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

Hon. Brock A. Swartzle

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PLAINTIFFS' SEPTEMBER 21, 2022 MOTION FOR CLASS CERTIFICATION PURSUANT TO MCR 3.501

Plaintiffs, individually and on behalf of all others similarly situated, request that this Court grant their Motion for Class Certification Pursuant to MCR 3.501 to allow Count III of their Second Amended Complaint to proceed as a class claim. Count III alleges that Defendants violated the due process rights of Plaintiffs and other putative Class members by collecting against them while they have a pending protest or appeal.

MCR 3.501 allows for class certification when:

(a) the class is so numerous that joinder of all members is impracticable;
(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

As further explained in the accompanying Memorandum in Support of Plaintiffs' September 21, 2022 Motion for Class Certification Pursuant to MCR 3.501, the putative Class meets each of these requirements.

Plaintiffs requested concurrence from Defendants in the relief sought. Defendants did not concur.

WHEREFORE, Plaintiffs respectfully request that this Court grant this Motion, appoint Plaintiffs as representatives of the Class, designate the law firm of Blanchard & Walker PLLC as Class Counsel, approve Plaintiffs' proposed Notice Form attached to the accompanying Memorandum as Exhibit 1, and postpone notice pursuant to MCR 3.501(C)(3) until Defendants have had sufficient time to review the backlog of pending appeals to identify Class members, and Order any other relief that the Court finds just and equitable in the interests of the Class.

Respectfully submitted,

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Dated: September 21, 2022

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' SEPTEMBER 21, 2022 MOTION FOR CLASS CERTIFICATION PURSUANT TO MCR 3.501

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I. INTRODUCTION

Defendants' illegal collection activity has deprived Michiganders of property before Agency Determinations have become final and while timely protests and appeals remain pending—sometimes for months or years. During the COVID-19 pandemic, an unprecedented number of Michiganders faced job loss and economic insecurity. As a result, hundreds of thousands of Michiganders sought the assistance of Michigan's unemployment insurance system. These individuals were faced with financial uncertainty, and unemployment insurance was a lifeline in a time of crisis.

Knowing the critical nature of unemployment benefits, the Legislature enacted the Michigan Employment Security Act ("MESA") to provide specific parameters within which the Agency can determine whether payments were made erroneously. During the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to provide additional federal unemployment benefits. The CARES Act likewise provides parameters within which state unemployment agencies, including the Agency here, can determine whether payments were made erroneously. These parameters define when the Agency can seek to collect benefits paid back from claimants and require that Defendants verify that there is a valid overpayment owed under the MESA before taking action to collect an alleged overpayment. Defendants' collection activity is taking place outside of these parameters. The collection activity has continued forward despite a recently-revealed backlog of roughly 300,000 unprocessed protests and appeals.

Instead of verifying that claimants owed an alleged overpayment, Defendants utilized unlawful policies or practices to claw back benefits while claimants have pending protests or appeals. This unauthorized collection violates claimants' rights to due process. Plaintiffs seek class

certification related to this practice, seeking classwide monetary and equitable relief. Plaintiffs move for class certification as the only viable way to address this widespread due process violation.

II. BACKGROUND

A. DEFENDANTS ENGAGE IN COLLECTIONS ACTIVITY AGAINST CLAIMANTS WHILE APPEALS ARE PENDING AND BEFORE ISSUING A FINAL DETERMINATION ON THE MERITS

Plaintiffs' Second Amended Complaint alleges that Defendants violated the law by engaging in collection activity before there was a final Determination on the merits, or while there was a pending protest or appeal. The Agency has acknowledged that such premature collection activity has occurred. Plaintiffs seek class certification of Count III of the Second Amended Complaint under MCR 3.501. Specifically, Plaintiffs ask that this Court grant certification of the following class related to Count III:

> All individuals who have been subject to Agency attempts to collect alleged overpayments before any "final determination" that would give the Agency legal authority to initiate collection (the "Early Collection Class" or the "Class").

Plaintiffs allege that Defendants' actions as to the Early Collection Class violate claimants' rights to procedural and substantive due process.

