

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

SHAUN DURAN, *et al.*,

Plaintiffs,

v.

**No. D-101-CV-2023-00698
Judge Maria Sanchez-Gagne**

**NEW MEXICO DEPARTMENT OF
WORKFORCE SOLUTIONS, *et al.*,**

Defendants.

JOINT MOTION FOR (1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, (2) CERTIFICATION OF SETTLEMENT CLASS, (3) APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE, AND (4) SETTING A SCHEDULE FOR FINAL APPROVAL

This class action lawsuit, filed in March 2023, addresses the continuing consequences to New Mexicans from the COVID-19 pandemic and the unemployment system used to support and stabilize them. In response to the nationwide crisis, Congress enacted federal programs designed to help states provide additional unemployment benefits to vulnerable workers. States implemented these new programs quickly in order to best serve the country's workers and accomplish the purpose of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Continued Assistance for Unemployed Workers Act, and the American Rescue Plan Act (collectively, "Federal Pandemic Benefits" or "FPBs"). Many states, including New Mexico, faced enormous challenges in implementing the new federal programs while also handling a volume of unprecedented claims filed by millions of workers affected by the pandemic. States generally paid out claims to the best of their ability. There were a significant number of state errors and inaccuracies due to these fast-changing circumstances. This resulted in states, including New Mexico, often awarding more benefits than permitted by the new programs.

Ordinarily, the federal government requires state agencies to pursue recoupment of improperly awarded benefits vigorously, prescribing such methods as offsetting individuals' future unemployment benefits or offsetting federal and state income-tax refunds to pay back overpayment debt. In this case, the federal government recognized that seeking recovery of these CARES Act overpayments from individuals who did not commit fraud, especially in light of the economic effects of the pandemic, creates an extraordinary hardship on working families. Against this backdrop, the federal government authorized state agencies to administer waivers of FPB overpayments based on common criteria approved by the federal government as well as on an individualized basis. Plaintiffs allege that the Department of Workforce Solutions (the "Department") violated their rights under state law and the Due Process Clause of the New Mexico Constitution by seeking to collect overpayments of pandemic-related unemployment benefits. Plaintiffs contend that these overpayments resulted from administrative errors in the program and that the Department did not adequately provide federally approved waivers for these overpayments. Defendants deny all allegations and legal claims asserted.

The parties have reached a proposed settlement agreement ("Agreement") which, upon approval, will provide relief for Plaintiffs and enable Defendants to effectively carry out their duties under this settlement by delineating processes and standards for: 1) evaluating and applying federally approved overpayment waiver criteria (known as "Blanket Waivers") to class members' overpayments of pandemic related unemployment benefits; 2) promulgating administrative rules for approving and denying Individualized Waivers and notifying class members about the process to apply for Individualized Waivers; 3) processing applications for Individualized Waivers submitted by class members that are determined eligible to receive Individualized Waivers under those rules; and 4) issuing refunds of previously recouped overpayments that have been or are

waived. The proposed settlement is fair, adequate, and reasonable and was reached through good-faith, informed, arms-length negotiations conducted over the course of over two years. Accordingly, pursuant to NMRA 1-023(E) (“Rule 23”), the parties respectfully request that the Court (1) grant preliminary approval of the parties’ Settlement Agreement (the “Agreement”), attached hereto as *Exhibit 1*; (2) certify the settlement class under NMRA 1-023(A), 1-023(B)(1), and (B)(2); (3) approve the proposed Notice of Class Action Settlement (“Notice”), attached as *Exhibit 2*; and (4) set a schedule for final approval of the Agreement.

I. Relevant factual and procedural background

A. The Complaint

For purposes of this Motion, the relevant facts—though disputed—are those alleged in the class action complaint (“Complaint”). *See Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 9, 103 P.3d 39 (stating that whether the requirements of Rule 23 are met may be decided on the pleadings, and that “certification is not an appropriate time to examine the merits.”); *Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 4, 147 N.M. 157 (stating that when applying Rule 23, courts “accept as true all well-pled factual allegations from Plaintiffs’ complaints.”). The Complaint in this case was filed on March 27, 2023, by Plaintiffs Shaun Duran, Monica Fischetti Palmieri Williams, Erdem Yildiz, Coral Gonzalez-Inza, and Yohanna Gerges, who are individual unemployment insurance claimants who allege they have been harmed by the alleged deprivation of due process and unlawful actions by Defendants. In the Complaint, Plaintiffs bring claims against Defendants Sarita Nair, in her official capacity as Secretary of the New Mexico Department of Workforce Solutions, and the New Mexico Department of Workforce Solutions, alleging that Defendants have violated New Mexicans’ rights under state law and under the Due Process Clause of the New

