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' MOTION FOR CLASS CERTIFICATION

Plaintiffs, by and through their counsel, hereby moves this Court for an order certifying a class for purposes of Count I and Count II of this matter as a class action and authorizing Plaintiff to send notice of this case to the following class:

> All unemployment claimants who have suffered suspension of benefits for 21 days or more after a determination of eligibility without any Agency determination or redetermination of the reason to suspend benefits. (the "Class").

The Defendants, State of Michigan Unemployment Insurance Agency (the "Agency") other Defendants operating under color of state law have conspired to operate and continue an unconstitutional flagging system, resulting in indefinite suspension of timely benefits for claimants before termination of benefits and without issuing a determination.

As explained in the accompanying Brief in Support of this Motion, Plaintiff has proffered sufficient pleadings and evidence to satisfy the standard for class certification pursuant to Fed. R. Civ. P. 23. Specifically, the facts of this matter satisfy the standard for certification under Rule 23(a) and under 23(b). Moreover, the Court's discretionary powers to certify the case for purposes of determining liability under Rule 23(c)(4) are also appropriately invoked in the circumstances of this matter.

Therefore, Plaintiffs request class certification for adjudication of this matter in all or in part.

The undersigned counsel certifies that, prior to filing this Motion, counsel personally spoke to opposing counsel, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief; opposing counsel expressly denied concurrence. Plaintiff respectfully requests that this Court grant this Motion and certify a class of unemployment claimants wrongfully denied due process.

Respectfully submitted,
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Dated: November 4, 2024

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PLAINTIFFS' OPENING BRIEF IN SUPPORT OF CLASS CERTIFICATION

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STATEMENT OF ISSUES PRESENTED

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Plaintiffs say: Yes
Defendants say: No

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I. INTRODUCTION

Defendants knowingly operate a system of internal flags that cause benefit payments for Plaintiffs and putative class members to be suspended without notice and without due process. As a matter of clearly established law, the Agency is required to provide pre-termination notice and opportunity to be heard before cutting off unemployment benefits. Unemployment Benefits are a property right that may not be suspended without pre-termination due process. The Supreme Court says so. The US Department of Labor says so. Michigan state law says so.

Plaintiffs now move this Court to certify a class of individuals impacted by the alleged indefinite holds for purposes of deciding and applying injunctive relief sought by Plaintiffs' Motion for Partial Summary Judgment and Injunctive Relief (ECF No. 71) and to determine Defendants' liability for the incidental economic loss caused by ongoing policy and practice denying timely payment of benefits.

II. BACKGROUND

A. PROCEDURAL BACKGROUND

Plaintiffs filed this action against the named Defendants for injunctive relief, declaratory relief, equitable relief, and damages on August 26, 2022. (*See* ECF No. 1). Plaintiffs filed a First Amended Complaint on November 28, 2022, adding the UAW as a Plaintiff asserting that the Agency's actions independently constitute a breach of the prior settlement agreement reached in the related case of *Zynda et al. v. Arwood, et al.,* Case No. 2:15-cv-11449 (E.D. Mich. Filed April 21, 2015). (*See*

ECF No. 10). Defendants filed a renewed Motion to Dismiss Plaintiffs' First Amended Complaint on December 12, 2022. (*See* ECF No. 19). On July 12, 2023, the Court entered its opinion and order granting in part and denying in part Defendants' Motion to Dismiss and denying Plaintiff UAW's Motion for Preliminary Injunction for procedural reasons. (*See* ECF No. 33).

B. THE NATURE OF THE DUE PROCESS VIOLATION

On July 24, 2024, Plaintiffs presented a Motion for Partial Summary Judgment and for Injunctive Relief calling on the Agency Director to cancel all indefinite holds that cause suspension of benefits without any Agency determination to the claimant of the reason for suspension. That issue is fully briefed and pending before the Court. The scope of the injunctive relief and of Defendants' liability is patently appropriate for class-wide resolution. Defendants seem to agree. *See* ECF No. 83, Def. Resp. in Opp to Summ. J. at PageID 2438 (arguing that a Rule 23 class must be certified in order to enjoin Defendants' practices beyond treatment of Plaintiffs); *id* at PageID 2454 (arguing that money damages should be sufficient to make Plaintiffs and class members whole).

Since 1970, the Supreme Court has made clear that recipients of unemployment compensation have constitutionally protected property interests in unemployment benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10

L. Ed. 2d 965 (1963)). Since 1971, the Supreme Court has recognized that § 303(a)(1) of the Social Security Act does create an enforceable right, *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 91 S. Ct. 1347, 28 L. Ed. 2d 666 (1971). The Department of Labor acted immediately to instruct States to ensure their laws were revised to provide (1) for the necessary notice and hearing opportunity to claimants and employers prior to determinations and (2) for benefit payments in accordance with determinations in favor of claimants during appeal periods and pending appeals. Ex. 1, Unemployment Insurance Letter 1126 June 14, 1971.[1] Section 27 of the Michigan Employment Security Act was revised that same year, to ensure that:

> (a)(1) When a determination, redetermination, or decision is made that benefits are due an unemployed individual, the benefits become payable from the fund and continue to be payable to the unemployed individual, subject to the limitations imposed by the individual's monetary entitlement, if the individual continues to be unemployed and to file claims for benefits, until the determination, redetermination, or decision is reversed, a determination, redetermination, or decision on a new issue holding the individual disqualified or ineligible is made…

---

[1] See also, *In re Bank of Am. Cal. Unemployment Benefits Litig.*, 674 F. Supp. 3d 884, 942 (S.D. Cal. 2023) (holding that "once EDD [the California unemployment agency] determined that Plaintiffs were eligible, Plaintiffs had a protected property interest in the benefits" that could not be turned off without notice and opportunity to be heard); *Taylor v. Steinbacher*, No. C83-419, 1989 U.S. Dist. LEXIS 19343, at *17 (N.D. Ohio May 22, 1989) (concluding that unemployment recipients are entitled to pre-termination notice and opportunity to be heard and granting summary judgment for Plaintiffs on the issue).

