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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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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Pursuant to the Court's Order of January 26, 2024, this Supplemental Brief is limited to the following questions:

1. Whether the Court of Appeals erred in interpreting the Uniform Unclaimed Property Act, MCL 567.221 et seq., when it concluded that an examination or audit conducted by the Treasurer was not an "action or proceeding" under MCL 567.250(2)?

The Treasurer answered: "Yes."
Dine Brands answered: "No."
The Circuit Court answered: "No."
The Court of Appeals answered: "No."
This Court should answer: "No."

2. If the Court of Appeals erred, whether the commencement of the examination tolled the statute of limitations in MCL 567.250(2)?

The Treasurer answered: "Yes."
Dine Brands answered: "No."
The Circuit Court answered: "No."
The Court of Appeals answered: "No."
This Court should answer: "No."

3. Whether, even if an examination is a "proceeding," the Treasurer must still file a lawsuit within the applicable time frame to avoid the lawsuit being time-barred?

The Treasurer answered: "No."
Dine Brands answered: "Yes."
The Circuit Court answered: "Yes."
The Court of Appeals answered: "No."
This Court should answer: "Yes."

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INTRODUCTION

Defendant-Appellant Rachael Eubanks, in her capacity as the Treasurer for the State of Michigan (Treasurer), seeks leave to appeal the January 19, 2023 unanimous, published opinion of the Michigan Court of Appeals, which affirmed the Circuit Court's Order granting Plaintiff-Appellee Dine Brands Global, Inc. (Dine Brands) summary disposition under MCR 2.116(C)(7) and enjoining the Treasurer from requiring Dine Brands to report and escheat purportedly unclaimed property under Michigan's Uniform Unclaimed Property Act (UUPA). By Order dated January 26, 2024 (the Order), this Court scheduled oral argument on the Treasurer's Application, and directed the parties to file supplemental briefs addressing three questions:

(1) Whether the Court of Appeals erred in interpreting the Uniform Unclaimed Property Act, MCL 567.221 et seq., when it concluded that an examination or audit conducted by the Treasurer was not an "action or proceeding" under MCL 567.250(2)?

(2) If the Court of Appeals erred, whether the commencement of the examination tolled the statute of limitations in MCL 567.250(2)?

(3) Whether, even if an examination is a "proceeding," the Treasurer must still file a lawsuit within the applicable time frame to avoid the lawsuit being time-barred?

This case rests on whether the Treasurer is barred by MCL 567.250(2) from commencing an enforcement action to require Dine Brands to report and remit $243,116.81 as alleged "unclaimed property" to the State. Dine Brands disputes that this amount constitutes unclaimed property under the UUPA.[1] Notwithstanding whether the Treasurer has met her burden of proving

[1] During the examination, Dine Brands presented substantial evidence that none of the amounts at issue were owed to the payees for a variety of reasons and therefore cannot constitute unclaimed property. *See* MCL 567.223 (unclaimed property refers to amounts that are "owing" and "payable or distributable" to another person).

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that these amounts are indeed owed by Dine Brands, Dine Brands filed this action seeking a declaratory judgment that any such claims are time-barred under MCL 567.250(2) as the Treasurer waited years to examine Dine Brands' records related to these amounts, and then took almost a decade to complete the examination.[2]

The Michigan Legislature enacted the UUPA in 1995 to conform Michigan law with the Uniform Unclaimed Property Act of 1981 (the "1981 Uniform Act"). The 1981 Uniform Act is a model unclaimed property act drafted by the Uniform Law Commission, which has been adopted in substantial part by over thirty states, including Michigan. The UUPA sets forth rules for determining when property (generally, money owed to third parties) is abandoned, and imposes a duty on the holders of such property (*i.e.*, the debtors) to report or remit it to the state "on or before July 1 of each year." MCL 567.238(4), 567.240. The UUPA permits the Treasurer to examine a holder's books and records and, if necessary, file an enforcement action against a holder for failing to comply with these requirements. MCL 567.253.

MCL 567.250(2) imposes a time limitation on the Treasurer's ability to file such an action, providing that "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, after the duty arose." Both the Circuit Court and a unanimous Court of Appeals held that the Treasurer's claims against Dine Brands were time-barred under this provision because the Treasurer had failed to commence any enforcement action against Dine Brands to require the

[2] The Treasurer is wrong that she timely requested an examination of all property at issue. The examination began in 2013 and included checks issued as far back as 2003. The statute of limitations for property owed to another business on or before March 31, 2004, had already passed as of the date the examination notice was sent to Dine Brands. MCL 567.233, 567.238(4), 567.240.

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remittance of the amounts at issue within the applicable period. In reaching this conclusion, both lower courts reasoned that an examination of records, as that term is used within the UUPA, is not an "action" or "proceeding" within the meaning of MCL 567.250(2) and therefore the Treasurer's initiation of an examination within the statutory period did not satisfy or toll the statute of limitations.

The Court of Appeals and the Circuit Court did not err. Both undertook an exhaustive review of the provisions of the UUPA that refer to actions, proceedings and examinations and found that the UUPA consistently uses the term "examination" when discussing an audit or review of the holder's records, whereas it consistently uses the terms "action" and "proceeding" to refer to court actions and similar judicial dispute resolution processes. In addition, commentary to the 1981 Uniform Act – upon which MCL 567.250(2) is based – explained that the statute of limitations was specifically added to the Act to prevent states from subjecting holders to "suit" "for an indeterminate period." The Uniform Act was revised in 2016 to modify the statute of limitations to prohibit the state from commencing any "action, proceeding, or examination" after the statutory period, making crystal clear that actions and proceedings are distinct from, and do not include, examinations.

In addition, nothing in MCL 567.250(2) provides that the initiation of an examination tolls the statute of limitations. Under Michigan law, tolling of a statute of limitations must be explicit. The Michigan Legislature expressly includes tolling provisions where tolling is intended—for example, in the tax context. Tellingly, other states have adopted unclaimed property statutes of limitations that are nearly identical to MCL 567.250(2) except that they include an explicit tolling provision for examinations. The Michigan Legislature's election not to include a similar provision in MCL 567.250(2) was deliberate to exclude the tolling of the statute.

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Even if an examination were a "proceeding" for purposes of MCL 567.250(2), the Treasurer must still file a lawsuit within the applicable time frame or the Treasurer's claims are time-barred. The plain language of MCL 567.250(2) is clear: "an action *or* proceeding shall not be commenced . . . more than 10 years . . . after the duty arose." Under the plain meaning of these words, the commencement of either an action or a proceeding after the statutory period violates MCL 567.250(2). The Court of Appeals, in its advisory opinion in response to this Court's September 15, 2023 Order, misread MCL 567.250(2) to mean that an action or proceeding *shall* be commenced *within* the statutory period, rather than that an action or proceeding *shall not* be commenced *after* the statutory period, and in doing so, reached the incorrect conclusion. The proper construction of MCL 567.250(2) naturally follows from its stated purpose to limit the time during which a lawsuit can be brought against the holder. If the commencement of an examination within 10 years (or 5 years, for property owed to another business) by itself satisfied MCL 567.250(2), then the Treasurer could take unlimited time to complete the examination, and then have an unlimited time to commence an enforcement action against the holder. That is precisely what happened here: the Treasurer sought to examine Dine Brands' records dating back to 2003, but waited until 2013 to start the examination, and then took 8 more years to complete it.[3] Yet the UUPA's record retention period expired long before the Treasurer completed her examination. The Treasurer also sought records not covered by the UUPA's relatively narrow record retention requirement, which emphasizes the need for timely and efficient examinations. Finally, the adoption of MCL 567.251a in 2015, which gives holders the option to administratively appeal an audit determination, does not alter the operation of the statute of limitations in MCL 567.250(2) or the UUPA enforcement mechanism in MCL 567.253.

[3] The Treasurer did not even request records related to the amounts at issue until 2015.