Mexico Constitution, and seeking declaratory and injunctive relief and litigation costs and reasonable attorneys' fees. Specifically,:

- 1) Plaintiffs allege that Defendants violated Plaintiffs' Rights under the Due Process Clause of the New Mexico Constitution by doing the following:
 - The Department's determinations and redeterminations failed to provide claimants with adequate notice of the benefits they were receiving or the basis for those benefits, such that claimants could not assess whether the determinations were accurate.
 - The Department's determinations and redeterminations informing claimants of their eligibility for benefits did not provide notice of the serious financial and personal consequences of failing to appeal any overpayments, even those caused by the Department's own errors.
 - The Department systematically sent multiple, incorrect, conflicting and incoherent determinations and redeterminations, making it impossible for claimants to know what benefits the Department had actually awarded them, and what notices should be appealed.
 - The Department's notices of overpayment, which were typically included as a part of its redetermination notices, failed to provide claimants with sufficient information to determine whether or why an overpayment had occurred. This failure prevented claimants from challenging the overpayment, including the alleged amount of any overpayment. This failure later prevented claimants from understanding if they were eligible for a waiver of their overpayment and prevented claimants from being able to complete waiver applications seeking information as to whether the overpayment was the claimant's fault.
 - The Department had a practice of assessing overpayments and taking deductions from claimants' unemployment benefits in order to recoup overpayments without providing any notice to the claimant about the overpayment and reason for the overpayment determination or providing an opportunity to challenge the determination resulting in the overpayment.
 - The Department had a practice of taking deductions from claimants' unemployment benefits in order to recoup overpayments after providing notice of the overpayment but before the time had run for people to challenge the determination leading to the overpayment.
 - The Department had a practice of discouraging meritorious appeals by threatening claimants who appealed with a hold on their ongoing benefits.
 - The Department failed to provide all claimants who received pandemic relief benefits with notice of the availability of an overpayment waiver.

- The Department's notices of the availability of a waiver failed to provide claimants with sufficient information to determine whether they were eligible for a waiver and sufficient information to apply for a waiver.
 - The Department granted and continues to grant waivers of overpayments, without refunding amounts previously recouped or collected by the Department and without providing any mechanism to appeal an incomplete refund.
 - The Department did not give potentially overpaid individuals the opportunity to be heard prior to an overpayment determination, and once an overpayment determination was made, it did not issue a written determination providing sufficient information to understand the basis for the determination.
 - The Department continued to collect funds to repay overpayments even when a claimant applied for a waiver.
 - The Department recouped overpayments of benefits prior to the time the overpayment became final or, when an appeal was taken, prior to the decision after a fair hearing.
- 2) Plaintiffs allege that the Department violated the New Mexico Rules Act NMSA 1975 9-26-6(E)(2007) and Workforce Solutions Act., NMSA, 1978, § 9-26-6(E) (2007) by denying and limiting waivers of overpayments under federal pandemic relief programs based on criteria, standards, and policies that were not provided to the public through notice, were not subject to a public hearing, and were not published in the New Mexico Register.
 - 3) Plaintiffs allege that the Department violated the New Mexico Unemployment Compensation Act NMSA 1978 51-1-31 (1979) and breached the contract between the USDOL and the Department, which require the Department to cooperate with and comply with regulations issued by the United States Department of Labor.
 - 4) Plaintiffs allege that in addition to the legal claims above, the Department should be equitably estopped from collecting any of the alleged overpayments of pandemic related unemployment because the Department made representations that were false and concealed material facts about claimant's eligibility for benefits, which claimants relied upon to their detriment, when they spent the funds that the Department awarded them.

See Complaint ¶¶ 293–329. Plaintiffs allege that the effect of these actions left many class members with little to no income and victim to collection actions. *Id.* at 1–2, ¶¶ 15–60. The Complaint seeks, *inter alia*, certification of a class under Rule 1-023(B)(1) and (B)(2),

appointment of counsel of record as Class Counsel, and specific injunctive relief to remedy Defendants' violations of law. *See id.* at 71–76.

