IN THE STATE OF MICHIGAN
COURT OF CLAIMS

KELLIE SAUNDERS *et al.*,
individual UIA Claimants,

Plaintiffs,

v.

STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE
AGENCY and JULIA DALE, in her
official capacity,

Defendants.

Case No. 22-000007-MM

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PLAINTIFFS' RESPONSE TO DEFENDANTS MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE'S MARCH 14, 2022 MOTION FOR SUMMARY DISPOSITION

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Defendants say: "No"

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Defendants say: "No"

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Plaintiffs say: "Yes"
Defendants say: "No"

I. INTRODUCTION

Plaintiffs challenge specifically-defined Agency policies and practices that result in intentional collection activity without providing due process guaranteed under the Michigan Constitution. Defendants do not deny the challenged practices, but instead boldly claim that the challenged policies and practices are lawful. Therefore, it is not just likely that the practices will be repeated—it is all but certain. Further, no administrative process will cure the unconstitutional deprivation of property taking place beyond legislative authority granted to the Agency. Nor will any administrative process prevent further action depriving Plaintiffs and the classes of their constitutional right to be free from collection activities without due process of law. Defendants' motion for summary disposition should be denied. Instead, summary disposition should be entered in Plaintiffs' favor as to the illegality of the challenged policies and practices.

II. THE UNEMPLOYMENT AGENCY'S UNCONSTITUTIONAL POLICIES AND PRACTICES

A. THE AGENCY ISSUES MONETARY REDETERMINATIONS RETROACTIVELY REDUCING OR ELIMINATING WEEKLY BENEFIT AMOUNTS MORE THAN ONE YEAR AFTER INITIAL MONETARY DETERMINATIONS

It is uncontested that Defendants issue Monetary Redeterminations to claimants more than one year after sending claimants initial Determinations on the same issue. The Agency applies these Monetary Redeterminations retroactive to the start of claimants' benefits period. The Agency claims that it is authorized to issue such Monetary Redeterminations. It is not. For those who have had property taken or benefits halted based on Monetary Redeterminations issued more than one year after initial Monetary Determinations, their due process rights have been violated.

Those impacted by this process include Plaintiffs Saunders, Davis, Zestos, Eggleston, and Hillebrand. Each of these Plaintiffs received a Monetary Redetermination retroactively eliminating or reducing their WBA more than one year after a Monetary Determination on the same issue. *See,*

e.g., Ex. 6, Saunders 137-139, 141-146;[1] Ex. 1, Davis 1-3, 9-12; Ex. 10, Zestos 244-252; Ex. 2, Eggleston 21-23, 25-29; Ex. 3, Hillebrand 38-47. The Agency has not denied that it has issued these untimely Monetary Redeterminations to these Plaintiffs.

B. THE AGENCY FAILS TO REVIEW FILES AUTOMATICALLY FOR OVERPAYMENT WAIVER OR TO PROVIDE A PROCESS TO REQUEST WAIVER BASED ON ADMINISTRATIVE ERROR

It is uncontested that the Agency does not automatically review files for waiver based on administrative error and that the Agency does not provide a process to request such waiver or issue an appealable Determination on that issue. The Agency only provides an administrative process to UI claimants based on financial hardship. *See* Ex. 17, Form 1795 Hardship Waiver Application.

The Agency admits that it neither provides a process by which administrative error waiver can be requested nor issues appealable Determinations regarding administrative error waiver. The Agency does not provide the required process when assessing overpayment even if there is a blatant error on the file. For example, the Agency erroneously used Plaintiff Saunders' and Hillebrand's gross income to calculate their WBA, despite the fact that they provided all requested information, including their net income, and despite United States Department of Labor ("DOL") instruction to use net income to calculate benefit amount. Ex. 6, Saunders 137-139, 141-146; Ex. 3, Hillebrand 37-47, *see also* Ex. 18, UIPL 16-20 Change 1, Question 22 (stating that state agencies should use net income to calculate benefit amounts).

C. THE AGENCY INSTITUTES COLLECTION ACTIVITY AND SEIZES PROPERTY FOR INDIVIDUALS WHO HAVE A PENDING PROTEST OR APPEAL

It is uncontested that the Agency is pursuing collection activity against claimants who have

[1] For ease of reference, claimant documents have been attached to this Motion as exhibits and bates stamped PI Exhibit XXXXXX (claimant name). In referencing the documents internally, document bates stamps will be shortened. For example, the document bates stamped "PI Exhibit000137 (Saunders)" will be abbreviated to "Saunders 137."

pending protests and/or appeals and before a Determination has become final. It has no authority to do so. The Agency has engaged in collection activity against Plaintiffs Varga, Eggleston, Shephard, Larke, Logan, Hillebrand, and Scarantino even after the Agency acknowledged these Plaintiffs to have pending protests or appeals. *See, e.g.*, Ex. 9, Varga. 180-181, 184-243 (noting on February 1, 2021 that a "protest has been filed" and thereafter seizing his tax refund and continuing to send collection notices); Ex. 2, Eggleston 21, 25, 30-36 (noting on September 16, 2021 that Eggleston requested a status on his protest related to an August 28, 2021 denial, yet still sending monthly statements thereafter); Ex. 8, Shephard 158-179 (seizing a portion of Shephard's 2020 tax refund and sending repeated monthly statements despite timely protests); Ex. 4, Larke 60, 82 (issuing a Notice of Garnishment in May 2021 and seizing a portion of her 2021 unemployment benefits despite a pending protest); Ex. 5, Logan 119, 123, 126, 129-136 (sending repeated monthly collection notices threatening to seize her tax refund and garnish wages if she does not make payments, despite pending appeals); Ex. 3, Hillebrand 38, 41, 56-59 (same); Ex. 7, Scarantino 147-157 (same). The Agency does not deny that it has taken these actions.

