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**
v.	)	**MAGISTRATE JUDGE DAVID RUIZ**
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**
	)	
Defendants.	)	

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

Plaintiff Stephanie Steigerwald ("Plaintiff" or "Ms. Steigerwald"), by undersigned counsel, respectfully submits this Memorandum in Support of Her Motion for Class Certification (the "Motion") pursuant to Federal Rule of Civil Procedure 23(c). In support of the Motion, Ms. Steigerwald states as follows:

I. INTRODUCTION

As alleged in the Class Action Complaint filed in this matter, Defendants the Social Security Administration ("SSA") and Nancy A. Berryhill (together, the "Agency") failed to timely perform the Subtraction Recalculation as required for Ms. Steigerwald and other members of a proposed class, and thereafter failed to timely pay her, and the other members of the proposed class, any Retroactive Underpayment due, in violation of 42 U.S.C. § 1320a–6, 20 C.F.R. § 416.1123(b)(3) and POMS SI 02006.200. *See* Doc. 1, ¶¶ 97-101.[1] After the Complaint was filed, the Agency performed the Subtraction Recalculation for Ms. Steigerwald in an attempt to moot this class action, which attempt was unsuccessful. *See* Doc. 32, pp. 11-15. Thereafter, during class certification discovery, the Agency provided conclusive, uncontested evidence of its failure to perform the Subtraction Recalculation for some 28,510 to 37,675 potential class members, none of whom have been paid any Retroactive Underpayments that may be due. *See* Doc 50-2.

At the same time, the Agency has refused to respond to discovery requests seeking information as to its failure to perform the Subtraction Recalculation for potential members of the class for whom the Subtraction Recalculation was supposed to be performed between March 13, 2002 and August 31, 2012, citing the "incredibl[e] complex[ity]" of discerning the claimants for whom the Agency's past-actions caused injury. Doc. 37-1, p. 4. At this stage, the Agency's

[1] For the Court's convenience, this and other defined terms in this Motion are set out in the Appendix attached hereto as Exhibit A.

excuses are not enough to prevent the certification of a class beginning from March 13, 2002 to March 13, 2018.[2]

The undeniable fact is that the Agency has been derelict in its duties in tens of thousands of cases between September 1, 2012 and October 31, 2017, failing to perform the Subtraction Recalculation in 39% of cases when it was required to do so. *See* Doc. 50-2. The Agency has no proof that SSA's failure sprouted *ex nihilo* on September 1, 2012. Indeed, the persuasive inferential evidence is that the Agency has violated its rules going back to 2002.

The only evidence the Agency has proffered of its compliance with the laws requiring it to perform the Subtraction Recalculation is the existence of a settlement agreement, stating that "'the government ha[d] completed its obligations under [a prior] settlement agreement' *as of* March 12, 2002." Doc. 52, p. 9 (quoting Doc. 41-1, p. 2) (emphasis added). The referenced settlement agreement was entered into by the Agency *nine years earlier* through "an agreed order in 1993" in the case of *Willis v. Sullivan*, 730 F. Supp. 785 (M.D. Tenn. 1990). *See* Doc. 52, p. 9.

In skirting Plaintiff's discovery requests, the Agency has provided no basis to believe that it *remained* in compliance after March 12, 2002. To the contrary, audits performed by the Agency's Office of Inspector General (the "OIG Reports") demonstrate that the Agency was in

---

[2] POMS SI 02006.210(B)(1) provides that the Subtraction Recalculation should be performed "when a copy of the notice or information is received" – in other words, immediately upon receiving notice of a finalized attorneys' fee. Therefore, a class of claimants for whom the Subtraction Recalculation should have been, but was not, performed as required could theoretically exist of claimants for whom the Subtraction Recalculation was not performed up to and including on May 15, 2018 (the date of the filing of this Motion). Even though the POMS is clear in this regard, the Agency may be entitled to a brief period during which performance of the Subtraction Recalculation would be reasonable. Plaintiff believes 60 days is such a reasonable period. Therefore, as of the date of this filing, the Agency reasonably should have performed the Subtraction Recalculation for all claimants as to whom it was required to be performed on or before March 13, 2018 (giving the Agency at least 60 days to perform the Subtraction Recalculation for all members of the proposed class).