MCL 421.27(a)(1).

In recognition of Goldberg v. Kelly/Java Rights, state agencies have long been instructed to provide notice and opportunity to be heard prior to terminating benefits. This remained true throughout the pandemic and even in light of identity theft concerns.[2] Once determined eligible, claimants are presumed eligible unless agencies are unable to make a timely determination of ineligibility. UIPL 01-16, Change 1 states:

> If a determination of ineligibility has not yet been made, a benefit payment must be made by the end of the week following the week in which an issue is detected. In practice, that means that states would have at most 7-10 days to make a determination of ineligibility ***in order to not issue the benefit payment***. For example, if an issue is detected via cross-match with the NDNH on a Tuesday during week five of the claim, the state must either make a determination or make a payment by the end of the following week, in this case on Friday of week six, which is 10 days later. Absent a determination of ineligibility during a continued claim series, there is a presumption of continued eligibility and benefit payments must be issued timely.

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[2] Ex. 2, UIPL 16-21. Under the DOL's Unemployment Insurance Program Letter ("UIPL") 16-21, If the individual does not respond timely or responds but does not provide adequate information, the state must provide notice and opportunity to challenge the determination. ("[t]he agency must give each claimant a written notice of … [a]ny…determination which adversely affects a claimant's right to benefits"). The determination must explain the reason for the decision, including the facts: what the individual was asked to provide; what was received; and, if information was received, why that information was insufficient to verify the individual's ID").

(Ex. 2, UIPL No. 01-16, Change 1, p. 6 *Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers).*

In short, this case alleges that Defendants operate a flagging system that causes benefit payments on continuing claims to be held indefinitely without any determination or any notice and opportunity to respond. Defendants have continued this system unabated for another two years since this case was filed, in deliberate indifference to the due process requirements of the law.

C. THE PROPOSED CLASS DEFINED

Plaintiffs have thoroughly discussed the governing due process law and nature of requested injunctive relief in the Motion for Partial Summary Judgment and Injunctive Relief. (ECF No. 71). This case and the relief sought turns on a simple question of law impacting all Plaintiffs, putative class members, and future claimants interacting with the Michigan Unemployment Agency:

> *Is there any basis legal basis for the Agency to put continuing benefits on indefinite hold without providing notice to the claimant and a determination consistent with due process?*
>
> Plaintiffs answer: No

Or the question can be phased another way:

> *After a claimant is initially determined entitled to benefits, is there any scenario, consistent with due process, that the Agency is permitted use a hold that indefinitely suspends benefits without notice and a*

> *determination - longer than the 7-10 days allowed to investigate an issue?*
>
> Plaintiffs answer: No.

The Agency's practice of payment holds that persist indefinitely violate due process by preventing timely payment when due. Therefore, Plaintiffs and Class Counsel Propose to Certify the following class:

> All unemployment claimants who have suffered suspension of benefits for 21 days or more after a determination of eligibility without any Agency determination or redetermination of the reason to suspend benefits. (the "Class").

Any hold that last more than 21 days means the Agency has failed to pay at least one benefit payment when due and risks missing the second.

D. NAMED PLAINTIFFS REPRESENT A COMMON EXPERIENCE

Named Plaintiffs were and are impacted by the Defendants' practice of imposing indefinite holds on benefits without notice or determination. The harm is ongoing, and Plaintiffs were impacted and have standing. Defendants' attempts – years later – to justify indefinite holds and continued non-payment, are an irrelevant symptom of the problem, not a serious defense. *See e.g. Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013) (discussing *Goldberg v. Kelly* and noting that the Court required a hearing prior to termination of welfare benefits, *notwithstanding the availability of arguments that the particular Plaintiffs would still be denied benefits if the hearing were granted*). Moreover, each of the Plaintiffs were subject, are

subject, or may in the future be subject to the Agency's unconstitutional policies. Moreover, the injury is otherwise capable of repetition yet evading review. The record is replete with examples of repetitive indicators, flags, and BPR's on each single Plaintiff's file.

i. Plaintiff Diana Boudrie

Diana Boudrie received her initial eligibility determination on or about April 23, 2020. Her first payment was issued on May 6, 2020. Her claim was soon flagged and by September, six weeks of eligibility were missing/unpaid and additional benefit weeks were placed on hold without timely notice. Two months after benefits were stopped, the Agency officially issued an adverse determination. The Agency's untimely decision was recently rejected by an administrative law judge in August 2024. Despite the reversal, payments remained suspended until October 2024, when two payments were released. The weekly benefit amounts were paid in October 2024, lacking the three hundred dollar supplemental that would have been available if timely paid in 2020. Ms. Boudrie still has no way to access benefit payments for unpaid weeks of May 2, May 15 through June 20 and all weeks to which she was entitled after September 2020. (Ex 3, Boudrie Documents Collected).

