STATE OF MICHIGAN

COURT OF CLAIMS

GRANT BAUSERMAN and TEDDY BROE, individually and on behalf of a class of similarly-situated persons,

Plaintiff,

v.

STATE OF MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Defendant.

Case No. 2015-000202-MM
HON. DOUGLAS B. SHAPIRO

_____/

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UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

FAIRNESS HEARING: January 29, 2024, 10:00 a.m.

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INTRODUCTION

The Plaintiff Class Representatives, by Class Counsel, move for Final Approval of the Class Action Settlement Agreement between Plaintiffs and Defendant, the State of Michigan Unemployment Insurance Agency ("Agency"), and for Entry of Judgment, pursuant to MCR 3.501(D). The Defendant does not contest this motion. In support of this motion, Plaintiffs submit and incorporate the following exhibits:

- Exhibit 1 - Amended Settlement Agreement
- Exhibit 2 - Unopposed Motion for Preliminary Approval
- Exhibit 3 - Corrected Order Granting Plaintiffs' Unopposed Motion to Certify Settlement Class and Appointing Settlement Class Counsel
- Exhibit 4 – Joint Motion Amending the Notice of Settlement and Plan of Allocation and Extending Dates of Settlement Administration and Fairness Hearing.
- Exhibit 5 - Order Granting Parties' Joint Motion to Amend Notice of Settlement and Plan of Allocation and Extending Dates of Settlement Administration and Fairness Hearing
- Exhibit 6 - Amended Plan of Allocation
- Exhibit 7 - Amended Notice of Class Settlement
- Exhibit 8 - Declaration of Lisa Simmons on behalf of Analytics Consulting, LLC.
- Exhibit 9 - Proposed Final Order and Judgment
- Exhibit 10 – Release Agreement
- Exhibit 11 – Special Master Affidavit
- Exhibit 12 – Register of Actions Reflecting No Opt Outs or Objections

PROCEDURAL HISTORY

A. Background of Litigation and Settlement.

This lawsuit arises out of the Agency's use of an automated decision-making system known as the Michigan Integrated Data Automated System ("MiDAS"). Plaintiffs are former recipients of unemployment compensation benefits who alleged that the Agency, using MiDAS, unlawfully seized their property without affording due process of law. Plaintiffs filed this class action in the Court of Claims on September 9, 2015. Plaintiffs filed an amended complaint on October 19, 2015. Plaintiffs sought to recover damages on behalf of themselves and class members whose property was seized by the Agency based on automated determinations through MiDAS. On November 14, 2022, after seven years of litigation, including two appeals in the Michigan Supreme Court, the parties agreed to a $20 million settlement covering more than 8,000 class members. The settlement was reached during extensive arms-length negotiations between the parties, which were conducted with the assistance of an experienced neutral mediator. The settlement is based on the parties' mutual recognition of the strengths and weaknesses of each other's positions. Exhibit 1 – Amended Settlement Agreement.

B. Certification of Settlement Class and Preliminary Approval of Class Action Settlement.

On January 20, 2023, this Court granted Plaintiffs' Unopposed Motion to Certify the Settlement Class and Appoint Settlement Class Counsel. Exhibit 2 – Motion for Preliminary Approval; Exhibit 3 – Correct Order Granting Motion. In that Order, the Court:

- **Certified the settlement class**, defined as: "Those individuals who received an initial Determination or Re-Determination of Intentional Misrepresentation issued by the Agency between October 1, 2013, and August 31, 2015, issued initially through the Agency's auto-adjudication process, and suffered a first Collection on or after March 9, 2015, and who do not opt-out of the Settlement."

- **Found that the settlement class satisfied all requirements of MCR 3.501(A)(1)**, numerosity, commonality, typicality, adequacy, and superiority.

- **Appointed Grant Bauserman and Teddy Broe as Class Representatives**.

- **Appointed Plaintiffs' counsel as Counsel for the Class**.

- **Preliminarily Approved the Class Action Settlement**, finding that the parties reached the Amended Settlement Agreement, that the Agreement was reached in good faith after a well-informed, arms-length negotiation process, that the Agreement was supported by a recommendation of a neutral mediator, that payment by Defendant of $20 million represented a fair and reasonable resolution of the case, and that the proposed settlement is fair, reasonable, and adequate.

- **Approved the Class Notice**, finding that it fully satisfies the requirements of MCR 3.501(C)(1-7).

- **Approved the Class Notification Plan**, which provided for 1) a Class Notice via U.S. Mail for all Settlement Class Member for whom a mailing address is available; 2) direct notice via email (the Email Notice) to all Settlement Class Members for whom the Defendant has an email address and was available for mailing upon request and available for download at the Settlement Website. The Court found that the Class Notification Plan provided the best reasonable and practicable to settlement class members under the circumstances and is fully consistent with due process and MCR 3.501.

- **Appointed Analytics Consulting LLC as Claims Administrator.**

- **Approved the Plan of Allocation**, finding that the Plan of Allocation is fair, reasonable, and adequate, and further finding that it satisfies all due process requirements.

- **Appointed Megan Norris as Special Master.**

- **Approved the Attorney Fees of Plaintiffs' Counsel, Reimbursement of Costs, and Set-Aside of Administrative Costs**, finding that the request for attorney fees in the amount of $6,487,111.88 is fair, reasonable, and consistent with applicable law, that reimbursement of costs of $38,664.36 is fair, reasonable, and consistent with applicable law, and that a set-aside of $500,000 to fund the administration of the settlement was fair, reasonable, and consistent with applicable law.

- **Approved Service Awards to Class Representatives Bauserman and Broe,** in the amount of $15,000.00 each, finding that such awards reflected their time and effort expended in the litigation, and finding the awards are aligned with and proportional to the expected recovery for class members.

- **Approved the Case Management Order and Timeline.**

C. Amended Notice of Settlement.

On February 1, 2023, the initial mailing of the Class Notice was sent via certified U.S. Mail to potential class members notifying them of their legal rights, eligibility, and instructing them to register to become class members. Exhibit 4 - Joint Motion Amending the Notice of Settlement and Plan of Allocation and Extending Dates of Settlement Administration and Fairness Hearing. In the months that followed, registrations, economic claim form submissions, and hardship claim form submissions proceeded steadily albeit slowly. *Id*. The Claims Administrator and Class Counsel worked diligently to assist potential class member with registrations, answering questions, and reviewing submissions. *Id*.

The Claims Administrator was aggressive in potential class member contact, reaching out to potential class members and registered class members via Certified U.S. Mail, telephone calls, emails, social media advertisements, and implementing repeated rounds of skip tracing to locate known class members whose addresses, email addresses, and telephone numbers have changed multiple times in the past 10 years. *Id.* Class Counsel worked with the Attorney General's office to place announcements on the UIA website, in local newspapers, and local radio broadcasts to encourage potential class member registration. *Id*.

Class Counsel and the Claims Administrator were also diligent in their efforts to contact and inform class members about how to provide documentation in order to process both Economic Claims and Hardship Impact Claims. *Id*. For example, on May 10, 2023, Class Counsel hosted a live Zoom Townhall Webinar informing class members of exactly how to submit Hardship Impact Claims to maximize their potential award and later published the recorded meeting on the designated settlement website, www.UIAClassAction.com. *Id*. As of June 20, 2023, a total of 3051

registrations from known class members had been received, with a lesser amount of Economic Claim Form and Hardship Impact Claim Forms received by the Claims Administrator. *Id*.

By June 20, 2023, despite diligent efforts, it had become clear that many potential class members and registered class members faced difficulties in responding to outreach, registering, and submitting proper documentation with respect to Economic Claims and Hardship Impact Claims.[1] *Id.* The parties therefore moved for approval of an amended Notice of Class Settlement, which extended deadlines for the submission of claims registration forms or opt-outs, as well as other corresponding dates set forth in the amended notice. *Id*. On June 30, 2023, the Court granted the parties' joint motion. Exhibit 5 - Order Granting Parties' Joint Motion to Amend Notice of Settlement and Plan of Allocation and Extending Dates of Settlement Administration and Fairness Hearing; Exhibit 6 – Amended Plan of Allocation; Exhibit 7 – Amended Notice of Class Settlement

After the Court granted the parties' joint motion to amend the notice of settlement and plan of allocation, and extended the dates of settlement administration, Class Counsel hired 3 outside contract claims analysts, and assigned 1.5 additional staff members to reach out directly to individuals who had registered as class members to assist them in completing and submitting hardship claims forms. The claims analysts contacted by phone and/or email approximately 900 persons who registered for the class action settlement and submitted hardship claims forms. These staff members worked from August 14, 2023, until October 20, 2023, and in that time facilitated the completion and submission of additional hardship claims for many registered class members who otherwise would not have perfected their hardship claim form to receive a hardship award.

[1] A substantial number of claimants reported being suspicious that the notice and outreach might be a scam. Repeated personal outreach was required to assuage those suspicions.

D. Class Registration and Awards.

1. Opt-Outs, Objections, and Withdrawal Threshold.

Ultimately, based on data provided by the Agency, the Claims Administrator identified 8,205 known class members and received 3,206 registrations (39% of known class). Pursuant to Paragraph 57 of the Settlement Agreement, the threshold for invoking Defendant's right to exercise a withdrawal from the settlement agreement is 10% of the Class. Exhibit 1, Amended Settlement Agreement, ¶ 57 ("If ten (10) percent of the Class Members opt-out of this settlement, the Agency may terminate this Agreement.") No opt-outs have been submitted. Exhibit 12, Register of Actions. Thus, the ten percent threshold has not been met, and there is no option for Defendant to withdraw from the Settlement Agreement.

There are also no objections to the Settlement Agreement, or the Plan of Allocation filed in accordance with the provisions for submitting objections. The Court should therefore grant final approval to the class settlement. See *Hanlon v Chrysler Corp*, 150 F.3d 1011 (9th Cir. 1998) (In assessing class settlements for approval, courts review "the presence of a governmental participant" and "the reaction of the Class Members to the proposed settlement.")

2. Plan of Allocation – Economic and Hardship Claims.

The plan of allocation (POA) approved by this Court created a compensation plan that provides for the creation of two settlement pools of funds to satisfy claims. The Economic Loss Pool (ELP) was funded with approximately $8 million. The Hardship Impact Fund (HIP) was funded with approximately $4 million.[2]

[2] The funding of the ELP and HIP is based on an estimated Net Settlement amount of $11.4 million. Class Counsel has requested approval of attorney fees, reimbursement of litigation expenses, and projected administrative costs of $500,000. This is a Pro Forma projection. The actual amount of the Net Settlement will be calculated after the Court enters its Preliminary Approval Order which

3. Economic Awards.

Upon final approval, all 3,206 registered class members will receive an economic award. The total amount of economic awards will be at least $5,159,693.27. The average economic award will be at least $1,609.39. The economic awards provide registered class members with at least 100% recovery of the amounts seized by the Agency within the time period covered by the settlement.

4. Hardship Awards.

Upon final approval, claimants who completed the hardship claim process in accordance with the POA will receive hardship awards. The Claims Administrator received 968 hardship claims. The process for hardship evaluation proceeded in accordance with the Plan of Allocation and all timely claims have been evaluated.

In accordance with the Plan of Allocation, each hardship claim was reviewed manually and personally by Class Counsel, who awarded points based on the information submitted by each claimant. This process followed the method and point system established in the Plan of Allocation. In accordance with the Plan of Allocation, Class Counsel then used the total number of hardship points awarded, along with the total amount of money in the hardship fund, to calculate the value of a point. The Claims Administrator independently verified Counsel's calculation of the value of a point.

On October 31, 2023, the Claims Administrator notified all hardship claimants of their points awarded and an estimation of their award. Claimants were informed of their right to appeal the hardship award to the Special Master if they disagreed with their hardship award.

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will include an award of attorney fees to Class Counsel, reimbursement for litigation expenses, and administrative costs.

Appeals of allocations were due to the Special Master by November 17, 2023, for a final and binding decision pursuant to the Plan of Allocation. As of the date of this motion, the Special Master has received and completed her review of 44 appeals of hardship claim awards. The Special Master affirmed 33 of the original awards and denied the claimants' appeals as to those awards. The Special Master granted 6 appeal(s) and in those instances, the Special Master awarded five claimants a single point, and one claimant 2 points pursuant to her authority under the Settlement Agreement and Plan of Allocation. Thus, upon the completion of the appeals process, a total of 4817 hardship points were awarded to 968 hardship claimants. The total amount of the hardship awards is $4,000,000. The average hardship award will be $4,150.

BASES FOR FINAL APPROVAL OF CLASS SETTLEMENT

On January 20, 2023, this Court certified the following settlement class:

> Those individuals who received an initial Determination or Re-Determination of Intentional Misrepresentation issued by the Agency between October 1, 2013, and August 31, 2015, issued initially through the Agency's auto-adjudication process, and suffered a first Collection on or after March 9, 2015, and who do not opt-out of the Settlement. Exhibit 3 - Corrected Order Granting Plaintiffs' Unopposed Motion to Certify Settlement Class and Appointing Settlement Class Counsel.

Following the Court's Order Certifying the Settlement Class and Preliminarily Approving the Class Settlement, Class Counsel and the Claims Administrator worked diligently to notify known class members of the settlement, and to facilitate the registration of claims and the submission of both economic and hardship claim forms. For the reasons that follow, and for the reasons set forth in the unopposed motion for preliminary approval (Exhibit 2), the Court should grant this motion for final approval, approve the settlement on behalf of the class as set forth in the Amended Settlement Agreement, and Enter Final Judgment in accordance with MCR 3.501(D).

A. The Class Settlement is Fair, Reasonable and Adequate.

A trial court may approve a class action settlement if the settlement is fair, reasonable, and adequate. *Adelman v. Compuware Corp.,* No. 333209, 2017 WL 6389899, at *1 (Mich. Ct. App. Dec. 14, 2017) (citing *Vassalle v. Midland Funding, LLC*, 708 F.3d 747, 754 (6th Cir. 2013). "There is an overriding public interest in favor of settlements in class-action lawsuits. Factors to be considered by a trial court before approving a settlement include whether the settlement's terms are fair and reasonable, whether the settlement is a product of fraud, overreaching, or collusion, the relative strengths and weaknesses of the plaintiffs' claims, and the stage of the proceedings." *Brenner v. Marathon Oil Co*., 222 Mich. App. 128, 133–134; 565 N.W.2d 1 (1997) (citations omitted).

"[T]he rules governing class certification in MCR 3.501(A) very closely mirror the federal prerequisites for class certification found in [Fed. R. Civ. P. 23]." *Henry v. Dow Chemical Co*., 484 Mich. 483, 503 (2009). Thus, Michigan Courts rely on federal case law construing Fed. R. Civ. P. 23 in approving class action procedures under the Michigan Court Rules. See *Neal v. James*, 252 Mich. App. 12, 21 (2002) overruled on other grounds by *Henry v. Dow Chemical Co*., 484 Mich. 483 (2009). Plaintiffs therefore rely on similar provisions of federal law in this motion, where relevant.

The approval of class action settlements involves "a two-step process." *Crowhorn v. Nationwide Mut. Ins. Co*., 836 A2d 558, 562 (Del Supr, 2003).

> First, the court makes a preliminary evaluation of the fairness of the settlement after reviewing the proposed terms. If the Court concludes that there are no grounds to doubt the fairness of the settlement, the Court must order that class members be given notice of a formal Fairness Hearing, at which time class members will have an opportunity to make presentations in support of or in opposition to the proposed settlement. Following the Fairness Hearing, the Court makes specific findings regarding the fairness, adequacy and

> reasonableness of the settlement. Only if the Court finds that the settlement meets these requirements will the Court render final approval of the settlement. [*Id*.]

In this case, the Court gave preliminary approval to the settlement on January 20, 2023, and a final approval hearing is scheduled for January 29, 2024.

"[T]here is a presumption in favor of the settlement when there has been arm's length bargaining among the parties, sufficient discovery has taken place to enable class counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case, only a few members of the class object and their relative interest is small." *Crowhorn*, 836 A2d at 563. Even if the terms of a settlement agreement are not construed to be "ideal," approval should not be withheld if they are "fair and reasonable." *Jane Doe 30's Mother v. Bradley*, 64 A3d 379, 400 (Del Supr, 2012).

The review procedure to be undertaken by the trial court in the approval of a settlement agreement "requires the court to decide whether, in the exercise of its own business judgment and in light of the facts and circumstances presented, the proposed settlement is a fair and reasonable resolution to this litigation." *In re TD Banknorth*, 938 A2d 654, 657 (Del Ch, 2007). "Th[e] legal standard for approval of a class action settlement is well-established ... and embodies the notion that courts ... generally favor the voluntary resolution of legal disputes." *Id*. at 657 n 4 (citation omitted). Specifically, "an evaluation of whether a settlement is fair and reasonable requires balancing the strengths of the claims being compromised against the benefits the settlement provides to the class members. The settlement's proponents bear the burden of persuasion by a preponderance of the evidence." *Id*. (citations omitted). Ultimately, a "court fulfills its duty under [FR Civ P] 23 by exercising its sound business judgment in weighing and considering 'the nature of the claim, the possible defenses to it, [and] the legal and factual obstacles facing the plaintiff in the event of trial.'" *Marie Raymond Revocable Trust v. MAT Five LLC*, 980 A2d 388, 402 (Del

Ch, 2008), aff'd sub nom *Whitson v. Marie Raymond Revocable Trust*, 976 A2d 172 (Del Supr, 2009) (citation omitted).[3]

Courts use the following seven factors to evaluate class action settlements: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1093 (citing *UAW v. GMC*, 497 F.3d 615, 631 (6th Cir. 2007).

1. No Fraud or Collusion.

These seven factors all weigh in favor of final approval. First, with respect to the first factor concerning the risk of fraud or collusion, the parties were represented by experienced counsel with extensive experience in litigating class action lawsuits. The settlement agreement was achieved only after arms-length and good-faith negotiation between the parties, and was facilitated by an experienced neutral mediator, which reinforces the conclusion that the agreement is not collusive. *See In re Delphi Corp. Sec., Derivative & "ERISA" Litig*., 248 F.R.D. 483, 498 (E.D. Mich. 2008). As such, there is no indication of fraud or collusion.

2. Settlement is favored by concerns of complexity, expense, and likely duration of the litigation.

As the Court held in *In re Flint Water Cases,* 583 F. Supp. 3d 911, 945 (2022) "[c]lass actions are, in general, "inherently complex." This class action has woven its way to the Michigan Supreme Court twice. The rulings from the Supreme Court resolved significant and ground-

[3] The foregoing citations are drawn from the unpublished Opinion of the Court of Appeals in *Adelman v. Compuware Corp*., No. 333209, 2017 WL 6389899, at *3 (Mich. Ct. App. Dec. 14, 2017). While that decision is not binding precedent, it is persuasive because it sets forth the reasoning of the Court with respect to approval of class action settlements.

breaking legal questions, namely, whether plaintiffs may sue the State for money damages when the State violates the Michigan Constitution, and when a claim accrue for purposes of maintaining suit in the Michigan Court of Claims. Both legal questions are difficult and complex, as demonstrated by the fact that the Michigan Supreme Court decided both of them. Had either issue been decided against Plaintiffs, then the Class Members would stand to receive nothing. Even with these landmark rulings in place, if the Class Settlement had not been achieved, this case would have been litigated for many years, with discovery that would be costly to both Plaintiffs and the State, to an uncertain outcome. In contrast to protracted litigation, the settlement "provides substantial relief…promptly and efficiently and amplifies the benefits of that relief through the economies of class resolution." *Daoust v. Maru Rest., LLC*, Case No. 17-cv-13879 (E.D. Mich. July 3, 2019). "Therefore, the second [] factor weighs in favor of final approval." *Id*.

3. Discovery favors settlement.

Prior to settlement, the parties engaged in sufficient investigation and discovery to understand the nature of the dispute and the merits of the claims. The touchstone of the discovery factor is whether "the parties have sufficient information to make an informed decision about settlement," including both formal and informal discovery. *In re Mego Fin Corp Sec Litig*, 213 F.3d 454, 459 (9th Cir. 2000). Here, very early in the litigation, when the case was still pending in the Court of Claims, the Agency provided approximately 10,000 pages of documents pertaining to the issues raised in the Agency's motion to dismiss. Further, Plaintiffs relied extensively on publicly available information, including highly detailed reports from the State of Michigan Auditor General, to develop a thorough understanding of the Agency's use of the MiDAS to adjudicate unemployment fraud claims, and the extent to which MiDAS resulted in false

accusations of fraud, and wrongful collections.[4] Finally, beginning in July 2021, while the litigation was pending before the Michigan Supreme Court, the parties engaged the services of Megan Norris, an experienced and well-respected mediator. The Agency provided the mediator with substantial information from its databases including the potential class members with timely claims, the date of their timely collection activity, the amount of their losses, the manner in which the Agency collected payments from the identified class members, and the amount of Agency refund, if any. Thus, "all of aspects of the dispute are well-understood by both sides, and the parties have completed enough discovery to recommend settlement." *Daoust, supra* at 5-6.

4. The likelihood of success favors settlement.

Over the course of this litigation, Plaintiffs established timely claims against the Agency, and that the Agency could be held liable for damages based on the seizure of Plaintiffs' property. Plaintiffs have a likelihood of success on the merits. The total settlement amount of $20 million will provide full compensation for all registered class members for their economic loss, plus additional compensation for hardship claims. Thus, while success on the merits is likely, the settlement provides the same or better compensation as a judgment on the merits. "Litigation inherently involves risks." *Daoust, supra* at 6 (quoting *In re Painewebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y. 1997)). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id.* (citing *In re Ira Haupt & Co*., 304 F. Supp. 917, 934 (S.D.N.Y. 1969)). "Here, the fact-intensive nature of Plaintiffs' claims and Defendant's affirmative defenses present risk. The settlement eliminates this uncertainty." *Id*.

[4] *See, e.g.*, Office of the Auditor General Performance Audit Report: Michigan integrated Data Automated System (MiDAS), February 2016. Available at: https://www.audgen.michigan.gov/finalpdfs/15_16/r641059315.pdf (website last viewed 11/28/23).

5. The opinions of class counsel and class representatives support settlement.

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomms Coop*, 221 F.R.D. at 528. "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *Rodriguez v W Publ'g Corp*, 563 F.3d 948, 967 (9th Cir. 2009) (internal quotation marks and modifications omitted). As discussed in Plaintiffs' motion for preliminary approval (Exhibit 2), Class Counsel has extensive experience in civil rights and class action litigation, including such litigation involving the State of Michigan. Based on their professional experience and their understanding of the underlying facts and legal issues in the case, Plaintiffs' counsel unequivocally supports and recommends the proposed class settlement for final approval.

6. The reaction of absent class members favors settlement.

To-date, neither the Claims Administrator nor Class Counsel have received any notice of opt-outs or objections to the class settlement. Exhibit 12 – Register of Actions Reflecting No Opt Outs or Objections. "'The fact that the vast majority of class members neither objected nor opted out is a strong indication' of fairness." *Daoust, supra* at 7 (quoting *Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008); and citing *Willix v. Healthfirst, Inc*., No. 07 Civ. 1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011)). This factor weighs in favor of settlement.

7. The public interest favors settlement.

"There is an overriding public interest in favor of settlements in class-action lawsuits." *Brenner v. Marathon Oil Co*., 222 Mich. App. 128, 133–134; 565 N.W.2d 1 (1997) (citations omitted). The overriding public interest is so strong that "there is a strong presumption by courts

in favor of settlement." *In re Telectronics Pacing Sys., Inc*., 137 F. Supp. 2d 985, 1008 (S.D. Ohio 2001) ("Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement."); *see also Bautista v. Twin Lakes Farms, Inc*., 2007 WL 329162, at *5 (W.D. Mich. Jan. 31, 2007); *Robinson v. Ford Motor Co*., 2005 WL 5253339, at *4 (S.D. Ohio, June 15, 2005). The settlement in this case secures a substantial recovery that can efficiently resolve outstanding litigation between the State of Michigan and more than 8,100 former UIA claimants. The overriding public interest favors final approval of the settlement.

B. The Class Notice and Class Notification Plan Fairly and Adequately advised Class Members of the terms of the settlement, as well as the right of Class Members to exclude themselves from the Class, and to object to the settlement, and to appear at the fairness hearing.

As set forth above, Class Members received notice through hard copy mailing via U.S. mail, emails, phone calls and text messages based on last known contact information as well as skip-tracing. Notice was disseminated through advertisement, online and print media, and through social media. After the Court approved the Amended Notice in July 2023, additional claims analysts were hired to reach out directly registered class members. In the January 20, 2023 Order Granting Preliminary Approval, the Court concluded that the notice and notification plan comported with all constitutional requirements, including due process. The successful distribution of the notice and execution of the notification plan demonstrates that Class Members were provided the best practicable notice under the circumstances.

C. Award of Fees and Costs to Class Counsel and Service Awards to Class Representatives.

1. Attorney Fees.

As set forth in Plaintiffs' motion for preliminary approval (Ex. 2), Class Counsel achieved a $20 million settlement of this complex and long-standing dispute. Plaintiffs' Counsel filed this

action more than seven years ago and have successfully shepherded it twice to the Michigan Supreme Court; achieving groundbreaking rulings on the contours of Constitutional torts and the rule for accrual under the Michigan Court of Claims Act. The settlement will provide a program to compensate nearly 8200 Michiganders who were wrongfully accused of fraud in connection with their receipt of unemployment benefits and who had money seized by the Agency without due process.

For more than seven years, Plaintiffs' Counsel worked without compensation of any kind. Plaintiffs' counsel has invested and will continue to invest substantial time and resources into implementing this settlement. It is well established that counsel who performs common benefit work resulting in recovery of a common fund are entitled to compensation for those services from the fund. The U.S. Supreme Court held in *Boeing Co. v Van Gemert*, 444 U.S. 472, 478 (1980):

> [T]his Court has recognized consistently that a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole…The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent…inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.

Michigan Courts have recognized that the "common-fund exception provides for an award of attorney fees to a party that, alone, has borne the expenses of litigation that created or protected a common fund for the benefit of others as well as itself." *In re Attorney Fees of Kelman, Loria, Downing, Schneider & Simpson*, 406 Mich. 497, 503-504 (1979); *Amerisure Ins. Co. v Folts*, 181 Mich. App. 288, 291 (1989). Here, the Class Settlement is a classic example of a common fund case, "where the named Plaintiffs have created a common fund by securing a recovery for themselves and the class they represent." *N.Y. State Tchrs.' Ret. Sys*. 315 F.R.D. at 242 (quoting *In re DPL Inc., Sec. Litig*., 307 F. Supp. 2d 947, 949 (S.D. Ohio 2004). The Bauserman Plaintiffs

have created a common fund by securing a $20 million recovery not just for themselves, but for the class that they represent. Class Counsel should be compensated for the results that they achieved and the risk and expense that they have borne. Plaintiffs' Counsel's request for a fee award of $6.6 million or one-third of the settlement is reasonable under the circumstances.

Courts approve of awarding fees from a common fund based on the percentage-of-the-fund method. *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class"); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) ("Indeed, every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis."). The Sixth Circuit has observed a 'trend towards adoption of a percentage of the fund method in [common fund] cases. *N.Y. State Tchrs.' Ret Sys*., 315 F.R.D. at 245 (quoting *Rawlings*, 9 F.3d at 515). A percentage-of-the-fund approach fosters judicial economy by eliminating a detailed, cumbersome, and time-consuming lodestar analysis. *Rawlings*, 9 F.3d at 516-17; *N.Y. State Tchrs.' Ret. Sys*., 315 F.R.D. at 243; *Stanley v U.S. Steel Co*., 2009 WL 4646647 at *1 (E.D. Mich) (Use of the percentage method also decreases the burden imposed on the Court by eliminating a full-blown, detailed and time-consuming lodestar analysis while assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement); *In re Cardizem CD*, 218 F.R.D. at 532. In addition to the attorney fee, "[e]xpense awards are customary when litigants have created a common settlement fund for the benefit of a class." *In re Delphi*, 248 F.R.D. 483, 504 (E.D. Mich. 2008).

The Sixth Circuit has approved both the "lodestar" and common fund method of payment of attorney fees. *Rawlings v. Prudential–Bache Properties, Inc.*, 9 F.3d 513, 517 (6th Cir.1993).

Here, in addition to the amounts payable to the Class, Plaintiffs' counsel will receive attorneys' fees/costs related to their representation of the Plaintiffs in this action.

Consistent with Sixth Circuit authority, courts within the Sixth Circuit and throughout the country, have agreed that it is appropriate for class counsel to receive their attorneys' fees as a percentage of the common fund, when such fund is created due to their efforts. *See, Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) ("The percentage of the fund method has a number of advantages: it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation."); *Dillworth v. Case Farms Processing, Inc.*, 2010 WL 776933, at *8 (N.D. Ohio Mar. 8, 2010) ("The amount of the contingency, one-third of the total award, is also reasonable and has been approved in similar FLSA collective actions") (collecting cases); *see also Stahl v. Mastec, Inc.*, 2008 WL 2267469, at *1 (M.D. Fla. May 20, 2008)("attorneys who create a common fund are entitled to be compensated for their efforts from a reasonable percentage of that fund."), *citing Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.").

Consistent with this approach, courts throughout the Sixth Circuit have repeatedly held that 1/3 of a common fund is presumptively reasonable when a case is resolved with the creation of a common fund. *See, e.g., In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, at *1 (E.D. Tenn. June 30, 2014) ("The Court finds that the requested counsel fee of one third is fair and reasonable and fully justified. The Court finds it is within the range of fees ordinarily awarded."); *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *29 (M.D. Tenn., Aug. 11, 1999). Indeed, throughout the Sixth Circuit, attorneys' fees in class/collective actions have ranged from

20%–50%. *See, e.g., In re Cincinnati Microwave Inc. Sec. Litig.*, Consolidated Master File No. C–1–95–905, Order and Final Judgment (W.D. Ohio, Mar. 21, 1997) (awarding 30%); *Adams v. Standard Knitting Mills, Inc.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,377 (E.D. Tenn. Jan. 6, 1978) (35.8% award).

In addition to the foregoing authority, case law from throughout the country supports the payment of attorneys' fees as a percentage of the total common fund. *See, Prasker v. Asia Five Eight LLC, et. al, 2010 WL 476009*, at *6 (S.D.N.Y. Jan. 6, 2010) (stating that "[i]n wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award" and awarding an attorney fee payment of $346,500 out of the common fund of $1,050,000 (33%)); *Duchesne v. Michael Cetta, Inc.*, 2009 WL 5841175, at *3 (S.D.N.Y. Sept. 10, 2009) (approving attorney fees of $1,015,000 out of a common fund of $3,150,000, or 32.2%, and stating that the "percentage of recovery" method is consistent with the trend in the Second Circuit); *Faltaous v. Johnson and Johnson, et. al.*, 2007 WL 3256833, at *10 (D.N.J. Nov. 5, 2007) ("attorneys' fees of approximately 30 percent of the common fund are also regularly awarded in labor and employment law class actions.") (internal citations omitted); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 WL 5851465, at *5 (S.D.N.Y., March 31, 2009) (awarding 33% of common fund of $3,265,000.00 as attorneys' fees); *Stahl*, 2008 WL 2267469, at *2 (M.D. Fla. 2008) (approving attorney fees of $3,744,500.00 out of a common fund of $13,137,365.00); *Reyes v. Buddha-Bar NYC*, 2009 WL 5841177 (S.D.N.Y., May 28, 2009) (awarding attorneys' fees of 33 1/3% from common fund of $710,000.00); *Noell v. Suncruz Casinos*, 2009 WL 541329, at *1 (M.D. Fla., March 4, 2009); *Moultry v. Cemex, Inc.*, 8:07-cv-453-T-MSS (M.D. Fla., August 20, 2008) (awarding 32.25% of the common fund as attorneys' fees); *Kimmel, et al. v. Venture*

Construction Co., Case No. 1:10- cv-01388-RLV-WEJ, Docs. 69, 70 (N.D. Ga. Nov. 4, 2010) (approving common fund class settlement on behalf of class of construction superintendents).

"[O]ne purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring competent counsel continue to be willing to undertake risky, complex, and novel litigation." Manual for Complex Litigation, 4th § 14.121. As the Eleventh Circuit has recognized, "from the beginning and throughout the case, expertise in negotiations and tactics often advances a client's cause more quickly and effectively than the sustained and methodical trench warfare of the classical litigation model." *Norman v. The Housing Authority of the City of Montgomery*, 836 F.2d 1292, 1300 (11th Cir. 1988). "Where relatively small claims can only be prosecuted through aggregate litigation, 'private attorneys general' play an important role." *Daoust, supra* at 13 (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980)). "Attorneys who fill the private attorney general role must be adequately compensated for their efforts." *Id*. Otherwise, legal abuses would go without remedy because attorneys would be unwilling to take the required risks. *Id.* (citing *Goldberger v. Integrated Res Inc*, 209 F.3d 43, 51 (2d Cir. 2000)).

Here, Plaintiffs' Counsel's efforts over the past seven years have resulted in the creation of a common fund of $20 million. Plaintiffs' Counsel requests that this Court calculate the attorney fee as a straightforward one-third percentage of the fund fee and award Plaintiffs their out-of-pocket expenses incurred in prosecuting this claim. This equitable fee calculation eliminates the need for a complex, burdensome, and time-consuming lodestar analysis. Class counsel's request for one-third of the common fund to pay their fees is reasonable and consistent within the standards of class litigation set forth above. The Court should award Class Counsel the requested one-third

fee to be paid from the settlement fund, along with reimbursed costs to be paid from the settlement fund.

2. Calculation of the fee.

On September 27, 2022, Plaintiffs secured a settlement of $20 million from the Agency. As of December 2, 2022, Plaintiffs' Counsel have expended $38,664.36 in costs to prosecute the claim. Plaintiffs will likely incur some additional costs between now and the Final Fairness Hearing. The total costs, including costs incurred as of December 1, 2023, plus expected additional costs prior to the Fairness Hearing, will not exceed the $500,000 set aside that was approved by the Court when it granted the Motion for Preliminary Approval. Unused portions of the set aside will flow back to the fund used to compensate claimants.

The following formula illustrates how the attorney fee should be calculated. If the final attorney award were calculated as of the date of the filing of this motion, it would be calculated as follows:

$20,000,000 (gross recovery) - $87,174.99 (actual costs as of the date of fairness hearing) =

$19,912,825.01 (net recovery) ÷ 1/3 =

$6,637,608.33 (attorney fee).

This amount is likely to change slightly, as additional costs will be incurred, and additional interest will accrue, between the date of the filing of this motion and entry of the entry of the final order. Plaintiffs request an award from this Court authorizing an attorney fee, to be calculated under this formula, along with reimbursement of out-of-pocket costs as of the date of the Fairness Hearing.

3. Service Awards for Class Representatives.

As Class Representatives, Plaintiffs Bauserman and Broe should receive service awards in the amount of $15,000 each. This amount reflects the time and effort Plaintiffs expended in bringing and assisting in this litigation. The amount of the incentive awards is aligned with and proportional to the recovery for the Class Members, and therefore the Court can rest assured that the interests of the Class Representatives, including their interest in receiving a service award, is fully aligned with the interests of the other Class Members. Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs. *See, Sewell v. Bovis Lend Lease, Inc.*, No. 09 CIV. 6548 RLE, 2012 WL 1320124 at * 14-15 (S.D.N.Y., Apr. 16, 2012); *Reyes v. Altamarea Grp., LLC*, No. 10-CV-6451 RLE, 2011 WL 4599822 at *9 (S.D.N.Y., Aug. 16, 2011); *Willix*, 2011 WL 754862, at *7.

D. The Settlement Agreement Should Be Updated to Reflect the Actual Administrative Costs and Interest.

The parties have recalculated certain figures in the settlement agreement as a result of the actual costs of administration, which were $87,174.99. In addition, the State of Michigan transferred the settlement funds to Class Counsel in late 2022, following the execution of the settlement agreement. Since that time, the funds have been deposited with Huntington Bank and earning interest. The interest earned to date is $906,162.33.

The Court should approve the distribution of interest to the class and class counsel. Interest should be calculated to January 29, 2024. Forty-percent of that amount should be held back for taxes. Thirty-three percent of the net interest, after taxes, should be awarded to Class Counsel. The

remaining sixty-seven percent of the net interest, after taxes, should be distributed equally among all registered class members and added to their economic awards.

The settlement funds will also continue to accrue interest after January 29, 2024, until they are distributed as payments to registered class members. All interest that accrues from January 30, 2023, until the time the account is closed should be transferred to the State Bar Foundation as a *cy pres* award.

In the event that registered class members do not cash their settlement checks, those payments should be cancelled after 120 days, and the amount of money attributable to uncashed checks should also be transferred to the State Bar Foundation as a *cy pres* award.

The Court should therefore order that the allocation of payments set forth in the settlement agreement and plan of allocation be updated as follows:

E. Confirmation and Appointment of Claims Administrator and Special Master.

The Court-approved claims administrator, Analytics Consulting has fulfilled its duties under the Settlement Agreement by administering the Class Notice and Notification Plan, as described in detail in the Declaration of Lisa Simmons. Exhibit 8 Declaration of Lisa Simmons on behalf of Analytics Consulting, LLC. The Court should therefore confirm its appointment of Analytics Consulting to serve as the Settlement Administrator and find that Analytics Consulting has fulfilled its duties under the Settlement. The Court should further order that the Claims Administrator be paid in accordance with the Settlement Agreement.

The Court-Approved Special Master, Megan Norris, has fulfilled her duties under the Settlement Agreement, as set forth in the Affidavit of Megan P. Norris. Exhibit 11 - Affidavit of Megan P. Norris. The Court should confirm its appointment of Megan Norris to serve as Special Master, finding that she has fulfilled her duties under the Settlement, particularly with respect to

the evaluation and determination of appeals of Hardship Awards. The Court should also order that the Special Master be paid in accordance with the Settlement Agreement.

F. Waiver and Release/Post-Distribution Report.

As part of the Final Judgment, class members who receive payments will be required to sign a waiver and release of claims in order to be paid. Exhibit 10 – Joint Proposed Waiver and Release Agreement. Plaintiffs request the Court approve the waiver and release as part of the Final Judgment.

The Court should include a provision in the Final Judgment that known class members who have not opted-out and who have not made a claim as part of the Class Settlement will be barred from bringing future claims by operation of law.

The Final Judgment should further provide that Class Counsel will file a post-distribution accounting report, providing as follows:

Within 42 days after the settlement checks become stale (or, if no checks are issued, all funds have been paid to class members, *cy pres* beneficiaries, and others pursuant to the settlement agreement), the parties will file a Post-Distribution Accounting (and post it on the settlement website), which provides the following information:

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average, median, maximum, and minimum recovery per claimant, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each *cy pres* recipient, the administrative costs, and the attorneys' fees and costs.

b. Counsel will summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

c. The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' motion for preliminary approval and in the exhibits submitted with this motion, the Court should grant Plaintiffs' motion for final approval, and enter the Order Granting Final Approval and Entering Final Judgment. A copy of a proposed Order and Final Judgment is submitted with this motion as Exhibit 9.

Respectfully submitted,

PITT, MCGEHEE, PALMER & RIVERS, P.C.

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Dated: December 1, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 1, 2023 she served counsel of record with the foregoing document via the Court's MiFile e-filing system.

/s/ Julie Nardone
Julie Nardone
Legal Assistant
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