28 U.S.C. § 636(b)(1) and 28 U.S.C. § 636(b)(3) is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. The substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive matters is not forfeited nor voluntarily and expressly waived but is timely reserved and not waived. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). It is respectfully submitted that overworked and underpaid district court judges may not be neutral decision-makers in the request for de novo determination by an Article III

Judicial Officer without R&R on dispositive matters.

Pursuant to 28 U.S.C. § 636(b)(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters is inconsistent with the Constitution and laws of the United States. "The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O'Donoghue v. United States*, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). A decision without consent by a magistrate, a non- Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). "De novo review of a magistrate judge's determinations by an Article III judge is not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980)." *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished). Even before de novo review in a prior matter, the district court stated on the record that the outcome would be the same as the magistrate's with or without de novo review suggesting predetermined outcome, impermissible delegation,

undue influence, e.g., by magistrate, and/or other unconstitutional factors. Ambiguity regarding the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters which impermissibly diminishes the substantial right of full and fair judicial review without consent is reversible error. Likewise, application of the improper legal standard is reversible error. The legal standard on appeal of a magistrate order is different (less burdensome) than the proper standard under these facts: But for application of the improper legal standard, the outcome should and would be different in petitioner's favor.

Predetermined outcome and/or lack of de novo determination is corroborated by a pattern and practice of lack of adequate explanation for meaningful review. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020). Predetermined outcome and/or lack of de novo determination, such as, e.g., impermissible delegation, is corroborated further by a pattern and practice of adopting R&R's citing little, if any, case law on the merits. One example of prejudice, thereby, in a prior matter is the following: In that case, the magistrate admitted relying on extra-judicial sources over the internet to wrongfully dismiss meritorious claims and admitted impermissible ex parte communication from outside the record without granting the timely request for opportunity to respond to the unknown and unverified content. The propriety of adopting such is questioned. Citation available on request. Prejudicial error occurred because the outcome would be different but for the magistrate's admitted reliance on extra-judicial sources over the internet and his admitted reliance on impermissible ex parte communication outside the record without granting the timely request for meaningful opportunity to respond. Petitioner asserts prejudicial error herein. The magistrate has no

authority and no jurisdiction over a district court judge. But for the unauthorized and improper magistrate's order, the outcome should and would be different in the plaintiff's favor.

In addition, the recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, "core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995)." *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017)). Moreover, the 9th Circuit has ruled that without the party's consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.8d 994 (9th Cir. 2019). See *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot "resolve the case finally" "unless all parties to the action have consented to the magistrate judge's authority." The Seventh Circuit remanded: A plaintiff's consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)). To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or compulsory R&R without consent, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster.

Magistrate R&R without consent jeopardizes/impairs litigants' substantial rights including but not limited to, full and fair meaningful judicial review. To the extent a substantial right, including meaningful appellate review, is diminished for pro se litigants by R&R, and the record reflects that it is, magistrate R&R without consent cannot pass constitutional muster. Without Constitutional and/or statutory authority, the magistrate order lacks jurisdiction and, therefore, is null and void. The substantial right of de novo determination without R&R under these facts by an Article III Judicial Officer on dispositive matters is respectfully requested.

Accordingly, there is conflict with decisions of other courts and the U.S. Supreme Court which supports review. This issue is of exceptional importance, it is capable of being and has been repeated, it is capable of evading and has evaded judicial review, and it is incapable of vindication on appeal.

c. Third, an immediate appeal from the order should and would materially advance the ultimate termination of the litigation. Under these facts, the decision at issue involves "compulsory R&R" and/or denial of substantial rights which are closely related to the right to a particular mode of trial, a well-established substantial right. To the extent substantial rights could be waived and/or vindication on appeal is insufficient, the order must be immediately appealed which is hereby requested. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

2. Collateral Order Doctrine

Under the collateral order doctrine an appellate court will treat a prejudgment order as “final” if it conclusively resolves an important issue independent of the merits of the case, and the order is effectively unreviewable on appeal due to the irreversible effects of the decision. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). Many decisions may not qualify as “final.” The decision at issue functions as final because, including but not limited to, it involves “compulsory R&R” and/or denial of substantial rights which are closely related to the right to a particular mode of trial, a well-established substantial right. To the extent these substantial rights could be waived, must be immediately appealed, and/or are incapable of vindication on appeal, the order on appeal functions as final. *Id.; Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). Accordingly, permission to appeal is respectfully requested.