ii. Plaintiff Richard Brainer

Richard Brainer received his initial determination on or about April 22, 2020. The first payment was issued on May 12, 2020. Payment was suspended for six

weeks between July and September and again between December 2020 and April 2021. Eight months later, in December of 2021, the Agency reversed its initial decision and asserted that Mr. Brainer had never been eligible for benefits at all. He was told to repay $25,000. (The Agency even took his 2021 tax refund to pay the alleged debt). In January 2023, an administrative law judge rejected the Agency's ultra vires decision and reinstated Mr. Brainer's eligibility, but by 2024, the Agency still held his tax refund and as of this writing, Mr. Brainer is still unpaid for all eligible weeks after his claim was stopped 3 years ago. (Ex 4, Brainer Documents Collected).

iii. Plaintiff I.F.

Plaintiff I.F. received her initial eligibility determination on or about April 23, 2020. She received her first payment the same day. Benefits stopped for six weeks between July and September. In December, her claim was stopped indefinitely. Four months after that, I.F. received an adverse determination. In July 2022, the administrative appeals commission reinstated her eligibility, and the Agency sent her a debit card. She checked the card "every day for probably a year", but she has never been paid for any of the weeks after benefits were stopped. (Ex 5, I.F. Documents Collected).

iv. Plaintiff Christine Holifield

Christine Holifield received her initial eligibility determination or about April 23, 2020. Her first payment was issued on April 25, 2020. Benefits were suspended in June, before the Agency issued its first adverse determination in July. The Agency's adverse decision was reversed after two more years, but by then the claim was closed and she received nothing. A portion of the benefits due in 2020 were finally paid in 2023. Federal lost wage benefits that were available in 2020 have never been paid. In October 2024, reconsidered her eligibility after nearly 5 years and determined that she should be denied benefits retroactively to January 2021. (Ex 6, Holifield Documents Collected).

v. Plaintiff Paul Kreps

Paul Kreps received his initial eligibility determination on or about August 5, 2020 (although he had applied in April). He certified for benefits on a regular basis and responded to redundant requests that he verify his identity. Each week showed a "stop payment indicator" on his account. He submitted documentation on April 15, 2020, August 11, 2020, September 10, 2020, and October 14, 2020. The Agency is in possession of his marriage license, his driver's license, his social security card and his birth certificate. Still, he did not receive benefits. In December 2021, an additional hold was put on his account requiring updated banking information. He received nothing in 2021, 2022, or 2023. On September 5, 2024, the Agency issued Mr. Kreps a check for $18,000 in past due 2020 benefits, even though he is still owed

almost $10,000 more. Federal Lost Wage Assistance supplements that were available in 2020 have never been paid. A stop payment indicator remains visible on his account. The Agency has still not issued any notice or appealable determination to explain why remaining 2020 and 2021 benefits are unpaid. (Ex 7, Kreps Documents Collected).

vi. Plaintiff Andrew Myrold

Andrew Myrold received his initial eligibility determination on or about May 13, 2020. The first payment was issued on May 12, 2020 (a day earlier). This was the only payment issued to Mr. Myrold that year. The Agency stopped his claim and did not issue another payment until May 2021. The first adverse determination came in September 2021 and was reversed by an administrative law judge in 2023. Mr. Myrold has never received benefits for the many weeks of eligibility between May and August 2020 and there is no path forward for him to compel the Agency to pay him. (Ex 8, Andrew Myrold Documents Collected).

vii. Plaintiff Patricia Myrold

Patricia received her initial eligibility determination on or about May 13, 2020. Her first payment was issued on May 12, 2020. The Agency stopped her benefits later in May and did not issue another payment for another 12 months. Adverse determinations were finally issued in 2021, but those have all been reversed. The Agency voided the last of its adverse determinations just 4 months ago. Ms.

Myrold has never received benefits for the many weeks of eligibility between March and August 2020, and there is no path forward for her to compel the Agency to pay her. (Ex 9, Patricia Myrold Documents Collected).

viii. Plaintiff Marissa Quigg

Marissa Quigg received her initial eligibility determination on or about April 8, 2020. The first payment was delayed until July 23, 2020. In September, the Agency stopped her benefits. Six months later, the Agency reversed its initial eligibility decision. In February 2022, the administrative appeals commission voided the Agency's improper decision and reinstated her entitlement. Instead of releasing the overdue 2020 payments, the Agency added an additional hold in July 2022. A portion of the benefits due in 2020 were finally paid in 2023. Federal lost wage benefits that were available in 2020 have never been paid. (Ex 10, Quigg Documents Collected).

ix. Plaintiff Robin Shipe

Robin Shipe received her initial eligibility determination on or about October 9, 2020. After three months without a payment, the Agency reversed its decision and notified Ms. Shipe that she was not eligible. In December 2022, the initial eligibility determination was reinstated, but Ms. Shipe was never paid. (Ex 11, Shipe Documents Collected). In October 2024, the Agency issued an untimely determination holding Shipe ineligible for certain benefit weeks in 2020 and 2021.

Defendants largely admit the due process failures as to the Plaintiffs but call them "inadvertent" or "mistaken". *See e.g.* ECF No. 46, Defendant Dale's Answer to Second Amended Complaint at ¶¶46-143. These experiences are not "inadvertent" or "mistaken" aberrations. Rather they reflect a consistent practice of the Agency dating back five years or more. In fact, the Agency's own records report the same experience for hundreds of thousands of others. ECF Nos. 71 and 88 (reporting and discussing Agency responses to discovery).

