TESTIMONY OF SUSAN DOLLINGER
DIRECTOR – UNCLAIMED PROPERTY
North Dakota Department of Trust Lands

House Bill 1360
Senate Judiciary Committee
March 29, 2023

Madam Chair Larson, and members of the Senate Judiciary Committee, for the record, my name is Susan Dollinger. I am the Director of the Unclaimed Property Division of the North Dakota Department of Trust Lands, and I am here to testify in support of House Bill 1360.

As most of you will recall, during the 67th Legislative Assembly, Senate Bill 2048 was passed which resulted in the complete repeal of N.D.C.C. ch. 47-30.1 and replacement with N.D.C.C. ch. 47-30.2 or RUUPA (Revised Uniform Unclaimed Property Act).

While the primary goal of the Unclaimed Property Program has always been, and will continue to be, the return of property to its rightful owner/heir, the division is also tasked with holder (business) reporting compliance. We must ensure that businesses and other entities are fulfilling their obligation of reporting unclaimed property to the Division so we can locate missing owners to return their funds.

There are several key terms in the Unclaimed Property industry that are important to understand as we discuss what HB1360 does. First, the term "holder" is a person (usually a business) obligated under RUUPA to hold for the account of, or deliver or pay to, the owner of property that is subject to Unclaimed Property Laws. Second, the term "owner" is a person, or their legal representative, who has a legal or equitable interest in said property. The term includes a depositor in the case of a deposit, a beneficiary in the case of a trust, a creditor, claimant, or payee in the case of other property types.

"Dormancy period" refers to a specified amount of time that a holder retains custody of the property before it is considered unclaimed or abandoned under RUUPA. Once the dormancy period has passed and the holder is unable to locate an owner, the holder is required to turn the property over to the State. Where it appears that a holder may not be in full compliance with RUUPA, the Division may examine the holder's books and records to determine compliance with the law. Compliance is a vital part of every state's unclaimed property program, because if a holder fails to report property to the Division, that property cannot be reunited with its rightful owner.

Over time, unclaimed property programs across the country have seen a considerable increase in businesses failing to comply with examination requirements in a timely fashion. As a result of this, we are seeking to amend N.D.C.C. ch. 47-30.2.

The Bill before you contains two Sections. Section 1 tolls the holder record retention period from the date the holder is notified of an examination. This section also clarifies what records must be retained as outlined in N.D.C.C. § 47-30.2-24. Without records available for examination, determining compliance with existing law is impossible.

Section 2 increases the statute of limitations for holders who have filed a report from five years to seven, with all statutes of limitations being tolled by the delivery of a holder examination notice.

Each of these amendments are needed to close loopholes that have been increasingly exploited by some holders of unclaimed property. We have seen instances of holders (businesses) failing to comply with examination requests and then destroying records as their legal retention period continues to run.

In a perfect world, an unclaimed property examination would reach its conclusion in 2-3 years. However, we have seen holders attempt to drag out examinations 7, 8, or even 10 years. When this happens, businesses could potentially remove thousands of dollars of unclaimed property liability which ultimately permits those businesses to keep the property rather than return it to rightful owners of North Dakota. Extending the statute of limitations would give North Dakotans another tool to encourage compliance and additional time to distinguish between an examination that has simply stalled and bad actors.

In the attached documentation, you will see an example of what I am referring to. In March 2014, North Dakota joined a multi-state examination along with 15 other States of the Walt Disney Company and received considerable resistance. So much so that this examination has still not reached a conclusion. The Walt Disney Company brought legal action against the Treasurer of Michigan stating the lookback period fell outside of Michigan's statute of limitations.

This sort of resistance has become the "norm" when participating in multi-state examinations. Tolling the records retention and the statute of limitations periods would protect North Dakota from becoming directly involved in legal disputes such as what Michigan is facing. I also believe that if North Dakota makes this change, we will see many other states follow our lead.

Madam Chair and members of the committee, thank you for your time today. I would respectfully request a Do Pass vote on HB 1360 and would stand for any questions you may have.

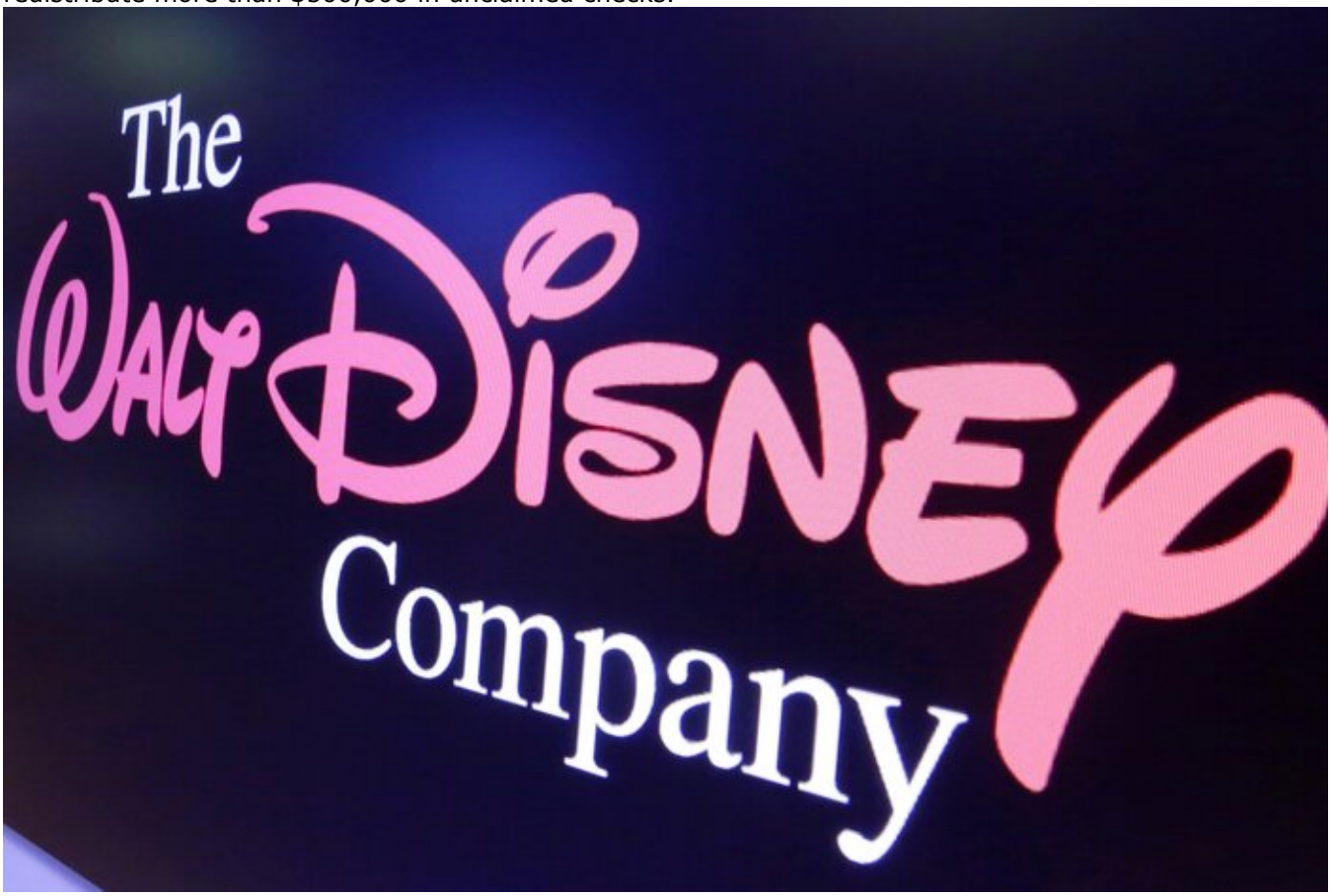
LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Disney Says 'No Justification' For Mich. Audit Delay

