IN THE STATE OF MICHIGAN
COURT OF CLAIMS

KELLIE SAUNDERS, ET AL,
individual UIA Claimants,

Plaintiffs,

v.

STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE
AGENCY, ET AL,

Defendants.

Case No. 22-00007-MM

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PLAINTIFFS' RESPONSE TO DEFENDANTS MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE'S JULY 5, 2022 MOTION FOR RECONSIDERATION OF THIS COURT'S JUNE 13, 2022 OPINION AND ORDER AND REQUEST FOR ORAL ARGUMENT

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I. INTRODUCTION

Defendants infringe unemployment claimants' right to due process by collecting alleged overpayments before the overpayments are final. The Parties agree that Defendants may only collect when there is a final Determination. However, Defendants have a practice of engaging in collection activity without taking adequate action to verify that a Determination is final. As a result, the Agency is collecting on Determinations that are *not final* as if they are final—before claimants have notice and opportunity to be heard.

The purpose of a preliminary injunction is to preserve the status quo while the case is litigated. Plaintiffs' Motion for Preliminary Injunction requested this Court to order Defendants to suspend the collections on all non-final Determinations to preserve the status quo while the legality of that practice is being litigated. Unless this Court does so, thousands of claimants will be harmed by unlawful practices before final disposition of this case. Ultimately, Plaintiffs seek equitable relief, including permanent injunction, declaratory judgment, and mandamus to stop this constitutional violation and prevent future violations. This is the Court that can grant this relief, with authority explicitly vested by the Court of Claims Act to hear claims in equity filed against the state, its agencies, and its actors.

The Court properly exercised its jurisdiction and authority in granting Plaintiffs' Motion with regard to Count III in its entirety. The Court's June 13, 2022 Order recognized that the public good required and favored a temporary pause in collection. Relying on later relief granting repayment of money already seized will be inadequate because, by the time additional relief is granted, the irreparable harm will already have been done. Defendants seemingly acknowledge that they are not permitted to collect before finality, but still are asking permission to continue the illegal practice. Plaintiffs ask that this Court respond to Defendants' request to "clarify" by

confirming that Defendants may not collect against Determinations that are not final—unless and until final resolution of this lawsuit. Doing so only requires the Agency to act with due diligence to verify a Determination is actually final before using its administrative powers to seize property.

II. THE COURT'S PRELIMINARY INJUNCTION IS PROPERLY DIRECTED TO PRESERVE THE STATUS QUO BY PREVENTING DEFENDANTS FROM UNLAWFUL COLLECTION BEFORE A DETERMINATION HAS BECOME FINAL

To preserve the status quo, Agency collection on Determinations that are not final must be stopped. Under MCL 421.62(a), Defendants may only collect on a final Determination. Under MCL 421.32a, a Determination becomes "final" 30 days after it is issued, so long as there is no pending protest or appeal.

Plaintiffs do not contest that a late appeal after 30 days does not operate to reverse an otherwise final Determination—but only if the appeal is *actually* late. The evidence presented on Plaintiffs' Motion conclusively shows that the Agency is collecting on Determinations that are not and have never been final. It does so when timely protests and appeals are logged in the Agency system, but erroneously marked as late. It does so when the Claimant's timely protests and appeals are not timely-logged into the Agency's system by the Agency. And it does so even when customer service agents are on notice that a timely appeal is in the file. In many cases, protests and appeals are never logged into the system at all. So far, Defendants have been unable to answer the question of how many claimants are being collected against, and how much the Agency is seeking to seize without any legal authority. The status quo will be preserved only if this Court confirms that Defendants may not initiate collection under section 62 of the MES Act unless and until they verify there is a final Determination to collect on.

If this Court waits until final disposition of this case to affirm that Defendants must follow the law, Defendants will have seized hundreds of thousands of dollars, and potentially more, from

vulnerable Michiganders without a mechanism for these claimants to recover the money unlawfully seized. The only way to stop this and to preserve the status quo is to stop Defendants' policies and practices that lead to collection before there is a final Determination on the merits of the claim and a final Determination regarding restitution. In response to the instant Motion, this Court must affirm Defendants' duty to verify that a Determination is final before they can lawfully collect against it.

