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

STEPHANIE LYNN STEIGERWALD,	)	CASE NO.: 1:17-CV-1516
	)	
Plaintiff,	)	JUDGE JAMES S. GWIN
	)	MAGISTRATE JUDGE DAVID RUIZ
v.	)	
	)	
NANCY A. BERRYHILL, ACTING	)	
COMMISSIONER OF SOCIAL	)	**REPLY IN SUPPORT OF**
SECURITY, ET AL.	)	**DEFENDANTS' MOTION TO DISMISS**
	)	
Defendants.	)	

I. INTRODUCTION

Plaintiff may not, as a matter of Article III jurisdiction, bring her claim in federal court when she did not first present that claim to SSA. She cannot rely on general claims, such as her initial claim for benefits or a fee petition; the law requires that she present her specific claim, to allow SSA to analyze the rules that apply to that claim and address the claim in the first instance. Moreover, where Plaintiff asks that SSA be ordered to recalculate and make a new determination of her Title II and Title XVI retroactive benefits to account for representatives' fees (a claim worth $5,392.08), she cannot correctly assert that she presented this claim by a letter addressing an entirely separate issue— that SSA release the remainder of her benefits withheld to pay fees (valued at $3,559.25). Because Plaintiff did not administratively present the claim that she now pursues in this Court, as a matter of settled law, she may not invoke this Court's jurisdiction.

Regardless, because SSA gave Plaintiff the relief she seeks in Court, her claim is moot. The Complaint claims that Plaintiff did not receive an underpayment because SSA failed to recalculate her Title II and Title XVI income once representatives' fees were authorized. (Compl. ¶¶ 7-11, 79-80, ECF No. 1, PageID # 2-3, 16.) That recalculation, and resultant underpayment, are just what SSA did, and paid to Plaintiff, on November 7, 2017. (Mot. to Dismiss, ECF No. 18, Walker Decl. ¶¶ 26-27, PageID # 191.) Given the Sixth Circuit case law under which the mootness of a putative class representative's claim before the filing of a class certification motion moots the entire case, Plaintiff's interest in pursuing class claims does not save this action from dismissal as moot.

II. ARGUMENT

A. Plaintiff Has Not Satisfied The Non-Waivable Presentment Requirement.

The requirement that Plaintiff present her claim to SSA before "proceed[ing] directly to district court" is "an 'absolute prerequisite' to review. . .." *Action All. of Senior Citizens v. Leavitt*, 483 F.3d

852, 857 (D.C. Cir. 2007) (internal citation omitted).[1] The crux of the Complaint is that SSA did not recalculate Plaintiff's Title II income once representatives' fees were authorized and, thus, did not pay Plaintiff an underpayment she was due. (*See* Compl. ¶¶ 7-11, 14, 79-80, PageID # 2-4, 16.) None of Plaintiff's communications with SSA—neither her initial claim for benefits, her representative's fee petition, nor her representative's September 2016 response letter to SSA—raised this issue. Thus, Plaintiff has not satisfied the mandatory and non-waivable presentment requirement, and this Court lacks jurisdiction over her lawsuit. *See Action All.*, 483 F.3d at 857 (district court lacked jurisdiction because plaintiff failed to satisfy presentment requirement where communications with the agency "made no mention of" her particular claim "to a waiver right").

A review of the nature of this action shows that Plaintiff's claim was not presented to SSA. Supplemental Security Income (SSI) payments under Title XVI of the Social Security Act are dependent on an individual's income and resources.[2] Title II benefits are not similarly dependent on a claimant's income and resources. Determining benefits is a multi-step process, with claims decisions made at various stages, sometimes over the course of years. As a consequence, under certain circumstances, when an individual receives both retroactive Title II benefits and retroactive Title XVI payments, SSA performs a calculation to prevent the individual from receiving a "windfall," or more combined Title II and Title XVI benefits than he would have been entitled to had he been paid when the benefits were due, rather than retroactively after a disability determination has been made. (Mot. to Dismiss, PageID # 68-69); 20 C.F.R. § 404.408b(b).[3] If part of the Title II benefit is used to pay an expense incurred in

[1] Internal citations, quotations, and alterations are omitted hereinafter unless otherwise indicated.

[2] A claimant may receive SSI only upon showing that his or her income and resources are below a certain threshold.