E. THE ECONOMIC IMPACT OF DELAYED PAYMENTS

The named Plaintiffs and putative class members all suffered the same incidental economic loss caused by failure to pay benefits when due. Based on Agency data and applying routine formulas used by economic experts, the economic damages of Plaintiffs and putative class members is calculable by formula. Plaintiffs' economic expert, Theresa Fulimeni, describes in her declaration produced to Defendants on July 15, 2024, that it is possible to calculate economic loss through application of accepted accounting standards and methodologies. (Ex. 12, Declaration of Theresa Fulimeni). The economic loss incidental to unconstitutional delay of UI payments can be calculated by mathematical formula and applied to the class on three criteria:

> a. *The lost time-value of the money usually calculated based on a multiplier that reflects economic factors such as interest rate and inflation* (i.e. money available previously is worth more than money paid later). In response to Interrogatory No. 7, the Agency has identified

over 800,000 claimants who have suffered a delay of 21-days or more, however, it fails to disclose the value of each delayed benefit week and the length of time between when it was due and when it was actually paid (if ever). All the Named Plaintiffs were impacted in this way.

b. *UI Benefits received in 2020 were subject to an income tax exemption up to $10,200.* That exemption was not available if 2020 benefits were paid after 2020. In response to Interrogatory 4, the Agency has identified Over 1.3 million unique claimants that had one or more benefit week that remained unpaid as of the end of 2020 as a result of stop payment indicator, generic availability, BPR or other holds. At the lowest tax bracket, Defendants Missed out on a tax break of 10% of the benefits wrongfully withheld. However, The Agency fails to disclose the monetary amount on hold. Almost all of the Named Plaintiffs were impacted in this way, Paul Kreps for one.

c. *The Lost Wages Assistance Program provided an additional $300 per week for six weeks in August and September of 2020.* Claimants who had benefits delayed for those weeks and paid later (or never) were not eligible for those supplemental payments. In Response to Interrogatory 10, the Agency has identified approximately 1.5 million benefit weeks (for over 500,000 claimants) that were not paid at all, or not paid until after the supplemental funding was no longer available. Most of the Named Plaintiffs were also impacted in this way, Diana Boudrie for one.

In order to make these calculations and ascertain the economic loss to the putative class, one could apply an appropriate interest rate to the delayed payments, a uniform tax rate for the lost 2020 tax break, and identify the number and value of LWA supplement payments lost.

On June 18, 2024, Plaintiffs requested the necessary information:

Please provide an itemized report for each benefit week from March 2020 to present. For each week, list each claimant, identified by MIN, who was placed on hold for any of the indefinite hold reasons, the payable amount of the benefit week, and when it was finally released

> (if ever) and the benefit amount released (if any) and the date of any request for information ("RFI") related to the reason for the hold.

Plaintiff's economic expert was deposed on October 11, 2024, and testified consistently that the requested documentation was essential to her ability to complete the analysis. (Ex. 13, Fulimeni Deposition at pp. 45-48). Still, Defendants refuse to provide the requested data. A Motion to Compel the requested data is fully briefed and pending resolution before the Court (ECF No. 104).

Once the data is made available, Ms. Fulimeni testified she could complete her calculations and present the incidental loss using interest rates based on historical interest and inflation data or governed by statute. The least controversial calculation would be an analysis based on the statutory interest rate used by the Agency 1% per month for its own collection activities. (Ex. 13, Fulimeni Dep. at pp. 26); MES Act Sec. 15; MCL 421.15.

III. ARGUMENT

A. THE STANDARD FOR CLASS CERTIFICATION

A district court has wide discretion to determine whether to certify a class. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Fed. R. Civ. P. 23 allows a plaintiff to file suit as a representative party on behalf of a class of individuals if certain conditions are met. A party seeking class certification must satisfy all the requirements of Rule 23(a) and at least one of subsections of Rule 23(b). *Id.* Under Rule 23(a), the class as proposed must satisfy requirements of "numerosity,

commonality, typicality, and adequate representation." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-538 (6th Cir. 2012). Under Rule 23(b)(2), certification is appropriate "if class members complain of a pattern or practice that is generally applicable to the class as a whole." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Under Rule 23(b)(3), class certification may also be maintained upon a demonstration that class litigation is superior to individual litigation and that common questions predominate over individual ones. *Id.* at 536. Alternatively, in circumstances in which neither Rule 23(b)(2) nor Rule 23(b)(3) are applicable, the Court has discretion to certify a class with respect to particular liability issues. Fed. R. Civ. P. 23(c)(4).