A. Plaintiffs, with Standing, Properly Requested Preliminary Injunction to Prevent Harm to Themselves and to the Public While this Litigation is Pending

Plaintiffs properly requested preliminary injunction of this Court. Specifically, Plaintiffs' Motion requested that this Court **"**Order[] Defendants to suspend all collection activities against claimants who have not yet received a final Determination on the merits of their claims." Plaintiffs' March 10, 2022 Motion at 25. Plaintiffs alleged that the Agency was knowingly collecting against claimants with pending protests or appeals. *Id.* at 12-13. Thus, the Agency was seizing property from Plaintiffs when it had no authority to do so and contrary to due process. Plaintiffs alleged that the entire process is unconstitutional because the Agency was seizing property during the pendency of administrative proceedings.

The scope of the requested injunction was justified and supported by a proffer of evidence. In their Motion, Plaintiffs argued in part that:

> The public interest is always best served when government officials are made to obey the protections afforded by the laws they purport to obey (and the same laws they enforce against citizens when it is to their own benefit). *See Connection Distributing Co v Reno,* 154 F 3d 281, 288 (CA6 1998) ("[T]he determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the [constitutional] challenge because it is always in the public interest to prevent the violation of a party's constitutional rights.").
>
> The requested relief will serve the public interest that the MESA, and hence Defendants, purport to support. The requested relief will limit the negative

> economic consequences associated with involuntary unemployment and subsequent attempts by the Agency unlawfully to collect benefits already paid. Plaintiffs and the putative class members have felt the crushing force of unemployment. In violation of their own policies, Defendants seek to recover tens of thousands of dollars from Plaintiffs and putative class members—benefits that were given to Plaintiffs and putative class members in a time of great need to pay for the basic necessities of life and that Defendants have no right under the law to collect. There is no public policy that would justify unimpeded violations of the law that create concrete harm for Michigan residents. [March 10, 2022 Motion at 23.]

Plaintiffs argued that they were likely to succeed on the merits because collecting before a final Determination is not authorized by state law, federal law, or federal regulations, and there was no remedy in the administrative process to stop this unlawful collection. This illegal collection harmed Plaintiffs and others similarly situated because Defendants seized property from vulnerable Michiganders, often under threat of garnishment, without any justification for doing so.

In deciding Plaintiffs' Motion for Preliminary Injunction, this Court affirmed that the Agency deprives claimants of due process when it "seek[s] repayment of unemployment benefits before completing the administrative-review process." Order, at 16. This Court concluded that the type of claim alleged in Count III was not subject to exhaustion requirements because the Agency lacked the authority to decide whether the administrative scheme itself was unconstitutional. *Id.* at 13. This Court concluded, "plaintiffs are entitled to preliminary injunctive relief to prevent the Agency from engaging in collection efforts until after the administrative process has run its course." *Id.* at 17. The Court granted Plaintiffs' Motion for Preliminary Injunction with respect to "Count III **in its entirety**." *Id.* at 17-18 (emphasis added). The Court recognized the importance of verifying finality before collecting, stating:

> Even when it is ultimately determined that overpayments should be collected, the Agency should already be waiting until the determination becomes final before collecting any overpayments, as this is precisely what the Agency agreed to do—and, more importantly, was ordered by the federal district court to do—in the *Zynda*

> settlement. This Court does not consider it a burden for the Agency to follow the law, whether that law is set forth in a statute or court order. [Order, at 15.]

Thus, this Court recognized that the Agency must wait until finality to collect an overpayment. This principle applies Agency-wide. To prevent irreparable harm and to preserve the status quo, Agency collection must be limited to final Determinations until final disposition of this case and permanent injunction.[1]

Plaintiffs have standing to raise these claims in this venue. To have standing to request the relief, a party "is normally required to have a sufficiently concrete interest in bringing a case that it can be expected to provide effective advocacy." *Mich Coalition of State Emple Unions v Mich Civil Serv Comm'n*, 465 Mich 212, 217; 634 NW2d 692 (2001). "[S]tanding has been described as a requirement that a party ordinarily must have a substantial personal interest at stake in a case or controversy, as opposed to having a generalized interest in the same manner as any citizen." *Id.* at 217-218. Plaintiffs have standing to raise these claims because they have been harmed by the Agency's actions, and the continued wrongdoing demonstrates that the Agency's actions are capable of repetition, yet evading review.

