

IN THE STATE OF MICHIGAN
COURT OF APPEALS

KELLIE SAUNDERS, ET AL.,

COA No.

Plaintiffs/Appellants,

Trial Court

v.

Case No. 22-00007-MM

Hon. Brock A. Swartzle

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

Defendants/Appellees.

APPLICATION FOR LEAVE TO APPEAL BY PLAINTIFFS/APPELLANTS

ORAL ARGUMENT REQUESTED

*This appeal involves a ruling that a provision of the Constitution,
a statute, rule or regulation, or other State governmental action is invalid.*

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....IV

STATEMENT OF JURISDICTION..... VI

STATEMENT OF QUESTIONS PRESENTED..... VII

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 1

INTRODUCTION..... 4

STATEMENT OF FACTS AND PROCEEDINGS BELOW..... 5

I. PLAINTIFFS’ ALLEGATIONS 5

A. *The Extra-Jurisdictional Collection Claim*..... 5

B. *The Waiver Claim* 8

II. PROCEDURAL HISTORY 11

STANDARD OF REVIEW 11

ARGUMENT..... 12

I. PLAINTIFFS AND PUTATIVE CLASS MEMBERS WILL SUFFER SUBSTANTIAL HARM IF FORCED TO WAIT UNTIL FINAL JUDGMENT TO APPEAL BECAUSE THE AGENCY HAS BEEN CLEAR IT WILL CONTINUE ITS UNLAWFUL ACTIONS DURING THE PENDENCY OF THIS LAWSUIT 12

II. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT I OF PLAINTIFFS COMPLAINT BECAUSE IT FAILED TO ANALYZE FOR SUBSTANTIVE DUE PROCESS, FAILED TO CONSIDER WHETHER THE ADMINISTRATIVE PROCESS WOULD PROVIDE THE RELIEF REQUESTED, AND RELIED ON UNSUPPORTED EVIDENCE RELATED TO EFFECTIVENESS AND AVAILABILITY OF THE ADMINISTRATIVE PROCESS 16

A. *The Court of Claims Erred in Dismissing Count I for Failure to Exhaust Administrative Remedies Without a Finding that There Was an Administrative Process to Provide the Relief Requested* 17

1. The Administrative Process 18

RECEIVED by MCOA 7/1/2022 2:23:43 PM

2. **Plaintiffs Seek Relief to Remedy the Wrongs Against Them and Other Claimants that is Not Available in the Administrative Process**..... 20

B. The Court of Claims Erred in Failing to Analyze Count I under Both Procedural and Substantive Due Process..... 21

C. The Court of Claims Erred in Dismissing Count I for Failure to Exhaust Administrative Remedies by Making Conclusions and Relying on Assumptions not Supported by Evidence..... 23

III. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT II UNDER MCR 2.116(C)(8) BECAUSE ITS FINDING THAT THERE IS NO PROPERTY RIGHT RELATED TO WAIVER OF OVERPAYMENT WAS ERRONEOUS AND ITS FINDING THAT PLAINTIFFS WERE PROVIDED NOTICE OF AN ADMINISTRATIVE PROCESS TO REQUEST REVIEW IS UNSUPPORTED BY THE EVIDENCE 24

A. The Court of Claims Erred When It Dismissed Plaintiffs’ Waiver Claim Under MCR 2.116(C)(8) Based on an Erroneous Finding that Claimants Do Not Have a Property Right Related to Waiver of Overpayment..... 25

B. The Court of Claims Erred in Dismissing the Waiver Count under MCR 2.116(C)(8) Because It Incorrectly Found that Plaintiffs had Notice with Respect to a Waiver and Failed to Analyze for Substantive Due Process 27

CONCLUSION AND RELIEF REQUESTED 29

RECEIVED by MCOA 7/1/2022 2:23:43 PM

INDEX OF AUTHORITIES

CASES

Bonner v City of Brighton, 495 Mich 209, 225; 848 NW2d 380 (2014) 21

California Department of Human Resources Development v Java 9, 18

Conlara, Inc v State Bd of Ed, 442 Mich 230, 237; 501 NW2d 88 (1993) 22

Cummins v Robinson Twp, 283 Mich App 677, 713; 770 NW2d 421 (2009)..... 15

Daniels v Williams, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986) 21

Dep’t of Licensing & Regulatory Affairs/Unemployment Ins. Agency v Lucente, ___ Mich ___;
___ NW2d ___ (2021) (Docket Nos. 160843, 160844)..... 20

GMC v Dep’t of Treasury, 290 Mich App 355, 369; 803 NW2d 698 (2010) 11

Herrick Dist Library v Library of Mich, 293 Mich App 571, 582; 810 NW2d 110 (2011) 22

Manor House Apartments v City of Warren, 204 Mich App 603, 605; 516 NW2d 530 (1994) .. 15

Millar v NM Dep’t of Workforce Solutions, 304 P3d 427, 432 (NM App, 2013) 26

Twp of Hopkins v State Boundary Comm’n, ___ Mich App ___; ___ NW2d ___ (2022)
(Docket No. 355195) 28

STATUTES

MCL 123.1008(2) 28

MCL 421.2(1) 29

MCL 421.32a 1

MCL 421.32a(1) 19

MCL 421.62(a) 2, 8, 28

MCL 421.62(a)(iii) 8

Section 32a of the MESA 19

RULES

MCR 2.116(C)(8),..... 24

MCR 7.205(B)(1)..... 12

TREATISES

Collateral Attacks on Deportation Orders: The Second Circuit Banishes the Ghost of Spector,
50 Brook L Rev 721, 746 (1984) 15

CONSTITUTIONAL PROVISIONS

Article I Section 17 of the Michigan Constitution 1

STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for leave to appeal because Appellants filed the application within 21 days of the Court of Claims' June 13, 2022 Opinion and Order granting in part and denying in part Defendants' Motion for Summary Disposition, as required by MCR 7.205(A)(1).

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STATEMENT OF QUESTIONS PRESENTED

1. Whether Plaintiffs will suffer substantial harm if appeal is not granted while claimants face imminent and ongoing property seizure.

Claimant-Appellant Answers: Yes
Circuit Court Answered: No
Agency Answers: No

2. Whether the Court of Claims erred in dismissing Count I of the First Amended Complaint (without prejudice as to all Plaintiffs except as to Plaintiff Kellie Saunders) for failure to exhaust administrative remedies without a finding that there was any administrative process that would provide the relief requested in this action.

