UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION

LUCY ALEXANDER, MARY BAUGHMAN, ROBERT MOODY, DANNY METTS, and RANDALL ROACH

On behalf of themselves and all those similarly situated,

Plaintiffs,

v.

THOMAS B. MILLER, in his official capacity as Commissioner of the Kentucky Department of Revenue, *et al*.,

Defendants.

No. 3:20-cv-00044-GFVT-EBA

MEMORANDUM OF LAW OF PLAINTIFFS AND THE CLASS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Statutes

Other Authorities

Page

Rules

Treatises

Regulations

Plaintiffs and the Class respectfully submit this Memorandum of Law in support of their motion for summary judgment.[1]

INTRODUCTION

Discovery in this action has confirmed that there is no genuine issue—indeed, no issue at all—as to the ongoing due process violations of the Kentucky Department of Revenue (DOR) and the University of Kentucky Healthcare System (UK Healthcare or UKH).[2] DOR collects medical debts alleged to be owed by UKH's patients by *administrative* levy—that is, the state garnishes Kentuckians' paychecks and seizes their state tax refunds and funds from their bank accounts without any judicial intervention whatsoever. When patient-debtors dispute the existence or amount of the claimed debt, DOR does not offer them hearings of any kind, either before or after seizure. Indeed, it expressly denies that such hearings are or can be available.

For more than 150 years, even before adoption of the Fourteenth Amendment, the law has been clear that such conduct is inconsistent with fundamental fairness:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence. *Baldwin v. Hale*, 68 U.S. 223, 233 (1863).

Baldwin embodies "the central meaning of procedural due process" under the Fourteenth Amendment, so that:

> It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Fuentes v.*

[1] The Evidentiary Submission in support of this motion includes documentary exhibits, stipulations, excerpts from Interrogatory Answers, responses to Requests for Admission, and excerpts of deposition testimony. Everything but deposition excerpts is cited by exhibit number ("Ex. xx"); the testimony excerpts are cited by deponent and page/line number (*e.g.*, "Deaton 30(b)(6) xx:yy-zz"). For clarity and for the convenience of the Court, the Evidentiary Submission is headed by a Statement of Material Facts as to Which There Is No Genuine Dispute ("SoF"), which in turn cites the evidentiary support for each assertion of fact. Although submission of such a Statement is not required by the Local Rules of this District (*cf.* M.D.Tenn.R. 56.01(b), (c), (d)), and this Memorandum of Law contains within it all the facts the Court will need to decide this motion, Plaintiffs believe the Court will find the SoF to be a convenient tool for organizing the record and locating materials therein. The Statement of Facts and other factual assertions in this Memorandum will frequently cite the SoF instead of directly citing diverse portions of the Evidentiary Submission.

[2] This case is brought under *Ex parte Young*, 209 U.S. 123 (1908), and the Defendants thus are not the organizations themselves but their responsible officials, as set forth at SoF ¶¶ 1-4.

> *Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *accord Johnson v. City of Saginaw*, 980 F.3d 497, 507 (6th Cir. 2020).

None of that has happened here.

Each of the Named Plaintiffs in this action has serious disputes about the existence or amount of the medical debt Defendants say they owe. Lucy Alexander, for example, was told by UKH that her insurer had pre-authorized the procedure for which she is now being billed; UKH acknowledges that it made a coding mistake that caused the authorization to be rescinded, but it strung Ms. Alexander along until it was too late to appeal the insurance denial. DOR is collecting from Ms. Alexander for a procedure she would not have had at all but for UKH's mistake.

Ms. Alexander has never had a hearing on these issues. Instead, her bank account was swept by DOR, her paycheck was garnished, and she was told that the only way she could avoid continuation of such exactions was to enter into a payment plan for a debt she believes she does not owe. As she testified (Alexander 74:3-14):

> I was told by the Department of Revenue that this is the only thing that I could do was make a payment plan. After they took a whole two week's paycheck, seized my wages. I went down to their office, and I sat down in front of two men, and they told me—I told them the whole story about the bill, how it was messed up, that they coded it wrong. The insurance paid, then they took it back. I told them the whole—went through everything with them. And they said, the only thing that you can do is make a payment plan. It was either that or them continuing seize my wages. And I had two kids to take care of. That's what happened.

That, in a nutshell, is what this case is about.

As they have throughout this litigation, Defendants say that they have satisfied due process because (they say) notice was given—in a document called "Letter 8"—and hearings were available before UKH referred its medical debt to the state for extrajudicial collection by administrative levy. But the indisputable facts obtained in discovery put the lie to those assertions:

- Prior to 2012, Defendants provided no notice of a hearing *at all*. Defendants have acknowledged that their pre-2012 procedures violated due process.

- Although Letter 8 since 2012 has referred to hearings, it remains constitutionally inadequate. Thus:
  - UKH's patients are not told that the hearing offered in Letter 8 is their one and only chance to avoid having their wages garnished and assets taken. Under the Sixth Circuit's controlling decision in *Hamby v. Neel*, 368 F.3d 549, 560-62 (6th Cir. 2004), Letter 8 is thus inadequate notice as a matter of law.
  - The version of Letter 8 currently in use *expressly denies* that patients have a right to a hearing on "on the grounds of inability to pay or dissatisfaction with medical care." Each of these[3] is a matter on which notice and a hearing are constitutionally required.

For each of these reasons, Plaintiffs and the Class are entitled to summary judgment.

But there is more. Letter 8 itself is written and delivered in a manner that makes it unlikely ever to be opened and acted upon. Due process requires notice procedures that someone "desirous of actually informing the absentee might reasonably adopt to accomplish it," *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 315 (1950), and Letter 8 does not come close to meeting this standard. It is not the first or second letter a debtor receives from UKH's collection arm;[4] it is always at least the third letter, and it is frequently much later in the chain than that. Each letter—Letter 8 and each of its predecessors—comes in the same plain, white envelope. Letter 8 itself is printed in tiny (9-point) type, and the hearing language is sandwiched between two separate provisions that, as UKH has acknowledged, make it clear that the purpose of the letter is *debt collection*. The undisputed expert testimony is that it is "unlikely that [Letter 8] would be opened; if opened, unlikely the 'hearing' section would be read; and if read, unlikely the 'hearing' section would be comprehended."

It is no surprise, therefore, that, as the Court noted in granting class certification, "although UKH debt collectors sent out 63,154 notices between 2013 and 2020, only sixty-five hearings were

[3] "Inability to pay" encompasses wrongful denial of financial assistance, which is perhaps the single most common reason a patients dispute bills.

[4] "Central Kentucky Management Systems" (CKMS) is an affiliate of UKH that engages in debt collection.

requested and only seventeen hearings were actually held, . . . a return rate of approximately one-tenth of one-percent" (ECF #46 PageID#1030). It is no longer merely alleged but now established "(1) that the vast majority of proposed class members were unaware that they had a right to a hearing; and (2) Defendants have failed to provide proposed class members with constitutionally sufficient notice and an opportunity to be heard" (*Id*. PageID1030-31).

Finally, Defendants have contended that Class members like Ms. Alexander, who entered into "voluntary" payment plans with DOR, have no remedies. This is simply wrong. Under *Fuentes*, there is no waiver of due process rights by entry into a payment plan,[5] and people who are coerced into entering into a payment plan—literally told they have no other way to avoid unconstitutional garnishments and levies—cannot be said to have done anything voluntary at all. Moreover, DOR reserves the right, which it exercises in thousands of cases each year, to go back to forced collections if a person ever misses a payment. People on payment plans are faced with the ongoing, omnipresent threat of being subject to garnishment and levy without any kind of hearing on the validity or amount of the debt, and that is also a due process violation.

For all these reasons, and as set forth in more detail below, the Court should enter summary judgment in favor of Plaintiffs and the Class (a) enjoining any further collection by DOR (including through payment plans) of debts asserted to be due to UKH, (b) requiring DOR to remove any collection fees and interest on Class Members' accounts and lift garnishments, levies, and liens, and (c) order Defendants to develop and propose a plan to bring their collection practices into compliance with the due process guarantees in the Fourteenth Amendment going forward and repair the harm past unconstitutional practices caused Plaintiffs and the Class.

[5] 407 U.S. at 94; *see* ECF #32-2, PageID#347-348.

STATEMENT OF FACTS

The Three Stages of the Collection Process

UKH collects patient debts through a tiered process. There are three stages:

- collection attempts by UKH itself or by Kentucky Medical Services Foundation (KMSF),[6] the billing arm for UKH providers;
- referral for further collection attempts by Central Kentucky Management Services (CKMS)[7]; and
- referral to the Department of Revenue (DOR) for non-judicial collection remedies including wage garnishment, lien placement, state tax refund offset, and bank account levies.

In no stage do patients receive notice at a meaningful time and in a meaningful manner of their right to dispute the existence and/or amount of the debt.

Stage One: Initial Collection Efforts by UKH or Kentucky Medical Services Foundation

UKH Invoices Do Not Mention Hearings or Appeals

The UKH collection process starts when UKH or KMSF sends a form invoice to a patient showing the amount owed for medical services and procedures provided (SoF ¶ 6). The format of the invoices has changed over the years, but the substance has not. Starting as early as 2009 and continuing to the present, patient invoices from KMSF and UKH merely direct patients to call a customer service line with inquiries about the amount alleged to be owed and instruct patients to memorialize any suspected billing errors in writing (SoF ¶ 8). **UKH's invoices do not now and have never contained notice about the patient's right to an appeal or a hearing on the existence and/or amount of the debt.** (SoF ¶ 7)

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[6] KMSF is the business office for providers practicing within the University of Kentucky HealthCare Enterprise.. As discussed below, it is not part of the University of Kentucky but a separate non-profit foundation, which ultimately caused DOR to conclude that it did not have statutory authority to collect KMSF debt—although none of the millions of dollars of KMSF debt that had been illicitly (in DOR's view) collected was ever refunded.

[7] CKMS is a non-for-profit corporation organized as a subsidiary of UKH and acts as a debt collector for UKH and KMSF debts.

UKH and CKMS's written policies concerning how staff should handle patient billing disputes are remarkable for what they do *not* say. *Nowhere* do they direct staff to inform the patient of a right to a hearing or appeal if s/he disagrees with the result of UKH's investigation of the claim. In fact, UKH and CKMS employees are trained not to use the word "hearing" at any time when speaking with patients. Instead, when a patient disputes their bill at the UKH or CKMS it triggers a completely internal review process, which they then contact the patient to inform them of the result of said review. The policies for the internal review process do not mention an "appeal" or "hearing," and the result of the review often provides for collection to continue (SoF ¶¶ 71-84).

UKH Invoices Do Not Advise Patients That They Are About to Lose Their Right to Financial Assistance

UKH sends a series of four invoices to each debtor, each on an identical form but containing increasingly urgent "pay now!" language in an optional-text box on the front. The third and fourth invoices (Forms C and X) warn the debtor to "pay immediately . . . to avoid placement with a collection agency." (SoF ¶¶ 9-10). None of the invoices discloses that **placement with an agency cuts off the debtor's right to participate in UKH's Financial Assistance Program**—even through UKH agrees that this is precisely what happens on referral to CKMS (SoF ¶¶ 119-121).

Stage Two: Further Collection Efforts by Central Kentucky Management Services

Initial Notices from CKMS Do Not Mention Hearings or Appeals

If no payment is made, UKH transfers the debts to CKMS for collection. CKMS's initial notices contain standard language from the Fair Debt Collection Practices Act (FDCPA), giving patients every reason to believe that UKH is employing ordinary collection practices that will

ultimately result in a court process. As early as 2009, Plaintiff Moody was sent multiple CKMS notices (Exs. 5-7) that contain the following FDCPA-like[8] disclaimers:

> Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice this office will provide you with the name and address of the original creditor, if different from the current creditor.
>
> This communication is from a debt collector and this is an attempt to collect a debt and any information obtained will be used for that purpose.

The disclaimers in these CKMS notices have remained substantially unchanged to the present (SoF ¶ 15). While these notices state that patients may notify CKMS that they dispute the validity of their debts, they do not state or even imply that patients have the right to a formal or informal hearing or appeal process before a neutral decisionmaker (SoF ¶ 16).

Like UKH, CKMS Does Not Mention Hearings or Appeals to Patients Who Call to Dispute a Bill

CKMS's written dispute policies describe a completely internal review process for disputes, with no mention of "appeal" or "hearing." Once internal review is complete, CKMS advises patient of the result and continues collection. Like UKH itself, CKMS never tells patients who call to dispute their bills that they have a right to appeal. (SoF ¶¶ 71-84)

Stage Three: Referral to the Kentucky Department of Revenue for Collection

If CKMS does not succeed in obtaining payment, it refers outstanding patient debts to DOR, which seizes bank accounts and garnishes wages to collect the debt.[9] The form notices issued by DOR have never notified UKH patients that they have a right to a hearing or appeal (SoF ¶¶ 98, 101), and it is DOR's firmly held and oft-restated position that no such right exists (SoF ¶¶ 102).

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[8] Under the FDCPA, a person who qualifies as a "debt collector" must disclose in the initial written communication "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). CKMS's initial notice parrots the language required by 15 U.S.C. § 1692g(a).

[9] Prior to 2018 or 2019, it also placed liens on real property.

CKMS repeatedly sends DOR accounts containing errors (SoF ¶¶ 204-205 & Ex. 72). At least *324 individual accounts* that were voided at the DOR level and sent back to CKMS due to a UKH billing error (SoF ¶ 183).

When a patient disputes their account with DOR, two responses often occur: (1) DOR tells the patient they can write a dispute letter, which DOR will forward to UKH; and (2) DOR puts a time-limited hold on the account and sends it back to CKMS, then triggering CKMS' internal review process (SoF ¶ 203). This can occur after property has already been seized (*e.g.*, SoF ¶ 199). There are also instances where CKMS does not respond to DOR, so when the time-limited hold expires, DOR will continue collecting on the account (SoF ¶ 203). In addition to disputing their account, patients have requested hearings at the DOR level, but are simply told that is not an option (SoF ¶¶ 206-210). DOR's position is and has been that due process is UKH's responsibility.

The Saga of "Letter 8" and Defendants' Ongoing Effort To Prevent Hearings

Since 2009, CKMS has issued a document called "Letter 8" to patients prior to referring their alleged debts to DOR. Defendants' grudging, incremental changes to the document over the years tell a clear story of their ongoing efforts to do as little as possible to provide hearings and as much as possible to prevent them.

The First Letter 8

The first Letter 8—used through May of 2012—merely states, "If we do not hear from you within 14 days from the date of this notice, your account will be turned over to the Commonwealth of Kentucky, Department of Revenue" (Ex. 12). This version of Letter 8 does not mention any right to a hearing or appeal.

The DOR's Cessation of Collections in 2012 Due to an Acknowledged Lack of Due Process, and Defendants' Decision to Keep Collecting "Pipeline" Debts Notwithstanding that Acknowledged Lack

In the Spring of 2012, DOR realized that UKH's procedures did not provide due process, and DOR froze its collection activity on UKH accounts (SoF ¶¶ 34). In June, UKH put in place new procedures that, it claimed, would meet constitutional requirements (SoF ¶¶ 35-38), but Defendants still needed to decide what to do about the patient-debtors whose accounts were already with DOR—and thus, concededly, had *not* been afforded due process. Stephen Crawford, then an Assistant General Counsel at DOR, wrote to counsel for UKH as follows:

Harry,

We need to come to some consensus on how to address UK debts assigned to DOR for collection prior to the installation of your new procedures designed to satisfy the necessary elements of " due process" required by the 5th amendment. Your new procedures prospectively protect both of us from any serious challenge in the area of law. However, we have cases already " in the pipeline" at Revenue that would not meet the minimum standards of due process and the question becomes, what do we do with them? In a perfect world we could just send them back to you for implementation of your new procedures but this would dramatically reduce the amount of money we currently collect for UK. Many of these cases are already in voluntary pay agreements or subject to on going wage garnishments, should we disturb these types of arrangements because we believe minimum due process was not afforded in the beginning of the collection process? We need to think through the ramifications of what to do with this "pipeline" debt. I would like to propose a meeting in the near future to think through the pros and cons of possible solutions to this conundrum. Can you check your schedule for an opening in the near future? Thanks!

(Ex. 15) No, it is not a "perfect world"—at least, the world inhabited by UKH and DOR is not. Rather than send the "pipeline" debt back to UKH so there could be some attempt to remedy the acknowledged failure of due process, DOR simply kept the money, kept the pipeline cases, and moved forward. As Defendant Watts testified:

> Q In fact, the cases were not sent back for implementation of the new procedures and they were kept, correct?
>
> A Yes.
>
> Q Because there was a lot of money at stake, correct?
>
> A Yes. (Watts 23:5-11).[10]

[10] This was not the only instance where DOR and UKH decided not to submit refunds or make other adjustments upon concluding that their procedures had been faulty. In 2019 DOR concluded that it should no longer collect UKH's physician debt (as opposed to hospital debt) because that debt was through KMSF, which was ***not*** a state agency like the University itself (*see* Watts 29:10-30:21; 37:20-25). Initially, DOR decided it would not place new KMSF debt for collection but *would* keep collecting on existing payment plans and wage levies (*id*. 40:12-25).

The Subsequent Development of Letter 8

In June 2012, in response to DOR's suspension of collection, CKMS added a telephone number and contact person to call for an "independent review of your account" in the event of a dispute, but with no explanation as to what that review would entail (SoF ¶¶ 35-37). UKH sent this version of Letter 8 to "debtors with overdue UKH accounts" (SoF ¶ 38), at least 5,000 of them (Ex. 21). In all of 2012, only 93 people responded to 23,244 Letter 8s, and UKH conducted only 13 reviews (*id.* at 18-19).

In August 2012, a new version of Letter 8 stated that "under Kentucky law, you have the right to protest this bill and request a conference with a University of Kentucky, Hearing Officer," providing patients fourteen days to dispute their bill in writing (Ex. 19). The fourteen days ran from the date Letter 8 was *mailed* by CKMS, but the dispute documentation had to be *received* by CKMS within that time period—*i.e*, CKMS took the "mail float" on both ends of the process. Assuming (best case) two days for mail delivery on each end, UKH's patients had (at most) ten days to obtain a "conference" on medical bills that could be more money than they made in a year.

- In 2013, CKMS sent 14,210 "Letter 8"s. 19 reviews were requested; 6 were held.
- In 2014, CKMS sent 15,115 Letter 8s. 18 reviews were requested; 9 were held.
- In 2015, CKMS sent 7,083 Letter 8s. 11 reviews were requested; 1 was held. (SoF ¶¶ 45-47)

Defendant Watts Tells UKH and CKMS That Their Procedures Are Deficient

On November 24, 2015, Defendant Tammy Watts, as Deputy Executive Director of DOR's Office of Processing and Enforcement, warned UKH and CKMS that their notice procedures were legally deficient because the initial invoice did not inform the debtor of his or her right to appeal

When all collection activity finally did cease, DOR did *not* make refunds to the individuals from whom, DOR believed, it had been collecting from without authority (*id*. 43:14-24). Plaintiff Baughman was one of the many individuals who suffered from this decision: DOR eventually stopped collecting the KMSF portion of her asserted debt, but it did *not* refund to her the money it had already taken (*id*. 44:10-25 & Ex. 113).

(SoF ¶¶ 17-20). Sample language for the invoice provided by Ms. Watts stated that referral to DOR "may result in wage garnishments, bank levies, tax refund seizures or other collection actions" (Ex. 8). UKH and CKMS were told to change their invoices by February 1, 2016. Ms. Watts emphasized that the changes were necessary before CKMS certified debts to DOR as due and owing. **Neither CKMS nor UKH *ever* modified their invoices based on this letter** (SoF ¶ 21), and **no document *ever* sent by UKH or CKMS warns of wage garnishments or bank levies**.

Instead of incorporating the legally required notice Watts had demanded, UKH sought easier and cheaper solutions. In March 2016, Mr. Crawford and Marcy Deaton, a UK lawyer who wore a second hat as the UKH Hearing Officer (Deaton 30(b)(6) 96:13-21), exchanged emails regarding the use of "informal hearing" procedures, which would exempt UKH from the notice and hearing requirements of Kentucky's Administrative Hearings statute, KRS Chapter 13B. Crawford wrote, "This may be our way out!" and Deaton replied, "I like it!" (SoF ¶¶ 163) Ultimately, UKH concluded that the "way out" would not work and decided to outsource the few hearings it was holding to the Kentucky Attorney General's Office, a transition that took from 2016 to 2019 to complete (Deaton 51:23-53:8). No hearings were conducted in this transition period, although some had been requested (*id*. 53:9-15). Until UKH turned the process over to the Attorney General's office in 2018, its "hearings" were held before Ms. Deaton, and did not even permit the patient to call or cross-examine witnesses from UKH (SoF ¶¶ 147-148). When the process moved to the Attorney General's office, Ms. Deaton took off one of her hats and slipped seamlessly into the role of prosecutor for UKH—which, in fact, is all she ever was.

The Current Letter 8 and Letter 83

The December 2016 revision to Letter 8 gave patients thirty days instead of fourteen to dispute their bills and rephrased the patient's right to "protest" as a right to "dispute" and the patient's right to a "conference" as a "hearing" right (Ex. 25).

The most recent version of Letter 8 from December 2018 is the first iteration to include any information for patients about the consequences of nonpayment of the debt and the possible means to enforce it, adding that "any individual state income tax refund to which you are entitled could be withheld for setoff against this debt. You would receive written notice before that occurs." (Ex. 24) This version—and every version to the present—does not cite the additional collection methods that DOR exercises, including wage garnishment and bank levy.

The current version of Letter 8 also explicitly excludes certain types of disputes from the appeals process. Since 2015, Letter 8 has contained the following proviso:

> NOTE: Hearings will not be granted on the grounds of inability to pay or dissatisfaction with medical care. (SoF ¶¶ 48-50)

This proviso was added to Letter 8 "to streamline the process" (Deaton 30(b)(6) 96:13-21)—*i.e.*, reduce the number of appeals UKH would have to deal with.

In March 2018, UKH amended its "Letter 83"—a "we haven't heard from you" letter that goes out immediately before Letter 8—to contain hearing language similar to that in Letter 8 (including, in particular, the carve-out for inability to pay or dissatisfaction with medical care). (Deaton 30(b)(6) 116:22-117:5).[11] Letter 83 does not contain any reference to DOR or to actions DOR might take.

The Timing of Letter 8, and Its Manner of Delivery

Despite Kentucky law requiring information concerning appeals to be in the "initial invoice," UKH's initial invoice provides no such information. Indeed, as set forth above, UKH *never* provides such information. And CKMS's initial demand for payment is no more than a standard FDCPA request for verification, with no mention of appeals or hearings. (SoF ¶¶ 14-16)

[11] Exhibit 9 is the pre-2018 Letter 83 and Exhibit 10 is the current (post-2018) version.

The supposed notice is provided only in Letter 8 and, since 2018, Letter 83. Letters 8 and 83 do not come at the beginning of the process but rather at the end (*see* Ex. 9). For example, CKMS sent Plaintiff Metts *thirty-two separate validation letters* before they sent him Letter 8 (ECF #32-43). The timing of Letter 8's delivery conceals its importance.

So does the manner of its delivery. CKMS is a debt collector and must comply with the FDCPA (SoF ¶ 12). Because section 1692f(8) of the FDCPA generally prohibits anything but a return address on an envelope sent for debt collection purposes, Letter 8, like all CKMS correspondence, arrives in a plain envelope, with no indication that it is from a debt collector, let alone that it contains important information about legal rights that will be forever lost unless exercised immediately (SoF ¶ 60). As set forth in detail in Point III below, the undisputed expert testimony is that it is "unlikely that [Letter 8] would be opened; if opened, unlikely the 'hearing' section would be read; and if read, unlikely the 'hearing' section would be comprehended."

CKMS records show that it mailed Letter 8 to Plaintiffs, but Plaintiffs do not recall receiving it, nor did they retain it, though they retained other correspondence from UKH and CKMS. If they received Letter 8, they did not recognize its importance at the time (*e.g.*, SoF ¶¶ 239, 275). This was a natural consequence of Defendants' conduct.

Defendants' statistics on the response to Letter 8—63,000 sent, 65 hearings requested, a response rate of *one-tenth of one percent*—confirm its insufficiency as a vehicle for providing actual notice of due process rights to UKH patients. There are 4,000 disputes in UKH's "Complaint Tracker" spreadsheet since January 1, 2017 (SoF ¶ 66). In that time period there has been precisely *one* hearing held (*id.*). Suppression works.

Named Plaintiffs' Facts

Lucy Alexander (SoF ¶¶ 216-250)

Ms. Alexander started planning for her hernia repair surgery, an elective procedure, two months in advance, which included paying a $150 preauthorization fee. Before her 2012 surgery, UKH told Ms. Alexander that her insurer, Anthem, had preauthorized the surgery and it would be fully covered. However, after her procedure, Ms. Alexander received a letter from Anthem that they denied coverage for the procedure. Ms. Alexander immediately contacted UKH to express her confusion and was told they will look into it. Ms. Alexander did not hear from UKH until three months later when she received a bill indicating that Anthem *had* covered the procedure. Ms. Alexander called UKH to set up a payment plan for the remaining balance three separate times but was always told the claim was still pending with her insurance, so she should wait. Then seven months after receiving that initial bill from UKH, Ms. Alexander received a bill now showing that she owed the full cost of the procedure, more than $25,000. Through calling UKH's billing department, Ms. Alexander now discovered that UKH had miscoded the procedure and her insurance company would *not* cover the surgery.

After telling Ms. Alexander for months that the issue was pending with the insurance company, UKH employees began insisting that the entire amount was her responsibility only after her time to appeal her insurer's decision had lapsed. UKH told Ms. Alexander that her only recourse was to file an insurance appeal that they themselves had rendered untimely. To dispute this, Ms. Alexander and her husband called UKH's phone number dozens of times and Ms. Alexander even emailed UKH a dispute letter. UKH's internal records indicate that the employees with whom Ms. Alexander spoke understood that she disputed the amount of the debt.

In December 2013, a UKH employee unilaterally removed the dispute from Ms. Alexander's account and in January placed her account for collection with CKMS. Ms. Alexander does

not remember receiving any mail from CKMS; her only contact with them was over the phone, when CKMS called her. Ms. Alexander reiterated her dispute to CKMS employees but was always told her only option was to pay. Over the phone, CKMS employees never told Ms. Alexander her account was being transferred to DOR, even when asked about consequences of non-payment.

Ms. Alexander discovered DOR's collection powers when it garnished 100% of her bi-weekly paycheck. Before the garnishment, she believed her bill was not in active collection because of her ongoing dispute with UKH. Fearful of continuing garnishment, Ms. Alexander succumbed to DOR's demands to enter a payment plan.

Ms. Alexander never knew she had the right to a hearing on her dispute. If she had known of such a right, she would have exercised it.

Mary (Margaret) Baughman (SoF ¶¶ 280-304)

In 2011, Mary Baughman, then age 60, received an echocardiogram, an endoscopy, and a colonoscopy from UKH providers. At the time, Ms. Baughman was disabled, uninsured, and unemployed. When her doctor recommended that she follow up the colonoscopy with a CT scan of her abdomen, Ms. Baughman explained that she was uninsured and inquired about the cost and necessity of the procedure. The provider did not give Ms. Baughman a cost figure but insisted she should have the procedure and that it wouldn't be that much money; Ms. Baughman followed her doctor's advice and consented to the scan. The CT scan was negative for abnormalities, but Ms. Baughman discovered that she now owed UKH nearly $3,000 for the scan.

UKH's internal records show that after Ms. Baughman received the initial invoices, she communicated with UKH on several occasions about the Financial Assistance Program (FAP). The records also show that UKH knew that Ms. Baughman was disabled, uninsured, and unemployed at the time that she received the services at issue. And the records demonstrate that based on Ms. Baughman's FAP application, UKH believed that she qualified for the program.

Nevertheless, UKH failed to apply the FAP discount to the charges, and the debt was eventually referred for further collection. She received no notice that she thereby lost her right to Financial Assistance.

When she began receiving threatening notices from DOR, Ms. Baughman contacted DOR to set up a payment plan but also put DOR on notice about her inability to pay the full amount. She also complained to DOR about being charged for an expensive and unnecessary procedure. DOR's records show that DOR understood Ms. Baughman was disputing the debt. But DOR never gave Ms. Baughman any indication that she had a right to a hearing or an appeal; instead, they advised her that her only recourse was to send them a dispute letter that they would forward on to UKH.

Ms. Baughman never knew she had the right to a hearing on her dispute. If she had known of such a right, she would have exercised it.

Robert Moody (SoF ¶¶ 251-264)

Robert Moody has received ongoing treatment at UKH since his HIV diagnosis in 2001 Over the last two decades, most of Mr. Moody's treatment has been covered by federal funds from the Ryan White HIV/AIDS program and UK's FAP. Mr. Moody qualified for and received FAP from 2001 to 2007; he also qualified for FAP from 2008 to 2009, but UKH failed to provide a renewal application in early 2008. In 2008, Mr. Moody realized he was no longer covered by FAP when he started receiving bills reflecting thousands of dollars in charges. It was not until September 15, 2008 that UKH told Mr. Moody that he had needed to reapply for FAP as of January 1.

While Mr. Moody was still cooperating with UKH's FAP application process and disputing the charges with CKMS, UKH referred his debt to DOR for collection without granting the FAP discount or issuing a FAP denial notice. Mr. Moody notified DOR about his dispute and managed to trigger CKMS's internal review process on several occasions. However, as the defendants'

internal review policies contemplate, internal reviews always resulted in continuing collection. In 2019, in order to get DOR to release a lien against his mother's home, Mr. Moody was forced to enter a payment agreement with DOR on the 2008 debts.

Mr. Moody never knew he had the right to a hearing on his dispute. If he had known of such a right, he would have exercised it.

Danny Metts (SoF ¶¶ 305-330)

Plaintiff Metts has been working effectively 24/7 since before the New Year and has not yet been able to sit for his deposition. Accordingly, the only facts relating to him that are discussed in this Memorandum are those from Defendants' files.

Randall Roach (SoF ¶¶ 265-279)

Randall Roach had surgery and was hospitalized for three days at UKH after a shooting range accident in early 2019. Mr. Roach was uninsured at the time of the accident. During the hospitalization, he recalls filling out an FAP application and a UKH employee telling him that he qualified for the program and would not have to pay for the services he was receiving.

UKH's internal records support Mr. Roach's recollection. After establishing that Mr. Roach would not qualify for Medicaid or the Medicaid spend-down program, the records show that he signed a FAP application and was advised to return his 2018 W-2 Form and proof of income for 2019. Mr. Roach provided his 2018 W-2 Form as instructed and even checked in on his application during a follow-up appointment. Mr. Roach was told by two different UKH employees that he would be covered by FAP and had no unpaid bills. But, without notifying Mr. Roach, UKH denied his FAP application and referred his debt for further collection, cutting off his ability to appeal the FAP denial.

Mr. Roach first learned that he owed UKH for the 2019 hospital stay when he received a bill from DOR for more than $73,000.00, which included interest and a $14,000+ DOR collection

fee. When he contacted UKH about the DOR notice, the UK employee with whom he spoke told him for the first time that his FAP application had been denied and then advised him to "contact [the] collectors" even though the collectors could not help him.

Mr. Roach never knew he had a right to a hearing on his dispute. If he had known of such a right, he would have exercised it.

LEGAL STANDARDS

Summary Judgment Standards

A party is entitled to summary judgment when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 509 (6th Cir. 2001); Fed.R.Civ.P. 56(c). When determining a summary judgment motion, the Court must view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Williams v. Int'l Paper Co.*, 227 F. 3d 706, 710 (6th Cir. 2000). Nevertheless, "[t]he moving party need not support its motion with evidence disproving the nonmoving party's claim, but need only show that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

To defeat summary judgment, an asserted issue of fact must, in the language of the rule, be "genuine." As this Court has held:

> A genuine dispute exists on a material fact, and thus summary judgment is improper, if the evidence shows that a reasonable jury could return a verdict for the nonmoving party. Stated otherwise, [t]he mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. *Caterpillar Fin'l Servs. Corp. v. Sunnytime Seeding & Landscaping, LLC*, 2011 WL 4834242, at *1 (E.D.Ky. Oct. 12, 2011) (citations and internal quotation marks omitted).

Controlling Due Process Principles

The Sixth Circuit enunciated the principle at the core of this case in *Hamby v. Neel*:

> It is well established that a possessory interest in property invokes procedural due process, which would require adequate notice and a meaningful hearing prior to any attempt to deprive the interest holder of that right. 368 F.3d at 560

And "[i]t is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes*, 407 U.S. at 80; *accord Johnson v. City of Saginaw*, 980 F.3d at 507. In declaring unconstitutional the notice provided Kentuckians facing eviction, the Supreme Court held:

> [When] arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *Greene v. Lindsey*, 456 U.S. 444, 451 (1982) (citation omitted).

Any procedures the government uses "must be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'" *Mathews v. Eldridge*, 424 U.S. 319, 349 (1973). This is not a matter of form but of substance: "When notice is a person's due, process which is a mere gesture is not due process." *Mullane* 339 U.S. at 315. The Constitution requires notice that someone "desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id*.

In this case, UKH's patient-debtors had two distinct property interests at stake at two separate moments in the Defendants' collection processes. Ultimately, the property at stake for Plaintiffs and the Class is the property DOR is able to seize, intercept, garnish, and encumber—Plaintiffs' wages, state tax refunds, money in bank accounts, and real property. But Plaintiffs and the Class also have a "legitimate claim of entitlement" to the financial assistance available through UKH's charitable care program, the Financial Assistance Program, discussed in Point II.C below. Defendants' deprivation of each of these property interests triggers due process protection.

The Role of Intent and of State Law

A defendant's intent is not an element of a procedural due process claim, and it is not here. A hearing either is or is not offered on the matters on which it must be offered; notice either is or is not adequate to apprise the person whose property is at risk of the right to contest the impending seizure. Likewise, a violation of state law relating to notice does not automatically create a due process violation. As set forth in detail below, a straightforward application of objective criteria to undisputed (or indisputable) facts shows that Defendants' conduct here violates due process as a matter of federal constitutional law.

But that does not mean that intent and state law are wholly irrelevant in this case. The state laws and regulations, for example, reflect the considered judgment of the Commonwealth of Kentucky as to what constitutes providing "adequate information" to the debtor, and they can therefore be considered in evaluating whether, under all the circumstances, the notice is in fact sufficient. *See*, *e.g.*, *O'Neill v. City of Louisville/Jefferson Cty. Metro Gov't*, 662 F.3d 723, 734 (6th Cir. 2011) (notice "lacked all the elements required by [state law] . . . and was not reasonably calculated to apprise the O'Neills of the allegations against them or of the procedures available to present their objections"). Furthermore, intent can shed light on consequences. Just as a defendant's purpose to deceive bears on whether statements are misleading, *Risner v. Regal Marine Indus*., 2013 U.S.Dist. LEXIS 58690, at *46-47 (S.D.Ohio Apr. 24, 2013), and just as a trademark defendant's intent to cause confusion bears on the likelihood that confusion will ensue, *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 286 (6th Cir. 1997), these Defendants' clear intent not to let messy things like due process get in the way of their collection juggernaut reinforces the objective determination, on the face of Defendants' documents and procedures, that due process was, in fact, not satisfied.

Plaintiffs and the Class reiterate that they are entitled to summary judgment without considering issues of intent or issues of state law. But the evidence is there, it all goes in one direction,[12] and it is open to the Court to consider it both for context and to resolve any doubts the Court may have on the dispositive federal issues.

ARGUMENT

I. UKH DOES NOT PROVIDE—AND HAS NEVER PROVIDED—ADEQUATE NOTICE OF THE RIGHT TO A HEARING TO CONTEST THE EXISTENCE OR AMOUNT OF ALLEGED DEBTS SENT TO DOR FOR FORCED COLLECTION

A. *Defendants Have Conceded That Their Procedures Prior to June 2012 Did Not Comply With Due Process*

It is undisputed that Defendants' procedures prior to June 2012 did not satisfy due process. The DOR has *never* provided notice and a hearing, and in that timeframe ***neither did UKH.*** Mr. Crawford's June 5, 2012 e-mail expressly acknowledged that due process had not been given up to that point. Accordingly, the Class is entitled to summary judgment with respect to any debts sent to DOR for collection prior to June 2012.

B. *Every Letter 8, Including the Current One, Violates Hamby v. Neel Because It Does Not Tell Debtors That the Proffered Hearing Is the One and Only Chance to Avoid Asset Seizure*

No version of Letter 8, including the current version, warns debtors that if they do not appeal *now* their assets will be subject to administrative levy without any right to a hearing whatsoever. A debtor would ordinarily expect (and Plaintiff Moody did expect (Cplt. ¶ 141; *see* ECF #32-6 ¶ 1)) that a creditor could not seize assets without first suing and obtaining a judgment. The debtor would further expect that s/he could, in that lawsuit, raise any defenses to the existence or

[12] Because intent is not an element of the due process claim, issues of fact as to Defendants' intent (if any exist) would not preclude entry of summary judgment for Plaintiffs and the Class. It bears mentioning, however, that summary judgment on issues of intent, although rare, *is* appropriate where (as here), the evidence reflects an absence of a genuine dispute on the issue. *E.g.*, *In re ClassicStar Mare Lease Litigation*, 727 F.3d 473, 484-87 (6th Cir. 2013) (affirming summary judgment for plaintiffs on RICO claim; "the district court properly found that Defendants could not establish a genuine dispute regarding their intent to defraud"); *Fifth Third Bank v. Gentile*, 2009 WL 10688745, at *6 (N.D.Ohio Apr. 24, 2009) (granting summary judgment to plaintiff on "actual intent to defraud" fraudulent conveyance claim).

amount of the debt that s/he had. As UKH's 30(b)(6) witness admitted, ***no version of Letter 8 tells debtors that if they do not appeal <u>now</u> they will forever forfeit the right to contest the debt*** (Deaton 30(b)(6) 124:17-125:5). This failure is fatal to Defendants' claims that they have complied with due process and, by itself, requires entry of summary judgment for Plaintiffs and the Class.

In *Hamby v. Neel*, Medicaid applicants received denial letters that did not inform them, *inter alia*, that:

> [I]f an appeal of a denied application was not pursued, applicants would be barred from a claim of benefits originating from the date of their initial applications; and . . . if applicants did submit new applications with new insurance denial letters, the second claim would cut off eligibility based on the first applications.

368 F.3d at 560. The Sixth Circuit held that because "the denial notices did not advise the applicants of the consequences of not appealing and filing new applications," the "Plaintiffs were given constitutionally inadequate notices in violation of procedural due process." *Id.* at 561-62.

Hamby is directly on point and controlling here. UKH patients were entitled to be told "the consequences of not appealing"—*i.e.*, that the hearing offered in Letter 8 was the one and only chance they would *ever* have to contest the existence or amount of the alleged debt. They were not. Accordingly, Plaintiffs and the Class here "were given constitutionally inadequate notices in violation of procedural due process," and summary judgment should be entered in their favor.

C. *Letter 8 is Affirmatively Misleading in What It Does Say About Consequences*

In December 2018, Letter 8 was revised to include some information regarding the consequences of nonpayment of the debt and the possible means to enforce it. A proviso was added stating "any individual state income tax refund to which you are entitled could be withheld for setoff against this debt. You would receive written notice before that occurs." (SoF ¶ 51) For several reasons, this addition is affirmatively misleading.

First, the reference to "written notice" before a tax refund is seized is false. No such notice is given. (Watts 111:20-112:6)

Second, notwithstanding Defendant Watts's express admonition in November 2015, neither the December 2018 version of Letter 8 nor any version thereafter, including the one currently in use, mentions the *additional* collection methods that DOR exercises against the patient, including wage garnishment and bank levy.[13] That omission makes all versions of Letter 8 since December 2018 affirmatively misleading. A person who was not expecting a state tax refund would think s/he had nothing to fear, and s/he would be very, very wrong.

Third, the statement that "[y]ou would receive written notice before [tax offset] occurs" is affirmatively misleading because it implies the patient could do something to protect him or herself as a consequence of that "written notice," whereas under the existing scheme s/he cannot. *There are no hearings at the DOR level,* and none at *any* level once a matter has been referred to DOR.

Finally, the reference to "written notice" before a tax refund is seized is misleading for the additional reason that if a patient were to investigate the regulations governing these procedures, s/he would learn that under K.R.S. § 131.570, s/he was not merely entitled to notice before offset of a tax refund; s/he was *also* entitled to a *hearing before the claimant agency* (here, UKH) to contest the debt to which the offset is applied. The patient would likewise learn that under K.R.S. § 131.595, the procedures set forth in K.R.S. § 131.560 to .595, including the notice/hearing procedure set forth in K.R.S. § 131.570, are the *exclusive* vehicle for applying state tax refunds to agency debts (Watts 111:16-113:21). A patient who drew that conclusion, however, would be bitterly disappointed, because DOR takes the convoluted position (Ex. 129) that a statute that has never been repealed, and states it is exclusive, does not apply to the precise subject matter it

[13] Neither UKH nor CKMS has *ever* incorporated *any* warnings about garnishments or bank levies in *any* of their correspondence with UKH patients.

addresses. Whether DOR's verbal gymnastics could, if challenged, survive as a matter of Kentucky law does not matter from a due process standpoint. What matters is that UKH's Letter 8 has, since December 2018, said things that are not true and that would lead a patient/debtor to believe s/he had remedies that DOR says s/he does not.

II. UKH VIOLATES DUE PROCESS BY PROHIBITING OR APPEARING TO PROHIBIT HEARINGS ON SOME OF THE MOST COMMON GROUNDS ON WHICH MEDICAL DEBTS ARE CONTESTED

The scope of the hearings UKH was required to hold to comply with due process is not a matter of dispute. UKH's Rule 30(b)(6) witness testified as follows:

> Q With respect to your authority [as UK's Hearing Officer], you understood, did you not, that a debtor could raise anything in the hearing that they might defend [a]n action on the debt for?
>
> A Correct. (Deaton 30(b)(6) 67:22-68:1)

As noted above, however, since 2015 Letter 8 has contained the following proviso:

> NOTE: Hearings will not be granted on the grounds of inability to pay or dissatisfaction with medical care. (Ex. 23 (2015); Ex. 24 (current))

For two separate reasons, that proviso denied Class Members due process.

A. *Because Quality-of-Care Issues Are Bases on Which to Adjust Medical Bills, the Failure to Offer or Hold Hearings on Such Issues Violates Due Process*

UKH's refusal to provide hearings on one of the most fundamental, most commonly contested issues relating to medical bills—complaints about the quality of the care for which the patient was billed—is both a failure of notice[14] and a separate basis on which any Class Member who was denied a hearing on a care issue has suffered a taking of his/her property without due process.[15]

It is ***stipulated*** that care issues can be bases on which to obtain adjustment of a medical bill. UKH's Risk Management Department routinely considered and acted on such requests:

[14] That is, Letter 8 states that hearing will not be given when, in fact, a hearing is constitutionally required.
[15] That there *are* such Class Members is clear. (SoF ¶ 174)

- Christie Young, R.N., reviewed cases referred by billing or Customer Service (including, where applicable, by CKMS) that raised care issues in connection with a billing, and she relayed her findings to the Director of Risk Management, Margaret Pisacano, who made decisions on behalf of the University of Kentucky as to whether to make a "risk management adjustment" to a patient bill.
- Sometimes Ms. Young, at the direction of the Director of Risk Management, instructed billing to make such an adjustment, and sometimes she did not.
- Ms. Young had authority to decline to recommend a risk management adjustment without referring the matter to Ms. Pisacano when Ms. Young determined that a risk management review was not warranted, and she did so on a number of occasions.
- The basis for Risk Management's decision in each instance was whether it believed the referred matter implicated a patient care issue, and if so, its assessment of the patient care issue in that case. (Ex. 67)

So far, this is not necessarily a due process problem. But it is also stipulated that:

- For billing purposes, Risk Management's decision concerning whether to instruct billing to make a risk management adjustment was final and, in UKH's view, was not subject to review by appeal/hearing. (*Id*.)

That *is* a due process problem—indeed, a flat-out due process violation. It is not for UKH to make unilateral decisions as to what issues "deserve" a hearing. As the Supreme Court held in *Fuentes*:

> If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession. 407 U.S. at 87 (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)).

Because Letter 8 denies the right to a hearing where one is constitutionally required, it is not adequate notice for due process purposes.

B. *Letter 8's Denial of Hearings for "Inability to Pay" Is Misleading Because It Could Be Understood as Precluding Hearings on Wrongful Denials of Financial Assistance*

Although UKH nominally does permit hearings contesting a medical bill on the basis of wrongful denial of financial assistance, and has on at least some occasions recognized that claims for wrongful denial are appropriate subjects for such a hearing,[16] Letter 8 is couched in terms that appear to deny such right. The single most likely person who will have an "inability to pay" a medical bill is one who was eligible for financial assistance but, for some reason, did not receive it. Such a person, when told s/he has no right to hearing on "inability to pay," could easily conclude that s/he was barred from asserting that the inability was due to a wrongful denial of financial assistance. Notices that do not adequately describe the remedies available to the person whose property is being taken do not satisfy due process. *Memphis Light, Gas & Water Div'n v. Craft*, 436 U.S. 1, 13-16 (1978). Here, the notice affirmatively *misdescribes* the remedy by denying the possibility of a hearing when one is at least potentially (and constitutionally must be) available.

C. *The Denial of Hearings for Inability to Pay Is Compounded By the Separate, Constitutionally Impermissible Denial of Notice and a Hearing at the Time Financial Assistance Is Denied*

1. UKH's Financial Assistance Program Is an "Entitlement," and Denial Thus Triggers Due Process Protections

The threshold question in *Hamby v. Neel* was whether those plaintiffs had a "legitimate claim of entitlement" with respect to Tennessee's Medicaid program (Tenncare) "such that due process requirements are invoked." Quoting *Board of Regents v. Roth*, 408 U.S. 564 (1972), the *Hamby* court recognized:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that

[16] There are several examples of such hearings in the record (SoF ¶¶ 150-154). Even here, however, UKH has admitted that it frequently refused to permit a hearing when—in its own, unilateral determination—it concluded that the denial of financial assistance was correct. (Deaton 30(b)(6) 96:22-98:3) Under *Fuentes*, that violates due process.

> stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 368 F.3d at 557.

A person need not be already receiving benefits to have a property interest protected by the Fourteenth Amendment. "[T]his Court has previously held that a social security claimant has a property interest in benefits for which he or she hopes to qualify." *Id.* at 559 (citing *Flatford v. Chater*, 93 F.3d 1296, 1304 (6th Cir. 1996)). That is, states must use fundamentally fair processes when determining a person's *eligibility* for a benefit.

The financial assistance available to UKH's patients under its Financial Assistance Program is an entitlement, not a mere unilateral expectation. The program is operated on an integrated basis with the Medicaid Disproportionate Share Hospital ("DSH") program (SoF ¶¶ 128-131), and the program's policies and procedures are "existing rules" from "an independent source . . . that secure certain benefits and that support claims of entitlement to those benefits." *Roth* at 576. Of necessity, UKH has admitted that FAP is an entitlement:

> Q Would you agree that the basic eligibility requirements for FAP are that you meet the qualification requirements that we saw on page 48 here, and that your household income level needs to be at a certain level relative to the [federal poverty level]?
>
> A Yes.
>
> Q So an uninsured patient who meets those requirements and submits all of the required proof of their income, residency, et cetera, is entitled to receive financial assistance, correct?
>
> [Objection]
>
> A Yes, if it's a -- if it's a procedure that's not exempt from the policy. (Thies FAP 30(b)(6) 84:7-19; *see also id.* 86:7-17 (underinsured patients)).

If UKH approves a patient for financial assistance, the financial assistance will apply to all of the patient's active accounts and any qualifying UK medical bills that the patient may incur over the next six months (*id*. 141:21-142:15).

2. UKH Violates Due Process Because It Does Not Offer Patients a Hearing at the Time FAP is Denied

UKH denies financial assistance in one of two ways: UKH can send the patient an actual denial letter, or it can simply send the debt to CKMS, which by the terms of the program *automatically* terminates the right to financial assistance.[17] In neither event does UKH offer the patient a hearing at the time of denial, and it therefore violates due process.

Until at least August 2020, the FAP application form stated in small print on the last page of the application that the patient "may request a fair hearing regarding denial of financial assistance (DSH) within 30 days of determination" The only reference to a right to a hearing on the denial of financial assistance is on the financial assistance application form. (SoF ¶¶ 124-125).[18]

At the time UKH denies a patient's financial assistance application, UKH does not notify the patient that they have a right to a hearing to appeal the denial (SoF ¶ 127) Nor is there a UKH policy available to patients that informs them of their right to appeal a denial (Thies FAP 30(b)(6) 23:21-24, 24:11-19). UKH's FAP denial letters make no mention of rights to appeal or a hearing even though the FAP program is run on an integrated basis with the DSH program (SoF ¶ 131), and there is a state-mandated denial form for the DSH program (DSH-001) that gives the patient separate, clear, and explicit instructions on how to appeal (SoF ¶ 133). Here, too, UKH has chosen simply to ignore a state-law requirement relating to notice.

The most common reasons for UKH's denials of financial assistance are that the patient did not supply sufficient proof of household income, did not submit a Medicaid determination

[17] Patients who receive care from UKH have a right to apply for financial assistance until UK refers the patient's account to a third party for collections, and UKH considers CKMS to be a third-party debt collector for purposes of UKH's financial assistance policy (SoF ¶¶ 119-120), so once UKH refers a patient's account to CKMS, the patient is no longer eligible to apply for financial assistance on that account. (Thies FAP 30(b)(6) 35:5-9) None of the medical bills that UKH sends to the patient discloses that the patient will lose the right to apply for and receive financial assistance once UKH refers the patient's account to a third-party debt collector. (SoF ¶ 123). UKH will occasionally allow patients to apply for financial assistance after it has referred the debt to a third-party debt collector, but only at UKH's exclusive discretion. (Thies FAP 30(b)(6) 35:10-36:18, 38:1-19).

[18] However, the current iteration of the FAP application, revised in August 2021, makes *no* reference whatsoever to the patient's right to a hearing of any kind (SoF ¶ 126).

letter, or submitted an insufficient letter (SoF ¶¶ 144-145).[19] Each of these situations is one in which UKH and its patient could easily have different views as to whether the patient was wrongfully denied financial assistance and why—questions that are plainly appropriate for resolution by a hearing. In spite of this, UKH has never told the patients to whom it denied financial assistance that they had the right to appeal that eligibility determination. No patient has ever requested such a hearing, and UKH has never held one (SoF ¶135).

UKH's failure to provide due process to patients who apply for financial assistance can mean wrongful denial of a benefit worth thousands, sometimes tens or hundreds of thousands, of dollars. For some patients, qualifying for financial assistance might be the only thing standing between them and financial ruin.

III. LETTER 8 IS NOT DELIVERED IN A "MEANINGFUL MANNER" AND THUS DOES NOT SATISFY DUE PROCESS

Letter 8 is not the first dunning letter a patient is sent by UKH's debt collector, CKMS. It is not, in general, either the second or third. On average, a patient will have been sent ***five*** previous letters from CKMS before being sent a Letter 8 (SoF ¶ 59). Some will have been sent many more—Plaintiff Metts, for example, was sent ***more than 30*** letters before being sent Letter 8 (*id*; Ex. 27). All of these letters are sent in the same plain, white envelope. All of them are at serious risk of being discarded as junk mail, without ever being opened, let alone read. Under the undisputed expert testimony in this matter, Letter 8 is not delivered in a "meaningful manner" and thus does not satisfy due process.

[19] In some instances, UKH will unilaterally decide that an income-qualifying patient's medical services do not qualify for financial assistance before the patient even has a chance to apply (SoF ¶¶ 137-143).

A. *Letter 8 Is Unlikely to Be Opened, Unlikely to Be Read if Opened, and Unlikely to Be Understood if Read*

We live in a world of junk mail. When a document being sent in the mail can affect legal rights, it is important for the sender to take steps to ensure the greatest possible likelihood that the envelope will be opened and the document read and understood. That is the only way to meet the standard set forth in *Mullane*, 339 U.S. at 315 (emphasis added):

> [W]hen notice is a person's due, process which is a mere gesture is not due process. ***The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.***

As the Federal Judicial Center has pointed out in the directly analogous context of damages class action notices (highlighting added):[20]

Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide | **2010**

- ***Are the notices designed to come to the attention of the class?***
  The FJC's illustrative notices, as also described in the accompanying "***Plain Language Notice Guide,***" explain how to be sure the notices are "noticed" by the casual-reading class member. With "junk mail" on the rise, and the clutter of advertising in publications, legal notices must stand out with design features long-known to communications pros.
  - ***Does the outside of the mailing avoid a "junk mail" appearance?***
    Notices can be discarded unopened by class members who think the notices are junk mail. A good notice starts with the envelope design, examples of which are at www.fjc.gov.
  - ***Do the notices stand out as important, relevant, and reader-friendly?***
    It is important to capture attention with a prominent headline (like a newspaper article does). This signals who should read the notice and why it is important. The overall layout of the notice will dictate whether busy class members will take time to read the notice and learn of their rights.

Available at https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf (the "Bench Guide").

Here, Letter 8 comes at the *end* of a long sequence of dunning letters, and it (or, since 2018, also Letter 83, which comes one letter earlier) is the *only* mention of a right to hearing a patient/debtor receives. Under the undisputed expert testimony in this action, however, if one actually

[20] In a class action for money damages under Fed.R.Civ.P. 23(b)(3), notice and an opportunity to opt out are required as a matter of due process, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), so discussions of adequacy of notice in that context are directly relevant here.

wants to communicate important information, one puts it in the *first* letter. (Ex. 29 at 5, 7. 14). And DOR concurs: its regulation on what "agencies" such as UKH must do in order to make their debts eligible for forced collections includes a requirement that the agency's initial invoice contain "instructions regarding the appeal process." 103 K.A.R. 1:070 § 2(3)(b)(4).[21] UKH has *never* complied with that requirement, notwithstanding being formally told by Defendant Watts, that it must. Ms. Watts told UKH what a person "desirous of actually informing" its patients about appeal rights would do, and UKH affirmatively chose not to do it.[22]

Returning to the content and manner of delivery of Letter 8, and as set forth in Plaintiffs' expert's report:

- Letter 8 came in the same plain, white envelope in which CKMS's previous missives had come (Ex. 29 at 4-7), without any "teaser" language on the outside of the envelope informing the recipient that information that could affect their legal rights lurks inside (*id*. at 6-7). A recipient would be unlikely to believe that there was anything new or important in the letter and could just throw it away.
- Letter 8 is printed in tiny (9 point) type (SoF ¶ 33; Ex. 29 at 10-11), which is 3 full points below the recommended 12-point minimum for comprehension;[23]
- Letter 8 does not contain "trust-building" material (such as the blue $^{U}_{K}$ logo) that would persuade recipients it is not a scam (Ex. 29 at 8-10); and
- the hearing language is not only in the generally unread "dead zone" in the middle of the letter (*id*. at 13) but is in fact sandwiched between separate provisions at the beginning and end of the letter that both make it clear that the purpose of the letter is *debt collection*:
    - Thus, the letter opens with, "You have been given every opportunity to pay your account or contact this office to make other arrangements,"

[21] The language of the regulation does not refer to "initial invoice" but rather to an invoice that must be mailed within five working days after the debt becomes due (which plainly *is* the "initial invoice" for that debt), 103 K.A.R. 1:070 § 2(2), and a later subsection makes it clear that § 2(3)(b)(4) is in fact referring to the agency's "original invoice," *see* § 2(7). Defendant Watts's November 24, 2015 letter to UKH (and other agencies), discussed in text, expressly refers to the requirement as pertaining to the agency's "initial invoice."

[22] At her deposition Ms. Watts was "surprised" to learn of UKH's noncompliance (Watts 130:13-131:1), but perhaps she should not have been. It is typical behavior of UKH and DOR that DOR's Stephen Crawford had told UKH's Marcy Deaton that "This isn't really for you. You guys are okay. It's for our other partners." (Deaton 30(b)(6) 107:18-23). Ms. Watts testified that Mr. Crawford had no business saying such a thing (Watts 131:13-132:14). Her November 2015 letter applied to all of DOR's agency partners, including UKH (Watts 130:8-12).

[23] Once upon a time (before 2012), a version of Letter 8 was captioned "NOTIFICATION" in 12-point bold solid caps, but UKH quickly put an end to that (SoF ¶ 33).

which UK's 30(b)(6) witness agreed was debt collection language (Deaton 30(b)(6) 78:23-79:2); and

- The letter ends with, "This communication is from a debt collector, and this is an attempt to collect a debt, and any information obtained will be used for that purpose"—a provision that, UKH's witness agreed, states "the purpose of the notification." (Deaton 30(b)(6) 23:1-13)[24]

Putting all this together, Plaintiffs' direct mail expert, Nicholas Ellinger, concluded that it is "unlikely that [Letter 8] would be opened; if opened, unlikely the 'hearing' section would be read; and if read, unlikely the 'hearing' section would be comprehended" (Ex. 29 at 1). Mr. Ellinger summarized his findings as follows:

> The techniques that one would use to get letter recipients to open, read, and understand their hearing rights include:
>
> - Putting appeal information in the first letter, which is the most likely to be read. That way, several letters worth of people won't have stopped reading or opening letters before they knew they had this option.
> - Putting appeal information in every letter.
> - Using different outer envelope/teaser techniques to get follow-up letters opened and read.
> - Building trust with the letter recipient, especially vital when asking for money and medical information.
> - Using a font size accessible by all, or even most, members of society for the appeal language.
> - Highlighting the ability to appeal in a letter opening, P.S., or emphasized font instead of putting it in a reading Dead Zone.
>
> CKMS used none of these techniques. (*Id*. at 14)

[24] The closing language also reinforces the lack of "trust-building" language in the letter (Deaton 30(b)(6) 86:4-10):

> Q And one of the things you're doing in the hearing -- in the hearing notice in paragraphs 1 through 5 is asking people for information, correct?
>
> A Correct.
>
> Q So you're telling them that that information will be used for debt collection purposes, correct?
>
> A Correct.

So to the extent patients actually open the envelope and read the part of Letter 8 that offers a hearing, they will learn that although they may be entitled to a hearing, the information they provide if they ask for one will be used by UKH to continue to chase them for collection.

As the Federal Judicial Center pointed out in the Bench Guide excerpted above, "[w]ith 'junk mail' on the rise, . . . legal notices must stand out with design features long known to communications pros." One such "design feature" is a "teaser" (or, as the FJC says, a "call-out")—a message on the *outside* of the envelope that persuades the recipient to open the envelope and read the material inside. The FJC says, "'Call-outs' on the front and back encourage the recipient to open and read the notice when it arrives with other mail" (Bench Guide at 10). The envelope the FJC suggest for securities class action notices[25] has two teasers, front and back, as follows:

Front

Notice Administrator for U.S. District Court
P.O. Box 00000
City, ST 00000-0000

Notice to those who bought XYZ Corp. Stock in 1999.

Jane Q. Class Member
123 Anywhere Street
Anytown, ST 12345-1234

Back

If you bought XYZ Corp. stock in 1999,
you could get a payment from a class action settlement.

It is not that UKH *could not* put an effective teaser or call-out on the envelopes containing Letter 8. UKH has *admitted* that

[25] Available at https://www.fjc.gov/sites/default/files/2015/ClaAct03.pdf.

> UKH could, without violating any provision of the Fair Debt Collection Practices Act and without violating any other provision of law, send notices of hearing rights to persons asserted to owe medical debt to UKH in an envelope
>
> - with the UK logo and return address in the upper left corner, and
> - with a conspicuous message on the exterior of the envelope stating "**IMPORTANT LEGAL NOTICE. YOUR LEGAL RIGHTS MAY BE AFFECTED**." (SoF ¶ 68)

Once again, UKH has chosen a path that results in less notice, less effectively, to fewer people.

The difference between how UKH sends Letter 8 and how DOR sends its notice and seizure letters is stark. Letter 8 is sent in a plain, white envelope and looks like every other letter received from the debt collector; as discussed, many people do not open such letters. The DOR letters, in contrast, are sent ***certified mail***, and pretty much everyone is going to open a certified letter, particularly if the return address is a government agency. It is no surprise, therefore, that at least 500 people did not respond to Letter 8 but contacted DOR with a dispute promptly on receipt of DOR's certified letter (SoF ¶ 67). DOR's letters *are* sent in a manner that would be used by someone "desirous" of having the communication received and read, and *its* letters *are* opened and read. Unfortunately, by the time an account is at DOR, it is too late: no hearings; just collection. Since hearings, in Defendants' view, can happen only at the UKH level, it is ***UKH*** that must send a notice that is designed to be opened, read, and understood. And it does not.

More than 63,000 Letter 8s since 2012; only 65 hearing requests; only 17 hearings—and ***only one hearing since January 1, 2017***. The numbers speak for themselves. The manner in which Letter 8 is delivered is constitutionally insufficient.

B. *Letter 83 Does Not Solve the Notice Problem*

As set forth above, beginning in 2018 UKH added hearing language to Letter 83, the "we haven't heard from you" letter that went out immediately prior to Letter 8.[26] Like Letter 8, Letter

[26] Because Letter 83 did not contain hearing language prior to 2018, it does not affect the claims of any Class Member who was referred to DOR prior to then.

83 does not tell people that the proffered hearing is their one and only chance to avoid forced collection; indeed, it does not mention DOR at all. Like Letter 8, Letter 83 contains the improper disclaimer of hearing rights for care issues or inability to pay. Accordingly, Letter 83 does not solve the substantive notice problems of Letter 8 addressed in Points I and II above.

And although the manner of delivery of Letter 83 is somewhat better than that of Letter 8—it is in 12-point type, not 9-point, and it arrives one letter earlier in the process—it is still not nearly good enough. It still arrives in the same plain, white, no-teaser envelope that all of CKMS's mail does, and the hearing language is still bracketed by announcements that what is really going on is debt collection. Mr. Ellinger reviewed Letter 83 and concluded (Ex. 30) that "the letter is still less likely to be opened than it could be" and that "[o]ther than font size, the challenges in getting the letter read also are consistent with those identified in my earlier report," so that, "except for font size, my original analysis still holds".

IV. THAT SOME PLAINTIFFS AND CLASS MEMBERS ENTERED INTO PAYMENT PLANS WITH DOR DOES NOT VITIATE THE DUE PROCESS VIOLATION OR NEGATE THE RIGHT TO INJUNCTIVE RELIEF

After their accounts were sent off to DOR and they were told that they had no right to contest their asserted medical debt, some patient-debtors, including some Plaintiffs, entered into payment plans with the Department of Revenue. It was, they were told, the only way to avoid seizure of assets.

Defendants have asserted that entry into a payment plan constitutes a waiver and that the "voluntary" payment plan negates any deprivation of property. Neither argument holds water.

A. *Entry Into a Payment Plan Does Not Waive The Right to Notice and a Hearing*

State actors have been arguing that debtors facing asset seizure have contractually waived the right to pre-seizure notice and a hearing for a long time. Courts have rejected those arguments

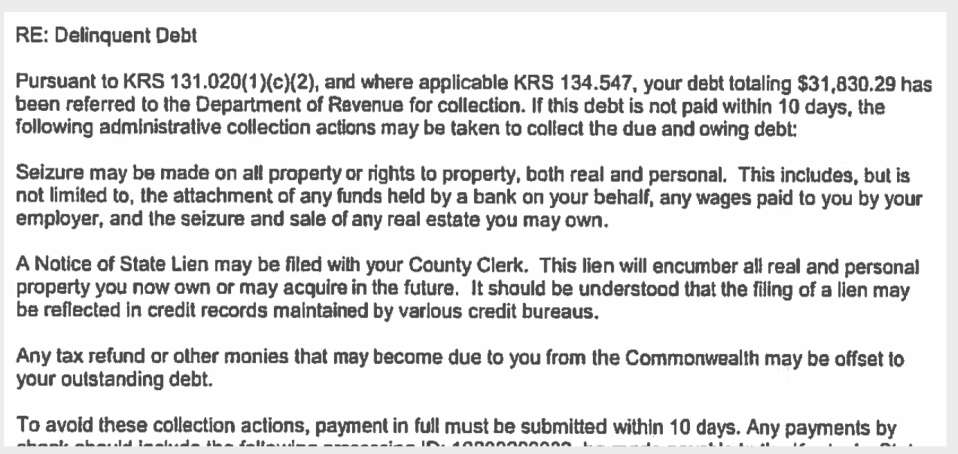
for just as long—at least as far back as *Fuentes* itself. In *Fuentes*, the creditors claiming the right to repossess debtors' property pointed to the underlying conditional sales agreement as a basis for asserting that the debtors had "waived their basic procedural due process rights." 407 U.S. at 94. In rejecting that argument, the Supreme Court noted that (as is plainly also true here) "[t]here was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power." *Id*. at 95. It then went on to hold that "a waiver of constitutional rights in any context must, at the very least, be clear," *id*. (emphasis in original), and it held that "[w]e need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver," *id*.

The same is true here. There is simply no language in DOR's form payment plan that can be construed as a waiver of constitutional rights. There *is* a waiver in the form, but it is a waiver of laches and the statute of limitations, not of procedural due process protections. (SoF ¶ 107) Accordingly, entry into payment plans with DOR by some Plaintiffs and some members of the Class did not waive their due rights or their claims that Defendants violated those rights.

B. *Plaintiffs' and Class Members' Entry Into Payment Plans Was Inherently Involuntary and Coerced*

Fuentes further held that a waiver must be "'voluntarily, intelligently, and knowingly' made," 407 U.S. at 95 (quoting *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972)). So, too, Defendants' argument here that there has been no taking of property depends on the asserted "voluntary" nature of the payment plan. But entry into payment plans by Plaintiffs and Class Members is *not* voluntary; it is coerced and inherently ***in***voluntary.

The first communication a debtor gets from DOR is a notice that tells them their assets are subject to seizure if they do not immediately either pay the asserted debt in full. Thus, on January 5, 2015 Plaintiff Alexander was sent a letter (Ex. 35) as follows:



RE: Delinquent Debt

Pursuant to KRS 131.020(1)(c)(2), and where applicable KRS 134.547, your debt totaling $31,830.29 has been referred to the Department of Revenue for collection. If this debt is not paid within 10 days, the following administrative collection actions may be taken to collect the due and owing debt:

Seizure may be made on all property or rights to property, both real and personal. This includes, but is not limited to, the attachment of any funds held by a bank on your behalf, any wages paid to you by your employer, and the seizure and sale of any real estate you may own.

A Notice of State Lien may be filed with your County Clerk. This lien will encumber all real and personal property you now own or may acquire in the future. It should be understood that the filing of a lien may be reflected in credit records maintained by various credit bureaus.

Any tax refund or other monies that may become due to you from the Commonwealth may be offset to your outstanding debt.

To avoid these collection actions, payment in full must be submitted within 10 days. Any payments by

The letter does not mention payment plans, but when patients call DOR they are told that is their only way to avoid either paying in full immediately or having their assets seized (SoF ¶¶ 96-100). This initial letter is followed up by a "Final Notice Before Seizure" (*e.g.*, Ex. 36), which says basically the same thing, only in solid capital letters. The DOR says patients who disagree with the bill can submit their reasons to DOR, but DOR makes it clear that ***it*** will decide whether those reasons are valid. No right of appeal is mentioned, and none is given.

Defendant Watts testified that entry into a payment plan in these circumstances is "voluntary":

> A . . . [W]hen when they voluntarily entered into a pay agreement, we assume they accept the debt and think it's correct and are making payments on it.
>
> Q Okay. So you're placing a lot of weight on the word "voluntarily" there, aren't you?
>
> A Voluntarily. They volunteer to pay.
>
> Q Of their own free will with no -- with – with no impetus from the Department?
>
> A We don't twist their arm. (Watts 52:4-12)

"Don't twist their arm"? Nonsense. Look at those letters. And remember that anyone who asks is told that there are three and only three choices: pay in full, do a payment plan, or have their assets seized.

Thus, in 2019, Plaintiff Tip Moody entered into a payment plan with DOR after discovering DOR had placed a lien on his 90-year-old mother's home in 2010 (SoF ¶¶ 261-262). Similarly, on June 18, 2015, DOR seized Plaintiff Lucy Alexander's entire biweekly paycheck. Ms. Alexander had two children to take care of and was depending on this money. After calling her employer's HR office to find out what happened, she drove straight to DOR's office to ask for a meeting (Alexander 74:5-14). At DOR's office, three men met with Alexander, and she told them about her dispute with UKH. They told her that she had to enter a payment plan of at least $100 every two weeks or they would continue to garnish her wages. So, Alexander started to pay $200 a month to DOR, which DOR took out of her paycheck directly. Plaintiffs Baughman and Moody likewise entered into a payment plan with DOR because they felt they had no choice (SoF ¶¶ 262, 295).

All of this happened, and continues to happen, in the face of what Plaintiffs and the Class have shown above are ongoing violations of their rights to due process of law—in particular, to meaningful notice and a meaningful opportunity to contest the debt before a neutral decisionmaker. It is not new law that an agreement obtained by the government through threats that the relevant government officials had no right to make is no agreement at all. *United States v. Tingey*, 30 U.S. 115, 129–30 (1831). Choices made by the party facing the government in such circumstances are not "voluntary" and do not defeat the federal claim against the governmental conduct. *Waskul v. Washtenaw Cty. Comm. Mental Health*, 979 F.3d 426, 451-52 (6th Cir. 2020). The issue is whether the party opposing the government has a "reasonable alternative," to acquiescing, see *Restatement (Second) of Contracts* § 175(1) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."), and the alternative of refusing to comply and then suing is not in general a "reasonable" one where, as here, "the threat involves . . . seizure of property," *id*. cmt. b. That is all

the more true here, because ***the government officials themselves are telling UKH's patients that they have no remedy and they have no choice***. DOR's conduct here is inherently coercive and vitiates consent as a matter of law.

And there *is* a taking of property, both because the payments are not voluntary (and thus are "deprivations") and because of the ongoing, omnipresent threat that if there is ever a default, the debtor will go back on forced collections—*without* any opportunity to contest the underlying debt. This risk is not chimerical; it is very, very real. From 2016 to 2019, an average of 3,100 debtors *a year* went from payment plans back to forced collections (SoF ¶¶ 175-182). One can be thankful for the falloff in forced collections for the past two years due to COVID while recognizing that, sooner or later, DOR, unless enjoined, will go back to its standard practice of moving people from payment plans to forced collection *without* any kind of a hearing.

Thus Plaintiffs and Class Members on payment plans are entitled to summary judgment.

C. *Plaintiffs and the Class Are Entitled to a Hearing at the DOR Level in the Event of Payment Plan Default*

1. DOR's Default Procedures are *Per Se* Violations of *Fuentes*

The thousands of UK patients who, each year, default on DOR payment plans are put back in DOR's "forced collection" mill—bank levies and wage garnishments—*without any opportunity for a hearing* on the existence or amount of the debt or the reasons for the default. This is a *per se* violation of *Fuentes v. Shevin*. Even if DOR were right that the payment plans were "voluntary," and even if it is unlikely that the patient/debtor has defenses to payment, *Fuentes* teaches that *a hearing must still be offered before assets are seized*. 407 U.S. 87 ("The right to be heard does not depend on an advance showing that one will surely prevail at the hearing.").

That conclusion is reinforced by the discussion in the previous section about the inherently involuntary nature of DOR's payment plans. Even were the Court to conclude that the

circumstances facing debtors on receipt of DOR seizure notices were not *inherently* coercive, each Class Member could defend a lawsuit on the payment plan on the ground that s/he was *individually* coerced into entering into it. The Class Member could also argue that the payment plan is voidable because induced by misrepresentations and omissions concerning the availability of hearings. *Such defenses would be available as an individual matter to any person who defaulted on a payment plan*, even if the Court does not accept the argument above that inherent coercion vitiates the payment plans for the Class as a matter of law. Accordingly, under *Fuentes*, DOR cannot go back to taking assets without giving the patient/debtor the opportunity to raise these (or any other) defenses at a properly noticed hearing.

2. ***Mathews v. Eldridge* Likewise Requires Hearings Before Assets Can Be Seized Following a Payment Plan Default**

DOR's basic position in this action is that due process is UKH's responsibility—notwithstanding that it is DOR, not UKH, that actually seizes the property of Plaintiffs and the Class. DOR says, in particular, that it is entitled to rely on UKH's certification that the debts have been "liquidated"—*i.e.*, "final due and owing, all appeals and legal actions having been exhausted," K.R.S. § 45.241(1)(b)(1); *see* Watts 65:15-25.

But regardless of whether DOR might be entitled to rely on such certifications in other circumstances, it may not do so here. The record in this action demonstrates that UKH repeatedly sends DOR accounts containing errors. Under *Mathews v. Eldridge*, 424 U.S. 319 (1973), the likelihood of error—both that inherent in medical billing and the record of actual errors in practice—means that a hearing at DOR would be required on payment plan default even had *Fuentes* not already resolved that issue.

(a) *The Mathews v. Eldridge Balancing Test*

Under *Mathews*, the court must weigh three factors in determining "what process is due": (1) the private interest of UKH patients subject to DOR levies, (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. *Accord Johnson v. City of Saginaw*, 980 F.3d at 509-11.

Here, the private interest of patients in their wages, tax refunds, and other assets that the DOR seizes to satisfy alleged patient debts with UKH is significant. *See, e.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-42 (1969) (holding that prejudgment garnishment procedures violated due process and noting the substantial hardships imposed by prejudgment wage garnishments on low-income families); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 44 (1993) (with respect to seizure of real property, "[the] right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance"); *Jahn v. Regan*, 610 F.Supp. 1269, 1277 (E.D.Mich. 1985) (noting it is "beyond question" that there is "a substantial interest in obtaining [a] tax refund") (citing *Marcello v. Regan*, 574 F.Supp. 586, 596 (D.R.I. 1983)); *see also Nelson v. Regan*, 560 F.Supp. 1101, 1108 (D.Conn. 1983), *aff'd*, 731 F.2d 105 (2d Cir. 1983)) ("Tax refunds, especially for the low and moderate income individuals, . . . may make a noticeable difference in the individuals' living standards. Even if the burden of an unjust offset is not as great as that of the loss of welfare benefits for those on the very margin of subsistence, as in [*Goldberg v. Kelly*], it is significant. A temporary deprivation may create a substantial burden."). If, as the Sixth Circuit held in *Johnson*, the property interest in one's *means* of livelihood is highly significant, the interest in one's *actual* livelihood is

even more so. As Plaintiff Alexander testified, "I had two kids to feed." Each of the other Named Plaintiffs faced similar or worse circumstances.

We do not dispute that the State's interest in collecting valid debts is significant, but the hardship to the State in costs or delay of holding hearings pales against the potentially life-wrecking consequences to Plaintiffs and the Class of *not* holding hearings. And the key word in the State's interest in collecting valid debts is "valid." The State has *no* interest in collecting amounts that are *not* owed, and holding hearings is the way one separates the valid from the invalid.

(b) *The Record in This Action Demonstrates a Significant Likelihood of Error in the Alleged Debts Sent to DOR for Collection*

With the first and third factors favoring Plaintiffs and the Class (or, at worst, in equipoise), we turn to the second factor—likelihood of error. At its most basic, the second *Mathews* factor is a "concern for accuracy." *City of Los Angeles v. David*, 538 U.S. 715, 718 (2003). *See also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. . . . [T]he quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error."). The cases addressing "likelihood of error" sometimes look at the inherent likelihood of error in the process being examined, *e.g.*, *Parham v. J.R.*, 442 U.S. 584, 606 (1979) ("risk of error *inherent* in the parental decision to have a child institutionalized for mental health care" (emphasis added)); *League of Women Voters v. Andino*, 497 F.Supp.3d 59, 76-77 (D.S.C. 2020) (risk of error in signature matching process), and sometimes look at showings of actual errors, *e.g.*, *Zinermon v. Burch*, 494 U.S. 113, 135-40 (1990) (analyzing erroneous admittance of Respondent to a hospital as a "voluntary" mental patient when he was unable to consent). Here, either way one looks at it, the likelihood of error is well over the threshold needed to trigger a hearing at the DOR level.

In *Mathews*, the Supreme Court held that the Social Security Administration's process for termination disability benefits satisfied constitutional due-process requirements in part because there were procedures by which beneficiaries were able "to challenge directly the accuracy of information in [their] file[s] as well as the correctness of the agency's tentative conclusions." *See Mathews*, 424 U.S. at 346. The opportunity to mount a *direct* challenge to the *accuracy* of information and the *correctness* of an agency's conclusion acts as "a safeguard against mistake." *Id.* As UKH patients are not afforded such an opportunity, the likelihood of error is high. The likelihood of error is further increased by the unquestionably individualized nature of medical bills. *See Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 798–99 (6th Cir. 2018) ("risk of individualized evaluative error" exists in the review of a person's medical records by the Social Security Administration).

The Court could readily take judicial notice that medical billing is inherently confusing, even to specialists, *see*, *e.g.*, Penelope Wang, "Sick of Confusing Medical Bills? Doctor, hospital, and insurance bills are riddled with incorrect charges," *Consumer Reports* (Aug. 1, 2018) (available at https://www.consumerreports.org/medical-billing/sick-of-confusing-medical-bills/). It is even simpler than that, however, for ***UKH agrees***. In trying to explain why UKH disregarded Ms. Watts's directive to include hearing information in the initial invoice, Ms. Deaton testified:

> Sometimes the invoices go back and forth with insurance and different payments, and a final amount can change of what they're still -- an initial invoice would be the first thing a person gets from UK hospital patient account. That's too early, frankly, in the process for that kind of a bill, because, you know, sometimes we're still waiting for payments, like I said, from insurance or something. . . . It's not like a tax invoice where the first tax invoice is the bill. It's not going to change. So just, like I said, our situation was somewhat unique for types of bills. (Deaton 30(b)(6) 121:12-25)

Whether or not Ms. Deaton's explanation justified excluding hearing language from UKH's initial invoices,[27] the consequences of UKH's "unique" billing practices are clear:

[27] It does not, of course. It would be easy to draft language in the "initial invoice" to the effect that, "This is our best guess at the moment as to what you might owe. We will tell you when we think we have a final answer on the

> Q And the back and forth, I mean, the amounts of the bills can change, and it can be, you know, pretty confusing to everyone as to exactly what is billed and what should be paid, correct?
>
> A Correct. (*Id*. 122:1-5)

In a process fraught with this much change and confusion, there is plainly a real risk that errors will creep in. And that would be true even were it not the case that the entity doing the processing and making the decisions has a direct financial stake in the outcome. Accordingly, the *inherent* likelihood of error in UKH's billing and decisionmaking process is substantial. *See Johnson v. Saginaw*, 980 F.3d at 510-11 (citing *Memphis Light*; significant likelihood of error in utilities cut-off decisions).

And the record bears this out. One need look no further than UKH's response to Request for Admission 25, which admits that *at least 324 individual* "accounts were voided at the DOR and/or the balance asserted by the DOR to be due was adjusted as a consequence of a communication by the listed debtor to the DOR concerning the listed account." (Ex. 32 ¶ 25) DOR documents likewise reflect recurring issues over time with the accuracy of debts sent in by CKMS (SoF ¶¶ 204-205). For example, Patient SS underwent heart surgery, was erroneously billed for services that should have been covered by insurance and Medicare, and her alleged debt was sent to DOR for collection. DOR garnished Ms. S's husband's tax refund and attached her daughter's bank account. After Ms. S disputed DOR's collection activity, her account was sent back to CKMS. Even after the account had been returned, CKMS continued to insist that the alleged debt had been billed accurately and there was no error on her account.. Ms. S had to persist in disputing the

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amount. At that point, if you do not agree that you owe that amount, you will have a right to appeal, as follows: [include hearing language]." The patient would then know what was going on—as the DOR regulation mandates and as fundamental fairness requires.

UKH said nothing like that. As the *Consumer Reports* article points out, healthcare institutions have no incentive to be clear and transparent, because the system is set up to get them paid regardless. And UKH had even less incentive to be transparent than did other institutions, because it had the hammer of DOR forced collections available to it, and it plainly did not want to make it more difficult to use that hammer.

alleged debt for another *year* before CKMS ultimately concluded it had incorrectly billed her and had referred the alleged debt to DOR in error. (SoF ¶¶ 184-189) A mistake that could have been rectified early by a clear hearing process instead required over a year of emails, phone calls, letters, and conversations to be fixed—and even then, it was only fixed *after* Ms. S's property was seized by DOR without due process. There are numerous other examples in the record (SoF ¶¶ 150-157, 190-200), some of which were explored in the "Complaint Tracker" 30(b)(6) deposition of Cheryl Davidson.[28]

On the record here, any right DOR may have had to rely on UKH's "certification" that the debts have been "liquidated" has been completely vitiated. Medical billing is complex. Even with the best will in the world, errors are made. And parties on opposite sides of a transaction can have different views of what happened, and why. These are paradigmatic issues that, when disputes arise, require hearings for their resolution. So before ***DOR*** goes back to taking people's assets after payment plan default, ***it*** needs to make sure that ***it*** is not acting in error.

3. **DOR is Perfectly Capable of Having Hearings Held**

DOR's basic position on hearings is "we can't." It does hold tax hearings, it says, because it knows about taxes, but it asserts (no doubt correctly) that it does not have expertise in medical debts, so (it says) it cannot hold hearings about them. (Watts 114:9-115:22)

DOR's chain of logic is faulty. The required hearings in this case are not situations in which expertise in a particular subject matter is required: they are an opportunity for a patient (and alleged debtor) to contest the existence or amount of his or her debt before a neutral decisionmaker. Non-expert judges hold such hearings by the thousands each day. The Kentucky Attorney General's Office has a contract to preside over such hearings at the UKH level, and the AG's office is

[28] The entire deposition, with its exhibits, will be included in the sealed copy of the evidentiary submission. Because the entire transcript contains HIPAA protected health information, it is not being publicly e-filed.

presumably not a hotbed of medical expertise. There is no reason why the AG's Office could not hold such hearings on behalf of DOR. The Office has a separate hearings division specifically set up to hold just such hearings for Kentucky Administrative Agencies.

V. THE APPROPRIATE INJUNCTION

Plaintiffs and the Class seek injunctive relief from this Court. Thus, "the precise remedy is left to the discretion of the trial court acting under traditional equitable principles." *E.g., Alexander v. Machinists & Aerospace Workers*, 565 F.2d 1364, 1382 n.4 (6th Cir. 1977). "[F]ederal-court decrees must directly address and relate to the constitutional violation itself," but the Court may appropriately enter a remedy for a constitutional violation that "is tailored to cure the 'condition that offends the Constitution.'" *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977).

Here, the appropriate injunction to remedy Defendants' unconstitutional medical debt collection processes provides relief to Plaintiffs and the Class in two steps. First, the injunction should protect the Class from Defendants' unconstitutional collection regime and order the Defendants to take certain steps to immediately begin repairing the harm they have caused. Second, the injunction should require Defendants to establish and maintain financial assistance and collection programs that provide UKH's patient-debtors with due process. Because Defendants' unconstitutional collection practices have created special challenges for Plaintiffs and Class Members in any current hearings regarding past alleged debts, one focus of the second step must be to ensure that Plaintiffs' and Class Members' eligibility for financial assistance is not prejudiced by the delay Defendants' caused. Under *Lewis v. Casey*, 518 U.S. 343, 362 (1996), Defendants are entitled to an opportunity to participate in framing this second-step relief.

A. *Plaintiffs and the Class Are Entitled to an Injunction Preventing Defendants from Continuing to Violate Their Constitutional Rights*

The injunction immediately necessary to prevent Defendants from continuing to violate the Class Members' constitutional rights is clear and one-dimensional: the Court must enjoin Defendants from any attempt to collect alleged medical debt from any Class Member until that Class Member has had notice of the right to a hearing on their existing debt and the hearing has been held. This is basic and obvious. The structure of the necessary hearing is addressed below.

Because many class members are, to date, unaware of this litigation and are making financial decisions based on the incomplete and inadequate information provided by Defendants, the Court's injunction must also include notice to the class members to inform them that this Court's Order prohibits Defendants from making collection efforts pending court approval of new collection processes designed to provide them a fair opportunity before a neutral arbiter to contest any aspect of their alleged debt.[29] Without this notice, some class members may seek a fresh start in bankruptcy or pay a debt they may believe is unfair or unaffordable, but that they have no choice but to pay.

B. *Plaintiffs and the Class Are Entitled to an Injunction That Repairs the Ongoing Damage Caused by Defendants and Protects Class Members and Future UKH Patients From Collection Abuses*

In addition to stopping the Defendants from using their current collection processes, the Court should order Defendants to

- remove the 25% collection fee and the 12% penalty interest[30] charged on transfer of an account to DOR; simply put, because the transfers violated due process, the fees and interest consequent on those transfers cannot stand;
- remove any encumbrances placed on Plaintiffs and Class Members' property; and

[29] When a federal court found that D.C. officials violated their duty to provide obstetric and gynecological care to people incarcerated in the District of Columbia's facilities, as part of the injunctive relief it ordered, it required that "the Defendants shall inform all women prisoners of the procedure to access health services while incarcerated." *Women Prisoners of D.C. Dep't of Corr. v. D.C.*, 877 F.Supp. 634, 682 (D.D.C. 1994).

[30] K.R.S. § 45-238(3)(a) and (b).

- lift any ongoing levies or garnishments.

Each of these provisions is an obvious and necessary remedy to undo the harm caused by Defendants' constitutional violations.

C. *A Court-Approved or Court-Ordered Plan Must Reform Defendants' Processes to Protect Class Members Going Forward*

The plan Defendants propose should contain specific elements to ensure that their ongoing practices do not slip back into constitutional violations. These Defendants were always looking for a "way out," repeatedly flouted known statutory obligations relating to notice and fairness, and deliberately kept money they knew they had taken wrongfully. "Trust me" is not a response the Court should accept from these Defendants. Any plan the Court ultimately orders must:

- revise communications to UKH's patient-debtors to provide notice of dispute and appeal rights;
- design letters and other communications so that they are likely be opened, read, understood, and acted upon;
- revise processes to provide this information at a meaningful time and in a meaningful manner;
- reform financial assistance program (FAP) procedures so that UKH's patient-debtors can apply, get a determination of eligibility for financial assistance, *and* receive notice of their right to appeal any determination; and
- provide for a system of data collection, monitoring, and enforcement for a period of time so the Court and Plaintiffs can be satisfied that Defendants' reforms are effective and being maintained by Defendants.

D. *A Court-Approved or Court-Ordered Plan Must Contain Specific Steps to Repair Harms and Remove Any Prejudice Caused by Defendants' Unconstitutional Collection Practices*

In addition to bringing their collection practices into compliance with the Constitution going forward, the Defendants must provide relief to those Plaintiffs and Class Members who will need to apply for financial assistance or contest alleged medical debts that may be more than a decade old. Defendants must provide processes and accommodations to Class Members to undo the harm caused by their failure to provide constitutionally adequate process in the past.

Plaintiffs and the Class are plainly entitled to a "do-over." So, what, under these specific circumstances, should that court-ordered "do-over" look like? The Sixth Circuit has recently provided some guidance in this area when ordering do-overs in the Social Security Administration's redetermination of Eric Conn's clients' eligibility for Social Security Disability benefits.

As part of the fallout from Conn's conspiracy to defraud the SSA, the Sixth Circuit considered whether the SSA was even allowed to redetermine Conn's clients' eligibility for disability benefits when it did not "'immediately' initiate redetermination proceedings." *Hicks*, 909 F.3d at 813. Although Plaintiffs were "likely right" that "the SSA's failure to act immediately caused them significant harm," including "[making] it harder for plaintiffs to supplement their administrative records with additional relevant materials and enabl[ing] Conn to destroy records," and although "[t]hese harms may have had a 'substantial influence' on plaintiffs' ability to to establish their initial eligibility for benefits long after the initial determination hearings," *id.* at 812, the Court held that sufficient "'remedial tools' are likely available other than precluding the government from holding redetermination hearings." These tools would remove the sting of the "prejudice[]" the beneficiaries suffered as a result of "the SSA's delays" and would include, "for instance, requiring the government to implement greater procedural protections," *id.* at 813.

It is those "remedial tools," in the form of "greater procedural protections," that Plaintiffs and the Class seek here. Specifically, the plan must contain, at least, the following elements to remove the "substantial influence" Defendants' delay creates on class members' ability to (a) apply for financial assistance and (b) contest the validity of their alleged debt at a hearing:

- a plan for locating and engaging class members;
- processes designed to ensure and document that class members actually receive notice;

- the opportunity to apply for FAP and appeal any denials of eligibility to a neutral arbiter, with UKH determining eligibility based on either eligibility at the time a patient-debtor received medical treatment or present-day eligibility;[31]
- fair accommodations/relaxed documentation requirements for Class Members to be approved for financial assistance given the passage of time,[32] coupled with using information available to the Defendants and other agencies of the state (a patient-debtors' tax returns, their eligibility for SSD, SNAP benefits, Medicaid, or other income-based programs, etc.) so that as many Class Members as possible have to take no affirmative step whatsoever to receive financial assistance; and
- offers of income-based payment plans[33] to allow class members to pay alleged debt (or debt a hearing determines is owed) without further hardship from Defendants' conduct.

Between September 2008 and January 2021, DOR delivered $50,450,501.59 to UKH Healthcare in medical debt collections (SoF ¶ 215). This figure does not include the money DOR retains for its efforts, which a March 2020 report by the Kentucky Center for Investigative Reporting found was $18,000,000, including $4 million in interest.[34] Under these circumstances (even setting aside the fact that some of this money was collected as a result of Defendants' willful conspiracy in 2012 to deprive Kentuckians of their property despite internally-recognized due process violations), Defendants' conduct has allowed them to unjustly enrich themselves at the class members' expense since 2008. The foregoing steps are tailored to remedy prospectively the harm Defendants' past conduct has caused.

[31] Allowing class members to be eligible for financial assistance at either the time of service or based on their present-day financial resources is a fair accommodation in light of the fact that it was Defendants' unconstitutional system that deprived them of a fair determination at the time of service.

[32] One current example of developing and administering programs with relaxed documentation requirements is the Kentucky Housing Corporation's use of "fact-based proxies" to support a renter's attestation of their income when KHC is determining income eligibility. Instead of requiring every applicant to document each and every source of income in their lives, the U.S. Treasury Department guidelines provide agencies the ability to use "fact-based proxies" to establish income eligibility. See, "Guidelines for fact-specific proxies," at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/service-design/fact-specific-proxies (last visited, February 20, 2022). Defendants' processes should use similar fact-based proxies and provide other accommodations when determining Class Members' eligibility for financial assistance.

[33] The federal government offers "income-based repayment" (IBR) plans for people for whom unadjusted student debt payments would impose a significant hardship. This program limits a person's student debt payments to between 10-15% of their discretionary income each month. *See* "Income Driven Repayment Plans" at https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited, February 20, 2022).

[34] Jared Bennett, *Insult to Injury: State Adds 32% When It Collects UK Medical Debt*, WPFL, March 17, 2020, https://wfpl.org/kycir-insult-to-injury-state-adds-32-when-it-collects-uk-medical-debt/

CONCLUSION

The Court should grant summary judgment for Plaintiffs and the Class and enter the injunction described in Point V and set forth in the Proposed Order.

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