3. Discretionary Review

Even assuming the decision at issue is not a collateral order, and petitioner asserts that it is, there are substantial legal questions of great public importance which invite discretionary review. The instant case includes challenge to the constitutionality and/or propriety of a non-Article III judicial officer deciding and/or denying motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters which impermissibly diminishes the substantial right of full and fair

judicial review without consent. The magistrate's order lacks jurisdiction because a non-Article III judicial officer has no authority over an Article III judicial officer to grant the motion. Jurisdiction cannot be waived. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself ... of its own jurisdiction....'" (quoting *Mitchell v. Maurer*, 298 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934))); *Yates v. Terry*, 817 F.3d 877 (4th Cir. 2016). Accordingly, the magistrate order is null and void and the district court's order sustaining/affirming a nullity is reversible as a matter of law.

4. Stay

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. For the reasons that follow, petitioner respectfully submits the burden of proof (BOP) has been met on all four requirements for granting stay pending appeal.

a. Petitioner's Success on the Merits

The substantial rights at issue herein are granted by our cherished Constitution. The district court's reliance on Local Civil Rule 73.02(B)(e) is misplaced. Accordingly, success on the merits is predicted which supports stay pending appeal.

b. Irreparable Harm

The order is effectively unreviewable and incapable of vindication on appeal due to the irreversible effects of the decision. Under these facts, the denial of substantial rights is akin to the right to a particular mode of trial and must be immediately appealed or waived. Moreover, the order could determine the action and prevent a judgment from which full and fair meaningful appeal might be taken. Accordingly, irreparable harm supports stay pending appeal.

c. The Balance of Equities

The balance of equities favor the plaintiff physician regarding public health issues, social well-being, denial of patients' access to continuity of care, denial of patients' access to their physicians of choice, and the disproportionately burdensome effect on similarly-situated small providers including the plaintiff physician. Accordingly, the balance of equities supports stay pending appeal.

d. Public Interest is Served

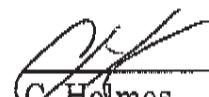
Overlapping with the balance of equities above, the public interest is served by promoting social well-being, by maintaining patients' access to continuity of care, by providing patients access to their physicians of choice, and by supporting public health measures and laws designed to facilitate small providers in these uncertain times who are unduly burdened. Accordingly, the public interest is served by stay pending appeal.

CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, petitioner respectfully requests that this Court grant permission to appeal with stay pending resolution of denial of substantial rights.

Respectfully submitted,

Dated 4/5/2021


C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.888.3010

Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorneys of record for the defendants by regular first class mail postage pre-paid on this date at this address: Jamie Hood, 172 Meeting St., Chas., SC 29401.

Dated 4/5/2021

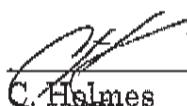

C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

EXHIBIT A

3/25/2021

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U.S. District Court

District of South Carolina

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Case Name: Holmes v. Blue Cross Blue Shield of South Carolina, Inc. et al

Case Number: 2:20-cv-00004-BHH-MHC

Filer:

Document Number: 72 (No document attached)

Docket Text:

TEXT ORDER denying [54] Motion for Reconsideration. *** After review, the Court finds no merit to Ms. Holmes' motion for reconsideration, which simply repeats the same arguments and seeks the same relief the Court previously denied. Nowhere in her motion does Plaintiff point to any intervening change in controlling law, any new facts or evidence not available previously, or any clear error of law or manifest injustice to warrant the extraordinary remedy of Rule 59(e) relief. Accordingly, Plaintiff's motion for reconsideration is denied. Entered at the direction of Honorable Bruce Howe Hendricks on 3/25/2021. (nsw)

2:20-cv-00004-BHH-MHC Notice has been electronically mailed to:

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No. 21-155

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

C. Holmes,

Appellant-Petitioner,

v.

Blue Cross Blue Shield
Of South Carolina, Scott
McCartha, Ms. Shipman,
J. Doe # 1 Through
J. Doe # X,

Appellee-Respondents.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

C. Holmes
PO Box 187
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Petitioner

INTRODUCTION

This petition is respectfully submitted regarding the panel decision which fails to address conflicts with decisions of the United States Supreme Court and authoritative decisions of other United States Courts of Appeals. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. Moreover, the panel decision involves one or more questions of exceptional importance which invite review and which are capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. Specifically, as set forth more fully below, one or more of the issues of exceptional importance involve denial of pro se litigants' substantial rights without consent on dispositive matters. It is likely these questions of exceptional importance could and would evade judicial review in the pro se setting which supports permission to appeal herein. The pro se petitioner is prejudiced thereby. But for permission to appeal, petitioner's substantial rights including but not limited to, judicial review will be impermissibly diminished by Report & Recommendation (R&R) without consent on dispositive matters. Moreover, the overworked and underpaid district court judge may not be a neutral decision-maker in the request for the substantial right of de novo determination by Article III Judicial Officer without Report & Recommendation (R&R) on dispositive matters. It is fair to say most pro se litigants on the civil side would have little or no access to well-trained attorneys which supports appeal herein. Accordingly, good grounds support this petition.