B. The Court Properly Exercised Equitable Powers in Granting Preliminary Injunction

Michigan Courts exercise the traditional powers of equity. The Court of Claims Act

[1] Preventing Defendants from collecting prematurely is especially important to preserve the status quo because claimants are not guaranteed to recover amounts already paid. In dismissing Count II of Plaintiffs' complaint, this Court concluded that the existence of state law is sufficient to notify claimants of their ability to request a waiver during the normal administrative appeal process. Order at 11; *see also* MCL 421.62(a). This Court also quoted language from the same statute that "waiver is prospective and does not apply to restitution and interest payments already made by the individual." MCL 421.62(a). Should this Court allow Defendants to continue collection during the pendency of protests or appeals (thus disrupting the status quo for claimants), there is a danger that the Agency will not refund overpayment to claimants even if the Agency ultimately determines waiver of overpayment is justified. To preserve claimants' rights to remain (or be made) whole, the preliminary injunction must be applied to the Agency's policies and practices.

specifically vested those equitable powers in the Court of Claims for all actions against a state agency. MCL 600.6419[2]. Defendants attempt to distract the Court by focusing on a statement from the Court of Appeals in *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield*, 144 Mich App 182; 375 NW2d 382 (1985) that "[t]he object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either." *Id.* at 185. Defendants claim this means that the status quo may only be preserved for the Named Plaintiffs. However, the Appeals Court went on to say that "[t]he status quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy." *Id.* at 383-384 (citing *Steggles v National Discount Corp*, 326 Mich 44, 51; 39 NW2d 237 (1949); *Van Buren School Dist v Wayne Circuit Judge*, 61 Mich App 6, 20; 232 NW2d 278 (1975)).

As the United States Supreme Court has explained: "for 'several hundred years,' courts of equity have enjoyed "sound discretion" to consider the "necessities of the public interest" when fashioning injunctive relief." *Hecht Co v Bowles*, 321 US 321, 329-330, 64 St 587; 88 L Ed 754, (1944); *see also id.* at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it"); *Weinberger v Romero-Barcelo*, 456 US 305, 312; 102 S Ct 1798; 72 L Ed 2d 91 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of

[2] MCL § 600.6419(1)(a) specifically confers jurisdiction on the Court of Claims "to hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."

injunction"). Such discretion is displaced only by a "clear and valid legislative command." *Porter*, 328 US at 398; *see also United States v Oakland Cannabis Buyers' Coop*, 532 US 483, 496, 121 S Ct 1711, 1720; 149 L Ed 2d 722 (2001) ("[W]hen district court are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise.").

Likewise, in Michigan jurisprudence, the circuits courts of this state (and the Court of Claims) exercise broad discretion to use equity powers and to issue injunctions, reviewable only for abuse of discretion. *See Vincent Johnson v Mich Minority Purchasing Council*, ___ Mich App ___, published opinion of the Court of Appeals, issued March 3, 2022 (Docket No. 357979), slip op. at 12 (Ex. 1) (quoting *McPherson v Michigan High Sch Athletic Ass'n, Inc*, 119 F3d 453, 459 (CA 6, 1997) (en banc) ("[W]e are also cognizant that much deference is given on appeal to a circuit court's decision to grant or deny the extraordinary equitable relief of a preliminary injunction. Importantly, the four factors governing consideration of injunctive relief are meant to 'simply guide the discretion of the court; they are not meant to be rigid and unbending requirements.'") Absent a clear abuse of discretion, the Appeals Court is "compelled to affirm this highly discretionary decision, and trust that the circuit court will handle the case with the attention, efficiency, and timeliness required when a preliminary injunction has been issued." *Vincent Johnson*, slip op. at 11 (Ex. 1). This Court did not abuse its discretion in granting preliminary injunction in its entirety.

C. In Other Cases, The Michigan Attorney General Has Likewise Taken the Position that a Preliminary Injunction is Appropriate to Prevent Irreparable Harm to the Public

The Attorney General has likewise invoked the equitable power of the Court to seek preliminary injunction and prevent public harm in other cases. In *Nessel v Price et al*, the Attorney General brought a motion for preliminary injunction enjoining the defendants "from marketing,

offering, issuing, servicing, collecting on, or otherwise providing usurious loans in Michigan." Ex. 2, Motion for Preliminary Injunction, at PageID. 78, *Nessel v Price et al*, No. 19-cv-13078 (ED Mich). The Attorney General did not seek injunction stopping the defendants from providing such loans to specific individuals and did not make class claims. Instead, the Attorney General sought broad relief preventing the defendants from engaging in the allegedly unlawful activity statewide. The Attorney General invoked these same equitable powers to argue that the people of the State of Michigan were likely to suffer irreparable harm without an injunction, averring:

