UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL KREPS, ET AL,

Plaintiffs,

Case No. 2:22-cv-12020

v.

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY, ET AL,

Hon. Mark A. Goldsmith

Defendants.

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PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF PARTIAL SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

Director Dale's Response attempts to complicate an uncomplicated issue. After an unemployment agency makes an initial determination of eligibility, it is required to remit payment unless and until it makes a contrary determination after notice and opportunity to be heard.

Under the facts as already developed, the Agency has admitted that it stopped payment on eligible claims without providing a determination to claimants, and without notice and opportunity to be heard. Defendants have identified a list of hundreds of thousands of Michigan residents it has subjected to this practice (including Plaintiffs). Director Dale, armed with the information, responsibility and authority to remedy this unconstitutional practice, has done nothing. For three years.

A. The Agency has an Ongoing Practice of Holding Back Benefits on *Continuing Claims* Without Pre-Termination Notice and Opportunity to be Heard

In the course of discovery, Defendants were directly asked:

> *"In total from March 1, 2020 to present, how many UI claimants experienced a suspension of weekly benefits in a continuing claim series for over 21 days without being issued a determination or redetermination regarding the reason for the suspension?"*

The Agency returned an excel spreadsheet including 920,752 claimants (or about 832,000 when de-duplicated). (Def. Resp. to Int. 7) (available for *in camera* inspection). Eight of the plaintiffs were included in Defendants' production, while others were inexplicably excluded. Plaintiffs Brainer, Brazil, Foster, Patricia and Andrew Myrold, Quigg, and Shipe are all listed in the Defendants' Response to

Interrogatory 7, while Boudrie and Kreps are not. (Ex. 1, Plaintiff Summaries and Documents).

Moreover, in the course of discovery, the Defendants were directly asked to "list all the indicators used in MiDAS that result in immediate halt in benefit payments *on a continuing claim series* and provide the Associated SQR(s) if applicable." The Agency returned a list of about 50 "stop payment indicators", BPR rule additions, identity verification, fraud manager rules, and "other reasons" that the Agency used to stop payment on continuing claims. (Ex. 2, Def. Resp. Int. 11); see also (Ex. 3, Def. Resp. Int 6); (Ex. 4, Def. Resp. to Int. 32).

Director Dale's Response suggests that they don't know what a "stop payment indicator" is or what it does. Feigned ignorance does not raise a genuine issue of fact. Defendants should be aware of their own records, including the MiWAM screen that Plaintiff Paul Kreps looked at for four years:

Certs | Adjudication | CRM | Task | Collection | Adjustment | Claim | Web

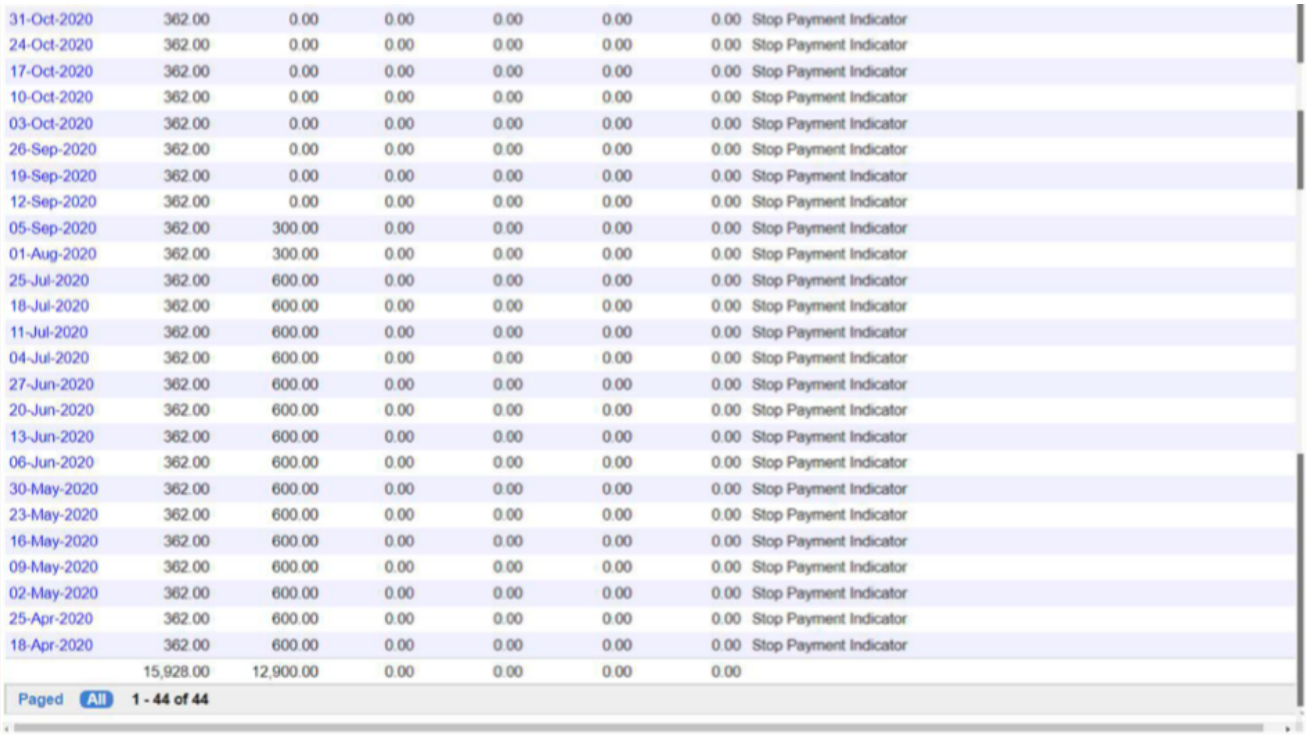
Summary | Certifications | Payments | Benefit Payments | Intercepts® | Transactions | Charge Summary | IVR Pending Certifications

Weeks Remaining: 26

Week Summary — Week Maintenance | Filter

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Week	WBA	Add'l Ben	Deductions	Withheld	Ben Pymt	Balance	Status
13-Feb-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
06-Feb-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
30-Jan-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
23-Jan-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
16-Jan-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
09-Jan-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
02-Jan-2021	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
26-Dec-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
19-Dec-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
12-Dec-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
05-Dec-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
28-Nov-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
21-Nov-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
14-Nov-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
07-Nov-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator



31-Oct-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
24-Oct-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
17-Oct-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
10-Oct-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
03-Oct-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
26-Sep-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
19-Sep-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
12-Sep-2020	362.00	0.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
05-Sep-2020	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
01-Aug-2020	362.00	300.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
25-Jul-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
18-Jul-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
11-Jul-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
04-Jul-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
27-Jun-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
20-Jun-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
13-Jun-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
06-Jun-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
30-May-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
23-May-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
16-May-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
09-May-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
02-May-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
25-Apr-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
18-Apr-2020	362.00	600.00	0.00	0.00	0.00	0.00	Stop Payment Indicator
	15,928.00	12,900.00	0.00	0.00	0.00	0.00	

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After Director Dale's Response Brief was filed, on September 5, 2024, the Agency issued Plaintiff Kreps a check for partial payment of his unpaid 2020 benefits. Inexplicably, it has still not paid nearly $10,000 of benefits still due to him since 2020 and 2021, and it has *still not issued any adverse determination* for the reason why he has not been paid the remaining benefits.

In another example, Plaintiff I.F. received her initial eligibility determination on or about April 23, 2020. She received her first payment on April 29, 2020. Benefits were stopped after 3 months. Benefits restarted after seven weeks, only to be cut off again after December 12, 2020. She received an adverse determination four months after the last payment. As of July 29, 2022, the Agency's adverse determination was reversed in her favor, but she has yet to receive payments for any

weeks after December 12, 2020. She is among claimants identified by Defendants in response to Interrogatory 7.

