UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

STEPHANIE L. STEIGERWALD, Plaintiff, v. COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	CASE NO. 1:17-CV-1516 OPINION & ORDER [Resolving Doc. No. 55]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Plaintiff Stephanie Steigerwald brings this class action complaint against Defendant Nancy Berryhill, Acting Commissioner of the Social Security Agency ("Commissioner").[1] With this case, Plaintiff Steigerwald alleges that Defendant Commissioner has repeatedly failed to properly calculate and disburse Social Security benefits when a claimant's representative receives attorney's fees.

Plaintiff Steigerwald now seeks to certify a class defined as:

> Individuals who became eligible to receive Concurrent Payments between March 13, 2002 and March 13, 2018, for whom Representatives' fees were paid out of the individual's retroactive benefits, and for whom [the Social Security Agency ("SSA")] made a Windfall Offset determination before the amount of Representatives' fees was determined and paid out of retroactive benefits, but for whom, after the amount of Representatives' fees was determined and paid out of retroactive benefits, SSA did not perform the Subtraction Recalculation and therefore has not issued any Retroactive Underpayment that may be due.[2]

For the following reasons, the Court **GRANTS** Plaintiff's motion to certify the proposed class. The Court will, however, slightly limit the class's timeframe.

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[1] *See generally* Doc. 1.
[2] Doc. 55-1 at 9. Defendant Commissioner opposes class certification. Doc. 57. Plaintiff replies. Doc. 59.

I. Background

A. Plaintiff Steigerwald

Plaintiff Steigerwald previously qualified for both retroactive disability benefits under Title II of the Social Security Act and retroactive supplemental security income ("SSI") benefits under Title XVI of that Act.[3] Because she qualified for both of those benefits retroactively, Defendant Commissioner needed to perform a "windfall offset calculation."[4]

This windfall offset calculation ensures that a claimant receiving retroactive benefits is not paid more benefits than they would have received if Defendant Commissioner had paid the benefits when originally owed.[5] The windfall offset calculation is necessary because SSI benefits are tied to a claimant's income: higher income decreases SSI benefits.[6] Receiving Title II disability benefits increases a claimant's qualifying income, thereby reducing the amount of SSI benefits that a claimant should receive.[7]

Defendant Commissioner correctly determined the amount of Title II disability benefits and SSI benefits that Plaintiff Steigerwald should have received.[8] Defendant Commissioner also correctly performed the initial windfall offset calculation for Plaintiff Steigerwald.[9]

A problem arose, however, because Plaintiff Steigerwald obtained her benefits with an attorney's help. When an attorney, or other qualifying representative, helps a claimant obtain Title II disability and SSI benefits, that attorney's fee can be deducted from the SSI benefit award.[10] Paying that attorney's fee decreases a claimant's income, thereby increasing the amount of SSI benefits she receives.[11]

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[3] Doc. 1 at ¶¶ 75-77.
[4] *See* Social Security Agency Program Operations Manual System (hereinafter "POMS") SI 02006.200.
[5] *See, e.g.*, POMS SI 02006.200(C).
[6] *See* 42 U.S.C. § 1320a-6.
[7] *See id.*
[8] Doc. 1 at ¶ 77.
[9] *Id.*
[10] *See* POMS SI 02006.200(B).
[11] 20 C.F.R. § 416.1123(b)(3).

In order to calculate the correct attorney fee-adjusted benefit amount, the Social Security Agency ("SSA") must perform a second windfall offset calculation to harmonize a claimant's Title II and Title XVI benefits.[12] This is known as the fee subtraction recalculation ("Subtraction Recalculation").

In Plaintiff Steigerwald's case, Defendant Commissioner awarded $13,500 in attorney's fees.[13] However, SSA did not perform the Subtraction Recalculation after paying this attorney fee.[14] As a result, SSA improperly withheld $5,392.08 from Plaintiff Steigerwald's benefits by failing to readjust and increase Steigerwald's monthly benefits to reflect that her benefits fell after the attorney fees were paid.[15]

After this case was filed, Defendant Commissioner performed the Subtraction Recalculation for Plaintiff Steigerwald and paid her the withheld benefits.[16]

B. The Proposed Class

Plaintiff Steigerwald alleges that Defendant Commissioner has failed to perform the Subtraction Recalculation in thousands of cases like hers over the last sixteen years.[17] As a result, Plaintiff Steigerwald alleges, Defendant Commissioner has failed to pay owed benefits to thousands of claimants.[18]