[3]As the court explained in *Guadamuz v. Heckler*, 662 F. Supp. 1060, 1061-62 (N.D. Cal. 1986), *rev'd sub nom. Guadamuz v. Bowen*, 859 F.2d 762 (9th Cir. 1988):

> [A] problem arises when a claimant has already been receiving Title XVI benefits and then later receives a retroactive award of Title II benefits for the same period. Had the Title II benefits been paid when due, they would have reduced the amount of Title

obtaining those benefits, *e.g.*, representatives' fees, SSA subtracts the amount of the expense from the Title II benefits, thereby reducing the Title II income "countable" against his Title XVI payments. *See* 20 C.F.R. § 416.1123(b)(3). In cases like this one, where a fee petition is filed and the amount of the authorized fee is not known when the windfall offset calculation is performed, SSA generally calculates the windfall offset twice, once before representatives' fees are known so that the Title II benefits may be released to the beneficiary, and again after representatives' fees are known.[4] It is this second calculation, or recalculation, to account for representatives' fees (specifically, subtracting $13,500 in fees paid to Mr. Roose from Plaintiff's Title II income and recalculating the windfall offset with the new Title II amount) that Plaintiff alleges was not done. (*See* Compl. ¶¶ 11, 79-80, PageID # 2-3, 16.)

But the Complaint does not state, as it must, that Plaintiff or her representative presented this claim to SSA before seeking relief in federal court. This Court therefore lacks jurisdiction over her suit under 42 U.S.C. § 405(g). *See 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."); *S. Rehab. Grp., P.L.L.C. v. Sec'y of HHS*, 732 F.3d 670, 680 (6th Cir. 2013) ("[P]laintiff bears the burden of establishing subject matter jurisdiction…. 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."). And, in any event, Plaintiff's belated attempts in her opposition to show presentment are insufficient.

1. <u>Mr. Roose's September 2016 letter did not present Plaintiff's claim to SSA.</u>

Plaintiff claims repeatedly in her Complaint that she had "no knowledge or notice" that SSA

XVI benefits the claimant would have received. However, where the Title II benefits are paid retroactively, the Title XVI benefits which have already been paid out were never reduced by the amount of Title II benefits. As a result the claimant receives a windfall. In order to remedy this problem Congress enacted a "windfall offset" provision in 1980.

[4] *See* POMS SI 02006.200.A.4; *see also* SI 02006.210.B.

had "fail[ed] to perform the Subtraction Recalculation" and, thus, "there was nothing from which to appeal and no potential remedy which could be exhausted." (Compl. ¶ 36, PageID # 8; *see also* ¶¶ 83, 90, PageID # 16, 18.) After claiming she was unaware of the recalculation issue, Plaintiff contends for the first time in her Opposition that she presented her claim to SSA by a letter, dated September 15, 2016, from Mr. Roose in response to a September 12, 2016 letter from SSA. (Opp'n., PageID # 404.) Mr. Roose's letter, however, is completely unrelated to Plaintiff's claims in her Complaint and thus does not satisfy § 405(g)'s presentment requirement.

Specifically, Mr. Roose's letter requested that SSA discharge the remainder of Plaintiff's benefits withheld to pay representatives' fees; it did not request a recalculation of Plaintiff's Title II benefits to account for the authorization of representatives' fees. (*See* Opp'n., Attach. 1, Roose Decl., PageID # 423.) SSA responded to Mr. Roose's letter by releasing $3,559.25 to Plaintiff on February 6, 2017. (*See* Walker Decl., Ex. A14, PageID # 318-19.) After SSA sent her that sum, Plaintiff filed this action, making clear that even she considered Mr. Roose's letter to have addressed a different issue than the one she tries to raise here.

Mr. Roose's letter involves the fact SSA withholds 25% of a retroactive Title II benefit to pay potential representatives' fees. 42 U.S.C. § 406(a)(4). The SSA may authorize a lower fee. *Id.* Here, SSA withheld $17,059.25, 25% of Plaintiff's past-due Title II benefits. (Walker Decl. ¶ 8, PageID # 188.) Mr. Roose was awarded $13,500 of the $17,059.25 for his work before SSA, leaving $3,559.25 to pay any additional fees. (*Id.* ¶ 23, PageID # 190.) Because under 42 U.S.C. § 406(b), Mr. Roose could also seek fees for work performed before district court, SSA contacted him on September 12, 2016 to determine if he intended to do so, in which case the $3,559.25 would remain withheld, or, whether SSA should release the remaining $3,559.25 directly to Plaintiff. (*Id.* Ex. A13, PageID # 316.) In his September 15, 2016 letter, Mr. Roose responded that he would not seek fees from the district court and, therefore, requested that SSA release the balance of the benefits withheld to pay representatives' fees.