B. Defendants' Contentions

Defendants have raised various defenses to Plaintiffs' allegations, which increase the complexity of the litigation, create risks for Plaintiffs' claims on the merits, and make settlement a more desirable resolution of this case. Defendants maintain that at all times material to this lawsuit their actions were compliant with Section 303(a)(1) of the Social Security Act (SSA), 42 U.S.C. § 503(a)(1), the applicable federal guidance for administering FPB programs, and the procedural due process standards established by *Mathews v. Eldridge*, 424 U.S. 319 (1976) and its progeny, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), *New Mexico Dept. of Workforce Solutions v. Garduño*, 2016-NMSC-002, 363 P.3d 1176 and *Millar v. New Mexico Dept. of Workforce Solutions*, 2012-NMCA-055, 304 P.3d 427. Defendants additionally argue:

- 1) Plaintiffs fail to state a claim upon which relief can be granted, particularly in regard to claims of deprivation of procedural due process and the existence of a legally cognizable property interest, as asserted by Plaintiffs. There is no constitutionally protected interest in unemployment benefits that one was never eligible to receive in the first place.
- 2) Procedures Defendants used to administer FPB programs minimized the risk of erroneous deprivation of any legally recognized property interest for recipients of FPBs. Specifically:
 - a. Defendants deny that the Department's notices failed to provide sufficient information about overpayments or the reasons therefor so as to violate procedural due process.
 - b. Defendants deny that the Department's notices did not properly inform recipients about appeal rights or waiver eligibility.
 - c. Defendants deny that the Department's notices discouraged appeals or failed to comply with procedural due process.
 - d. Defendants' notices adhered to the requirements under applicable laws.
 - e. Defendants deny that FPB overpayments were due to "systemic mistakes."
 - f. Defendants assert that many of the processes Plaintiffs have complained about, such as certain recoupment activities and requiring quarterly reapplications for benefits, were federal requirements rather than state-imposed mandates.

- 3) Any and all overpayment recoupment activities undertaken by Defendants were required by federal law and guidance in the administration of unemployment insurance programs in general and FPB programs specifically.
- 4) Defendants have not violated the State Rules Act, as the decision whether to exercise the waiver authority over FPBs is a matter of state discretion, subject only to the requirement that states electing to exercise that authority must adhere to minimum federal standards for approving and denying such waivers, which Defendants have. Further, the State Rules Act provides, “An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule, nor shall it constitute specific adoption thereof by the agency.” NMSA 1978, § 14-4-2(F) (2017). Therefore, it is immaterial whether the federal standards for administering FPB overpayment waivers that Defendants adhered to “were not provided to the public through notice, were not subject to a public hearing, and were not published in the New Mexico Register.” Complaint ¶ 305.
- 5) Plaintiffs’ suggestion in the Complaint (at ¶¶ 300-306) that the Workforce Solutions Act required Defendants to “make and adopt such reasonable and procedural rules as may be necessary to carry out” the approving and denying of FPB overpayment waivers is false. While Section 9-26-6(E) NMSA 1978, grants the Secretary of the Department of Workforce Solutions rulemaking authority, it does so using the word “may,” reflecting legislative intent to make the exercise thereof permissive rather than mandatory.
- 6) Finally, Defendants contend that any alleged damages by the Plaintiffs or any members of the putative class were not caused by Defendants’ actions but rather by Plaintiffs’ own actions and other circumstances.

C. The parties explored their claims and positions through an extensive investigation prior to filing suit.

The parties developed most of the facts relevant to this case prior to filing suit through outreach and investigation. The New Mexico Center on Law and Poverty urged the Department, starting in July 2020, to voluntarily take positions later subject to this lawsuit and made public records requests to obtain information about the Department’s process for notifying claimants of overpayments. The New Mexico Center on Law and Poverty ultimately filed a lawsuit to compel the production of those public records. In the years prior to filing the Complaint and since, Class Counsel worked with the representative Plaintiffs, reviewed voluminous documents, and spoke with hundreds of unemployment claimants to determine that the practices described in this lawsuit

are common to all unemployment claimants. Class Counsel also engaged in outreach to class members to document the impact of Defendants' practices on their unemployment claims and the class-wide nature of the practices.

II. Settlement negotiations

The parties devoted substantial time and effort to reaching a proposed settlement. At all times, the negotiations were conducted at arms' length. The parties began negotiating a class settlement in September of 2022, prior to filing the lawsuit. The lawsuit was filed on March 27, 2023. On May 12, 2023, Defendants removed the case to federal court. On May 18, 2023, Plaintiffs filed a Motion for Remand and after the issue was fully briefed, the District court issued an Order of Remand on May 11, 2023, but denied Plaintiffs' request to award "just costs and any actual expenses, including attorney fees, incurred as a result of the removal" pursuant to 28 U.S.C. 1447(c). Counsel for the parties have met for settlement negotiations eleven times and have communicated at length over email and telephone to discuss the terms of the settlement. The parties worked extensively to negotiate processes for the Department to seek federal approval for waivers that will not require individualized applications to the greatest extent possible. This required research, data collection by the Department, testing and modification of its information technology system for unemployment compensation and consultation with the federal government. The parties also negotiated the form of notices to claimants about pandemic related overpayments and the availability of individualized waivers and refunds, as well as draft regulations establishing the process for individualized waiver determinations. Each of these included weeks and at times months of negotiation, and revisions to the settlement agreement.