Originally, Plaintiff Steigerwald based this claim upon several reports from SSA's Office of Inspector General ("OIG").[19] These OIG reports found serious flaws in Defendant Commissioner's processing of windfall offset calculations generally.[20] These reports did not directly address the specific problem of Defendant Commissioner's alleged failure to perform the Subtraction

[12] *See generally* POMS SI 02006.200; *see also* POMS SI 02006.210 (detailing the step-by-step procedure for calculating the windfall offsets).
[13] Doc. 1 at ¶ 79.
[14] *Id.*
[15] *See* Doc. 18-2 at ¶¶ 26-27.
[16] *Id.*
[17] *See* Doc. 1 at ¶¶ 39-74.
[18] *Id.* at ¶ 27.
[19] *Id.* at ¶¶ 57-74.
[20] *Id.*; *see also* Docs. 1-5, 1-6.

Recalculation.[21] However, at least one example provided in the OIG reports seemingly involves Defendant Commissioner's failure to perform the Subtraction Recalculation and pay the resulting benefits.[22]

In discovery, Defendant Commissioner produced data showing that between September 1, 2012 and October 31, 2017, Defendant Commissioner needed to perform a Subtraction Recalculation for approximately 95,000 claimants.[23] Of those 95,000 claimants, Defendant Commissioner has yet to perform a Subtraction Recalculation for 37,765 people, or approximately 39 percent of the total claimant pool.[24]

Of those 37,765 people, Defendant Commissioner estimates that 28,510 will be owed past-due benefits once SSA performs the Subtraction Recalculation.[25] Defendant Commissioner has not explained SSA's methodology for determining that the other 9,510 people will not be owed any benefits even before SSA has performed the Subtraction Recalculation.[26]

II. Legal Standard

Rule 23 of the Federal Rules of Civil Procedure governs class action lawsuits. A court may certify a class action only if all of Rule 23(a)'s procedural requirements are met, and if certification is appropriate under Rule 23(b)(1), (b)(2), or (b)(3).

"Rule 23 does not set forth a mere pleading standard."[27] Instead, a party seeking class action certification "must affirmatively demonstrate his compliance" with Rule 23.[28] As a result, courts should perform a "rigorous analysis," which may "overlap with the merits of the plaintiff's underlying

[21] *See generally* Doc. 52-1.
[22] *See* Doc. 1-6 at 10.
[23] Doc. 50-2 at 3.
[24] *Id.* at 2-3.
[25] *Id.* (defining "Category 1" individuals as those who have not had a Subtraction Recalculation performed and may be owed past-due benefits).
[26] *Id.* (defining "Category 2" individuals as those who have not had a Subtraction Recalculation performed, but who would not be owed past-due benefits).
[27] *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 351 (2011).
[28] *Id.*

claim."[29] But courts should consider the merits of the case only to the extent that "they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[30]

Rule 23(a) sets forth the following four prerequisites to class certification: (1) the class must be so numerous that "joinder of all members is impracticable"; (2) there must be "questions of law or fact common to the class"; (3) the claims of the representative party must be "typical" of those of the class; and (4) the representative party must "fairly and adequately protect the interests of the class."[31]

"No class that fails to satisfy all four of the prerequisites of Rule 23(a) may be certified, and each class meeting those prerequisites must also pass at least one of the tests set forth in Rule 23(b)."[32]

Here, Plaintiff seeks certification under Rule 23(b)(3).[33] Rule 23(b)(3) requires showing that (1) common questions of law and fact "predominate" over any questions affecting only individual members; and (2) the class action device is the "superior" method of resolving the controversy.[34]

III. Analysis

The Court evaluates each prerequisite to certification in turn.

A. Rule 23(a) Certification

1. Numerosity and Presentment

In order to certify a class, "Rule 23(a) requires the [C]ourt to find that 'the class is so numerous that joinder of all members is impracticable.'"[35] Here, Defendant Commissioner has admitted that there are at least 28,510 potential class members for whom SSA has not performed a Subtraction Recalculation and to whom SSA may owe benefits. The Sixth Circuit has previously called an

[29] *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (quoting *Dukes*, 564 U.S. at 349-350).
[30] *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013).
[31] Fed. R. Civ. P. 23(a).
[32] *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).
[33] Plaintiff alternately seeks class certification under Fed. R. Civ. P. 23(b)(2), or a "hybrid" 23(b)(2)/23(b)(3) certification. *See* Doc. 55-1 at 19-21.
[34] Fed. R. Civ. P. 23(b)(3).
[35] *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 884 n.1 (6th Cir. 1997).

objection to an 1,100 person class's numerosity "frivolous."[36] In this case, the numerosity requirement is met.