III. PLAINTIFFS' COMPLAINT ALLEGES CLEAR VIOLATIONS OF THE LAW SUCH THAT DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON THE PLEADINGS IS WITHOUT MERIT

Defendants move for summary disposition under MCR 2.116(C)(4), relying on Plaintiffs' alleged failure to exhaust their administrative remedies. Defendants alternatively move for summary disposition under MCR 2.116(C)(8), stating that no factual development could justify recovery for Plaintiffs. The Agency is recycling defective arguments that have already been rejected by the Courts. As described below, exhaustion of administrative remedies is irrelevant here, and the law and facts mandate the opposite result Defendants seek. Here, summary disposition should be granted to Plaintiffs. The Michigan Court Rules allow for the Court to issue

judgment in favor of the party opposing the Motion for Summary Disposition "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment…." MCR 2.116(I)(2). The facts and law in this case support judgment for Plaintiffs.

Defendants' Motion for Summary Disposition makes no attempt to dispute that the activity Plaintiffs complain of is occurring. Instead, Defendants argue that the activity either does not violate the law or is at worst negligent, and therefore is not a constitutional violation. Plaintiffs allege systemic, pervasive constitutional violations. Plaintiffs are not litigating their access to or the outcome of an administrative hearing on eligibility or WBA amount. The asserted defenses are inadequate when Defendants are seizing claimants' property without any legal authority to do so and without an adequate administrative remedy to address the systemic violations.

Plaintiffs challenge three Agency practices. First, Plaintiffs challenge the Agency practice of issuing Monetary Redeterminations more than one year after the original Determination on a disputed issue. This is not a challenge to any Agency finding regarding individual eligibility. Instead, this claim alleges that extra-jurisdictional Redeterminations are void and without legal effect and that, therefore, the Agency's original Determination should stand, and the Agency does not have jurisdiction to reverse it. Moreover, seizing property based on void extra-jurisdictional Redetermination violates UI claimants' due process rights, regardless of actual individual eligibility or the outcome of the administrative process.

Next, Plaintiffs challenge the Agency practice of failing to review alleged overpayments for administrative error waiver and failing to provide an administrative process to request such administrative error waiver. Federal and state law require the Agency to do one or the other at the time an overpayment is assessed. This is not an action to contest individual eligibility for administrative error waiver. Moreover, seizing property without first providing the waiver review

process violates UI claimants' due process rights, regardless of actual individual eligibility or the outcome of the administrative process.

Finally, Plaintiffs challenge the Agency practice of assessing overpayments (or Restitution Determinations) before an eligibility Determination has become final. Due process under United States Supreme Court precedent requires notice and opportunity to be heard before collection activity can occur. State law goes further and only authorizes the Agency to undertake collection activity after a Determination has become final. A Determination is not final so long as an appeal or protest is pending. The state also has agreed under contract not to institute collection activity before a Determination has become final. Moreover, seizing property without authority to do so before a final Determination on the merits violates UI claimants' due process rights, regardless of actual individual eligibility or the outcome of the administrative process.

Plaintiffs are not challenging individual findings of eligibility or ineligibility under the Michigan Employment Security Act ("MESA" or "MES Act"). Instead, Plaintiffs challenge the constitutionality of seizure of property and the withholding of benefits that flow from Agency decisions made without due process of law. Defendants violate due process when they make deliberate decisions that deprive a person of life, liberty, or property. *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986); *see also Marlin v City of Detroit*, 205 Mich App 335, 339; (1994) (quoting *Parratt v Taylor*, 451 US 527, 548; 101 S Ct 1908; 68 L Ed 2d 420 (1981) ("A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss. The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations."); *Sniadach v Family Fin Corp of Bay View*, 395 US 337, 342; 89 S. Ct. 1820; 23 L. Ed. 2d 349 (1969) ("Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent

notice and a prior hearing . . . this prejudgment garnishment procedure [of employee wages] violates the fundamental principles of due process.").

A. THE MESA DEFINES THE BOUNDARIES WITHIN WHICH THE AGENCY CAN OPERATE

The Michigan Unemployment system is administered through three agencies or groups: (1) the Unemployment insurance Agency ("UIA" or "the Agency") in the Michigan Department of Labor and Economic Opportunity ("LEO"), which makes eligibility Determinations and redeterminations, makes payments, collects "overpayments," assesses penalties, and generally administers the unemployment system; (2) the Michigan Office of Administrative Hearings and Rules ("MOAHR") in the Department of Licensing and Regulatory Affairs ("LARA"); and 3) the Unemployment Insurance Appeals Commission ("UIAC"), a quasi-independent appeals body also housed in LEO. The role and authority of these entities is defined in the MESA.

Although this is a state-created system, it is a creature created by federal legislation and regulation as part of the Social Security Act. As explained by the United States Supreme Court in the seminal case *California Department of Human Resources Development v Java*:

> All federal-state cooperative unemployment insurance programs are financed in part by grants from the United States pursuant to the Social Security Act, 42 U.S.C. §§ 501-503. No grant may be made to a State for a fiscal year unless the Secretary of Labor certifies the amount to be paid, 42 U.S.C. § 502 (a). The Secretary of Labor may not certify payment of federal funds unless he first finds that the State's program conforms to federal requirements. In particular, § 303 (a)(1) of the Act requires that state methods of administration be found "to be reasonably calculated to insure full payment of unemployment compensation when due." [402 US 121, 125-126; 91 S Ct 1347; 28 L Ed 23 666 (1971).]