Plaintiffs who seek to represent the Class experienced the same premature, unlawful collection as putative Class members. For Plaintiff Kellie Saunders, the Agency retroactively reduced her benefits in October 2021. Second Am. Compl. ¶ 40. Although Saunders timely protested the adverse Determination, and was found to not owe restitution, the Agency sent Saunders monthly bills for the alleged overpayment, forcing Saunders to make payments to avoid garnishment. Second Am. Compl. ¶ 44; Ex. 2, Saunders Page 0001-0005. For Plaintiff Erik Varga, the Agency found him ineligible for benefits in January 2021 after initially finding him eligible and paying benefits. Second Am. Compl. ¶ 47. Despite a timely protest, the Agency garnished his

2020 federal tax return, sent repeated delinquency notices and monthly bills, and threatened to garnish 25% of his wages. Second Am. Compl. ¶¶ 48-54; Ex. 2, Varga Page 0006-0019.

For Plaintiff Lisa Shephard, the Agency found her ineligible for benefits after issuing her benefits for several months. Second Am. Compl. ¶¶ 59-61. Although she timely protested the adverse Determination, the Agency seized her 2020 tax refund and sent her repeated monthly bills and notices of delinquency despite her pending protest. Second Am. Compl. ¶¶ 61-70; Ex. 2, Shephard Page 0020-0034. For Plaintiff Jennifer Larke, the Agency retroactively found her ineligible for benefits in October 2020. Second Am. Compl. ¶ 85. Despite Larke's timely protest of the adverse Determination, the Agency seized a portion of her 2021 unemployment benefits, sent Larke notices of garnishment threatening to seize 25% of her income, and sent repeated monthly bills. Second Am. Compl. ¶¶ 86-92; Ex. 2, Larke Page 0035-0060.

Plaintiff Anna Logan was found ineligible for benefits after receiving benefits for months. Second Am. Compl. ¶¶ 95-96. Despite Logan's timely protest, the Agency sent her monthly bills threatening to seize her tax refund or garnish her wages. Second Am. Compl. ¶¶ 97-99; Ex. 2, Logan Page 0061. For Plaintiff Joshua Eggleston, the Agency found him retroactively ineligible for benefits in August 2021 after he received benefits for months. Second Am. Compl. ¶¶ 104-106. Although Eggleston timely protested, the Agency sent him monthly bills threatening to seize his tax refund and to garnish wages, and Eggleston was compelled by the Agency's coercive notices to pay on the balance despite his pending protest. Second Am. Compl. ¶¶ 106-112; Ex. 2, Eggleston Page 0062-0073.

For Plaintiff Cheryl Scarantino, the Agency found her retroactively ineligible for benefits. Second Am. Compl. ¶¶ 124-127. Despite Scarantino's timely protests, the Agency issued monthly bills to Scarantino, and Scarantino was compelled by the Agency's coercive notices to pay on the

balance despite her pending protest. Second Am. Compl. ¶¶ 126-131; Ex. 2, Scarantino Page 0074-0082. For Plaintiff Theresa Brandt, the Agency retroactively reduced her weekly benefit amount. Second Am. Compl. ¶ 141. Despite Brandt's timely protest, the Agency sent Brandt monthly bills alleging that she owed over $10,000. Ex. 2, Brandt Page 0083-0088.

Plaintiffs allege that Defendants' actions violate both procedural due process and substantive due process rights. In general, due process is intended to protect citizens from "*deliberate* decisions of government officials to 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) (emphasis in original). Procedural due process "require[s] the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'" *Id.* Substantive due process is intended to "prevent governmental power from being 'used for purposes of oppression'" through "barring certain government actions regardless of the fairness of the procedures used to implement them." *Id.*

The Michigan Supreme Court has recognized that "alleged violations of substantive and procedural due process must be separately analyzed in order to determine whether the specific dictates of due process have been satisfied." *Bonner v City of Brighton*, 495 Mich 209, 225; 848 NW2d 380 (2014). The Court made this statement after the Michigan Court of Appeals erroneously "meld[ed] together plaintiffs' substantive and procedural due process claims." *Id.* The Court stated, "[w]hile the touchstone of due process, generally, 'is the protection of the individual against arbitrary action of government,' the substantive component protects against the arbitrary exercise of governmental power, whereas the procedural component is fittingly aimed at ensuring constitutionally sufficient procedures for the protection of life, liberty, and property interests." *Id.* at 224. Plaintiffs allege in Count III that Defendants violate the procedural and substantive dictates

of due process by engaging in collection activity while there is a pending protest or appeal.