In another example, Plaintiff Andrew Myrold received his initial eligibility determination on or about May 13, 2020. The first payment was issued in May 2020. The Agency stopped his benefits and did not issue another payment until May 2021 (for fall 2020 benefit weeks). Mr. Myrold has still never received benefits for the many weeks of eligibility between May and August 2020. There are no adverse determinations related to the unpaid weeks and there is no administrative appeal available. Mr. Myrold is also among claimants identified by Defendants in response to Interrogatory 7. Similar experiences are shared by every one of the Plaintiffs, all of whom suffered benefit suspension without notice. (Ex. 1, Plaintiff Summaries and Documents).

B. The Agency is Fully Aware of SPI, BPRs, and Other Practices that Continue to Stop Payments to Date

Director Dale's Response suggests she is not fully aware of the problem. The records prove otherwise. In January 2023, Dale herself requested a series of computer reports (known in the system as "SQRs") designed to identify the scope of the SPI problem and potentially lift the holds. For instance, SQR 37037 was generated at the Director's request:

> Report request for Benefit's Leadership/Director: How many claims have stop payment indicators. In report – besides totals, please include Claim #, Account Type, BYB, WBA, if claim is allowed/denied, the

> Indicator Type, what the indicator does/definition, Date Indicator was added, the impact date of the indicator, if payments were stopped because of the indicator, and if yes (to payments being stopped) – how many weeks were stopped on the claim. If multiple stop indicators are on the claim, list each one separately."

(Ex. 5, SQR 37037 Report for Claims with Stop Payment Indicator, Dec 19, 2022 at RTP #1 2605-2607). The results were astounding, although the report has not been shared, the development notes show it returned over 5 million rows of indicators for more than 2 million claimants.[1]

In another attempt, the Agency ran a report for "SQR 37109: *Report for claimants eligible for payment but not paid due to indicator*."[2] In yet another attempt, the Agency records show efforts to identify payments held up by "pending determination" flags for determinations *that have never been issued*.[3] The results of these reports have not been shared despite multiple attempts to confer regarding

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[1] *Id*. ("There are about 4400 week level stop indicators... There are about 925K account level indicators on claimant customers. There are about 2.2 million customer level indicators on claimants.")

[2] Ex. 6, SQR 37109 log ("Report Request = to be run as/when needed - A listing of claimants, *who are not paid, but are eligible for payment*. Identify the reason(s) for non payment of an eligible week of benefits. If *payment is held due to an indicator*, share specific information/details re: indicator. If payment is held due to "no payment" stops on cert, share specific information/details re: reason(s). been paid and why not paid."); *See also* Ex. 7, Automation Advice No. 369, January 20, 2023 ("The report was created to capture non mons that are preventing payment…").

[3] Ex. 8, SQR 37107 log ("The purpose of this sqr: SQR 37107-Looking for Open issues where a decision is ready on the parent case, but waiting on the Misrepresentation issue to be closed.")

discovery production. After requesting these reports in January 2023, Director Dale did… nothing. The effort was abandoned:

> *Determination has been made at the executive level to cancel the Backlog Payment Release effort. This SQR has been closed as a result and will be removed from future agendas.*

(Ex. 9, Mar. 21, 2023 Waivers/FCP/Payment Release - Team Meeting, RTP #1 add'l at 529-531 (emphasis added). Moreover, when Director Dale testified at deposition, she either cannot recall any knowledge of the holds, or completely disavows any reliance on the Agency's system.

> *You know, I've said several times that the Midas system is inconsistent when it comes to the indicators… what I have heard as we continue to work on our new system is that the indicators cannot be used with any level of reliability because they've been bastardized from their initial intent by Midas. So I couldn't speak with any confidence yea or nay to that.*

(Ex. 10, Julia Dale Deposition, August 12, 2024 Dep. at 141-144). So, the Director is aware that benefit payments for eligible claimants have been on hold for years, and has the authority to fix it, but has not. Even the Agency's own public facing "chatbot" is still programmed acknowledge stop payment indicators and other holds that prevent payment. (Ex. 11, "Ava" Chatbot responses as of 9/16/2024).