> [Defendants'] predatory and usurious loan practices cause certain, great, and actual harm to Michigan residents every day. Consumers are trapped in loans they cannot afford with exorbitant interest rates that violate the law. Loan payments are automatically withdrawn from consumers' accounts, sometimes in varying amounts and, on information and belief, as a condition of receiving the loan, which can cause accounts to become overdrawn, resulting in additional fees being required to pay back an illegal loan. These injuries are significant and ongoing. [Ex. 2, Motion, PageID. 90.]

In further support, the Attorney General relied on *Attorney Gen ex rel Michigan Bd of Optometry v Peterson*, which stated that "[h]arm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety, and welfare." 381 Mich 445, 465; 164 NW2d 43 (1969); *see also generally* Ex. 3, Motion for Preliminary Injunction, *Attorney Gen v Enbridge Energy, Limited Partnership et al*, No. 19-474-CE (30th Circuit Court, Ingham County) (requesting broad injunctive relief to protect the citizens from irreparable harm).

In determining whether to grant or deny broad preliminary equitable relief, a court must look to the claim itself. Here, like in other cases in which the State has advocated for broad injunctive relief, claimants are trapped with potentially crippling debt causing irreparable harm. This debt and collection activity is due only to Defendants' broad unlawful policies and practices. Plaintiffs make class allegations *and* Plaintiffs seek to protect all claimants while they advocate for permanent equitable relief finding that Defendants' policies and practices are themselves

unlawful. Upon finality of this case, should Plaintiffs prevail, the policy will be found unlawful as to all claimants, regardless of class status. Should this Court allow the collection activity under the allegedly unlawful policies to continue, by the time of the final hearing in this litigation, the rights of many claimants will have been irreparably harmed by the Agency's policies and practices.[3]

D. The Court Properly Exercised Equitable Powers to Halt Collections on Non-Final Determinations that Will Occur, and to Preserve the Status Quo until UIA Claimants can Recover for Collections that have Already Occurred

In this action, Plaintiffs allege unlawful activity by the Agency and seek permanent equitable relief preventing the Agency from engaging in the unlawful activity. If the relief is ultimately granted, it will inure to the benefit of all claimants—not just to Plaintiffs—and prevent widespread economic harm from otherwise continuing. The ultimate effect of the relief Plaintiffs seek will be that the Agency will be prevented from engaging in any collection activity before there is both a final Determination on the merits of the underlying claim and a final Determination regarding claimant's duty to repay. If this Court waits until the ultimate disposition of this case to order that Defendants must verify that Determinations are final before collection, the constitutional violation will have already occurred, and the harm will already have been done.

Plaintiffs also *separately* seek economic damages to compensate claimants for the irreparable harm caused by unconstitutional seizure of property based on Defendants' unlawful practice. This is a distinct harm limited to the putative class of people who have already had their property seized. The lost time-value of income is a harm that cannot be remedied by later court

[3] "'[T]his equitable jurisdiction *is not to be denied or limited in the absence of a clear and valid legislative command*. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'" *Weinberger*, 456 US at 313 (quoting *Porter v Warner Holding Co*, 328 US 395, 398; 66 S Ct 1086; 90 L Ed 1332 (1946)) (emphasis added).

order. If allowed to continue a practice that they seemingly recognize is unauthorized, the Agency will multiply the harm and needlessly increase its own liability. Preventing challenged illegal collection now will not only prevent irreparable harm but will also minimize the potential for administrative burden that would come upon an Order that Defendants must determine which claimants were subject to unlawful seizure and calculate the damages owed.

III. DEFENDANTS' REMAINING ARGUMENTS ON RECONSIDERATION ARE DISTRACTIONS WITHOUT LEGAL SUPPORT

A. Class Status is Irrelevant Because Plaintiffs Challenge the Agency's Process Itself—Not Simply Its Application to Plaintiffs Themselves

Class status is irrelevant when Plaintiffs have standing to challenge the Agency's unlawful policies. If the Agency's actions are unlawful as to Plaintiffs, they are unlawful as to all claimants. Defendants do not demonstrate how ceasing collection until verifying finality would cause them a hardship. Nonetheless, Defendants aver that they should be permitted to continue a likely violation that is against their own policies and procedures at least until after a decision on class status. This is illogical when, regardless of class status, if Plaintiffs attain the relief they are seeking, Defendants will no longer be able to implement the contested policies with respect to any UI claimant. Defendants' position is that they should be permitted to collect with impunity, despite pending appeals, for an unknown period. This will only irreparably harm unemployment claimants and will be of no benefit to Defendants.