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For the reasons herein, this Court should deny leave to appeal, or, if leave is granted, affirm the Court of Appeals' unanimous January 19, 2023 Opinion affirming the Circuit Court's Order granting motion for summary disposition, while also rejecting and reversing the Court of Appeals' November 9, 2023 Opinion. Alternatively, if the Court disagrees with the Circuit Court and Court of Appeals and holds that an examination is an action or proceeding, the Court should still affirm the Court of Appeals' unanimous January 19, 2023 Opinion, and reverse the November 9, 2023 Opinion, as the Treasurer must have still commenced an action within the statutory period, which she did not do.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT AN EXAMINATION CONDUCTED BY THE TREASURER IS NOT AN "ACTION OR PROCEEDING" UNDER MCL 567.250(2).

Under longstanding principles of statutory construction, the terms "action" and "proceeding," as used in MCL 567.250(2), do not include an "examination." First, the UUPA consistently uses the term "examination" to refer to a records review or audit, whereas it uses the terms "action" and "proceeding" to refer to judicial dispute resolution processes. Second, the plain meaning of the terms "action" and "proceeding" do not include records examinations. Third, MCL 567.250(2) was expressly intended to apply to *judicial* actions and proceedings. Finally, other states that have adopted unclaimed property statutes of limitations similar or identical to MCL 567.250(2) have construed the terms "action" and "proceeding" to exclude examinations.

The Court of Appeals and the Circuit Court did not err in holding that an "action" or "proceeding," as used in MCL 567.250(2), do not include an "examination." As a result, the Treasurer did not satisfy MCL 567.250(2). And, as the Court of Appeals noted, "Defendant [did] not dispute that more than 10 years have elapsed (or 5 years, in the case of checks paid to other businesses) since the amounts at issue were required to be reported and remitted to the State. Thus,

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there [was] no dispute that the statutory period has run." (COA Jan 19, 2023 Opinion at 6 n4 (quoting Circuit Court Order on Motion for Summary Disposition).) The Treasurer is thus barred from requiring Dine Brands to report and escheat the purported unclaimed property in its possession. This "renders discussion of the parties' other arguments on appeal irrelevant." (COA Jan 19, 2023 Opinion at 6.)

A. The UUPA Consistently Uses the Term "Examination" to Mean a Records Review or Audit and the Terms "Action" and "Proceeding" to Mean Judicial Dispute Resolution Processes.

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004) (quoting *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999)). "The words of a statute provide the most reliable evidence of [the Legislature's] intent . . . ." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citation and quotation marks omitted). Accordingly, this Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Id* at 237 (quoting *Bailey v United States*, 516 U.S. 137, 145 (1995)).

The UUPA does not define the terms "action" or "proceeding." It explicitly and consistently uses the term "examination" when discussing an audit of a company's records and the terms "action" and "proceeding" to refer to court actions and similar judicial dispute resolution processes.

The UUPA requires "holders" of intangible property (*i.e.*, a debt) that is "presumed abandoned" to report and remit the property to the state each year. MCL 567.238, 567.240. The Treasurer "may examine the records of a person to determine whether the person has complied with this act." MCL 567.251(2). This is what the UUPA defines as an "examination." In lieu of

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a standard examination, eligible companies under audit may elect a "streamlined" examination process (notably, this process is unavailable to out-of-state companies like Dine Brands). MCL 567.251b. If the Treasurer determines that a company failed to report or remit unclaimed property, she can issue a "notice of examination determination," which is simply a notice of her findings at the conclusion of an examination regarding the property she believes the company must report and remit to the state. MCL 567.251a(1). The company can then appeal the notice of examination determination by filing an "action" in the circuit court or by filing a request for reconsideration with the Treasurer. *Id.* Notably, MCL 567.251, MCL 567.251a, and MCL 567.251b are the *only* provisions in the UUPA that address examinations. *Nowhere else does the UUPA use the term "examination."* These provisions establish that the Michigan Legislature exclusively used the term "examination" to refer to the Treasurer's review of the putative holder's records.

By contrast, as the Court of Appeals recognized, in all but one instance,[4] the Legislature uses the terms "action" or "proceeding" to refer to ways that a party can seek judicial relief or redress for a dispute. (*See* COA Jan 19, 2023 Opinion at 5-6.) *See also* MCL 567.247 (providing that a property owner aggrieved by a decision of the administrator may bring an "action" in the circuit court), MCL 567.251a (providing that a holder aggrieved by a decision of the administrator may bring an "action" in the circuit court); MCL 567.254 (providing that the administrator may bring an "action" in a court of competent jurisdiction on behalf of another state related to

[4] The Court of Appeals correctly recognized that the only time "action" does not mean a judicial action or a process for seeking redress for a dispute is when the statute addresses actions of individuals, which occurs after a judicial "action" is already referenced. (*See* COA Jan 19, 2023 Opinion at 5-6.) *See* MCL 567.248(1) (noting that "any action" by the holder to destroy or dispose of documents under the Treasurer's authorization cannot give rise to an "action or proceeding"); MCL 567.249 (noting that "any action" by the Treasurer to destroy or dispose of documents that have "insubstantial commercial value" cannot give rise to an "action or proceeding"). This in no way suggests that an "action" includes an "examination."

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compliance with the other state's unclaimed property laws, and another state may similarly bring an "action" in that state on behalf of Michigan); MCL 567.248 (barring an "action or proceeding" by the property owner against a holder for the destruction or other disposal property if authorized by the administrator); MCL 567.249 (barring an "action or proceeding" by the property owner against the administrator for her destruction of unclaimed property); MCL 567.250(1) (providing that even if the property owner's right to commence an "action or proceeding" against a holder has expired, the property is still subject to the UUPA); and MCL 567.250(3) (barring the administrator from commencing an "action or proceeding" against a holder more than four years after the duty arose, if the holder has elected to participate in the streamlined audit process).[5]

It would be nonsensical to substitute the term "examination" for "action" or "proceeding" in these statutory provisions: for example, owners and holders of unclaimed property cannot bring "examinations" against the Treasurer as contemplated in these statutes. Consequently, the UUPA's use of "action or proceeding" within MCL 567.250(2) must similarly refer to judicial actions or proceedings.[6]

---

[5] The Treasurer argues that the "only coherent" reading of the phrase "action or proceeding" in MCL 567.250(3) is that it is a reference to the audit itself and a reduction of the audit's "scope" from 10 years to 4 years. (Tr Supp Brief at 21.) That is nonsense. Similar to MCL 567.250(2), the use of "action or proceeding" in MCL 567.250(3) contemplates a four-year statute of limitations for the filing of an enforcement action or similar proceeding for those holders "electing to participate in the streamlined audit process." MCL 567.250(3). By definition, that provision only applies to those holders *already* under examination by the Treasurer and that have elected to participate in the streamlined audit program, which is intended to be a more efficient audit that can be completed in 18 months or less. *See* MCL 567.251(b)(2)(a). This provision proves Dine Brands' point: if the Treasurer can complete an audit within 18 months, there is no excuse for the Treasurer to take 8 years in this case.

[6] The Treasurer's argument that the Court of Appeals' interpretation would render the term "enforced" in MCL 567.250(1) nugatory (Tr Supp Brief at 19) is patently flawed and misleading. That provision states: "The expiration, before or after the effective date of this act, of any period of time specified by contract, statute, or court order, during which a claim for money or property can be made or during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property, does

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This Court has recognized that, "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, the use of different terms within similar statutes generally implies that different meanings were intended. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word." *US Fid Ins & Guar Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) (internal citations omitted). The use of "action" and "proceeding" in MCL 567.250(2) rather than "examination," which was used elsewhere within the Act to have a separate and distinct meaning, establishes the Legislature's intent to connote different meanings to those terms. As the Court of Appeals held, this omission further indicates the Legislature intended to exclude "examinations" from consideration under MCL 567.250(2). (*See* COA Jan 19, 2023 Opinion at 6 (citing *Mays v Snyder*, 323 Mich App 1, 40; 916 NW2d 227 (2018), aff'd, 506 Mich 157 (2020) ("It is a basic tenet of statutory construction that the omission of a statutory provision should be construed as intentional.").)