III. The terms of the proposed settlement

The Agreement provides class-wide programmatic relief. It requires that the Department implement federally approved waiver criteria for class members who qualify. It also requires that

the Department notify the entire class of their eligibility for Individualized Waivers of overpayments in the federal pandemic relief programs established under the CARES Act, the Continued Assistance for Unemployed Workers Act, and the American Rescue Plan Act and waive overpayments for those who apply and are eligible. It also requires the Department to refund overpayment amounts collected to individuals whose overpayments are waived.

The Agreement provides for certification of a Rule 1-023(B)(1) and (B)(2) class defined as

[A]ll individuals who received Federal Pandemic Benefits, who were subsequently assessed an overpayment of Federal Pandemic Benefits, and who did not receive a full waiver of those overpayments, either because they did not apply for a waiver, a waiver application was denied, a waiver application was granted as to some, but not all, of the overpaid Federal Pandemic Benefits, or a waiver application was granted but did not provide for a refund of amounts previously recouped.

Agreement ¶ 7.

Excluded from this definition are individuals who received state unemployment benefits pursuant to NMSA 1978, Sections 51-1-1 through 51-1-59, but who were not assessed an overpayment of FPBs. *Id.* Individuals who received state unemployment benefits and were also assessed an overpayment of FPB are class members but will only be entitled to relief for overpayments of FPB and not state unemployment benefits. *Id.* Also excluded from this definition are individuals who have been assessed overpayments of FPB as a result of their knowingly false statements, knowingly false representations, or knowing failure to disclose material facts, as described in NMSA 1978, Section 51-1-38(A) and (B). *Id.*

Class Counsel are attorneys with the New Mexico Center on Law and Poverty (Sovereign Hager, Stephanie Welch, and Emma O’Sullivan) and Ives & Flores, P.A. (Laura Schauer Ives and Adam C. Flores). Plaintiffs will request the Court’s approval of reasonable attorney’s fees and

class representative incentives that are not taken from any funds shared with the class but are awarded based on counsels' work performed in this litigation. *See* Agreement ¶¶ 43–44.

Class members' rights under the Agreement are broken down into four categories: (1) processing of Blanket Waivers, (2) promulgation of regulations for an Individual Waiver system and subsequent processing of Individual Waivers, (3) processing of refunds, and (4) closure of litigation and release of Defendants. Each of these categories is summarized in detail below.

A. Defendants will apply Blanket Waivers to class members' overpayments that meet federal criteria (Paragraphs 28–33).

Blanket waivers do not require an individual class member to submit a waiver request, but instead allow the Department to waive recovery for overpayment of FPB based on the cause of the overpayment being one of a certain category of causes or a “single set of facts.” Agreement ¶ 5. No later than fourteen days after the Agreement receives final approval from the Court, Defendants will determine if class members' overpayments are in the categories approved for Blanket Waivers by the United States Department of Labor (“DOL”). *Id.* ¶ 28. Class Counsel shall be notified when Blanket Waiver processing is complete, and Defendants shall disclose the total number of Blanket Waivers processed. *Id.* During this process, class members may request an Individualized Waiver and it shall be processed as laid out in subsection B. *Id.* ¶ 29.

The Agreement also provides a process for collaboration between Class Counsel and Defendants to request additional Blanket Waivers should certain class members not fall within categories already approved by DOL. *Id.* ¶ 30. Should DOL ultimately deny such requests, Defendants will share the reasons for denial with Class Counsel if it is provided to Defendants by DOL. *Id.* ¶ 32. If DOL approves additional blanket waivers, Defendants shall process those within ninety days of receiving DOL approval unless a reasonable extension is necessary. *Id.* ¶ 33. The

parties anticipate that the Agreement's Blanket Waiver process alone will secure more than \$100 million in affected benefits for class members.

B. Defendants will process Individualized Waivers if class members request them and are found eligible to receive them, and will promulgate rules to govern the process (Paragraphs 34–41).

If a class member with FPB-based overpayments is not eligible for, or opts out of, a Blanket Waiver, they may apply for an Individualized Waiver. *Id.* ¶ 16. A class member would be eligible for an Individualized Waiver if (1) the individual was not at fault for the overpayments or (2) recovering overpayments would cause hardship to the individual. *Id.* ¶¶ 16, 40. In order to process Individualized Waivers, Defendants will initiate rulemaking to create regulations governing the process no later than thirty days after the Certification Date. *Id.* ¶ 34. The rules promulgated shall explain the application process, set forth the criteria for Individualized Waiver approval or denial, and explain the appeal process for denial. *Id.* The regulations shall not conflict with the terms of the Agreement. While Class Counsel may utilize the dispute resolution provision in Paragraph 51 of the Agreement if proposed rulemaking appears to conflict with the Agreement, Class Counsel will not have any additional authority or input over the regulation contents. *Id.* ¶ 35. Finally, during the rulemaking process, Defendants cannot deny Individualized Waiver applications until the rules are finalized but may grant Individualized Waivers prior to rule finalization. *Id.* ¶ 34.

