UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL KREPS, et al.,

Plaintiffs,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY, et al.,

Defendants.

No. 2:22-cv-12020

HON. MARK A. GOLDSMITH

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether this Court should deny Plaintiffs' motion for class certification where Plaintiffs cannot satisfy the threshold questions because they have no protected right under the CARES Act, their class is ill-defined, named Plaintiffs are not members of their own class, and Plaintiffs fail to tie any action by each Defendant to their defined class and fail to mention Count III.

2. Whether this Court should deny class certification where Plaintiffs cannot meet their burden of proof to establish the Rule 23(a) requirements because: (a) Plaintiffs' conclusion on numerosity is speculative; (b) Plaintiffs cannot establish commonality because of dissimilarities within the proposed class and the need for individual analysis of each class member's claim impedes the generation of common answers to drive the resolution of the lawsuit; (c) Plaintiffs cannot establish typicality because of the need for individual assessment of each Plaintiff's claim and named Plaintiffs have no claim to the relief requested; (d) based on their failure to establish typicality, Plaintiffs cannot satisfy adequacy and Plaintiffs' counsel is not sufficiently qualified to represent the class.

3. Whether this Court should deny class certification where Plaintiffs cannot establish the requirements for injunctive relief under Rule 23(b)(2) or the predominance/superiority requirements under Rule 23(b)(3) because of the need to analyze the benefit claim file for the named Plaintiffs and any class member.

4. Whether this Court should deny certification of issue classes under Rule 23(c)(4) where Plaintiffs have not identified with particularity any proposed issue class and where the "discrete issues" that Plaintiffs might identify would require highly individualized inquiries into the facts and circumstances of each class member.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 23

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Young v. Nationwide Mut. Inc. Co., 963 F.2d 532 (6th Cir. 2012)

Sprague v. Gen. Motors Corp., 133 F.3d 388 (6th Cir. 1988)

INTRODUCTION

The purpose of class certification is for a court to manage similarly situated plaintiffs for efficiency and fairness. However, not every case is appropriate for class certification. This is one of those cases.

Here, Plaintiffs have failed to address the innumerable, highly individualized factual inquires that render their proposed class unascertainable and prevent Plaintiffs from establishing commonality, typicality, adequacy, or predominance and superiority. Plaintiffs may point to spreadsheets that offer hundreds of thousands of lines of data. However, individualized claim history cannot be reduced to a spreadsheet and requires a separate analysis. To determine whose benefits were suspended and for what reason, this Court would need to hold thousands of mini trials to determine whether an individual was in the class. This is not the purpose of class treatment.

Simply put, this Court should deny Plaintiffs' motion for class certification.

STATEMENT OF FACTS

A. The MES Act and its requirements.

Any right to unemployment benefits arises under the Michigan Employment Security (MES) Act. *Peplinski v Michigan Employment Sec Comm'n*, 359 Mich. 665, 668 (1960). The Legislature created a "specific procedure to be observed in the administration of the unemployment compensation act and for a limited judicial review, [which] is exclusive of any and all other possible methods of review." *Mooney v Unemployment Compensation Comm'n*, 366 Mich. 344, 355 (1953).

Initially, individuals seeking benefits have the burden of demonstrating eligibility for those benefits—that is, they have sufficient earnings to establish a claim. Mich. Comp. Laws § 421.32(b). To continue to receive benefits, the individual must report to the Agency pursuant to its rules to maintain eligibility for those benefits. Mich. Comp. Laws § 421.32(a); Mich. Comp. Laws § 421.28(a). The individual must also timely certify bi-weekly during their reporting week. Mich. Admin. Code R. 421.210(3). If a bi-weekly certification is late, the individual must demonstrate good cause for the lateness. Mich. Admin. Code R. 421.210(5)–(6). The answers that the claimant provides during their certification may affect their eligibility for benefits, in whole or in part.

In addition, there are several issues that can suspend a claimant's benefit. For example, a claimant will not be paid for any week in which they do not certify

for benefits, refuse suitable work or return to work, fail to report work search, if they are not able and available for work, or if the program under which claimant is collecting benefits ends. Mich. Admin. Code, R. 421.210(1) ("[a]n individual shall receive benefits for any week of unemployment for which the individual filed a claim and reported in accordance with this rule . . . and for which the individual is otherwise eligible and qualified for benefits."). A benefit payment is not due and payable unless the individual is eligible for those benefits.

The MES Act recognizes that new issues may arise, or new information may come to light, after the Agency's initial monetary determination on the claim. Thus, the Legislature gave the Agency several years to issue an administrative decision to recover improperly obtained benefits. Mich. Comp. Laws § 421.62(a). The Agency is statutorily obligated to take the action necessary to recover all benefits improperly obtained or paid under the MES Act. Mich. Comp. Laws § 421.62(d).

The Agency has the exclusive original jurisdiction to determine a claimant's right to receive benefits. Mich. Comp. Laws § 421.32(a). It must issue written decisions (called Determinations or (Re)determinations) regarding eligibility and qualification issues. Mich. Comp. Laws § 421.32(a)(1)–(2). If an interested party appeals a decision, the Agency will refer the matter to the Michigan Office of Administrative Hearings and Rules (MOAHR) for a hearing before an

Administrative Law Judge. *Id.*; Mich. Comp. Laws § 421.33(1). Following an ALJ decision, an interested party may appeal to the Unemployment Insurance Appeals Commission. Mich. Comp. Laws § 421.33(2); Mich. Comp. Laws § 421.34. After the Appeals Commission issues a decision, an interested party may pursue judicial appeals (from circuit court to the Michigan Supreme Court). Mich. Comp. Laws § 421.38(1), (4).

B. Pandemic Unemployment Assistance under the CARES Act.

The CARES Act was signed into law on March 27, 2020. Pub. L. 116–136, § 2102. It gave states the option of extending unemployment benefits (PUA) to individuals who ordinarily were ineligible to receive unemployment benefits under existing state law. *Id.* PUA payments include a state's weekly unemployment benefit amount and a supplemental federal benefit of $600.00. Pub. L. 116–136, § 2104(b)(1)(B). The CARES Act provided 39 weeks of unemployment benefits to eligible covered individuals. A "covered individual" under the CARES Act is defined as someone who is not eligible for regular unemployment benefits. § 2102 (a)(3)(A)(i). Pub. L. 116–136, § 2102(1)(3)(A)(i). Further, the CARES Act provides that a covered individual must self-certify that he was self-employed and seeking employment, did not have sufficient work history, or otherwise would not qualify for regular unemployment benefits and that he meets one of the eleven requirements of subclause (I). Pub. L. 116–136, § 2102(a)(3)(A)(ii)(II).