That balance is *not* the Title II underpayment that Plaintiff sought in this case and received on November 7, 2017,[5] and whether Plaintiff was entitled to the balance of benefits withheld pursuant to 42 U.S.C. § 406(a)(4), is a wholly separate issue from whether she was entitled to a Title II underpayment as a result of a recalculation of her Title II income, *see* 42 U.S.C. § 1320a-6; 20 C.F.R. § 416.1123(b)(3). Plaintiff attempts to conflate these distinct issues, arguing that Mr. Roose's response to release the "'withheld benefits' ... of course, include[d] *all* the benefits which were being withheld by the Agency as of that date, including those funds which were already then withheld due to Defendants' failure to perform the Subtraction Recalculation." (Opp'n., PageID # 404.) The face of the correspondence shows that that is not the case. Mr. Roose's letter provides:

> We were notified that additional money is being withheld for our fee in a Social Security Notice dated September 12, 2016.
>
> We are writing to inform you that we are not petitioning the United States District Court for the Northern District of Ohio for the balance of our fee. Please release the withheld benefits to the claimant.

(Roose Decl., PageID # 423.) The "withheld benefits" to which Mr. Roose referred in the second paragraph are the "additional money ... being withheld for our fee" he refers to in the first paragraph and which SSA raised in its "Notice dated September 12, 2016." *Id.* The money withheld for fees, raised in SSA's September 12, 2016 Notice, was "the amount of $3559.25, which represents the balance of 25 percent of the past-due benefits for [Plaintiff], in anticipation of direct payment of an authorized attorney's fee." (Walker Decl., Ex. A13, PageID # 316.) Thus, in referring to "the withheld benefits," Mr. Roose was referring to something precise, and that was not a claim that SSA recalculate her Title

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[5] Plaintiff's representative sought and Plaintiff was given $3,559.25, which represents the balance of the 25% of her past-due benefits that SSA had withheld to pay any authorized representatives' fees. (Walker Decl., Ex. A14, PageID # 318-20.) The Title II underpayment Plaintiff sought in this case and SSA paid her on November 7, 2017 was $5,392.08, which is the difference in the original windfall-offset amount of $27,785.03 (which did not account for fees) and the recalculated windfall-offset amount of $22,392.95 (which did account for fees).

II benefits, and pay her a retroactive underpayment.[6]

That Mr. Roose's letter did not present Plaintiff's recalculation claim to the agency is evidenced by the fact that Plaintiff repeatedly alleges that she had "no knowledge or notice" that SSA "fail[ed] to perform the Subtraction Recalculation" and, therefore, "there was nothing from which to appeal and no potential remedy which could be exhausted." (Compl. ¶ 36, PageID # 8; *see also id.* ¶¶ 83, 90, PageID # 16, 18.) If Mr. Roose's letter presented her recalculation claim, then SSA's September 12 letter, which elicited Mr. Roose's response, would have notified Plaintiff of the issue, and SSA's February 6, 2017 letter, responding to Mr. Roose's letter and informing Plaintiff that she had a "right to appeal," (Walker Decl., Ex. A14, PageID # 318-20), would have provided an administrative remedy that Plaintiff would have had to exhaust. *See* 20 C.F.R. §§ 404.900(a), 416.1400(a). Plaintiff cannot have it both ways. If Mr. Roose's letter could somehow be read to present Plaintiff's recalculation claim, then by not appealing the February 6, 2017 discharge of the "withheld benefits," Plaintiff failed to exhaust. *See id.*[7] But Plaintiff never presented her recalculation claim, which, according to her Complaint, she knew nothing about and she could not exhaust. (*See, e.g.,* Compl. ¶ 83, PageID # 16.)[8]