As part of the federal oversight process, the DOL issues Unemployment Insurance Program Letters ("UIPL"). Unlike other areas of administrative "guidance," UIPLs are binding instructions to the state unemployment programs defining the administrative requirements of federal law. Ex. 15, UIPL 01-96. Under the 2020 CARES Act, the federal government created additional direct

pandemic unemployment subsidies wholly funded by federal money. These were an alphabet soup of additional programs providing supplemental funding, additional benefit weeks, and relief to workers otherwise not covered by regular UI benefits. In order to participate, each participating state was required to enter into a contract with the DOL for administration of the programs. Those contracts required states to use existing state law process and procedure and apply it to the CARES Act benefits programs. *See, e.g.*, Ex. 19, Indiana Agreement Implementing the Relief for Workers Affected by Coronavirus Act; Ex. 20, Arkansas Agreement Implementing the Relief for Workers Affected by Coronavirus Act.

When an applicant applies for unemployment benefits, the Agency makes a determination whether a claimant is eligible and the amount of weekly benefit (known as a weekly benefit amount or "WBA") for which they are eligible. If a claimant or an employer disagrees with a Determination, they can "protest" under MESA Section 32a and request Agency reconsideration, and the Agency issues a "Redetermination." Section 32a also allows the Agency to reconsider a prior Determination on its own motion and issue a Redetermination. Whether by protest or Agency reconsideration, Section 32a requires a Redetermination to be issued within 30 days of the original determination OR, if good cause is shown, within a year of the original Determination on the disputed issue. *See* MCL 421.32a(1), (2). If a claimant or an employer disagrees with a Redetermination, it may file an appeal to MOAHR. At MOAHR, the claimant is provided with the first opportunity for a hearing, the right to present evidence, and the right to have counsel in front of an administrative law judge ("ALJ"). This hearing process exists precisely to satisfy the due process rights of claimants. Under Section 32a of the MESA, a Redetermination becomes final unless appealed to MOAHR. A decision of the ALJ becomes final unless appealed to the UIAC.

Agency process for collection of overpayments (also known as restitution) and assessment

of penalties (including fraud penalties) are primarily governed by Section 62 of the MESA. Section 62 authorizes the Agency to initiate collection activity within three years after a Determination or Redetermination becomes final. Section 62(b) addresses assessment and collection of fraud or misrepresentation penalties. Section 62(a) governs collection of non-fraud restitution due. This administrative scheme is discussed more thoroughly in *Dep't of Licensing & Regulatory Affairs/Unemployment Ins. Agency v Lucente*, ___ Mich ___; ___ NW2d ___ (2021) (Docket Nos. 160843, 160844) (Ex. 13).

B. THE ADMINISTRATIVE PROCESS CANNOT ADDRESS PLAINTIFFS' CLAIMS OF SYSTEMIC CONSTITUTIONAL VIOLATIONS CREATED BY AGENCY POLICIES AND PROCEDURES

The Defendant Agency is a creation of the Michigan Legislature. *See* MCL Ch 421, Act 1 (noting that the MESA was enacted to create the Agency). Because the Legislature created the Defendant Agency, the Agency's powers are limited to those conferred by statute. *See Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011) ("Therefore, being creations of the Legislature, they are only allowed the power that the Legislature chooses to delegate to them through statute."); *see also id.* (quoting *Conlara, Inc v State Bd of Ed*, 442 Mich 230, 237; 501 NW2d 88 (1993) ("The agency's authority to adopt rules (if it has any such authority) is usually found 'in the statute creating the agency and vesting it with certain powers.'").

Any actions the Defendant Agency takes outside of its statutory authority violates the Michigan Constitution. As the Court of Appeals stated in *Herrick Dist Library*:

> The general rule in Michigan, then, is that the power and authority of an agency must be conferred by clear and unmistakable statutory language. And if a statute does explicitly grant an agency a power, that power is subject to "strict interpretation." *Mason*, 343 Mich at 326. An administrative agency that acts outside its statutory boundaries usurps the role of the legislature. This type of administrative overreach of course conflicts with our federal and state constitutions, which specifically indicate that "in the actual administration of the government Congress or the Legislature should exercise the legislative power…." *JW Hampton*, 276 U.S.

> at 406. As such, the role of an administrative agency terminates wherever the Legislature chooses to end it. *See York*, 438 Mich at 767. [*Herrick Dist Library*, 293 Mich App at 583.]

Regardless of whether the functions of the Agency are ministerial or quasi-judicial, the Court of Claims is empowered and vested with the jurisdiction to decide whether inferior Agencies of the States are acting within their authority and to enjoin unconstitutional actions depriving due process rights. *See Bauserman v Unemployment Ins Agency*, 330 Mich App 545, 557-559; 950 NW2d 446 (2019) (summarizing the history of a due process claim for money damages against the Agency that originated in the Court of Claims). The Court of Claims also has jurisdiction over Plaintiffs' claims for declaratory and equitable relief. *See Parkwood Ltd Dividend House Ass'n v State House Dev Auth*, 468 Mich 673, 775; 664 NW2d 185 (2003) (finding exclusive subject matter jurisdiction in the Court of Claims related to a claim against the state seeking solely declaratory relief).