B. The Ordinary and Common Meaning of the Terms "Action" and "Proceeding" Refers to Judicial Dispute Resolution Processes.

Numerous cases from this Court have similarly defined the terms "action" and "proceeding" to refer to *judicial* dispute resolution processes and not to mere records examinations or audits by government agencies. *See Twp of Casco v Sec'y of State*, 472 Mich 566, 593; 701

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not prevent the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the administrator as required by this act. This subsection does not apply to gift cards or gift certificates." In other words, even if an owner's right to reclaim the property from the holder has expired, the holder must still report and remit the property under the UUPA. The Legislature's use of "enforced" alongside "commenced" makes sense here because the Legislature is specifically overriding the enforceability of contracts, statutes or court orders that may extinguish the owner's rights as against the holder. MCL 567.250(2) is different: it prohibits the Treasurer from commencing a new action after the statutory period.

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NW2d 102 (2005) (noting that a court must accord to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute); *see also Epps v 4 Quarters Restoration LLC*, 498 Mich 518; 872 NW2d 412 (2015) (holding that an "action," as used in another statute, is defined as "a lawsuit brought in court; a formal complaint within the jurisdiction of a court of law") (citing *Black's Law Dictionary*, (6th ed)); *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002) ("action" means "a civil or criminal judicial proceeding"); *Meyers v Barlock*, 281 Mich 629; 275 NW 656 (1937) (defining "proceeding" as "[a]ny application, however made, to a court of justice for the purpose of having matters in dispute judicially determined; any application to a court of justice however made for aid and enforcement of rights, for relief, for the redress of injuries, for damages or for any remedial object"); *see also People v Bobek*, 217 Mich App 524; 553 NW2d 18 (1996) (defining "proceeding" as "the form and manner of conducting juridical business before a court or judicial officer").

The Treasurer counters that the terms "action" and "proceeding" should apply so broadly as to encompass virtually everything. (*See* Tr Supp Brief at 16 (defining action as "the doing of something; state of being in motion or of working"); *Id* (defining proceeding as "an advancing or going on with what one has been doing").) Such an interpretation would improperly lead to absurd results in the context of the UUPA. *See People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) ("Statutes must be construed to prevent absurd results."). Indeed, applying the Treasurer's definition to certain provisions in the UUPA would render them unintelligible, uncertain, and without any meaning. As the Treasurer herself notes, if her interpretation were applied to MCL 567.248(1), that statute would be rewritten to mean: "'An [act of doing something] or [an advancing or going on with what one has been doing] shall not be maintained against a holder for

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or on account of any [act of doing something] taken by the holder in destroying or otherwise disposing of the property pursuant to the authorization of the administrator.'" (*See* Tr Supp Brief at 17.) On the other hand, if "action or proceeding" means judicial dispute resolution processes, as the lower courts held, the statute's meaning returns: "A [judicial action] or [similar dispute resolution procedure] shall not be maintained against a holder for or on account of any [act of doing something] taken by the holder in destroying or otherwise disposing of the property pursuant to the authorization of the administrator." *See* MCL 567.250.[7]

Even if the Legislature intended the term "proceeding" to have a broader meaning, that would still not make an examination a "proceeding." As noted above, the UUPA consistently uses the term "proceeding" to refer to a process by which a person can seek *relief* or *redress for a dispute*. An examination is not a dispute resolution process. It is merely a review of the holder's records that may, or may not, culminate in the Treasurer determining there is a potential liability; in other words an examination may *or may not* even lead to a dispute, let alone include a process to try to resolve a dispute. MCL 567.251(2), 567.251a(1). An examination does not include any of the hallmarks of an administrative proceeding, which typically include the right to a hearing (often before an objective decision-maker) to present the holder's arguments and authorities, the

[7] The Treasurer argues that the phrase "action or proceeding" within the bankruptcy code includes audits and investigations. (*See* Tr Supp Brief at 9.) But the bankruptcy code palpably differs from the UUPA and underscores why an "action or proceeding" within MCL 567.250(2) does not include an examination. Unlike MCL 567.250(2), the bankruptcy code operates an automatic stay as to not only "an action or proceeding," but also as to "*any act* to collect, *assess*, or recover a claim against the debtor." 11 USC 362(a)(1), (6). And, even then, the Legislature still believed a separate, explicit provision was necessary to clarify that "an audit by a governmental unit to determine tax liability" is also automatically stayed. *See* 11 USC 362(a)(9)(A). The Michigan Legislature's exclusion of examinations from MCL 567.250(2), its use of "examination" in other provisions of the UUPA, and its failure to include a similar provision equating an examination with an "action or proceeding" like 11 USC 362(a)(9)(A) all establish that it did not intend MCL 567.250(2) to include an examination.

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ability to introduce evidence supporting the company's position and to require the government to produce relevant documents, and the ability to present or cross-examine witnesses. *See Nummer v Dep't of Treasury*, 448 Mich 534, 558; 533 NW2d 250 (1995) (noting that in judicatory proceedings a party typically has the right to be represented by counsel, examine and cross-examine witnesses, and submit exhibits). In the Treasurer's examination of Dine Brands, none of these factors was present.

C. MCL 567.250(2) Was Specifically Intended to Apply to Judicial Actions and Proceedings.

The Legislature's adoption of the UUPA, a model act based on the 1981 Uniform Act, establishes the Legislature's understanding and agreement with the polices underlying the 1981 Uniform Act. MCL 567.250(2) is nearly identical to the statute of limitations in the 1981 Uniform Act, which provides: "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). 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 Mutual 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.").

The drafters of the 1981 Unform Act—the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws)—expressly stated that the statute of limitations was intended to establish finality, to provide to the holder a clear deadline by

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which the Treasurer must commence a lawsuit to escheat any unclaimed property. The commentary to section 29(b) of the Act states, "an administrator must commence an action against a holder within 10 years after the time the property was first reportable." 1981 Uniform Act, cmt 29(b). The comment then explained, "[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." *Id*. The drafters were concerned that "[a] holder may under the 1966 Act be *subject to suit for an indeterminate period*. Certain states have argued that Section 16 of the 1966 Act applies to states and thus there is no statute of limitations. The 10-year limitation period will provide a holder with a cut-off date on which it can rely." *Id* (emphasis added). The comment makes no mention of examinations, articulating a simple and straightforward rule that the administrator must file a lawsuit against the holder within 10 years of the date the property at issue should have been reported in order to demand enforcement.[8] Only such a rule would give the holder a clear "cut-off date on which it can rely." By contrast, under the Treasurer's position, Dine Brands would still "be subject to suit for an indeterminate period" as the Treasurer could take unlimited time to conduct the examination (and then presumably unlimited time thereafter to commence an enforcement action). This is exactly the opposite of what the drafters intended.

In 2016, the Uniform Law Commission revised the uniform unclaimed property act (the "2016 Uniform Act"). The 2016 Uniform Act's statute of limitations is based on the 1981 Uniform Act,[9] but includes one key difference, stating "[t]he administrator may not commence an action,

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[8] The enforcement provision of the 1981 Uniform Act is also identical to MCL 567.253. *See* 1981 Uniform Act, § 32 ("The administrator may bring an action in a court of competent jurisdiction to enforce this Act.").