The principle that a plaintiff may seek an injunction as to all individuals impacted by similar violations, without the need for class status, is well-established. *See, e.g., Craft v Memphis Light, Gas & Water Div*, 534 F 2d 684, 686 (CA6 1976) (quotation marks omitted) (alterations in original) ("[T]he district court properly recognized that such relief to the extent granted [would]…accrue to the benefit of others similarly situated…"); *Caspar v Snyder*, 77 F Supp 3d

616 (ED Mich 2015) ("Courts have regularly held that a plaintiff may seek an injunction applicable to all similarly-situated individuals harmed by the same unconstitutional practice, without the necessity of seeking class-action treatment."); *Hill v Snyder*, 821 F 3d 763, 767 (CA6 2016) (referencing precedent concluding that the plaintiffs need not bring a class action to obtain declaratory or injunctive relief that will apply to all similarly-situated individuals); *Sandford v R L Coleman Realty Co*, 573 F 2d 173, 178 (CA4 1977) (recognizing "the settled rule [] that whether plaintiff proceeds as an individual or on a class suit basis, the requested injunctive relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.").

B. Agency Collection Only Comports with Due Process if Defendants Exercise Due Diligence to Reliably Identify whether a Determination Has Become Final

In seeking clarification, Defendants in part ask that this Court distinguish between timely and untimely appeals. Plaintiffs do not dispute that the Preliminary Injunction applies only to claim files with timely protests or appeals. However, *the Injunction cannot be limited to only those the Agency has flagged as having timely protests or appeals*. The Agency has been unable to identify in response to Plaintiffs' discovery requests the number of pending appeals and which of those appeals are timely. The Agency has continued to collect against claimants even when they have timely pending appeals. Because the Agency cannot reliably distinguish between timely and untimely appeals, the Agency should not be permitted to collect *any* alleged overpayment without *first* verifying finality of the underlying Determination. If this Court accepts Defendants' attempt to parse timely and untimely appeals or protests, this will allow Defendants to collect even against timely claimants whose files are incorrectly marked as untimely.

Evidence presented on Plaintiffs' Motion for Preliminary Injunction confirms that the Agency is unable or unwilling to distinguish timely from untimely protests or appeals. It is

uncontested that the Agency is pursuing collection activity against claimants who have pending protests and/or appeals and before a Determination has become final. There are various points in the process at which systemic failures seem to lead Defendants to believe a Determination is final when it is not. There are protests and appeals that never get logged. Sometimes, protests and appeals get logged, but the logging is delayed so the Agency treats the timely protest or appeal as untimely. Sometimes, claimants clearly protest or appeal timely, but the Agency still marks the protest or appeal as untimely. Even though the correspondence system in MiWAM is built so that claimants can designate and submit a communication as a protest or appeal, Defendants do not reliably review this correspondence for protests and appeals.

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 made timely pending protests or appeals. *See, e.g.*, Ex. 4, Varga. 180-181, 184-243 (marking his protest as late despite it being timely, then noting on February 1, 2021 that a "protest has been filed," and thereafter seizing his tax refund and continuing to send collection notices); Ex. 5, 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 despite acknowledgment that Eggleston timely protested the underlying Determination on the merits); Ex. 6, Shephard 158-179 (seizing a portion of Shephard's 2020 tax refund and sending repeated monthly statements despite timely protests); Ex. 7, Larke 60, 82 (issuing a Notice of Garnishment in May 2021 and seizing a portion of her 2021 unemployment benefits despite an acknowledged timely pending protest); Ex. 8, Logan 119, 123, 126, 129-136 (marking a timely appeal as untimely and sending repeated monthly collection notices threatening to seize her tax refund and garnish wages if she does not make payments, despite pending appeals); Ex. 9,

Hillebrand 38, 41, 56-59 (same); Ex. 10, Scarantino 147-157 (same). The Agency does not deny that it has taken these actions.