Shortly after the CARES Act was enacted, the Department of Labor (DOL) issued a series of program letters (called UIPLs) to provide states with operating instructions. (Ex. A UIPLs.) In the original UIPL, issued just nine days after the CARES Act was enacted, the DOL required states to process PUA claims as they would under state law unless otherwise provided in Section 2102 of the CARES Act. (Ex. A, 04/05/2020 UIPL 16-20, p. I-7.) These provisions included, but were not limited to, an appeals process. (*Id*. at pp. I-9, I-11, I-12.)

On May 11, the DOL issued a UIPL reminding states to maintain the integrity of their unemployment programs. (Ex. A, 05/11/2020 UIPL, No. 23-20, p. 1–2, 8.)

Change 2 to UIPL 16-20, directly addressed the inconsistency between self-attestation and the investigation of fraud. The DOL reminded states that they had the authority to request supporting documentation. (Ex. A, 07/21/2020 UIPL, Change 2, p. I-9.)

On August 31, the DOL issued another UIPL reminding states of their roles and responsibilities in addressing fraud. (Ex. A, 08/31/2020 UIPL, No. 28-20.) The DOL recommended that states intercept potentially fraudulent activity as early as possible to minimize impact on the unemployment system. (*Id*. at 3.) Further, the UIPL encouraged states to explore tools, methods, and strategies to deter and prevent fraud. (*Id*. at 5.)

Change 4 to UIPL 16-20, addressed continued assistance to unemployed workers under the Continued Assistance Act (CAA), following expiration of benefits under the CARES Act. The CAA was signed into law on December 20, 2020, and extended PUA program benefits until March 14, 2021. The DOL provided guidance concerning the new changes to the PUA program and again reminded states about program integrity. (Ex. A, 01/08/2021 UIPL, 16-29 Change 4, pp. 1–3.)

The problems implementing the CARES Act programs were bountiful and continue today. The Office of Inspector General (OIG) in a December 15, 2023, update, noted that the office remained committed to "meeting the challenges created by the COVID-19 pandemic and to assisting the Department of Labor (DOL or Department) and Congress in improving the efficiency and integrity of the Unemployment Insurance (UI) program." (See generally, Ex. B, OIG Report.) The OIG announced that from April 1, 2020, to March 31, 2021, "only 5 of the 53 SWAs [also known as state unemployment agencies] were able to timely pay benefits. . . ." (*Id.* at p. 3.) By August 2023, only 34% of SWAs were paying on time compared to 75% before the pandemic. (*Id.*)

The OIG determined that "the risk of improper payments including fraud was even higher under PUA because claimants could self-certify their eligibility for benefits." (*Id.*) That office remains concerned that unemployment agencies

have "unintentionally waived or will waive fraudulent payments." (*Id.)* It is estimated that at least $191 billion of the $888 billion of the total federal and state unemployment benefits could have been improperly paid to ineligible individuals. (*Id.* at pp. 3–4.)

The OIG found that from March 28, 2020, to September 30, 2020, "in 4 states, potentially fraudulent claims were paid more than 60 percent of the time." (*Id.* at p. 5.) And notes that its investigative matters are unprecedented, with 205,000 fraud investigative matters opened since April 1, 2020. (*Id.* at p. 6; see also Ex. B, OIG Investigations Newsletter, Volume 53, p. 2—Michigan fraudsters convicted in unemployment fraud scheme and improperly obtained over $4.8 million in benefits.)

C. Plaintiffs have proffered no qualified class representatives for their proposed class.

1. Paul Kreps.

In the second amended complaint, Kreps asserts that Defendants will not pay his benefits, placed a stop payment indicator on his account, and closed his claim. (Dkt. 36, PageID.1255, ¶¶ 49–51). In the class certification motion, Kreps asserts that he received payment for $18,000, but that he is owed $10,000 more in benefits and that he lost additional assistance because Defendants did not pay him in 2020. (Dkt. 111, PageID.3391–3392.)

In response, Defendants asserts that his monetary determination found him eligible for up to 26 weeks of unemployment benefits. (Ex. C, 8/5/2020 monetary determination.) The Agency paid him for 26 weeks of unemployment benefits. (Ex. P, Declaration.) The delay in payment was because the Agency asked him to verify his identity by August 19, 2020. (Ex. C, Request for Information, p. 1811 of 1815.) Kreps did not provide the documentation until October 2020. (Ex. C, Copy of Driver's License and Social Security Card – time stamped by Agency 10/14/20, p. 20 of 1815.)

The Agency issued an adverse decision on October 12, 2020. (Ex. C, 10/12/20 Notice of Determination, p. 1804 of 1815.) Even though Kreps received the decision and did not agree with it, he did not file a protest or otherwise follow the instructions provided. (Ex. C, Kreps deposition pp. 39–40, 42, 43.) The decision became final by operation of law. Mich. Comp. Law § 421.32a(1). However, the Agency, on its own motion, reconsidered and reversed its previous decision on April 13, 2021. (Ex. C, 04/13/21 Notice of Redetermination, p. 1800 of 1815.)

On March 4, 2022, the Agency sent Kreps a letter advising him that it could not issue payment to him because it did not have a valid payment method for him. (Ex. C, 03/04/22 Valid Payment Method Required, p. 26 of 1815.) Kreps was instructed to either update his payment method online or use the Agency's

automated phone system to do so. He admitted that his payment information (banking account) changed from when he filed his claim. (Ex. C, Kreps deposition pp. 51–52.) After being unable to update his payment method, Kreps called the Agency and was advised they could not take his information over the phone and instead, offered to send Kreps a debit card. He refused the card and never called the Agency again to seek payment. (Ex. C, Kreps deposition, p. 54.) Kreps' failure to accept the debit card is the sole reason he has not been paid until 2024.

2. Marisa Quigg.

Quigg asserts that Defendants improperly denied her benefits. (Dkt. 36, PageID.1266, ¶ 134; Dkt. 111, PageID.3393.) She filed her regular unemployment claim (C6921238-0) on April 5, 2020, and the Agency found her monetarily eligible three days later. (Ex D., 04/08/2020 monetary determination.) The Agency issued adverse decisions in May and July 2020. (Ex. D, Notice of Determination and (Re)determination, pp. 29 and 33 of 3696, respectively.) Quigg filed a late appeal to the July 2020 decision and the Michigan Office of Administrative Hearings and Rules (MOAHR) found that she did not have good cause for the late appeal. (Ex. D, ALJ Order, pp. 80–86 of 3696.) She took no further appeals, and the adverse decisions became legally final by operation of law.

Quigg filed her PUA claim (C8840686-0) on July 20, 2020, backdating her claim to February 2, 2020. (Ex. D, 07/20/2020 PUA monetary determination.)

She concedes that she received her first payment three days later. (Dkt. 111, PageID.3393.) The Agency suspended her payments due to its benefit payment review policy, which the Department of Labor recommended. (Ex. P, Declaration; Dkt. 118, PageID. 4541–4546.) The Agency issued an adverse decision on March 26, 2021, which the MOAHR ultimately found void on February 24, 2022. (Ex D, 03/01/2022 MOAHR decision.)