Per request, it is respectfully submitted one or more of the following situations exist:

- 1) a change in the law occurred after submission of the case;
- 2) the case involves one or more questions of exceptional importance;
- 3) a material factual or legal matter was overlooked; or
- 4) the opinion conflicts with a decision of the U.S. Supreme Court, this Court, or another court of appeals, and the conflict was not addressed.

For the following reasons and for substantial justice affecting substantial rights, petitioner respectfully submits the unpublished opinion filed June 29, 2021, misapprehends or overlooks material fact and law supporting rehearing.

DISCUSSION

The unpublished June 29, 2021, opinion provides, "Because the district court did not certify the orders (*under 28 U.S.C. § 1292(b)*), we deny Holmes' petition for permission to appeal." (Emphasis supplied.) Specifically, the opinion is based on error of material fact because the petitioner did not petition solely under 28 U.S.C. § 1292(b). The petition is based on appealability under 28 U.S.C. § 1292(b), the collateral order doctrine, and/or discretionary review. Moreover, it is respectfully submitted that even under 28 U.S.C. § 1292(b), the order is appealable because certification by the district court is untenable, unreasonable, and/or futile when a basis for the appeal is that the overworked and underpaid district court judge is not a neutral decision-maker in the request for the substantial right of de novo determination by Article III Judicial Officer without Report

& Recommendation (R&R) on dispositive matters, for the substantial right of meaningful judicial review which is impermissibly diminished by R&R without consent on dispositive matters, and/or other questions of exceptional importance. In addition, the burden of proof (BOP) has been met on all four requirements for granting stay pending appeal. Accordingly, rehearing is respectfully requested.

Further, the unpublished opinion filed June 29, 2021, misapprehends the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), which recognizes the collateral order doctrine. The collateral order doctrine states an appellate court will treat a prejudgment order as essentially “final” if it conclusively resolves an important issue independent of the merits of the case, and the order is effectively unreviewable on appeal due to the irreversible effects of the decision. *Id.* Specifically, the unpublished opinion overlooks the material fact that the petitioner petitioned under the collateral order doctrine regarding the request for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, of meaningful judicial review which is impermissibly diminished by R&R without consent on dispositive matters, and/or other questions of exceptional importance. In addition, certain important questions involving substantial rights must be appealed immediately or be waived. Further, the unpublished opinion filed June 29, 2021, raises novel issues of great public importance which support discretionary review. Accordingly, the case of *Cohen, supra*, the collateral order doctrine, and/or discretionary review support appealability herein.

**I. The Substantial Right of
De Novo Determination by Article III Judicial Officer
Without R&R on Dispositive Matters**

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Without being disagreeable, the record reflects there is no consent to involvement by a magistrate or to Report & Recommendation (R&R) on dispositive matters. The record also reflects timely denial of consent. The propriety of a magistrate ruling on request for the substantial right to de novo determination by Article III Judicial Officer without R&R on dispositive matters is challenged. The orders on appeal should be reversed due to, including but not limited to, lack of adequate explanation for meaningful review.

As a threshold matter, the pro se petitioner has had no access to the Record on Appeal and to the extent the record appears to contain consent to a magistrate, that consent is falsified. Significantly and materially, the differences between an Article III Judicial Officer and a magistrate are evident, even to the casual observer. The Constitutional right to request Article III Judicial Officer without fear of retaliation is a substantial right akin to the right to a particular mode of trial. The magistrate herein issued evasive, non-responsive filing to petitioner's motion for the substantial right to the Constitutional protection of *de novo* determination by an Article III Judicial Officer without R&R on dispositive or essentially dispositive matters. Moreover, petitioner challenges the propriety and/or lack of jurisdiction of the magistrate ruling on and/or denying the substantial right to the Constitutional protection of *de novo* determination by an Article III Judicial Officer without R&R on dispositive matters. Further, it is

respectfully submitted that the magistrate has no authority or jurisdiction over the district court judge and the Local Rule cited does not authorize referrals to a magistrate on dispositive matters without consent. Moreover, by wrongful referral to a magistrate the outcome is predetermined and/or the improper legal standard is applied. Ambiguity as to the proper legal standard is prejudicial error and a denial of due process. Petitioner respectfully requests permission to appeal unauthorized, non-responsive, arbitrary, and/or capricious denial of substantial rights in the District Court by a magistrate and/or adoption of such. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to a magistrate. Jurisdiction cannot be waived. 28 U.S.C. § 636(b)(3). Further, without consent, there is no jurisdiction for R&R on dispositive matters. To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or unauthorized R&R, the interpretation and/or application of the statute and/or the Local Rule cited, cannot pass constitutional muster.