By **Danielle Ferguson**

Law360 (January 11, 2023, 6:57 PM EST) -- A Michigan appellate judge on Wednesday pressed the state treasurer to explain why an audit into Walt Disney Co.'s compliance with claimed property laws took more than eight years, a delay that gave Disney an opportunity to challenge the state's plan to make it redistribute more than $500,000 in unclaimed checks.



An attorney representing Disney told a Michigan appellate panel Wednesday there was "no justification" for the state treasurer to take more than eight years to complete an audit into the company's compliance with claimed property laws. (AP Photo/Richard Drew)

Michigan is appealing a circuit court decision siding with Disney that said the state treasurer cannot force the media giant to turn over $532,000 in uncashed Michigan-address checks from as far back as 2002 because the action fell outside the state's 10-year statute of limitations under its unclaimed property act.

The Michigan treasurer notified Disney in 2013 it was going to conduct an unclaimed property examination of Disney's books. The state retained third party Kelmar Associates, which was conducting an audit of Disney on behalf of 15 other states. But Kelmar Associates didn't complete the audit until 2020, sending Disney a list of 337 uncashed Michigan-address checks.

Assistant Attorney General James A. Ziehmer told the panel Wednesday that he didn't know of any allegations of bad faith in the delay. He said the examination included multiple other states and that Michigan wasn't leading the investigation.

"I'm not seeing that as a valid explanation of why it took so long," Michigan Court of Appeals Judge

Kathleen Jansen said.

"You can't say, 'I'm examining this for 20 years,'" she added in a later exchange with Disney counsel.

Ethan Millar of Alston & Bird LLP, representing Disney, told the panel there was "no justification" for the state treasurer to take more than eight years to complete the examination of Disney's records on top of waiting more than 10 years to begin the examination in the first place.

Michigan law says the treasurer cannot bring an unclaimed property "action or proceeding" more than 10 years after the duty of a property holder arose or more than five years for transactions between two or more commercial entities.

An Oakland County Circuit Court judge ruled last January that the treasurer could not compel Disney to report and repay the money the treasurer's examination found in uncashed paychecks to Michigan workers and uncashed checks to vendors and government agencies from 2002 to 2014.

Millar said Wednesday the state treasurer is "distorting" the meaning of a statute of limitations. No enforcement action was filed within the 10-year statute of limitations, Millar told the panel.

Judge Jansen asked if the state launching the audit would count as an action. Millar said audits are referred to as "examinations" in the statute, rather than an action.

The state has said the circuit court misinterpreted "action or proceeding" language in the Uniform Unclaimed Property Act. The circuit court's interpretation means the administrative process is "meaningless" because it would require the state treasurer to initiate a lawsuit to enforce unclaimed property, despite the act giving the state treasurer the authority to do an examination without court involvement, the state treasurer said.

The state argued that when the treasurer begins an examination within the statute of limitations, any findings of that audit are within the limitation period.

Disney argued that a claim for amounts found in an audit is a separate action or proceeding than the actual audit.

Judge Christopher P. Yates asked Ziehmer what he would do with Disney's reasoning, saying he likely "can't get away from" Disney's argument.

Ziehmer said if the circuit court ruling stands, it would require the state treasurer to bring a lawsuit for every examination, which would create needless litigation.

The same issue was at the center of Dine Brands Global Inc. v. Rachael Eubanks, which was also on the appeal panel's docket Wednesday. In Dine Brands, the treasurer found $243,000 of unclaimed payroll and accounts payable checks. The Oakland County Circuit Court also entered a judgment in favor of Dine Brands for the same reasons concerning the statute of limitations. The attorneys — the same in both cases — had no further argument for that case.

Walt Disney Company is represented by Ethan D. Millar of Alston & Bird LLP and Jill M. Wheaton and Nasseem S. Ramin of Dykema Gossett PLLC.

Dine Brands Global is represented by Ethan D. Millar of Alston & Bird LLP and Lynn A. Gandhi of Foley & Lardner LLP.

Michigan Treasurer Rachael Eubanks is represented by James A. Ziehmer of the Michigan Department of Attorney General Revenue and Tax Division.

The cases are The Walt Disney Co. v. Rachael Eubanks, case number 360291, and Dine Brands Global Inc. v. Rachael Eubanks, case number 360293, in the Michigan Court of Appeals.

