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STATE OF MICHIGAN

IN THE SUPREME COURT

DINE BRANDS GLOBAL, INC.,

Plaintiff-Appellee,

vs.

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

Defendant-Appellant.

Case No. 165391

Court of Appeals Case No.: 360293

Oakland Co. Cir. Ct. Case No.: 2021-189420-CZ

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PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellee Dine Brands Global, Inc. (Dine Brands) agrees that this Court has jurisdiction over the application for leave to appeal filed by Defendant-Appellant Rachel Eubanks, in her capacity as the Treasurer for the State of Michigan (the Treasurer) under MCR 7.303(B)(1). The Treasurer seeks leave to appeal the January 19, 2023, published decision of the Court of Appeals unanimously affirming the Circuit Court Order granting summary disposition to Dine Brands. That order also enjoined the Treasurer from requiring Dine Brands to report and remit unclaimed checks, because the Treasurer is barred from escheating these checks by the Uniform Unclaimed Property Act's (UUPA) statute of limitations provision, MCL 567.250(2).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The UUPA states that the Treasurer shall not commence "an action or proceeding … with respect to any duty of a holder under [the UUPA]" more than a specified period of time (either five or ten years, depending on the type of property at issue) "after the duty arose" to report and remit the property to the State. Did the Court of Appeals err in finding that the statute of limitations contained in MCL 567.250(2) had run, and therefore, the Treasurer is time-barred from requiring Dine Brands or its affiliates to report and remit such property to the state?

Plaintiff-Appellee answers:	No
Defendant-Appellant answers:	Yes
The Circuit Court would answer:	No
The Court of Appeals would answer:	No
This Court should answer:	No

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

MCL 567.250 is the statute most relevant to this matter.

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INTRODUCTION

The Michigan Uniform Unclaimed Property Act (UUPA) requires businesses like Dine Brands to report and remit money to the Treasurer after it has remained unclaimed by its owner for a specified period (generally 1-3 years). The Treasurer may audit or examine a business' records to see if it holds property that was not properly reported. If the Treasurer determines that any amounts are due, the UUPA allows the Treasurer to bring an action to seize ("escheat") these amounts. But the UUPA's statute of limitations—MCL 567.250(2)—expressly prohibits the Treasurer from bringing any "action or proceeding" more than 10 years (or 5 years, for property owed to another business) after the property was reportable. The Treasurer has not yet brought an action against Dine Brands. The straightforward issue in this case is whether the Treasurer's claims against Dine Brands are time-barred.

The Treasurer waited almost 10 years to begin her examination of Dine Brands, and then took over eight more years to complete the examination. At the end of the examination, in 2021, she determined that $258,169.09 of (mostly voided) checks represented unclaimed property, including checks issued as far back as 2003. Dine Brands disputed that any of those checks represented unclaimed property. In addition, by the time the examination was completed, the UUPA's statute of limitations had run on the Treasurer's right to commence an enforcement action. Dine Brands then brought this action seeking declaratory and injunctive relief that the Treasurer's claims are time-barred. In response, the Treasurer asserted the novel theory that an examination itself is an "action or proceeding" under the UUPA and that the initiation of an examination also somehow tolls the statute of limitations for bringing a later enforcement action.

The Circuit Court rejected the Treasurer's argument and granted Dine Brands' motion for summary disposition. The court held that the phrase "action or proceeding" refers to judicial actions and proceedings and does not include a mere records "examination"—which is a term

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found throughout the UUPA but not in MCL 567.250(2). Further, the court held that, regardless of whether an examination was a "proceeding" for this purpose, the Treasurer would still have been required to bring an enforcement action within the statute of limitations under the plain language of MCL 567.250(2), which it did not do. The court's conclusion was consistent with the purpose of statutes of limitations, the UUPA's record retention requirement, and the model Uniform Unclaimed Property Act, on which the UUPA and MCL 567.250(2) are based.

The Court of Appeals unanimously affirmed. It thoroughly reviewed the UUPA and applied the same principles of statutory interpretation to affirm the rejection of the Treasurer's argument. The court held, "The fact that the Legislature omitted the word 'examination' from MCL 567.250(2), despite using it elsewhere in the statute, indicates the Legislature intended to exclude 'examinations' from consideration under MCL 567.250(2)."

The Treasurer now claims review by this Court is warranted under MCR 7.305(B)(2), (3), and (5)(a). (App. at p 3.) But aside from a brief mention of these rules, she does not address them or show how this appeal meets these requirements. That is because it does not. The Court of Appeals' unanimous decision is not clearly erroneous and does not constitute reversible error; it will not cause material injustice; and this case does not involve an issue of significant public interest, or a legal principle of major significance to the state's jurisprudence. The Treasurer claims that, "The ruling renders three statutes concerning administrative examinations nugatory because it requires a lawsuit to be commenced in the first instance, before the Treasurer may even commence an audit." (App. at p 3.) That is simply not true. The Court of Appeals' decision does not require a lawsuit to be brought before an examination can begin; the Treasurer may still begin an examination long before filing suit.

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If anything, the decision should cause the Treasurer to be more diligent about initiating and completing unclaimed property examinations in a timely manner–which is hardly reversible error.

This Court should deny the Application.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. The Examination

The facts are not in dispute. Dine Brands reports and remits unclaimed property, including amounts corresponding to payroll and accounts payable checks, as required by Michigan law. (Appellant's Appendix at p 58 (Helfers Affidavit, Dine Brands' Motion for Summary Disposition (MSD), ¶ 4).) From 2000 to 2015, Dine Brands and its subsidiaries remitted almost $60,000 to the State of Michigan. (*Id*, ¶ 9.)

In 2013, the Treasurer initiated an unclaimed property examination of Dine Brands to determine its compliance with the UUPA. (Appellant's Appendix at p 93 (Helfers Affidavit, Dine Brands' Reply, ¶ 3).) Rather than conducting its own examination, the Treasurer retained a third party, Kelmar Associates, LLC (Kelmar), to conduct the examination, and joined a multistate examination that Kelmar was conducting on behalf of seventeen other states. (*Id*, ¶¶ 3-4.) Kelmar requested detailed records regarding payroll and accounts payable checks issued to payees with last known addresses in Michigan as far back as 2003. (Appellant's Appendix at p 60 (Helfers Affidavit, Dine Brands' MSD, ¶ 14).) Most of the checks at issue had long since been voided in the ordinary course of Dine Brands' business because they were not owed (*e.g.*, they were issued in error, reissued and paid, or for other reasons). (Appellant's Appendix at pp 95-96 (Helfers Affidavit, Dine Brands' Reply, ¶ 12).)

Nonetheless, to the extent that Dine Brands could locate the requested records, it produced them. During the examination, Dine Brands raised various legal defenses, including that the

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checks did not represent unclaimed property and that, even if they did, the statute of limitations had run. Dine Brands' arguments were largely ignored by the Treasurer. (*Id*, ¶¶ 12, 15-16.)

On April 29, 2021, Kelmar sent Dine Brands an Excel spreadsheet that included a list of accounts payable and payroll checks issued between 2003 and 2012, which Kelmar and the Treasurer determined were unclaimed property subject to escheat to Michigan. (Appellant's Appendix at p 60 (Helfers Affidavit, Dine Brands' MSD, ¶ 14).) The Treasurer presumed these checks were unclaimed property based merely on the fact that they were voided more than 30 days after issuance or were outstanding for more than 90 days. (*Id.*) It included 538 Michigan-address checks totaling $258,169.09. (*Id.*)

On July 6, 2021, the Treasurer sent Dine Brands a letter rejecting the statute of limitations defense without any explanation, and which merely stated "[t]he amount presently due as a result of this examination is $258,169.09." (*Id*, ¶ 18.) The letter also directed Dine Brands to "remit a check payable to the Michigan Department of Treasury within 30 days" and warned that "an assessment for penalties and interest related to this examination will follow after the remittance is received and the holder report is processed." (*Id.*)

B. Proceedings in the Circuit Court

On August 11, 2021, Dine Brands filed an action in Oakland County Circuit Court, seeking declaratory and injunctive relief that any action by the Treasurer to escheat substantially all the checks at issue was time-barred under MCL 567.250(2).[1] (Dine Brands expressly reserved its

[1] At the time, $243,116.81 of the $258,169.09 total checks at issue in the examination were past the statute of limitations, including (a) $161,065.36 of payroll checks issued prior to March 31, 2010; (b) $70,604.20 of checks issued to vendors on or prior to March 31, 2013; and (c) $11,447.25 of checks issued to governmental agencies and other non-profit organizations on or prior to March 31, 2008. Contrary to the Treasurer's representations in the Application (App. at 4), a portion of the vendor checks would also be time-barred even under the Treasurer's interpretation of MCL 567.250(2) as more than 5 years had passed before the examination began in 2013.

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other legal defenses, including that the checks did not represent unclaimed property.) Dine Brands moved for summary disposition under MCR 2.116(C)(7). The Treasurer opposed the motion and counter-moved for summary disposition in her favor under MCR 2.116(I)(2).

The Circuit Court granted Dine Brands' motion and denied the Treasurer's. It held that an action seeking escheat of the amounts at issue would be barred by the UUPA's statute of limitations and enjoined the Treasurer from demanding escheatment of these amounts. (Cir. Ct. Opinion at 16-17.) The Circuit Court rejected the Treasurer's argument that an examination is an "action or proceeding" for purposes of MCL 567.250(2), and therefore she had already acted timely. (*Id* at 11-12.) In reaching this conclusion, the court reviewed the UUPA as a whole and considered how each of these terms was used in context throughout the UUPA. (*Id* at 12.) The court cited this Court's opinion in *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (on Rehearing)*, 484 Mich 1; 795 NW2d 101 (2009) for the proposition that, "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings…." (Cir. Ct. Opinion at 14, citing *US Fidelity & Guaranty Co* at 14.) The court cited numerous other authorities to support its conclusion that an "action or proceeding" does not include an examination. (Cir. Ct. Opinion at 14-15, citing *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142; 644 NW2d 715 (2002) and *Epps v 4 Quarters Restoration LLC*, 498 Mich 518; 872 NW2d 421 (2015).)

The Circuit Court also held that, even if an examination was a "proceeding," the Treasurer's claims would still be time-barred because the Treasurer had failed to file an enforcement action under MCL 567.253 within the statutory period. (Cir. Ct. Opinion at 13.) The court pointed to the plain language of MCL 567.250(2), which bars *any* action or proceeding from being commenced after the statutory deadline. The Circuit Court held that the "plain meaning" of MCL 567.250(2) "requires actions to be filed within the applicable statute of limitations regardless

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of whether an examination is timely commenced." (Cir. Ct. Opinion at 11-12, citing *Sau-Tuk Indus, Inc v Allegan Co,* 316 Mich App 122; 892 NW2d 33 (2016) and *Nastal v Henderson & Assocs Investigations, Inc,* 471 Mich 712; 691 NW2d 1 (2005).) The Circuit Court also relied on the official commentary to the Unclaimed Property Act of 1981, on which MCL 567.250(2) is based. The commentary explicitly states that the purpose of the statute of limitations is to prevent the state from initiating a *lawsuit* against a holder after the statutory period. (Cir. Ct. Opinion at 15.) The Circuit Court further held that the Treasurer's theory was inconsistent with the fundamental purposes of statutes of limitation and the UUPA's record retention requirement, as it would permit the Treasurer to take an unlimited amount of time to complete an examination and commence an enforcement action. (Cir. Ct. Opinion at 15, citing *Bigelow v Walraven*, 392 Mich 566; 221 NW2d 328 (1974).)

C. Proceedings in the Court of Appeals

On appeal, the Court of Appeals unanimously affirmed. The Court of Appeals addressed the question of whether an examination constitutes an "action or proceeding" under MCL 567.250(2) and explained that the terms "action" and "proceeding" on the one hand, and "examination" on the other, were used consistently throughout the UUPA and do not mean the same thing. In particular, the Court of Appeals noted that MCL 567.251(2), MCL 567.251a(1), and MCL 567.251a(15) establish that an "examination" refers to the "examination of records," or audit, by an administrator. By contrast, MCL 567.247, 567.248(1), 567.249, 567.251a(1), 567.254(4) and (5) establish that the terms "action" and "proceeding" consistently refer to *judicial* actions and proceedings. "[T]he use of different terms within similar statutes generally implies that different meanings were intended." (COA Opinion at 6, citing *US Fidelity*.)

The Court of Appeals concluded that, "[a]n examination is not an 'action or proceeding,' which halts the statute of limitations," and "the trial court properly granted [Dine Brands']

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summary disposition under MCR 2.116(C)(7) because defendant's claims for remittance of unclaimed accounts payable checks and unclaimed wages were time-barred." (COA Opinion at 6.) The Court of Appeals never addressed the Circuit Court's second reason for its grant of summary disposition to Dine Brands, as it was not necessary for affirmance.

The Treasurer filed a motion to stay the precedential effect of the Court of Appeals' opinion, which was unanimously denied by this Court. (April 21, 2023 Order.)

STANDARD OF REVIEW

Dine Brands agrees with the Treasurer that this Court reviews the interpretation of statutes *de novo*. *See, e.g., Ally Fin, Inc v State Treasurer*, 502 Mich 484, 491; 918 NW2d 612 (2018). Appellate courts also review rulings on motions brought under MCR 2.116(C)(7) *de novo*. When deciding such a motion, courts must accept all well-pleaded factual allegations as true and construe them in favor of the opposing party, unless other evidence contradicts them. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is time barred is an issue of law for the court. *Dextrom v Wexford Co*, 287 Mich App 406, 428-29; 789 NW2d 211 (2010) (footnotes omitted).

ARGUMENT

The Treasurer states that this Court should grant the Application pursuant to MCR 7.305(B)(2), (3), and (5)(a). (App. at p 3.) But none of these grounds for appeal applies. The Court should deny the Application.

A. This Case Lacks an Issue of Public Interest

There is no issue of public interest involved here, merely the proper application of the statute of limitations that applies to unclaimed property enforcement actions.

The Treasurer claims that "the entire examination process . . . would be rendered nugatory" if an "action or proceeding" excludes an examination, and the Treasurer must now commence a

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lawsuit before it can even begin an audit. (App. at pp 1, 2, 7, and 13.) The Court of Appeals' opinion *says no such thing, and results in no such thing.* The Court of Appeals held that MCL 567.250(2) merely requires that the Treasurer complete her examination and, if necessary, commence an action against the holder within the statutory period. The examination can (and should) still come first, without the commencement of a lawsuit or judicial proceeding. Given that the statute of limitations is generally 10 years, compliance should not be at all difficult. Indeed, the Treasurer concedes that MCL 567.251b contemplates that an examination can be completed in 18 months. (App. at p 19.) That would still leave 8 ½ years after an audit is completed, for the Treasurer to try and resolve the matter, and, if necessary, bring a suit. This is plenty of time and exceeds the period afforded by most statutes of limitations in Michigan law. The Treasurer's the-sky-is-falling-type arguments made throughout the Application are nothing more than false hyperbole. The Treasurer's suggestion that she is "entitled" to make claims for property for the 10 years preceding the examination misunderstands how statutes of limitations work: they continue to run absent express tolling language in the statute, which does not exist here.

The result in this case is entirely the result of the Treasurer's own choices. First, she waited many years to begin the examination. Had she wanted to review records relating to checks issued as far back as 2003, she could have initiated the examination shortly after those checks were reportable. Instead, she chose to wait until the statute of limitations already expired on some of those checks and would expire shortly thereafter on the remainder. Second, the Treasurer chose to join a complex audit with 17 other states, rather than conduct her own examination, or have the outside auditor examine only Michigan checks, both of which would have taken less time. As the Treasurer concedes: "[a] multi-state audit necessarily increases the number of records to be reviewed and issues to be sorted." (App. at p 20.) Third, rather than focusing on likely sources of

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unclaimed property, the Treasurer's auditors adopted an aggressive approach and requested records on every single check issued during the audit period that was voided after 30 days and then asserting—contrary to Michigan law—that Dine Brands bore the burden of proving the checks were not unclaimed property. (Appellant's Appendix at p 60 (Helfers Affidavit, Dine Brands' MSD, ¶ 14).)[2]

Further, it is doubtful that the Treasurer even has the right to bring an enforcement action before or during an examination, let alone the obligation to do so. Until an audit is completed, the Treasurer does not know if there is a valid claim against the company. Filing an enforcement action demanding escheatment before completion of the audit would be premature and speculative, and so would not be ripe. *See Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553-54; 904 NW2d 192 (2017) ("The doctrine of ripeness . . . focuses on the timing of the action. The ripeness doctrine requires that a party has sustained an actual injury to bring a claim. A party may not premise an action on a hypothetical controversy.") (internal quotations and citations omitted); *Green v. Ziegelman*, 282 Mich. App. 292, 305; 767 NW2d 660 (2009) (action was unripe if "th[e] event [complained of] has not occurred, and perhaps may never take place . . . .").

B. <u>There Is No Legal Principle of Major Significance to the State's Jurisprudence</u>

This case raises no legal principles of major significance to the state's jurisprudence. Again, the issue to be addressed here is simply whether the UUPA's statute of limitations, MCL 567.250(2), continues to run while an examination of records is in progress, or if the examination tolls the statute. In resolving this issue, the Court of Appeals and Circuit Court looked to the plain

[2] Notably, the Treasurer also has remedies if a holder unreasonably delays an examination (which the record shows was not the case here), including subpoenaing relevant documents, asking the holder to sign a waiver to extend the statute of limitations (a common practice in tax audits), threatening interest/penalties, or commencing an action under MCL 567.253. The Treasurer never informed Dine Brands that she believed Dine Brands was delaying the examination in this case.

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language of the statute and applied longstanding and uncontroversial principles of statutory construction. "This Court may exercise its discretion to deny leave when [it] determine[s] that, despite the obvious and significant impact of the case on the parties, the Court does not believe that the legal issues raised in the appeal are of sufficient statewide import for the Court to intervene." *People v Bensch*, 505 Mich 859, 859; 934 NW2d 825 (2019) (Viviano, J., concurring).

Moreover, the Court of Appeals' opinion will not affect the application of statutes of limitations generally or any aspect of the State's jurisprudence beyond the UUPA itself.

C. The Court of Appeals' Decision Is Not Clearly Erroneous and Will Not Cause Material Injustice

1. The Court of Appeals' Decision Is Consistent with the Plain Language of MCL 567.250(2) and Other Provisions of the UUPA

The Treasurer argues that the Court of Appeals "clearly erred" in applying the UUPA's statute of limitations to bar her claims against Dine Brands. (App. at p 3.) Although she claims that the opinion makes Michigan an "outlier," she cites no case that has accepted her argument, or that has rejected Dine Brands' position. In fact, the Application does not cite a single legal authority contrary to the Court of Appeals' decision. The Court of Appeals simply applied well-established concepts of statutory interpretation to the plain language of MCL 567.250(2), and unanimously concluded that the Treasurer's claims against Dine Brands were time-barred.

MCL 567.250(2) of the UUPA provides in full: "Except as otherwise provided in subsection (3)[3], an action or proceeding shall not be commenced by the administrator with respect to any duty of a holder under this act more than 10 years, or, for the holder of records of transactions between 2 or more associations as defined under section 37(a)(2), more than 5 years,

[3] Subsection (3) involves the streamlined audit process, which applies only to Michigan-based companies and is not relevant to this action.

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after the duty arose."[4] There is no tolling language in the statute. Nonetheless, the Treasurer argued that her examination was an "action or proceeding" and that she could bring any future action to escheat the amounts at issue in the audit at any time. Both lower courts rejected this argument and held that an examination is not an "action or proceeding" under the statute, based on how these terms are consistently used throughout the UUPA.

Indeed, the Court of Appeals explained that the terms "action" and "proceeding" are used consistently in the UUPA to refer to *judicial* actions and proceedings. (COA Opinion at 5-6.) *See, e.g.*, MCL 567.247 ("A person who is aggrieved by a decision of the administrator . . . may bring an action to establish the claim in the circuit court . . . ."); MCL 567.248(1) ("An action or proceeding shall not be maintained against a holder for or on account of any action taken by the holder in destroying or otherwise disposing of the property pursuant to the authorization of the administrator."); MCL 567.249 ("An action or proceeding shall not be maintained against the state or any officer or against the holder for or on account of any action taken by the administrator under this section."); MCL 567.251a(1) ("a holder that is aggrieved of the decision may bring an action in the circuit court, . . ."), (2) ("in lieu of filing an action in circuit court, the holder may later file an action in circuit court under the provisions of subsection (4) or (8)," (4), (8), (9), (12), (13), and (14) (other similar references); MCL 567.254(4) and (5) ("the attorney general of this state may bring an action in the name of the administrator of the other state in a court of competent jurisdiction . . . .") and MCL 567.254(5) ("The administrator may request that the attorney general

[4] In general, property is presumed abandoned one to three years after the property became payable to the owner. If not claimed, property that became presumed abandoned between April 1 and March 31 of the following year is reportable to the state on the following July 1. MCL 567.238(4).

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of another state . . . bring an action in the name of the administrator in the other state.").[5] By contrast, the term "examination" is separately used in the UUPA to refer to an audit of the holder's records. *See* MCL 567.251(2), 567.251a(1), 567.251a(15).

The UUPA only provides for one means of enforcement, which is for the Treasurer to "bring an action in a court of competent jurisdiction." MCL 567.253. As a result, it follows that the statute of limitations was referring to this provision when it states that an action must be brought within the period specified. "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Since an action or proceeding, as used in the statute, does not include an examination, both lower courts correctly concluded that the Treasurer's claims against Dine Brands were time-barred.

The Treasurer makes the conclusory assertion – again without citation to any authority – that MCL 567.251a uses all three terms to describe "the same thing: an administrative investigation." (App. at 18.)[6] This is contrary to the basic principle of statutory construction that different words have different meanings and is flatly contradicted by the statutory language itself. A review of MCL 567.251a shows that (1) the term "examination" is only used in reference to an audit and specifically the "notice of examination determination" issued at the conclusion of an audit;" (2) the term "action" is used repeatedly to refer to judicial actions by holders to appeal the examination determination; and (3) the term "proceeding" is not used at all. In any event, MCL

[5] The Court of Appeals pointed out that the only time "action" does not mean a judicial action is when the statute discusses the actions of individuals, and only occurs after a judicial "action" is already referenced. (COA Opinion at 6.) *See* MCL 567.248(1), 567.249.

[6] Lacking any relevant authority to support her position, the Treasurer solely cites to irrelevant authorities, such as the Bankruptcy Code. (App. at p 12.)

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567.251a is also entirely irrelevant to the construction of MCL 567.250(2), as it was not enacted until December 27, 2014, almost 20 years after MCL 567.250(2) (which was enacted on May 17, 1995). MCL 567.250(2)'s language has remained unchanged over the years, except for reducing the statute of limitations to five years for amounts due to another business association.[7]

The Treasurer also argues that, by not including the forum of the "action or proceeding" in MCL 567.250(2), the Legislature must have intended the terms to include non-judicial proceedings. (App. at p 15.) The Court of Appeals rejected that argument as well, explaining that MCL 567.248 and MCL 567.249, when referring to an "action" by an administrator, similarly contain no venue language. The court explained that, in all these cases, "the context of the clauses indicates the actions are judicial." (COA Opinion at 6.) *See* MCL 567.248(1) ("An action or proceeding shall not be maintained against a holder for or on account of any action taken by the holder in destroying or otherwise disposing of the property pursuant to the authorization of the administrator"); MCL 567.249 ("An action or proceeding shall not be maintained against the state or any officer or against the holder for or on account of any action taken by the administrator under this section.").

2. The Court of Appeals' Decision Is Consistent with Both the 1981 Uniform Unclaimed Property Act and the 2016 Uniform Unclaimed Property Act

Further, the Court of Appeals' decision is consistent with the Uniform Unclaimed Property Act of 1981 (the 1981 Uniform Act), on which the UUPA—including, specifically, MCL

[7] Both the United States Supreme Court and the Michigan Supreme Court have long held that courts must construe statutes at the time they are enacted, not based on subsequent developments. *See, e.g., Wayne Cnty Bd of Rd Comm'rs v Wayne Cnty Clerk*, 293 Mich 229, 235; 291 NW 879 (1940) ("In construing a statute, we are to construe it in the light of the circumstances existing at the date of its enactment, not in the light of subsequent developments."); *Husted v Consumers Power Co*, 376 Mich 41, 54; 135 NW2d 370 (1965) (same). Further, MCL 567.251a merely provides the process by which a holder can dispute or challenge an examination determination. It says nothing about the Treasurer's ability to enforce an examination determination through an action or the statute of limitations for doing so.

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567.250(2)—is based. *See* S.B. 390-396: Revised First Analysis (noting that Michigan seeks to adopt the Uniform Act, which 27 other states have already done). This Court has held that "by adopting the language of … a model act, it is evident that the Legislature 'was cognizant of, and in agreement with, the policies which underlie the model acts' language." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984) (quoting *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 559; 302 NW2d 537 (1981)). *See also Citizens Ins Co v Tuttle*, 411 Mich 536, 546; 309 NW2d 174 (1981) ("It is probable that the Legislature, in using the language of the model act, intended the meaning ascribed to that language by the drafters of the model act, particularly where that meaning is the most natural sense of the language used.").

MCL 567.250(2) is worded almost identically to the 1981 Uniform Act's statute of limitations, which states: "No action or proceeding may be commenced by the administrator with respect to any duty of a holder under this Act more than 10 years after the duty arose." 1981 Uniform Act, § 29(b). The only difference is that MCL 567.250(2) provides a five-year (rather than ten-year) statute of limitations for property owed to another business. The official commentary to the 1981 Uniform Act makes clear that the statute of limitations requires the administrator to bring a "suit" against the holder within the statutory period, or the administrator's claims are barred. (*Id*, cmt 29(b)) ("[u]nder [prior] law it [was] not clear that statutes of limitations apply to the state in compelling a holder to report or deliver unclaimed property. A holder may under the [prior Uniform] Act be subject to *suit* for an indeterminate period.") (emphasis added).

The Treasurer's position is further undermined by Delaware's unclaimed property statute of limitations, which is also based on the 1981 Uniform Act provision and is worded nearly identically to MCL 567.250(2)—*except that* the Delaware Legislature *did* include a tolling provision. *See* 12 Del Code § 1156(b) ("The State Escheator may not commence an action or

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proceeding to enforce this chapter with respect to the reporting, payment, or delivery of property more than 10 years after the duty arose. *The period of limitation established by this subsection is tolled by the State Escheator's delivery of a notice of an examination to a holder under this chapter*. . . .") (emphasis added). By explicitly providing that a notice of examination tolls the period of limitations, the Delaware Legislature recognized that (1) an examination is not an action or proceeding and (2) without the tolling provision, the start of an examination would have no impact on when an action must be commenced to enforce an examination determination. In other words, the Delaware Legislature interpreted the Uniform Act's statute of limitations in the *exact same way* as the Court of Appeals here, and modified it to add a tolling provision to give the state more time to commence an enforcement action if necessary. The fact that the Michigan Legislature did not add a tolling provision confirms that the Legislature did not intend for an examination to toll indefinitely the statutory requirement to bring an action to enforce the UUPA within the requisite period.[8] The Treasurer's novel interpretation of MCL 567.250(2) defies legislative intent.

Lastly, when the Uniform Act was amended in 2016, it revised the statute of limitations to provide that "[t]he administrator may not commence an action, proceeding, or *examination* with respect to a duty of a holder under this [act] more than 10 years after the duty arose." 2016 Act, § 610 (emphasis added). The explicit addition of "examination"—as compared to the 1981 Act and MCL 567.250(2)—makes it indisputably clear that the drafters did not equate an "examination" with an "action or proceeding." *See Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) ("Each word of a statute is presumed to be used for a purpose, and, as far as possible,

[8] The Michigan Legislature is aware of tolling provisions and explicitly articulates these provisions where it intends the statute of limitations to be tolled. *See, e.g.*, MCL 205.27a ("The statute of limitations shall be extended for the following if the period exceeds that described in subsection (2) . . . ."); MCL 500.2833(1)(q) ("The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.").

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effect must be given to every clause and sentence."). Otherwise, it would have been unnecessary to add "examination" to the statute of limitations in the 2016 Act. Again, the Treasurer cites no authority showing that any other jurisdiction has construed the Uniform Act's statute of limitations differently from the Court of Appeals. She cannot, because to Dine Brands' knowledge, no such case exists.[9]

3. Regardless of Whether an Examination Is an Action or Proceeding, the Treasurer's Claims Are Time-Barred Because an Enforcement Action Must Still Be Filed Within the Statute of Limitations

Moreover, regardless of whether an "examination" is an "action" or "proceeding" within the meaning of MCL 567.250(2), which it is not, the Court of Appeals' affirmance of the grant of summary disposition to Dine Brands is still correct, and the Application should be denied. This is because the plain language of MCL 567.250(2) provides that *any* "action" or "proceeding" must be commenced within the statutory period. Therefore, as the Circuit Court properly recognized, even if an examination did constitute a "proceeding" for this purpose, the Treasurer would still be required to bring an action under MCL 567.253 within the statute of limitations to enforce its audit determination, which she did not do. As a result, the Treasurer's claims are still time-barred.

The UUPA's examination and enforcement process is straightforward. MCL 567.251(2) provides that, "The administrator, at reasonable times and upon reasonable notice, may examine the records of a person to determine whether the person has complied with this act." At the end of the examination, the administrator may make a determination of liability. If the holder refuses to pay, MCL 567.253 provides that, "[T]he administrator may bring an action in a court of

[9] The Treasurer's complaint that the Court of Appeals did not address her preclusion argument is specious. (App. at p 21.) As she concedes, preclusion can only potentially apply to an audit determination if Dine Brands did not appeal it, which Dine Brands did. Furthermore, preclusion can only apply to decisions that are adjudicatory in nature. An unclaimed property examination is not, as there is no opportunity to call witnesses, seek discovery, and there is no hearing. *See William Beaumont Hosp v. Wass*, 315 Mich App 392; 889 NW2d 745 (2016).

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competent jurisdiction to enforce this act." This is the *only* enforcement provision in the UUPA. The Circuit Court held that, "An action to enforce the Treasurer's examination determination under MCL 567.253 . . . is unquestionably an 'action' under MCL 567.250, and must be filed within the statutory period." (Cir. Ct. Opinion at 12.) In reaching this conclusion, the Circuit Court relied on the plain language of the statute: "an action or proceeding shall not be commenced by the administrator" after the statutory period. MCL 567.250(2). Thus, regardless of when the Treasurer began her examination of Dine Brands, if the Treasurer were to bring an action against Dine Brands today to require escheatment, such an action would "plainly violate" MCL 567.250(2). *See* State Farm, 466 Mich at 146 (each word of a statute must have a separate and distinct meaning, so as to not "render any part of the statute surplusage or nugatory"); *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011) ("The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately.").

This is also consistent with the commentary to the Uniform Act, discussed above, which provides that the administrator must bring a lawsuit (action) prior to expiration of the statutory period. 1981 Uniform Act, cmt 29(b) (statute of limitations intended to prevent the holder from being "subject to *suit* for an indeterminate period") (emphasis added). If, as the Treasurer contends, the statute of limitations was "tolled" by the initiation of an examination such that the Treasurer could bring an enforcement action at any time, that would conflict with both the plain language of the statue and the express stated intent of the Uniform Act to "provide a holder with a cut-off date on which it can rely." (*Id.*) As the Circuit Court acknowledged, "the 1981 Uniform Act added a statute of limitations for the specific purpose of giving certainty to holders that they would not be subject to claims regarding unclaimed property more than ten years after the date the property was required to be reported and remitted." (Cir. Ct. Opinion at 14.) The Treasurer's

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interpretation "would turn the drafters' intended purpose on its head because it would allow [the Treasurer] to bring an action at any point in the future by extending the audit indefinitely." (*Id.*) It would also undermine the very purpose of statutes of limitations to "'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend;' 'to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured;' and to protect 'potential defendants from protracted fear of litigation.'" *Bigelow*, 392 Mich at 576 (quoting 51 Am Jur 2d, Limitation of Actions, § 17, pp. 602-03). As the Circuit Court explained, under the Treasurer's interpretation, she "could take an unlimited amount of time to complete the audit, and then an unlimited amount of time thereafter to pursue claims against the holder." (Cir. Ct. Opinion at 14.) The court held that "[n]othing in the UUPA supports this conclusion." (*Id.*)

Finally, as the Circuit Court recognized, it would also conflict with the UUPA's record retention requirement. (*Id.* at 15-16.) Under MCL 567.252, the holder must retain certain records for 10 years (or 5 years, for property owed to another business) after the holder was required to report the property. The Treasurer's interpretation of MCL 567.250(2) would allow her to bring an action against Dine Brands long after the record retention requirements had ceased. This makes no sense. The Legislature intentionally made the record retention requirement coterminous with the statute of limitations because it is unfair to enforce a statute of limitations against a holder that is no longer required to maintain the records necessary to defend against the Treasurer's claims. The Circuit Court held that "[a]n interpretation of a statute of limitations that places holders in indefinite jeopardy of having to defend themselves in an action, and requiring them to maintain documents in perpetuity, is untenable." (*Id.* at 14.)

RELIEF REQUESTED

For the above stated reasons, this Court should deny the Application for leave to appeal.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to MCR 7.212(B) and 7.312, I hereby certify that the foregoing Response to Defendant-Appellant's Application for Leave to Appeal contains 6,302 words.

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