The administrative process of the Agency does not provide any redress for alleged constitutional violations. *Bauserman*, 330 Mich App at 572. In *Bauserman*, the Defendant Agency sought summary disposition on the plaintiffs' claims that Agency action violated their due process rights, arguing that the plaintiffs had "an alternative remedy available to them because they can seek redress through the administrative system established by the MES Act." *Id.* at 570-571. The Court rejected the Defendant Agency's arguments, reasoning as follows:

> Our review of this legislative scheme leads to the conclusion that while the administrative process established by the MES Act allows for a review of the Agency's decisions with respect to the award or disqualification of unemployment benefits, or pertaining to its imposition of penalty and interest, it does not provide an avenue for plaintiffs to seek redress in the form of monetary relief for the alleged violation of their due-process rights protected by the state Constitution. *See Mays*, 323 Mich App at 67 (observing that the proper inquiry is whether "a judicially imposed damage remedy for the alleged constitutional violation is the only available avenue for obtaining *monetary* relief"). Further, while the procedure set forth in the MES Act establishes a way for claimants to challenge the Agency's decision regarding their unemployment benefits, we agree with the Court of Claims that it does not provide a suitable avenue for plaintiffs to challenge the Agency's

> alleged systemic and concerted deprivation of their due-process rights caused by the Agency's implementation of the MiDAS system. Put another way, we disagree with the Agency that the administrative process set forth in the MES Act provides a remedy for plaintiffs to seek redress for the due-process violations that they claim to have suffered as a result of the Agency's allegedly unlawful actions. [*Bauserman*, 330 Mich App at 572.][2]

The *Bauserman* Court found that the administrative process did not give the plaintiffs a remedy to pursue their constitutional claims when the plaintiffs were not "merely disputing the determination of their individual employment benefits," but were instead "mounting a direct and large-scale challenge to an administrative process of the Agency that resulted in the seizure of their property without their consent, which plaintiffs assert was done in violation of their right to due process protected by Const 1963, art 1, § 17." *Id.* at 572-573; *see also Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 53; 620 NW2d 546 (2000) ("Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration, however, and will not be required if review of the agency's final decision would not provide an adequate remedy….").

In this case, claimants seek declaratory and injunctive relief and damages due to alleged constitutional violations. *Lucente*, on which Defendants rely, is thus distinguishable because it addressed fraud findings and assessment of penalties under MCL 421.62. *See generally Lucente*, ___ Mich ___ (consolidated with *Herzog*) (Ex. 13). The Agency is also well aware of the inability of the Agency administrative process to address constitutional violations. *See Bauserman*, 330

[2] Defendants cite *Mooney v Unemployment Compensation Comm'n* for the proposition that the Legislature allows for only limited judicial review of unemployment decisions. In *Mooney*, the plaintiffs sought judicial review of whether they were eligible for benefits. 336 Mich 344, 348; 58 NW2d 94 (1953). After the appeal board found that the plaintiffs were not eligible for benefits, the plaintiffs petitioned the Grand Rapids superior court for review. *Id.* The Michigan Supreme Court found that the superior court was without jurisdiction to review when the Legislature provided for appeal from the appeal board to *circuit courts*. *Id.* at 357. Here, Plaintiffs are not seeking individual judicial review related to questions of law or fact in their eligibility for benefits. Instead, Plaintiffs are alleging systemic constitutional violations, which cannot be addressed through the administrative process.

Mich App at 372, *supra*. Accordingly, it is well-established that the Agency's administrative process is not an appropriate venue to address allegations of constitutional violations.

C. DEFENDANTS VIOLATE UI CLAIMANTS' DUE PROCESS RIGHTS BY ISSUING MONETARY REDETERMINATIONS MORE THAN ONE YEAR AFTER ISSUING MONETARY DETERMINATIONS ON THE SAME ISSUE

All claimants who face untimely Monetary Redeterminations and against whom the Agency asserts a right to seize property have a right to due process *before* seizure. Plaintiffs are not asking for individual eligibility determinations. Plaintiffs are asking that this Court rule that Monetary Redeterminations are void and without legal effect when they are issued more than one year after the initial Monetary Determination and that the original Monetary Determinations must therefore be enforced.[3]

1. *Extra-Jurisdictional Redeterminations are Void and Without Legal Effect Under the MESA*[4]

Section 32a of the MESA provides:

> A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year after the date of mailing or personal service of the original determination on the disputed issue or, if the

[3] Defendants cite *York v Detroit*, 438 Mich 744, 762; 475 NW2d 346 (1991) for the contention that a statutory violation does not *ipso facto* amount to a constitutional violation. In *York*, the issue was not a due process violation. Instead, the case addressed a pretrial detainee's Fourteenth Amendment right to medical care and whether that right was violated by deliberate indifference to serious medical needs. *York*, 438 Mich at 759. The Court rejected the plaintiff's proposed instruction that "failure to follow the department regulations would by itself establish deliberate indifference" and stated that violation of statutes does not *ipso facto* amount to a constitutional violation after finding that the alleged constitutional violation required a finding of deliberate indifference. *Id.* at 762. Unlike the *York* plaintiff, Plaintiffs here are not claiming that a statutory violation is a *per se* constitutional violation. Unlike the *York* violation, a due process violation does not require a showing of deliberate indifference. Instead, Plaintiffs argue that Defendants violated their due process rights because they intentionally deprived them of property without any legal authority to do so, relying on the statutes to establish Defendants' lack of legal authority.

[4] The Agency repeatedly refers to Plaintiffs' claims related to "extrajudicial" adjudications. This is not what Plaintiffs allege. Plaintiffs allege "extra-*jurisdictional*" actions (*i.e.*, actions beyond the Agency's jurisdiction).

> original determination involved a finding of fraud, within 3 years after the date of mailing or personal service of the original determination. [MCL 421.32a(2) (emphasis added).]

Plaintiffs allege that the Agency issued "Monetary Redeterminations" more than one year after issuing "Monetary Determinations" on the same issue. These "Monetary Determinations" and "Monetary Redeterminations" are distinct from *restitution* Determinations under Section 62(a).

The Agency does not have jurisdiction to issue these untimely Monetary Redeterminations. The MESA grants the Agency jurisdiction to issue Redeterminations only within one year after the initial Determination on the disputed issue. MCL 421.32a(1)-(3). Under MCL 421.32a(1), the Agency has 30 days to review a Determination. The 30-day period can be extended up to one year only upon a showing of good cause for the delay. MCL 421.32a(2). The MESA does not grant the Agency any jurisdiction or authority to act to issue Redeterminations after one year.