Defendant SSA fights this seemingly obvious conclusion by arguing that Plaintiff Steigerwald has not proved that class members other than herself have met the jurisdictional prerequisite of "presenting" their cases to SSA.[37] This argument fails.

The Court previously found that Plaintiff Steigerwald presented her case when her attorneys sent a letter alerting SSA that their representative's fees were final.[38] The Court expressly reserved the question of whether Plaintiff Steigerwald and the class may have also satisfied the presentment requirement at some earlier point.[39] The Court now holds that Plaintiff Steigerwald and the other prospective class members adequately presented their claims when their representatives submitted a fee request and those representatives' fees were finalized.

42 U.S.C. § 405(g) requires that a Social Security claimant "present" her claim for benefits to the Commissioner and allow the Commissioner to make a decision on that claim.[40] The purpose of the presentment requirement is to allow Defendant Commissioner the opportunity to resolve claims before involving the courts.[41]

However, this case is atypical because, as Defendant Commissioner has recognized, this is not a case about putative class members' entitlement to benefits.[42] Defendant Commissioner admits that she has already found each class member entitled to the benefits at issue.[43]

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[36] *Id.*
[37] *See* 42 U.S.C. § 405(g); *see also Heckler v. Ringer*, 466 U.S. 602, 617 (1984) (explaining that § 405(g)'s presentment requirement is nonwaivable and jurisdictional).
[38] Doc. 32 at 6-7.
[39] *Id.* at 6.
[40] *See* 42 U.S.C. § 405(g); *Mathews v. Eldridge*, 424 U.S. 319, 328-29 (1976).
[41] *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 12 (2000); *see also Mathews*, 424 U.S. at 328 (observing that presentment is necessary because "some decision" by the Commissioner is clearly required by § 405(g)).
[42] *See* Doc. 52 at 17 (arguing that an attorney's fees provision does not apply because "putative class members already are entitled to the past-due benefits sought in this suit").
[43] *Id.*

This admission largely decides the presentment issue: if Defendant Commissioner has found the class entitled to these benefits, then the class must have presented their claims for these benefits to the Commissioner at some point. The only remaining question, then, is when did the class present their claims?

The Court finds that class members adequately presented their claims once Defendant Commissioner knew that each class member's representative's fee was paid. Once a representative's fee is finalized, Defendant Commissioner's own operating manual states that SSA will be notified of that fee and must perform the Subtraction Recalculation.[44]

The Supreme Court held in *Matthews v. Eldridge* that "§ 405(g) requires only that there be a 'final decision' by the Secretary with respect to the claim of entitlement to benefits."[45] Other courts have interpreted the presentment requirement liberally, finding § 405(g)'s presentment requirement satisfied once a claimant submits her claim for benefits and allows Defendant Commissioner to make a decision on that claim.[46]

Here, both parties agree that the prospective class members presented their initial benefits claims to Defendant Commissioner and that Defendant Commissioner found them entitled to benefits. Further, as Defendant Commissioner has stated, "putative class members already are entitled to the past-due [Subtraction Recalculation] benefits sought in this suit."[47]

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[44] *See* POMS SI 02006.202(B).
[45] 424 U.S. at 329; *see also Weinberger v. Salfi*, 422 U.S. 749, 764-67 (1975).
[46] *See, e.g.*, *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 46-47 (2000) (Thomas, J. dissenting) (noting that "[p]resentment of a Social Security benefits claim for purposes of 42 U.S.C. § 405(g) is accomplished by the near-costless act of filing an application for benefits[.]"); *see also Linquist v. Bowen*, 813 F.2d 884, 887 (8th Cir. 1987); *Briggs v. Sullivan*, 886 F.2d 1132, 1139 (9th Cir. 1989) ("The Secretary then conceded that there is no problem with *presentment* here, since the appellant-beneficiaries have already had their claims for entitlement resolved in their favor . . . . [H]aving presented their claims for benefits to the Secretary once already, there was no requirement in this case that the class members 're-present' their claims[.]"); *Tatum v. Mathews*, 541 F.2d 161, 164 (6th Cir. 1976) (finding jurisdiction when the class included those only who had "made a claim for benefits"); *Nat'l Assoc. for Home Care & Hospice, Inc. v. Burwell*, 77 F. Supp. 3d 103, 109 (D.D.C. 2015) (finding presentment where "at least one member of NAHC ha[d] submitted a claim for payment to the agency that was rejected") .
[47] Doc. 52 at 17.