C. The Definition of a "Fair Hearing" is NOT at Issue

Director Dale's Response Brief seems to concede that due process requires a "fair hearing" before shutting off benefits but invites an argument about whether a "full evidentiary hearing" is required. Arguments about what constitutes a "fair

hearing" are not at issue here.[4] The facts in this case are that the Agency has provided no notice, no hearing, no determination to eligible claimants why their benefits have been shut off. It is unclear why the Defendant is presenting arguments about whether a "full evidentiary" or some lessor form of fair hearing is required.

D. Agency Fraud-Fighting Practices are NOT at Issue

The Agency tries at every turn to suggest that Plaintiffs would have the Agency pay fraudulent claims filed by imposters. That is not at issue. None of the relief sought requires the payment of a fraudulent claim or prevents the agency from timely identifying fraudulent payments and stopping payments based on a timely determination of fraud or misrepresentation.

The sad fact is that the Agency and its systems are dysfunctional. The Agency is unable to pay eligible claimants in a timely manner AND it is unable to avoid paying fraudulent claims. The Agency routinely uses the latter failure to justify the former. It is incompetent at both, and one does not justify the other.

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[4] The Social Security Act at 42 U.S.C. § 503(1) explicitly provides for the "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(3)(emphasis added). This provision has been interpreted co-extensively with the constitutional guarantee of due process. *See e.g. Cosby v. Ward*, 843 F.2d 967, 982 (7th Cir. 1988) ("Whether the statutory 'fair hearing' requirement has been met is tested by the same standards as constitutional procedural due process."); *Ross v. Horn*, 598 F.2d 1312, 1318 (3d Cir. N.J. 1979) ("We assume here that the requirements of due process and those of the 'fair hearing' provision of 42 U.S.C. § 503(a) are co-extensive.)

The Department of Labor has been consistent that Section 303 of the Social Security Act creates a right to timely payments "when due," and also no right to timely payments when they are "not due." (Ex. 12, Unemployment Insurance Program Letter 04-01). In either case, unemployment claimants are entitled to timely notice and a due process right to be heard.

Specifically in the context of the challenges posed by criminal rings and imposter claims, the Department of Labor reminded state agencies of their due process obligations on December 11, 2020:

> "When a state obtains information through automated systems or other sources, questioning the validity of a claim or indicating potential fraud, the state must act quickly by:
> 1) Providing the individual with proper notice explaining the issue and allowing an opportunity to provide information to verify their identity and/or resolve the issue. The notice must clearly explain how the issue can be resolved, indicate a deadline by which the information must be received, and provide consequences for not responding timely;
> 2) Deciding whether or not sufficient information has been provided to verify the individual's identity and/or resolve the issue; and,
> 3) *Issuing a written determination.*

(Ex 13, December 11, 2020, DOL email to state agencies)(emphasis added). Even the self-proclaimed "fraud czar" of the unemployment Agency (testimony is widely relied on by Director Dale in her Response Brief) admits clearly that stopping benefits on continuing claims before notice is a "no-no" for due process law. (Ex. 14, Kolar Dep. at 219) ("Q: Because that would be a no-no if you did it on continuing claims, A: Yes. There's no denying").

E. The Court's Power to Enjoin an Unconstitutional Practice is Neither Extraordinary nor Preliminary

Federal courts across the country routinely issue permanent injunctions to stop state actors from further violating its citizens constitutional rights regardless of the availability of class relief or money damages. The availability of a damages class is irrelevant to Section 1983 standing, especially where money damages are undeniably inadequate to cure an unconstitutional condition.[5] Here, each of the Plaintiffs have standing to seek injunctive relief requiring Agency practices be brought into compliance with the constitution. Plaintiffs have been and continue to be impacted by the Agency's practice of putting indefinite holds on benefits without notice and opportunity to be heard. (Ex. 1, Plaintiff Summaries and Documents). The threat of future harm to Plaintiffs does not depend on the occurrence of