The framers of the constitution intended litigants to be the beneficiaries of the substantial right to an Article III Judicial Officer. Conflict between 28 U.S.C. § 636(b)(1) and 28 U.S.C. § 636(b)(3) is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. The substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive matters is not forfeited nor voluntarily and expressly waived but is expressly reserved and not waived. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). It is respectfully submitted that overworked and underpaid district court judges may not be neutral decision-makers in the request for de novo determination by an Article III

Judicial Officer without R&R on dispositive matters.

Pursuant to 28 U.S.C. § 636(b)(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters is inconsistent with the Constitution and laws of the United States. "The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O'Donoghue v. United States*, 289 U.S. 516, 531, 58 S.Ct. 740, 743, 77 L.Ed. 1356 (1938). A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover; Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 588 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). "De novo review of a magistrate judge's determinations by an Article III judge is not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980)." *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished). Even before de novo review in a prior unrelated matter, the district court stated on the record that the outcome would be the same as the magistrate's with or without de novo review suggesting the outcome is predetermined. Citation available on request. Predetermined outcome and/or lack of de novo

determination is corroborated by a pattern and practice of lack of adequate explanation for meaningful review herein. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020). Predetermined outcome and/or lack of de novo determination, such as, e.g., impermissible delegation, is corroborated further by a pattern and practice of adopting R&R's citing little, if any, case law on the merits. Petitioner was prejudiced thereby in a prior unrelated matter. In that case, a different magistrate admitted relying on extra-judicial sources over the internet to wrongfully dismiss meritorious claims and admitted impermissible ex parte communication outside the record without granting the timely request for opportunity to respond to the unknown and unverified content. The propriety of adopting such is questioned. Prejudicial error occurred because the outcome would be different but for the magistrate's admitted reliance on extra-judicial sources over the internet and his admitted reliance on impermissible ex parte communication outside the record without granting the timely request for meaningful opportunity to respond. Petitioner asserts prejudicial error herein and requests reversal. In the alternative, the order should be vacated with instructions for adequate explanation in order to provide adequate record for meaningful review. This issue is of exceptional importance, it is capable of being and has been repeated, it is capable of evading and has evaded judicial review, and it is incapable of adequate remedy on appeal.

In addition, the recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, "core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995)." *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 887, 840 (5th Cir. 2017).

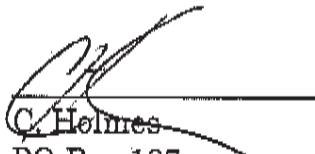
Moreover, the 9th Circuit has ruled that without the party's consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). See *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot "resolve the case finally" "unless all parties to the action have consented to the magistrate judge's authority." The Seventh Circuit remanded: A plaintiff's consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)). To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or unauthorized R&R without consent, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster. Magistrate R&R without consent jeopardizes/impairs litigants' substantial rights including but not limited to, full and fair meaningful judicial review. To the extent a substantial right, including meaningful appellate review, is diminished for pro se litigants by R&R, and the record reflects that it is, magistrate R&R without consent cannot pass constitutional muster. Without Constitutional and/or statutory authority, the magistrate order lacks jurisdiction and, therefore, is null and void. Accordingly, petitioner timely submits there is no consent to the magistrate or to R&R on dispositive and/or essentially dispositive matters. The substantial right of de novo determination, as opposed to de novo review, by an Article III Judicial Officer without R&R on dispositive matters is respectfully requested. "The touchstone of due process is protection of the

individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV.

CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, petitioner respectfully requests reconsideration.

Respectfully submitted,

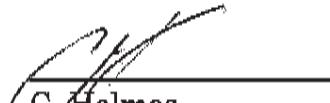


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Certificate of Service

I hereby certify that a true copy of the above document was served upon the attorneys of record for the defendants by regular first class mail postage pre-paid on this date at this address: Jamie Hood, 172 Meeting St., Chas., SC 29401.

Dated July 5, 2021.



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