B. SUMMARY OF LEGAL ARGUMENT

The MESA is clear: a Determination is not final until a claimant has exhausted all appeals, MCL 421.32a, and the Agency is not authorized to initiate collection until after the window for appeal has closed, MCL 421.62(a). Section 32a provides, "[t]he redetermination is final *unless* within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge pursuant to section 33." MCL 421.32a (emphasis added). Section 62(a) provides, "[t]he unemployment agency shall issue a determination requiring restitution within 3 years *after the date of finality of a determination*, redetermination or decision reversing a previous finding of benefit entitlement." MCL 421.62a (emphasis added).

The Unemployment Insurance Appeals Commission ("UIAC") has likewise confirmed that Section 62 "does not afford the Agency additional time to *reconsider* an original benefit determination. Rather, the starting point for Section 62(a)'s three-year period is the date of finality of an underlying ruling reversing a previous finding of benefit entitlement." Ex. 3, May 3, 2022 UIAC Opinion at 5 (emphasis in original). The UIAC went on to conclude that the three-year period in Section 62(a) "is triggered by a final ruling reversing a previous finding of benefit entitlement" and that the Section "cannot be used to launch a collateral attack on a final determination under Section 32a." *Id.* Defendants' invocation of Section 62(a) to justify their actions is unsupported by law. Defendants cannot initiate collections until after finality.

Plaintiffs allege that Defendants violate the procedural due process rights of Early Collection Class members, including by collecting overpayments before finality in violation of state law and without providing an adequate administrative process to stop such overpayment

during a pending protest or appeal. Defendants violate the substantive due process rights of Early Collection Class members, including by arbitrarily subjecting Early Collection Class members to collection of overpayments while they have pending protests or appeals. This Court earlier found that Plaintiffs are likely to succeed on the merits of Count III, stating, "[t]he Agency is likely depriving plaintiffs of their right to due process by seeking repayment of unemployment benefits before completing the administrative-review process." June 13, 2022 Order at 16.

Defendants have also defended their actions by arguing that there is no violation because any early collection is due to Agency negligence or mistake. Plaintiffs allege that the actions are intentional. The experience of Plaintiffs demonstrates that the Agency is engaging in knowing, intentional collection activity beyond the scope of its legal authority. This experience is common for Class members. Resolution of this Motion does not require this Court to reach the merits, only to determine there are common questions for the Class members.

C. How to Identify the Early Collection Class

As Defendants' documents show, it is simple to determine whether a claimant is part of the Early Collection Class. If Defendants have sent monthly bills to a claimant, garnished wages, or seized tax refunds while there is a pending protest or appeal, and before there is a final Determination on the merits, that claimant is a member of the Early Collection Class. *See, e.g.*, Ex. 2 (showing collections against Plaintiffs).

III. PROCEDURAL HISTORY

Although some discovery has been exchanged, Plaintiffs still have limited information regarding the scope of the alleged violation. Plaintiffs served discovery on Defendants on January 28, 2022. Through discovery, Plaintiffs seek information regarding the number of individuals impacted by Defendants' unlawful practices and the actions Defendants have taken or continue to

take to prevent the unlawful collection at issue. After Defendants moved to stay discovery, this Court initially entered an Order on April 26, 2022 denying Defendants' Motion. However, Defendants filed a renewed Motion to Stay Discovery on April 27, 2022, requesting a stay of discovery until their Motion for Summary Disposition was adjudicated. On May 18, 2022, this Court granted a stay of classwide discovery until resolution of Defendants' Motion for Summary Disposition.