3. Andrew and Patricia Myrold.

In the second amended complaint, Andrew Myrold asserts that Defendants improperly denied him benefits. (Dkt. 36, PageID.1267, ¶ 140). In the class certification motion, he asserts that Defendants have not paid him benefits from May to August 2020. (Dkt. 111, Page.ID.3392.) Patricia Myrold claims that the Agency improperly denied her benefits in May, June, and July 2020. (Dkt. 36, PageID.1267, ¶¶ 142–143.) In the class certification motion, she asserts that Defendants improperly denied her benefits in August 2020. (Dkt. 111, PageID.3393.)

On May 13, 2020, the Agency found Andrew monetarily eligible for benefits. (Ex. E, A. Myrold p. 1.) But on July 30, 2021, and again on October 6, 2022, the Agency found him ineligible for benefits. (*Id.,* A. Myrold pp. 5–12.) Additionally, the Agency sought restitution for multiple weeks of improperly paid benefits. (*Id.*) Andrew appealed and MOAHR ruled in his favor, holding that he

was eligible for benefits beginning July 5, 2020, if he was otherwise eligible and qualified. (*Id.,* A. Myrold pp. 13–19.) Andrew appealed that favorable decision and asked MOAHR, the Appeals Commission, and the Jackson County Circuit Court to order the Agency to pay him additional benefits. (*Id.,* A. Myrold p. 20–35.) According to his circuit court brief, Andrew wanted benefits from April 18, 2020, to July 4, 2020. (*Id.,* A. Myrold p. 34.)

Initially, the circuit court ordered the Agency to pay Andrew benefits for that period. (*Id.,* A. Myrold pp. 36–44.) The Agency asked for reconsideration and the court ordered a hearing to allow the Agency to show why Andrew was ineligible for the benefits he was requesting. (*Id.*, A. Myrold pp. 45–47.) The parties briefed the issues before the court. (*Id.*, A. Myrold pp. 48–113.) In its motion for relief from the reconsideration order, the Agency outlined the reasons why Andrew was not eligible for any further payments. (*Id.*, A. Myrold pp. 59–62.)

Upon reconsideration, the circuit court affirmed the decision of the Appeals Commission and "revoked" its earlier ruling requiring the Agency to pay Andrew benefits from July 5, 2020, to January 19, 2023. (*Id.,* A. Myrold p. 117.) It is noteworthy that the court announced that the Agency demonstrated that Andrew was "not otherwise eligible to receive payment of benefits for the period in question." (*Id.*, A. Myrold p. 116.) Andrew did not seek any further appeals.

Patricia Myrold filed a regular claim on May 10, 2020, and the Agency found her eligible for benefits. (Ex. E, P. Myrold p. 1.) The Agency paid her 26 weeks, she waived payment for five weeks, and the Agency did not pay her for two weeks because her reported earnings offset her weekly benefit amount. (*Id.,* P. Myrold Declaration of UI Examiner James Burton, pp. 3–9.) There were multiple weeks where the Agency required Patricia to file an additional claim–weeks ending May 9, 2020, through August 1, 2020 (*Id.* at p. 5, 8–9), but she refused to do so.

4. Diana Boudrie.

Boudrie asserts that the Agency engaged in premature collection against her and failed to pay her benefits owed. (Dkt. 36, PageID.1256–1257, ¶¶ 61–69). Further, she claims that Defendants failed to pay her in 2020 for "unpaid weeks of May 2, May 15 through June 20, and all weeks to which she was entitled after September 2020. (Dkt. 111, PageID.3389.)

She filed a PUA claim on April 21, 2020, which was monetarily approved three days later. (Ex. F, 04/23/2020 monetary determination.) Boudrie certified for, and received payments, for weeks ending April 11, 2020, through August 22, 2020. No payment was issued for weeks ending August 29, 2020, through September 19, 2020, because Boudrie refused her employer's offer to return to work. (Ex. F, certifications and deposition pp. 20, 23.) On November 6, 2020, the Agency found her monetarily ineligible for PUA benefits (*Id.,* 11/06/20 PUA

Monetary Determination) and Boudrie timely appealed. (*Id.*, 11/06/20 Protest or Appeal of a (Re)determination.) While the Agency engaged in a few instances of improper collection activity, it did not collect any money from her. (*Id.*, collection letters.)

Regarding non-payments, Boudrie failed to certify for weeks ending May 2, May 16, May 23, May 30, June 6, June 13, September 26, October 3, October 10, and October 17. (Ex P, Declaration.) She waived payment for weeks ending September 12 and September 19. (*Id.*)

5. Richard Brainer.

Brainer contends that the Agency prematurely collected $532 from him while his appeal was pending. (Dkt. 36, PageID.1265, ¶ 122.) In the class certification motion, he asserts that Defendants suspended his payments from July 2020 to September 2020 and again from December 2020 through April 2021 and that Defendants have not paid him for "all eligible weeks after his claim was stopped." (Dkt. 111, PageID. 3389–3390.)

The Agency issued an adverse decision and Brainer appealed. (Ex. G, Protest/Appeal.) While that appeal was pending, the Agency collected $532 from him but subsequently reimbursed him for the intercepted funds. (*Id.,* Agency check to Brainer.) Other than the seizure of the $532, he does not allege any other injuries or damages. (Dkt. 36, PageID.1264–1265, ¶¶ 115–123.)

Defendants respond that from July to September 2020, it paid his regular weekly benefit amount, but delayed the LWA portion of his payment due to implementation issues. (Ex. P, Declaration.) His December 2020 through April 2021 payments were delayed because Brainer did not certify to receive payments for those weeks until April 3, 2021. (*Id*.) Brainer last certified on April 24, 2021 and last logged into his MiWAM account on July 17, 2021. (*Id*.) After he missed four consecutive weeks of available certification, no further certifications were generated. (*Id*.)

6. Christine Holifield.

Holifield alleges that after the Agency approved her unemployment claim it stopped paying her in June 2020. (Dkt. 36, PageID.1263, ¶¶ 107–108.)

On October 16, 2020, the Agency issued an adverse decision finding Holifield ineligible for benefits (because she was not available for full-time work due to her disability) beginning March 22, 2020, going forward. (Ex. H, 10/16/20 Notice of Determination.) She appealed the decision and MOAHR affirmed. (*Id.*, 12/08/20 ALJ Order.) In a subsequent appeal, the Appeals Commission found in her favor after a retroactive change in Michigan law. (*Id.*, Decision of the UIAC.) Holifield admits she has been paid all benefits owed to her. (*Id.,* deposition pp. 22–23, 36.)

Holifield also asserts she lost additional financial payments due to the original non-payment of benefits. However, once the Agency issued the adverse decisions in July and October 2020, it did not have to issue any further payments until the decisions were reversed. Mich. Comp. Laws § 421.27(a)(1). And the Agency's adverse decision was not overturned until the law was amended on February 28, 2022, allowing for availability of part-time work.