Because SSA's operating manual states that SSA will process the Subtraction Recalculation when it receives notification that a representative's fee is finalized,[48] class members adequately presented their benefits claim when they finalized their representatives' fees. At that point, Defendant Commissioner knew that putative class members sought their Subtraction Recalculation-related benefits. Further, as Defendant Commissioner "is quite aware of a recipient's uninterrupted claim for the full benefits allowed by law,"[49] no further "re-presentment" by the class is necessary.[50]

The Court finds that each member of the proposed class has adequately presented his or her claim. Therefore, the class has at least 28,510 members, and Rule 23(a)'s numerosity requirement is met.

2. Common Questions of Law or Fact

Rule 23(a)(2) provides that a class action may be maintained only if "there are questions of law or fact common to the class."[51] Commonality is satisfied if the claims of the class "depend upon a common contention" that is "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[52] "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation."[53]

Here, there are two questions common to each prospective class member: First, did Defendant Commissioner have to perform the Subtraction Recalculation once the class member's

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[48] *See* POMS SI 02006.202(B).
[49] *Linquist,* 813 F.2d at 887 & n.11.
[50] Plaintiff Steigerwald also argues that class members adequately presented their claims by filing their initial benefits claims. The Court need not reach that question. Ultimately, whether class members presented their claims by filing for benefits or by finalizing representative's fees is merely academic in this case. The proposed class is composed only of those people who also finalized representative's fees.
[51] Fed. R. Civ. P. 23(a)(2).
[52] *Dukes,* 564 U.S. at 350.
[53] *Sprague,* 133 F.3d at 397.

representative fee was finalized? Second, did Defendant Commissioner pay any past-due class member benefits after the Subtraction Recalculation within a reasonable amount of time?

Defendant Commissioner argues that these questions are posed at too high a level of generality, and that Plaintiff has failed to establish that Defendant Commissioner's failure to perform the Subtraction Recalculation is part of a "pattern or practice." The Court disagrees.

The Commissioner's cited cases for this argument all deal with situations that are not analogous to the present case. Those cases involved one of two situations. In cases like *Wal-Mart v. Dukes*, employer defendants allowed lower level managers to exercise significant personnel discretion, but plaintiffs alleged that a company-wide discriminatory policy existed.[54] In cases like *Unan v. Lyon*, defendants offered a "human error" defense after a previous systemic issue was allegedly fixed.[55]

By contrast, here Defendant Commissioner has no discretion when deciding whether to perform the Subtraction Recalculation; the Commissioner must perform it.[56] Additionally, Plaintiff does not allege that Defendant Commissioner utilizes a discriminatory policy. Instead, Plaintiff alleges that Defendant Commissioner fails to comply with established SSA policy. In this scenario, unlike in the *Dukes* discrimination context, Plaintiff Steigerwald does not need to "pinpoint a specific policy [leading to the Commissioner's failures] to satisfy the requirements for class certification."[57]

And unlike in *Unan v. Lyon*, Defendant Commissioner has not presented any argument or evidence rebutting the notion that this case involves anything other than a systemic error. Ultimately, irrespective of the underlying reason for the Commissioner's failure, the Commissioner admits that SSA has failed to perform the Subtraction Recalculation in nearly 40 percent of cases over the last

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[54] *See Dukes*, 564 U.S. at 355-56; *In re Countrywide Fin. Corp. Mortg. Lending Practices Lit.*, 708 F.3d 704, 707-710 (6th Cir. 2013).
[55] *See Unan v. Lyon*, 853 F.3d 279, 291 (6th Cir. 2017).
[56] *See* POMS SI 02006.200.
[57] *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560 (N.D. Cal. 2007); *see also Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 60-61 (3rd Cir. 1994).

five years. This error is so pervasive that it is unlikely there will be a factual dispute about whether Defendant Commissioner systemically fails to perform the Subtraction Recalculation.[58]

Relatedly, the Court finds important that Defendant Commissioner has presented no evidence—and has not even argued—that the agency had any intention of calculating and paying these past-due benefits without litigation. The seemingly obvious rebuttal to an allegation of a pattern or practice of failing to follow SSA's Subtraction Recalculation regulations is that the agency is operating at maximum capacity and is simply backlogged. But at no point in this litigation has Defendant Commissioner even attempted to make that, or any other, argument suggesting that the Commissioner has complied with its own recalculation regulation to the best of SSA's ability. As such, even if Plaintiff Steigerwald did need to show evidence of a systemic failure, she has met that burden for the purposes of class certification.