2. *The Unemployment Insurance Appeals Commission Has Confirmed that the Agency Cannot Issue Redeterminations More than One Year After an Original Determination on the Same Issue*

The appellate body charged with final administrative review of Agency action—the UIAC—has already conclusively confirmed the jurisdictional limitations of the UIA. *See, e.g.*, Ex. 11, UIAC Appeal Docket No. 264147W-REH at 5 (considering this issue and concluding "[t]he May 19, 2021 redetermination was issued more than one year after the original April 29, 2020 adjudication of the disputed issue. Accordingly, we reaffirm our ruling that the Agency did not have jurisdiction to issue the May 19, 2021 redetermination."); *see also* Ex. 12, UIAC Appeal Docket No. 264147W (finding a Monetary Redetermination regarding qualification to be untimely when it was issued more than one year after the original eligibility Determination and the only intervening Redeterminations addressed only additional weeks of entitlement to benefits rather than qualification).

3. *Michigan Case Law Affirms that the Agency Cannot Issue Redeterminations More than One Year After an Original Determination on the Same Issue*

The UIAC's finding that the Agency has no jurisdiction to issue Redeterminations more than one year after an original Determination on the same issue relies on well-established Michigan Supreme Court precedent addressing the term "disputed issue" in Section 32a. *See, e.g.*, *Royster v Mich Employment Security Comm*, 366 Mich 415, 421; 115 NW2d 106 (1962); *Lucente*, ___ Mich ___, slip op. at 23 (Ex. 13).

4. *The Agency is Violating Plaintiffs' Due Process Rights Regardless of Individual Benefit Eligibility*

The Agency's failure to follow the law violates the due process rights of Plaintiffs and the classes by depriving them of property based on Redeterminations that it has no legal authority to issue. It is undisputed that Monetary Redeterminations are being issued more than one year after Monetary Determinations. The Agency's only argument is to dismissively posit that its actions are lawful because the Monetary Redeterminations could alternatively be considered restitution Determinations under Section 62(a). They are not.

Defendants attempt to shore up their defenses by stating that they may have "mistakenly" sent Redeterminations under Section 32a rather than restitution determinations under Section 62(a). The Agency's arguments related to similar so-called "mislabeling" or "mistakes" have already been rejected by the Michigan Supreme Court. *See Lucente*, ___ Mich ___, slip op. at 3 (Ex. 13) (rejecting an argument related to the Agency's defense of "mislabeling," and stating "[c]haracterizing its error as a mere mislabeling, the Agency argues that its mistake does not provide grounds for setting aside the 'redeterminations' because the decision adequately apprised the appellants of the Agency's various findings and did not prevent the appellants from pursuing administrative appeals of those decisions. We conclude otherwise.").

D. THE AGENCY'S FAILURE TO REVIEW FILES AUTOMATICALLY FOR OVERPAYMENT WAIVER OR TO PROVIDE A PROCESS TO REQUEST WAIVER BASED ON ADMINISTRATIVE ERROR VIOLATES CLAIMANTS' DUE PROCESS RIGHTS

Plaintiffs allege that the Agency has violated their rights to due process by failing to provide a process to seek waiver due to administrative error or to automatically review files for such waiver, and by failing to issue an appealable Determination on their eligibility for such waiver. The Agency is required under state and federal law, consistent with the requirements of due process, to review and issue a decision regarding a claimant's eligibility for waiver of alleged overpayment based on Agency error and to do so before undertaking collection activity. As the claim is stated in the instant Motion and in Plaintiffs' First Amended Complaint, Defendants' arguments about individual waiver eligibility are not relevant.

1. *State Law Mandates Waiver of Overpayments that are Due to Agency Error*

The MESA provides that the Agency "shall waive recovery of an improperly paid benefit if repayment would be contrary to equity and good conscience and shall waive any interest." MCL 421.62(a). As the word "shall" makes clear, this waiver of repayment is mandatory if repayment would be "contrary to equity and good conscience." *Id.* One of the reasons the MESA mandates waiver of repayment is if "[t]he improper payments resulted from an administrative or clerical error by the unemployment agency." MCL 461.62(a)(iii).

2. *Binding Federal Instruction Mandates a Waiver Program and Appealable Determinations on Administrative Error Waiver*

State law cannot be reasonably interpreted inconsistent with federal constitutional rights and binding DOL instructions to the participating states. The United States Supreme Court ruled that a state violates the due process rights of unemployment claimants granted under Section 303(a)(1) of the Social Security Act when it cuts off benefits before notice and opportunity to be

heard. *See Java*, 402 US at 130-133.

Following *Java*, the DOL instruction provides that Determinations on waiver of overpayments fall within *Java*'s requirements of a notice and opportunity for a fair hearing. Under UIPL 23-80, states have two options for administering waiver: (1) review the files for waiver at the time an overpayment is assessed and provide a Determination on the waiver issue; or (2) provide a process by which claimants can request assessment for waiver and clear notice of that right. Ex. 14, DOL UIPL 23-80 ¶ 5 (Feb. 28, 1981). Should the Agency exercise the latter option, the Agency must also "[p]rovide, *as a part of each overpayment determination*, information about State law provisions concerning waiver, and provide that claimants may request consideration of waiver and receive an appeal determination on the action taken." *Id.* (emphasis added). Should the state agency decline to waive overpayment as allowed by state law, the failure to waive "constitutes a denial of a claim for unemployment compensation within the meaning of Section303(a)(3)," and the Agency must give the claimant the right to appeal the Determination. *Id.* ¶ 6.