On June 13, 2022, this Court granted in part and denied in part Defendants' Motion for Summary Disposition, opening up classwide discovery. On July 13, 2022, Defendants served partial responses to discovery. On July 22, 2022, after Defendants declined to provide a timeline by which they intended to provide complete discovery responses despite Plaintiffs' requests to confer, Plaintiffs filed a Motion to Compel. On August 11, 2022, this Court denied Plaintiffs' Motion to Compel based on Defendants' assertion that they would supplement their discovery in a rolling manner no later than August 31, 2022.

Defendants served partial interrogatory responses on September 2, 2022. However, Defendants still have not provided complete interrogatory responses, and Defendants have yet to supplement their documentary production or identify what responsive documents they will produce. As a result, Plaintiffs have limited information about the scope of the class asserted here or of Defendants' attempts to prevent the violation from continuing to occur. Based on recent disclosures from the Agency, it now appears almost certain that identification of Class members is likely to take several more months and will involve review of a backlog of 300,000 or more protests and appeals.

IV. ARGUMENT

In a case such as here where there are many individuals impacted by the same violation of

the law, a plaintiff has the option to bring a claim on a classwide, rather than an individual, basis. The Michigan Court Rules provide a mechanism for adjudicating claims on a classwide basis when the violations are alleged to be widespread and to impact many individuals in a similar manner. MCR 3.501 allows for class certification when:

> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

In granting class certification, this Court is not deciding the merits of the case and has "broad discretion" to determine if the class will be certified. *Henry v Dow Chem Co*, 484 Mich 483, 501; 722 NW2d 301 (2009). This means that a state court need not engage in the "rigorous analysis" required by the federal rules. *Id.* This Court may decide a motion for class certification based "on the pleadings alone" when "the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met." *Id.* at 502. In this case, the Agency's own internal records and the pleadings demonstrate that each factor supports certification of the putative class.

A. THE CLASS MEMBERS ARE NUMEROUS

The first factor requires that the class members be numerous. In this case, it is without dispute that the Class members are numerous, potentially encompassing hundreds of thousands of claimants. "There is no particular number of [class] members necessary, nor need the number be known with precision 'as long as general knowledge and common sense indicate that the class is large.'" *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007) (quoting *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999)). To meet numerosity, the precise

number of class members "does not need to be ascertained." *Id.* at 310-311; *see also Duskin v. Dep't of Human Servs (On Remand)* 304 Mich App 645, 653; 848 NW2d 455 (2014) (quotation marks and citation omitted) ("[T]he plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members" and the plaintiff must establish "that a sizeable number of class members have suffered an actual injury.").

In *Hill*, a case that alleged that class members were harmed by trees the defendant planted, the plaintiffs asserted with respect to numerosity that there were 7,000 "problem trees." *Hill*, 276 Mich App at 310. The defendants defended against this assertion by stating that not every "problem tree" equated to a class member because the parties did not know that each tree caused harm to someone. 276 Mich App at 310. Nonetheless, the Court found this factor to be "amply satisfied" when newspaper articles, a letter from the defendant's officials, and the defendants' acknowledgment of the "tree problem" supported the conclusion that there were thousands of trees causing problems for homeowners. *Id.* at 310-311.

In this case, although the numbers are still preliminary, Defendants have acknowledged that there are currently 274,000 protests or appeals that have not been reviewed. Ex. 4, Sept. 9, 2022 Letter. It is unknown how many of those individuals have been or are currently being collected against. In addition to the hundreds of thousands of claims that have not been reviewed, Defendants acknowledge over 36,000 claimants with known appeals that remain pending. Ex. 5, Interrogatory Response. The acknowledged 274,000 pending claims that need to be reviewed and pending appeals do not include the number of claimants who now have a final Determination, but who were previously collected against during a pending protest or appeal. They also appear to be limited to claims for federal benefits, rather than state benefits. Common sense also indicates that

the Class is large. At the peak of the pandemic, over three million Michigan residents claimed unemployment benefits. Ex. 6, Unemployment Claims Chart. Claims exceeded one million weekly until October 2020 and hovered between 600,000 and one million until June 2021. *Id.*