Regardless, why Defendant Commissioner has failed to perform the Subtraction Recalculation is irrelevant to the merits of the class's claims. Liability depends only on proving that Defendant Commissioner has failed to follow the Subtraction Recalculation regulations and procedures.

Disposition of the class's claims all depend on whether Defendant Commissioner has performed the Subtraction Recalculation and paid resulting benefits to the class in a timely manner. The proposed class satisfies the commonality requirement.

3. Typicality

Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[59] "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the

[58] *See, e.g.*, *Unan*, 853 F.3d at 291(denying summary judgment to either party when plaintiffs pointed to "hundreds" of mistakes but had "not put forth sufficient evidence to rebut defendant's claim that these [errors] were the result of worker error").
[59] Fed. R. Civ. P. 23(a)(3).

challenged conduct."[60] In other words, "as goes the claim of the named plaintiff, so go the claims of the class."[61]

As of the beginning of this case, Plaintiff Steigerwald was in the same position as each prospective class member.[62] Like the proposed class, Defendant Commissioner determined that Plaintiff was entitled to both Title II SSI and Title XVI disability benefits. A qualifying representative (in Plaintiff's case, an attorney) helped Plaintiff to obtain her benefits and received an SSA-approved fee for his representation. The Commissioner performed one windfall offset calculation for Plaintiff, but failed to perform the Subtraction Recalculation once her representative's fee was finalized. Because Defendant Commissioner did not perform the Subtraction Recalculation, Plaintiff Steigerwald did not receive recalculated benefits within a reasonable time period.

Defendant Commissioner argues that Plaintiff Steigerwald has not proven typicality because she has not diagnosed the underlying issue that has led Defendant Commissioner to not perform the Subtraction Recalculation in 39 percent of cases over the last five years. Defendant Commissioner contends that as a result, there is no way to know whether the reason that SSA did not perform Plaintiff Steigerwald's Subtraction Recalculation is the same as the reason SSA did not perform other class members' Subtraction Recalculations. But as the Court has already stated,[63] Plaintiff Steigerwald does not need to identify the precise cause of Defendant Commissioner's failure in order to certify a class.[64]

The Court therefore finds that Plaintiff Steigerwald satisfies the typicality requirement. Defendant Commissioner placed both Plaintiff Steigerwald and the putative class members in the same position when SSA failed to perform their Subtraction Recalculations.

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[60] *Sprague*, 133 F.3d at 399 (quoting *In re American Med. Sys. Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)).
[61] *Id.*
[62] As the Court has noted in a previous opinion, Defendant Commissioner has since performed the Subtraction Recalculation for Plaintiff Steigerwald and paid Plaintiff Steigerwald her past-due benefits in an ill-conceived effort to moot her class action claim. *See* Doc. 32 at 11-15.
[63] *See supra* Section III.A.2.
[64] *See Xiufang Situ*, 240 F.R.D. at 560.

4. Adequate Representation

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class."[65] This requirement is "essential to due process, because a final judgment in a class action is binding on all class members."[66] Adequacy of class representation is measured by two standards. First, class counsel must be qualified, experienced and generally able to conduct the litigation.[67] Second, class members must not have interests that are antagonistic to one another.[68]

The Court finds that the class Plaintiff Steigerwald and her counsel will adequately represent the class.

Near the beginning of this case, Defendant Commissioner performed Plaintiff Steigerwald's Subtraction Recalculation and paid her past-due benefits in an attempt to moot her class claim.[69] In spite of this, Plaintiff Steigerwald has remained an active participant in this litigation. The Court sees no reason to believe that she will not continue to vigorously prosecute this case.

Further, none of the class members' goals are in conflict. The primary relief sought is an injunction ordering Defendant Commissioner to perform the Subtraction Recalculation. That injunction would apply equally to each class member. Assuming that Defendant Commissioner performs the Subtraction Recalculation correctly, any monetary relief that class members receive would be determined solely by Defendant Commissioner's Subtraction Recalculation formula, not by the Court. For those reasons, there is no risk that greater recovery by one class member may lessen another class member's relief.

Finally, Plaintiff's counsel from the law firms Roose & Ressler, A Legal Professional Association, and Kelley, Drye & Warren, LLP will adequately serve as class counsel. Attorney Jon

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[65] Fed. R. Civ. P. 23(a)(4).
[66] *American Med. Sys.*, 75 F.3d at 1083; *see also Pelzer v. Vassalle*, 655 F. App'x 352, 364 (6th Cir. 2016).
[67] *American Med. Sys.*, 75 F.3d at 1083.
[68] *Id.*
[69] *See* Doc. 32 at 11-15.