Claimant-Appellant Answers: Yes
Circuit Court Answered: No
Agency Answers: No

3. Whether the Court of Claims erred in dismissing Count I of the First Amended Complaint (without prejudice as to all Plaintiffs except as to Plaintiff Kellie Saunders) when the Court failed to analyze the Constitutional Due Process allegation for procedural due process and substantive due process.

Claimant-Appellant Answers: Yes
Circuit Court Answered: No
Agency Answers: No

4. Whether the Court of Claims erred in dismissing Count I of the First Amended Complaint (without prejudice as to all Plaintiffs except as to Plaintiff Kellie Saunders) for failure to exhaust administrative remedies by making conclusions and relying on assumptions not supported by any evidence submitted.

Claimant-Appellant Answers: Yes
Circuit Court Answered: No
Agency Answers: No

5. Whether the Court of Claims erred in dismissing Count II of the First Amended Complaint based on a conclusion that Plaintiffs had no liberty or property interest to be free from seizure of property before a determination with notice and opportunity to be heard on whether the alleged overpayment qualified for a waiver.

Claimant-Appellant Answers: Yes
Circuit Court Answered: No
Agency Answers: No

6. Whether the Court of Claims erred in dismissing Count II based on a conclusion that Plaintiffs were provided notice of an administrative process to request review for waiver of alleged overpayment based on Agency error.

Claimant-Appellant Answers:	Yes
Circuit Court Answered:	No
Agency Answers:	No

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I Section 17 of the Michigan Constitution

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

MCL 421.32a - Review of determination; redetermination; notice; reconsideration; applicability of redetermination, disqualification, or ineligibility to compensable period; finality of redetermination; additional transfer provisions; finding of fraud; change in mailing address.

- (1) Upon application by an interested party for review of a determination, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination. After review, the unemployment agency shall in its discretion issue a redetermination affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination, or may transfer the matter to an administrative law judge for a hearing. If the unemployment agency issues a redetermination, it shall promptly notify the interested parties of the redetermination. The 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.
- (2) The unemployment agency shall, for good cause, including an administrative clerical error or evidence produced by an interested party showing that a prior determination or redetermination was not sent to the interested party's correct address or an address ascertained under subsection (5), reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. 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 original determination involved a finding of fraud, within 3 years after the date of mailing or personal service of the original determination.
- (3) If an interested party fails to file a protest within the 30-day period and the unemployment agency for good cause reconsiders a prior determination or redetermination and issues a redetermination, a disqualification, or an ineligibility imposed thereunder, other than an ineligibility imposed due to receipt of retroactive pay, the redetermination, disqualification, or ineligibility does not apply to a compensable period for which benefits were paid or are payable unless the benefits were obtained as a result of an administrative clerical error, a false statement, or a nondisclosure or misrepresentation of a material fact by the claimant. However, the

redetermination is final unless within 30 days after the date of mailing or personal service of the notice of redetermination an appeal is filed for a hearing on the redetermination before an administrative law judge pursuant to section 33.

- (4) In addition to the transfer provisions in subsections (1) and (2), both of the following apply:
 - (a) If both the claimant and the employer agree, the matter may be transferred directly to an administrative law judge in a case involving the payment of unemployment benefits.
 - (b) If both the unemployment agency and the employer agree, the matter may be transferred directly to an administrative law judge in a case involving unemployment contributions or reimbursements in lieu of contributions.
- (5) If a determination or redetermination includes a finding that an interested party committed fraud, the unemployment agency shall, in addition to sending the determination or redetermination to the interested party's address of record, ascertain from the department of state, the department of treasury, and the United States Postal Service other known mailing addresses of the interested party and send the determination or redetermination to the most recent address.
- (6) A claimant, employer, or interested party shall, during a benefit year, notify the unemployment agency of a change in its mailing address.

MCL 421.62(a) Recovery of improperly paid benefits.

- (a) If the unemployment agency determines that an individual has obtained benefits to which the individual is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest pursuant to section 15(a) by 1 or more of the following methods: deduction from benefits or wages payable to the individual, payment by the individual in cash, or deduction from a tax refund payable to the individual as provided under section 30a of 1941 PA 122, MCL 205.30a. Deduction from benefits or wages payable to the individual is limited to not more than 50% of each payment due the claimant. The 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. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall not initiate administrative or court action to recover improperly paid benefits from an individual more than 3 years after the date that the last determination, redetermination, or decision establishing restitution is final. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall issue a restitution determination on an issue within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose, or in the case of an issue of intentional false statement, misrepresentation, or concealment of material information in violation of section 54(a) or (b) or sections 54a to 54c, within 3 years after the receipt of the improperly paid benefits unless the unemployment agency filed a civil action in a court within the 3-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment

agency issued a determination requiring restitution within the 3-year period. The time limits in this section do not prohibit the unemployment agency from pursuing collection methods to recover the amounts found to have been improperly paid. Except in a case of an intentional false statement, misrepresentation, or concealment of material information, the unemployment agency shall waive recovery of an improperly paid benefit if repayment would be contrary to equity and good conscience and shall waive any interest. If the agency or an appellate authority waives collection of restitution and interest, except as provided in subdivision (ii), the waiver is prospective and does not apply to restitution and interest payments already made by the individual. As used in this subsection, “contrary to equity and good conscience” means any of the following:

- (i) The claimant provided incorrect wage information without the intent to misrepresent, and the employer provided either no wage information upon request or provided inaccurate wage information that resulted in the overpayment.
- (ii) The claimant’s average net household income and household cash assets, exclusive of social welfare benefits, were, during the 6 months immediately preceding the date of the application for waiver, at or below 150% of the annual update of the poverty guidelines most recently published in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC 9902(2), and the claimant has applied for a waiver under this subsection. The unemployment agency shall not consider a new application for a waiver from a claimant within 6 months after receiving an application for a waiver from the claimant. A waiver granted under the conditions described in this subdivision applies from the date the application is filed. If the waiver is granted, the unemployment agency shall promptly refund any restitution or interest payments made by the individual after the date of the application for waiver. As used in this subdivision:
 - (A) “Cash assets” means cash on hand and funds in a checking or savings account.
 - (B) “Dependent” means that term as defined in section 27(b)(4).
 - (C) “Household” means a claimant and the claimant’s dependents.
- (iii) The improper payments resulted from an administrative or clerical error by the unemployment agency. A requirement to repay benefits as the result of a change in judgment at any level of administrative adjudication or court decision concerning the facts or application of law to a claim adjudication is not an administrative or clerical error for purposes of this subdivision.