7. Isabella Foster (formerly I.F. a minor at time complaint was filed)

Foster alleges that after the Agency approved her unemployment claim it stopped paying her in January of 2021. (Dkt. 36, PageID.1263, ¶¶ 98–99.)

The Agency found Foster eligible for PUA benefits, effective March 8, 2020 for 39 weeks of benefits. (Ex. I, 04/23/2020 monetary determination.) The 39 weeks expired on week ending December 12, 2020. (Ex. P, Declaration.) Foster (a high school student) was not available for full-time work as required by state law and was deemed ineligible for PUA benefits in April 2021. (Ex. I, 05/07/2021 MOAHR decision.) She appealed that determination and MOAHR affirmed the Agency's ineligibility determination. (*Id.*) Upon further appeal and a change in Michigan law, the Appeals Commission reversed the Agency's adverse decision. (*Id.*, 07/29/2022 Decision of the UIAC.)

8. Robin Shipe

Shipe claims that after the Agency approved her PUA unemployment claim it placed her file under Benefit Payment Review (BPR). (Dkt. 36, PageID.1260, ¶ 85.) She also claims that she has never been paid benefits. (*Id. at* ¶ 94.) Shipe appealed the Agency's ineligibility redetermination and was found eligible for benefits. (Ex. J, 11/28/2022 ALJ Order.)

ARGUMENT

I. Plaintiffs fail to satisfy threshold questions and do not meet the elements under Rule 23(a) and (b) and therefore, their motion for class certification should be denied.

A. Class action legal standard.

Class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) quoting *Califano v. Yamasaki,* 442 U.S. 682, 700–701 (1979). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* To be certified, a class must satisfy all four of the Rule 23(a) prerequisites–numerosity, commonality, typicality, and adequate representation–and fall within one of the three types of class actions listed in Rule 23(b). *Young v. Nationwide Mut. Ins. Co.,* 693 F.2d 532 (6th Cir. 2012), citing *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 397 (6th Cir. 1998.) The party seeking class certification has the burden of proving

the Rule 23 certification requirements. *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1079 (6th Cir. 1996).

A court "may not certify any class without 'rigorous analysis' of the requirements of Rule 23." *Sprague,*133 F.3d at 397. That means, the court must ensure that Rule 23 requirements are *actually* met, not simply presumed from the pleadings. Under *General Telephone Co. v. Falcon,* a court can use underlying facts to make this determination. 457 U.S. 147, 160 (1982). A class action analysis "will entail some overlap with the meris of the plaintiff[s'] underlying claim." *In re American Medical Sys., Inc.,*75 F.3d at 1078.

B. Plaintiffs fail to meet required prerequisites for class certification.

Before the court undertakes an analysis of the Rule 23(a) and (b) requirements, Plaintiffs must show that they have a protected right under the PUA program of the CARES Act, that the class definition is sufficiently defined to allow this Court to determine who belongs in the class, show that Plaintiffs are members of their own class, and tie the acts of the Defendants to the alleged harm of the named Plaintiffs. Plaintiffs fail to establish any of these prerequisites.

1. Plaintiffs have no protected right under the CARES Act.

As presented in Defendants' Motion for Summary Judgment, Plaintiffs Shipe, Boudrie, Foster, Brainer, and Holifield do not have a protectable property

right in PUA benefits under the CARES Act. (Dkt. 110, PageID.3336—3338.) Thus, any claim for a due process violation concerning PUA benefits is not viable.

To maintain a claim for a violation of the Due Process Clause of the Fourteenth Amendment plaintiffs must have a legitimate claim of entitlement to an interest protected by the Fourteenth Amendment. *Board of Regents of State College v. Roth*, 408 U.S. 564, 575–578 (1972). Multiple courts have found that PUA benefits are not "property," and a claimant cannot bring a claim for a due process violation.

Specifically, these courts relied on a holding by the United States Supreme Court that provides "[w]hen a statute has not created a private right, it is not the proper function of federal courts to infer the existence of such a right." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media,* 589 U.S. 327, 334 (2020); see also *Graham v Payne*, 3:21-cv-888, 2022 WL 815138 (at *2)(N.D. Ind.), March 17, 2022; *Moss v Lee*, 3:21-cv-00561, 2022 WL 68388 (at *5)(M.D. Tenn.), January 6, 2022 (state's ability to terminate federal supplemental benefits places "the benefit outside the scope of a property interest"); *McClendon v Bernard*, 4:21-cv-00823-KGB, 2021 WL 5567369 (at *2) (E.D. Ark.), November 29, 2021; *Winter v New Mexico Dep't of Workforce Solutions*, 21-475 JFR/SCY, 2023 WL 184115 (at *3–5)(D. N.M.), January 13, 2023 (no property interest under CARES Act because of significant discretionary authority over continuation of those

benefits, regardless of how or when that discretion is exercised); *Jackson v Daniel*, 1:21-cv-1107-LY-SH, 2022 WL 1157656 (at *4–5)(W.D. Tex.), April 18, 2022; and *Sterling v Feek*, 3:22-cv-05250, 2023 WL 5718163 (at *4–6)(W.D. Wash.), September 5, 2023 (PEUC benefits are not property). (Ex. K, all unpublished court decisions.)

As such, this Court should hold that the above-mentioned Plaintiffs do not have a protected interest in PUA benefits and should deny class certification for any alleged violation of due process in a PUA claim.

2. Plaintiffs' class definition is ill-defined, and named Plaintiffs are not members of their own class.

Prior to analyzing the requirements under Fed. R. Civ. P. 23, this Court must determine whether a precisely defined class exists and whether the named plaintiffs are members of the proposed class. *Young,* 693 F.3d 532. The class 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." *Id. at* 537—538. In *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.,* the Sixth Circuit denied class certification in a junk-fax case, where individualized fact findings were necessary to determine who received the faxes and thus, who was a class member. 863 F.3d 460, 470–473 (6th Cir. 2017).

As a preliminary matter, Plaintiffs support allegations regarding their unemployment claims with screenshots or documents from their benefit files. (Dkt. 111, Ex. 3–11, PageID.3436–3509.) It should be noted that Plaintiffs did not take one 30(b)(6) deposition from any Agency claims examiners to ascertain any facts regarding the individual Plaintiffs' file outside of documentation. In fact, Plaintiffs attempted to question Plaintiff Brainer about documents related to his unemployment file, but Brainer was unable to answer the questions. (Ex. G, Brainer deposition, pp. 32–36.) As such, this Court should give little weight to Plaintiffs' speculations regarding the facts concerning the handling of their unemployment claims because they have very little relevant and subject matter expertise testimony upon which to rely.

Here, Plaintiffs contend their class consists of claimants whose benefits were suspended for 21 days or more after eligibility and who did not receive an Agency Determination or (Re)determination providing the reason for the benefit suspension. (Dkt. 111, PageID.3388.) But the proposed class is not ascertainable for several reasons.