Ressler has decades of relevant experience practicing before SSA and has represented thousands of claimants.[70] Similarly, Kelley, Drye & Warren has a successful class action practice group,[71] and its lead attorneys on this case have previously litigated a successful Social Security class action.[72] Further, the Court finds that they have vigorously and competently litigated this case.

Plaintiff Steigerwald has thus met the adequate representation requirement.

B. Rule 23(b)

In addition to satisfying Rule 23(a)'s four requirements, a plaintiff seeking class certification must also meet the demands of at least one of Rule 23(b)'s provisions.[73] Plaintiff Steigerwald seeks to certify a class under Rule 23(b)(3).[74]

A Rule 23(b)(3) class is appropriate when "questions of law or fact common to class members predominate" over individual questions, and "a class action is superior to other available methods" of deciding the case.[75] In this case, common questions predominate and a class action is likely to be vastly superior to individual adjudications.

"The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'"[76] For this inquiry, common questions are those "where 'the

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[70] Doc. 55-3 at 5.
[71] *See id.* at 2.
[72] *Id.* at 3-4.
[73] *See Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 278-79 (6th Cir. 2018) ("Any class certification must satisfy Rule 23(a)'s requirement of numerosity, commonality, typicality, and adequate representation. Further, a class action must fit under at least one of the categories identified in Rule 23(b).").
[74] Plaintiff Steigerwald also proposes that the Court certify either a Rule 23(b)(2) or 23(b)(2)/23(b)(3) hybrid class. But a hybrid class is unnecessary where the class can qualify entirely as a 23(b)(3) class. *See Hardy v. District of Columbia*, 283 F.R.D. 20, 26 & n.3 (D.D.C. 2012) (declining to certify a 23(b)(2) or hybrid class because certification under Rule 23(b)(3) was appropriate). It is true that a Rule 23(b)(2) class could be appropriate here because Plaintiff's monetary relief may be "incidental" to her injunctive relief. *See Dukes*, 564 U.S. at 360-66. But because a Rule 23(b)(2) class is mandatory, it raises potential due process concerns when dealing with claims that may entitle putative class members to monetary relief. *See id.* at 363. Those concerns seem heightened here because class members are, by definition, already represented by separate counsel in their related underlying Social Security cases. Further, Plaintiff Steigerwald will apparently seek to deduct attorney's fees from class members' recovered benefits. *See* Doc. 50-1 at 17-24. The Court finds it unnecessary to create potentially thorny due process issues when a Rule 23(b)(3) class is appropriate here and can alleviate those concerns.
[75] Fed. R. Civ. P. 23(b)(3).
[76] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

same evidence will suffice for each member to make a prima facie showing,'" while individual questions require '"evidence that varies from member to member.'"[77]

Plaintiff Steigerwald argues that one question predominates over all others: Did Defendant Commissioner violate the regulations requiring Subtraction Recalculation by failing to perform the Subtraction Recalculation and pay the resulting benefits to the class members within a reasonable period of time? Because the class definition includes only those people to whom Defendant Commissioner admits that she owes, but has not paid, benefits, this question collapses into: How long is a reasonable time for Defendant Commissioner to delay paying the class members' their benefits? The Court's answer to this question will apply equally to every class member.

Individual questions about each class member are minor in comparison. Although each class member may be entitled to a different amount of monetary relief, Defendant Commissioner would calculate each class member's monetary relief by applying a consistent formula to class member income levels that have already been provided to SSA.[78] The Subtraction Recalculation is the type of formulaic calculation of individual relief that courts regularly find should not stop class certification.[79]

Similarly, Defendant Commissioner may argue that whether a delay is "reasonable" is controlled by each claim's individual circumstances. But here, the class definition includes only those people who have satisfied all required steps to qualify for their Subtraction Recalculation-related benefits. As such, any delay is solely the fault of the Commissioner. Given that SSA's OIG has defined a timely period to process windfall offset claims as ninety days, the year-plus delays at issue for most class members here are likely to be *per se* unreasonable.[80] The fact that Defendant

[77] *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196-97 (5th ed. 2012)).
[78] *See* POMS SI 02006.200; POMS SI 02006.202.
[79] *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 42 (2013) (noting that "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal").
[80] *See* Doc. 1-5 at 7 (noting that the OIG "used a standard of 90 days to determine whether SSA processed windfall offset determinations timely"); *cf. U.S. v. Wolfram*, 878 F.2d 1437, at *2 (6th Cir. 1989) (unpublished) (holding that district court's delay of four years and nine months in ruling on a Rule 35(b) motion was *per se* unreasonable). *But see*

Commissioner may be able to prove that she is not liable to some members at the tail-end of the proposed class cannot defeat certification for the entire class.