[9] The comment to the 2016 Uniform Act's statute of limitations provides: "Section 610(c) is a return to the limitations provision provided for in the 1981 Act, which provides for a 10-year statute of limitations, without any contingencies (Section 29 of the 1981 Act). By contrast, the 1995 Act, at Section 19, provides that the 10-year limitations period is only effective as to

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proceeding, *or examination* with respect to a duty of a holder under this [act] more than 10 years after the duty arose." 2016 Uniform Act, § 610(c) (emphasis added).[10] The explicit addition of "examination" makes abundantly clear that an "examination" is not 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, effect must be given to every clause and sentence."). If, as the Treasurer argues, the phrase "action or proceeding" was meant to include an examination, it would have been unnecessary to add "examination" to the statute of limitations in the revised 2016 Uniform Act. Indeed, the use of separate terms for actions, proceedings, and examinations in the same phrase necessarily means that each term has a different meaning. *Midwest Inst of Health, PLLC v Gov of Mich (In re Certified Questions from the United States Dist Court)*, 506 Mich 332, 399; 958 NW2d 1 (2020) ("Many other statutes mentioned both 'health' and 'safety,' indicating that these terms had different meanings—if they meant the same thing, the Legislature would not likely have used each term.").

D. Other States With Statutes of Limitations Similar or Identical to MCL 567.250(2) Have Construed The Terms "Action" and "Proceeding" to Exclude "Examinations."

The Treasurer disingenuously argues that a decision construing "action or proceeding" to exclude examinations would make Michigan "the first in the nation to hold that examinations are not actions or proceedings" within the meaning of the UUPA and "out of step with the rest of the nation." (Tr Supp Brief at 1.) That is false – the question is one of first impression. No court in the nation has held one way or the other that an action or proceeding includes or excludes an

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specifically identified property included in a report as filed. This is not the rule recognized by this Act. This 10 year limitations period provides a holder with a clear cut-off date on which it can rely." 2016 Uniform Act, cmt 610(c).

[10] The 2016 Uniform Act also adopts a shorter (5-year) statute of limitations for holders that filed a non-fraudulent report. 2016 Uniform Act, § 610(b).

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examination. But at least a dozen state legislatures have made clear that, for similar statutes of limitations, an action or proceeding does *not* include an examination. By contrast, Dine Brands is not aware of a single state that has defined the term "action" or "proceeding" in its unclaimed property law to include an "examination." Thus, the Treasurer's interpretation of MCL 567.250(2) would make Michigan an outlier, not the other way around.

Delaware's unclaimed property statute of limitations, like MCL 567.250(2), is based on the 1981 Uniform Act provision and includes wording nearly identical to MCL 567.250(2): "The State Escheator may not commence an action or proceeding to enforce this chapter with respect to the reporting, payment, or delivery of property more than 10 years after the duty arose." *See* 12 Del Code 1156(b). The Delaware Legislature, however, then added the following language: "*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 an examination is not an action or proceeding and that, even if it was, an enforcement action must still be brought within the statutory period. The Delaware Legislature modified the statute to avoid this outcome and accomplish legislatively what the Treasurer is seeking to do here through its strained interpretation of MCL 567.250(2). If the Treasurer does not like the rule adopted by the Legislature in MCL 567.250(2), the appropriate remedy is for the Legislature to change the statute. Unless and until that happens, this Court must read the statute as it is currently written.

Similarly, North Dakota's statute of limitations—which is based on the 2016 Uniform Act's statute of limitations—provides: "The administrator may not commence an action, proceeding, or examination with respect to a duty of a holder under this chapter more than ten

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years after the duty arose." ND Code 47-30.2-39(3). That statute, which expressly includes the term "examination" separately from "action" and "proceeding," also adds a tolling provision nearly identical to that in Delaware: "The periods of limitation established by this section are tolled by the administrator's delivery of a notice that a holder is subject to an examination under section 47-30.2-55." ND Code 47-30.2-39(4). Again, such language would be unnecessary if the Treasurer's interpretation of MCL 567.250(2) was correct.

Ten other states – Colorado, Idaho, Indiana, Kentucky, Maine, Tennessee, Utah, Vermont, Washington, and Wisconsin[11] – and the District of Columbia[12] have also adopted statutes of limitations based on the 2016 Uniform Act. As explained above, in these states, the statutes of limitations make clear that "actions" and "proceedings" do not include "examinations," by expressly distinguishing between these terms.

Thus, the lower courts did not err in holding that an examination is not an "action or proceeding" under MCL 567.250(2) and this Court should deny leave to appeal.

II. THE COMMENCEMENT OF AN EXAMINATION DOES NOT TOLL THE STATUTE OF LIMITATIONS IN MCL 567.250(2).

MCL 567.250(2) lacks any language providing for the tolling of the statute of limitations in the case of an examination or for any other reason. This Court has held, "[t]olling provisions, like statutes of limitation, are of legislative creation." *Mair v Consumers Power Co*, 419 Mich 74, 85; 348 NW2d 256 (1984). Without express tolling provisions, "it is [a] general rule that exceptions to statutes of limitation are to be strictly construed." *Id* at 80 (holding that an administrative proceeding before a federal agency did not toll the statute of limitations for

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[11] *See* CRS 38-13-609; Idaho Code 14-5-610 (effective July 1, 2024); Ind Code Ann 32-34-1.5-36; KRS 393A.390; 33 MRS 2120; ND Code 47-30.2-39; Tenn Code Ann 66-29-140; Utah Code Ann 67-4a-610; 27 VSA 1520; Rev Code Wash 63.30.410; Wis Stat 177.0610.

[12] DC Code 41-156.10.

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commencing a court action). This rule derives from the presumption that, if the Legislature had intended tolling of a statute of limitations, it could have and would have included such a provision; such a provision cannot be read into existence by a court. The Legislature is aware of tolling provisions and explicitly articulates these provisions where it intends the statute of limitations 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.").

This Court has consistently rejected tolling in the absence of express statutory language. *See, e.g., Chabad-Lubavitch of Mich v Schuchman*, 497 Mich 1021; 862 NW2d 648 (2015) (reversing a judgment where there had been no grounds to toll the statute of limitations because "MCL 600.5827 and MCL 600.5829 govern the accrual of the plaintiffs' claims. *The statutory scheme is exclusive, and neither statute contains a provision to toll the period of limitations.*") (emphasis added); *Trentadue v Gorton*, 479 Mich 378, 392; 738 NW2d 664 (2007) (a party "may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of a statute"). Accordingly, because neither MCL 567.250(2) nor any other provision in the UUPA provides that the statute of limitations is tolled by the initiation of an examination, this Court must presume that omission to be intentional.

As explained above, MCL 567.250(2) stands in stark contrast to Delaware's nearly identical unclaimed property statute of limitations, which added an express tolling provision as follows: "[t]he 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. . . ." *See* 12 Del Code 1156(b). The same is true for the North Dakota tolling provision noted above. ND Code 47-30.2-39(4).

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The absence of a similar tolling provision in Michigan's UUPA confirms that, unlike Delaware and North Dakota, the Michigan Legislature did not intend the initiation of an examination to toll the statute of limitations under MCL 567.250(2).

This Court should deny leave to appeal as the correct result was reached in finding the claims by the Treasurer to be time-barred.

III. EVEN IF AN EXAMINATION IS A PROCEEDING AND WAS TIMELY INITIATED UNDER MCL 567.250(2), THE TREASURER MUST STILL FILE AN ACTION WITHIN THE STATUTORY PERIOD.

A. The Plain Language of MCL 567.250(2) Prohibits the Treasurer from Commencing an Action or Proceeding After the Statutory Period.

MCL 567.250(2) unambiguously provides that "an action or proceeding shall not be commenced" after the statutory period. Put differently, the administrator "shall not" commence *either* an action *or* a proceeding after the statutory deadline. This Court has held that:

> One fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. Thus, when the 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 to apply the terms of the statute to the circumstances in a particular case. Concomitantly, it is our task to give the words used by the Legislature their common, ordinary meaning.