The Court has been presented with additional reliable evidence that the alleged violations are not merely unintentional accidents. Putative class member Theresa Brandt still seeks a hearing on timely pending appeals. Yet she is currently subject to collection and has been notified of her obligation to make monthly payments, or face wage garnishment. Ex. 11, Brandt Monthly Statement. Plaintiffs have also presented a proffer of evidence from a former UIA worker, further confirming that the Agency knowingly continues collection even after notice of timely pending appeals. Ex. 12, Declaration of Starr Doerring at ¶ 7.

Defendants have a legal obligation at the time of assessing overpayment to verify that there is a final Determination on the merits of the underlying claim. If there is no verified final Determination, Defendants cannot collect the alleged overpayment. Plaintiffs agree that a Determination is final when 30 days have passed since its issuance, and a later protest or appeal does not operate to make the Determination no longer final. However, there is no evidence that the Agency can reliably distinguish between a final Determination and a Determination that is not final. It is unclear in the Defendants' Motion for Clarification whether they are asking permission to collect on non-final determinations—so long as the Agency has not logged a timely protest or appeal on the claim. On reply, the Agency should clarify whether it is seeking permission to do so.

C. The Agency's Position is Inconsistent with Prior Acknowledgment that the Practice is Unauthorized and Previous Claims of "Inadvertent Mistake" when it Prematurely Collected Against Claimants

In previous briefing, the Agency represented to this Court that any collection before a final Determination on the merits was inadvertent or negligent. In their Motion for Summary

Disposition, Defendants stated that "the Agency's policies and procedures generally *do* stay all collection activities against claimants with pending timely appeals…" and attributed any such collection to "mere negligence." *See* Defendants' March 14, 2022 Motion at 17-18 (emphasis in original). Defendants seemingly recognize in the instant Motion that the Order granting Plaintiffs' Motion for Preliminary Injunction in part "barred collection efforts until completion of the administrative process…" Defendants' July 5, 2022 Motion at 8.

Contrary to the prior representations, Defendants are now apparently requesting Court permission to continue intentional collections it seemingly admits are unauthorized. Presumably, what the Agency really wants is permission to continue collection without having to verify whether there are timely pending protests or appeals.

Defendants seemingly insist that they should be permitted to continue to collect while there are pending appeals despite this Court's ruling that Plaintiffs are likely to prevail on the merits of this claim. Defendants insist that they should be permitted to continue to collect without regard for pending appeals, even though it is against their policies and procedures to do so. Defendants insist that they should be permitted to continue the violation—against the law and against Defendants' own supposed policies—until there is a final ruling from this Court that their practices are unlawful. It is unclear what motivation Defendants have to collect against claimants with pending appeals when that collection is allegedly against Defendants' own policies and when this Court has found Plaintiffs are likely to succeed on merits that such collection violates the Michigan Constitution.

As this Court and Defendants have recognized, injunctive relief is extraordinary. Defendants know that Plaintiffs ultimately seek permanent injunction, declaratory judgment, and mandamus. Defendants know that, if Plaintiffs prevail, this relief will mean that they cannot collect

restitution until a final Determination on the merits of the underlying claim and a final Determination on restitution. If this Court waits to enjoin Defendants on an Agency-wide basis until the final disposition of this case, hundreds of thousands of Michiganders will have been victimized by the Agency's unlawful collections. By insisting on continuing to engage in collection that is unlawful *and* purportedly against Defendants' own policies and procedures, Defendants will only increase their liability, make equitable relief more difficult to implement, and add to the administrative nightmare related to administering overpayments and repayment of unjustified collections.

D. No Federal Law Requires (or Even Allows) the State or the Treasury to Seize Tax Returns Related to Determinations that are not Final

The Agency's argument that federal law requires collection through the Treasury Offset Program is a red herring. The Treasury Offset Program is only available for fraud claims and misrepresentation. Even for those claims, use of the program is only available for final claims after notice and opportunity to be heard. Under state law, a Determination is only final after 30 days without protest or appeal. MCL 421.32a. And Section 62 only authorizes the Agency to initiate collection after finality. MCL 421.62. The Agency seemingly implies that it is illegally using the Treasury Offset Program to collect non-final, non-fraud unemployment overpayments. Defendants ask the Court to bless this practice. It cannot do so.