In order to satisfy DOL instructions and due process obligations, if the Agency opts not to make review for administrative error waiver part of the process on all UI files, the UIA must provide information to claimants regarding how to seek waiver. Ex. 16, UIPL 01-16 ("[I]f state law provides for waiver of recovery of overpayments under certain circumstances, states must clearly communicate the potential availability of a waiver to individuals when establishing an overpayment and, if an individual requests a waiver, make an official determination on the waiver request before initiating overpayment recovery."). Defendants' overpayment notices do not include waiver language. *See* Ex. 21, Sample UI Letters (showing assessment of overpayment without notice of the ability to request waiver); *compare* UIPL 23-80 ¶ 5 (stating that if a state does not make a determination as to applicability of waiver a part of the determination process on

every case, it must "[p]rovide, as part of each overpayment determination, information about State law provisions concerning waiver, and provide that claimants may request consideration of waiver and receive an appeal determination on the action taken.").[5] Defendants are choosing not to exercise either option and so violate the due process rights of claimants by seizing property before considering the file for waiver.

3. *Plaintiffs are Challenging Defendants' Failure to Provide the Requisite Process Rather than Challenging Individual Eligibility for a Waiver*

Plaintiffs are not requesting that Defendants find them eligible for waiver. Instead, Plaintiffs challenge the Agency's failure to provide any process by which claimant files are reviewed for or by which claimants can request administrative error waiver. In fact, there is no administrative process to request such a waiver despite law mandating the contrary. Michigan's UIA does not allow claimants to apply for administrative error waiver; the only available application for waiver is based on economic hardship. *See* Ex. 17, Form 1795 Hardship Waiver Application. Defendants do not dispute this. Instead, Defendants argue that the onus should be on UI claimants to create a process by which they can request administrative error waiver, or to be savvy enough to know without any prompting from the UIA about the availability of such a waiver. The Agency's argument that Plaintiffs should have *sua sponte* created their own administrative process by which they could request waiver due to error should be rejected when it is the Agency's responsibility to create such a process.

It is also irrelevant that a new federal instruction related to PUA waiver was not issued until 2021. State law has at all relevant times mandated that the Agency grant waiver when

[5] Plaintiff Jennifer Larke's August 9, 2021 restitution Determination shows that the Agency is aware of its obligation to waive overpayments under MES Act Section 62. However, Larke was thereafter issued additional restitution Determinations without any overpayment waiver or notice of ability to request overpayment waiver.

overpayment was due to administrative error. MCL 421.62(a). Contrary to Defendants' arguments, Plaintiffs' waiver claim does not turn on future events. Although the Agency claims it is hoping to implement a new waiver program in the next year, this does not change the fact that the Agency's failure to evaluate claims for waiver due to administrative error violates longstanding state and federal law, nor does it change the fact that the Agency should stop collection in the meantime to avoid irreparable harm.

E. THE AGENCY VIOLATES DUE PROCESS RIGHTS THROUGH ENGAGING IN COLLECTION ACTIVITY AND SEIZING PROPERTY AGAINST INDIVIDUALS WHO HAVE A PENDING PROTEST OR APPEAL

The Agency has an unconstitutional policy and practice of instituting collection activity and seizing property from individuals who have pending protests or appeals of Agency Determinations or Redeterminations. As alleged in Plaintiffs' Amended Complaint, this policy and practice denies claimants of due process under law by depriving them of property without providing adequate notice and opportunity to be heard and before finality.

1. *Procedural Due Process under Java and State Law Requires Reasonable Notice and Opportunity to be Heard Before Collection Activity Can Occur*

Supreme Court precedent provides that claimants must be paid benefits when they become due and that unemployment agencies must provide reasonable notice and opportunity for a hearing before depriving UI claimants of property. *See Java*, 402 U.S. at 133-135. In *Java*, the plaintiff challenged California's policy by which payment of a claimant's benefits is automatically stopped while there is a pending appeal. 402 US at 128. The United States Supreme Court found that a state violates the due process rights of unemployment claimants when it fails to provide notice and opportunity for a hearing before stopping benefits. 402 US at 133. The Supreme Court further found that payments must be made at the initial determination stage and that payments must continue while an appeal is pending. *Id.* at 133-134. The Supreme Court ultimately enjoined

California's practice, finding that halting payment of benefits because an appeal is pending violates claimants' constitutional rights. *Id.* at 135. Here, Defendants' policies and practices go one step further. Not only does the Agency stop payment of benefits before opportunity to be heard, it erroneously contends that it does not violate due process when it claws back benefits already paid while an appeal is pending.

Under Michigan law, procedural due process requires a state actor to provide notice and opportunity to be heard before depriving a person of property. *See Dow v State*, 396 Mich 192, 206; 240 NW2d 450 (1976) ("The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. The opportunity to be heard includes the right to notice of such opportunity."). Meaningful opportunity to be heard requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008) (quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950)); *see also Lucente*, slip op. at 29 (quoting *Livonia v Dep't of Social Servs*, 423 Mich 466, 508; 378 NW2d 402 (1985) ("After all, 'the right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process.'").

2. *Federal Law Forbids Collection Before Opportunity to be Heard*

Federal law also requires notice and opportunity to be heard before seizing alleged overpayments. Under federal law, the state of Michigan is prohibited from collecting overpayments without notice, without providing an opportunity to be heard, and without an opportunity to consider any evidence. *See* 26 USC 6402(f)(3)(A) (providing that a state may not take action to collect unless it "notifies the person owing the covered unemployment debt that the

State proposes to take action pursuant to this section"); *see also* 26 USC 6402(f)(3)(B) (prohibiting collection action unless the state "provides such person at least 60 days to present evidence that all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt"); 26 USC 6402(f)(3)(C) (prohibiting collection activity unless and until the state "considers any evidence presented by such person and determines that an amount of such debt is legally enforceable and is a covered unemployment compensation debt"). Similarly, Section 303(a) of the Social Security Act mandates that states provide claimants with an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment are denied." 42 USC 503(a)(3). Yet the Agency is collecting alleged overpayments before giving claimants the opportunity to appear before an impartial tribunal and present evidence.