INTRODUCTION

On January 28, 2022, Plaintiffs filed this lawsuit alleging that Defendants are violating the due process rights of unemployment insurance claimants by seeking collections, wage garnishments, and tax return seizures based on three distinct policies and practices that are unauthorized by law: (1) relying on “Monetary Redeterminations” that are void *ab initio* as outside the jurisdiction of the Agency to redetermine (because they are issued more than one year after the initial Determination on the same matter); (2) failing to review or provide a process to determine if repayment of any overpayment is required or whether the claimant qualifies for a waiver before collecting; and (3) collecting alleged overpayment based on non-final determinations while a claimant has a protest or appeal pending. In lieu of filing an Answer, Defendants filed a Motion for Summary Disposition. On June 13, 2022, the Court of Claims issued an Opinion and Order dismissing Count I without prejudice except as to Plaintiff Saunders and dismissing Count II entirely without prejudice. The Court of Claims denied the Motion for Summary Disposition as to Count III and granted in part and denied in part Plaintiffs’ Motion for Preliminary Injunction. Plaintiffs request Leave to Appeal the dismissal of Count I and Count II only.

Defendants do not deny that the challenged actions are occurring. Instead, Defendants insist that their actions are lawful—despite rulings and clear legal authority to the contrary. Defendants have stated their intent to continue seizing claimant property based on the challenged activity during the pendency of this lawsuit. The Court of Claims’ decision allows the Agency to continue in its arbitrary and untimely retroactive reversal or elimination of benefit entitlement and reliance on those reversals to seize claimants’ property. The decision also allows the Agency to continue its abuse of power by seizing claimants’ property without engaging in the necessary

analysis regarding waiver of overpayment. Claimants and putative class members cannot afford to wait and suffer future unlawful seizure of property until the remaining claims are litigated.

To address the unconstitutional collection activities alleged, Plaintiffs seek both equitable and economic relief. In particular, Plaintiffs seek injunctive and declaratory relief and mandamus declaring the challenged conduct illegal and requiring the Agency to follow the law before seizing the property of Plaintiffs and putative class members. These are not remedies available in the administrative process, yet the Court of Claims' decision engaged in no analysis related to whether the administrative process would actually grant the relief Plaintiffs sought through their First Amended Complaint. Plaintiffs ask that this Court grant them leave to file an appeal of the Court of Claims' Opinion and Order granting summary disposition as to Count I and Count II.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

I. Plaintiffs' Allegations

A. The Extra-Jurisdictional Collection Claim

The first contested Agency action is Defendants' practice of seizing property based on Monetary Redeterminations sent to claimants more than one year after the initial Determinations on the same issue, including to Plaintiffs Saunders and Davis and putative Jurisdiction Class Members. For these individuals, the Agency initially issued Monetary Determinations finding them eligible for a certain Weekly Benefit Amount ("WBA"). Then, more than one year later, the Agency issued a Monetary Redetermination retroactively reducing or eliminating their WBA. *See, e.g.,* Saunders 137-139, 141-146; Davis 1-3, 9-12; Eggleston 21-23, 25-29; Zestos 244-246, 247-252; Hillebrand 38-47; Rama 23-26 (App'x 27-77).

For some claimants, the Agency instituted or engaged in collection activity based on these untimely Monetary Redeterminations despite a specific Order to the contrary. For Plaintiff

Saunders, the Agency engaged in collection activity based on this untimely Monetary Redetermination even after an Administrative Law Judge (“ALJ”) found in her favor. February 23, 2022 ALJ Opinion and Order (stating the Agency’s Monetary Redetermination is “void and without legal effect” because the Agency “issued the October 22, 2021 PUA monetary redetermination contrary to the requirements of Section 32a(2) of the Act.”) (App’x 78-87). Despite the ALJ Administrative Order becoming final, the Agency nonetheless initiated collection activity and sent a monthly bill for \$6,666.00 to Saunders on April 19, 2022. April 19, 2022 Monthly Statement (stating “You owe \$6,666.00 based on one or more (re)determinations or appellate decisions that have become final.”) (App’x 88-91). Although the Agency has since confirmed it will not collect against Saunders, there is nothing to prevent the Agency from issuing yet another Monetary Redetermination and again seeking to collect from Saunders or any putative class member.

Although Plaintiff Eggleston had appealed in the administrative process, he continued making monthly payments in response to the Agency’s collection activity and threats of garnishment. On or about April 7, 2022, the Agency unilaterally cancelled Plaintiff Eggleston’s administrative appeals of his Monetary Redetermination. Thereafter, the Agency issued a *new* Monetary Redetermination (now more than two years after the original Determination on the issue) again retroactively changing his weekly benefit amount. April 14, 2022 Monetary Redetermination (App’x 92-97). Then, the Agency assessed a new Overpayment of \$46,172.00, again without considering the Overpayment for waiver, or providing any notice or process for requesting a waiver caused by administrative error. The Agency later reversed course and reinstated his original WBA. Now, Plaintiff Eggleston’s MiWAM portal says the Agency owes him \$500. Yet there is

no administrative process for Plaintiff Eggleston to recover this amount and nothing to prevent the Agency from issuing another untimely Monetary Redetermination.

For putative class members Kelly Rama and Theresa Brandt, the Agency's actions based on extra-jurisdictional Monetary Redeterminations were even more egregious. Rama appealed an adverse Monetary Redetermination that was issued more than one year after the initial Monetary Determination. Rama then had a hearing in front of an ALJ. However, the ALJ failed to recognize any jurisdictional limits of the Agency, upholding the untimely Monetary Redetermination. Rama Pages 0074-84, ALJ Order (App'x 98-110). Further, the ALJ relied on modified documents, which the Agency used to prove that Rama had made a misrepresentation in her application for benefits. Rama Page 87, Agency-Modified Response (App'x 111); *compare* Rama Page 0089, Original Response (App'x 112). For Rama, then, the ALJ hearing was ineffective both on an individual claim level to cure the unauthorized collection based on the extra-jurisdictional Redetermination and to stop the Agency from issuing more such extra-jurisdictional Monetary Redeterminations.

Putative class member Theresa Brandt also appealed an adverse Monetary Redetermination that was issued more than one year after the initial Monetary Determination. Brandt also had a hearing in front of an ALJ. At the hearing, the ALJ ruled that restitution should be waived. Brandt Pages 0001-7, ALJ Order (App'x 113-119). In response, Teresa Burns—a Division Administrator for the Defendant Agency—filed a memorandum alleging that the ALJ did not have jurisdiction to waive overpayment and outright refusing to implement the ALJ's Order and again presented modified documents to prove its case. Brandt Pages 0009-12, Burns Memo (Appx 120-123); *compare with* Brandt Page 0013, Original Income Verification (App'x 124).