--Editing by Marygrace Anderson.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE WALT DISNEY COMPANY

Plaintiff-Appellee,

v

RACHAEL EUBANKS, in her capacity as **THE STATE TREASURER FOR THE STATE OF MICHIGAN**

Defendant-Appellant,

Court of Appeals No. 360291

Oakland County Circuit Court
No. 2021-189464-CZ

MOTION OF AMICUS CURIAE NATIONAL ASSOCIATION OF STATE TREASURES THROUGH ITS AFFILIATE NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Amicus Curiae National Association of State Treasures through its affiliate the National Association of Unclaimed Property Administrators ("NAUPA") respectfully moves this Court pursuant to MCR 7.312(H) and MCR 7.316, for leave to file an amicus curiae brief in the above captioned case.

In support of its Motion, NAUPA states:

1. NAUPA is a non profit organization that is an affiliate network of the National Association of State Treasurers, Inc. NAUPA's membership consists of the unclaimed property administrators representing all states, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands and other international governmental entities (collectively "states").

2. NAUPA seeks to promote and strengthen unclaimed property administration and interstate cooperation in order to enhance the states' return of unclaimed property to rightful owners.

3. The issues presented in this appeal concern whether the statute of limitations under the Michigan Uniform Unclaimed Property Act (the "UUPA"), MCL 567.221, et seq., MCL 567.250(2) continues to run after the state has commenced an "examination" or "audit" of a holder pursuant to MCL 567.251(2).

4. The Oakland County Circuit Court has, when reviewing MCL 562.250(2) interpreted the term "action or proceeding" to mean an action filed in court, this interpretation of MCL 562.250(2), will result in holders being able to limit the scope of their unclaimed property liability based upon their own conduct during an audit. Under this interpretation, the only option available to the states to prevent them from losing the ability to enforce their unclaimed property laws will be to preemptively file an action in court at the earliest possible opportunity, even before an examination has been completed, and in some cases, contemporaneous with audit commencement.

5. The issues presented in this appeal are important to NAUPA and its members, as they concern the amount of time that states have to enforce their respective unclaimed property laws. The outcome of this case impacts the administration of unclaimed property laws not only in Michigan, but potentially in other NAUPA member states as well.

6. NAUPA has previously participated as *amicus curiae* in a number of cases in other states involving the interpretation and application of unclaimed property laws.

7. Should the Court grant this motion, NAUPA intends to address in its brief why the Court should reverse the ruling issued by the circuit court and issue an order in favor of Appellant.

8. NAUPA served as an advisor to the drafting committee of the Uniform Unclaimed Property Act (1981) (the "1981 Act"), adopted by the Uniform Law Commission, which contains the statute of limitations provision upon which MCL 567.250(2) is based. NAUPA believes that it can assist the Court in understanding the structure, wording, and intent of this provision. NAUPA also believes that it can assist the Court in understanding the practical impact that the outcome of this case can have on the unclaimed property examination process, and why finding that the statute of limitations ceases to run against the state upon the commencement of an examination is consistent with both the 1981 Act and the UUPA.

9. NAUPA believes that it can assist the Court in understanding the scope of the problem that the Circuit Court's interpretation of the statutory language would cause to states trying to protect individuals' recover property and the decision is inconsistent with the historic purposes of the unclaimed property laws.

10. A copy of the NAUP's proposed amicus brief is attached to this motion. Attachment 1.

11. Counsel for Defendant-Appellant Eubanks, has no objection to the filing of an amicus brief.

WHEREFORE, the undersigned respectfully requests that the Court grant its motion for leave

to file a brief as *amicus curiae* in support of Defendant-Appellant's position in this matter.

Respectfully submitted,

Fraleigh Law Firm, PLLC

By _____
Michael J. Fraleigh (P36615)
Attorney for Amicus Curiae National Association of State Treasures through its affiliate the National Association of Unclaimed Property Administrators

(517) 575-0500

Dated: June 27, 2022

National Association of State Treasurers

By:_ _____
Shaun Snyder, Pending Admission Pro Hac Vice
1201 Pennsylvania Avenue, NW Suite 800
Washington, DC 20004

(202.) 630-0810

Dated: June 27, 2022

ATTACHMENT 1

ATTACHMENT 1

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THE WALT DISNEY COMPANY

Plaintiff-Appellee,

v

RACHAEL EUBANKS, in her capacity as **THE STATE TREASURER FOR THE STATE OF MICHIGAN**

Defendant-Appellant,

Court of Appeals No. 360291

Oakland County Circuit Court
No. 2021-189464-CZ

PROPOSED

AMICUS CURIAE BRIEF FOR NATIONAL ASSOCIATION OF STATE TREASURES THROUGH ITS AFFILIATE THE NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS

Fraleigh Law Firm, PLLC
By: Michael J. Fraleigh (P36615)
Attorney for Amicus Curiae National Association of State Treasures through its affiliate the National Association of Unclaimed Property Administrators
6200 Pine Hollow Dr., Suite 200
East Lansing, MI 48823

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF QUESTIONS PRESENTED

1. The State Treasurer has the statutory right to examine books and records and determine compliance. Holders of property meeting the statutory definition must remit property to Treasury. The statute of limitations to enforce that obligation does not continue to run while the examination is underway. Did the circuit court err in ruling that the statute of limitations continued to run through an audit?

Appellant's answer: Yes

Appellee's answer: No

Amicus Curiae's answer: Yes

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The issue presented in the matter sub judice concerns whether the statute of limitations under the Michigan Uniform Unclaimed Property Act ("UUPA"), MCL 567.221, et seq., MCL 567.250(2) continues to run after the State Treasurer has commenced an "examination" or "audit" of a holder pursuant to MCL 567.251(2). The Amicus submitting this brief, the National Association of Unclaimed Property Administrators ("NAUPA"), has a significant interest in the nationwide administration of state unclaimed property laws, including the continued ability of its member states and unclaimed property administrators to effectively enforce the reporting requirements of their respective unclaimed property laws, which is implicated by this appeal.

NAUPA is a network of the National Association of State Treasurers, Inc. NAUPA's membership consists of the unclaimed property administrators representing all states, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands and other international governmental entities. NAUPA seeks to promote and strengthen unclaimed property administration and interstate cooperation in order to enhance the states' return of unclaimed property to rightful owners and provide a forum for the open exchange of information and ideas. NAUPA's member states continually strive to increase the amount of unclaimed property they are able to reunite with its rightful owners, returning in excess of $3 billion dollars every year to owners, with billions more being returned by companies in possession of unclaimed property (known as "holders") through their compliance with mandated pre-reporting owner notification requirements of the unclaimed property laws.[1] In many cases, the return of unclaimed property to

[1] Such reporting requirements include holders sending a notice to the last known address of the owner prior to the transfer of the custody of unclaimed property to the state, so as to allow the owner to reassert control over the asset and rebut a presumption of abandonment.

its owner can meaningfully impact that individual's life. The issues presented in this case are important to NAUPA and its members since they affect the enforcement of unclaimed property laws both in Michigan and potentially in other states.