Additionally, Individualized Waiver notices must be in plain English and Spanish, worded so as to best inform class members of their rights and obligations in the process. *Id.* ¶ 37. Class Counsel will be able to provide input on the form of the final notice, but the general agreed upon contents of the waiver are detailed in Paragraph 37 of the Agreement. *Id.* Notice will be posted to the class members' online account portals and sent via either U.S. mail or e-mail, depending on member preferences. *Id.* ¶ 38. The Individualized Waiver notice process will include additional processes to ensure the information is widely disseminated. *Id.* This includes prominent notice on

the Department's website; sharing of information via television, radio, and other media; and training for the Department's staff to provide necessary information to those who contact the Department about the Individualized Waiver. *Id.* ¶ 39. Notice of approvals and any refunds will be provided to class members who apply, while notice of denials will explain the reasons for denials and class members' rights and ability to appeal. *Id.* ¶ 40. Finally, data regarding the Individualized Waivers will be shared by Defendants with Class Counsel. *Id.* ¶ 39. Defendants shall not continue deductions to recoup overpayments until certain time limits specified in Paragraphs 39 and 41 have passed. *Id.* ¶ 41.

C. Defendants will issue refunds of previously deducted overpayments that are waived as part of the aforementioned processes (Paragraph 42).

Some class members who have had their overpayments waived or whose overpayments will be waived pursuant to the Agreement have already repaid some of the overpayment back to Defendants. Within a reasonable period of time, Defendants will refund to class members who have had waivers approved but have not received refunds (or have received only partial refunds), all the unrefunded amounts that had been previously deducted as overpayments. *Id.* ¶ 42. Defendants must certify by affidavit that all FPB overpayment refunds have been processed for the applicable class members. *Id.*

D. Approval of settlement, notice to the class, Defendants' release, and provision of continuing jurisdiction over this lawsuit to resolve disputes and enforce the terms of this Agreement until the dismissal of the lawsuit (Paragraphs 23–27, 45–48, 51).

1. Approval of settlement and notice

If the joint motion to certify the class is granted and the Court preliminarily approves this Agreement, class members shall have the opportunity to object to this Agreement by attending the final approval hearing and presenting any objections to the Court. *Id.* ¶ 23–24. Defendants will be responsible for providing the Court's approved notice to class members in two ways. *Id.* ¶ 25.

First, Defendants must post a copy of the notice to each class member's online account. Second, Defendants must send the notice to each class member by either email or U.S. Mail, depending on each members' preference. *Id.* All notices must be made available to class members in both English and Spanish. *Id.*

2. Closure and dispute resolution

Parties agree to resolve in good faith any disputes that arise from the meaning and processes of this Agreement. *Id.* ¶ 51. However, the Court retains jurisdiction to hear and resolve any disputes relating to the performance of the terms and conditions of the Agreement during the specified enforcement period. *Id.* ¶ 46, 51. Once the terms of the Agreement have been satisfied and within fourteen days after all timely Individualized Waiver applications have been processed, the parties will file a joint motion or notice with the Court dismissing the lawsuit with prejudice and terminating the Court's continuing jurisdiction to enforce this Agreement. *Id.* ¶ 45. If one party opposes the dismissal, the other party may petition the Court to dismiss the case. *Id.* Should the petition be granted, then the party opposing the motion shall be liable for reasonable attorney fees and costs associated with petitioning the Court for closure. *Id.*

This Agreement releases Defendants from "all future claims and actions brought by Class Members arising from the alleged failure to lawfully administer the waiver process for overpayments of [FPB]." *Id.* ¶ 48. There is no release of Defendants from regular state unemployment insurance benefits claims or actions by class members or to appeals of any overpayment determinations, inclusive of those relating to the FPB. *Id.*

IV. ARGUMENT

A. The settlement class should be certified because the requirements of Rule 1-023 are met.

Certification of the settlement class and approval of the settlement is appropriate here because all of the relevant requirements under Rule 1-023 are met. New Mexico Rule of Civil Procedure 23(E) requires that a “class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Rule 1-023(E) NMRA. “Approval of a settlement class action is appropriate if the district court concludes that the class meets the requirements of Rule 1-023 and that the settlement would be fair, adequate, and in the best interests of the class.” *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 26, 143 N.M. 158 (citing federal standards for class action settlement approvals), *rev’d on other grounds* by 145 N.M. 77, 194 P.3d 108. The Court should certify the class in this case because it meets all of the requirements of Rule 1-023(A) and Rule 1-023 (B)(1), and Rule 1-023(B)(2) and approve the settlement because it provides the most impactful classwide relief to Plaintiffs and class members, and is therefore fair, adequate, and in the best interests of the class.