In exercising its discretion to certify a class, a court need not reach the merits of an issue unless it is necessary to resolve "that the prerequisites of Rule 23[] have been satisfied." *Walmart v. Dukes*, 564 U.S. 338, 350-51 (2011); *Erica P. John Fund v. Halliburton*, 131 S. Ct. 2179 (2011) (proof of causation unnecessary when seeking leave to send notice under Rule 23); *Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 560 (6th Cir. 2007) ("Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff's suit"). "'When a court is in doubt as to whether to certify a class action, it should err in favor of allowing a class.'" *Int'l. Union, UAW v. Kelsey-Hayes Co.*, 2015 U.S. Dist. LEXIS 55057, at

*4 (E.D. Mich. Apr. 28, 2015) (Steeh, J.) (quoting *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 303 (E.D. Mich. 2001) (Edmunds, J.))

i. Hybrid Certification Approach is Appropriate

Courts commonly use the phrase "hybrid class action" to refer to a single case in which "plaintiffs seek both injunctive relief and monetary damages through certification under more than one section of Rule 23." 2 WILLIAM RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:38 (6d 2024) (describing the two primary approaches "hybrid" actions). Courts sometimes choose to separately certify *both* a (b)(2) class for the portion of the case concerning injunctive and declaratory relief *and* a (b)(3) class for the portion of the case requesting monetary damages. At other times, Courts choose to bifurcate the litigation into liability and damage phases and then typically begin by determining the defendant's liability; in so doing, courts may certify a (b)(2) class for the liability phase or determine liability using issue certification under Rule 23(c)(4). If the defendant is found liable, courts adopting this approach will then decide whether to certify a (b)(3) class for money damages purposes and/or an additional (b)(2) class for final injunctive relief. *See Id.* Under Rule 23, the court has broad discretion to use either approach, although the latter approach is most suited to the circumstances of this matter.

The legal question of whether the State's practices should be enjoined as violation of the due process clearly predominates the determination of rights for all

class members in this matter – where Plaintiffs contend that indefinite holds of continued benefits must be lifted unless and until the state issues a determination otherwise (after notice and opportunity to be heard). This fundamental legal question is dispositive and predominates. Therefore, the efficient use of judicial resources directs that the Court should certify a class pursuant to 23(b)(2) to determine the dispositive issue and may thereafter revisit the liability for incidental loss associated with delayed benefits. In either scenario, Plaintiffs easily satisfy the standards of both Rule 23(b)(2) and 23(b)(3)

> Certification of a hybrid action is often thought to be the best of both worlds, achieving the judicial economies associated with group litigation while also respecting the due process rights of individuals with monetary claims should the defendant be found liable during the first phase of the trials. Since *Wal-Mart* has made money damages largely unavailable in (b)(2) class suits, courts have turned to these forms of hybrid class actions. Either of the two approaches discussed insulates the (b)(2) class piece from the money damage portion of the case, hence complying with *Wal-Mart*'s admonition against adjudicating individual damage claims in a (b)(2) class action

Id. (citations omitted); *Charron v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221, 238–39 (S.D.N.Y. 2010) (certifying a (b)(2) class for the equitable portion of the case and a (b)(3) class for the damages portion of the case and limiting the damages class to certain liability issues pursuant to Rule 23(c)(4)).

B. THE PROPOSED CLASS SATISFIES RULE 23(A)

i. The Putative Class Members are Numerous

Numerosity under Rule 23(a)(1) requires that the class be sufficiently numerous that joinder of all members individually would be impracticable. "There is no strict numerical test for determining impracticability of joinder." *In re Am. Med. Sys.*, Inc., 75 F.3d 1069, 1079 (6th Cir. 1996). "Nevertheless, while 'the exact number of class members need not be pleaded or proved, impracticality of joinder must be positively shown, and cannot be speculative." *Golden v. City of Columbus*, 404 F.3d 950, 965-66 (6th Cir. 2005) (internal citations omitted). "Courts within the Sixth Circuit have recently stated that the numerosity requirement is fulfilled when the number of class members exceeds forty." *Rouse v. Washington*, 2021 U.S. Dist. LEXIS 111678 (citing *Busby v. Bonner*, 466 F. Supp. 3d 821, 831 (W.D. Tenn. 2020) (punctuation modified).

Here, the evidence shows that there are more than enough putative class members to satisfy the numerosity requirement. *Versen v City of Detroit*, 2023 U.S. Dist. LEXIS 137866, at *1-3 (ED Mich, Aug. 8, 2023)(finding that 56 class members was sufficiently numerous to satisfy the numerosity requirement). In *A.M.C. v. Smith*, another public benefits case regarding lack of notification of the termination of benefits, the court found that the proposed class of over 100,000 far exceeded the traditional numerosity benchmark of forty class members. 620 F. Supp. 3.d 713, 732 (M.D. Tenn., Apr. 14, 2020) (citing *Snead v. CoreCivic of Tennessee*, LLC. No. 3:17-CV-0949, 2018 U.S. Dist. LEXIS 108391, 2018 WL 3157283, at *11*). The

proposed class here includes hundreds of thousands of claimants that the Agency has placed on indefinite hold. This far exceeds the accepted standard that forty potential class members is enough to make joinder of plaintiffs impractical. See, e.g., *Turner v. Grant County Det. Ctr.*, No. 05-148-DLB, 2008) (recognizing the "rule of thumb"); *Allen v. Leis*, 204 F. R. D. 401, 406 (S. D. Ohio 2001) (same).

ii. Common Questions of Law and Fact Predominate

Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." *Dukes*, 564 U.S. at 349–50 (internal citations omitted). "This does not mean merely that they have all suffered a violation of the same provision of law.... That common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. "[W]hat matter[s] to a class certification... is not the raising of common 'questions'— even in droves—but rather, the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation." *Rouse*, 2021 U.S. Dist. LEXIS 111678 at *37 (citing *Dukes*, 131 S. Ct. at 2551 (quotation omitted)). There "need be only a single issue common to all members of the class" to demonstrate commonality. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996). Further, "[v]ariations in the circumstances of class

members are acceptable, as long as they have at least one issue in common." Id (quoting *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004).