There is no federal law that mandates that Defendants seize money that claimants do not owe. Under the state unemployment system: Defendants may only initiate collection against claimants after (1) there is a final determination on the merits of the underlying claim (MCL 421.32a); (2) there is a final determination that one or more weeks have been "overpaid" (MCL 421.62(a)); and (3) there is a final determination that the claimant must repay the overpayment in "equity and good conscience" (MCL 421.62(a); Ex. 13, UIPL 23-80; Ex. 14, UIPL 01-16; Ex. 15,

UIPL 20-21 Change 1). Until all these preconditions are met, there is no legally enforceable unemployment debt that may be collected under federal law. 31 CFR 285.8(c)(1) (stating that, when notifying Fiscal Service of debt owed, the state must certify "that the debt is past due and legally enforceable" and that it has complied with all "State requirements applicable to the collection of debts under this section"). In fact, if the state erroneously issues a notification that there is a debt owed when there is not actually a legally enforceable covered unemployment compensation debt, the state is obligated to correct and update the notification to Fiscal Service regarding the alleged debt. *See* 31 CFR 285.8(4).

When it comes to unemployment benefits, the state's ability to use the Treasury Offset Program to recover overpayment is even more limited than its ability to recover overpayment under state law. Federal law allows for federal tax intercepts to pay a covered unemployment compensation debt *only* when (1) the state notifies the federal government that there is an overpayment that is due; *and* (2) the debt is due to fraud or failure to report earnings.

There is no mandate that the state notify the federal government of an overpayment. Specifically, federal law provides that the Secretary of the Treasury shall follow certain steps only "[u]pon receiving notice from any State that a named person owes a covered unemployment compensation debt to such State…." 26 USC 6402(f)(1). Federal law also defines "covered unemployment compensation debt" as "a past-due debt for erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings *which has become final under the law of a State* certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected." 26 USC 6402(4)(A); *see also* 31 CFR 285.8(c)(3)(ii) (stating that the state must consider whether "the debt is due to fraud or the debtor's failure to report earnings" in the case of a "covered unemployment compensation debt."). Only upon fulfillment of these conditions may

the Secretary of the Treasury reduce a federal tax refund to pay the state for an overpayment related to unemployment.

Defendants vaguely refer to unspecified mandates from the Department of Labor, claiming that they need permission from the Department of Labor before they can halt Treasury Offset Program collections. However, the limited discovery available so far confirms that the Agency asked that question and specifically was told that the State has wide discretion to determine what is final and, therefore, what is collectible. Ex. 16, January 2022 DOL Correspondence (advising that the delay of collections was acceptable and stating "[y]our State recoupment practices and TOP require finality which you have flexibility in determining what finality means for those recoupment methods…."). Moreover, once the State learns that a covered unemployment compensation debt is not due, it has an affirmative duty to notify the Treasury to suspend collections, correcting and updating the previous notification. *See* 31 CFR 285.8(c)(4) ("The State shall, in the manner and in the time frames provided by Fiscal Service, notify Fiscal Service of any deletion or decrease in the amount of past-due, legally enforceable State income tax obligation or unemployment compensation debt referred to Fiscal Service for collection by tax refund offset.").

On reply, Defendants should address whether they are using the federal Treasury Offset Program to collect on *non-fraud* and *non-final* determinations while claimants have timely pending appeals. If so, Defendants should clarify whether they are asking this Court's permission to continue to do so and on what statutory authority they are relying in taking such action.

IV. CONCLUSION

This lawsuit alleges that Defendants engage in unlawful policies with respect to all unemployment claimants by collecting in cases without a final Determination. In moving for preliminary injunctive relief, Plaintiffs asked that this Court find that they are likely to prevail on

their claims that the policies themselves are unlawful and that unlawful collection is already causing irreparable harm. Allowing Defendants to continue collection based on unlawful policies will create irreparable harm to claimants across the state by allowing constitutional violations to occur, leaving claimants with no recourse to be made whole.

Accordingly, Plaintiffs ask that this Court clarify and affirm that:

(1) the Preliminary Injunction applies to suspend the Agency policy and practice of initiating collection on determinations before they are final;

(2) Defendants may not engage in collection activity against any claimant until they verify finality (*i.e.*, both a final Determination on the merits and a final Determination on restitution due);

(3) Defendants' duty to comply extends to a duty to notify the United States Treasury (and the Michigan Treasury and any other collection agents) to cease collection against any claimants who Defendants have erroneously reported to have debts that are final and legally enforceable.

Respectfully submitted,

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