violation of the Windfall Offset rules (of which the Subtraction Recalculation requirement is an integral part) going back to 2001. *See infra*, p. 7. Moreover, the evidence the Agency has provided conclusively shows that SSA regularly violated the laws requiring it to perform the Subtraction Recalculation and issue any Retroactive Underpayments due between September 1, 2012 and October 31, 2017. This evidence by itself provides a strong, legally significant inference that the problem the Agency asserts ended on March 12, 2002 did not simply start again out of the blue on September 1, 2012 (and did not end on October 31, 2017).

Ms. Steigerwald's claims are ideally suited for class certification. Ms. Steigerwald and every proposed Class Member: (1) became eligible to receive Concurrent Payments due to a favorable or partly-favorable determination or decision by SSA, establishing entitlement to defined periods of retroactive benefits under both SSI and Title II, or to a defined period of Title II retroactive benefits during a period in which SSI was paid; (2) were represented by an attorney or non-attorney representative (a "Representative") in connection with the determination or decision, for which representation SSA or a court authorized a fee; and (3) following SSA's performance of an initial Windfall Offset calculation, SSA failed to timely perform the Subtraction Recalculation as required, thereby failing to pay any Retroactive Underpayment due.

The legal and factual issues are substantially if not wholly similar for each member of the proposed class. Given the common questions of law and fact to all proposed class members, and the sheer numerosity of the members of the proposed class, which number, at the very least, is in the tens of thousands, a class action is the superior method for resolving this dispute. This Court should certify the case as a class action pursuant to Fed. R. Civ. P. 23(a) and, as explained below, Rules 23(b)(2) and/or 23(b)(3), and should appoint Ms. Steigerwald's attorneys as Class Counsel.

II. CLASS DEFINITION

Plaintiff moves for certification of the following class:

> 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 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.

III. LEGAL STANDARDS

"Rule 23 of the Federal Rules of Civil Procedure controls federal class action lawsuits. Under that Rule, a court may certify a class action if the class seeking certification meets Rule 23(a)'s procedural requirements, and if certification is appropriate under Rule 23(b)(1), (b)(2), or (b)(3)." *Chapman v. Tristar Prod., Inc.*, 2017 WL 1433259, at *2 (N.D. Ohio 2017). Rule 23(a) establishes four requirements: (1) numerous class members, (2) who have common questions of law or fact, (3) which is being pursued by a representative whose claims are typical of those of the class members, and (4) who will fairly and adequately protect the interests of the class." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013).

At the class certification stage, the Court must conduct a "rigorous" analysis which "may 'entail some overlap with the plaintiff's underlying claim.'" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466 (citing *Dukes*, 564 U.S. at 351 n.6).

"For purposes of a class certification motion, the Court must accept as true the allegations of the complaint." *Ledford ex rel. Epperson v. Colbert*, 2012 WL 1207211, at *1 (S.D. Ohio 2012) (collecting cases). "The Court 'may consider reasonable inferences drawn from facts before [it]

at that stage of the proceedings.'" *Id.* (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976)); *see also Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012) ("Plaintiffs [] advocated for application of a 1% error rate . . . it was within the district court's discretion to infer that the 1% error rate was applicable to the Defendant.") (citations omitted). "The Court has 'broad discretion to modify class definitions' 'to ensure that a certified class is properly constituted.'" *Chapman*, 2017 WL 1433259, at *2 (quoting *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007)).

IV. ARGUMENT

A. Certification Under Fed. R. Civ. P. 23(a)

1. The Class is Sufficiently Numerous that Joinder is Impracticable

In order to fulfill Rule 23(a)'s numerosity requirement, "[t]he plaintiff need not demonstrate that it would be impossible to join all the class members; rather, he need simply show that joinder in this case would be difficult and inconvenient." *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577, 585 (S.D. Ohio 2003) (citation omitted). It is the circumstances of the case, not a strict numerical test, that determines impracticability of joinder, and there is "no specific number below which class action relief is automatically precluded." *Senter*, 532 F.2d at 523 n.24. "When class size reaches substantial proportions . . . the numerosity requirement is usually satisfied by the numbers alone." *Rudawsky v. Borror*, 2008 WL 11351312, at *4 (S.D. Ohio 2008) (citing *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996)).