Attorneys practicing in the unemployment field have been contacted by thousands of people seeking representation when the Agency is collecting against them. Exs. 7-10, Declarations of Attorneys Nicholas Roumel, Marla Linderman, Cristine Wasserman, and Jonathan Browning. Attorney Nicholas Roumel, who has been practicing for 38 years, currently has about fifty UIA clients, but has been contacted by many others to whom he cannot offer representation. Ex. 7, Roumel Decl. ¶¶ 1, 5, 9. Attorney Marla Linderman, who has been practicing for 25 years, has been contacted by over 1,300 people regarding unemployment matters, many of whom are being collected against while they have pending appeals. Ex. 8, Linderman Decl. ¶¶ 1, 4, 12. Attorney Cristine Wasserman, who has been practicing for almost 25 years, is aware of many individuals against whom the Agency is seeking collections while they have pending appeals. Ex. 9, Wasserman Decl. ¶¶ 1, 11. Even when Ms. Wasserman has communicated with the UIA Restitution Department to alert the Agency of unlawful premature collection activity, the Agency has not stopped its collection. *Id.* ¶ 10. Attorney Jonathan Browning, who has focused his practice on unemployment since 2021, has had clients with pending protests or appeals feel compelled to pay coercive UIA bills or been garnished. Ex. 10, Browning Decl. ¶¶ 2, 4-5.

B. Common Questions of Law and Fact Predominate Because All Class Members Have Suffered the Same Injury—Collection Before Finality—and the Injury is Discernible from the Same Fact Pattern for All Class Members

The second factor, commonality, is met when "the common issue or issues [] predominate over those that require individualized proof." *Hill*, 276 Mich App at 311. This "does not require *all* issues in the litigation to be common." *Id.* Commonality "requires the plaintiff to demonstrate

that the class members 'have suffered the same injury,'" which means that the determination of a common contention's "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc v Dukes*, 564 US 338, 350; 131 S Ct 2541; 180 L Ed 2d 374 (2011) (quoting *General Telephone Co of Southwest v Falcon*, 547 US 147, 157; 102 S Ct 2364; 72 L Ed 2d 740 (1982)).

In this case, the Court must determine whether Defendants' collection activity violates claimants' rights to due process and whether Defendants are liable for the violations. This revolves around common questions of law and fact. Common questions of fact predominate for the Class. For the Class, Plaintiffs will show that all Class members (1) applied for and received benefits; (2) the Agency later alleged they were ineligible for benefits already received; (3) claimants protested or appealed the adverse Determination; and (4) the Agency engaged in collection activity while a protest or appeal was pending. These facts will be consistent across all Class members and easily discernible from each Class member's Agency file.

A single question of law governs the Class: whether the Agency violates claimants' rights to due process by engaging in collections activity against claimants when there is a pending protest or appeal. MCL 421.32a and MCL 421.62(a) forbid the Agency from engaging in collections activity before both conditions have been met.

When there are common question of fact and law as to liability, different types of damages amongst class members cannot defeat commonality. *See Hill*, 276 Mich App at 311. In *Hill*, the plaintiff sought to certify a class of homeowners harmed by the defendant's silver maple trees planted on public easements in front of residents' homes. *Id.* at 302. The homeowners were harmed in various ways, including by obstructing sewer pipes, making sidewalks unstable, and destroying lawns, plus the time and money for cleaning and repairs. *Id.* The court found common questions

of law where the question was whether the defendants were liable at all for damages caused by the trees. *Id.* at 312; *see also Zine v Chrysler Corp*, 236 Mich App 261, 289; 600 NW2d 384 (1999) (quoting *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998), *cert den.* 524 U.S. 923; 118 S Ct 2312; 141 L Ed 2d 170 (1998)) (noting that the question is whether there "'is a common issue the resolution of which will advance the litigation.'").[1] Thus, whether Class members have suffered different damages has no bearing on the question of whether common issues of fact or law predominate.

C. THE CLAIMS OF PLAINTIFFS ARE TYPICAL OF THE CLASS WHEN THEY SHARE THE SAME CORE IN THE ALLEGATION THAT PREMATURE COLLECTION VIOLATES DUE PROCESS

The third factor, typicality, is met when the claims share a legal theory and "'core of allegation.'" *Neal v James*, 252 Mich App 12, 21; 651 NW2d 181 (2002), quoting *Allen v Chicago*, 828 F Supp 543, 553 (ND Ill 1993). This does not require that the facts be identical. *Id.* Courts customarily consider the questions of commonality and typicality together. *See, e.g., Mich Ass'n of Chiropractors v Blue Care Network of Mich*, 300 Mich App 577, 591-595; 834 NW2d 138 (2013) (finding both commonality and typicality using the same analysis). In *Hill*, the court found typicality when "the class members' legal theories are the same: trespass-nuisance, negligence, and governmental taking without due process." *Id.* at 313. The court therefore found that the "core of allegation" was the same when each theory centered around the question of whether the

[1] *See also Duskin v Dept of Human Servs*, 304 Mich App 645, 654; 848 NW2d 455 (2014) (quoting *Wal-Mart Stores, Inc v Dukes*, 564 US 338, 338; 131 S Ct 2541; 180 L Ed 2d 374 (2011)) ("[t]he 'common contention…must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'"); *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599-600; 654 NW2d 572 (2002) (noting that the question is whether the plaintiff "can demonstrate with common proof that the members of the class have suffered a common injury…" and that the question was "whether 'the common issues [that] determine liability predominate.'").

defendant provided due process. 276 Mich App at 313. Similarly, the core of Plaintiffs' claim here is that the Agency violated their rights and the Class members' rights to due process. The Agency did so when it engaged in collection activity while there was a pending protest or appeal.

D. PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE CLASS WHEN THEIR INTERESTS ALIGN WITH THE CLASS MEMBERS AND PLAINTIFFS' COUNSEL ARE EXPERIENCED CLASS ACTION LITIGATORS

Fourth, Plaintiffs must show that they will fairly and adequately protect the Class and the Class's interests. To meet adequacy:

> Proponents of class certification establish adequacy by showing that class representatives can fairly and adequately represent the interests of the class as a whole. To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interest. [*Duskin*, 304 Mich App at 657 (quotations omitted)].

See also Brown v VHS of Mich, Inc, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2021 (Docket Nos. 349240, 349251), p. 28-29 (unpublished 2021 Mich App LEXIS 1947) (quoting *Stout v JD Byrider*, 228 F3d 709, 717 (CA 6 2000)) (noting that "a class representative will satisfy the requirement of adequacy if they will vigorously pursue the interests of the class through counsel who is qualified, competent, 'experienced and generally able to conduct the litigation.'") (Ex. 11).

Here, the proposed class representatives suffered from the same unlawful Agency activity as did the Class they seek to represent. They all had benefits retroactively reduced or denied and were collected against based on the same unlawful Agency activity. If Plaintiffs succeed in this litigation, the Class members will benefit. There is nothing in the record to suggest that the proposed Class representatives have any interest antagonistic to, or conflicting with, the interests of the Class they seek to represent. Moreover, Plaintiffs' counsel are highly experienced class and

collective action litigators, having litigated dozens of class actions, including suits against the State.

E. MAINTENANCE AS A CLASS ACTION WILL BE SUPERIOR TO OTHER AVAILABLE METHODS WHEN IT WOULD BE IMPRACTICAL TO LITIGATE THOUSANDS OF INDIVIDUAL CLAIMS SEEKING THE SAME RELIEF

Finally, Plaintiffs must show that class-based litigation would be superior to other methods of resolution. The primary concern related to superiority is "practicality and manageability." *Hill*, 276 Mich App at 313. The Michigan Supreme Court has noted that this factor is essentially a test of practicality. *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 601-602; 654 NW2d 572 (2002). Because "[a]lmost all claims will involve disparate issues of law and fact to some degree[, t]he relevant concern here is whether the issues are so disparate as to make a class action unmanageable." *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 419; 415 NW2d 206 (1987).

Courts often consider this factor to be "intertwined" with commonality. *A&M Supply Co*, 252 Mich App at 603; *Zine v Chrysler Corp*, 236 Mich App 261, 289 n 14; 600 NW2d 384 (1999) (stating "[t]his factor ties in with the fifth factor in that if individual questions of fact predominate over common questions, the case will be unmanageable as a class action" and that "this fifth factor is 'essentially the same' as the 'convenient administration of justice'… and is essentially a practicality test."); *see also Brown*, slip op. at p. 32 (stating that "[t]he main concerns underlying the requirement of superiority are practicality and manageability" and finding that the trial court did not err by concluding that the plaintiff met the element of superiority because "to try each case separately would have entailed significant duplication of judicial resources" and that while "there is an underlying risk that the discrete claim of each class member could result in inconsistent verdicts, the facts themselves would not be so disparate to make the management of the class action

completely unmanageable.").

The Michigan Court Rules provide several factors that the court should consider in determining whether the moving party satisfies MCR 3.501(A)(1)(e). In particular,

> In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:
> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
> (c) whether the action will be manageable as a class action;
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions. [MCR 3.501(A)(2).]

The touchstones of superiority—manageability and practicality—support adjudicating this class as a class action. The factors in MCR 3.501(A)(2) also support adjudicating this matter as a class action.

Managing Plaintiffs' claims as a class action will be more manageable than adjudicating hundreds of thousands of individual claims. Michigan attorneys who practice in the unemployment field are unable to represent everyone who fits within the class definition due to the overwhelming number of people seeking representation for the same issue. Ex. 7-10, Declarations of Attorneys Roumel, Linderman, Wasserman, and Browning (attesting to the same). Given the unambiguous

nature of the legal violation alleged here, Agency review of the Class members' files will identify members of the Class. *See, e.g.*, Ex. 2 (showing collection activity against Plaintiffs). Class action litigation is an efficient way to seek relief on behalf of hundreds of thousands of Michiganders who have been identically impacted and who seek monetary and equitable relief.

Plaintiffs allege a distinct violation of law that can be proven with easily identifiable facts. This issue is amenable to class treatment. Given the large number of class members, there is a risk that individual actions would interpret the law differently and create conflicts. Accordingly, Court control and class treatment of the claims is necessary to ensure that every claimant who could be impacted by the claim at issue here can pursue their claim through this class mechanism and be treated consistent with the law. Efficiency and consistency concerns militate in favor of class treatment as greatly superior to hundreds of thousands of individual actions.

Plaintiffs seek equitable relief on behalf of the Class. With respect to their claim for equitable relief, Plaintiffs seek a decision from this Court that Defendants' actions violate the law. If this Court finds that the actions violate the law, this finding will apply to all individuals who are similarly impacted—in other words, it will apply to all Class members. It would be inefficient to require everyone whose rights Defendants are violating to bring an individual case for equitable relief. Instead, a single class action seeking equitable relief with respect to all individuals similarly situated is more efficient and cost-effective.

Litigating this matter as a class action is the only economical solution when the value of individual claims would be outweighed by the cost of litigation. Individual claims are insufficient in amount to justify separate actions. Plaintiffs seek monetary damages; however, some Class members have monetary damages that are too small to justify the cost of individual litigation. Claimants have suffered monetary damages including money seized, the lost time value of money,

and loss due to exorbitant interest rates on loans the claimant was forced to obtain to pay his bills. Such damages are likely significant for a claimant, but small relative to the cost of litigation.

Further, putative Class members do not have a significant interest in controlling the prosecution or defense of separate actions. The legal violations are clear, and a finding by this Court that the Agency's actions are unlawful as to Plaintiffs is a finding that the Agency's actions are unlawful as to all Class members. Whether the Agency committed the same violation as to each Class member can be determined by a basic review of the claimant's UI file. Class members do not have an interest in the separate time and expense of litigation when the resolution of their claims can be easily determined in the context of this matter.

V. NOTICE OF CLASS ACTION

MCR 3.501(C) provides the way in which notice of class status must be provided to putative class members. MCR 3.501(C)(3) grants the court the power to "determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent."