A class action is also a superior vehicle for this controversy. One of the primary reasons for class actions is to aggregate small claims that aggrieved parties may otherwise never litigate.[81]

That is exactly what this case will do. Although some class members may ultimately receive thousands of dollars in past-due benefits, the evidence shows that many would only be owed several hundred dollars and some would receive significantly less than that.[82]

Further, a class action is superior to individual adjudications because it will potentially conserve significant judicial resources by adjudicating thousands of related actions at once.

Defendant Commissioner's other arguments against 23(b)(3) certification are unavailing.

For the reasons already discussed, common issues predominate over individual issues. Additionally, despite Defendant Commissioner's contention that Rule 23(b)(3) actions are limited solely to "damages," 23(b)(3) certification is available where, as here, a plaintiff requests monetary relief that is already owed to them, *i.e.* restitution.[83] Further, Defendant Commissioner is incorrect that sovereign immunity should play any role in the Court's analysis. Because Plaintiff Steigerwald seeks restitution, which is equitable monetary relief and not "money damages," there is no sovereign immunity waiver issue.[84]

For those reasons, the Court will certify a Rule 23(b)(3) class.

Blankenship v Sec. of HEW, 587 F.2d 329, 335(6th Cir. 1978) (declining to interpret a statute's mandate that hearings be held in a "'reasonable' time period" as a ninety-day limitation).

[81] *See Amchem Prods., Inc.*, 521 U.S. at 617 ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 355 (1997))).

[82] *See* Doc. 50-3 at 3-4 (noting that the amounts owed to a sample of putative class members ranged from $0.00 to $10,929.23).

[83] *See, e.g.*, *Steele v. United States*, 200 F. Supp. 3d 217 (D.D.C. 2016) (certifying a plaintiffs' request for restitution as a 23(b)(3) class).

[84] Indeed, even if, as Defendant Commissioner alleges, Plaintiff Steigerwald mislabeled her request for monetary relief as "damages," the United States has clearly waived its sovereign immunity where, as here, claimants attempt to recover Social Security benefits owed to them. *See* 42 U.S.C. § 405(g) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.").

C. Class Definition

Finally, the parties dispute the appropriate class definition. Primarily, Defendant Commissioner argues that Plaintiff's class definition is over-inclusive by approximately ten years. Defendant Commissioner argues that Plaintiff has provided insufficient evidence to suggest that the class extends beyond the SSA-identified 28,510 individuals owed benefits from between September 1, 2012 and October 31, 2017.

Defendant Commissioner's argument is persuasive on its face, but nevertheless unsuccessful. Defendant Commissioner fails to mention that Plaintiff does not have evidence of class members before September 1, 2012 because Defendant Commissioner has been unable or unwilling to provide that information. That information appears to be almost wholly within the Commissioner's control.

As an initial matter, the Court will order Defendant Commissioner to provide Plaintiff's requested information on putative class members from March 13, 2002 onward within thirty (30) days of the date of this Order.

Further, the Court will certify the following class:

> Individuals who became eligible to receive Concurrent Payments between March 13, 2002 and October 31, 2017, for whom Representatives' fees were paid out of the individual's retroactive benefits, and for whom [the Social Security Agency ("SSA")] made a Windfall Offset determination before the amount of Representatives' fees was determined and paid out of retroactive benefits, but for whom, after the amount of Representatives' fees was determined and paid out of retroactive benefits, SSA did not perform the Subtraction Recalculation and therefore has not issued any Retroactive Underpayment that may be due.[85]

This class includes the 37,675 people that Defendant Commissioner has determined have not had the Subtraction Recalculation performed from between September 1, 2012 and October 31, 2017.[86] Defendant Commissioner states that 9,165 of these individuals would not be owed any past-due benefits even if the Subtraction Recalculation was performed. But, without some explanation of

[85] Capitalized terms are as defined in Doc. 55-2.
[86] These are the individuals that Defendant Commissioner placed into "Category 1" and "Category 2" in her discovery disclosures. *See* Doc. 50-2 at 2-3.