In this regard, unclaimed property examinations play a vital role in ensuring that holders comply with the unclaimed property laws. At the same time, however, most state have extremely small staffs and auditing departments. Moreover, unclaimed property administrators cannot obtain access to the type of information that would enable them to readily and systematically determine apparent non-compliance of holders on an annual basis. For example, unlike the Internal Revenue Service and other taxing authorities, which receive various mandatory filings (e.g., W-2s, 1099s, business and income tax filings, etc.) on a quarterly or annual basis that they are able to review to identify possible under-reporting of tax liabilities, unclaimed property administrators do not have access to this information and they do not receive similar types of regulatory data submissions that can be used to assess holders' potential unclaimed property liabilities. Further complicating these difficulties, holders of unclaimed property often are large national or multi-national companies with numerous subsidiaries located far from the states to which the property is due.

The Uniform Law Commission (the "ULC") was well-aware of these enforcement limitations when it drafted the Uniform Unclaimed Property Act (1981) (the "1981 Act"), which added the 10-year limitation period, upon which MCL 567.251(2) is based, that is at issue in this case. Indeed, the ULC has recognized the constraints on states' enforcement abilities on multiple occasions. For example, in its comments to the 1981 Act, the ULC acknowledged that states have found obtaining compliance with the unclaimed property laws to be extremely difficult, and that

the enforcement provisions of previous uniform unclaimed property laws adopted by the ULC were inadequate. *See* 1981 Act, Commissioner's Prefatory Note. The ULC also acknowledged that conducting audits is very expensive and burdensome for the states, and that holders often rely on this in failing to report. *See* 1981 Act, §33, Comment. Additionally, in its comments to the corresponding statute of limitations provision applicable to state enforcement efforts contained in the Uniform Unclaimed Property Act (1995) (the "1995 Act"), the ULC expressly observed that "the Unclaimed Property Act is based on a theory of truthful self-reporting." 1995 Act, § 19 (b), Comment.

It is in this context of under-reporting and compliance challenges that the ULC included a statute of limitations applicable to state enforcement efforts to the 1981 Act. A number of states, including Michigan, have enacted a version of this provision since it was adopted by the ULC over 40 years ago. Yet, the circuit court's opinion is the first that NAUPA is aware of to hold that the statute of limitations continues to run against the state even after it has identified possible non-compliance and properly initiated an examination of a holder. NAUPA has grave concerns that, if this ruling is allowed to stand, it will be unreasonably and unnecessarily used to undermine the ability of states to enforce their unclaimed property laws, encourage noncompliance by holders with these laws, result in needless litigation, and ultimately deprive citizens of assets that are rightly theirs. NAUPA therefore intercedes in this action as Amicus in order to assist the Court in understanding the intended purpose and operation of the statute of limitations contained in the 1981 Act, and incorporated by the Michigan Legislature as part of the UUPA, as well as the practical impact the circuit court's opinion would have on the administration and enforcement of Michigan's unclaimed property laws, as well as potentially for the courts in this State.

II. INTRODUCTION

This case focuses on the question of what constitutes an "action or proceeding" that will stop the statute of limitations from running against the state under MCL 562.250(2). As explained in the State Treasurer's brief, this term is intended to be broadly construed and, under the UUPA, includes a timely commenced examination that results in findings that may be challenged by the holder in court. For the reasons further explained by the State Treasurer, the circuit court's opinion that an "action or proceeding" is limited to an action filed in court is contrary to applicable Michigan law. NAUPA respectfully submits that consideration of the 1981 Act, upon which MCL 562.250(2) is based, as well as the practical implications of allowing the statute of limitations to continue to run after an examination has been commenced, support the State Treasurer's position that the circuit court's opinion should be overruled.

In this regard, an examination is the mechanism specifically provided for by the 1981 Act for states to determine a holder's compliance with their unclaimed property laws. Indeed, examinations are the primary method by which states enforce the duty of holders to report unclaimed property, while actions in court are extremely rare. Moreover, courts have expressly held that an examination (audit) constitutes an administrative proceeding under a state's unclaimed property laws.[2] Based on the wording, structure, and intent of the 1981 Act, it is clear that the term "action or proceeding" in § 29(b) of the Act should be interpreted to include an examination, and the commencement of an examination stops the statute of limitations from running against the state.

---

[2] The UUPA, like other unclaimed property laws, uses the terms "examination" and "audit" interchangeably. *See, e.g.*, MCL 567.251(4) (referring to both an "examination" and an "audit" within the same section).

Moreover, the UUPA expressly provides that the State Treasurer does not need to bring a court action in order to enforce the findings made during an examination. Instead, under MCL 567.251a, the burden is on the holder to bring a court action challenging any of the state's examination determinations. This provision, which is not included in the 1981 Act and further highlights the primacy of examinations as the state's principal enforcement mechanism, eliminates any doubt that the term "action or proceeding" is intended to include an examination.

Finally, interpreting the term "action or proceeding" to mean an action filed in court, as the circuit court did, would result in holders being able to limit the scope of their unclaimed property liability based upon their own conduct during an audit. Under this interpretation, the only option available to the state to prevent it from losing the ability to enforce its unclaimed property laws would be to preemptively file an action in court at the earliest possible opportunity, even before an examination has been completed, and in some cases, contemporaneous with audit commencement.[3] Such a result should be rejected as it would both discourage holders from cooperating during the examination process and encourage needless litigation.