Massey v Mandell, 462 Mich 375, 380; 614 NW2d 70 (2000) (internal citations and quotations omitted). This is particularly true in the case of a statute of limitations, which must be strictly construed to accomplish its purpose of imposing finality and repose. *Mair*, 419 Mich at 74.

"The word 'or' is a disjunctive term that causes the statute to prohibit *either* action." *Cheboygan Sportsman Club v Cheboygan Cnty Prosecuting Atty*, 307 Mich App 71, 92; 858 NW2d 751 (2014) (emphasis in original); *see also* 1A Singer, Sutherland Statutory Construction (7th ed), § 21:14, pp 189-190 ("The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately.") In *People v Pfaffle*, the Court of Appeals

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explained that by drafting the statute that prohibits four actions — "recruitment, inducement, solicitation, or coercion" – the Legislature indicated that these four actions should be considered separately, such that all four actions were prohibited, "in order to give full effect to the language the Legislature used in crafting a statute intended to prohibit" the different types of conduct. 246 Mich App 282; 632 NW2d 162 (2001). Under this rule, it would be improper for the Treasurer to commence *either* an action *or* a proceeding after the statutory period. Thus, even if an examination constituted a "proceeding" and the Treasurer timely initiated the examination, the Treasurer would still need to bring any later action within the statutory period. It is undisputed that a lawsuit filed by the Treasurer under MCL 567.253 to enforce her final determination in an examination is an "action" for purposes of MCL 567.250(2). The Treasurer's failure to file such action within the statutory period means that she is prohibited from doing so now. *See People v Patton*, 325 Mich App 425, 436; 925 NW2d 901 (2018) ("This reasoning is further supported by the language of the statute. It uses the term 'or' in separating the phrases 'registered to' and 'assigned to' from the phrase 'routinely used.' The Legislature's use of the disjunctive term 'or' evidences that there are two ways to violate the statute. That is, defendant could violate MCL 28.727(1)(h) by failing to register a telephone number registered to him; he could separately violate the statute by failing to register a telephone number that he routinely used.").

As the Circuit Court held, "even if an examination were a proceeding, if Defendant were to bring an action against Dine Brands today to require escheat of the amounts at issue, such action would still plainly violate MCL 567.250(2)'s command that 'an action . . . shall *not* be commenced by the administrator' after the statutory period." (Jan 25, 2022 Circuit Court Opinion, at 12-13 (emphasis added).) At oral argument preceding the Court of Appeals' initial decision, Judge Yates seemingly recognized this limitation on the Treasurer's ability to bring an action that falls outside

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the statute of limitations even if the examination was timely commenced.[13] Yet, on remand from this Court seeking the Court of Appeals' opinion on this issue, the Court of Appeals inverted the language of the statute (and thereby fundamentally misread it) to denote that either an action or proceeding shall be commenced within the statutory period (as opposed to prohibiting either from commencing after it), reasoning: "'The Legislature's use of the disjunctive word 'or' indicates an alternative or choice between two things.' Here, that means that the Legislature expressed its intent that, within the period of limitations, defendant could choose to either: (1) begin an examination/proceeding; or (2) commence an action." (COA Nov 9, 2023 Opinion at 3 (internal citations omitted).) But again, this reading can only be true if MCL 567.250(2) was drafted to state that an action or proceeding shall *be* commenced within the statutory period. As explained above, the statute says the precise opposite: "an action or proceeding shall *not* be commenced" after the statutory period. In this context, the use of "or" means that the Treasurer shall not commence *either* an action *or* a proceeding after the statutory period.

If a rule stated that "apples or oranges shall not be delivered after 6 am," no one would reasonably contend that the delivery of apples before 6 am would mean that oranges could then be delivered after 6 am. This statement plainly means that neither can be delivered after 6 am. But the Treasurer and the Court of Appeals argue the exact opposite. Such interpretation would only make sense if only one of the two alternatives is contemplated to occur—for example "an online application or physical letter application shall not be submitted later than April 15." In that context,

[13] Judge Yates pointedly asked the Treasurer's counsel: "What do you do with their last argument though because that does seem to be the one you can't get away from? Let's say that an examination is a proceeding and so you commenced it and that's fine, but it's in the disjunctive and you can't bring an action outside of the period either. So, it's not as if you get the benefit of having started the examination. When you go to court, you violate the statute of limitations independent of when the examination started." (Jan 10, 2023 Oral Arg Audio at 16:30-16:56 (recording available upon request).)

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only one of these alternatives needs to occur prior to the deadline because it does not make sense to submit two separate applications. Even in this example, though, neither application may be submitted after the deadline.

Regardless, actions (lawsuits) and examinations are not simply alternative means of completing the same task; an examination is not a substitute for an action and the completion of an examination does not negate the requirement to bring an enforcement action. The structure of the UUPA specifically contemplates that an examination may lead to an enforcement action *if* the Treasurer identifies property in the examination that should have been reported under the UUPA and the holder disputes that the property is reportable. Indeed, an examination is a review of a company's records for the express purpose of determining whether the company holds unclaimed property that should have been reported to the State, and an enforcement action is the Treasurer's sole remedy in the UUPA if the holder refuses to escheat unclaimed property identified in an examination. MCL 567.251(2), 567.253. Actions are thus, by design, commenced *after* examinations.

Until an examination is completed (or a holder refuses to comply with an examination), a dispute giving rise to an enforcement action is not yet ripe because the Treasurer has no basis to contend that the holder failed to satisfy its obligations under the UUPA. It would make little sense under the statutory framework for the commencement of an examination to obviate the requirement that a subsequent action be timely filed, particularly before such action becomes ripe.

The ordinary meaning of MCL 567.250(2)'s command that "an action or proceeding shall not be commenced" after the deadline thus bars the Treasurer from commencing either an action or proceeding after such time.

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B. The Legislature's Adoption of MCL 567.251a Twenty Years After the Enactment of MCL 567.250(2) Did Not Change MCL 567.250(2)'s Meaning.

The Court of Appeals erroneously based its interpretation of MCL 567.250(2) in its advisory opinion on MCL 567.251a, which was adopted almost 20 years after the enactment of MCL 567.250(2) to give companies the option of administratively appealing the Treasurer's examination determination.[14] Relying entirely on this optional process, the court stated that UUPA "does not require . . . that defendant bring an action to enforce a decision issued by defendant under MCL 567.251a(1). Rather, as noted, it is the obligation of a *holder* to challenge the final administrative decision issued by defendant under MCL 567.251a(1)." (COA Nov 9, 2023 Opinion at 4-5) (emphasis added).

As an initial matter, MCL 567.251a was enacted decades after MCL 567.250(2), and is irrelevant to interpreting MCL 567.250(2). This Court has 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). MCL 567.250(2)'s language has remained unchanged over the years, including during the time MCL 567.251a was enacted, except for the reduction of the statute of limitations to five years for amounts due to another business association. As a result, its

[14] MCL 567.250(2) was enacted on May 17, 1995. MCL 567.251a was enacted on December 27, 2014, and became effective on March 31, 2015. Pub Acts 2014, No. 423. Prior to the adoption of MCL 567.251a, holders only had the right to appeal directly to court to challenge an examination determination. The administrative appeal process in MCL 567.251a is purely optional: "the holder *may elect* to contest the decision by filing a request for reconsideration with the administrator prior to bringing an action . . . ." (emphasis added). *See James Twp v Rice*, 509 Mich 363, 372; 984 NW2d 71 (2022) ("We acknowledge that the term 'may' is ordinarily considered to be permissive.").

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meaning should be the same today as it was when it was adopted. *See Protect Our Jobs v. Bd. of State Canvassers*, 492 Mich 763, 785; 822 NW2d 534 (2012) (holding that an amendment to a statute does not impact the meaning of other statutory provisions that "would remain unchanged" by the amendment).