The above cases demonstrate that the Agency's actions are intentional and repeated, rather than negligent or mistaken. Further, the above cases demonstrate that claimants cannot get the

relief sought here (injunctive relief, declaratory judgment, mandamus, and monetary relief) in the administrative process available.

B. The Waiver Claim

The second contested action is the Agency’s practice of seizing claimant property, including future benefits, wages, and tax refunds, without providing the requisite review for waiver based on administrative error. Section 62 of the Michigan Employment Security Act (“MESA”) describes Agency assessment of restitution and collection of overpayments. *See* MCL 421.62(a). Section 62 of the MESA *requires* the Agency to waive overpayments that are a result of Agency error. Specifically, MCL 421.62(a) 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.” Section 62 defines the statutory standard for equity and good conscience as including all situations where the alleged overpayment was a result of Agency error. MCL 421.62(a)(iii).

Before seizing property from claimants, federal and state law and instruction require Defendants to make two Determinations: (1) whether there has been an overpayment; and (2) whether the claimant is required to repay that overpayment (*i.e.*, whether the claimant is entitled to a waiver of overpayment). According to the United States Department of Labor, both determinations impact claimant rights within the meaning and coverage of Section 303 of the Social Security Act. *See* Unemployment Insurance Program Letter (“UIPL”) 23-80.¹

¹ As part of the federal oversight process, the Department of Labor 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. UIPL 01-96 (App’x 125-128).

Due process requires a pre-deprivation Determination on disputed issues with notice and opportunity to be heard on all Determinations under Section 303. *See California Department of Human Resources Development v Java*, 402 US 121, 125-126; 91 S Ct 1347; 28 L Ed 23 666 (1971). As to waiver of overpayment specifically, due process requires that a state Agency either make *sua sponte* waiver review or provide notice and administrative process for claimants to request a waiver. Due process further requires that a state Agency issue an appealable Determination on the issue of waiver of overpayment. Until the state Agency conducts one of these processes, it *cannot* collect an overpayment. If it does collect an overpayment before conducting these analyses, the state Agency violates claimants' rights to due process. Nonetheless, the UIA here is assessing overpayments and seizing property before reviewing claimant files for administrative error waiver.

Due process requires that the State "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." *See* UIPL 01-16. Due process further requires that "if state law provides for a waiver of recovery of an overpayment, the notice of the overpayment determination must provide enough information to enable the individual to understand under what circumstances a waiver may be granted and how to request such a waiver." *See id.*

Plaintiffs allege that Defendants violate claimants' rights to procedural due process, including by arbitrarily denying would-be waiver applicants of meaningful notice and opportunity to be heard by collecting overpayment before providing a defined and appealable process to seek waiver of overpayment due to administrative error. Plaintiffs also allege that Defendants violate claimants' rights to substantive due process by collecting overpayment before reviewing for

waiver, including by arbitrarily refusing to review files for their eligibility for waiver, refusing to provide notice and explanation of an administrative process at the time of assessing overpayment, and refusing to halt collection even when an ALJ Order confirms eligibility for an administrative error waiver (*e.g.*, for Plaintiff Brandt).

For Plaintiffs and putative class members, the Agency has assessed overpayments without reviewing for administrative error, providing notice to claimants, or providing an appealable Determination on eligibility for waiver. This leaves claimants without any ability to request a waiver due to administrative error or to appeal any decision denying Agency error waiver. The record is devoid of any evidence that the Agency provided the requisite notice. *See, e.g.*, Sample Overpayment Letters (App'x 129-205).

In some cases, such as for claimant Rama described above, the Agency has submitted false claimant certification records to prove that the overpayment was not due to Agency error. In the rare cases when an ALJ *sua sponte* orders waiver, such as in the case of claimant Brandt, the Agency refuses to honor administrative error waiver ordered by the ALJ, refusing to recognize the jurisdiction of the ALJ to do so. In rare cases where the Agency has reviewed and granted waiver for administrative error, it does so at the time the overpayment is assessed. *See, e.g.*, Larke 111-114 (App'x 213-216). However, even when waiver is granted under Section 62(a), there is nothing to prevent the Agency from reversing course and un-waiving overpayment. This was the case for Plaintiff Larke, whose overpayment was waived on August 9, 2021 under Section 62(a) but was reversed by her next Weeks of Overpayment notice.

The Agency does not provide clear notice of a process to request administrative error review. The Agency also does not *sua sponte* review overpayments for Agency error waiver. Nor does the Agency provide an appealable Determination regarding waiver of overpayment. Even if

individual overpayment assessments are later reversed, the violation is capable of repetition yet evading review. In fact, it has been repeated thousands of times over by the Agency in the last six months.

II. Procedural History

On January 28, 2022, Plaintiffs Kellie Saunders, Erik Varga, Lisa Shephard, Dawn Davis and Jennifer Larke filed a Verified Class Action Complaint for injunctive relief, declaratory relief, equitable relief and damages in this matter. On March 10, 2022, Plaintiffs filed their Motion for Preliminary Injunction to Suspend Collection Activities. On March 14, 2022, Defendants filed their Motion for Summary Disposition. On March 24, 2022, Plaintiffs filed their First Amended Complaint to include five additional Plaintiffs: Anna Logan, Joshua Eggleston, Jennifer Hillebrand, Cheryl Scarantino and Eleni Zestos.

On March 29, 2022, Defendants filed their first Motion to Stay Discovery until their Motion for Summary Disposition was adjudicated. On April 7, 2022, Defendants filed notice that their Motion for Summary Disposition would stand as their response to Plaintiffs' First Amended Complaint. This Court denied the first Motion to Stay Discovery on April 26, 2022. On April 27, 2022, Defendants filed their second Motion to Stay Discovery. On May 17, 2022, this Court held oral argument on Plaintiffs' Motion for Preliminary Injunction to Suspend Collection Activities and Defendants' Motion for Summary Disposition.

STANDARD OF REVIEW

This Court reviews a lower court's decision to grant a motion for summary disposition *de novo*. *GMC v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010). In the case of an interlocutory appeal, the Michigan Court Rules require the appellant to "set[] forth facts

showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal.” MCR 7.205(B)(1).