The commonality requirement for class certification is clearly met in this case. The plaintiffs and all class members share a common injury: the alleged violation of their due process rights through the termination of unemployment benefits without proper investigation and determination. This shared experience creates a common question of law that is central to the validity of each claim. Moreover, the established legal precedents affirm the protected property interest that unemployment claimants have in their benefits. By addressing these common issues, this class action has the potential to generate answers that will drive the resolution of the litigation for all class members, thus satisfying the commonality requirement under Rule 23(a).

iii. The Claims of Plaintiffs are Typical of the Class when they Share the Same Core Allegation that Termination of Benefits Before Investigation and Without Determination Violates Due Process

The third factor, typicality, is met when the claims share a legal theory and "'core of allegation.'" *Neal v James*, 252 Mich. App. 12, 21; 651 NW2d 181 (2002), (quoting *Allen v Chicago*, 828 F. Supp. 543, 553 (N.D. Ill. 1993)). This does not require that the facts be identical. *Id.* Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims

are based on the same legal theory." *Beattie*, 511 F.3d at 561 (internal citations omitted). For the district court to conclude that the typicality requirement is satisfied, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Id.*

In *Rouse*, Plaintiffs alleged that the Michigan Department of Corrections (MDOC) and specifically staff members at the Southern Michigan Temporary Facility (SMT) failed to abide by adequate COVID-19 protocols and failed to provide necessary access to the prison's law library in violation of the inmates Eighth Amendment and 6th Amendment rights respectively. *Rouse v. Washington*, 2021 U.S. Dist. LEXIS 111678 at *2-3. In determining whether the class representatives in Rouse had a sufficient level of typicality with all class members this court reasoned that as the class representatives challenged the "same practices giving rise to the claims of all class members— Defendant' allegedly inadequate response to the health dangers posed by the COVID-19 pandemic. Typicality is, therefore satisfied." *Id.* at *36.

In *Versen*, the court determined that for the purposes of typicality, the named plaintiff must "demonstrate that the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Versen,* 2023 U.S. Dist. LEXIS 137866, at *8 (quoting *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013). The named plaintiff's allegations were nearly identical to

those of the putative class members (alleging that the City of Detroit's ordinance deprived him of his procedural due process rights). As there was no Indication that the named plaintiff's interests would conflict with those of other members in the putative class, this Court determined that the typicality requirement was satisfied. *Versen,* 2023 U.S. Dist. LEXIS 137866, at *8.

Here, typicality is satisfied for the proposed class. The core of Plaintiffs' claim here is that the Agency violated their rights and the Class members' rights to due process and that The Agency did so when it terminated payment of benefits before conducting an investigation and making a determination. If the named Plaintiffs can properly allege that lack of notice and untimely determination of benefits by the Agency violated their due process rights, then that common fault applies to all other class members. All the proposed class members' allegations concern these same practices and policies of the Agency and are nearly identical. They are typical of the class.

iv. Named Plaintiffs and Class Counsel Are Able to Fairly and Adequately Protect the Interests of the Class

Under Rule 23(a)(4), the class representatives must fairly and adequately protect the interests of the class. The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between names parties and the class they seek to represent. *Amchem Prod v Windsor*, 521 US 591; 689 (1997). The adequacy component has "two requirements that must be met: (i) class counsel must be

qualified, experienced, and generally able to conduct the litigation; and (ii) the class representatives must not have interests that are antagonistic to the other class members. *Rouse*, at *34 (citing *Stout v. Byrider,* 228 F.3d 709, 717 (6th Cir. 2009).

Here, the proposed class members all suffered from the same unlawful Agency practice as did the class they seek to represent. If Plaintiffs succeed in this litigation, the Class members will benefit. There is nothing in the record to suggest that the proposed Class representatives have any interest antagonistic to, or conflicting with, the interests of the Class they seek to represent.

Moreover, Plaintiffs' counsel are experienced class and collective action litigators, having served as class counsel in dozens of cases, including against the State of Michigan and the Agency. (Ex.14, Declaration of David M. Blanchard) (detailing two decades of work on impact litigation for Michigan workers). Since the founding Blanchard & Walker, PLLC in 2015, the firm has served as lead counsel or co-counsel in dozens of class and collective actions and recovered millions of dollars for workers in Michigan and in other across the country. Moreover, lead counsel has over a decade of experience litigating due process rights related to the unemployment insurance system and advocacy on behalf of claimants provided on a pro bono basis. *Id.*

C. THE PROPOSED CLASS SATISFIES 23(B)(2)

i. Rule 23(b)(2) is Particularly Suited to Injunctive Relief Cases Involving Premature Termination of Public Benefits

Courts "routinely grant class action status under Rule 23(b)(2) in cases 'alleging systemic administrative failures of government entities.'" *A.M.C. v Smith*, 620 F Supp 3d 713, 735 (MD Tenn, 2022) (quoting *Vazquez Perez v. Decker*, No. 18-CV-10683 (AJN), 2020 U.S. Dist. LEXIS 222884, at *9 (S.D.N.Y. Nov. 30, 2020) (citation omitted). Courts across the country have consistently ruled that class certification is appropriate for groups of plaintiffs seeking to address public benefits issues. For example, in *Dozier v. Haveman*, the court chose to certify a class action for individuals alleging that a Michigan state-sponsored Medicaid program's termination notice was inadequate, as it failed to inform recipients about their potential eligibility for another Medicaid program. 2014 U.S. Dist. LEXIS 153395 (E.D. Mich., Oct. 20, 2014). Similarly, in Illinois, a court granted class certification for Medicaid-eligible children with mental health or behavioral disorders, who were recommended intensive home- and community-based services. That case alleged that the state failed to provide necessary services, violating Medicaid Act, ADA, and Rehabilitation Act rights. See *N.B. v. Hamos, 26 F Supp 3d 756 (ND Ill, 2014)*. Similarly, in Georgia, a court granted class certification for a group of plaintiffs who alleged that Georgia state agencies failed to properly redetermine Medicaid eligibility after SSI benefit termination as defendants did not consider other programs for Medicaid eligibility and provided inadequate termination notices. *J.M. v. Crittendon*, 337 F.R.D. 434 (ND Ga., 2019).