Here, the class constitutes *at least* 28,510 claimants. *See* Doc. 50-2. This is likely a fraction of the entire class, as the 28,510 number accounts for some individuals for whom SSA failed to perform the Subtraction Recalculation only "between September 1, 2012 and October 31, 2017." *Id.* at p. 2. Given the date limitations, the 28,510 number necessarily excludes all potential class

members for the periods between March 13, 2002 and August 31, 2017, as well as between November 1, 2017 and March 13, 2018.

Furthermore, the 28,510 number artificially deflates SSA's failure to perform the Subtraction Recalculation, because the number excludes an additional 9,165 claimants for whom SSA failed to perform the Subtraction Recalculation, but for whom the Agency states that performance of the Subtraction Recalculation would not result in any Retroactive Underpayment. Doc. 50-2, pp. 2-3. All told, SSA failed to perform the Subtraction Recalculation in 39% of eligible cases in a period of five years and one month (61 months). Statistically, given similar numbers of individuals over a 16-year period (*e.g.*, March 2002-March 2018), and assuming SSA's failure rate remained constant at approximately 39%, the final class would consist of approximately 117,253 claimants.[3] These numbers certainly satisfy Fed. R. Civ. P. 23(a)'s numerosity requirement, as does the "baseline" number of 28,510 claimants, who certainly would be members of the class. *See Bittinger v. Tecumseh Prod. Co.*, 123 F.3d 877, 884 (6th Cir. 1997) (Finding defendant's objection to numerosity "frivolous" where "[t]he class is composed of over 1100 retirees. The district court explicitly found, and we agree, that joinder of so many parties would be impracticable.").

a. The Class Should Extend From March 13, 2002 to March 13, 2018

Plaintiff at this time has no exact data regarding SSA's failure to perform the Subtraction Recalculation between March 13, 2002 and August 31, 2017. However, the Court is allowed at this stage to "consider reasonable inferences drawn from facts before" it in determining the

---

[3] 95,519 (total amount of claimants the SSA was supposed to perform the Subtraction Recalculation for in a 61 month period, per Doc. 50-2, p. 3) divided by 61 equals an average of 1,565.88 claimants per month. 1,565.88 multiplied by 192 months (March 2002-March 2018) equals 300,648.96 claimants. Assuming a 39% failure rate, 39% of 300,648.96 is 117,253.

temporal size of the class. *Senter*, 532 F.2d at 523. The Agency has conclusively shown that, for the time period it has reviewed between 2012 and 2017, SSA has systemically failed to perform the Subtraction Recalculation as required. Doc. 50-2. The prior cases cited in the Complaint – namely *Guadamuz v. Heckler*, 662 F. Supp. 1060 (N.D. Cal. 1986) and *Willis v. Sullivan*, 730 F. Supp. 785 (M.D. Tenn. 1990), illustrate that SSA's failure to perform the Subtraction Recalculation is not new, and has been the subject of at least two lawsuits, in the 1980's and 1990's, resulting in class-action settlements. *See* Doc. 1, ¶ 15. And the OIG Reports from 2011 and 2016, attached to Plaintiff's Complaint, show that SSA has failed to process Windfall Offset actions timely or correctly in a staggeringly large subset of cases. *See, e.g.*, Doc. 1-5, p. 6.

On this last point, the Agency's declarant has protested that "[t]he OIG audits did not aim to, and did not, evaluate or address whether representatives' fees were subtracted from Title II benefits countable as income in performing any windfall offset calculations." Doc. 52-1, ¶ 3. This is beside the point. The OIG Reports indubitably and indisputably show that the Agency systemically fails to process Windfall Offset actions timely and correctly. According to the 2011 OIG Report, this failure resulted in "benefits [that] were unpaid for as long as 10 years after they were due and payable." Doc. 1-5, p. 7. In other words, from 2001. The Agency has done nothing to contest that SSA regularly and routinely fails to process Windfall Offset actions timely or correctly. *See, e.g.*, the Court's January 17, 2018 Opinion and Order, Doc. 32, p. 3 n.12, noting that the 2016 OIG Report "estimated that over 13,000 beneficiaries did not have windfall offset calculations processed and over $70 million was unpaid as a result." The OIG Reports suggest the Agency cannot fulfill its legal obligations – at least without Court intervention. Accordingly, the Court should conclude that the class can and should extend from March 13, 2002 to March 13, 2018.

b. The Class Is Ascertainable

The Agency may protest against certifying a class whose members the Agency has not yet identified (*i.e.*, one that includes members for whom the Subtraction Recalculation was not performed between March 13, 2002 and August 31, 2012, and between November 1, 2017 and March 13, 2018). The Agency has already identified and named 28,510 claimants for whom the Subtraction Recalculation has not been performed, as required. However, as it did during class certification discovery (when it protested identifying the initial subset of 28,510 proposed class members), the Agency may assert that ascertaining the identities of claimants prior to September 1, 2012 for whom the Subtraction Recalculation was not performed "would be disproportionate to the needs of this case, given its limited relevance and the burden on the agency of compiling such information." Doc. 41, p. 11. Such an argument should be rejected.

"[U]nder Sixth Circuit law, the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *Legrand v. Intellicorp Records, Inc.*, 2016 WL 1161817, at *3 (N.D. Ohio 2016) (quotation omitted). "Further, any argument that ascertainability would be administratively difficult because there is no easily available list of affected individuals would be unavailing." *Id.* The Sixth Circuit has found that "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012) (collecting cases from around the country for this proposition). Indeed, the *Young* court could have been describing this case when it wrote:

> It is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies. We reject Defendants' attacks on administrative feasibility . . . .

Id. at 540. SSA has been delinquent in its duties for decades. It cannot now rely on its own faulty record-keeping in order to further allow it to evade its duties.

2. This Case Involves Common Questions of Law or Fact

To satisfy Fed. R. Civ. P. 23(a)'s commonality requirement, "[t]he Court looks for 'a common issue the resolution of which will advance the litigation.'" *Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442, 444 (N.D. Ohio 2012) (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998)). "Even one common question will suffice." *Siding*, 279 F.R.D. at 444. "[T]he commonality requirement will be satisfied as long as the members of the class have allegedly been affected by a *general* policy of the Defendant and the general policy is the focus of the litigation." *Putnam v. Davies*, 169 F.R.D. 89, 93 (S.D. Ohio 1996) (emphasis in original) (quotation and citation omitted).

Here, the common questions among all class members are whether the Subtraction Recalculation has been performed and whether any Retroactive Underpayments have been made, as required by law. Each class member is entitled to injunctive relief, forcing the Agency to perform the Subtraction Recalculation, and to issue monetary relief, in the form of any past-due benefits (*i.e.*, Retroactive Underpayments) that the Agency has wrongly withheld from them.

3. Ms. Steigerwald's Claims are Typical of Those of the Class

A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082 (quotation omitted). "However, the typicality requirement does not insist on identical claims." *In re Revco Sec. Litig.*, 142 F.R.D. 659, 666 (N.D. Ohio 1992) (citation omitted).

Here, the Agency failed to perform the Subtraction Recalculation for Ms. Steigerwald, and subsequently failed to pay her any Retroactive Underpayment she was due. Doc. 1, ¶¶ 75-80. By

definition, these facts – which have already been conceded by the Agency – make Ms. Steigerwald's claim typical to each member of the proposed class. *See* Doc. 1, ¶¶ 98-100.

4. Ms. Steigerwald and her Counsel Adequately Represent the Class Members' Interests

"Rule 23(a)(4) requires adequate representation and 'serves to uncover conflicts of interest between the named parties and the class they seek to represent.'" *Siding*, 279 F.R.D. at 445 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). "Adequacy has two requirements: '1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Siding*, 279 F.R.D. at 445 (quoting *Senter*, 532 F.2d at 525).

Here, there is no antagonism between Ms. Steigerwald's interests and the interests of the unnamed class members. To the contrary, Ms. Steigerwald has absolutely no incentive at this time to want the class members not to get paid, as the Agency has already performed the Subtraction Recalculation on her behalf and paid her the Retroactive Underpayment she was due in an attempt to moot her claim. *See* Doc. 32, pp. 11-15. Indeed, notwithstanding the fact that the Agency tried to disincentivize Ms. Steigerwald from pursuing this class action by paying her, she has refused to submit, and continues as named Plaintiff in this case.

In its evaluation of proposed class counsel, the Court should consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Before filing the Complaint, undersigned counsel and Kirk B. Roose over a span of years spent multiple months, and hundreds of hours, identifying and investigating the potential claims

in this action.[4] Counsel in this case has extensive experience in litigating class action cases, and prior success in litigating a Social Security Act class action. Doc. 1, ¶ 34. Counsel is also experienced in Social Security law and litigation of individual cases against the Agency. *Id.* With this Motion, counsel has submitted evidence showing they are qualified, experienced, and generally able to conduct the litigation.[5] As the Court is aware, Plaintiff's counsel has vigorously represented both the named plaintiff and the potential class to date on motion practice and in discovery disputes. Counsel has already dedicated over 1,000 hours of billable time to this case, and will continue to dedicate substantial resources to this litigation. Accordingly, should this Court certify a class, Plaintiff seeks appointment of the undersigned as class counsel pursuant to Fed. R. Civ. P. 23(g).

B. Certification Under Fed. R. Civ. P. 23(b)(2) is Appropriate

Certification of a Rule 23(b)(2) class is appropriate where a defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) "has been used extensively to challenge the enforcement and application of complex statutory schemes, such as suits involving the award or termination of benefits under the Social Security Act." 7AA Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, § 1775, at 73 (3d ed. 2005) (emphasis added). Should Rule 23(b)(2) apply to the class, no additional showing needs to be made above and beyond the prongs of Rule 23(a), analyzed above.

Plaintiff believes the class here may be certified by the Court solely under Rule 23(b)(2). Although Plaintiff seeks injunctive, declaratory and monetary relief, *see, e.g.*, Doc. 1, ¶ 19; *id.* at

---

4 Mr. Roose passed away on April 27, 2018.

5 *See* Firm Resumes and Bios (submitted as Exhibit B to this Motion).

pp. 20-21, courts in this Circuit have found that monetary relief may be sought in a 23(b)(2) class action where the monetary claims are "merely incidental to the claims for injunctive and declaratory relief." *Carter v. Arkema, Inc.*, 2018 WL 1613787, at *5 (W.D. Ky. 2018). The *Carter* court observed that "incidental monetary relief . . . 'flow[s] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief . . . .'" *Id.* at *5-6 (quoting *Dukes*, 564 U.S. at 365-66). *Carter* thus held that a class action for injunctive and incidental monetary relief could be certified as a 23(b)(2) class because "[t]he Court will not need to make any individualized factual or legal determinations if it must determine what monetary relief each subclass member should receive." *Id.* at *6.

The same result should hold true here. Once the Agency is found to be required to perform the Subtraction Recalculation for the members of the proposed class, the Court should not need to make any "individualized factual or legal determinations" in order to determine what each class member should receive. Instead, if the Agency performs the Subtraction Recalculation correctly, the monetary relief to individual claimant class-members, consisting of any Retroactive Underpayment due to them, will be "incidental" to the injunctive and declaratory relief order, in that it should be able to be accurately made without further Court intervention.