There is no requirement that the Agency pay benefits within 21 days. And Plaintiffs cite no authority to support this contention. Instead, unemployment benefits are payable "when due." 42 U.S.C. § 503(a)(1). The United States Supreme Court defined "when due" to mean "at the earliest stage of

unemployment that such payments are administratively feasible after giving both the worker and the employer an opportunity to be heard." *Cal. Dep't of Human Res. Dev. v. Java,* 402 U.S. 121, 131 (1971); see also Ex. A, 04/05/2020 UIPL 16-20 p. I-11 ([f]ull payment of PUA when due must be made as soon as administratively feasible).) There are several reasons why a benefit payment is not due.

In the affidavit of Kristine Jo Kratz (Ex. L), she offers a number of reasons why a weekly benefit is not paid, which includes identification verification issues, claimant's failure to certify for the weekly benefit, the program under which claimant is paid (such as the CARES Act) stops, the claimant had earnings that exceeded their weekly benefit amount, and there is no new program in place to continue the benefits. (Ex. L, Kratz affidavit ¶¶ 5–7.) For example, if a claimant does not certify for benefits for week 1 but certifies for week 2, they will not be paid for week 1. If a claimant has earnings that are greater than their weekly benefit amount, they are not entitled to unemployment benefits for those affected weeks. In these situations, the Agency does not issue payment and then investigate. Instead, claimant is not paid for the affected weeks and then the Agency issues a request for information to claimant, adjudicates the issue, and issues a Determination or (Re)determination that is appealable. This is authorized under 20 C.F.R. Part 604.

Plaintiffs contend that "[c]lass members received no notice inadequate notice or untimely notice of the reason(s) why their payment were withheld." (Dkt. 111, PageID.3409.) To determine whether payments were "withheld," whether notice was provided, and whether the notice was sufficient, and "timely," the Court must review the benefits files for all potential class members. (Ex. L, Kratz Affidavit, ¶ 9; Ex. M, Sparks deposition, pp. 23, 26, 104, 108, 109–112.)

More importantly, each of the named Plaintiffs received either a Determination or (Re)determination that apprised them of the reason for suspension of any benefits:

- **Kreps** – Ex. C, 10/12/2020 Notice of Determination (failed to establish identity); 03/04/2022 Valid Payment Method Required (refused to accept debit card).
- **Quigg** – Ex. D, 7/20/2020 Notice of Redetermination (disqualified because she quit in lieu of termination).
- **Myrold, Andrew** – Ex. E, 7/30/2021 Notice of Determination(s) (not available for full-time work, failure to seek work, and inability to work), pp. A. Myrold 5, 94—100).
- **Myrold, Patricia** – Ex. E, Declaration of James Burton (refusal to file a new claim).
- **Boudrie** – Ex. F, 11/06/2020 Protest or Appeal of a (Re)determination.
- **Brainer** – Ex. G, 12/02/2021 Notice of Determination (failure to show job attachment).
- **Holifield** – Ex. H, 10/16/2020 Notice of Determination (not available for full-time work).
- **Foster** – Ex I, 05/07/2021 ALJ order (affirming 4/20/2021 (Re)determination of ineligibility).
- **Shipe** – Ex. J, 11/28/2020 ALJ order (reversing Agency Monetary (Re)determination and finding eligibility).

And all Plaintiffs but Paul Kreps and Patricia Myrold appealed their adverse decisions.

In short, there is no administratively feasible way to determine who is a class member and none of these Plaintiffs fit into the defined class.

a. Plaintiffs fail to tie any action by each Defendant to this defined class and fail to mention Count III.

Plaintiffs must also specify what action each individual Defendant took that caused the harm to the purported class. This Court has previously found that plaintiffs who bring putative class claims can abandon or waive some of those claims by failing to address them in their class certification request. *Durant v. Servicemaster Co.,* 208 F.R.D. 228, 234 (E.D. Mich. 2002), *overruled on other grounds,* 109 F. App'x 27 (6th Cir. 2004). Likewise, other courts have held that the failure to address the issue at class certification makes it abandoned. *In re Aquila ERISA Litigation,* 237 F.R.D. 202, 213 (W.D. Mo. 2006); *Polo v. Goodings Supermarkets, Inc.,* 232 F.R.D. 399, 402 (M.D. Fla. 2004). These cases are consistent with fundamental principles that "issues . . . unaccompanied by some effort at developed argumentation, are deemed waived." *McPherson v. Kelsey,* 125 F.3d 989 (6th Cir. 1997.)

The class definition fails to assert any specific action the Defendants took to cause harm to Plaintiffs. Plaintiffs offer nothing more than a general statement that

"Defendants operate a flagging system that causes benefit payments on continuing claims to be held indefinitely without any determination or notice and opportunity to respond." (Dkt. 111, PageID.3387.) But nowhere do they demonstrate how this "flagging system" affected the claims of any of the named Plaintiffs and which Defendant(s) was involved in the action taken to harm that Plaintiff. Especially because decisions were issued to the named Plaintiffs and they either exercised their right to a hearing or chose not to do so. Failure to tether class certification issues to the Defendants is fatal under *Durant.*

Plaintiffs also do not mention Count III in their class certification request. This is fatal for this claim. In *Durant* plaintiffs raised breach of contract and unjust enrichment in their complaint. *Durant,* 208 F.R.D. at 229. But, at the time of seeking class certification, they did not address whether the unjust enrichment claim satisfied Rule 23(b) in their motion or brief for class certification. *Id.* at 234. The court held that the issue was abandoned. *Id.* Here, Plaintiffs' failure to address Count III should meet the same fate. Defendants ask this Court to deem this count abandoned.

C. Plaintiffs fail to establish the factors necessary for class certification under Rule 23(a).

1. Plaintiffs fail to establish numerosity.

Plaintiffs must show that the class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). While a plaintiff need not prove the exact number of the class members, they must positively demonstrate that joinder of all members is impracticable; the conclusion "cannot be speculative." *Golden v. City of Columbus,* 404 F.3d 950, 965–966 (6th Cir. 2005) (quoting *Gen. Tel, Co. of the Northwest, Inc. v. EEOC,* 446 U.S. 318, 330 (1980)). Each member of the class must have suffered an actual injury, because the purpose of class action is not to provide blanket remedy for those who *might* have been injured but were not. *See e.g., Sprague,*133 F.2d at 397.

Here, Plaintiffs merely announce that the proposed class includes "hundreds of thousands of claimants that the Agency has placed on indefinite hold." (Dkt. 111, PageID.3401.) But they offer nothing to support this assertion, including what constitutes an "indefinite hold." (See *Golden,* 404 F.3d 966 (merely referring to the number of renters in Columbus was insufficient to prove numerosity.) Plaintiffs' purported expert, who reviewed several spreadsheets provided by the Agency, admits that she "cannot separate the claimants who are still subject to indefinite holds [not paid] from the claimants who were reviewed and had their claims properly refused." (Ex. N, declaration of Kristen Nelson Escher, ¶ 7.) Also

admittedly, Escher requires additional information such as when flags were applied holding payment and then lifted, and the status of the claim to be able to provide more specific opinions. (*Id.*) While this information is contained in the benefit files for the named Plaintiffs, Escher never reviewed those files.