III. ARGUMENT

A. The circuit court's opinion that the statute of limitations continues to run until the State Treasurer commences an action in court is contrary to § 29(b) of the 1981 Act, upon which MCL 562.250(2) is based

As the circuit court noted, MCL 562.250(2) is based on § 29(b) of the 1981 Act, both of which state that "no action or proceeding" may be commenced "by the administrator with respect

[3] Where the State faced the potential of becoming unable to recover material sums because of an impending time-bar, it would thus be compelled to file suit, even where its facts and cause of action were not fully developed. This is not the optimal use of the courts; however, this outcome can be anticipated if the circuit court's interpretation is upheld. *See* further discussion at p. 14.

to any duty of a holder" more than 10 years "after the duty arose."[4] Notwithstanding the broad and unrestricted nature of the phrase "action or proceeding," the circuit court held that the only way for the State Treasurer to stop the statute of limitations from running is to file an action in court pursuant to MCL 567.253 (which is based on § 32 of the 1981 Act). As described further below, the circuit court's decision is contrary to both the letter and intent of the 1981 Act.

As an initial matter, it is important to note that the 1981 Act, like the Michigan UUPA, does not define either "action" or "proceeding," requiring these terms to be read in context, taking into consideration their ordinary definitions, to determine their meaning. *See, e.g.*, *PNC Bank Nat'l Ass'n v. Dep't of Treasury*, 285 Mich. App. 504, 506 (2009) ("Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.") (citation omitted).[5] *See also* MCL 8.3a. In construing these terms, it is important to note that "[i]t has been universally held that statutes of limitation sought to be applied to bar rights of the government must receive a strict construction in favor of the government." *Livingstone v. Dep't of Treasury*, 434 Mich. 771, 785-86 (1990). As explained in the State Treasurer's brief, the Michigan legislature intended for the phrase "action or proceeding" to be interpreted broadly, and the initiation of an examination under the UUPA

[4] Under MCL 567.250(2), an alternative 5-year period applies to duties of holders related to transactions involving two or more associations, and, under MCL 567.250(3), an alternative 4-year period applies to duties of "eligible holders" participating in the "streamlined audit process" provided for by MCL 567.251b. These alternative periods are not contained in the 1981 Act.

[5] As noted in the State Treasurer's brief, the definition of "action" in Black's Law Dictionary is "the process of doing something; conduct or behavior." Additionally, the definition of "proceeding" in Black's Law Dictionary incorporates the definition of an "administrative proceeding" which includes, among other things, an "investigation" before an "administrative agency." Black's Law Dictionary, Eleventh Edition, 2019.

constitutes an action or proceeding that stops the statute of limitations from running. An analysis of § 29(b), read in the context of the entire 1981 Act, leads to the same conclusion.

The 1981 Act authorizes two methods for unclaimed property administrators to enforce the statute: a suit in court and an examination. Specifically, under § 32 of the 1981 Act, an administrator "may bring an action in a court of competent jurisdiction to enforce this Act." This provision is not limited to a suit against any specific entity or concerning any particular duty. Thus, a suit may be brought under § 32 to enforce any aspect of the 1981 Act against any party (including holders, claimants or another state). Importantly, this provision expressly states the forum for the action (a court of competent jurisdiction). Separately, under § 30(b) of the 1981 Act, an examination (or audit) by an administrator may be commenced of any holder "to determine whether the [holder] has complied with the provisions of this Act." Thus, an examination is the mechanism expressly authorized by the 1981 Act for the administrator to enforce the duty of holders to report unclaimed property under the Act.

In sum, the 1981 Act provides two enforcement methods (a court action and an examination), and a statute of limitations provision (§ 29(b)) applicable to any "action or proceeding." Based on this statutory structure alone, the most reasonable interpretation of "action or proceeding" would be that it is not limited to a court action but would include both a court action and an examination. This interpretation is further supported by the fact that – in direct contrast to § 30(b), which requires the administrator to bring an "action" in court, § 29(b) contains no such language or other venue limitation. Moreover, the statute of limitations section immediately follows the section authorizing examinations, further supporting the interpretation that the limitations provision of § 29(b) applies to examinations, as well as to court actions, such that an initiation of an examination by the administrator would constitute an action or proceeding stopping

the statute of limitations.[6] In short, the wording and structure of the 1981 Act strongly supports, if not compels, interpreting the phrase "action or proceeding" to include an examination. *See, e.g.*, *Livingstone*, 434 Mich at 785 (holding that in construing statute of limitations provision "the 'whole chapter' in which a statute of limitation was contained, [is] 'to be read as one act, with its several parts and clauses mutually acting on each other as their sense requires'").

Notwithstanding the foregoing, the circuit court held that the State Treasurer is required to file an action *in court* in order to stop the statute of limitations from running against it under MCL 562.250(2), the corollary to § 29(b). Even assuming, *arguendo*, that the term "action" in § 29(b) is limited to an action brought in court, however, it is still necessary to assign some meaning to the term "proceeding" in the statute. Failure to do so would render the term a nullity, in violation of fundamental rules of statutory construction. *See, e.g.*, *PNC Bank Nat'l Ass'n*, 285 Mich. App. at 506.[7] In this regard, consideration of relevant case law establishes that courts have expressly recognized that an audit or examination constitutes a "proceeding" in the context of enforcing state unclaimed property laws.

For example, in *Total Asset Recovery Services, LLC, v. MetLife, Inc.*, No. 2010-CA-3719, 2013 Fla. Cir. LEXIS 18463, at *2 (Fla. Cir. Ct. Aug. 20, 2013), the court held that an unclaimed

---

[6] The 1981 Act was the first unclaimed property act adopted by the ULC to contain a limitations period applicable to state enforcement efforts. In addition to adding this limitations provision, the 1981 Act also added a provision requiring holders to retain records for 10 years after property becomes reportable. *See* 1981 Act, § 31. This provision setting a record retention requirement that is coterminous with the 10-year limitation on state enforcement efforts comes immediately after the provision authorizing states to conduct unclaimed property examinations.