These cases illustrate a robust and consistent pattern across various jurisdictions where courts have granted class certification in public benefits cases. This trend is particularly pronounced when addressing systemic issues or widespread policy challenges that affect many similarly situated individuals. Courts have recognized the efficiency and effectiveness of class actions in addressing these types of issues, as they allow for a unified resolution that can benefit all affected parties. This approach ensures that relief, when granted, is comprehensive and reaches all affected individuals, not just those with the resources to bring individual lawsuits.

> Rule 23(b)(2)'s narrow purpose does not foreclose using it as a springboard for additional proceedings. A class action might end with a final "award of prospective relief to the class" that enjoins the challenged practice but permits separate suits by class members seeking individual relief. *Cf. Cooper*, 467 U.S. at 876, 880-81. We, for example, have held that plaintiffs could use Rule 23(b)(2) to obtain a declaratory judgment about the meaning of a standard-form contract, and that class members could later use that judgment "as a predicate for monetary damages" in individual suits. *Gooch*, 672 F.3d at 427-29, 433; *see Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 279-80 (6th Cir. 2018); *see also* 18A Charles A. Wright et al., *Federal Practice and Procedure* § 4455.2, at 444-45 & n.5 (3d ed. 2017)

Doster v. Kendall, 54 F.4th 398, 439 (6th Cir. 2022) (Cert granted and remanded on other grounds); *cf. Monteleone v. Auto Club Grp.*, 113 F. Supp. 3d 950, 964 (E.D. Mich. 2015) ("What is unique about *Gooch* is that the policyholders also sought to recover money damages to be certified under Rule 23(b)(3), and the declaratory relief granted was likely to significantly advance those claims. Moreover, in *Gooch*,

the court's Interpretation of the disputed policy terms amounted to a finding of liability for all policyholders who submitted a claim").

ii. The Proposed Class Satisfies all Rule 23(b)(2) Requirements

Class certification is appropriate under Rule 23(b)(2) when the Defendant "has acted or refused to act on grounds that apply generally to the class," the class seeks an indivisible remedy, and the class is cohesive. See Fed. R. Civ. P. 23; *Dukes*, 564 U.S. at 360; *Romberio v. UnumProvident Crop.*, 385 F. App'x 423, 433 (6th Cir. 2009). *Reeb*, 435 F.3d 639, at 635-46 (Rule 23(b)(2) class certification is appropriate in situations in which the "party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate in respecting the class as a whole.")

The "key" to (b)(2) classes is "the indivisible nature of injunctive or declaratory remedy warranted– the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or none of them." *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Although the Rule looks for "grounds" that "apply generally" to the class, it is well-settled that the defendant's conduct described in the complaint need not be directed or damaging to every member of the class and 23(b)(2) certification is proper "so long as the challenged policy or practice was generally applicable to the class as a whole. *See* 2

WILLIAM RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:28 (6d 2024).

Here, Defendants acted on grounds that generally apply to all class members. Defendants failed to issue timely decisions that affected benefit entitlement for nearly one million claimants. Defendants implemented a web of algorithms for the single purpose of stopping payments. Class members received no notice, inadequate notice or untimely notice of the reason(s) why their payments were withheld. Systemic administrative failures of government are ideal candidates for injunctive classes. Courts routinely grant class action status in such cases. *Vazquez Perez v. Decker*, 2020 U.S. Dist. LEXIS 222884, 2020 WL 7028637, at *9 (S.D.N.Y. Nov. 30, 2020). The legal claims and right to relief are both indivisible and cohesive across the class. *A.M.C. v Smith*, 620 F Supp. 3d 713, at 735 (the "indivisibility" requirement incorporates the notion that the defendant's conduct "can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (citing *Dukes*, 564 U.S. at 360). Finally, Defendants seem to agree, arguing in response to Plaintiffs Motion for Summary Judgment that resolution of injunctive claims requires class certification. *See* ECF No. 83, Def. Resp. Opp. Summ J. at PageID 2454.

Once the Court determines that the prerequisites of Rule 23(b)(2) are satisfied, it need not delve further at this time. Both 23(a) and one of the requirements of

23(b) have been met. The Plaintiffs' and class members predominant objective is to lift the indefinite holds on weekly benefits stretching back four years. Once the questions of injunctive relief and liability have been determined, only then it is necessary to determine if further relief requires separate certification under 23(b)(3).