Plaintiffs attach a summary list of payments from the benefit files for some of the named Plaintiffs that list things like "stop payment indicator," "stop all," "stop refund," "additional claim required," "ineligible week," and "pending payment" and more. (Dkt. 111, PageID.3474, 3476–3477, 3481, 3484–3485, 3487, 3489, 3497, and 3508.) But what those indicators mean in conjunction with the history of the claim is unknown and does not mean that the suspension of payment was unlawful or that notice was not provided. Plaintiffs do not have testimony from Agency staff experienced in reading information in a benefit file. As we can see from Defendants exhibits, the named Plaintiffs were provided with notice. (See Ex. C–J.)

This Court should hold that Plaintiffs offer mere speculation and do not establish numerosity. Should Plaintiffs rely on spreadsheets to establish their class, courts have held such reliance is insufficient. *Bond v. Antero Res. Corp.,* 328 F.R.D. 187, 194 (S.D. Ohio 2018) (use of a spreadsheet and conclusory statements were not evidence and extrapolation of class size based on generalized testimony "would be overly speculative"); *Edwards v. McCormick,* 196 F.R.D. 487, 494

(S.D. Ohio 2000) ("mere supposition . . . is not enough to satisfy Rule 23(a)'s numerosity requirement.").

2. There is no commonality between the class representatives and the proposed class.

Rule 23 requires that issues of fact and law common to the class predominate over those issues subject to individualized proof. Fed. R. Civ. P. 23(a)(2). This "common contention . . . 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 of the validity of each one of the claims in one stroke." *Wal-Mart Stores,* 564 U.S. at 350.

In *Wal-Mart,* the class involved Walmart employees asserting a Title VII claim. While all claims were alleged to involve Title VII, the Court noted it would have to examine all class members' claims to determine why certain employment action was taken. *Id.* at 351–352. There was no common answer determinative of all class members' claims. *Id.* at 352.

To succeed on a due process claim, a plaintiff must establish that they have a protected property interest under the Due Process Clause, that they were deprived of that interest, and the state did not provide them with adequate pre-deprivation procedural rights. *Cahoo v. SAS Analytics Inc.,* 912 F.3d 887, 900 (6th Cir. 2019) (citing *Hahn v. Star Bank,* 190 F.3d 708, 716 (6th Cir. 1999)). Due process is

flexible and "calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976).[1] It requires notice reasonably calculated to apprise interested party of pendency of action before their property is taken. *Yang v. City of Wyoming, MI,* 793 F.3d 599, 602 (6th Cir. 2015).

Here, Plaintiffs identify no question that can be answered in one stroke for all class members. They contend the class members share a common injury—the alleged violation of due process rights by terminating benefits without a proper investigation and determination. (Dkt. 111, PageID.3402.) But no common evidence can show who received an investigation and if that investigation was proper. In fact, Plaintiffs own exhibits show that an investigation was undertaken. For example, Dkt. 111, PageID.3475 reveals that Kreps' claim is "Staged – Pending Fact Finding." Likewise, Dkt. 111, PageID.3480 lists a "Fraud Investigation" on the staging screen. Additionally, no common evidence can show who received notice of the suspension of benefits. No common evidence will show who appealed any adverse decision. And to Plaintiffs' contention that claimants either received "no notice, inadequate notice or untimely notice of the reason(s) why their payments were withheld" (Dkt. 111, PageID.3409), no common evidence will provide this information for a group of class members. All

[1] Defendants do not agree that Plaintiffs have a protected property interest as argued *infra;* this argument is presented in the event this Court finds that a property right exists.

the Court needs to do is look at the Determinations, (Re)determinations, Protest or Appeal notice, and ALJ and Circuit Court orders in Ex. C–J) for the named Plaintiffs and it can see that each class member will require answers to individual questions. Plaintiffs thus identify no common question as defined in *Wal-Mart.*

Finally, there is no commonality amongst the Plaintiffs. Kreps did not get paid on his regular claim because he did not timely respond to a request to verify his identity, he did not protest an adverse decision, and he did not contact the Agency to update his payment method. Boudrie quit certifying on her PUA claim because she did not want to return to work because she did not want to expose her husband to COVID-19. Holifield did not get paid on her PUA claim until the Michigan Legislature changed the MES Act to allow her to be eligible for payments. Quigg did not get paid on her regular claim because she failed to timely protest an adverse decision. None of these factual distinctions could be deduced from a spreadsheet; rather, the facts had to be discovered by reviewing each individual's unemployment benefit file. There is no commonality between the Plaintiffs, and thus, no commonality amongst the proposed putative class.

3. Plaintiffs fail to establish typicality or adequacy.

Plaintiffs must establish that their claims are typical of those of the class members. Fed. R. Civ. P. 23(a)(3). See also, *Sprague,* 133 F.3d at 399. While there is a close relationship between commonality and typicality, a court's

typicality inquiry asks, "whether despite the presence of common questions, each class member's claim involves so many *distinct* factual or legal questions as to make class certification inappropriate." *Id.* (emphasis in original).

Relatedly, the class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This means that the representative must have interests common with the unnamed class members and that representatives will "vigorously prosecute the interests of the class through qualified counsel." *In re Am. Med. Sys.,* 75 F.3d at 1083.

a. Plaintiffs cannot establish typicality or adequacy because their circumstances and those of the class members vary widely.

Typicality and adequacy are missing where named plaintiffs have not been injured in same manner as the absent class members. *Lossia v. Flagstar Bancorp, Inc.,* 895 F.3d 423, 431 (6th Cir. 2018) (where plaintiffs' overcharges were reversed, they were not valid representatives of the class of individuals who charges had not been reversed).

Here, the widely varying circumstances in the history of a claim and what due process is required at what stage negates both typicality and adequacy. Named Plaintiffs Quigg, A. Myrold, Boudrie, Brainer, Holifield, Foster, and Shipe received Determinations or (Re)determinations that provided them with protest and appeal rights. And they all appealed. Turning to Kreps and P. Myrold, Kreps has

refused the debit card that contain his benefits and P. Myrold chose not to file an additional claim when her CARES Act benefits expired.

To have a claim typical of the class, the named Plaintiffs must show they suffered a due process violation as that is the class they contend to represent. But the documents that Defendants attach for each named Plaintiff refute any claimed due process violation.

