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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PLAINTIFF UAW'S RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY DISPOSITION

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did plaintiff UAW substantially comply with the notice provision of the *Zynda* agreement?

   Plaintiffs say: Yes
   Defendants say: No

2. Did the Agency breach its obligations under the *Zynda* agreement?

   Plaintiffs say: Yes
   Defendants say: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Devlin v. Kalm, 493 F. App'x 678, 682 (6th Cir. 2012)……..23

Jackson v. VHS Detroit Receiving Hosp., 814 F.3d 769, 775 (6th Cir. 2016) 11

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I. INTRODUCTION

Plaintiff International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") has fought for benefits for its unemployed workers for decades. The UAW has fought at the bargaining table by negotiating Supplemental Unemployment Benefits. It has fought through lobbying for more robust federal and state unemployment benefits. And it has fought, when necessary, through the court system when unemployment benefits have not been provided consistent with federal law. Perhaps no legal fight was more important than the UAW's participation in *Zynda v. Arwood*, where the UAW successfully negotiated firm commitments by Defendant Michigan Unemployment Insurance Agency (the "Agency") to make sure that the horrible abuses which occurred in advance of *Zynda* would not happen again.

When the COVID-19 pandemic occurred, Congress effectively decided that our policy to deal with the pandemic was to encourage non-essential businesses to shut down and then to bolster Unemployment Insurance ("UI") payments to keep the economy afloat. While the UAW readily concedes that the influx of new claims presented an administrative burden, the Agency's response was not filled with inadvertent errors. Instead, the Agency made conscious decisions to stop paying benefits to eligible claimants without proper notice and an opportunity for a hearing and to engage in recoupment of benefits for people with active appeals. These actions were in clear violation of the *Zynda* Settlement. In moving for summary

judgment, the Agency presents no arguments that it did not substantively violate the *Zynda* Settlement.

Upon learning of these widespread violations, the UAW, consistent with the obligations of the *Zynda* Settlement, reached out to the Agency on multiple occasions to redress the issue. The UAW has hundreds of thousands of active and retired members in Michigan, and it is of high importance that the unemployment agency operates effectively for Claimants. The UAW simply wants the benefit of its bargain from the *Zynda* settlement. Instead, the Agency has adopted a confrontational position, ignored the UAW's request to address the issues, and continues to violate *Zynda* to this date. Therefore, the Agency's motion should be denied, and summary judgment should be granted in favor of the UAW.

II. FACTUAL BACKGROUND

A. The MiDAS System Creates a Nightmare for Claimants with Collection and Fraud Processes in Violation of Law

In order to understand the *Zynda* agreement itself, it is important to understand the background that led to its adoption. In 2013, the Agency replaced its outdated case processing software with a new system, the aptly named MiDAS system. The MiDAS system as implemented was a failure of truly epic proportions. The system automated many functions in the UI process, including, most regrettably fraud determinations. The most mundane discrepancies between a claimant's application and what an employer submitted would lead to a determination of ineligibility and a

fraud finding. Under then-existing Michigan law, the Agency would then charge quintuple damages on all unemployment benefits received. As a result, someone could have received $15,000 in unemployment benefits and suddenly faced a repayment bill of $75,000 without a human ever reviewing the case.

An important part of the robofraud fiasco was the deficiency of the notices provided to claimants, including requests for information. Many people were not properly notified of any issue before a fraud finding, but even those that did struggled to avoid such a finding—the notices the Agency sent did not provide sufficient due process to claimants and sometimes were designed so that reasonable responses automatically led to fraud findings. *See generally* https://spectrum.ieee.org/michigans-midas-unemployment-system-algorithm-alchemy-that-created-lead-not-gold.

B. The UAW and Other Plaintiffs Successfully Sue the Agency and Reach a Settlement Agreement.

In the midst of this debacle, the UAW and several individuals sued the Agency seeking injunctive relief to stop robofraud, restore lawful collection processes, and generally guarantee that claimants' rights were protected in the UI process.[1] The

[1] The Agency faced multiple other lawsuits as a result of its unlawful processes. Those suits also sought money damages and languished for years before resolutions were reached. In contrast, the UAW was able to reach a relatively early resolution to try and achieve immediate reform of Agency practices. The UAW obviously is fully supportive of individuals exercising their rights to a judicial process, however, the contrast is highlighted merely to demonstrate that the UAW's interest in the

DOL also began investigating the Agency's actions. The results were embarrassing. Once actual people were assigned to review fraud determinations, 93% of fraud determinations were found to be incorrect. *See https://www.theguardian.com/us-news/2016/dec/18/michigan-unemployment-agency-fraud-accusations?ncid=newsltushpmgnews.*

In response to the *Zynda* litigation being filed, the Agency filed a motion to dismiss. That motion was largely denied in a decision by Judge Cleland dated March 29, 2016. *See Zynda v. Arwood*, 175 F.Supp.3d 791 (E.D. Mich. 2016) ("Zynda I"). In Zynda I, Judge Cleland found the UAW had standing to pursue the lawsuit and allowed claims for due process violations, Fifth Amendment violations, and claims for violation of the Social Security Act to proceed. The Agency later filed another motion to dismiss, arguing that the case was "moot" because the Agency had stopped engaging in robofraud determinations following the United States Department of Labor's issuance of an Unemployment Insurance Program Letter (UIPL) directing states not to use automated systems for fraud findings. The motion was denied. *See Zynda v. Arwood*, 2016 WL 4593828 (E.D. Mich., September 2, 2016) ("Zynda II").

Following Judge Cleland's decisions, the parties mediated a settlement agreement that was adopted as a Consent Judgment. On January 31, 2017, the UAW

Agency is merely for it to be effective. It wants the system to work so that UAW members (and all Michiganders) receive the unemployment benefits to which they are entitled.

and fellow Zynda plaintiffs entered into a Settlement Agreement with the Zynda Defendants. The Settlement itself includes numerous provisions detailing changes to the Agency's "Policies and Practices." Paragraphs 4-16 of the Agreement (which can be found on pp. 2-5), lay out specific requirements that the Agency agrees to adhere to in the processing of UI claims. Most relevant to this litigation, the Parties agreed to the following:

> 13. The Agency shall not initiate or continue recovery of an overpayment or penalty until a (re)determination of the overpayment becomes final after the claimant has had notice and reasonable opportunity to challenge the (re)determination and/or exhaust all appeals.
>
> 14. During the pendency of a decision on any overpayment or misrepresentation (re)determination, the Agency will continue to make timely UC payments when due and shall not make any attempts to collect restitution while an appeal is pending, and shall not begin collection of restitution or penalties until or after 35 days from the date of a (re)determination.

(Ex. 1, *Zynda* Settlement at ¶¶ 13-14).

The *Zynda* Settlement was explicitly subject to this Court's jurisdiction to resolve potential breaches. *Id.* at ¶ 21 and *Zynda* Stipulated Order of Dismissal, 2:15-cv-11449-RHC-RSW (attached as Exhibit 2) ("The Court shall retain jurisdiction of this matter pursuant to the terms of the Settlement Agreement and for the purpose of enforcing the terms of this Order and the Settlement Agreement.")

The Settlement Agreement further contained a provision calling for a Notice and Opportunity to Cure and established a Liaison within the Department, which read in relevant part:

> 23. Notice and opportunity to cure/Liaison. If Plaintiffs believe any Agency policy, practices, or actions are not in compliance with this Settlement Agreement, Plaintiffs shall give the Agency written notice of such alleged breach providing the opportunity to cure such breach for a period of thirty (30) business days after delivery of the notice. Within 10 days of notice, Defendants shall provide a response (written, by phone, or in person) of the actions proposed in response, if any. Any notice of breach shall be made to the following:
>
> Talent Investment Agency/Unemployment Ins. Agency
> Attn: UIA Deputy Director
> Cadillac Place
> 3024 West Grand Blvd., Ste. 12-350
> Detroit, Michigan 48202
>
> * * *
>
> A Liaison for issues related to implementation of this Settlement Agreement and compliance shall be appointed within the Agency. The Agency may designate substitutions of the liaison by notice pursuant to the terms of this Agreement. The liaison is the UIA Deputy Director, and his or her designee, at a phone number and email to be provided by Defendants.

C. The Agency Begins Violating *Zynda* During the Pandemic and the UAW Sends Notice of *Zynda* Settlement Violations

The 2020 COVID-19 pandemic radically increased the obligations on the Agency. While the UAW was patient in hoping the Agency could resolve the various issues, eventually it became clear that the Agency had taken actions that violated the *Zynda* Settlement. Consistent with the Settlement Agreement, the UAW (through

counsel) reached out to the Agency to provide "Notice" that the *Zynda* Settlement was being violated and provide the Agency "Opportunity to Cure." (*See* Sept 2, 2021 Letter, attached as Exhibit 3). That notice, sent on September 2, 2021, was directed to Kimberly Berry, the UIA Deputy Director, complied with all requirements of Paragraph 23 of the Settlement Agreement, and identified five deficiencies.

The letter does not specifically reference the UAW. However, the *Zynda* Settlement routinely refers to all plaintiffs collectively and directs the Agency to provide notice to plaintiffs' counsel where the Agency had notification obligations. That same counsel sent the September 2, 2021 Notice. The Notice specifically references the need for the "Parties" to provide the State with notice of breach and then immediately said that the September 2, 2021 letter was "written notice of breach of the Settlement terms and a request to cure." The letter proceeds to note as a deficiency the failure to provide new agency forms, an obligation that under the Settlement Agreement, the Agency owed to the Plaintiffs in *Zynda*, including the UAW.[2]

[2] Respectfully, the Agency's fixation on Notice seems to stem from its continued confusion about David Blanchard's role. (*See* ECF No. 108, Order Granting Movant David Blanchard's Motion to Quash). David Blanchard is a lawyer who has clients he represents. When he sends letters to the Agency signing his name on behalf of the parties to the *Zynda* Settlement, he is speaking on behalf of his clients in that litigation, including the UAW. It is not his personal letter.

Most relevant to the deficiencies pursued in this action, the deficiency letter notes:

> Under the Zynda Settlement, the state is prohibited from pursuing collection activity against UI beneficiaries until a claim is final and all timely protests and appeals have been exhausted. (See Paras. 13, 14). We are aware of rampant collection activity reaching many cases in which claimants have timely appealed - and yet garnishment action by the state is going forward. In many cases, timely appeals have not been timely logged within the MiWAM system and are recorded as "late protest", if at all. Even for late protests and appeals, the complete failure to adjudicate claims and pay benefits when due constitutes a violation of due process and a violation of the Zynda Settlement. We request that all garnishment activity cease unless and until the state is capable of processing and adjudicating of protests and appeals in a timely manner. And we demand immediate response to this matter by your office or the designated liaison.

(*Id*. at para. 1).

Following receipt of an emailed copy of this letter, the email was immediately forwarded by Kim Pendrick in the Attorney General's office to Defendant Teresa Burns and Kimberly Berry. Defendant Teresa Burns then forwarded the letter of violations to multiple other employees. (*See* UIA Internal Emails in Response to Deficiency Letter, attached as Exhibit 4). Attorney General lawyer Kim Pendrick said she would "work on preparing a response to this letter." Ms. Pendrick sent a response letter to UAW's counsel on September 10, 2021. That letter expressed no interest in a broader conversation about policies and procedures and stated it would only review individual case files rather than wholistic review of the Agency's processes. (*See* Pendrick 9/10/21 Letter, attached as Exhibit 5).

Individual Plaintiffs subsequently filed this litigation, including allegations of violations of the *Zynda* Settlement. Hoping to avoid litigation, the UAW sent a second "Notice" on November 14, 2022. That notice was sent to counsel for the Agency. The Notice states "In the UAW's view . . . the purpose of Zynda was to create broad rules applicable to all claimants. Where widespread policies and practices are violated, individual case file resolution is not the proper response. From files that the UAW has reviewed, the Zynda violations are not 'isolated' and need an institution-wide remedy." (*See* Nov. 14, 2022 deficency letter, attached as Exhibit 7). The Notice raised the prospect of the UAW needing to intervene "to make sure the *Zynda* Agreement is properly understood and properly enforced in federal court," but also expressed a desire to confer with the Agency in the hopes of avoiding "unnecessary litigation." *Id*.

The Agency remained unwilling to confer with the UAW about the identified *Zynda* Agreement violations. At that point, the UAW joined the pending litigation. A third notice was sent on July 19, 2023 after the Agency first suggested that they had not been properly notified. (*See* July 19, 2023 deficiency letter, attached as Exhibit 7). As the initial response to the September 2021 Notice was from the Attorney General's Office, and litigation was ongoing between the UAW and the Agency at that point, the notice was sent to counsel of record for the Agency. The Notice reiterated the *Zynda* Settlement violations that had been outlined in the two

prior notices. In response to this July 19, 2023 Notice, the Agency for the first time claimed in an August 1, 2023 letter that the Notice did not comply with the requirements of the Settlement Agreement and invited the UAW to mail notice to Kimberly Breitmeyer. (*See* Husband August 1, 2023 Letter attached as Exhibit 8). The August 1, 2023 letter acknowledges that (1) the Talent Investment Agency referenced in the *Zynda* Agreement no longer exists and (2) there was no current UIA Director. After being cleared to send a letter directly to a represented party by the Agency Counsel's August 1, 2023 letter, counsel for the UAW sent a letter to Ms. Breitmeyer on July 15, 2024. (*See* Breitmeyer Ltr attached as Exhibit 9).

Contrary to the August 1, 2023 letter, Director Dale specifically testified that *Zynda* compliance was supposed to go through the Attorney General's office.

> Q. Was there a point in time when you did appoint a liaison for Zynda compliance?
>
> A. I believe the instruction that has been provided is for a contact to be made through the Attorney General's Office. And there was concerns -- I think that is something that's been communicated with you.· Perhaps I have a faulty recollection

(Ex. 10, Julia Dale Dep. Tr. at 42). Even when asked directly about Ms. Breitmeyer being the appropriate contact person, Director Dale testified that "we've also at times requested that you go through the Attorney General's Office." (*id* at 43).

D. The UAW Joins the *Kreps* Litigation to Enforce the *Zynda* Settlement

As referenced above, in the midst of this exchange of letters, the UAW joined this litigation. The UAW brought Count IV in the operative Amended Complaint, which alleges violations of the *Zynda* Settlement. Specifically, the UAW alleged violations of Paragraphs 13 and 14 of the *Zynda* Settlement. The Complaint includes specific factual allegations as to how Defendants violated those paragraphs. These include:

> 266) Defendants routinely suspend timely payments and institute collection activity while appeals on the merits or appeals on restitution Redeterminations are pending.
>
> 267) Defendants decreased UI claimants' current unemployment benefits, withheld state tax returns, and garnished wages, in violation of the Zynda Settlement.

Discovery has proved in this case that the UAW's concerns about *Zynda* Settlement violations were well founded. These allegations are unchallenged in the record and in this pending motion. The Individual Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment details the facts underlying these violations in more detail, and the UAW adopts and incorporates those arguments to avoid duplication.

III. STANDARD OF REVIEW

Summary judgment is appropriate "only where no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law." *Jackson v. VHS Detroit Receiving Hosp.*, 814 F.3d 769, 775 (6th Cir. 2016). In considering a motion for summary judgment, a court "views the factual evidence and draws all reasonable inferences in favor of the non-moving party." *Rhodes v. Michigan*, 10

F.4th 665, 672 (6th Cir. 2021). Under Federal Rule of Civil Procedure 56(f)(1), a Court, "[a]fter giving notice and a reasonable time to respond" may "grant summary judgment for a nonmovant."

IV. ARGUMENT

A. The Agency Violated the *Zynda* Settlement Agreement

Defendants initiated collection activity on over 500,000 people, seeking over $5 billion from Michiganders. They did so knowing that many determinations were not final and appeals had not been logged by the Agency. Teresa Burns acknowledged the Agency's culpability in a December 2021 email to Julia Dale and Kimberly Berry, among others at the Agency, which states in part:

> If the collection goes active on accounts where there are in fact timely protests submitted, the Agency will be in violation of the settlement agreement that it entered in the Frazier case. I believe this is also a term that we must comply with as a result of the Zynda settlement agreement as well. A timely protest or appeal stops collections. If we have a backlog of protests or appeals that have not been applied to cases where restitution is due, the debt is not legally collectible because it is not final.

(Ex. 11, Burns Dec. 12, 2021 Email). Despite a clear warning, the Agency maintained the same illegal practices in violation of Claimant's due process rights. Dale, Berry, and Burns went ahead with collection anyway.

Therefore, there's no genuine factual issue that the Defendant Agency violated the Zynda Settlement Agreement. Consequently, it is appropriate in these

circumstances to grant summary judgment in favor of the non-moving party. Fed R. Civ. P. 56(f)(1).

As a result of the *Saunders v UIA* Preliminary Injunction in 2022, the plaintiffs were effectively able to halt "a collection machine that was seeking to clawback over $4 billion dollars from the accounts of recently unemployed Michiganders. Moreover, the pause allowed the Agency to uncover hundreds of thousands of previously unprocessed protests and appeals from class members, as disclosed in status reports file throughout litigation." (Ex. 12, Blanchard Declaration in Support of Saunders Preliminary Approval at para. 13).

Defendants also used auto-generated misrepresentation issues to indefinitely suspend benefits, in violation of Section 14 of the *Zynda* Agreement. Many of these "misrepresentation" issues never even resulted in a determination, but still had the effect of indefinitely suspending benefits. Defendants have been long aware of these holds. In January 2023, the Agency generated SQR 37107, which was intentionally created to identify stop payments indicators holding up payment and specifically un-adjudicated misrepresentation issues. (Ex 13, SQR 37107 Log)(" For sqr 37107 are you looking for Claims where all issues are resolved, that has a Stop Payment Indicator and a benefit payment that cannot be released? In the report do you want to know the type of Stop Payment indicator that is on the claim and if there are multiple Stop Payment Indicators. Do you want this as an Adhoc report that can be

generated on by staff?" and "looking for Open issues where a decision is ready on the parent case, but waiting on the Misrepresentation issue to be closed").

If there was no violation of the *Zynda* agreement, the Agency would not have expended resources to generate an SQR instructing staff to report back on how many Claimants were impacted by their illegal practices.

B. The UAW Provided Timely Notice of Deficiencies Consistent with its Obligations Under the *Zynda* Agreement

On September 2, 2021, counsel for the UAW sent a three-page letter to then-UIA Deputy Director Kimberly Berry outlining violations of the *Zynda* Agreement. Nobody argues or disputes in any way that this notice was properly delivered consistent with the obligations of the *Zynda* Agreement. The Agency argues that the Notice was insufficient because it did not list the UAW specifically. That argument must be rejected.

The letter was sent by the UAW's counsel, who represents the UAW in multiple actions against the Agency.[3] The letter is written in the first-person plural, references the "Parties" to the *Zynda* Agreement, and refers to Mr. Blanchard's

[3] Mr. Blanchard represented the UAW not only in *Zynda* but also in an enforcement action in *Frazier v. Malek* where the UAW sought to enforce an older settlement agreement with the Agency. *See generally Frazier v. Malek*, 591 F. App'x 468 (6th Cir. *2015*) (finding the UAW had standing to enforce Settlement Agreement it had reached in 1997). "We discern no obstacle to the district court determining whether the Agency systematically has ignored these conditions and, if it has, ordering the appropriate remedy." *Id*. at 470.

"clients." Who is the letter possibly on behalf of if not for the plaintiffs to the *Zynda* Agreement, including the UAW? Respectfully, if Mr. Blanchard were to sign such a letter purporting to speak on behalf of his clients without being instructed to do so, it is doubtful that Mr. Blanchard would continue to represent the UAW in this unemployment litigation. Mr. Blanchard cannot reach out to the Agency on behalf of "clients" and not have actual clients he is representing. And while certain individual Plaintiffs are pursuing relief in this case as third-party beneficiaries of *Zynda*, those people have no obligation under the *Zynda* Settlement to pursue the Notice and Cure provisions.

Defendants attempt to make much of the fact that later letters specifically reference the UAW as if somehow that means the September 2, 2021 letter was not on behalf of the UAW. The implication should go the other way. When Mr. Blanchard was speaking on behalf of just one client – the client who eventually joined this litigation as a party – he knew to refer to a specific plaintiff. The obvious implication is that when he refers to "clients" in the context of a *Zynda* enforcement letter without differentiation, he was speaking on behalf of all his *Zynda* clients.

That subsequent follow-up notices were sent directly to counsel for the Agency instead of the Deputy Director is irrelevant for two reasons. First, and most obviously, the September 2021 letter is all the notice required under the *Zynda* Settlement. The Agency does not dispute that it is proper notice.

Second, however, those notices constitute sufficient notice on their own, particularly in the full context of the notices in this case. Following the September 2021 Notice, the UAW's counsel did not receive a response from Ms. Berry, the UIA Deputy Director, but from Kim Pendrick in the AG's Office. Over the next several years, Plaintiff's counsel sent multiple notices to the Agency's counsel, notices that often referred back to the initial notice that was specifically directed to Ms. Berry. Director Dale specifically testified that at some point Mr. Blanchard was instructed to communicate not with a liaison but with the Attorney General. (See Exhibit 10).

Moreover, all Kimberly Berry, the UIA Deputy Director, did upon receiving the notice was give it "to Legal for them to discuss next steps." (Exhibit 14, Berry Dep. Tr. at 18). Ms. Berry's entire conception of the *Zynda* Liaison position was that "I understood my role was to make sure that as liaison I liaisoned between [Mr. Blanchard] and the Agency. So once the information was received, I provided it to Legal." (*Id* at 22). She saw no other obligation than to pass the information along.

> Q. As the liaison, your only duties were to the pass on the information to the appropriate people?
> A. Correct.
> * * *
>
> Q. You didn't pass it on or discuss it with anybody other than the attorneys for the Agency?
> A. No.

> Q. And you didn't take any action yourself to review or change any policies related to these concerns that were raised in [the September 2, 2021] letter, is that right?
> A. Correct.

(*Id* at 23-24).

The centrality of the Attorney General's office is apparent from the fact that Ms. Pendrick, and not Ms. Berry, provided the response to UAW counsel's September 2, 2021 letter. The situation was further complicated by the fact that Mr. Blanchard was involved in litigation against the Agency, which raises issues related to reaching out to a represented party under Michigan ethics rules. While permissible under ethic rules to reach out to the UIA Deputy Director under this scenario, the safest course for attorneys is to send notices to a represented person's counsel. Per Director Dale's testimony, that appears to have been the preference of the Agency as well.

Defendants ignore this whole context and seem to rely primarily on this Court's determination at the Preliminary Injunction stage that the UAW had not exhibited a likelihood of success on the merits that it had given proper notice. But, as the Court noted itself in denying the UAW's motion for reconsideration, the initial decision on the preliminary injunction motion was made "without the benefit of the UAW's position" and further that additional arguments made on the motion for reconsideration were inappropriate because "new arguments are improper in a motion for reconsideration." (*See* ECF No. 50). Needless to say, the UAW is

presenting a more detailed argument on this issue here than in the PI briefing, and the standard for summary judgment is obviously different than for preliminary injunction. *See, e.g., Eller Media Co. v. City of Cleveland*, 161 F.Supp.2d 796, 806 (N.D. Ohio 2001) ("It is well-established that the standard which applies to a motion for a preliminary injunction is different from that used on a motion for summary judgment.")

The Agency has had many notices and many opportunities to cure. Even assuming the Agency's implied "U.S. mail only requirement", strict compliance is not-required when the purpose of the contract provision is satisfied. It has long been established that Michigan's common law of contract requires substantial compliance, not strict compliance, with contractual terms.

> Michigan follows the substantial performance of contract rule. The common-law rule was that performance as a condition precedent to recovery on a contract must be strict performance in accordance with the terms of the contract… A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract.

Gibson v. Group Ins. Co., 142 Mich App. 271, 275 (Mich. Ct. App. 1985); see also *Mayor v. W. Va.* (*In re Eagle-Picher Indus.*), 285 F.3d 522, 525 fn. 3 (6th Cir. 2002) ("In general, substantial compliance means that a party has 'complied with the essential requirements, whether of a contract or of a statute.' Black's Law Dictionary 1428 (6th ed. 1991)").

In this context, it is hardly a failure of notice for the follow-up Notices to be initially sent to the Agency's counsel. The Agency's lawyers were who could "determine next steps," who engaged with UAW counsel, and thus who UAW counsel followed up with. On this record, the UAW met all of its Notice requirements under the *Zynda* Settlement. Defendants were on actual notice and actually refused to even confer on the systemic violations raised. There is no room for any argument that Defendants would have done something different – would have addressed the violations - had notice been sent to someone else or in some other form. Therefore, Defendants' motion to dismiss the UAW on these grounds must be denied.

C. The Record Demonstrates *Zynda* Violations

With proper notice provided, the UAW is seeking relief in the form of a court order telling the Agency to bring its policies and practices into compliance with the *Zynda* Settlement. As laid out in the operative Amended Complaint, the UAW highlights a number of ways that the Agency is violating the *Zynda* Settlement. Nowhere in their 35-page brief does the Agency ever suggest that they are, in fact, complying with the *Zynda* agreement. Instead, the Agency raises only defenses to avoid actually looking at the record of its compliance. Those defenses should be rejected, and summary judgment should be denied.

D. The Zynda Settlement Does Not Conflict With State Law

Count IV of the Amended Complaint highlights the two provisions of the *Zynda* Settlement that the UAW is seeking to enforce. First, Paragraph 13 of the Settlement prohibits the Agency from initiating or continuing to recover an "overpayment or penalty until a (re)determination of the overpayment becomes final after the claimant has had notice and reasonable opportunity to challenge the (re)determination and/or exhaust all appeals." The Agency raises no argument that state law in any way prohibits this provision. As such, the UAW's claim must proceed.

Second, the UAW seeks enforcement of Paragraph 14 of the Settlement Agreement, which states:

> During the pendency of a decision on any overpayment or misrepresentation (re)determination, the Agency will continue to make timely UC payments when due and shall not make any attempts to collect restitution while an appeal is pending, and shall not begin collection of restitution or penalties until or after 35 days from the date of a (re)determination.

The Agency does raise in connection with Count II of the individual Plaintiffs' claims that the Agency purports to be unable to comply with this provision because MCL 421.27(a)(1) requires the Agency to suspend benefit payments once an adverse decision is issued. The provision in paragraph 28 of the *Zynda* Settlement is narrower than Defendants allow. That provision says only that the State is not compelled to follow the *Zynda* Settlement when it is in conflict with a law "contrary to which the parties have no legal right to contract." After the Zynda court found due process to

be lacking in the Agency's notice for misrepresentation (fraud) determinations, the Parties negotiated to ensure that benefits would not be terminated before a claimant had an opportunity for a hearing in front of an administrative law judge.

Section 27 of the MES Act has not changed since the parties entered into the Zynda Agreement. Nor has there been any superseding interpretation of Section 27 by the courts that would prevent enforcement. Yet Defendants argue now that the terms agreed to in 2017 were nugatory at the time they negotiated them – based only on their new-found interpretation. Defendants posture is not a model of good faith bargaining.

Plaintiff UAW is not aware of reason that the State of Michigan, on the heels of rampant unconstitutional collection illegal activity that led to *Zynda*, cannot contract to adopt policies and procedures that are intended to make sure such abuses do not occur again. Defendants certainly cite no authority prohibiting them from reaching such an agreement. The UAW acknowledges that under the supremacy clause, the State may not be able to ignore certain DOL regulations or guidance, but the State AG must have the authority to bind the State on interpretation of state law.

Second, even if such a limit existed, the relevant provision of the *Zynda* Settlement "shall be curtailed and limited only to the extent necessary to bring it within legal requirements." (*See* Exhibit 1 at ¶28).[4]

Third, the state law provision referenced does not even prohibit the relief the UAW seeks. The provision at issue states in its entirety:

> (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, or, for benefit years beginning before October 1, 2000, a new separation issue arises resulting from subsequent work.

This provision does not prohibit the State from paying out benefits during an appeal. Thus Paragraph 14 of the *Zynda* Settlement is not "contrary to law" and certainly is not a law "contrary to which the parties have no legal right to contract." Paragraph 14 refers only to a decision on "overpayment or misrepresentation (re)determination." It was specifically targeted to address the abuses of the robofraud era and make sure that future claimants did not face such problems again. The

[4] Also, if this Court were to find that the provisions of the *Zynda* Settlement were unenforceable, that would allow the UAW to reopen the entire *Zynda* litigation. (*Id* at ¶27-28).

Agency's argument that it cannot comply with the agreement it negotiated itself must be rejected.

E. Colorado River Abstention is Inappropriate

Defendants make a brief argument for Colorado River abstention for Count III of the Complaint. The UAW believes this does not apply to them, as the UAW brought only Count IV to enforce the *Zynda* settlement. But since the UAW's claim also includes a challenge to the Agency's "improper collection" activity, it wants to reiterate that such abstention is inappropriate in this case.

As a preliminary matter, for purposes of the UAW's enforcement of *Zynda*, the Agency explicitly agreed to allow the District Court to maintain jurisdiction over this suit. It certainly is in no position to argue Colorado River Water abstention applies after agreeing to resolve such disputes in this Court. "Abstention is an 'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it,' therefore '[o]nly the clearest of justifications' warrant abstention." *Devlin v. Kalm*, 493 F. App'x 678, 682 (6th Cir. 2012) (quoting *Rouse v. DaimlerChrysler Corp*., 300 F.3d 711, 715 (6th Cir. 2002)). The plaintiffs in the *Saunders v. UIA* case (of which the UAW is not a party) have separate legal claims and are seeking separate damages. The Sixth Circuit in *Devlin* reversed the district court's application of Colorado River abstention because "[a]lthough the two actions arise out of the same basic facts; Plaintiff raises separate legal challenges and

seeks different relief for his [state court administrative proceeding] and his suit in federal court." *Devlin*, 493 F. App'x at 685. Tellingly, Defendants do not cite a single case applying Colorado River abstention in a similar factual scenario. Defendants' invocation of Colorado River abstention must be denied.

V. CONCLUSION

In the face of a rampantly illegal system, the UAW brought suit to reform the Agency's policies and practices. The district court rejected Agency attempts to dismiss the case and found that pre-termination notice procedures were profoundly lacking in due process. The UAW and the Agency (among other parties) entered into a Settlement Agreement that bound the Agency to reform and follow new policies and procedures to ensure due process. The Agency makes no argument that it is not in violation of that Agreement.

The UAW requests that this Court deny in full Defendants' motion as to Count IV of the Amended Complaint. Further, the UAW requests that pursuant to Fed. R. Civ. P 56(f)(1), the Court give notice and an opportunity to respond to the Agency to explain why summary judgment on the Count IV should not be granted on behalf of the UAW.

Respectfully Submitted,

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Dated: December 9, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 9, 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.

/s/ Leslie M. Wenzel
Leslie M. Wenzel, Law Office Assistant

PLAINTIFF UAW'S RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION FOR SUMMARY DISPOSITION
INDEX OF EXHIBITS

Exhibits to be filed pending resolution of protective order issues

1 Zynda Settlement

2 *Zynda* Stipulated Order of Dismissal

3 Sept 2, 2021 Letter

4 UIA Internal Emails in Response to Deficiency Letter

5 Pendrick 9/10/21 Letter

6 Nov. 14, 2022 deficiency letter

7 July 19, 2023 deficiency letter

8 Husband August 1, 2023 Letter

9 Breitmeyer July 15, 2024 Letter

10 Julia Dale Dep. Tr. at 42, 43

11 Burns Dec. 12, 2021 Email

12 Blanchard Declaration in Support of Saunders Preliminary Approval at para. 13

13 SQR 37107 Log

14 Berry Dep. Tr. at 18