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[6] Plaintiff's argument that Mr. Roose's letter satisfied presentment because SSA used "parallel" language in the November 12, 2017 Notice, *see* (Opp'n PageID # 405), is similarly meritless, as the documents pertain to two separate issues. (*Compare* Walker Decl., Ex. A13, PageID # 316 and Roose Decl., PageID # 423) (discussing the withheld amount of $3,559.25, which was "the balance of 25 percent of the past-due benefits for [Plaintiff], in anticipation of direct payment of an authorized attorney's fee"), *with* (Walker Decl. ¶¶ 26-27, PageID # 191; *id.* Ex. A15, PageID # 322) (paying Plaintiff $5,392.08 because SSA recalculated [her] windfall offset to account for attorneys' fees incurred in obtaining Title II benefits).

[7] Plaintiff argues that Defendants waived exhaustion arguments. (Opp'n, n.6, PageID # 403.) But exhaustion arguments were contingent upon the Complaint alleging that she presented her recalculation claim, which Plaintiff does not do. In any event, presentment is simply not waivable. *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976).

[8] Even if Mr. Roose's reference to "withheld benefits" could somehow be interpreted to have included Plaintiff's claim for an underpayment, allowing such a general reference to benefits to satisfy the presentment requirement would contravene controlling precedent requiring that " virtually all legal attacks be presented to the agency. . . .," *S. Rehab. Grp.*, 732 F.3d at 679, and undermine the purpose of the presentment requirement, as explained more fully below.

2. Plaintiff did not present her claim to SSA via her initial claim for benefits or her representative's fee petition.

Plaintiff also contends for the first time that she presented her recalculation claim to SSA via her initial claim for benefits and her representative's fee petition. (Opp'n., PageID # 406-11.) Even if Plaintiff had met her burden to plead jurisdictional facts, her theory—that the presentment requirement is satisfied any time an individual files a claim for benefits or her representative seeks fees—is unsupported by applicable law and would eviscerate the presentment requirement.

Plaintiff's theory that she satisfied the presentment requirement by applying for Title II and Title XVI benefits is based on cases that are not binding, *Linquist v. Brown*, 813 F.2d 884, 887 (8th Cir. 1987), and *Gould v. Sullivan*, 131 F.R.D. 108 (S.D. Ohio 1989), but that, in any event, reach conclusions inconsistent with more recent Supreme Court case law. Plaintiff's reliance on *Linquist* and *Gould* is based on categorizing her claim as "collateral" to her initial claim for benefits, (Compl. ¶ 85, PageID # 17), but that distinction "has been rendered obsolete by *Shalala v. [Ill.] Council on Long Term Care, Inc.*, 529 U.S.[] 13-14 []," which made clear that such distinctions are irrelevant for purposes of presentment. *Action All.*, 483 F.3d at 858.

Moreover, Plaintiff's argument that the presentment requirement is satisfied any time a claimant makes an initial claim for benefits would undermine the very purpose of the requirement, resulting in nearly every claim proceeding directly to federal court, rather than allowing the agency to interpret and apply its policies and address any issues in the first instance. Numerous courts have rightly rejected such arguments. *Id.* at 857 (explaining that without "a specific demand" setting forth the plaintiff's claim, the presentment requirement "would [be] strip[ped] … of all content"); *Haro v. Sebelius*, 747 F.3d 1099, 1113 (9th Cir. 2014) (calling similar argument "overly broad" and explaining that purpose of the presentment requirement would "not be fulfilled if plaintiffs … were permitted to raise claims in federal court that were not raised before the agency"); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 557 (N.D. Cal. 2007) (rejecting argument that initial application for benefits satisfied presentment

requirement because such a theory "would render the … requirement meaningless, since any individual who had applied for benefits would … be deemed to have adequately presented a claim for judicial review").

Here, as even Plaintiff appears to admit, her claim that SSA failed to recalculate her Title II benefits to account for representatives' fees is a separate legal issue from her initial claim for benefits, requiring analysis of separate statutes and regulations. (Opp'n., PageID # 409) ("Defendants' failure to perform the Subtraction Recalculation was not the failure to make a decision as to whether Plaintiff … w[as] entitled to benefits. It was the failure … to make a necessary recalculation (*i.e.*, the Subtraction Recalculation)."). The presentment requirement is meant to ensure that SSA can conduct the requisite analysis in the first instance, apply its policies, and address any issues, as it ultimately did here, without burdening the courts. Plaintiff's theory "would be a wholesale subversion" of this "legislative intent to avoid overburdening the courts if beneficiaries were able to bring federal cases where a simple phone call, e-mail, or letter might straighten out the problem." *Situ*, 240 F.R.D. at 557.

For these same reasons, Mr. Roose's fee petition does not satisfy the presentment requirement. Moreover, Plaintiff now argues that Mr. Roose's fee petition satisfied presentment because the filing of a fee petition "necessarily triggers the Subtraction Recalculation." (Opp'n., PageID # 406.) Plaintiff is mistaken on both counts. The authorization of the fee petition, not its filing, triggers recalculation of Title II benefits to account for representatives fees.[9] Indeed, the recalculation of the windfall offset cannot occur until the amount of approved fees is known, or authorized. Accordingly, the filing of the fee petition, which necessarily comes *before* any fee authorization, could not have served to present Plaintiff's claim that SSA failed to perform the recalculation *after* representatives' fees were authorized.

[9] *See* POMS SI 02006.200.A.4 (explaining that, although the windfall-offset calculation can be performed without the fee, the field office may learn of the authorized fee at several points, and there can be no adjustment of the Title II income until after the fee is determined); SI 02006.210.B.

And after that filing, SSA told Plaintiff and her representative that "[i]f [she] thinks more SSI benefits are due, and has not received more money or a letter within 90 days of this authorization notice, … she should contact SSA." (Walker Decl., Ex. A8, PageID # 287.) She did not do so.

B. Plaintiff's Claim Is Moot Where SSA Performed The Very Recalculation And Paid Plaintiff The Very Underpayment She Seeks In Her Complaint.

Because SSA performed the recalculation Plaintiff requested and paid her the underpayment she sought in her Complaint, her claim is moot.[10] As SSA attested, "[o]n November 6, 2017, SSA recalculated Ms. Steigerwald's windfall offset to account for the attorneys fees incurred in obtaining Title II benefits" and "[b]ased on [that] recalculation[,] … on November 7, 2017, SSA paid an underpayment in the amount of, $5,392.08 to [Plaintiff] via direct deposit." (Walker Decl. ¶¶ 26-27, PageID # 191.) Where the Complaint seeks that precise relief, (*see* Compl. (g), PageID # 21) (requesting order for SSA "to re-calculate all Windfall Offset calculations" and "thereafter to make all required Retroactive Underpayments"), and she has obtained that relief, her claim is moot. *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) ("Mootness results when events occur during … litigation which render the court unable to grant the requested relief.").[11]

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[10] There is no merit to Plaintiff's argument that her claim is not moot because she has not been paid costs or received injunctive relief. Plaintiff's individual interest in an injunction expired when she received payment, and she cannot show that she is likely to suffer the same injury again. *See Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Smith v. SEC*, 129 F.3d 358, 363 (6th Cir. 1997). Plaintiff points to no provision that would entitle her to any costs before this Court dismisses this case as moot. *Cf. Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 ("interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"). The Supreme Court cited *Lewis* in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78 n.5 (2013), suggesting that what *Lewis* said about fees means that a plaintiff cannot rely on an interest in recouping litigation costs to avoid mootness.

[11] To the extent Plaintiff claims that she "cannot be sure at this time that Defendants have paid her all of the money she is owed" and that she intends "to depose Janet Walker to determine whether [Plaintiff] did in fact receive all the funds that she deserves," (Opp'n., n. 12, PageID # 413), no such deposition is permissible. If Plaintiff wishes to contest the amount of SSA's November 7, 2016 payment, she must exhaust the appeals process set forth in the November 12, 2017 Notice (Walker Decl. Ex. A15, PageID # 323.). *See* 20 C.F.R. §§ 404.900(a), 416.1400(a).

1. No exception to mootness applies here because Plaintiff has not filed a motion for class certification nor even made plausible allegations that a class exists.

Plaintiff acknowledges that "'dismissal is ordinarily required when the named plaintiff's claim becomes moot *before* certification. . . .'" (Opp'n., PageID # 412 (quoting *Unan v. Lyon*, 853 F.3d 279, 285 (6th Cir. 2017)). Plaintiff argues, however, that two exceptions to the ordinary rule—the "picking off" exception and the "inherently transitory" exception—apply here. (*Id.* PageID # 413.) That is incorrect for at least two reasons.

First, as the Sixth Circuit has said, "under our precedent, [when] the named plaintiffs' claims were moot prior to moving for class certification, and no exception to the mootness doctrine applies to this case, the district court was 'required' to dismiss this action.[] *Brunet [v. City of Columbus*], 1 F.3d [390,] 399 [(6th Cir. 1993)]." *Gawry v. Countrywide Home Loans, Inc.*, 395 F. App'x 152, 160 (6th Cir. 2010) (footnote omitted); *see also Wilson v. Gordon*, 822 F.3d 934, 948 (6th Cir. 2016) (explaining *Carroll v. United Compucred Collections, Inc.,* 399 F.3d 620 (6th Cir. 2005), "held that a class action was not moot even though the named plaintiffs had been tendered a Rule 68 offer of judgment *because a motion for class certification was then pending.*") (emphasis added); *Brunet*, 1 F.3d 390 at 400 (explaining cases applying the picking off exception are "limited to the situation where 'a motion for class certification has been pursued with reasonable diligence and *is then pending before the district court*'") (same); *see also Unan,* 853 F.3d at 285 (explaining the case law recognizes the picking off exception "when a motion for class certification is . . . pending"). As the court explained in *Unan*, the filing of a certification motion is significant because once such a motion is filed a defendant might choose to provide relief to a plaintiff in some procedurally anomalous way as an artifice designed to avoid class action litigation. 853 F.3d at 286-87. And regardless of whether a defendant "is on notice that the named plaintiff wishes to proceed as a class," *Wilson*, 822 F.3d at 947, when any such notice is not provided by a class certification motion supported, as it ordinarily must be, by evidence that demonstrates, upon rigorous analysis, that certification should be ordered, *Young v. Nationwide Mut.*

Ins. Co., 693 F.3d 532, 537 (6th Cir. 2012), or even by a complaint detailed enough to demonstrate the likelihood of common questions as to which a plaintiff presents a typical claim, but only by conclusory allegations indicating the plaintiff's unsupported belief that a certifiable class exists, neither the language nor the theoretical underpinnings of cases such as *Unan* warrant a presumption that the defendant has provided relief to the plaintiff just as a strategic move. Thus, neither exception applies as a threshold matter, where, as here, Plaintiff has neither filed a motion for class certification, nor provided any basis to believe that SSA has failed to perform the relevant recalculation for other claimants for reasons that have anything to do with those pertaining to Plaintiff's case.

Plaintiff baldly asserts that "Defendants may not now assert that because Plaintiff has not yet filed her Motion for Class Certification, her claim can be mooted." (Opp'n., PageID # 414.) But she ignores the aforementioned Sixth Circuit case law, and relies on two non-binding cases that do not overcome this authority. (*Id.* citing *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008); *Eckert v. Equitable Life Assurance Society of U.S.*, 227 F.R.D. 60 (E.D. NY 2005)).[12] The *Stewart* court held that an unaccepted Rule 68 offer of judgment made prior to a class certification motion did not moot a putative class action. 252 F.R.D. at 386. But *Stewart* was decided by a court whose decisions are not precedential and did not take into account the Sixth Circuit's subsequent statements as to the state of the Circuit law requiring that exceptions to the ordinary mootness rule apply only after a class certification has been filed. And, here, "Defendants have not made an Offer of Settlement pursuant to [Fed. R. .Civ. .P.] 68 to Ms. Steigerwald." (Opp'n., n. 13, PageID # 414.) Thus, one of the main concerns animating the court's decision in *Stewart*—that "Rule 68 offers of judgment prior to class certification pit the self-interests of named plaintiffs against the interests of the class as a

[12] Any reliance on *Price v. Medicaid Dir.*, 838 F.3d 739, 746 (2016) is misplaced. In *Price*, the defendants did not claim that the case was moot, and the *Price* court only examined whether the relief sought in the complaint could redress the alleged injuries, not whether the controversy remained live throughout the proceedings. *Id.*

whole" due to Rule 68's cost-sharing provision, 252 F.R.D. at 386—is not at issue here. *See also Combe v. Goodman Frost, PLLC*, 217 F. Supp. 3d 986, 987 (E.D. Mich. 2016) (explaining the "dilemma" to the class representative when given a Rule 68 offer of judgment due to "the risk of 'incur[ring] the costshifting liability imposed by Rule 68'").

And *Eckert* is simply not the law in this circuit. In *Eckert*, the court applied the relation-back doctrine and retained jurisdiction even where the plaintiff had not yet filed a motion for class certification. *See* 227 F.R.D. at 64. However, the Sixth Circuit has "refused to apply *Geraghty's* relation back doctrine when the named plaintiff's individual claims became moot *before application for class certification.*" *Gawry*, 395 F. App'x at 160 (emphasis in original). [13] Also, there are good reasons to reject *Eckert*'s holding that mere allegations of a putative class can permit application of the mootness exceptions. Class certification requires a plaintiff to meet more than a mere pleading standard; instead, a plaintiff needs to support each element of Fed. R. Civ. P. 23 with evidence. *See Wal-mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). By contrast, as set forth in more detail below, Plaintiff has not even made plausible allegations sufficient to suppose that a certifiable class actually exists, namely that the failure to recalculate Plaintiff's benefits was due to a systematic error, and that if others might have suffered a similar failure it was not because of factors such as human error unique to their individual situations. Plaintiff's bald allegations should not be permitted to allow this case to proceed where Plaintiff's claim is moot.

2. Even if the exceptions could be applied prior to the filing of a motion for class certification, the mootness exceptions do not apply here.

Even if exceptions to the ordinary mootness rule could pertain where a plaintiff has not filed a motion for class certification, neither of the exceptions Plaintiff invokes applies here.

[13] N.D. Ohio Local Rule 23.1(c) does not mandate, as Plaintiff suggests, (Opp'n., n. 14, PageID # 415), that a motion for class certification be filed after the parties' 26(f) meeting.

First, SSA did not "pick off" Plaintiff. When Plaintiff raised the recalculation issue in her Complaint, SSA recalculated her Title II benefits, and issued an underpayment. (Walker Decl. ¶¶ 26-27, PageID # 191.) "[A]n agency's administrative decision to correct a mistake by returning the funds demanded by the plaintiff[] [does not] qualif[y] as the type of 'pick off' defense tactic that insulates a putative class action from the constitutional requirement of the existence of a live case or controversy." *Heard v. SSA*, 170 F. Supp. 3d 124, 135 (D.D.C. 2016), *appeal pending*, No. 16-5125 (D.C. Cir.). To hold otherwise could discourage agencies from correcting mistakes that come to their attention through a lawsuit.

Further, neither of the factors for determining the applicability of the "picking off" exception supports applying it here. To determine whether the "picking off" exception applies, the Sixth Circuit looks to the "timing and method of relief." *Unan*, 853 F.3d at 286. Applying these two factors, the court in *Unan* applied the "picking off" exception where: 1) the plaintiffs had brought similar claims to the State's attention *before the lawsuit was filed*, and 2) the state created a *new, ad hoc process*, to redress the claims, instead of using their standard operating procedures. *Id.* (emphasis added.) By contrast, Plaintiff did *not* bring her claim to SSA before filing this lawsuit, and once SSA became aware of her claim, it acted according to its standard procedure, under its POMS and regulations, to perform the recalculation and release the resultant underpayment. *See e.g.*, POMS SI 02006.200 *et seq*. Where that is the case, the "picking off" exception to mootness does not apply. *Cf. Unan*, 853 F.3d at 285-86; *Wilson*, 822 F.3d at 950-951.

Second, Plaintiff has not shown that the "inherently transitory" exception to mootness applies. For that exception to apply, it must be "certain other class members are suffering the injury." *Unan*, 853 F.3d at 296. Thus, the *Unan* court applied the exception where "[a]ffidavits … demonstrate[d] … hundreds of erroneous assignments"; "plaintiffs' counsel had referred ninety additional individuals who had received erroneous … assignments"; and the "plaintiffs ha[d] put forth evidence that the[]

assignments occurred as a result of systemic, rather than human, error." *Id.*; *see also Wilson*, 822 F.3d at 945 (plaintiffs' affidavits documented hundreds of erroneous assignments). Plaintiff does not come close to meeting this standard, as she has not identified one other person who is suffering from the same issue raised in her Complaint and provides no relevant evidence that her issue arose from a systematic error.[14]

Instead, Plaintiff relies on two class actions from 30-40 years ago, one of which, *Guadamuz v. Heckler*, 662 F. Supp. 1060 (N.D. Cal. 1986), resulted in SSA adopting the very POMS provision that Plaintiff challenges in this lawsuit, and the other of which, *Willis v.* Sullivan, 730 F. Supp. 785 (M.D. Tenn. 1990), resulted in a settlement and Agreed Order. Where both cases were resolved decades ago, Plaintiff cannot rely on them to support a putative class-wide problem today.

Plaintiff otherwise relies solely on two SSA OIG reports, (Compl. ¶¶ 44-74, PageID # 10-15), that do not evaluate the issue raised in the Complaint. The goal of both audits was to "determine whether the … (SSA) had adequate controls to ensure it accurately and timely paid the … (OASDI) benefits it withheld pending a windfall offset determination." (*Id.* Attach. 6, Ex. B OIG Audit Report 2016, PageID # 58; *see also id.* Attach. 5, Ex. A OIG Audit Report 2011, PageID # 36.) Here, there is no question here that the "SSA … applied the Windfall Offset and made a partial payment of Plaintiff's retroactive Title II benefits." (Compl. ¶ 77, PageID # 15-16.) Thus, the question at issue in the OIG reports is simply not at issue here. Instead, Plaintiff claims that SSA failed to recalculate her windfall offset account for representatives' fees once they were authorized, and, consequently, "failing to pay the Retroactive Underpayment rightfully belonging to Plaintiff and the other putative class members." (*Id.*

[14] And more generally, application of this exception here would be entirely inconsistent with the Supreme Court's characterization of the exception. In *Genesis Healthcare Corp*, the Court noted that this exception "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," and that a resolution of one plaintiff's case that does not foreclose other potential plaintiffs from bringing their own cases on the same theory does not warrant application of the "inherently transitory" doctrine. 569 U.S. at 76-77. *Cf. Wilson*, 822 F.3d at 949.

¶ 11(d), PageID # 4.) The OIG reports did not address this issue, much less conclude that SSA is not complying with its pertinent policy.

Plaintiff nevertheless claims that "[o]n information and belief, a large percentage of" the cases identified in the OIG reports "were similar in nature to that of Plaintiff and the other members of the purported class […]." (*Id.* ¶ 61, PageID # 12; *see also id.* ¶ 74, PageID # 15.) Nothing on the face of the OIG Reports supports that belief. The 2011 Report does not even mention representatives' fees. And the only reference to representatives' fees in the 2016 Report is a statement that in one case, the "SSA applied the $4,044 windfall offset amount and paid $1,654 in attorney fees on the beneficiary's behalf. However, SSA did not pay the beneficiary the remaining $1,745 in withheld benefits due." (2016 OIG Report, PageID # 65.) There is no indication that this was due to any recalculation issue. In any event, one example is insufficient to support a reasonable belief that a "significant percentage," (Compl. ¶ 74, PageID # 15), of the cases identified in the 2016 Report are similar to Plaintiff's.[15] Mere speculation that one example in otherwise irrelevant OIG reports might represent a scenario similar to Plaintiff's is a far cry from the "hundreds" of examples found sufficient in *Unan* and *Wilson* and falls well short of Plaintiff's burden to show that it is "certain other class members are suffering the injury.'" *Unan*, 853 F.3d at 296.

For these reasons, neither exception to mootness applies, and Plaintiff's claim—for a recalculation that SSA has done and for an underpayment Plaintiff has received—is moot.

III. <u>CONCLUSION</u>

For the foregoing reasons, this case should be dismissed under Fed. R. Civ. P. 12(b)(1).

[15] In fact, the one example in the 2016 OIG report that referred to attorneys' fees was one of 5 cases in which SSA incorrectly processed the windfall offset, and the 5 cases amounted to only 2 percent of the total cases addressed in the report. (2016 OIG Report, PageID # 65.)

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 Reply in Support of Defendants' Motion to Dismiss is fifteen (15) pages and complies with the page limitations for a matter assigned to the standard track.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2018, a copy of the foregoing ***Reply in Support of Defendants' Motion to Dismiss*** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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