B. The requirements of Rule 1-023(A) are met.

Rule 1-023 NMRA is a “remedial procedural device” that is to be interpreted liberally. *See Romero v. Phillip Morris, Inc.*, 2005-NMCA-035, ¶ 36, 137 N.M. 229. In deciding a motion for class certification, the court must “accept as true all well-pled factual allegations from Plaintiffs’ complaints.” *Davis*, 2009-NMSC-048, ¶ 4. “Class certification is not the appropriate time to decide the merits of the case, because in determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Id.* (internal quotation marks, citations, and alterations omitted).

1. Numerosity

Rule 1-023(A)(1) requires a finding that “the class is so numerous that joinder of all members is impracticable.” The class is defined as “all individuals who received Federal Pandemic Benefits (“FPB”), who were subsequently assessed an overpayment of FPB, and who did not receive a full waiver of those overpayments, either because they did not apply for a waiver, a waiver application was denied, a waiver application was granted as to some, but not all, of the overpaid FPB, or a waiver application was granted but did not provide for a refund of amounts previously recouped.” Agreement, ¶ 8. As alleged, the class includes tens of thousands of people dispersed across the state of New Mexico, including rural areas, who received conflicting notices, filed waivers but have not received refunds, did not file waivers or appeals for fear of losing access to benefits, and were continuously unable to reach Defendants to resolve issues.

In sum, because there are allegedly tens of thousands of class members dispersed across the State of New Mexico, including in rural areas, the numerosity requirement of Rule 1-023(A)(1) is satisfied. *See Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 106, 276 P.3d 252, 281, *rev'd on other grounds sub nom. Starko, Inc. v. New Mexico Human Servs. Dep't*, 2014-NMSC-033, ¶ 106, 333 P.3d 947 (affirming certification on numerosity grounds where between two and three hundred potential plaintiffs were “widely dispersed across the entire state” and “[i]n the event that certification had been denied, those potential plaintiffs would have been greatly inconvenienced by having to individually join in the litigation, many from remote locations”).

2. Commonality

Rule 1-023(A)(2) requires a finding that “there are questions of law or fact common to the class.” “The commonality requirement of Rule 1-023(A)(2) is relatively easily met because it is deemed to require only that a single issue be common to the class.” *Berry v. Fed. Kemper Life Assur. Co.*, 2004-NMCA-116, ¶ 42, 136 N.M. 454 (citations omitted). Here, numerous common

questions of law and fact concern Defendants’ alleged notice practices and FPB program administration, alleged failure to waive overpayment, as was provided for by Congress in 2021, and alleged failure to fully refund incorrectly deducted overpayment charges. *See* Agreement, ¶ 2; Complaint, ¶ 39–47. Because there are questions of law or fact common to the class, the commonality requirement of Rule 1-023(A)(2) is satisfied.

3. Typicality

Rule 1-023(A)(3) requires a finding that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” For typicality, “[t]he fit need not be perfect.” *Berry*, 2004-NMCA-116, ¶ 43. Here, all five individual class representatives were subject to the FPB program administration challenged in this case. As alleged in the Complaint, all Plaintiffs and all class members who were able to apply for a waiver were subject to Defendants’ failure to cease overpayment deductions after waiver applications and Defendants’ failure to fully refund overpayment deductions. Complaint ¶¶ 94–98, 120–128, 180–180, 201, 223–224, 267–268. Also, the Complaint alleges that all Plaintiffs and class members were subject to Defendants’ confusing benefits and payment notices such they were (1) unable to apply for a waiver, or never received notice of waiver availability and (2) unable to determine how much was owed or waived. Finally, all Plaintiffs and class members have overpayment deductions that have allegedly not been refunded or were not appropriately waived. Complaint ¶¶ 94–98, 120–128, 180–180, 201, 223–224, 267–268. Because “the alleged unlawful conduct affect[ed] both the named plaintiff[s] and the class members,” the typicality requirement of Rule 1-023(A)(3) is satisfied. *See Berry*, 2004-NMCA-116, ¶ 43.