3. *State Law Only Authorizes the Agency to Undertake Collection Activity Only After a Determination has Become Final*

The MESA permits the Agency to seek collection on an overpayment only after all appeals have been exhausted and a (Re)Determination has become final. MCL 421.62(a) (stating that the Agency may seek restitution only after "the date of *finality* of a determination, redetermination, or decision reversing a previous finding of benefit entitlement.") (emphasis added); MCL 421.32a(1)-(3) (stating that a Redetermination is not final if an appeal has been filed within 30 days after notice of a (Re)Determination, or one year with good cause).

The primary case Defendants cite in support of the claim that due process does not require a stay of collection during a pending appeal actually supports Plaintiffs' position. *See McAvoy v HB Sherman Co*, 401 Mich 419, 439-441; 258 NW2d 414 (1977). Similar to the United States Supreme Court in *Java*, the *McAvoy* Court considered a rule that required continued payment of workers' compensation benefits during an appeal. 401 Mich at 434-435. The *McAvoy* Court noted that the "primary goal" of the Act was "the delivery of sustaining benefits to a disabled employee

as soon as possible after an injury occurs, regardless of any traditional tort concepts of liability," and that the rule was implemented because employers and carriers had increasingly appealed, causing injured employees to wait years to begin receiving compensation. *Id.* at 435-437. The *McAvoy* Court concluded that the rule "not only comports with procedural due process guarantees as regards employers and carriers, but it also extends a quantum of due process to disabled employees who have been awarded benefits but are denied them by a strangulating appellate process." *Id.* at 441.[6]

The holding in *McAvoy* supports Plaintiffs' arguments related to *Java*. When benefits are due, the state cannot stop paying them despite a pending appeal. The *McAvoy* Court found as much. The *McAvoy* Court recognized that the underlying policy of *Java* was the same as in *McAvoy*. The *McAvoy* Court stated that *Java* upheld the payment of benefits to a claimant without a stay pending appeal "when a claimant has been awarded those benefits after a full initial hearing." *McAvoy*, 409 Mich at 440 (citing *Java*, 402 US at 134). The *McAvoy* Court further recognized that "it is arguable that the staying of *all* benefits awarded, pending appeal, could conceivably constitute a denial of *claimants'* due process rights." *Id.* (emphasis in original).

Defendants' analysis of Sections 32a and 62(a) with respect to Plaintiffs' early collection claim irresponsibly misstates the law. Defendants rely on the fact that the Agency "shall" issue a Determination assessing restitution if it determines that a claimant was overpaid, citing MCL

[6] Defendants also puzzlingly cite *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 94; 803 NW2d 674 (2011) regarding the Legislature's ability to exert control over appeals of administrative decisions. *Naftaly* addressed a different constitutional provision—article 6, § 28—that provides for judicial review. 489 Mich at 90. There is no dispute that the Legislature may control mechanics of appealing administrative decisions, including "whether a party may obtain a stay pending appeal…." *Id.* at 94. In the MES Act, however, the Legislature did *not* allow for collection pending appeal. Instead, the Legislature provided that restitution Determinations can only be issued after a final decision on the merits. MCL 421.62(a).

421.62(a). There are two issues with this. The first is that Plaintiffs allege that the Agency must issue a final Determination before assessing restitution and instituting collection. The second is that, while MCL 421.62(a) allows for the issuance of restitution Determinations, this is not the same thing as stating that the Agency "shall collect" alleged overpayments while there are pending appeals. The Agency misses the point in stating that the Legislature does not mandate that it stay collections during the appellate process. The clear statutory language mandates the Agency to issue a restitution Determination *only after* there is a final decision on the merits, so there should be no collections to stay.

The Agency does not dispute that it engages in collection activity in many cases before there is a final decision on the merits. Instead, the Agency argues that this collection is lawful by misrepresenting statutes and case law. Continuing payments despite a pending appeal is vastly different than clawing back money already paid during a pending appeal. Like in *McAvoy* and *Java*, Plaintiffs and the class members here were at some point found entitled to benefits, and all parties (including the Agency) still have a right to appeal any Determination or Redetermination regarding eligibility for benefits. Defendants' irresponsible and reckless misrepresentations of the Agency statutory scheme and disregard for well-settled due process limitations should be rejected.

4. *The Agency is Prohibited Under the Federal Court Settlement in Zynda From Undertaking Collection Activity Before a Determination Has Become Final*

The Agency admits that it is prohibited from collection before finality under a Settlement Agreement. *See* Ex. 22, Stipulated Order to Dismiss and Settlement Agreement in *Zynda et al v Arwood et al,* No. 2:15-cv-11449, (ED Michigan filed April 21, 2015). The *Zynda* plaintiffs fought for constitutional collection parameters that the Agency now admits it is not following. Specifically, the collection activity violates Paragraph 13 of the Agreement, which states that "[t]he Agency shall not initiate or continue recovery of an overpayment or penalty until a

(re)determination of the overpayment becomes final after the claimant has had notice and reasonable opportunity to challenge the (re)determination and/or exhaust all appeals." *Id.*, ¶ 13. The *Zynda* settlement went even further and mirrored *Java*, requiring the Agency to continue payments during the pendency of an appeal. *Id.*, ¶ 14 ("During the pendency of a decision on any overpayment or misrepresentation (re)determination, the Agency will continue to make timely UC payments when due and shall not make any attempts to collect restitution while an appeal is pending….").The Agency's acknowledgment of the parameters of the settlement is meaningless when it admits that it is engaging in premature collection activity and avers that such collection activity is not unlawful.