And again, there are too many distinct factual or legal questions to make class certification appropriate. The proposed class members could have filed and been approved for regular unemployment or PUA unemployment. Or they could have had their initial claim for regular unemployment denied and then filed a subsequent claim for PUA benefits. And depending on when the claimant filed the PUA claim, or when the claimant certified for PUA benefits, different statutory provisions applied to the claim (e.g., claims filed before the end of 2020 could be based on self-certification while claims filed after the start of 2020 required documentary proof of labor market attachment). And, as Kratz indicated, a claim may not be paid for a variety of factual reasons. (Ex. L, ¶¶ 6–7.)

As such, the claims of named Plaintiffs are not typical of the claims of the potential class members and thus, they are not adequate representatives.

b. Plaintiffs' counsel cannot provide adequate representation of the class.

Since class members must act through class counsel, courts analyze the qualifications of class counsel to ensure competency to adequately protect the interests of the class. See, *International Union, United Auto., Aerospace, and Agr. Implement Workers of America v. Gen. Motors Corp.,* 497 F.3d 615, 626 (6th Cir. 2007) (citing *Gen. Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 157 n. 13 (1982)).

Defendants do not believe Plaintiffs' counsel is sufficiently qualified or has the resources to adequately represent the interests of the class members for several reasons:

- Admittedly, Mr. Blanchard filed this lawsuit with the hope of a "quick settlement."
- Mr. Blanchard is a one-man law firm. he complains that he is overwhelmed with the discovery in this case, although it is discovery that he requested. (Dkt. 104, PageID.3116–3117.)
- Review of federal court records review that Mr. Blanchard has only filed two motion to certify a class, one was denied and the other was dismissed. (Ex. Q, Westlaw information.)
- Mr. Blanchard waited until the last minute to retain two of his three expert witnesses: approached Ms. Edwards on July 5and Ms. Fuliemi in the beginning of July when the deadline for expert witness disclosures and reports was July 15, 2024. (Dkt. 114, PageID.3841.)
- The majority of Mr. Blanchard's class certification experience involves conditional certifications pursuant to 29 U.S.C. § 216(b) and the Fair Labor Standards Act, not general labor or unemployment cases. (Review of cases listed from motion for class certification.)
- Currently, Mr. Blanchard has 17 open cases in state and federal court, including another class action matter (class action by stipulation)

pending in the Michigan Court of Claims. (Ex. Q, Westlaw information).

II. This case is not suited for relief under Rule 23(b)(2) because of the varying issues to be determined for each Plaintiff and Plaintiffs also fail to meet predominance and superiority under Rule 23(b)(3).

In addition to the prerequisites under Rule 23(a), the putative class action must also fall into one of the types of cases detailed in Rule 23(b). Plaintiffs argue they meet the requirements of (b)(2) and (b)(3). But their arguments fail on both grounds.

A. A Rule 23(b)(2) class fails because it requires individualized inquiries, and any injunctive relief would not respect the class as a whole.

Rule 23(b)(2) provides class treatment where the opposing party "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." *Wal-Mart,* 564 U.S. 338 at 360. The *Wal-Mart* Court announced that "Rule 23(b)(2) applies only when a single injunction . . . would provide relief to each member of the class." *Id.* at 359. A class under 23(b)(2) is referred to as a "mandatory class." *Romberio v. UnumProvident Corp.,* 385 Fed.Appx. 423, 432 (6th Cir. 2009). "The defining characteristic in a mandatory class is 'the homogeneity of the interest of the members of the class.'" *Id.* at 432—433. Where individualized determinations are needed, "the homogeneity needed to protect the interest of absent class members is

lacking." *Id.* That is, where the case depends on "adjudication of facts particular to any subset of the class" or "require a remedy that differentiates materially among class members" a Rule 23(b)(2) class is inappropriate. *Id.* at 433.

In support of their ask for injunctive relief, Plaintiffs allege "Defendants acted on grounds that generally apply to all class members" by failing to issue timely decisions, "implemented a web of algorithms" to stop benefit payments, and class members did not receive notice of why their payments were suspended, or the notice they received was inadequate or untimely. (Dkt. 111, PageID.3409.) Plaintiffs' objective with the injunction is to "lift the indefinite holds on weekly benefits stretching back four years." (*Id.* at PageID.3410.)

But an individual inquiry is required to determine if: 1) benefits were placed on an "indefinite hold," 2) a notice explaining the reason that benefits were stopped was issued by the Agency, 3) that notice was inadequate or untimely; and 4) the individual is properly owed any benefits. Defendants exhibits for the named Plaintiffs show the need for this inquiry.

For example, while Plaintiffs all claim they are owed benefits that have remained unpaid (Dkt. 111, PageID.3389–3394), Kreps refused a debit card from the Agency that contains his benefits for over two years (Ex. C, Kreps transcript pp. 50, 55—56), A. Myrold exercised several levels of appeal and has been found ineligible for any further benefits (Ex. E. A. Myrold pp. 114–117), P. Myrold

refused to file an additional claim for benefits (Ex. E. P. Myrold pp. 3–5), and Holifield admits she is not owed any benefits. (Ex. H, p. 24.) Thus, injunctive relief is not appropriate.

B. Questions of law and fact for the class do not predominate and are not superior over individual claims and Plaintiffs fail the requirements of Rule 23(b)(3).

To meet the predominance requirement, a plaintiff "must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Young,* 693 F.3d at 544. That is, plaintiffs must show that "common questions will *predominate* over individual ones." *Id.* (emphasis in original). The test here is more demanding than when reviewing commonality; the predominance test begins with "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. 804, 809 (2011).

The superiority requirement looks at "the difficulties likely to be encountered in the management of a class action." *Young,* 693 F.2d at 545. Where many individual inquiries are necessary, "class action cannot be a superior form of adjudication." *Pipefitters Local 636 Inc. Fund v. Blue Cross Blue Shield of Mich.,* 654 F.3d 618, 631 (6th Cir. 2011).

1. Plaintiffs cannot meet the predominance test.

Individualized questions and circumstances permeate this action. Each Plaintiff is subject to critical defenses such as receipt of a Determination or (Re)determination from the Agency, which controls the outcome of this case. To determine whether an individual qualifies as a class member, this Court must, at a minimum, answer the following questions:

- Was a benefit payment stopped, and if so why and for how long;
- Did the Agency provide fact-finding to support the cessation of payment and did claimant respond to that fact-finding;
- Did the Agency issue a Determination or (Re)determination with protest and appeal rights; and
- Did the claimant protest or appeal and if so, what was the result?

Plaintiffs only attach a few benefit file documents for each claimant while Defendants attach documents that reveal notice and appeal rights were provided to the named Plaintiffs, and in some instances, Defendants provide proof of an appeal by those Plaintiffs.