ARGUMENT

Plaintiffs have alleged that the Agency violates unemployment claimants’ rights to procedural and substantive due process by (1) seizing claimant property based on untimely Monetary Redeterminations; (2) seizing claimant property without providing notice of an appealable determination on whether an overpayment is required to be repaid or waived due to Agency error; and (3) seizing claimant property while there is a pending protest or appeal. These actions are not random mistakes but are intentional Agency action that abuses Agency power and results in the seizure of claimant property.

The Court of Claims dismissed Count I without prejudice as to all Plaintiffs except for Kellie Saunders under MCR 2.116(C)(4), finding that the remaining Plaintiffs were required to exhaust their administrative remedies. The Court of Claims appears to have dismissed the class allegations tied to Count I, finding that an Agency error with respect to Plaintiff Saunders “was an isolated, inadvertent error.” The Court of Claims dismissed Count II without prejudice as to all Plaintiffs, finding that Plaintiffs and the putative Waiver Class Members did not have a property right to waiver of overpayment. Both of these dismissals constitute reversible error. Time is of the essence for these claimants, whose property has been seized or who face imminent seizure of property. Accordingly, interlocutory appeal is appropriate to address the disputed issues before this case reaches finality.

I. Plaintiffs and Putative Class Members Will Suffer Substantial Harm if Forced to Wait until Final Judgment to Appeal Because the Agency Has Been Clear It Will Continue Its Unlawful Actions During the Pendency of this Lawsuit

To date, Defendants have not denied that they are engaging in the contested activity.

Instead, Defendants claim that their actions are lawful and insist that they can (and will) continue the complained-of activity during the pendency of this lawsuit. Defendants have sent collection notices to Plaintiffs and putative class members stating, “Under an Administrative Garnishment, your employer will be required to deduct and send to UIA up to 25% of your disposable earnings each pay period until the debt is paid in full.” *See, e.g.*, Larke 82-85 (App’x 209-213); Varga 211-214 (App’x 221-224). Defendants have seized tax refunds and deducted portions of UI benefits in order to collect overpayments Plaintiffs contend are not actually owed. *See, e.g.*, Larke 60 (App’x 207-208); Varga 188 (App’x 218-219). Defendants allow claimants to elect to assign “voluntarily” 15% of their wages to UIA for repayment of the debt. *See id.* This assignment is not truly voluntarily. Individuals are coerced into repaying a smaller amount on a debt not actually owed in order to avoid the Agency wreaking further financial havoc on them. Defendants send this coercive collection even when there is no final determination on the merits or when waiver is required by law. *Id.*

Because of Defendants’ actions, Plaintiffs and thousands of other Michiganders are facing financial instability, food instability, inability to pay for transportation, late payment fees and utility shut-off fees, inability to pay rent or mortgages, and exorbitant interest rates on loans simply to pay for basic necessities of life. Should the Agency continue to issue untimely Monetary Redeterminations and fail to waive overpayment as required by law, Plaintiffs and others fear losing their jobs, being unable to buy food, being unable to pay for utilities, and more because of Defendants’ unlawful seizure of property. Plaintiffs and the putative class members are faced with imminent tax refund seizure, garnishment of wages, and reduction of future unemployment benefits.

The Agency engages in collection activity with impunity, knowing that there is no process

in place for Plaintiffs to recover overpayments wrongfully recouped, and that any later recovery is unlikely to make them whole. Defendants have already likely collected hundreds of thousands of dollars (or more) from vulnerable Michiganders. Defendants' failure to follow the law immediately will result in additional seizure of claimant property. When Defendants waive overpayments, they do not also retroactively refund Plaintiffs for money the Agency illegally collected. If money is collected or withheld now, Plaintiffs are also losing the time value of money and facing further economic insecurity.

The tax filing deadline has passed, and many Michigan residents are returning to work and depending on tax refunds and tax credits to get back on their feet. Instead of gaining financial stability when they return to work, many Michiganders are faced with further financial instability due to the Agency's actions seeking to garnish their wages and seize their tax refunds. Every day, putative class members are facing collections and dire financial circumstances due to Defendants' unlawful actions. If Plaintiffs have to litigate this lawsuit to completion before appealing the dismissal of Counts I and II, collections, seizure of property, and unlawful failure to review overpayments for a waiver will continue without the constitutionally required due process, and the resulting harm will be irreparable.

The burden on Plaintiffs and the putative class members is without bounds when Defendants are permitted to seize tax refunds and garnish wages and future UI benefits, without due process or a mechanism to recover that seized property. The families who rely on these streams of income face immediate and concrete harm to their livelihood when Defendants engage in the contested collection activity. When Defendants interfere with streams of income for families who are already financially stressed due to job loss and the ongoing pandemic, this impacts whether they can put food on the table. It impacts whether they are getting eviction notices. It impacts

whether they are able to pay electric bills. And it can cause claimants to face even deeper debt when families are forced to take out high-interest loans in order to meet the basic necessities of life.

By the time this case reaches the end of litigation, Defendants will likely have wrongfully recouped millions of dollars outside of the law, with no clear statutory remedy or administrative process for returning this money to those harmed. While the MESA, Michigan administrative rules, federal law, and constitutional due process requirements were intended to prevent the very collections activity Defendants are now engaging in, these same provisions provide no remedy for recoupment when Defendants wrongfully seize the assets of claimants. This appeal must be heard and decided before Defendants can continue taking more money from Plaintiffs and the putative class members.

Because Defendants staunchly refuse to follow the law by issuing extra-jurisdictional Redeterminations and failing to waive overpayment when the MESA requires it, the violations are capable of repetition yet evading review. Given the Agency's procedures, even if the Agency issues a late Redetermination finding each of these claimants eligible for benefits, pursuing the present administrative remedy would be futile because any adjudication in favor of Plaintiffs and putative class members could simply be answered by the Agency's issuance of yet more extra-jurisdictional Monetary Redeterminations and unlawful collections. *See Cummins v Robinson Twp*, 283 Mich App 677, 713; 770 NW2d 421 (2009) (finding futility to be an exception to the general rule of exhaustion of administrative remedies); *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994) (same); *see also* Corrigan, *Collateral Attacks on Deportation Orders: The Second Circuit Banishes the Ghost of Spector*, 50 Brook L Rev 721, 746 (1984) (“[administrative] exhaustion is not required when a party might suffer irreparable injury

from pursuing the administrative remedy, when agency jurisdiction is absent or the agency's position is clearly illegal, or when a dispositive question of law is presented that is peculiarly within judicial competence.”). This futility has been shown through Agency action, including the Agency's collection against Plaintiff Saunders after a final Determination in her favor, the Agency's erasure of Plaintiff Eggleston's protests, the Agency's outright refusal to follow an ALJ ruling in the case of claimant Theresa Brandt, or an ALJ's reliance on the Agency's untimely Monetary Redetermination in the case of Kelly Rama even though it was void *ab initio* as beyond the jurisdiction of the Agency and then the ALJ's subsequent ruling that collection activity may proceed.