5. *Under the State's Contract to Administer CARES Act Benefits, the Agency is Prohibited from Undertaking Collection Activity Before a Determination is Final*

For CARES Act programs, the DOL mandates that unemployment insurance agencies suspend collection until opportunity for a fair hearing AND a final determination on the merits. *See, e.g.*, Ex. 19, Indiana Agreement Implementing the Relief for Workers Affected by Coronavirus Act, Addendum No. 2 ¶ VII, Addendum No. 3 ¶ IV, Addendum No. 4 ¶ IX (providing that "[n]o repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final."); *see also* Ex. 20, Arkansas Agreement Implementing the Relief for Workers Affected by Coronavirus Act, Addendum No. 2 ¶ VII, Addendum No. 3 ¶ IV, Addendum No. 4 ¶ IX (same).

6. *Seizing Property Without Authority to Do So Before a Final Determination Violates UI Claimants' Due Process Rights*

The very essence of Plaintiffs' claims is that there are systemic violations based on a custom and policy of the Agency to collect from claimants during appeals. Seizing property

without authority to do so, such as seizing property before a final Determination on the merits, violates the due process rights of UI claimants. Regardless of whether claimants are ultimately found eligible or ineligible for benefits, the constitutional violation will have already occurred. Despite the possibility of future repayment, irreparable damage has already been inflicted on claimants when they are deprived of benefits when they are due or when the state seizes wages or garnishes tax refunds at a time at which the Agency is prohibited from doing so. The Agency even states that its policies and procedures generally stay collection activity while there are pending timely appeals. Even if this is true, Plaintiff is alleging that the Agency is not following these policies and procedures.

F. Plaintiffs May Seek Mandamus and Superintending Control When There is No Mechanism for Plaintiffs to Appeal The Constitutional Violations and Defendants Have a Clear Legal Duty to Refrain From Unlawful Collection Activity

In opposing Plaintiffs' request for a writ of superintending control or mandamus, Defendants largely rely on their allegation that an appeal is available. As described above, there is no administrative process or appeal related to Plaintiffs' allegations of constitutional violations. This presents questions of fact and law that are inappropriate for resolution at this early stage.

Nonetheless, in opposing Plaintiffs' request for mandamus, the Agency alleges that there is no clear legal right to overpayment waivers or to a stay of collections. This misses the substance of Plaintiffs' allegations. Plaintiffs are not alleging that the Agency violated due process by failing to grant waivers; Plaintiffs allege that the Agency violates the Michigan Constitution by failing to provide the processes mandated by the MESA and by federal law and binding federal instruction. Plaintiffs allege that Defendants have a clear legal duty to issue Monetary Redeterminations only within one year of the initial Monetary Determination on the same issue, to consider requests for administrative waiver or to provide a process to request such a waiver and to provide an appealable

Determination on such decision, and to collect only after there is a final Determination on the merits. Plaintiffs dispute that the Agency is not ministerial. For the challenged processes in this case, the Agency's functions are entirely ministerial. This too presents questions of fact and law that are inappropriate for resolution at this stage.

G. Plaintiffs May Seek Injunctive Relief When They Are Likely to Succeed on the Merits and There is Irreparable Harm

Defendants argue that Plaintiffs cannot meet their burden for injunctive relief. As described above and in Plaintiffs' March 10, 2022 Motion for Preliminary Injunction to Suspend Collection Activities and April 6, 2022 Reply in Further Support of Motion for Preliminary Injunction, Plaintiffs are likely to succeed on the merits. Plaintiffs have further alleged irreparable harm beyond simple financial hardship. In *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, cited here by Defendants, the Court found that although lay-offs cause financial hardship, there was not irreparable harm where the plaintiffs had an adequate legal remedy to allege that the layoffs violated the CBA or constituted an unfair labor practice. 482 Mich 1, 10; 753 NW2d 595 (2008). Here, as described above, Defendants' defective administrative process is not a viable way for Plaintiffs to pursue their claims that Defendants violated their constitutional rights to due process.

Finally, Defendants' statement that injunction would cause more harm to the Agency than to Plaintiffs is irrational. Plaintiffs acknowledge that the Agency is inundated. However, the Agency is well aware that preliminary injunctive relief is a mandate that a party *refrain* from engaging in allegedly unlawful activity. Plaintiffs' request for preliminary injunction, as pleaded in their March 10, 2022 Motion, is clear that Plaintiffs are asking that the Agency suspend collection activity while they continue to struggle to implement systems by which they can follow the law. Plaintiffs are not requesting that the Agency take additional affirmative action at this time.

Suspending collections until the Agency has a viable system for requesting administrative error waiver is a reasonable solution and actually requires that the Agency take less action than it is currently taking, thus lightening the Agency's load rather than requiring it to expend additional resources.

IV. CONCLUSION

State and federal law contradict Defendants' positions. Defendants even recycle arguments that have already been rejected in the Michigan Court of Appeals or the Michigan Supreme Court. Defendants claim that they can and will continue these unlawful activities. Defendants even admit the factual allegations. Defendants' position essentially forces claimants—even those for whom there has never been an adverse finding—to wait in limbo for three years while the Agency determines whether to issue a new Redetermination, whether to waive any overpayment associated with that Redetermination, and whether to collect against claimants. Defendants' Motion should be denied, and summary disposition finding that the challenged practices violate the law should be entered for Plaintiffs under MCR 2.116(I)(2).

Respectfully submitted,

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