Plaintiffs also allege they are entitled to the lost time value of their money, a tax exemption of up to $10,200 for unemployment received in 2020, and benefits from the Lost Wages Assistance Program (an additional $300 per week for six weeks in August and September 2020). (*Id.* at PageID.3395–3395.) Eligibility for these programs is dependent on when the claim was filed, whether claimant was

eligible for and receiving PUA or regular unemployment benefits and eligible for the additional monies or exemption, and whether the benefit program was still active. For example, the LWA Program lasted from July 25, 2020 to December 27, 2020 and was the time during which FEMA provided the grant awards for benefit payments.[2] If an applicant was initially found to be ineligible for LWA benefits but was later determined to be eligible due to an appeal they may receive LWA benefits if the appeal was "decided in the applicants' favor during the Period of Performance" and "if funding [was] available within the total obligation awarded for benefits by FEMA during the Period of Assistance."[3] To determine eligibility for LWA benefits, the Court must look at the benefit file to answer these inquiries.

[2]https://www.fema.gov/disaster/historic/coronavirus/governments/supplemental-payments-lost wages#:~:text=Lost%20wages%20assistance%20increased%20the,as%20they%20look%20for%20work (Last accessed November 26, 2024.); See also FEMA Supplemental Lost Wages Payments under Other Needs Assistance, https://www.fema. gov/sites /default/files/documents/fema_supplemental-lost-wages-payments-under-other-needs-assistance_022022.pdf. (Last accessed November 26, 2024.); See also https://www.fema.gov/press-release/20210318/fema-announces-lost-wages-grant-michigan. (Last accessed November 26, 2024.)

[3] FEMA Supplemental Lost Wages Payments under Other Needs Assistance, https://www.fema. gov/sites /default/files/documents/fema_supplemental-lost-wages-payments-under-other-needs-assistance_022022.pdf. (Last accessed November 26, 2024.)

The Court cannot determine if due process rights were violated without examining the benefit files of each potential class member. Because of the many necessary individualized inquiries, predominance is plainly lacking.

2. The necessity of individual inquires also defeats superiority.

Plaintiffs must also demonstrate that a class action is a superior method of adjudication. Fed. R. Civ. P. 23(b)(3). Plaintiffs fail on this element.

As mentioned throughout this brief, individualized inquiries into the benefit files for each potential class member is necessary. Even Plaintiffs' own assertion shows that an individualized inquiry is required–they claim class members received "no notice, inadequate notice or untimely notice of the reason(s) why their payments were withheld." (Dkt. 111, PageID.3409.) The only way to determine if a notice was provided, or if such notice was inadequate or untimely, is by looking at the benefit file and likely requesting testimony from the individual.

Plaintiffs seem to believe that the Agency can generate a "report(s)" that would provide the necessary information and allow them to forego review the file. (Dkt. 111, PageID.3414.) This is assertion is simply unsupported.

Plaintiffs requested that the Agency generate a list of claimants through the MiDAS system that had benefits suspended, date of suspension, date claim was reviewed, and date benefits allowed to proceed. (Ex. O, Plaintiffs Interrog. 4.) The Agency's response to that interrogatory only identified 5 of the 9 Plaintiffs

(Shipe, the Myrolds, Brainer, and Holifield). Subsequently, Plaintiffs ask for additional information to be added to the spreadsheet that resulted from Interrogatory 4–"identify the date a request for information . . . was generated regarding the issue that caused the suspension." (Ex. O, Plaintiffs Interrog. 26 and 27.) In its response, the Agency stated that "the history of one week of unemployment for a claimant is complex and cannot be detailed in an Excel spreadsheet or SQL." (*Id.*, see Defendants' answer to interrogatory.) The Agency reports there is "no direct correlation to the 'request for information' columns that were added, and the population pulled for Interrogatory #4." (*Id.*) The Agency concludes that a review of the week, claim, and associated history in MiDAS for each specific claimant is required. (*Id.*) (See also, Ex. L, ¶ 9 and Ex. M.)

Because of the need for individualized inquiries by this Court, a class is not the superior form of adjudication. *Young,* 693 F.3d at 545.

III. A Rule 23(c)(4) class fails because any issue requires an individualized inquiry.

Plaintiffs' suggest a hybrid approach to class certification that utilizes Fed. R. Civ. P. 23(c)(4). But even an issue class fails.

Rule 23(c)(4) authorizes the court to isolate common issues and proceed with class treatment of those issues. *Martin v. Behr Dayton Thermal Products LLC,* 896 F.3d 405, 412–413 (2018). Courts apply "Rule 23(b)(3) predominance

and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)." *Id.* at 411. In *Martin,* the Sixth Circuit found that the district court only certified issues "capable of resolution with generalized, class-wide proof." *Id.* at 415. The issues need only be answered once "because the answers apply in the same way to each property owner." *Id.* That is, those issues "turn on each Defendant's knowledge and conduct, which need only be established once." *Id.* at 414.

Here, none of the issues can be resolved with class-wide proof. For example, one of Plaintiffs' issues is that "Defendants failed to issue timely decisions . . . ." (Dkt. 111, PageID.3409.) This issue cannot be answered with class-wide proof because the Court must analyze the timeline of each benefit file to determine timeliness of the decision. Plaintiffs also contend that "Defendants implemented a web of algorithms for the single purpose of stopping payments." (*Id.*) That issue is likewise not capable of class-wide-proof because a stop payment indicator can be placed on a benefit file in many ways, not just via an algorithm, and a file can have many stop payment indicators. Also, suspension of benefits is not unlawful and in fact is mandated when a claimant fails to certify for benefits, to search for work, to be able and available for work, and reports earnings that exceeded claimant's weekly benefit amount. Lastly, another potential issue could be "[c]lass members received no notice, inadequate notice, or untimely

notice of the reason(s) why their payments were withheld." (*Id.*) But again, this question can be answered only by looking at the benefit files. Certainly, the Court would be required to analyze the notice to determine its adequacy and hear testimony from the individual to determine whether they understood the contents of the notice. Thus, issue certification under Rule 23(c)(4) fails.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this brief, Defendants, Michigan Unemployment Agency, Julia Dale, Kimberly Berry, and Teresa Burns contend that Plaintiffs have not established the prerequisites needed for class certification and respectfully request that this Court deny Plaintiffs' request for class certification.

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Dated: December 9, 2024

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on December 9, 2024, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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Dated: December 9, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL KREPS, et al.,

Plaintiffs,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY, et al.,

Defendants.

No. 2:22-cv-12020

HON. MARK A. GOLDSMITH

DEFENDANTS' INDEX OF EXHIBITS FOR JOINT BRIEF IN RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INDEX OF EXHIBITS FOR JOINT BRIEF IN RESPONSE TO PLANTIFFS' MOTION FOR CLASS CERTIFICATION

EXHIBIT	DESCRIPTION
A	Unemployment Insurance Program Letters (UIPLs)
B	Office of Inspector General Audit report and Newsletter
C	Kreps documents, testimony, and declaration
D	Quigg documents and declaration
E	Myrolds documents
F	Boudrie documents and testimony
G	Brainer documents
H	Holifield documents and testimony
I	Foster documents
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K	Unpublished cases
L	Affidavit of Kristine Kratz
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