4. Adequacy of representation

Rule 1-023(A)(4) requires a finding that “the representative parties will fairly and adequately protect the interests of the class.” The named Plaintiffs and their counsel have vigorously represented the interests of Plaintiffs and the class. They negotiated with Defendants over an extended period of time to obtain relief that addresses the most burdensome, long-lasting impacts of Defendants’ alleged violations. The named Plaintiffs have retained counsel experienced in civil rights, workers’ rights enforcement, and class action litigation. *See Exhibit 3*, Class Counsel Affidavits. Because the named Plaintiffs and their attorneys have fairly and adequately protected the interests of the class by securing classwide relief that potentially obtains millions of dollars in refunds for the class and resolves the alleged continued economic burdens class members are experiencing due to the violations alleged in the Complaint, Rule 1-023(A)(4) is satisfied.

C. The requirements for relief under Rule 1-023(B)(1) are met.

A class action can be maintained under Rule 1-023(B)(1) if separate actions by individual members would increase the risk of either (a) “incompatible standards of conduct for the party opposing the class” due to “inconsistent or varying adjudications” or (b) “adjudications with respect to individual members of the class would [be] . . . dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.” The factors of Rule 1-023(B)(1)(a) are met because prosecution of individual claims would lead to the Department creating different rules and incompatible remedies to fit individual claimant issues. This is itself the basis for one of Plaintiffs’ claims: Defendants’ failure to publish uniform rules for their waiver processes. This failure has already resulted in some individuals receiving waivers and some not, with no or an insufficient explanation for the difference. Different individual adjudications could result in one court directing Defendants to issue certain rules and another court directing them to issue different rules, making it impossible

for Defendants to comply with both courts' orders. The relief provided by the Agreement eliminates this issue with uniform Blanket Waivers and consistent Individualized Waiver processes and rulemaking. Agreement ¶¶ 28–32, 34–41. Additionally, individual prosecution of the claims in the Complaint would be dispositive of others' interests, because their remedies include published rules that would apply to all claimants who received FPB, declarations of claimants' rights, and processes that would apply to all FPB claimants. Individual prosecution to access similar financial relief that is provided for in the Agreement would therefore likely be dispositive to the interest of non-parties, meeting the requirements of Rule 1-023(B)(1)(b). Individual prosecution would increase the risk of incompatible relief or negatively affect non-parties—and the relief proposed in the Agreement provides efficient, timely, and much needed relief to the class—Therefore, the requirements of Rule 1-023(B)(1) are met.

D. The requirements for relief under Rule 1-023(B)(2) are met.

In addition to Rule 1-023(B)(1), the class should also be certified under Rule 1-023(B)(2). Rule 1-023(B)(2) requires a finding that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” This factor is met because Plaintiffs allege that the Department has acted in the past in a manner that affected the entire class by imposing allegedly unlawful policies and practices on the entire class, and has now consented in the Agreement to providing prospective relief that will apply uniformly to the entire class in the form of the rules and processes for Blanket Waivers, Individual Waivers, and refunds to all qualifying class members. Because Defendants acted or refused to act on grounds generally applicable to the class, and because the relief bargained for in the Agreement appropriately

resolves any issues with Defendants' administration of FPBs and remedies Plaintiffs' concerns, the requirements of Rule 1-023(B)(2) are met.

E. The Agreement is fair to class members.

The New Mexico Court of Appeals has held that approval of a settlement class action under Rule 23(E) is appropriate when the requirements of Rule 23 are met and “the settlement would be fair, adequate, and in the best interests of the class.” *Rivera-Platte*, 2007-NMCA-158, ¶ 26. To evaluate the fairness of a class action settlement, the Court must consider the three factors set forth in *Rivera-Platte*:

First, we examine the settlement process, including the adequacy of discovery, the fairness of the process afforded objectors, and the fairness and honesty of the negotiation. Then we look at the risks of litigation, including the merits and complexities of the parties' claims and the potential duration and cost of trial. We view the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial. Finally, we examine the class members' reaction to the settlement.

Id. ¶ 42. Each of these three factors is met here.

a. The settlement process

The first *Rivera-Platte* factor requires examination of “the settlement process, including the adequacy of discovery, the fairness of the process afforded objectors, and the fairness and honesty of the negotiation.” *Id.* As discussed above, Plaintiffs undertook an extensive fact investigation prior to and since filing the case, including interviewing numerous affected FPB claimants and filing a public records lawsuit against Defendants to obtain materials necessary for this litigation. Also, the parties have shared information during the extensive negotiation process.

Plaintiffs have also afforded objectors a fair process. The notice to the proposed class is fair and appropriate. The parties have prepared a draft Notice of Class Action Settlement for approval by the Court that concisely and accurately summarizes the major provisions of the

proposed Agreement. *Exhibit 2*. The Notice is in simple, understandable language. The Notice provides phone numbers and emails for people to contact counsel to ask questions or obtain additional information, and class members can obtain copies of the full Agreement from the parties or online on the parties' websites.

The process for distribution of class notice concerning the final approval hearing is also reasonably calculated to reach as many class members as possible. The parties propose to distribute notice to class members of the hearing via the means delineated in Section II.D.1 above, thereby ensuring individual notice to potential class members for whom the Department has contact information.

The settlement approval process also provides adequate opportunity for class members to raise objections or comment on the Agreement. Objectors "shall have the opportunity to object to this Settlement Agreement by attending the final approval hearing and presenting any objections to the Court. Class Members who wish to attend the final approval hearing to present objections must notify Class Counsel in writing no later than three days prior to the hearing, stating their full name, address, telephone number, intention to appear, and a brief explanation of the basis for the Class Member's objection.." *Exhibit 1*, ¶ 24. Although the date of the final approval hearing has not yet been set, the parties propose that the Court set it for a date six to eight weeks after granting preliminary approval. *See Rivera-Platte*, 2007-NMCA-158, ¶ 18 (collecting cases: approximately one month between date of mailing and final approval hearing is sufficient).

The third sub-factor of the "settlement negotiations" factor considers the "fairness and honesty of the negotiations." The Settlement Agreement provides for relief in the form of waivers of FPB overpayments to the maximum extent allowed by federal law and protections of class members' rights to due process. The parties worked diligently through contested negotiations over

fifteen months at arm's length, representing their separate clients, to develop a settlement framework that enables the Department to implement waiver processes and ensure the protection of claimants' rights in those processes and class counsel to meaningfully enforce class members' rights under the Agreement. There was no self-dealing by counsel. Plaintiffs will ask the Court to approve limited class representative incentives, costs, and attorneys' fees, up to an agreed upon cap, that are not taken from any funds shared with the class, but are paid separately from Defendants' budget based on actual successful work performed in this case.

b. Fairness of settlement in light of risks of litigation

The second *Rivera-Platte* factor requires examination of “the risks of litigation, including the merits and complexities of the parties’ claims and the potential duration and cost of trial.” *Rivera-Platte*, 2007-NMCA-158, ¶ 42. The Court should “view the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial.” *Id.* The Agreement provides for a substantial amount of the relief Plaintiffs sought in the Complaint, while recognizing the risks posed by several factual and legal defenses Defendants would otherwise assert in this litigation. In lieu of litigating a complex case to judgment and risking potential dismissal, the Agreement secures valuable relief for the class, likely exceeding \$100 million in total benefits that Defendants might otherwise recoup from class members.

From Defendants’ perspective, the relief sought in the Agreement focuses the Department’s resources not on this litigation, but on promptly providing the foremost relief to class members. The parties agree that it is in the best interests of the class to ensure that the Department work promptly to rectify past issues with the FPB. Removing the financial burden on class members by quickly processing waivers and refunds is the top priority of the parties, and this Agreement meets these goals.

The parties agree to a Blanket Waiver process that, for those who qualify, will be universally applied without the need for the notice processes requested in Paragraphs H(i) of the Complaint. Agreement ¶¶ 28–33. This results in timely relief for class members, requires no additional steps on their part, and reduces the administrative burden on the Department. For Individual Waivers, the parties agree to a specified notice template that also removes the need for the notice revision process requested in Paragraphs H(ii-iii) of the Complaint. Agreement ¶¶ 34–38. This once again provides timely relief to class members and provides Class Counsel with opportunity to provide input on the notice form, all while focusing Department resources on providing waivers and issuing refunds. Accordingly, the relief afforded in the Agreement is substantial, timely, and will provide meaningful relief to class members.

c. Class members’ reactions

The third *Rivera-Platte* factor requires examination of “the class members’ reaction to the settlement.” 2007-NMCA-158, ¶ 42. The parties are unaware of any negative reactions to the settlement, and do not anticipate any at the final approval hearing. Through this Agreement, class members will gain access to processes for obtaining waivers of their FBP overpayments, including refunds of money already recouped, and the assistance of experienced counsel in accessing that right, should they need it. The Court will hear any concerns of class members at the fairness hearing required by the Agreement and Rule 1-023.

V. CONCLUSION

For the reasons discussed above, Plaintiffs and Defendants request that the Court (1) grant preliminary approval of the parties’ Settlement Agreement, attached hereto as *Exhibit 1*; (2) conditionally certify the settlement class under NMRA 23(b)(1) and (2); (3) approve the proposed

Notice of Class Action Settlement (“Notice”), attached as *Exhibit 2*; and (4) set a schedule for final approval of the Settlement Agreement.

Respectfully submitted,

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