[7] The circuit court recognized this principal, noting that "'[c]ourts must give effect to every word, phrase, and clause in a statute and avoid giving an interpretation that would render any part of the statute surplusage or nugatory.'" Disney Opinion at 14. Disregarding its own directive, however, the circuit court failed to give any effect to the term "proceeding" under MCL 567.250(2).

property audit of an insurance company initiated by the state constituted an "administrative proceeding."[8] Therefore, the court dismissed the plaintiff's complaint brought under the Florida False Claims Act on the grounds that it was precluded by the provision of the Act barring private actions that are "'based upon allegations or transactions that are the subject of . . . an administrative proceeding'" involving the affected agency. *Id.* at *3 (quoting Florida Statutes § 68.087(2)) (ellipses in original). *See also State ex rel. French v. Card Compliant, LLC*, No. N13C-06-289 PRW CCLD, 2017 Del. Super. LEXIS 198, at *22-24 (Del. Super. Ct. Apr. 21, 2017) (holding that an unclaimed property audit constituted an "administrative proceeding" in dismissing claims brought under Delaware's False Claims and Reporting Act based on the Act's "administrative proceedings bar"). Courts have reached the same conclusion with regard to audits or examinations in other regulatory areas as well. *See, e.g.*, *United States v. Beckham*, 917 F.3d 1059, 1065 (8th Cir. 2019) (holding that an audit constituted "a pending proceeding" under the Internal Revenue Code); *Bowen v. M. Caratan, Inc.*, 142 F. Supp. 3d 1007, 1022-23 (E.D. Cal. 2015) (holding that an audit by the Department of Labor is a "proceeding" under the Fair Labor Standards Act); *Inland Manpower Ass'n v. U.S. Dep't of Labor*, 882 F.2d 343, 344 (9th Cir. 1989) (holding that "auditing process" by the Department of Labor constituted administrative "proceedings" under the Comprehensive Employment Training Act Act); s*ee generally United States v. Leo*, 941 F.2d 181, 198-99 (3d Cir. 1991) (noting that "[o]ther courts of appeals have broadly construed the term 'proceeding'") (*citing United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir. 1970) *cert. denied*, 400 U.S. 849 (1970) ("'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency"). These authorities and others

[8] Florida has adopted § 29(b) of the 1981 Act and requires an "action or proceeding" to be brought within 10 years after the duty arose. *See* Florida Statutes § 717.129(2).

demonstrate that an examination initiated by a state administrator to enforce compliance with the unclaimed property laws constitutes a "proceeding" that stops the statute of limitations from running under § 29(b) of the 1981 Act.

Nevertheless, pointing to the use of the disjunctive "or" in the term "action or proceeding," the circuit court concluded that both a proceeding and any subsequent related judicial action must be brought within the same statutory period. Disney Opinion at 13. Contrary to the circuit court's suggestion, use of the disjunctive in MCL 562.250(2) makes clear that it is intended to provide the state with alternative avenues for enforcing a holder's compliance with the UUPA, and any action in court arising out of a timely commenced proceeding will not be barred by the statute of limitations. *See, e.g.*, *United States v. Ninety-Three Firearms*, 330 F.3d 414, 422-23 (6th Cir. 2003) (finding that a subsequent judicial action by the United States government seeking forfeiture of firearms was not barred by statute of limitations where administrative forfeiture procedure had been commenced within the time provided by statute for bringing "any action or proceeding for the forfeiture of firearms," and requiring administrative proceedings and judicial actions to be brought within the same statutory period would result in unnecessary, burdensome and costly judicial actions). If the legislature intended otherwise, it would have used the conjunctive structure "proceeding and action" in MCL 562.250(2).[9]

[9] *Root v Ins. Co. of N. Am.*, 214 Mich App 106 (1995), cited by Appellee supports this conclusion. In that case, the Court explained that "[t]he primary rule of statutory interpretation is to ascertain and give effect to legislative intent." *Id.* at 109. As the Court noted, the term "or" is disjunctive and is "generally construed as referring to an alternative or a choice between two or more things." Nevertheless, making an exception to this general rule, and looking at the specific purpose of the no-fault insurance statute at issue in the case, it construed the phrase "the laws of any state or the federal government" in the conjunctive in order to accomplish the legislation's intent of reducing insurance costs by eliminating payment for all duplicative benefits. *Id.* at 109-10. Here, to give effect to all the terms in § 29(b) and to effectuate the enforcement scheme of the 1981 Act, it is

The role that examinations play in bringing holders into compliance with state unclaimed property laws further supports the conclusion that the commencement of an examination stops the statute of limitations from running against the state. In this regard, examinations are the primary method by which unclaimed property administrators seek to enforce holders' duties to report unclaimed property, and most examinations are resolved cooperatively. *See, e.g.*, G. Allen Mayer, *Unclaimed Property Programs Are Alive and Well*, 101 TAX NOTES STATE 615, 619-20 (Aug. 9, 2021), available at https://www.taxnotes.com/tax-notes-state/unclaimed-property/unclaimed-property-programs-are-alive-and-well/2021/08/09/76xx7 (last visited June 23, 2022) (explaining that unclaimed property examinations are necessary both to "check the accuracy of a holder's voluntary self-reporting and serve as a deterrent to noncompliance by other holders" and that "most unclaimed property examinations are conducted in a highly cooperative manner with few, if any, disputes"). Actions in court, by contrast, are rare and represent a tiny fraction of the administrators' enforcement efforts. However, if the phrase "action or proceeding" is interpreted not to include an examination, MCL 562.2502 would require the state to preemptively file an action in court in order to ensure it is able to enforce any liability determinations made during the examination process. Such a result is untenable and can only serve to discourage cooperative resolutions of examinations and encourage unnecessary litigation.

This conclusion is consistent with NAUPA's understanding of how the statute of limitation provisions on state enforcement powers contained in the Uniform Unclaimed Property Act operate since the first such provision was introduced in the 1981 Act. NAUPA has served as an advisor to the drafting committees of the Uniform Unclaimed Property Acts adopted by the ULC in 1981,

---

appropriate to conclude that an examination is a proceeding that stops the statute of limitations from running against the state.

1995 and 2016. Most recently, in 2014, NAUPA submitted written comments on the statute of limitations provisions to the ULC in connection with its drafting of the Revised Uniform Unclaimed Property Act, which was adopted in 2016 ("RUUPA"). In its submission, NAUPA made clear its understanding that the "periods of limitation" on enforcement set forth in the 1995 Uniform Unclaimed Property Act (which, like the 1981 Act, sets a limit on the amount of time the state has to commence an "action or proceeding")[10] is intended to establish a reasonable "statute of limitations for examination." *See* NAUPA's Limitations and Retention of Records Whitepaper (May 9, 2014), available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey= d4ad106c-8576-d0f0-4f5a-a614b97ba79a&forceDialog=1 (last visited June 23, 2022 (recommending for the purpose of "clarity" that the periods of limitation provision "be combined into the section regarding Requests for Reports and Examination of Records"). Significantly, comments by the ULC contained in RUUPA confirm NAUPA's understanding to be correct. Specifically, in addressing the "statute of limitations on examinations" the ULC states that RUUPA follows the 1981 Act and "provides a 10 year time bar on how far back of the end of the holding period an examiner can go, as well as specifies a 10 year record retention rule." RUUPA, Prefatory Note at 8.