The Court of Appeals' view that the adoption of MCL 567.251a impacts the meaning of the statute of limitations raises additional concerns here because the Treasurer's examination of Dine Brands occurred in 2013—*prior* to the effective date of MCL 567.251a in 2015. By relying on MCL 567.251a to construe MCL 567.250(2), the court appears to suggest that when the examination began, the Treasurer still needed to commence an action within the statute of limitations. But that changed in 2015 when the Treasurer's claims to all property, including property that was already barred by MCL 567.250(2) prior to the adoption of MCL 567.251a, became timely simply because the examination was timely commenced. There is no evidence that the Legislature intended to revive claims that were already barred by the statute of limitations. *See People v Nuss*, 405 Mich 437, 450; 276 NW2d 448 (1978) ("The principle is elemental that all statutes are prospective in their application unless the contrary clearly appears from the context of the statute itself."); *Detroit Club v State*, 309 Mich 721, 731; 16 NW2d 136 (1944) ("In the instant case it is difficult to conceive that the intent of the legislature was to revive actions which were plainly barred . . . ."). Applying MCL 567.251a in this manner would also have an impermissible retroactive effect on Dine Brands. *See Patel v Gonzales*, 432 F3d 685, 691 (6th Cir 2005) ("Courts should apply the law in effect at the time of the decision, unless such law has a retroactive effect on the parties."). For these reasons as well, MCL 567.251a should be ignored in construing MCL 567.250(2).

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But even if MCL 567.251a is taken into account, it does not change the meaning of MCL 567.250(2). Again, MCL 567.251a merely provides an *optional* administrative process by which a holder "may elect" to dispute or challenge an examination determination. It does not require the holder to file an appeal, nor does it provide that the holder waives its rights or defenses if it does not do so. MCL 567.251a does not mention MCL 567.250(2) at all. It does not purport to override MCL 567.253 or say that the Treasurer need not enforce an examination determination if the holder declines to appeal. The Court "cannot read into the statute what is not there." *AFSCME v City of Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003); *see also Malpass v Dep't of Treasury*, 494 Mich 237, 251; 833 N.W.2d 272 (2013) ("'[T]o supply omissions transcends the judicial function.'") (*quoting Iselin v United States*, 270 U.S. 245, 251 (1926)); *Hobbs v McLean*, 117 U.S. 567, 579 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."). It would turn the Legislature's intent on its head if a statute that was intended to expand a holder's rights by providing an optional administrative appeals process is construed to limit those rights if the holder does not appeal.

If a company under examination does not appeal within the 90-day period specified in MCL 567.251a(1), the Treasurer must still pursue an action against the company under MCL 567.253, which has also remained unchanged since its adoption in 1995. Indeed, the only means of enforcement provided by the UUPA is an action under MCL 567.253. If the Treasurer declines to pursue such an action, that is her decision. But nothing in MCL 567.251a excuses the requirement that she bring an action to enforce her rights. In many cases, neither party may desire to litigate if the amount at issue is relatively low, if the law is unclear, or if the facts are complex. But if a holder reasonably decides that it does not wish to initiate litigation, yet the Treasurer

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decides to do so, the holder is entitled to defend itself. This was also the case prior to the adoption of 567.251a, as holders still had the right to appeal to court, but if they chose not to do so, the Treasurer still had to file an action to enforce her audit determination against the holder. The adoption of MCL 567.251a does not change how the UUPA is enforced at all.

Under the Court of Appeals' interpretation in its advisory opinion, MCL 567.253 would also be rendered meaningless, as the Treasurer would never need to file an action after commencing an examination. *See Apsey v Mem'l Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007) ("A reviewing court should not interpret a statute in such a manner as to render it nugatory. A statute is rendered nugatory when an interpretation fails to give it meaning or effect."). As noted above, neither MCL 567.251a nor any other provision of the UUPA provides that the company waives its rights or defenses—including the statute of limitations under MCL 567.250(2)—if it declines to bring its own action and the Treasurer pursues her remedies. It is inconceivable that the Legislature would have intended to fundamentally alter the statute of limitations in the manner suggested by the Treasurer, and render the enforcement provisions of the UUPA nugatory, without saying a word. *See Sole v Mich Econ Dev Corp*, 509 Mich 406; 419; 983 NW2d 733 (disagreeing with the Court of Appeals because its "interpretation would render Subsection (11) nearly meaningless, as it would not allow disclosure of anything already exempt under Subsection (9)"); *Walen v Dep't of Corrections*, 443 Mich 240, 251; 505 NW2d 519 (1993) ("It follows from the structure of the statute that § 11, which offers no explanation about how inspection will take place, is essentially concerned with compelling agencies to create certain records. A contrary construction would render § 3 meaningless.").

Had the Legislature intended MCL 567.251a to drastically alter the statute of limitations, it would have made far more sense for the Legislature to adopt an explicit statute providing that

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the Treasurer's issuance of an examination determination tolls or satisfies the statute of limitations under MCL 567.250(2), as was done by Delaware and North Dakota. "[R]ules of statutory construction require that separate provisions of a statute, where possible, should be read as being a consistent whole, with effect given to each provision." *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994); *see also People v Evans*, 434 Mich 314, 324; 454 NW2d 105 (1990) ("In the absence of express evidence to the contrary, the section as amended is to be construed to have the same scope as the unaltered sections of the original statute. The unchanged sections and the amendment are to be interpreted so that they do not conflict.") (quoting 1A Sands, Sutherland Statutory Construction (4th ed), § 22.35, pp 296-297).

The conclusion that the adoption of an administrative appeal process does not affect the meaning of MCL 567.250(2) is also consistent with how dozens of states with similar statutes of limitations operate. On one hand, many states that have adopted the same or similar statute of limitations as MCL 567.250(2) have not enacted administrative appeals processes for holders. Again, by relying on MCL 567.251a, the Court of Appeals and the Treasurer would seemingly concede that, in these states, the state must still commence an action within the statutory period, even assuming that a proceeding includes an examination. On the other hand, the states that have adopted the 2016 Uniform Act have similar statutes of limitations to Michigan, except their statutes explicitly add "examination," along with "action or proceeding." The 2016 Uniform Act also adds an optional administrative process similar to MCL 567.251a for holders that disagree with the administrator's determination of liability. 2016 Uniform Act, Article 11.[15] Despite the addition

[15] The following states have adopted the statute of limitations from the 2016 Uniform Act, which is nearly identical to MCL 567.250(2) except that it adds the term "examination," as well as an optional administrative appeal process: Colorado (CRS 38-13-609, 38-13-1103); The District of Columbia (DC Code 41-156.10, 41-161.03); Idaho (Idaho Code 14-5-610, 14-5-1102); Indiana (Burns Ind Code Ann 32-34-1.5-36, 32-34-1.5-65); Kentucky (KRS 393A.390, 393A.680); Maine (33 MRS 2120 2183); North Dakota (ND Code 47-30.2-39, 47-30.2-75); Tennessee (Tenn Code

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of this administrative review process (which was not included in the 1981 Uniform Act), the official commentary to the 2016 Uniform Act makes plain that the statute of limitations provision marks "a return to the limitations provision provided for in the 1981 Act, which provides for a 10 year statute of limitations, without any contingencies. . . . This 10 year limitations period provides a holder with a clear cut-off date on which it can rely." 2016 Uniform Act, cmt 610.