Defendant Commissioner's reasoning for that determination, the Court will not exclude those 9,165 individuals from the class.[87]

The Court will include class members from March 2002 onward because the time limitations that Defendant Commissioner proposed are not the result of a reasoned application of the facts to the law. Instead, they exist solely because of a discovery bargain: Defendant wanted to produce no information; Plaintiff wanted fifteen years of information; the parties settled on five years of information.

In spite of this bargain, Plaintiff Steigerwald correctly argues that the class is likely to extend from March 2002 onward. As Plaintiff Steigerwald notes, this case does not represent the first time that SSA has failed to comply with its Subtraction Recalculation duties. After a previous settlement began in the 1990s, court oversight of SSA's Subtraction Recalculation performance ended on March 13, 2002.[88] SSA's alleged non-compliance with the Subtraction Recalculation regulations thus began sometime after that date.

Further, although the OIG reports Plaintiff cites do not directly address the Subtraction Recalculation,[89] those reports do shed light on SSA's failures to comply with the broader windfall offset procedure, of which the Subtraction Recalculation is one part.[90] These OIG reports detail SSA windfall offset struggles dating back to 2001.[91]

For those reasons, Plaintiff Steigerwald has satisfied her burden to show that the class should extend from March 13, 2002 until October 31, 2017.[92] The Court recognizes, however, that

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[87] *See id.* (defining Category 2 individuals as those "to whom no underpayment would be due even upon performing the windfall offset recalculation to account for representatives' fees").
[88] *See Willis v. Sullivan*, 730 F. Supp. 785 (M.D. Tenn. 1990); *see also* Doc. 41-1 at 2 (noting in a March 12, 2002 docket entry that "the government has completed its obligations under the [*Willis*] settlement agreement").
[89] *See generally* Doc. 52-1.
[90] *See* Doc. 1-5; Doc. 1-6.
[91] *See* Doc. 1-5 at 7-8 (finding, in 2011, that as a result of SSA's failure to complete SSI windfall offset determinations or to release withheld benefits, "benefits were unpaid for as long as 10 years after they were due and payable").
[92] Plaintiff Steigerwald also seeks to extend the class forward from October 31, 2017 until March 13, 2018. But she has presented no evidence that SSA's Subtraction Recalculation struggles have continued after October 31, 2017. Importantly, the OIG reports only detail SSA activities through 2016. Further, Plaintiff Steigerwald chooses the March 13, 2018 cut-off date by assuming that ninety days is a reasonable time for Defendant Commissioner to perform the

production and analysis of the data Defendant Commissioner produces regarding class members from before September 1, 2012, may suggest that Defendant Commissioner's alleged Subtraction Recalculation struggles began after March 2002. That data might also suggest that those pre-2012 class members are subject to some other distinct defense. If that situation arises, Defendant Commissioner may move to modify the class definition.

IV. Conclusion

For those reasons, the Court **GRANTS** Plaintiff Steigerwald's motion for class certification. The Court **APPOINTS** Plaintiff Steigerwald as class representative and **APPOINTS** the law firms of Roose & Ressler, A Legal Professional Association, and Kelley, Drye, and Warren, LLP as class counsel.

The Court hereby certifies the following Rule 23(b)(3) class:

> Individuals who became eligible to receive Concurrent Payments between March 13, 2002 and October 31, 2017, for whom Representatives' fees were paid out of the individual's retroactive benefits, and for whom [the Social Security Agency ("SSA")] made a Windfall Offset determination before the amount of Representatives' fees was determined and paid out of retroactive benefits, but for whom, after the amount of Representatives' fees was determined and paid out of retroactive benefits, SSA did not perform the Subtraction Recalculation and therefore has not issued any Retroactive Underpayment that may be due.

Finally, the Court **ORDERS** Defendant Commissioner to provide Plaintiff's requested information on putative class members from March 13, 2002 onward within thirty (30) days of the date of this order.[93]

IT IS SO ORDERED.

Subtraction Recalculation. However, Plaintiff Steigerwald has presented no evidence about how quickly SSA can feasibly perform the Subtraction Recalculation. Especially given the large number of people for whom SSA must perform the Subtraction Recalculation, the Court is not willing to define a "reasonable time" as ninety days at this point. *Cf. Heckler v. Day*, 467 U.S. 104, 110-19 (1984) (declining to require SSA to hold hearings within ninety days where, as here, no statutory requirement mandated that outcome).

[93] The extent of this information should match or exceed that provided in Defendant's responses to Plaintiff's interrogatories 1-3. *See* Doc. 50-2.

Case No. 1:17-cv-1516
Gwin, J.

Dated: July 12, 2018

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE