IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHANIE STEIGERWALD,	)	CASE NO.: 1:17-CV-1516
	)	
Plaintiff,	)	JUDGE JAMES S. GWIN
	)	MAGISTRATE JUDGE DAVID RUIZ
v.	)	
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	
	)	
Defendants.	)	

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I. STATEMENT OF THE ISSUES

1. Whether this Court lacks subject-matter jurisdiction over Plaintiff's complaint under 42 U.S.C. § 405(g), because Plaintiff has not alleged that she (or any of the putative class members she claims to represent) met the non-waivable requirement to present her claims to the Social Security Administration ("the SSA") before proceeding to federal court.
2. Whether this Court lacks subject-matter jurisdiction over Plaintiff's complaint under 28 U.S.C. § 1361, because Plaintiff had an adequate, available remedy under 42 U.S.C. § 405(g) had she satisfied the presentment requirement before proceeding to federal court.
3. Whether this Court lacks subject-matter jurisdiction over Plaintiff's complaint because any controversy is moot, where the SSA paid Plaintiff the very benefits for which she sued once it learned of Plaintiff's claim for past-due benefits.

II. SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly emphasized that a Social Security claimant who believes that the SSA has unlawfully failed to provide benefits cannot establish a federal court's jurisdiction over her claim unless she first presents it to the SSA pursuant to § 405(g) of the Social Security Act ("the Act"), 42 U.S.C. § 405(g), so that the agency has the opportunity to provide those benefits, in the first instance, without the need for litigation. *See, e.g., Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (explaining that 42 U.S.C. § 405(h) "demands the 'channeling' of virtually all legal attacks through the agency … [to] assure[] the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying 'ripeness' and 'exhaustion' exceptions case by case"). This is so regardless of whether the agency has put a potential plaintiff on notice that she may be entitled to the benefits at issue. *See Nat'l Kidney Patients Ass'n v.*

Sullivan, 958 F.2d 1127, 1131 (D.C. Cir. 1992) (explaining that § 405(g) "impose[s] … a 'nonwaivable' requirement 'that a claim for benefits shall have been *presented* to the [agency]' " (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976) (emphasis in original)).

Here, Plaintiff and her attorney representative were told that she may be entitled to past-due benefits, and that if they did not hear from the agency as to whether she would get such benefits, they could proactively contact the SSA. Nevertheless, while Plaintiff asks this Court to order the SSA to pay her past-due benefits, (Compl. ¶ 3, ECF No. 1, PageID # 2), her complaint contains no indication that she or her attorney representative (or any of the members of the putative class she claims to represent) ever presented such a claim to the SSA. Consequently, this Court lacks jurisdiction over her complaint. *See Nat'l Kidney Patients Ass'n*, 958 F.2d at 1131 (explaining that "[t]he presentment requirement—arising out of § 405(g)'s requirement of some decision by the Secretary … is an essential and distinct precondition for § 405(g) jurisdiction") (internal citations and quotations omitted); *Fanning v. United States*, 346 F.3d 386, 399 (3d Cir. 2003) (holding that the district court lacked jurisdiction over Fanning's class action complaint where the class plaintiffs did not channel their claim through the agency).[1]

In addition, once Plaintiff's claim was made known to the SSA, the agency paid Plaintiff the very benefits for which she sues. Her claim is therefore moot, and for that reason as well, the Court should dismiss this case for lack of subject-matter jurisdiction. *See Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) ("[I]f a case becomes moot, it does not satisfy the 'case or

[1] Plaintiff also asserts jurisdiction under 42 U.S.C. § 1383(c)(3), but that section incorporates the provisions of 42 U.S.C. § 405(g) for Title XVI purposes. Moreover, as discussed more fully below, because Plaintiff has an adequate alternative remedy under § 405(g), had she satisfied the presentment requirement, jurisdiction under 28 U.S.C. § 1361 is also precluded. *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 (6th Cir. 2005).

controversy' requirement of Article III, U.S. Const. art. III, § 2, and the federal courts are powerless to decide it.").

III. BACKGROUND

A. Statutory and Regulatory Background

1. Calculation of Retroactive Benefits

The SSA administers two distinct disability benefit programs. An individual with a disability may be entitled to disability benefits under Title II of the Social Security Act if she satisfies certain insured status requirements (or is related to an individual who satisfies those requirements) regardless of financial need. 42 U.S.C. §§ 402, 423. Separately, an individual with a disability may be eligible for supplemental security income ("SSI") under Title XVI of the Act, but only if, among other things, the individual has limited income and resources. 42 U.S.C. § 1381a; 20 C.F.R. §§ 416.110, 416.202.

An individual's Title XVI eligibility or payment amount, or both, may be affected if the individual receives other income, such as Title II benefits. 42 U.S.C. §§ 1382(b)(1), 1382a(a)(2)(B); 20 C.F.R. § 416.1123(d)(1). However, if part of the individual's Title II benefits are used to pay an expense incurred in obtaining those benefits, the SSA subtracts the amount of the expense from the amount of the Title II benefits it considers as income. 20 C.F.R. § 416.1123(b)(3). Accordingly, when an individual hires a representative to represent her in obtaining Title II benefits, fees paid to that representative are subtracted from the Title II benefit amount considered by the SSA when determining Title XVI eligibility or payment amount, or both. *Id.*

When the SSA determines that an individual was entitled to Title II benefits for months in which the benefits were not paid, the SSA pays the unpaid benefits to the individual in a single

payment, which the Act and regulations refer to as a "retroactive" benefit. 42 U.S.C. § 1320a-6(a); 20 C.F.R. § 404.408b. Thus, an individual receiving monthly Title XVI benefits may receive in a single month a retroactive Title II benefit representing multiple months of benefits that, if paid in the months in which they were due, would have been considered in the determination, for the given month, of Title XVI eligibility or payment amount, or both. The windfall offset provision of the Act, 42 U.S.C. § 1320a-6, prevents an individual who receives retroactive Title II benefits from receiving a greater benefit than would have been received had the benefits been paid in the months in which they were due. As the regulations explain, "Your retroactive monthly social security benefits will be reduced by the amount of SSI payments (including federally administered State supplementary payments) that would not have been paid to you, if you had received your monthly social security benefits when they were regularly due instead of retroactively." 20 C.F.R. § 404.408b(b).

When the amount of any representative's fee[2] is known at the time of the windfall offset determination, the SSA reduces, based on the amount of the fees, the retroactive Title II benefits that may be considered income in determining, for a given month, Title XVI eligibility or payment amount, or both. *See* SSA Program Operations Manual System ("POMS") POMS SI 02006.210.B; SI 02006.200.A.1 ("It is longstanding SSI policy to deduct the expenses of obtaining income from

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[2] The SSA authorizes a representative's fee in two ways: it approves a fee agreement or authorizes a fee based on a fee petition submitted by the representative. POMS GN 03920.001. The SSA may not approve a fee agreement if the total fee described in the fee agreement in more than $6,000. *See* 42 U.S.C. § 406(a)(2)(C); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080-02 (Feb. 4, 2009) (raising the fee cap specified at 42 U.S.C. § 406(a)(2)(A)(ii)(II) from $4,000 to $6,000). If the fee agreement is not approved, the representative may file a fee petition, seeking up to 25 percent of past-due benefits. POMS GN 03920.001; 42 U.S.C. § 406(a)(4) (stating that the SSA shall pay fees awarded under the Social Security Act of up to 25 percent of past-due benefits).

that income before counting it in the SSI eligibility and payment computations . . . . In all title II and title XVI offset cases these expenses include any attorney or nonattorney representative fees that apply to the title II benefit, even if part of the fee is determined based on title XVI past-due benefits.”).[3]

The amount of the representative’s fee may not be known, however, at the time the SSA makes the windfall offset determination and pays retroactive Title II benefits. Such a situation may arise, for instance, when a beneficiary’s representative files a fee petition. *See* POMS GN 03930.020.C.7.b (stating that there is no time limit on when a fee petition may be filed). In such cases, the SSA calculates the windfall offset twice, once before the amount of the representative’s fees is known so that the retroactive Title II benefits may be released to the beneficiary, and once after the amount of the representative’s fees is known. *See* POMS SI 02006.200.A.4 (explaining that, although the windfall-offset calculation can be completed without knowing the fee amount, the field office may learn of the authorized fee at any of several points in the effectuation of the claim, and there can be no adjustment of the Title II income until after the amount of the fee is determined); SI 02006.210.B. One way a recalculation may be triggered is for a beneficiary to bring a fee authorization notice into the field office, at which time, the Claims Specialist will adjust the windfall offset. *See* POMS SI 02006.201; SI 02006.202.B (explaining that “[s]ometimes, the first notice to the [field office] of authorized fees is from a contact by the representative or claimant who received a notice” of fee authorization, which the Claims Specialist can use to recalculate the offset). When the SSA recalculates the windfall offset after the amount of the fees is known, it pays the beneficiary any additional benefits that may be due. *See* POMS SI 02006.210.B.

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[3] The POMS, a manual used by agency employees, is available at https://secure.ssa.gov/apps10/poms.nsf/Home?readform (last visited Oct. 31, 2017).

2. Judicial Review

No judicial review is needed, of course, when a claimant presents a claim to the SSA and the agency provides the benefits that the claimant requests. A successful claimant would have neither standing to sue nor any particular reason to bother a court with a claim that was already resolved. But not every claim is successful either initially or in the course of the SSA's multi-tiered administrative review process. *See generally* 20 C.F.R. §§ 404.900(a), 416.1400(a). Judicial review of claims arising under the Social Security Act is governed by 42 U.S.C. § 405(g), which provides, in relevant part, that:

> Any individual, *after any final decision of the Commissioner of Social Security made after a hearing to which he was a party*, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia…

(Emphasis added). Section 405(h) bars judicial review absent compliance with the requirements of § 405(g). 42 U.S.C. § 405(h) ("No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided"); *see also Nat'l Kidney Patients Ass'n*, 958 F.2d at 1131 (explaining that the "presentment requirement … is a crucial prerequisite"). In general, judicial review of a claim arising under the Act is available only after the Commissioner renders a "final decision" on the claim "after a hearing." 42 U.S.C. § 405(g); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) (A "'final decision' is a statutorily specified jurisdictional prerequisite.").

The Supreme Court has characterized § 405(h)'s bar to avenues of review other than that provided for in § 405(g) as "sweeping and direct," *Salfi*, 422 U.S. at 789-90, and has explained

that the bar applies to "all claims" that "aris[e] under the Act." *Heckler v. Ringer*, 466 U.S. 602, 615 (1984). A claim arises under the Act if the Act provides "'both the standing and the substantive basis for the presentation' of the claims…." *Id.* (quoting *Salfi*, 422 U.S. at 760-61). It does not matter whether the plaintiff seeks "only declaratory and injunctive relief and not an actual award of benefits as well." *Id.*; *see also Ill. Council*, 529 U.S. at 13-14 (stating that *Salfi* and *Ringer* "foreclose distinctions based upon the 'potential future' versus the 'actual present' nature of the claim, the 'general legal' versus the 'fact-specific' nature of the challenge, the 'collateral' versus 'noncollateral' nature of the issues, or the 'declaratory' versus 'injunctive' nature of the relief sought" and declining to "accept a distinction that limits the scope of § 405(h) to claims for monetary benefits"); *Mich. Ass'n of Homes & Servs. for Aging, Inc. v. Shalala*, 127 F. 3d 496, 500-01 (6th Cir. 1997).

Section 405(g) has been interpreted as setting forth both a non-waivable requirement to present claims to the agency in the first instance and a requirement to exhaust the administrative process, which can be waived. *See Ringer*, 466 U.S. at 617 ("[T]he exhaustion requirement of § 405(g) consists of a nonwaivable requirement that a claim for benefits shall have been presented to the Secretary and a waivable requirement that the administrative remedies prescribed by the Secretary be pursued fully by the claimant.") (internal citations omitted).

Presentment is not satisfied merely by the previous filing of an initial application for benefits. *Haro v. Sebelius*, 747 F.3d 1099, 1112-1113 (9th Cir. 2014) (rejecting as "overly broad" the claim that *Eldridge* stands for the proposition that the initial claim for benefits satisfied the presentment requirement). Rather, each issue on which the individual seeks administrative and judicial review must have been presented to the agency. *See Ill. Council*, 529 U.S. at 15 (stating that § 405(g) contains the "nonwaivable and nonexcusable requirement that an individual present

a claim to the agency before raising *it* in court") (emphasis added). Indeed, the Sixth Circuit has held that the "nonwaivable and nonexcusable presentment requirement mandates that v*irtually all legal attacks* be presented to the [A]gency." *S. Rehab. Grp., P.L.L.C. v. Sec'y of HHS*, 732 F.3d 670, 679 (6th Cir. 2013) (emphasis added).

Once a claim has been presented, it proceeds through the administrative review process. Exhaustion of administrative remedies generally requires that the claimant: (1) receive an initial determination regarding entitlement for benefits; (2) request reconsideration; (3) request a hearing before an administrative law judge ("ALJ"); and (4) request that the Appeals Council review the decision of the administrative law judge. *See* 20 C.F.R. §§ 404.900(a), 416.1400(a).[4]

B. <u>Factual Background</u>

Plaintiff applied for Title II and Title XVI benefits on June 17, 2009, alleging [redacted] [redacted]. (Declaration of Janet Walker, attached hereto as Ex. A, ¶ 3.) On July 15, 2014, an ALJ found that [redacted]. (*Id*. ¶4.) The ALJ did not approve Plaintiff's attorney fee agreement because the agreement provided for more than the lesser of 25 percent of past-due benefits or $6,000.[5] (*Id.* ¶ 5.)

On August 29, 2014, the SSA sent Plaintiff and her attorney representative, Kirk Roose, a Notice of Award of Title XVI benefits (*id.* ¶ 6), and on December 7, 2014, a Notice of Award of Title II benefits. (*Id.* ¶¶ 6, 7.) In the December 7, 2014 Notice of Award of Title II benefits, the SSA indicated it was withholding $17,059.25 from Plaintiff's past-due benefits in case her attorney

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[4] The SSA's regulations also provide for an expedited appeals process under limited circumstances not present here. *See* 20 C.F.R. §§ 404.924, 416.1424.

[5] $17,059.25 represented 25 percent of Plaintiff's retroactive Title II benefit. *See* 42 U.S.C. § 406(a)(2)(C) (stating that the Commissioner may not approve a fee agreement if the total fee described in the fee agreement is more than $6,000); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080-02 (Feb. 4, 2009) (raising the fee cap specified at 42 U.S.C. § 406(a)(2)(A)(ii)(II) from $4,000 to $6,000).

was due fees.[6] (*Id.* ¶ 8.) Once Plaintiff began receiving Title II benefits, she was no longer eligible for Title XVI benefits, and the SSA stopped sending her Title XVI payments beginning in January 2015. (*Id.* ¶ 9.)

On February 23, 2105, the SSA performed the windfall offset calculation, without accounting for representative's fees because they had not yet been determined. (*Id.* ¶ 10.) On March 1, 2015, the SSA sent Plaintiff a Notice of Change in Benefits and explained that her next check would be for $24,162.94, which included her retroactive Title II benefits through February 2015. (*Id.* ¶¶ 11, 12.)

On April 20, 2015, the SSA received a fee petition, dated January 23, 2015, from Plaintiff's attorney representative, Mr. Roose, seeking $17,059.25. (*Id.* ¶ 13.) On January 22, 2016, an ALJ authorized Mr. Roose to charge and collect a fee for $10,000.[7] (*Id.* ¶¶ 15, 16.) The SSA sent a notice, entitled "Authorization to Charge and Collect a Fee," to Mr. Roose and a copy to Plaintiff. (*Id.* ¶¶ 15, 16, 17.) This notice explained that the authorization of a fee might change the windfall offset calculation, entitling Plaintiff to a greater amount of benefits and stating that Plaintiff should contact the SSA in the event she did not receive more money or a letter within 90 days of the notice. The notice provided in pertinent part:

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[6] Plaintiff's representative could be due fees if he filed a fee petition after the fee agreement was rejected. *See* 42 U.S.C. § 406(a)(4) (stating that the SSA shall pay fees awarded under the Social Security Act of up to 25 percent of past-due benefits); 20 C.F.R. § 404.1730 (discussing timing of the payment of fees out of past-due benefits); POMS GN 03920.001.

[7] When the SSA evaluates a fee petition, it considers a variety of factors, including the amount of the fee requested, the level of review to which the claim was taken, the complexity of the case, and the amount of time the representative spent on the case. 20 C.F.R. §§ 404.1725(b), 416.1525(b).

> **Possible Refund To The Claimant**
>
> *A claimant may be due more money when the Social Security Administration (SSA) authorizes a representative's fee* and a claimant receives both Social Security and SSI benefits. This is because SSA deducts the authorized fee from the amount of Social Security benefits that count as income for SSI purposes. Then more SSI benefits are due.
>
> *If a claimant thinks more SSI benefits are due, and has not received more money or a letter within 90 days of this authorization notice, he or she should contact SSA*. If a claimant visits a Social Security office, he or she should take this authorization notice.

(*Id.* ¶17; Ex. A8.) (emphasis added).[8]

On March 28, 2016, the SSA sent Plaintiff and Mr. Roose a Notice of Change in Benefits and informed her that $10,000 in representative's fees were being paid to Mr. Roose out of the $17,059.25 in benefits the SSA withheld. (*Id.* ¶¶ 19, 20.) On March 23, 2016, a few days before the SSA sent Plaintiff the Notice of Change in Benefits detailing the $10,000 fee authorization, Mr. Roose sought review by the Regional Chief Judge of the amount of the fee authorized. (*Id.* ¶¶ 18.) On August 31, 2016, the Regional Chief Judge authorized Mr. Roose to charge and collect a fee of $13,500, and sent a copy of the notice to Plaintiff and Mr. Roose. (*Id.* ¶¶ 22-23.)

On February 6, 2017, the SSA sent Plaintiff a Notice of Change in Benefits, indicating that she would receive a check for $3,559.25, while the SSA withheld the remainder of the $17,059.25 ($13,500) to pay the authorized representative's fees. (*Id.* ¶ 25.) Plaintiff does not allege that she or her attorney representative (or any other purported class member) contacted the SSA to request that it recalculate the windfall offset once her representative's fees were known.

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[8] *See* POMS SI 02006.201; SI 02006.202.B (explaining that "[s]ometimes, the first notice to the [field office] of authorized fees is from a contact by the representative or claimant who received a notice" of fee authorization, which the Claims Specialist can use to recalculate the offset).

On July 18, 2017, Plaintiff filed a complaint in this court, individually and on behalf of a purported class. (Compl., ECF No. 1, PageID # 1.) After learning of Plaintiff's claim in her complaint that her windfall offset had not been recalculated to account for payment of representative's fees, which had been approved after the initial calculation of the windfall offset, the SSA concluded that she was due $5,392.08. (Walker Decl. ¶ 26.) On November 7, 2017, the SSA paid Plaintiff her past-due benefits and notified both Plaintiff and her attorney representative of the payment in a notice dated November 12, 2017. (*Id.* ¶ 27.)

IV. ARGUMENT

A. Legal Standards

Federal courts are courts of limited jurisdiction. *Norton v. Larney*, 266 U.S. 511, 515-16 (1925). When faced with a jurisdictional challenge under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff has the burden to prove that the court has subject-matter jurisdiction over her claims. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).[9] Moreover, the United States, as sovereign, is immune from suit except as it specifically consents to be sued, and the terms of its consent must be strictly construed. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *see also S. Rehab. Grp., P.L.L.C.. v. Sec'y of HHS*, 732 F.3d 670, 676-77 (6th Cir. 2014) (explaining that § 405's requirements of presentment and exhaustion are a condition on the waiver of sovereign immunity and must be strictly construed). The immunity bar is jurisdictional in nature, such that a court

[9] Because Defendants are moving to dismiss for lack of subject-matter jurisdiction, this Court may, if necessary, consider information not contained in the pleadings. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); *City of Olmsted Falls v. U.S. E.P.A.*, 266 F. Supp. 2d 718, 721-22 (N.D. Ohio 2003), *aff'd*, 435 F.3d 632 (6th Cir. 2006).

lacks jurisdiction to consider a lawsuit against the United States unless it has consented to suit. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983).

Additionally, Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of "cases" or "controversies." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Under this requirement, "throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969)); *see also Cooey v. Strickland*, 588 F.3d 924, 926 (6th Cir. 2009). "The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citations omitted). "Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) (internal citations omitted). "[D]ismissal is ordinarily required when the named plaintiff's claim becomes moot *before* certification." *Unan v. Lyon*, 853 F.3d 279, 285 (6th Cir. 2017).

B. <u>This Court Lacks Jurisdiction Over the Subject Matter of Plaintiff's Complaint.</u>

Plaintiff has not met her burden to plead that this Court has jurisdiction over her complaint. *S. Rehab. Grp., P.L.L.C.*, 732 F.3d at 680 (presentment requirement is jurisdictional); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936) ("It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case.."); *see also Blakely*

v. United States, 276 F.3d 853, 864 (6th Cir. 2002) (in FTCA context, plaintiff has the burden to plead jurisdiction). Plaintiff asserts jurisdiction under 42 U.S.C. § 405(g), but she has not alleged that she has met its essential, non-waivable requirement that she first present her claim to the SSA. (Compl. ¶ 20, ECF No. 1, PageID # 5.) Lack of notice from the SSA does not excuse compliance with the non-waivable presentment requirement. And in any event, both Plaintiff and her attorney were told that Plaintiff may be entitled to additional retroactive benefits after the amount of the representative's fee was determined and that she should contact the agency if they believed Plaintiff was entitled to more money. Instead of doing so and allowing the SSA the opportunity to correct any claimed error in the first instance, Plaintiff proceeded to federal court. But failing to present a claim to the SSA is precisely what § 405(h) prohibits by requiring, instead, that Plaintiff use the administrative process set forth in § 405(g). Moreover, because § 405(g) would have provided Plaintiff with an adequate alternative remedy had she presented her claim to the SSA, federal court jurisdiction is precluded under 28 U.S.C. § 1361.

Lastly, consistent with the purpose of the presentment requirement, once the SSA became aware of Plaintiff's claim, it recalculated the windfall offset to include representative's fees and issued an underpayment of $5,392.08 to Plaintiff on November 7, 2017. (Walker Decl. ¶¶ 26-27.) As a result, Plaintiff has received the relief she requests, her claim is moot, and her complaint must be dismissed.

1. Plaintiff Does Not Allege, Much Less Plausibly Claim, that She Satisfied § 405's Non-Waivable Requirement to Present Their Benefits Claims to the SSA in the First Instance.

Plaintiff invokes 42 U.S.C. § 405(g) as a jurisdictional basis for her claims. (Compl. ¶ 20, ECF No.1, PageID # 5.) Section 405(h) "purports to make exclusive the judicial review method set forth in § 405(g)," by providing that " '[n]o findings of fact or decision of the [Secretary] shall

be reviewed by any person, tribunal, or governmental agency except as herein provided'" *Shalala v. Ill. Council on Long Term Care, Inc.,* 529 U.S. 1, 10 (2000) (quoting 42 U.S.C. § 405(h)). While Plaintiff concedes that § 405(g)'s administrative process would have been available to her and the putative class members had they requested that the SSA recalculate their benefits payments, (*see* Compl. ¶¶ 13, 17, ECF No. 1, PageID # 4-5) (alleging that Plaintiff and the putative class have a "right to appeal" the SSA's actions resulting in the non-payment of their past-due benefits), the complaint does not allege that Plaintiff, her attorney representative, or any of the putative class members presented their past-due benefits claims to the SSA or otherwise attempted to use the procedures set forth in § 405(g) before proceeding to federal court. Accordingly, Plaintiff cannot meet her burden of establishing jurisdiction over her class action complaint under 42 U.S.C. § 405(g).[10]

Section 405(g) has been interpreted as setting forth both a requirement to present claims to the agency in the first instance, which cannot be waived, and a requirement to exhaust the administrative process, which can be waived. *See Heckler v. Ringer*, 466 U.S. 602, 617 (1984). The rationale for the channeling requirements in §§ 405(g) and (h), including presentment, is to "assure[ ] the agency greater opportunity to apply, interpret, or revise policies, regulations, or

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[10] Although the complaint contains class allegations, no class has yet been certified. Thus, the only claims before this Court are Plaintiff's individual claims, over which this Court has no subject-matter jurisdiction. Moreover, any class allegations in the complaint must be dismissed where the named Plaintiff fails to meet the jurisdictional requirements to bring an individual suit. *See Taylor v. KeyCorp*, No. 1:08-cv-1927, 2010 WL 3702423, at * 4 n. 4 (N.D. Ohio Aug. 12, 2010) (J. Nugent), *aff'd by* 680 F.3d 609 (6th Cir. 2012) ("Having determined that the only remaining named plaintiff . . . lacks standing to bring the claims at issue, Plaintiffs' Motion for Class Certification is necessarily moot"); *Crayton v. Callahan,* 120 F.3d 1217, 1220 (11th Cir.1997) (dismissing putative class action where named plaintiffs failed to exhaust administrative remedies).

statutes without possibly premature interference by different individual courts applying 'ripeness' and 'exhaustion' exceptions…." *Ill. Council*, 529 U.S. at 13. By allowing the agency the opportunity to address claims in the first instance, the presentment requirement avoids "overburdening the courts" by preventing beneficiaries from bringing "federal cases where a simple phone call, e-mail, or letter might straighten out the problem. . . ." *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 557 (N.D. Cal. 2007).

Here, Plaintiff asks the Court to find that she is entitled to additional past-due benefits. (Compl. ¶ 3, ECF No. 1, PageID # 2.) But Plaintiff does not claim, as she must, that either she or her attorney ever presented this claim to the SSA before seeking relief directly in federal court. *S. Rehab. Grp., P.L.L.C.*, 732 F.3d at 680 ("By failing to establish that they satisfied the presentment requirement, plaintiffs have not fulfilled the conditions placed on the limited waiver of immunity in the Medicare Act."); *see also Ritchie*, 15 F.3d at 598 (facial attack is a challenge to the sufficiency of the pleading itself). Indeed, Plaintiff ignores the non-waivable presentment requirement altogether and argues instead that she did not fail to exhaust administrative remedies. (Compl. ¶¶ 36-38, ECF No. 1, PageID # 8-9.) Because Plaintiff does not allege that she satisfied § 405's presentment requirement, and for that reason alone, this Court lacks jurisdiction over her complaint. *See S. Rehab. Grp., P.L.L.C.*, 732 F.3d at 679; *Crayton,* 120 F.3d at 1220.

Moreover, to the extent Plaintiff's exhaustion arguments are even relevant, they are without merit. Plaintiff claims that she did not fail to exhaust because she "never received notice of [her] entitlement or non-entitlement to Retroactive Underpayments." (Compl. ¶ 36, ECF No.1, PageID # 8.) But any lack of notice simply does not absolve Plaintiff of the presentment requirement because that requirement is not waivable. *See Ringer*, 466 U.S. at 617; *Laurie Q. v. Callahan*, 973 F. Supp. 925, 932 (N.D. Cal. 1997) (stating that the "court does not agree with plaintiffs that the

Commissioner's possible failure to provide proper notice relieves plaintiffs of their duty to fulfill the presentment requirement"). And, as noted, the SSA did, in fact, send a notice to Plaintiff and her attorney representative that she may be entitled to "more money when the [SSA] authorizes a representative's fee" and even stated that she should contact the SSA if she thought "more SSI benefits [we]re due, and has not received more money or a letter within 90 days of this authorization notice." (Walker Decl. ¶¶ 15-17.) Moreover, Plaintiff cannot credibly suggest that any misunderstanding on her part about her rights to past-due benefits precluded her from asserting those rights. Her complaint goes out of its way to tout the relevant expertise of the attorney who has represented her throughout her claims process. *See* (Walker Decl.) (identifying her attorney as Kirk Roose); (Compl. ¶ 34, ECF No. 1, PageID # 8) ("The attorneys of Roose & Ressler are experienced in Social Security law and litigation of individual cases against the Commissioner in this District."). There is thus no basis, either legally or factually, for any claim that Plaintiff should be excused from § 405's requirements because she was "unaware of the need to apply the Subtraction Recalculation." (*Id.* ¶ 95, PageID # 19; *see also id.* ¶ 83, PageID # 16.)

Plaintiff also claims that "because the SSA never informed Plaintiff or the other putative class members of its failure to perform the Subtraction Recalculation … there was nothing from which to appeal and no potential remedy which could be exhausted." (*Id.* ¶ 36, PageID # 8.) But Plaintiff's claim that the SSA failed to perform the recalculation once representative's fees were adjudicated is exactly the type of claim that the presentment requirement seeks to channel to the agency in the first instance. *See Situ*, 240 F.R.D. at 557 (agreeing that it would be "wholesale subversion" of legislative intent behind Medicare Act, which incorporates § 405(g) jurisdictional provisions, "to avoid overburdening the courts if beneficiaries were able to bring federal cases where a simple phone call, email, or letter might straighten out the problem. . . ."). That there is

no decision "from which to appeal" is at least partially the result of Plaintiff's failure to present her claims to the agency for decision. Instead, Plaintiff and her attorney representative circumvented the purpose of the presentment requirement—to give the agency the opportunity to address her claim and pay any past-due benefits, if owed,—by bringing her claim directly in federal court. This is precisely what § 405's presentment requirement seeks to prevent. *Ill. Council*, 529 U.S. at 13 ("explaining that 42 U.S.C. § 405(h) "demands the 'channeling' of virtually all legal attacks through the agency … [to] assure[] the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts").

The value of the presentment requirement is illustrated in this case by the fact that, when her complaint was made known to the SSA, the SSA performed the recalculation of the windfall offset to include representative's fees, and disbursed additional retroactive benefits to Plaintiff, remedying Plaintiff's complaint without the necessity of the Court's intervention. But valuable or not, the requirement is jurisdictional. For these reasons, § 405(g) does not provide a basis for jurisdiction over Plaintiff's class action complaint.

2. <u>This Court Lacks Mandamus Jurisdiction Because § 405(g) Provides Plaintiff an Adequate Alternative Remedy.</u>

Because Plaintiff chose not to pursue an available remedy under § 405(g) by presenting her claims to the SSA before proceeding to federal court, this Court also lacks jurisdiction over her class action complaint under the Mandamus Act, 28 U.S.C. § 1361. The Mandamus Act states that a "district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id.*; *Ringer*, 466 U.S. at 616. A writ of mandamus is a drastic remedy to be used only in extraordinary situations. *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394,

402 (1976); *In re Parker*, 49 F.3d 204, 206 (6th Cir. 1995). And the party seeking a writ must show that she has exhausted all other available avenues of relief and that she is owed a clear, non-discretionary duty. *Id.*; *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 (6th Cir. 2005). Mandamus jurisdiction therefore pertains only where there is "'no other adequate remedy [is] available….'" *Action Alliance of Senior Citizens v. Leavitt*, 483 F. 3d 852, 858 (D.C. Cir. 2007).

The Supreme Court has recognized that § 405(g) "clearly [provides] an adequate [alternative] remedy," foreclosing the issuance of a mandamus remedy, where, as here, a plaintiff could have brought a claim under § 405(g). *Ringer*, 466 U.S. at 617. And Plaintiff appears to concede that relief under § 405(g) would have been available to her and the putative class members if she (and they) had chosen to follow the requirements of § 405(g) by presenting a claim to the SSA before proceeding to Court. (*See* Compl. ¶¶ 13, 17, ECF No. 1, PageID ## 4-5) (alleging that Plaintiff and the putative class have a "right to appeal" the SSA's actions resulting in the non-payment of their past-due benefits); *see also BP Care, Inc.*, 398 F.3d at 515 (stating that relief under § 405(g) precludes mandamus jurisdiction). Mandamus jurisdiction is therefore not available to allow Plaintiff to bypass the administrative scheme created by Congress.

3. Because the SSA Issued an Underpayment to Plaintiff Once It Became Aware of Her Claim, Plaintiff Has Received Her Requested Relief and Her Claim Is Moot.

Once Plaintiff raised her claim by filing this case, the SSA performed a recalculation of the windfall offset to account for representative's fees, which had been approved after the initial calculation of the windfall offset, and issued an underpayment of $5,392.08 to Plaintiff on November 7, 2017. (Walker Decl. ¶¶ 26, 27.) Accordingly, Plaintiff has received the relief she requests in this lawsuit, and her claim is moot. (Compl. ¶ 3, ECF No. 1, PageID # 2); *Carras*, 807 F.2d at 1289 ("Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief.").

The fact that Plaintiff has styled her complaint as a putative class action does not excuse her from meeting the fundamental Article III requirement that "throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer*, 523 U.S. at 7 (quoting *Lewis,* 494 U.S. at 477). "Where . . . the named plaintiff's claim becomes moot *before* certification," the ordinary rule is that "dismissal of the action is required." *Brunet v. City of Columbus*, 1 F.3d 390, 399 (6th Cir. 1993) (emphasis in original).[11]

The Sixth Circuit has recognized limited exceptions to this default rule, but only in cases where a motion for class certification has been filed but not adjudicated. *Id.*; *Gawry v. Countrywide Home Loans, Inc.*, 395 F. App'x 152, 156 n. 2 (6th Cir. 2010) (stating that courts of appeals have repeatedly refused to apply *Geraghty's* [*United States Parole Comm'n v. Geraghty,* 445 U.S. 388, (1980)] relation back doctrine when the named plaintiff's individual claims became moot *before application for class certification*) (internal citations omitted); *Wilson v. Gordon*, 822 F.3d 934, 944 (6th Cir. 2016) (upholding application of exceptions when claims became moot after class certification motion was filed where class was certified and State did not appeal certification decision); *Unan*, 853 F.3d at 285 (applying exceptions when the claims became moot

[11] In any event, the Complaint hardly demonstrates that class certification would be appropriate in this case at all. For example, to establish that a class should be certified, Plaintiff must show that her broad allegations covering allegedly thousands of claims of past-due benefits articulate a common contention "of such a nature that it is capable of classwide 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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see also In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.*, 708 F.3d 704, 707 (6th Cir. 2013) (rejecting certification where a lack of common explanation for the alleged harm defeated the commonality requirement of Fed. R. Civ. P. 23(a)). But the Complaint does not suggest, in all but the most conclusory way, what issues the claims that putative class members might have that are common to them all.

after the class certification motion was filed). These exceptions are narrow and are unlikely to apply here, even if a class had been certified. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). Here, Plaintiff has not even filed a motion for class certification, much less had her class certified.

At the time Plaintiff's claim became moot, Plaintiff had a legally cognizable interest in only her own claim on the merits. *See Brunet*, 1 F.3d at 401. Therefore, even if the Court did have jurisdiction at the time the complaint was filed (which it did not), the Court now lacks subject-matter jurisdiction over the entire action, and it must be dismissed. Fed. R. Civ. P. 12(b)(1).

V. CONCLUSION

For the foregoing reasons, this Court lacks subject-matter jurisdiction over Plaintiff's class action Complaint. Defendants respectfully request that this Court dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, the undersigned declares under penalty of perjury that this Memorandum in Support of Defendants' Motion to Dismiss is twenty (20) pages and complies with the page limitations for an unassigned matter.

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