The 2016 Uniform Act's enforcement provision (which is very similar to that in the 1981 Uniform Act) further supports this conclusion. It reads: "If a determination under Section 1012 becomes final and is not subject to administrative or judicial review, the administrator may commence an action in the [court] or in an appropriate court of another state to enforce the determination and secure payment or delivery of past due, unpaid, or undelivered property. The action must be brought not later than [one] year after the determination becomes final." 2016 Uniform Act, § 1201(a). Thus, an action must still be brought after the examination is completed. Accordingly, the drafters of the Uniform Acts did not intend for the adoption of an administrative review process to negate or affect the operation of the statute of limitations or the enforcement provision. Rather, whether an appeal process is available to the holder or not, the unclaimed property administrator must still file an action against the holder if the administrator wishes to pursue its claims. The North Dakota Legislature reached this exact conclusion, as it added the tolling provision to the statute of limitations even though the unclaimed property act includes an administrative appeals process. *See* ND Code 47-30.2-75 ("A person in this state aggrieved by an audit that in any form requests the payment of money or a civil penalty is entitled to a hearing before the board. A demand for a hearing must be made within thirty days of the request by the

Ann. 66-29-140, 66-29-167); Utah (Utah Code Ann 67-4a-610, 67-4a-1103); Vermont (27 VSA 1520, 1583); Washington (Rev Code Wash 63.30.410, 63.30.730; Wisconsin (Wis Stat 177.0610, 177.1103).

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administrator. . . .").

The Michigan Legislature likewise intended the same result when it adopted the 1981 Uniform Act's statute of limitations and made no mention of any impact on the statute of limitations or the enforcement statute when it added an optional administrative appeal process in 2015. The Treasurer's interpretation of MCL 567.250(2) would make Michigan the only state in the country that has effectively nullified its statute of limitations by adopting an administrative appeals process for holders. It would also operate as a trap for the unwary. Such an interpretation should be rejected. *See People v Harrison*, 194 Mich 363, 370; 160 NW 623 (1916) ("The intent to change the law must be evident and certain."); *Petrus v Dickinson Cnty Bd of Comm'rs*, 184 Mich App 282, 300; 457 NW2d 359 (1990) ("The United States Supreme Court has stated that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") (citing *Lanzetta v New Jersey*, 306 US 451, 453 (1939)).

C. The Legislature Intended MCL 567.250(2) to Bar Untimely Actions Regardless of When an Examination Is Commenced.

As explained above, MCL 567.250(2) is based on Section 29(b) of the 1981 Uniform Act. "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." *Citizens Ins Co*, 411 Mich at 546. The drafters of the 1981 Unform Act made clear that the statute of limitation was intended to establish finality, to "provide a holder with a cut-off date on which it can rely." 1981 Uniform Act, cmt 29(b). This is because, "[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." *Id.* The drafters were concerned that "[a] holder may under [prior law] be *subject to suit for an indeterminate period*." *Id* (emphasis

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added). The only way that a holder will *not* be subject to suit for an indeterminate period is if the Treasurer must commence an enforcement action under MCL 567.253 within the statute of limitations. Under the Treasurer's interpretation, an examination could extend the statute of limitations for an indefinite period of time. As the commentary to the 1981 Uniform Act indicates, this is not what the drafters intended.

This conclusion is consistent with the purposes of statutes of limitations generally. Statutes of limitations are necessary 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 v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974) (quoting 51 Am Jur 2d, Limitation of Actions, § 17, pp 602-603). If examinations have no time limitations, these purposes will not be served, as holders would be placed in indefinite jeopardy of having to defend themselves in an action, requiring them to maintain documents, however numerous, in perpetuity. Courts will also be forced to deal with stale claims. This is why Dine Brands filed this action: the Treasurer is seeking to claim amounts dating back to 2003, where records no longer exist.

D. Dine Brands' Construction of MCL 567.250(2) Is Consistent with the UUPA's Record Retention Requirement.

The conclusion that an action enforcing a holder's duty to report property to the State must be commenced within 10 years (or 5 years for property owed to another business) after the reporting deadline is consistent with the UUPA's record retention requirement. MCL 567.252 provides:

> A holder required to file a report under section 18, as to any property for which it has obtained the last known address of the owner, shall maintain a record of the name and last known address of the owner for 10 years, or, for

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> the holder of records of transactions between 2 or more associations as defined under section 37(a)(2), for 5 years, after the property becomes reportable, except to the extent that a shorter time is provided in subsection (2) or by rule of the administrator.

The record retention requirement includes no tolling provision for examinations.

The property at issue in this case principally includes alleged wages (with a one-year abandonment period) and alleged amounts due to another business (with a three-year abandonment period). Dine Brands was not required to maintain *any* records for wages alleged to be due in 2003 later than 2014, or for amounts alleged to be due to another business in 2003 later than 2011. Yet the Treasurer sought such records well after these mandatory recordkeeping periods had expired and then penalized Dine Brands (by presuming the amounts at issue to be outstanding obligations subject to the UUPA) if records were not available to prove the opposite. This problem is compounded by the fact that, at the commencement of the examination, Dine Brands did not know what records the Treasurer sought to review. Indeed, the Treasurer did not request *any* records relating to the amounts in dispute until 2015.[16] (*See* Appellant's Appendix at 94, (Helfers Affidavit ISO Dine Brands' Reply, ¶ 7).)

The Treasurer concedes that "the time periods used in the statute of limitations mirror the record retention requirements." (Tr Supp Brief at 20.) The Legislature's use of the same duration for the statute of limitations and record retention requirement highlights its intent that these provisions work in tandem. *See Matter of Regina Metro Co, LLC v NY State Div of Hous & Cmty Renewal*, 35 NY3d 332, 353; 154 NE3d 972 (2020) ("Together, the statute of limitations, lookback provision and record retention rules formed an integrated scheme . . . ."). In other words, the

[16] The UUPA's record retention requirement also only requires Dine Brands to maintain certain records (such as the owner's name and address) and not the detailed supporting records sought by the Treasurer in this case.

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Legislature intended the statute of limitations and the record retention requirement to lapse at the same time, such that a holder need not incur additional costs to preserve records once the Treasurer's ability to enforce a holder's duty to report and remit property has expired. *See TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596, 609; 950 NW2d 469 (2019) (different provisions of a statute that relate to the same subject matter must be read together in harmony); *Radina v Wieland Sales, Inc*, 297 Mich App 369, 373; 824 NW2d 587 (2012) (same). Yet, the Treasurer's view is that as long as she sent a notice of examination to Dine Brands before the period in MCL 567.250(2) expired, she can request any records at any time in the future, long after the record retention period has expired, and penalize Dine Brands if it has not maintained the records.[17] This would eviscerate the very purpose of the UUPA's record retention requirement.

Courts have rejected attempts to extend statutes of limitations beyond the corresponding record retention requirement. For example, in *Benskin, Inc v W Bank*, the Iowa Supreme Court analyzed whether the discovery rule should toll a seven-year limitations period where there was an identical record retention period. 952 NW2d 292 (Iowa 2020). In rejecting the applicability of the discovery rule, the Iowa court held that "a discovery rule would run counter to the

[17] The Treasurer's position raises serious constitutional questions and for that reason as well, should not be adopted by this Court. "The rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *Loose v Battle Creek*, 309 Mich 1, 13; 14 NW2d 554 (1944). In *Temple-Inland, Inc v Cook*, 192 F Supp 3d 527, 550 (D Del 2016), the Delaware District Court held that a statutory framework in which the State waited many years to commence and conduct an audit, avoided the otherwise applicable statute of limitations under dubious circumstances, and gave holders no notice that they would need to retain unclaimed property records to defend against audits, amounts to a "game of 'gotcha'" that shocks the conscience and violates a holder's substantive due process rights. Similar to what the *Temple-Inland* court warned against, the Treasurer's interpretation of MCL 567.250(2) would reward her for waiting many years to begin and complete an audit by allowing her to circumvent the applicable statute of limitations and record retention requirement, thereby giving her an indefinite period to perform the examination while making it difficult or impossible for a holder to challenge the examination determination.