Consistent with the foregoing, other than the circuit court's opinion that is the subject of this appeal, NAUPA is unaware of any case in which a court has held that the statute of limitations

[10] The 1995 Act adds an additional provision not contained in the 1981 Act expressly stating that the statute of limitations is tolled for property that is not reported or specifically identified to the state by a holder. *See* 1995 Act, Section 19(b) ("In the absence of such a report or other express notice [of unreported property] the period of limitations is tolled"). The comments to Section 19(b) of the 1995 Act state that this provision "clarifies existing law and codifies the holdings" of cases that have ruled on this issue.

on a state's ability to enforce a holder's duty to report unclaimed property continues to run against the state after it has initiated an examination of a holder in the 40 years since the 1981 Act was adopted.

B. Changes made to the 1981 Act by the Michigan legislature in adopting the UUPA further clarify that the initiation of an examination stops the running of the statute of limitations under MCL 567.250(2)

As described above, the provisions contained in the UUPA limiting the State Treasurer's time to enforce duties under the Act, the authority of the State Treasury to conduct examinations of holders, and the ability of the State Treasurer to bring an action in court are each based on, and virtually identical to, provisions contained in the 1981 Act. *Cf.* 1981 Act § 29(b) with MCL 567.250(2), 1981 Act § 30(b) with MCL 567.251(2), and 1981 Act § 32. The wording, structure, and intent of the enforcement scheme established by these provisions taken from the 1981 Act make clear that an examination constitutes an "action or proceeding" that stops the statute of limitations from running against the state. Changes made by the Michigan Legislature to the 1981 Act in adopting the UUPA eliminate any doubt that this conclusion is correct.

Specifically, MCL 567.251a, a section that is not contained in the 1981 Act, expressly provides that the State Treasurer does not need to bring a court action in order to enforce the findings from an examination that a holder has failed to report unclaimed property. Instead, once the State Treasurer issues a "notice of examination determination" setting forth "the property that is deliverable by the holder to the administrator as a result of an examination" (MCL 567.251a(15)), the burden is on the holder to dispute any determinations made in the examination, either through a request for reconsideration, and/or by the holder bringing an action in court. *See* MCL 567.251a(1)-(4). Property that is not contested by the holder is required to be delivered to the state by operation of law, without any further action by the State Treasurer. *See* MCL 567.251a

(5).[11] This additional section that has been added to the UUPA unequivocally demonstrates that an examination is the State Treasurer's primary method of enforcing a holder's duty to report unclaimed property to the state, and that the Michigan Legislature intended that an examination constitutes an "action or proceeding" under MCL 567.250(2).[12]

Under the circuit court's ruling, however, in order to preserve the State Treasurer's ability to enforce a holder's reporting obligations for all of the years that were in scope at the start of an examination, the State Treasurer would be compelled to file an action in court in essence at the same time that it commences the examination. Such a paradoxical result, in addition to encouraging needless litigation and discouraging holder cooperation, should be rejected as being directly contrary to the enforcement procedures established by the Michigan Legislature.

The "streamlined audit process," provided for by MCL 567.251b, further illustrates that the Michigan Legislature did not intend for the statute of limitations to continue to run after an examination has been initiated. This section, which was added to the UUPA in 2015, sets a "goal" of completing this type of examination within 18 months from the holder's receipt of the audit notice. MCL 567.251b(2)(a). However, under MCL 567.250(3), an "action or proceeding" with respect to the duty of a holder participating in the "streamlined audit process" must be brought within 4 years "after the duty arose." Therefore, under the circuit court's ruling that the statute of

---

[11] *See also Livingstone*, 434 Mich. at 777-78 (describing how under the Michigan use tax statute, MCL 205.22(2), an "unappealed final assessment becomes due and payable by operation of law").

[12] Should a holder fail to deliver the uncontested property identified in a "notice of examination determination," the State Treasurer might find it necessary to bring an action in court under MCL 567.253. Such an action, however, would be based upon the holder's failure to comply with its duties under MCL 567.251a. The statute of limitations for this type of action would run, not from when the property was originally due to be reported, but rather from when the property was required to be delivered under MCL 567.251a(1) (*i.e.*, 90 days after the mailing of the "notice of examination determination" if uncontested by the holder).

limitations continues to run after an examination has been commenced, even if a streamlined audit was initiated a day after a holder filed its annual unclaimed property report, and the goal of completing the audit within 18 months was met, one full report year (or **25%**) of the reduced time period that was within the scope of the streamlined audit at its commencement would necessarily be beyond the state's judicial enforcement abilities at its conclusion if the holder were to dispute any of the examination determinations. And if the examination was not commenced until several months after the annual report was filed, and it took just a few months longer than 18-months to complete the audit (which the statute itself describes as merely a "goal") to be completed, two full years (or **50%**) of the reduced 4-year time period would be lost.[13] Such an absurd result could not have been the intent of the Michigan Legislature, and further demonstrates that the only rational interpretation of MCL 567.250(2) is that the initiation of an examination stops the statute of limitations from running against the state for purposes of enforcing a holder's duty to report unclaimed property.

C. Measuring the 10-year period established by § 29 of the 1981 Act from the initiation of an examination accomplishes the underlying purposes that statutes of limitations are intended to serve

The circuit court incorrectly concluded that measuring the statute of limitations from the date an examination is commenced would place holders in "indefinite jeopardy of having to defend

[13] Moreover, procedural mechanisms available under the UUPA provide the holder with the ability to extend the examination process for many months if not years. *See* Mich. Admin. Code, R. 567.9 (1)-(2) (providing process for holder to request reconsideration that it is not eligible to participate in streamline audit process); MCL §567.251a(1),(6)-(8), (10)-(12) (providing processes for holder to request reconsideration of examination determinations that could take over a year to resolve). Under the circuit court's interpretation of MCL 567.250(2), a holder, simply by using these procedural mechanisms, could make it possible for all, or almost all, of the period that was within scope of a streamlined audit at its commencement to be beyond the state's judicial enforcement abilities at its conclusion.

themselves in an action, and requir[e] them to maintain documents in perpetuity," thereby purportedly turning the intended purpose of the statute of limitations on its head. Disney Opinion at 14. To the contrary, as described further below, recognizing that an examination constitutes an "action or proceeding" that stops the statute of limitations from running accomplishes the purpose of establishing a liability cut-off for holders that § 29 of 1981 Act (upon which MCL 562.250(2) is based) was intended to serve, while at the same time preventing holders from being able to unilaterally dictate the scope of the state's enforcement powers through their own conduct during the examination process.

Statutes of limitations are intended to prevent unfair surprise by giving defendants notice of potential suit and the nature of potential claims against them, as well as to ensure the preservation of evidence. *See, e.g., Livingston*, 434 Mich. at 795 ("[limitation] statutes are not enacted for the sake of defeating legal claims, but only to require notice of such claims within a reasonable time and thus guard against the unfair handicaps of defending against unfounded and belated suits") (citation and internal quotations omitted and alteration in original); *Lansing Gen. Hosp., Osteopathic v. Gomez*, 114 Mich. App. 814, 824 (1983) ("The purpose of the statute of limitation is to compel action within a reasonable time so the opposing party has a fair opportunity to defend, to protect against stale claims, and to protect defendants from protracted fear of litigation."). In the unclaimed property enforcement context, measuring the statute of limitations from the initiation of an examination accomplishes all of these goals.

The initiation of an examination puts a holder on notice that the state is commencing a process to determine whether the holder has complied with the unclaimed property laws, which will ultimately lead to a determination of the holder's unclaimed property liability. It also informs the holder of the time period that is within the scope of the examination – namely, ten years from

the date the examination is initiated, and that the holder is required to retain records encompassing the same period. Thus, measuring the statute of limitations from the start of an examination, the state's primary method for enforcing the unclaimed property laws, would plainly give the holder a fair opportunity to defend itself. Moreover, contrary to the conclusion reached by the circuit court, measuring the statute of limitations from the commencement of an examination would not result in a holder being kept perpetually at risk of a claim being brought against it. Instead, the examination initiation establishes a clear cut-off to potential liability and for every day that the state does not initiate an examination, any time period that is more than 10 years prior to that date would no longer be subject to a judicially enforceable claim.

Nevertheless, the circuit court expressed concern over the possibility of the state being able to retain the ability "to bring an action at any point in the future by extending the examination indefinitely." Disney Opinion at 14. This concern is based on a fundamental misunderstanding of the realities of unclaimed property examinations. Contrary to the circuit court's suggestion, states have no incentive to delay concluding examinations for the one basic reason that property is not delivered to a state until after an audit has been completed, and, thus, the opposite is true. In other words, every day that a state does not complete an examination is another day the state does not have custody of the property. Moreover, states are aware that the sooner unclaimed property is reported, the greater the likelihood it can be reunited with its rightful owner.[14] In contrast,

[14] Contract examiners engaged by the states (including Michigan) likewise have no reason to delay the completion of the examination, because they are compensated on the basis of results rather than the time required to perform the audit, and no compensation is paid whatsoever until completion of the exam, and delivery of property to the state based on the state's determination of liability.

holders have strong incentives to extend the examination process as long as possible because they are able to retain the benefit of the unreported property until the conclusion of an examination.[15]

Moreover, under the circuit court's ruling that the statute of limitations continues to run until the state files an action in court, the longer a holder is able to delay the conclusion of an examination, in addition to retaining the benefit of holding on to unreported property longer, a holder will actually be able to unilaterally reduce the scope of its potential unclaimed property liability. Indeed, for each year that the examination remains unresolved, one year of unclaimed property liability that was undisputedly in scope at the time the examination was commenced would no longer to subject to judicial enforcement. Thus, even after a routine, cooperative examination is completed, a holder would be incentivized not to turn over any unclaimed property absent the initiation of a court action, because the longer a holder fails to comply, the shorter its scope of liability would become.

In sum, if upheld, the circuit court's ruling would completely undermine the examination process, allow the statute of limitations to be used by holders to benefit from their own delay and game the ability of state administrators to enforce the unclaimed property laws, and encourage unnecessary litigation. Such a result should be rejected as being flatly inconsistent with the

---

[15] *See* G. Allen Mayer *Unclaimed Property Programs are Alive and Well*, Tax Notes, available at https://www.taxnotes.com/tax-notes-state/unclaimed-property/unclaimed-property-programs-are-alive-and-well/2021/08/09/76xx7 (Aug. 9, 2021) (discussing the problem of "lucrative silence," whereby holders are disincentivized from communicating with property owners so as to retain the benefit of holding property, as well as the "financial incentive for 'audit defense' firms to prolong a compliance examination in ways that would increase their billable hours"). Indeed, in this case, the circuit court noted the State Treasurer's contention that the delays in the examination process were, in fact, caused by the holders. *See* Disney Opinion**Error! Bookmark not defined.** at 11. The circuit court, however, did not address the issue of how a holder's delay might affect an examination and the scope of a holder's liability, choosing instead to address only the hypothetical possibility that a state, for some unidentified reason, might seek to delay the conclusion of an audit indefinitely.

purposes of adding a statute of limitations applicable to the state in the 1981 Act. *See, e.g.*, *Livingstone*, 434 Mich. at 785 ("statutes of limitations should be construed in a manner that best effectuates the policies the Legislature intended to promote").

IV. CONCLUSION

For the reasons set forth above, NAUPA respectfully submits that the Court should reverse

the ruling issued by the circuit court and issue an order in favor of the State Treasurer

Respectfully submitted,

Fraleigh Law Firm, PLLC

By _____

Michael J. Fraleigh (P36615)
Attorney for Amicus Curiae National Association of State Treasures through its affiliate the National Association of Unclaimed Property Administrators
(517) 575-0500

Dated: June 27, 2022

National Association of State Treasurers

By:_ _____

Shaun Snyder
1201 Pennsylvania Avenue, NW Suite 800
Washington, DC 20004

(202) 630-0810

Dated: June 27, 2022