II. The Court of Claims Erred in Dismissing Count I of Plaintiffs Complaint Because It Failed to Analyze for Substantive Due Process, Failed to Consider Whether the Administrative Process Would Provide the Relief Requested, and Relied on Unsupported Evidence Related to Effectiveness and Availability of the Administrative Process

The Court of Claims dismissed Count I of the Complaint, without prejudice, as to Plaintiffs (other than Plaintiff Kellie Saunders) for claimant failure to exhaust administrative remedies. The Court of Claims relied on MCR 2.116(C)(4), which provides for dismissal when “[t]he court lacks jurisdiction of the subject matter.” The Court of Claims found that it did not have jurisdiction because Plaintiffs were required to exhaust administrative remedies before bringing a lawsuit in that venue. The court did not identify any administrative process that would provide the relief sought.

Moreover, the Court of Claims failed to consider whether the Agency's actions with respect to Count I constituted an abuse of power to the extent that substantive due process is violated. Further, Plaintiffs in this lawsuit do not seek Determinations that they are eligible for benefits and do not seek to appeal in this context any adverse Determinations regarding eligibility of WBA.

Dismissal under MCR 2.116(C)(4) can only be granted where the relief requested can be obtained through the administrative process. The relief requested here cannot be obtained through the administrative process. Plaintiffs have been victims of the Agency's extra-jurisdictional actions and reliance on those actions to seize claimant property. To remedy this wrong, Plaintiffs seek relief including injunctive and declaratory relief and mandamus, in addition to monetary losses caused by the Agency's procedures. Finally, the Court of Claims erred relying on assumptions related to the effectiveness and availability of the administrative process.

A. The Court of Claims Erred in Dismissing Count I for Failure to Exhaust Administrative Remedies Without a Finding that There Was an Administrative Process to Provide the Relief Requested

The Court of Claims dismissed Count I under MCR 2.116(C)(4), finding that it did not have jurisdiction because Plaintiffs had an administrative process available to them. The administrative process will ultimately determine whether a claimant is eligible or ineligible for benefits and, if eligible, how much they are eligible to receive as a WBA.

To remedy the wrongs alleged in Count I, Plaintiffs do not seek Redeterminations in their favor. Instead, they seek declaratory and injunctive relief that the Agency is acting unlawfully, mandamus, and economic damages where applicable. The UIA is intentionally undertaking collection activity based on extra-jurisdictional Monetary Redeterminations reversing benefits more than one year after the original Determination. This count does not allege a statutory violation—this count alleges that the Agency is not providing due process because it is acting arbitrarily and outside the power granted to it. Plaintiffs seek declaratory and injunctive relief and mandamus acknowledging that Redeterminations issued more than a year after the contested issue are void *ab initio* and cannot form the basis for collection activity (regardless of where Plaintiffs

are in the administrative process). The policy and practice challenged results in unconstitutional deprivation of property whether it relates to past, present or future redeterminations.

1. The Administrative Process

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 creation of 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).]

Under the 2020 CARES Act, the federal government created additional direct pandemic unemployment subsidies wholly funded by federal money. These were additional programs providing supplemental funding, additional benefit weeks, and relief to workers otherwise not covered by regular UI benefits. In order to participate, each 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., Michigan Agreement Implementing the Relief for Workers Affected by Coronavirus Act* (App’x 225-241).

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 claimants or employers disagree with a Redetermination, they 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.

The 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. Restitution under Section 62(a) is only authorized after a decision on eligibility for benefits has been reversed after payment of benefits. And collection of overpayments previously paid is only required if the agency determines that the overpayment does not qualify for a waiver. This administrative system is discussed more thoroughly in *Dep't of Licensing & Regulatory Affairs/Unemployment Ins. Agency v Lucente*, ___ Mich ___; ___ NW2d ___ (2021) (Docket Nos. 160843, 160844) (App'x 242-299).

2. Plaintiffs Seek Relief to Remedy the Wrongs Against Them and Other Claimants that is Not Available in the Administrative Process

In concluding that there was no procedural due process violation related to the issuance of untimely Monetary Redeterminations, the Court of Claims relied on the existence of an administrative process for individual claimants. However, with respect to Count I, Plaintiffs seek relief that includes declaratory judgment, preliminary and permanent injunction, and mandamus, in addition to economic damages. Plaintiffs seek a ruling that the Agency cannot issue Redeterminations more than one year after the initial Determination on the same issue and therefore cannot seize claimant property based on these extra-jurisdictional Redeterminations. Access to an administrative process and a hearing before an ALJ does not provide a remedy to stop the Agency from issuing extra-jurisdictional Monetary Redeterminations or force the Agency to stop collections based on those Determinations.

There is no evidence in the record that the administrative process provides the relief requested. To the contrary, at the trial court, Plaintiffs provided significant evidence to establish that it does not. The administrative process will not give claimants a declaratory judgment. The administrative process will not give claimants a preliminary injunction to stop the Agency from acting outside its bounds. And the administrative process will not grant mandamus. Nor will the

administrative process stop the Agency from repeatedly issuing untimely Monetary Redeterminations and relying on them to harm claimants. As shown in the case of claimant Kelly Rama, even following the administrative process does not provide relief because ALJs have refused to find that the Agency does not have the authority to issue untimely Redeterminations.

B. The Court of Claims Erred in Failing to Analyze Count I under Both Procedural and Substantive Due Process

There are two components of due process: procedural due process and substantive due process. The due process clause 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[es] 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 distinction after the Michigan Court of Appeals incorrectly “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.

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.]