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corresponding seven-year record retention requirement . . . ." *Id.* at 303. It reasoned: "It would make little sense to allow lawsuits to be asserted over seven years after a breach, when the bank may no longer have the relevant records." *Id.*

E. The Treasurer's Policy Arguments Are Irrelevant and Incorrect.

The Treasurer complains that Dine Brands' interpretation will require Michigan to conduct its own, independent examination of holders through lawsuits rather than participate in multistate audits. (*See* Tr Supp Brief 22-23.) First, policy-type arguments such as these are irrelevant to the Court's interpretation of the UUPA. *See Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002) ("Reasonable minds can differ about whether it is sound public policy to so limit the duty imposed on authorities responsible for our roads and highways. Our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts."); *Ross v Consumers Power Co*, 420 Mich 567, 596; 363 NW2d 641 (1984) (noting that the Court's individual or collective determinations should not provide what it deems would be most fair or just or the best public policy, but rather what it "believe[s] the Legislature intended the law to be in this area"). Any such arguments advanced by the Treasurer cannot override the plain language of MCL 567.250(2) and longstanding and fundamental principles of statutory construction. MCL 567.250(2) must be construed narrowly to fulfill its purpose of providing finality and certainty to the parties. Like the Circuit Court and the Court of Appeals, this Court should give the Treasurer's arguments no weight.

Second, in any event, the Treasurer's fears are unfounded. The statute of limitations under MCL 567.250(2) is generous: generally ten years after the date the property was required to be reported. This is more than enough time for the Treasurer to conduct an examination, issue

findings, and commence an action if necessary. MCL 567.251b(2)(a) contemplates that an examination will normally take only 18 months to complete. If a holder unreasonably delays an examination, the Treasurer has several remedies to keep the examination on track, including subpoenaing documents, asking the holder to sign a waiver to extend the statute of limitations (a common practice in tax audits), or commencing an action under MCL 567.253. The Treasurer can also impose penalties and/or interest on a holder that is not cooperating with an examination. MCL 567.255.

The extended duration of the Dine Brands examination is the direct result of the Treasurer's actions. 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 much earlier, shortly after the checks would have been potentially reportable to the State (2004 or 2006, depending on the applicable abandonment period). Instead, she waited until 2013, when the statute of limitations had already expired on some of the checks[18] and would expire shortly thereafter on the remainder. Second, rather than conducting her own examination, the Treasurer chose to join a complex multistate audit with 17 other state participants. This required the auditors to review approximately seventeen times as many records as they would have had to review had the Treasurer conducted a separate examination. Third, rather than focusing on likely sources of unclaimed property (such as outstanding checks), the Treasurer adopted an aggressive approach by requesting that Dine Brands produce records on every single check issued during the audit

[18] The statute of limitations for property owed to another business is 5 years, and the dormancy period for such property is 3 years. Thus, as of the date of the examination, the statute of limitations had already run for any such checks issued on or before March 31, 2004, as they would have been abandoned on or before March 31, 2007, and reportable on or before July 1, 2007, which is more than 5 years before the examination began on June 18, 2013. MCL 567.233, 567.238(4), 567.240.

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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. Although state unclaimed property laws were originally intended to reunite owners with their forgotten property, Michigan and other states in recent years have used these laws to generate revenue.[19] To serve that goal, the Treasurer engaged a third-party firm (Kelmar Associates, LLC) compensated on a contingent-fee basis,[20] to conduct the examination of Dine Brands. As other courts have chronicled, use of a private firm with a financial stake in the outcome of the audit has led to abusive audit practices, including "serv[ing] broad information requests and engag[ing] in expansive audits that impose substantial burdens on companies, thereby inducing settlements that generate income" for the states and their auditors.[21] Indeed, that is what happened here.

The UUPA's statute of limitations provides an important check on the ability of the Treasurer and her auditors to employ such tactics. As discussed in the commentary to the Uniform Acts, companies must have an absolute cut-off date on which they can rely. That will not be the case if the Treasurer has unlimited time to conduct her examination, and then further unlimited

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[19] Carolee Kvoriak Cameron & Jackie J. Cook, *General: Tax Law: A Continuation of the July 2012 Tax Law Theme Issue: How the Gold Gets in the Pot at the Rainbow's End; An Attorney's Guide to Unclaimed Property Compliance in Michigan*, 91 MI Bar Jnl. 40, 40 (Oct. 2012) ("Although unclaimed property collection is not technically a tax, cash-strapped states have turned to it in recent years to increase state revenue. . . . [S]tates have been increasingly looking at unclaimed property collection as a potential pot of gold. . . . Michigan's legislature similarly had fiscal considerations in mind when it amended Michigan's unclaimed property laws in 2010, shortening the period for turning over property as unclaimed to the state and accelerating the annual due dates for unclaimed property reports.").

[20] *See* State of Michigan Standard Contract Terms, at 2, available at https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Procurement/Contracts/MiDEAL-Media/008/7700189.pdf?rev=ef968eb0104041629c9ff9322931c2cb&hash=7D93E4573F934EF79446658014C67443 (Kelmar contingency fee ranges from 10.25% to 10.5% of the amount of unclaimed property determined to be due in examination).

[21] *State v AT&T Inc*, 239 A3d 541, 576 (Del C 2020); *see also Marathon Petroleum Corp v Sec'y of Fin for Del*, 876 F3d 481, 497 (3d Cir 2017) ("Kelmar's financial incentive to claim as much escheatable property as possible taints the entire process with an appearance of self-interested overreaching.").

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time to file an enforcement action. Accepting the Treasurer's position will only lead to more abusive audit practices. Yet MCL 567.250(2) was expressly intended to avoid this result and encourage efficient and fair examinations.

F. The Treasurer Errs in Attempting to Use an Examination Determination to "Reset" the Statute of Limitations.

The Treasurer now concedes that she must bring an action to enforce an examination determination but makes the novel argument that the statute of limitations for commencing such action under MCL 567.250(2) is based on when she makes her determination. (*See* Tr Supp Brief 25-26.) The Treasurer provides no support for her theory, which is contradicted by the plain language of MCL 567.250(2). MCL 567.250(2) provides that "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 … *after the duty arose*." (Emphasis added). The Treasurer's claim against Dine Brands is that Dine Brands had a "duty" to report and remit $243,116.81 as "unclaimed property" to the State under the UUPA. According to the Treasurer, such property was required to have been reported and remitted between 2004 and 2016. Under MCL 567.250(2), the clock begins to run at the time "the duty arose," which is when Dine Brands should have reported and remitted the property at issue under the UUPA. It is nonsensical for the clock to begin to run from the date the Treasurer issues the examination determination because the obligation to report and remit to report is the very "duty" that the Treasurer is claiming that Dine Brands violated.

Even if the statute were unclear (which it is not), the commentary to section 29(b) of the 1981 Uniform Act—on which MCL 567.250(2) is based—erases any doubt. The comment unequivocally states that "an administrator must commence an action against a holder *within 10 years after the time the property was first reportable*." 1981 Uniform Act, cmt 29(b) (emphasis added). It would also be contrary to the drafters' intent to "reset" the statute of limitations based

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on the date of the Treasurer's examination determination, as the Treasurer could take unlimited time to complete the examination and issue a determination, and so such a rule would not "provide a holder with a cut-off date on which it can rely." *Id.*

Thus, even if an examination is a "proceeding," the Treasurer must still file a lawsuit within the applicable time frame to avoid the lawsuit being time-barred. The Court of Appeals did not reach this issue in its initial opinion, which is the opinion sought to be appealed. While it did address this issue in its advisory opinion on remand, it got the question wrong and this Court should not accept its position.

CONCLUSION

This Court should deny leave to appeal, or, if leave is granted, affirm the Court of Appeals' unanimous January 19, 2023 Opinion affirming the Circuit Court's Order granting motion for summary disposition, while also rejecting and reversing the Court of Appeals' November 9, 2023 Opinion. Alternatively, if the Court finds that an examination is an action or proceeding, the Court should still affirm the Court of Appeals' unanimous January 19, 2023 Opinion, and reverse the November 9, 2023 Opinion, as the Treasurer must have still commenced an action within the statutory period, which she did not do.

Dated: May 24, 2024

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 12,703 words.

Dated: May 24, 2024

Respectfully submitted,

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