D. THE PROPOSED CLASS ALSO SATISFIES RULE 23(B)(3)

To the extent the Court decides that 23(b)(3) certification is also necessary at this time, Plaintiffs also easily satisfy this burden. To certify a class under Rule 23(b)(3), the Court must find that (1) common questions predominate over questions affecting individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The "predominance" and "superiority" provisions are intended to promote "economies of time, effort, and expense, and promote…uniformity of decision as to persons similarly situated." *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336, 374 n.17 (10th Cir. 1973).

i. Class Members are Ascertainable and Identifiable

The class definition must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-538 (6th Cir. 2012) (punctuation modified). Here, there is no question that the proposed class is ascertainable as all potential members, those who had their unemployment benefits

terminated in violation of their Due Process rights are known by defendants. Defendants possess the means necessary to identify all potential class members.

ii. Common Questions Predominate

Rule 23(b)(3) permits the certification of a class where "common questions of law or fact 'predominate over any questions affecting only individual members,' and the collective approach is 'superior' to other methods of adjudicating the controversy." *Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 507 (E.D. Mich. 2023) (quoting *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2017)). The predominance requirement will be met if there exists a common question of legality or fact that is at the heart of the litigation. *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir.2007).

In *Versen*, the City of Detroit argued that the proposed members of the plaintiff class failed to meet the predominance requirement as the questions posed were too individualized as there were issues concerning the manner in which the Plaintiff's vehicles were (i) impounded and with (ii) the assessment of damages. *Versen,* 2023 U.S. Dist. LEXIS 137866, at *10. The court held that "the general proposition that one impoundment may differ slightly from the next is insufficient to establish that individualized issues predominate." *Id.* at *11. The court went on to explain that as the claims brought by plaintiff and the putative class members arose from the impoundment of their vehicles without a sufficient and prompt hearing, that

the minor differences in the manner in which the City impounded their vehicles did not predominate over their common issues. *Id. ("Courts within the Sixth Circuit have held that if common issues predominate, class certification should not be denied simply because individual class members are entitled to differing damages.") (citing In re Sonic Corp. Customer Data Breach Litig., No. 1:17-MD-02807-JSG, 2020 U.S. Dist. LEXIS 204169, at *7 N.D. Ohio 2009).*

Here, there exists a single common question impacting all members of the proposed class. That is, does there exists any basis for The Agency to put benefits on indefinite hold without providing notice to the claimant and a determination that is consistent with due process. Put another way, is there any legal basis, consistent with due process, that the Agency may use a flag that results in an indefinite hold without notice and a determination, longer than the 7-10 days allowed to investigate? This singular question stretches throughout the class, impacting each and every member all suffered from the same challenged policies. The possibility that each Plaintiff may have specific damages, based on how many weeks the benefits were withheld and for how long, has no bearing on the analysis. The injury is the same across the putative class – and the manner in which each Plaintiff's damages will be calculated will also be the same across the class. The legal question and scope of liability uniquely predominates in a matter such as this.

iii. Class Resolution is Superior to Individual Adjudication

Courts to consider several factors when analyzing superiority under Rule 23(b)(3):

> To determine whether a class action is the superior method for fair and efficient adjudication, the district court should consider the difficulties of managing a class action. The district court should also compare other means of disposing of the suit to determine if a class action is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court. Additionally, the court should consider the value of individual damage awards, as small awards weigh in favor of class suits.

Rouse, 2021 U.S. Dist. LEXIS 111678 at *43 (citing *Pipefitters Local 636 Ins. Fund v Blue Cross Blue Shield*, 654 F3d 618 (6th Cir., 2011).

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

Plaintiffs seek a decision from this Court that Defendants' actions violate the law. If this Court finds that the actions violate the law, this finding will apply to all individuals who are similarly impacted—in other words, it will apply to all Class

members. It would be inefficient to require everyone whose rights Defendants are violating to bring an individual case for equitable relief. A single class action seeking equitable relief with respect to all individuals similarly situated is more efficient and cost-effective.

Litigating this matter as a class action is the only economical solution when the value of individual claims would be outweighed by the cost of litigation. Individual claims are insufficient in amount to justify separate actions. Plaintiffs seek monetary damages; however, many or all Class members will find monetary damages too small to justify the cost of individual litigation.

Further, putative Class members do not have a significant interest in controlling the prosecution or defense of separate actions. The legal violations are clear, and a finding by this Court that the Agency's actions are unlawful as to Plaintiffs is a finding that the Agency's actions are unlawful as to all Class members. Whether the Agency committed the violation (and the incidental economic impact to each Class member) can be determined by a handful of computer-generated reports and a uniform calculation.

IV. CONCLUSION

The requirements of Rule 23(a) and 23(b) are clearly satisfied for the putative class. This Court's intervention is necessary to uphold the rights of the class members and to address the systemic failures that have led to these violations. Moreover, the

superiority of class action litigation is evident, given the impracticality of managing thousands of individual claims and the risk of inconsistent rulings that could arise from separate actions.

This matter primarily seeks injunctive relief to resolve and remedy a fundamental due process violation. That relief serves the interests of all affected claimants efficiently and effectively and is capable of resolution on a class basis that will resolve the legal issue as it applies to all class members and future UI Claimants. Moreover, the incidental economic loss associated with the delayed payments is also capable of resolution on a class wide basis – even if application of a uniform formula results in different results for different people. Therefore, maintaining this action as a class will ensure a fair and uniform resolution to the issues at hand. The class should be certified in the interest of justice, and judicial efficiency.

Respectfully submitted,
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Dated: November 4, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 4, 2024, she electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notifications of such filings to all participating attorneys.

Leslie M. Wenzel, Law Office Assistant

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
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