The essence of substantive due process is a promise that the State will not abuse its authority or act outside of the power granted to it. At the trial court, Plaintiffs presented evidence that the Agency regularly abuses its power and acts arbitrarily to deprive Plaintiffs of the process due to them. Claimants may be like Plaintiffs Hillebrand and Eggleston who have timely appealed and requested a hearing and yet still face collection activity. They could be like Plaintiff Saunders who actually obtained a final ruling in her favor after a hearing from the ALJ, and yet still are subject to collection activity. They may be like claimant Theresa Brandt, who obtained an ALJ

ruling, and yet the Agency appealed and outright refused to honor an ALJ ruling. Or they may be like claimant Kelly Rama, for whom the ALJ upheld the untimely Monetary Redetermination even though it was void *ab initio* as beyond the jurisdiction of the Agency and then ruled that collection activity may proceed.

In this case, the Court failed to analyze substantive due process violations with respect to Count I. The Court of Claims erred in stating that Plaintiffs could not state a due process claim simply because the Redeterminations are untimely. This is not the essence of Plaintiffs' Complaint. Plaintiffs complain that the Agency abuses its power by randomly issuing Monetary Redeterminations and then relying on those Monetary Redeterminations to seize claimant property. The Court relied entirely on the availability of the administrative process and failed to consider whether Defendants' actions violate substantive due process rights.

In all cases, the availability of the administrative process does not provide a remedy to address the Agency's abuse of power through its reliance on extra-jurisdictional Redeterminations that the Legislature did not authorize the Agency to issue. This abuse of power harms claimants. Plaintiffs request that this Court find that Plaintiffs stated a claim that the Agency's actions extra-jurisdictional Redeterminations violate the due process rights of claimants. The Court of Claims erred in failing to analyze Count I through the lens of substantive due process.

C. The Court of Claims Erred in Dismissing Count I for Failure to Exhaust Administrative Remedies by Making Conclusions and Relying on Assumptions not Supported by Evidence

In analyzing Plaintiffs' due process claim, the Court of Claims analyzed whether the administrative process itself provides notice and opportunity to be heard. At the time of the hearing, this Court was aware that the Agency sought restitution from Plaintiff Kellie Saunders despite a final Determination in her favor that she did not owe the overpayment. The Court of

Claims was also aware at the time of briefing that the Agency was erasing protests of extra-jurisdictional Redeterminations, such as in the case of Plaintiff Varga and Eggleston. Now, Plaintiffs have presented evidence that the Agency is refusing to honor ALJ rulings that it does not have jurisdiction to issue untimely Redeterminations, as in the case of claimant Brandt.

The Court of Claims also erred in dismissing finding no violation of procedural due process under Count I because it relied on an assumption that any violation of Count I was isolated to Plaintiff Saunders. This assumption was not based on competent evidence. There is no evidence in the record that the contested behavior is isolated to Plaintiff Saunders. To the contrary, at the trial court, Plaintiffs provided significant evidence to establish that it is not.

The Court of Claims erred by assuming that any violation of Count I was isolated to Plaintiff Saunders. In so ruling, the Court of Claims relied on the representations of counsel—not any evidence that contradicted Plaintiffs’ allegations that the violation is widespread. Plaintiffs request that this Court find that Plaintiffs stated a claim that the Agency’s actions extra-jurisdictional Redeterminations violate the due process rights of claimants.

III. The Court of Claims Erred in Dismissing Count II Under MCR 2.116(C)(8) Because Its Finding that There is No Property Right Related to Waiver of Overpayment was Erroneous and Its Finding that Plaintiffs were Provided Notice of an Administrative Process to Request Review is Unsupported by the Evidence

The Court dismissed Count II under MCR 2.116(C)(8), which provides for dismissal when “[t]he opposing party has failed to state a claim on which relief can be granted.” In making this determination, the Court relies on the pleadings. In ruling on Defendants’ Motion, the Court considered whether there was a property right to waiver and whether claimants were provided with notice of a process to request waiver of overpayment due to Agency error. In doing so, the Court erred because it failed to consider that claimants have a property right to property seized and failed

to consider whether there was *meaningful* notice and opportunity to be heard under the law that satisfies the dictates of due process before the deprivation.

In the chaos of the COVID-19 pandemic, the Agency understandably made errors with respect to eligibility and Weekly Benefit Amounts. Claimants then relied on the benefits the Agency granted in order to survive. The law recognizes this principle and provides that, in the case of Agency error, the Agency may not seize the property of claimants who relied on benefits they received through no fault of their own. To prevent this from happening, federal instruction provides requirements by which the State must review cases for error or provide a clear, appealable Determination regarding eligibility for such waiver. It is undisputed that the Agency does not fulfill these obligations.

A. The Court of Claims Erred When It Dismissed Plaintiffs' Waiver Claim Under MCR 2.116(C)(8) Based on an Erroneous Finding that Claimants Do Not Have a Property Right Related to Waiver of Overpayment

Defendants seize claimant property when they refuse to consider the overpayment for waiver due to administrative error. Collecting on overpayments without reviewing the overpayment for waiver and providing an appealable Determination violates due process rights because it interferes with a claimant's right to property by seizing tax refunds, wages, and other funds of which claimants have the right to expect possession. When Plaintiffs are issued an overpayment, they are entitled to expect review for waiver of overpayment. Defendants' arbitrary actions surrounding waiver demonstrate that its current system related to waiver (if any) does not satisfy substantive due process.

Plaintiffs here are not asking the Court to find that the Agency must waive their overpayments. Instead, Plaintiffs are asking that the Court find that the Agency violates claimants' rights to due process when it (1) fails to review overpayment for Agency error; (2) fails to issue

an appealable Determination regarding waiver eligibility; and (3) acts to seize property without providing the requisite process. Here, the Agency is not fulfilling its due process obligations before seizing claimant property. It is acting arbitrarily and capriciously by refusing to review for waiver overpayment. The Agency's actions lead to the unjustified and unlawful seizure of claimant property.

Claimants have a property right to their tax refunds, wages, and other assets. The Agency seizes this property without justification when it fails in its obligation to review for and provide waiver as the law requires. Instead of following the law, the Agency is seeking to collect from claimants without providing any of the safeguards due process promises to unemployment claimants.²

The Agency is ignoring its obligations under state and federal law and is arbitrarily ignoring orders to waive overpayment. When waiver is denied, the Agency seizes claimant tax refunds, wages, and assets in order to repay the alleged overpayment. In dismissing the waiver count, the trial court relied almost entirely on a finding that claimants do not have a property right to *waivers*. In so ruling, the Court relied entirely on *Millar v NM Dep't of Workforce Solutions*, 304 P3d 427, 432 (NM App, 2013). *Millar* is distinguishable. The issue in *Millar* was whether the claimant received prompt notice of appeal. *Id.* The *Millar* court found that the claimant was

² Even when waiver is granted under Section 62(a), there is nothing to prevent the Agency from reversing course and un-waiving overpayment. This was the case for Plaintiff Jennifer Larke, whose overpayment was waived on August 9, 2021 under Section 62(a) but was reversed by her next Weeks of Overpayment notice. Claimants Rama and Brandt highlight the failure in due process related to Defendants' failure to waive overpayment. For claimant Rama, the ALJ did not even consider waiver. For proposed Plaintiff Brandt, even though the ALJ granted waiver, the Agency affirmatively refused to effectuate the waiver and stated that it would not be implementing the ALJ's Order. This demonstrates the futility of requesting a "do-it-yourself" waiver of overpayment as the Court suggested. Even when an ALJ orders waiver, the Agency does not comply. Plaintiffs request that this Court permit the addition of Proposed Plaintiffs Rama and Brandt and grant amendment.

obligated to repay the overpayment because the Agency did not act arbitrarily and capriciously in so ordering. Therefore, the Agency fulfilled its due process obligations *before seizing claimant property*.

B. The Court of Claims Erred in Dismissing the Waiver Count under MCR 2.116(C)(8) Because It Incorrectly Found that Plaintiffs had Notice with Respect to a Waiver and Failed to Analyze for Substantive Due Process

In dismissing Count II, the Court of Claims stated that “it is simply not the case that plaintiffs were entirely without notice of any guidance with respect to a waiver.” Ord. at 11 (App’x 19). It is true that MCL 421.62(a) requires waiver of overpayment in the case of Agency error. This is a waiver to which all claimants are entitled when their overpayment is the result of the Agency’s error rather than their own fault.

However, in the context of reviewing overpayments for waiver, due process does not stop at requiring notice of the law via statute. The notice required is a notice of a determination with opportunity to be heard. Claimants have had a right to appealable Determinations related to their benefits since *Java*. Following *Java*, the United States Department of Labor clarified that this right to appealable Determinations extends to the waiver context. *See* UIPL 23-80 (App’x 300-202). Federal instruction has determined that due process requires that the State “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.” *See* UIPL 01-16 (App’x 304-310); *see also* UIPL 20-21 Change 1 (parenthetical)(App’x 311-350). Due process further requires that “if state law provides for a waiver of recovery of an overpayment, the notice of the overpayment determination must provide enough information to enable the individual to understand under what circumstances a waiver may

be granted and how to request such a waiver.” See UIPL 01-16. If a state does not do this, it is not providing due process as to that determination.

A right to waiver buried in a statute without a process to request such waiver is not meaningful notice to claimants, nor does it comply with the due process notice requirements laid out in state law and federal instruction. It certainly does not provide claimants with *meaningful* notice of a determination of their right to a waiver. Plaintiffs ask that this Court find that Plaintiffs stated a claim with respect to the Waiver Count.

In relying on MCL 421.62(a) to provide sufficient notice to claimants, the Court of Claims relied on *Twp of Hopkins v State Boundary Comm’n*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 355195). In *Twp of Hopkins*, a group of property owners sought to annex land from the plaintiffs. *Id.*, slip op. at 2. The dispute centered in party around a “legal sufficiency meeting.” *Id.* The Court of Appeals concluded:

Because of the detailed statutory process set forth in the SBCA, we conclude there was no need for promulgated rules, regulations, or procedures respecting the legal sufficiency meeting. The Legislature set forth a detailed, comprehensive scheme for resolving boundary petitions, including setting forth requirements for the legal sufficiency meeting. See, e.g., MCL 123.1008(2); MCL 78.4(1). The Commission has helpfully put the various requirements into readily understandable guidelines, but these do not add to or contradict the requirements that are already found in the statute. [*Id.*, slip op. at 12.]

The Court of Appeals cited MCL 123.1008(2) as an example of comprehensive guidance. *Id.* In reviewing MCL 123.1008 as a whole it is clear that, with respect to legal sufficiency meetings, the statute sets forth guidelines related to sufficiency of a petition, sets deadlines, and requires public hearing and notice of hearing. MCL 123.1008.

In contrast, MCL 421.62(a) simply states a limitation on Agency collection by requiring that that restitution “shall” be waived in certain circumstances. The statute provides no information about how to request a waiver, who the request should be directed to, time for requesting waiver,

right to hearing related to waiver, or any other details related to the availability of waiver and how to get it. It is unclear how a single statement related to waiver, without any details for how to request or get such a waiver, constitutes *meaningful* notice and opportunity as procedural due process requires.

Further, in dismissing Count II, the Court of Claims apparently only considered whether Plaintiffs stated a claim of a violation of procedural due process. The Court of Claims failed to address the abuse of power the Agency engages in when it seizes claimant property in violation of the law and without providing the mandatory process to seek waiver due to overpayment. Plaintiffs ask that this Court find that Plaintiffs stated a claim with respect to the Waiver Count.

CONCLUSION AND RELIEF REQUESTED

The MESA provides an explicit statement of the public interest it is meant to protect. The Michigan Legislature has made an explicit legislative finding of public policy as it relates to the maintenance of unemployment benefits. Section 2 of the MESA, entitled “Declaration of Public Policy,” specifically provides:

Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his or her family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state. [MCL 421.2(1).]

This has been especially true during the COVID-19 pandemic, a time of extreme financial instability and uncertainty.

The public interest mandates enforcement of the protections of the Michigan Constitution with respect to the very citizens it is meant to protect. Yet Defendants staunchly refuse to follow the law, resulting in imminent harm to hundreds of thousands of claimants. Plaintiffs stated claims in Counts I and II that the Agency was acting beyond its power and failing to provide substantive and procedural due process to claimants. Plaintiffs seek a judgment that the Agency is acting unconstitutionally and outside its power. Plaintiffs also seek relief that is otherwise unavailable to claimants. ALJs cannot issue mandamus, cannot rule on constitutional issues, and apparently cannot even stop the Agency from collecting based on extra-jurisdictional and void Redeterminations.

On appeal, Plaintiffs seek reversal of the Court of Claims' dismissal of Counts I and II and Because the Court of Claims Erred in Dismissing Counts I and II, Plaintiffs request leave to appeal or entry of a peremptory order reversing the Court of Claims' entry of summary disposition as to Count I and Count II. On remand the Court of Claims should address Plaintiffs' Motion for Preliminary Injunction on Counts I and II. For the foregoing reasons, Plaintiffs respectfully request that this Court grant Appellants' application for leave to appeal.

Respectfully Submitted,

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