[5] "When it has been held unconstitutional to deny benefits to otherwise qualified persons on the ground that they are members of a certain group, the officials have the obligation to cease denying those benefits not just to the named plaintiffs but also to all other qualified members of the group." *Soto-Lopez v. N.Y.C. Civil Serv. Com.*, 840 F.2d 162, 168-169 (2d Cir. 1988) ("[t]he availability of such injunctive relief is not limited to class actions. When a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute."); *Warmsley v. Thaler*, No. 5:10cv2, 2010 U.S. Dist. LEXIS 101437, at *8-9 (E.D. Tex. Aug. 25, 2010)(*see* Ex. 15) ("In this case, a class action is not necessary because the same relief sought can, for all practical purposes, be obtained through the entering of permanent injunctive relief if such relief is shown to be warranted."); *Fairley v. Forrest Cty.*, 814 F. Supp. 1327, 1329-30 (S.D. Miss. 1993) ([t]he Court finds that the declaratory and injunctive relief sought by the plaintiffs will have the same effect as a class action regardless of whether the Court certifies this matter as a class action or not).

speculative events. *Bassett v. Snyder*, 59 F. Supp. 3d 837, 857 (ED Mich. 2014) (Lawson D.J.) (granting injunction to enjoin application of state law that would cause Plaintiffs and others to lose future benefits). Moreover, comparing the Agency admissions of claimants put on hold with member roles, Plaintiff UAW can confirm approximately 40,000 of its members have been impacted by the Agency's practices.[6]

There is no further factual development necessary to determine that the Agency's practices violate the Due Process clause of the Constitution and order it to cease practices that result in continuing indefinite holds on claimant benefits. The law is clear, the violation is clear, and no amount of money damages can remedy the harm caused by continued delay in benefits. Additional harm is not speculative when the Director has made it known they believe they do not have any responsibility to halt the violations, disavows knowledge of what the computer system is doing to claimants, and feigns ignorance to the applicable constitutional principles.

Moreover, Fed. R. Civ. P. 57 provides that the Court may grant declaratory judgment regardless of the accessibility of other relief. *Bassett* at 857. In either event, the law requires pre-termination due process precisely because a delay in benefits denies claimants the very purpose of the emergency financial relief, and no amount

[6] Because of the large amount of personal identifying information involved and the privacy rights of members, the confidential results can be made available for *in camera review*).

of late payment/damages can make up for the harm caused. Ex. 16, Declaration of Economic Expert Kathryn Edwards ("In sum: Delay of benefits delays the protection that UI confers, allowing the harms of job displacement to occur until benefits are received. That harm cannot be erased or undone.")

F. Prospective Injunctive Relief is Required to Order Director Dale to Bring the Agency into Compliance with Clearly Established Law

Plaintiffs in this litigation seek only to bring Agency practices into compliance with the law. In conjunction with the pending motion, Plaintiffs are requesting the Agency lift all indefinite holds that continue to prevent timely benefit payments, unless and until it provides claimant with a determination reversing eligibility, after notice and opportunity to be heard. Plaintiffs are concisely requesting:

> As to continuing benefit payments in a claim series, once the Agency has made an initial determination of eligibility it shall not suspend (or continue to suspend) timely payments of the weekly benefit amount unless and until it has provided a claimant both:
> a. pretermination notice of the reason for the suspension and opportunity to be heard, consistent with the principles of *Goldberg v. Kelly,* 397 U.S. 254 (1970), and *California Department of Human Resources v. Java,* 402 US 121 (1971); *and*
> b. an appealable (Re)Determination providing notice of the reason the claimant is ineligible or disqualified.

(Ex. 17, Plaintiff's Proposed Order).

Respectfully Submitted,

s/ David M. Blanchard
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Dated: September 18, 2024

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2024, my assistant, Leslie M. Wenzel, electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully Submitted,

s/ David M. Blanchard

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