Although Plaintiffs sent discovery requests to Defendants on February 28, 2022, Defendants have not provided sufficient discovery responses to assess the true scope of the putative Class. In fact, Defendants' apparent inability to report the number of claimants impacted by their unlawful practice strongly suggests that Defendants are not yet able to identify the individuals to whom notice must be sent. Defendants have acknowledged that there are currently 274,000 pending appeals on MiWAM and 45,000 pending appeals via web chat. Ex. 4

, Sept. 9, 2022 Letter. It is unknown how many of those individuals have been or are currently being collected against. It also appears that it does not include Class members who received regular state benefits, rather than federal pandemic benefits. This number also does not

include the claimants whose claims have been resolved, but who were earlier collected against, and thus have already been harmed. Regardless of whether the ultimate determination is not in claimants' favor, by prematurely collecting, the Agency deprived them of their constitutional right to due process.[2]

Plaintiffs need adequate discovery before they can accomplish effective notice. The Michigan Court Rules allow the Court to "postpone the notice determination until after the parties have had an opportunity for discovery…." MCR 3.501(C)(3). Plaintiffs ask that this Court postpone the notice determination until Defendants have provided appropriate discovery. [3] MCR 3.501(C)(5) states the requirements for the content of notices. Plaintiffs have attached a form of proposed Notice for use at the appropriate time. *See* Ex. 1.

VI. CONCLUSION

The violations alleged in Count III of Plaintiffs' Second Amended Complaint are easily discernible and justiciable. Hundreds of thousands of Michiganders have been similarly impacted by the Agency's unlawful actions. This is a case that was intended to be litigated as a class—in

[2] As this Court has recognized, "even the temporary deprivation of a constitutional right is an irreparable harm. *Garner v Mich State Univ*, 185 Mich App 750, 764; 462 NW2d 832 (1990)…. [T]he Agency is depriving plaintiffs of due process by seeking repayment of unemployment benefits before completing the administrative-review process. The Agency's actions, therefore, are irreparably harming plaintiffs with respect to their third count." June 13, 2022 Ord. at 16.

[3] When the time comes to send notice, Plaintiffs ask that this Court Order Defendants to send notice to putative class members electronically through the MiWAM system. It is undisputed that Defendants have the infrastructure to send large-scale notifications because it has already notified the individuals for whom waiver of overpayment has been granted. The Agency is in possession of all contact information for claimants and has access to the MiWAM system. Plaintiffs propose utilizing Defendants' MiWAM program. Each claimant account on MiWAM has a home page. Ex. 12, MiWAM Account Overview. Defendants can program MiWAM so an alert screen will appear when a claimant logs into MiWAM. To access the electronic notification, Plaintiffs propose that Defendants post an alert that will say "Class Action – Notice of Rights, Click Here to Learn More" that will link to a website with the notice and opt-out form. This is the same screen where the Agency has sought collection from claimants and the same method they have used to instruct claimants to "make a payment on outstanding balance."

the interest of efficiency and consistency, the same legal issues can be adjudicated and resolved with respect to the entire Class in a single litigation, rather than flooding the courts with thousands of separate lawsuits.

Defendants engaged in collections activity against claimants while there was a protest or appeal pending and without issuing a final determination on the merits. Resolution of whether there is a violation can be determined by answering a single question of law and by a cursory review of a claimant's file.

Accordingly, Plaintiffs respectfully request that this Court enter an Order:

1. Appointing Plaintiffs as representatives of the Class;

2. Designating the law firm of Blanchard & Walker PLLC as Class Counsel;

3. Approving the class notice attached as Exhibit 1, but delaying notice until an appropriate time after the Agency has had time to review its backlog and identify putative Class members; and

4. Ordering any other relief that the Court finds just and equitable in the interests of the Class.

Respectfully submitted,

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Dated: September 21, 2022

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

Hon. Brock A. Swartzle

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PLAINTIFFS' SEPTEMBER 21, 2022 MOTION FOR CLASS CERTIFICATION PURSUANT TO MCR 3.501

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11	*Brown v VHS of Mich, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2021 (Docket Nos. 349240, 349251), p. 28-29 (unpublished 2021 Mich App LEXIS 1947)

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