Plaintiff is aware of the Supreme Court's *dictum* leaving open the question of whether a 23(b)(2) class can *ever* be certified as to money damages. *See Dukes*, 564 U.S. at 360. Therefore, notwithstanding some post-*Dukes* district court precedent allowing Rule 23(b)(2) certification in cases of "incidental" monetary relief, if the Court does not feel comfortable certifying a Rule 23(b)(2) class here, Plaintiff asks, in the alternative, that the Court use "divided certification" by certifying a Rule 23(b)(2) class for purposes of injunctive and declaratory relief, and a Rule 23(b)(3) case for purposes of monetary relief. The Sixth Circuit in *Gooch v. Life Inv'rs Ins. Co.*

of Am., 672 F.3d 402, 412 (6th Cir. 2012) has at least tacitly approved such an approach,[6] district courts in this Circuit have utilized it and at least one other circuit court has explicitly affirmed its appropriateness. *See, e.g., Int'l Union v. Hydro Auto. Structures, Inc.*, 2013 WL 12109422, at *4-5 (W.D. Mich. 2013) (certifying class pursuant to Rules 23(b)(1) and (b)(2)); *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 445 (7th Cir. 2015) ("Because we conclude that the class can be certified under both Rule 23(b)(2) and 23(b)(3), we have no need to consider whether the district court should have considered certification of one particular issue."). As next explained, certification under Rule 23(b)(3) also would be appropriate.

C. Certification Under Fed. R. Civ. P. 23(b)(3) is Appropriate

Rule 23(b)(3) establishes two additional requirements not needed for certifying a Rule 23(b)(2) class. First, "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, [must] predominate over those issues that are subject only to individualized proof." *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1124-25 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 80 (2017). In this regard, "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (quotation omitted).

Here, "[t]he only individual questions would be the calculation of individual damages. Many courts have recognized that variations in potential damages awards will not defeat class certification." *Patrick v. AK Steel Corp.*, 2008 WL 4758673, at *6 (S.D. Ohio 2008) (citing *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 487 (S.D. Ohio 2004)). Additionally, as noted

---

[6] "In sum, certifying declaratory relief under Rule 23(b)(2) is permissible even when the declaratory relief serves as a predicate for later monetary relief, which would be certified under Rule 23(b)(3)." *Gooch*, 672 F.3d at 429.

supra, once the Agency is enjoined to perform the Subtraction Recalculation for the proposed class members, the individual past-due benefits owed to each proposed class member should be able to be easily calculated by the Agency, without (it is hoped) the need for Court intervention. Even though each class member might receive a differing amount of Retroactive Underpayment, differences in the amount of the past-due benefit received are no bar to certifying a 23(b)(3) class.

Second, for Rule 23(b)(3) to apply, a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), observed that '[t]he 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.'" *Smith v. Ajax Magnethermic Corp.*, 2007 WL 3355080, at *2 (N.D. Ohio 2007). Here, each individual class member's recovery likely will be relatively small.[7] The incentive for an individual class member to obtain representation and file a lawsuit against the Agency is minimal. The policy promoting class actions would be fully effectuated in this case. *See also Amchem*, 521 U.S. at 617 ("A class action solves this problem [of small individual recoveries] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (citation omitted).

These policy factors all weigh heavily in finding a class action to be a "superior" method in proceeding here. The district court in *Smith*, faced with a similar request to certify a Rule 23(b)(3) class, chose to do so. This Court should do the same, for substantially the same reasons:

> First, the relatively small amount of individual damages and the similarity of claims give class members little interest in individually controlling separate actions.

---

[7] The initial sample size of 50 potential class members provided by the Agency in response to class certification discovery requests determined that the 50 claimants were owed, if anything, between $32.00 and $10,929.23. Doc. 50-3.

> Second, the Court is unaware of any other litigation concerning these alleged . . . violations, nor is such litigation likely given the costs of litigation relative to the potential recovery on individual claims. Third, concentration of these claims in this Court is desirable, as it will streamline the resolution of the claims and conserve judicial and litigation resources. Finally, the Court is aware of no particular difficulties associated with the management of this class action, especially given the current stage of the litigation. Thus, for purposes of Rule 23(b)(3), a class action is superior to other methods of adjudication in the instant case.

Smith, 2007 WL 3355080, at *5.

V. CONCLUSION

The Court should grant the Motion, certifying a class pursuant to Federal Rule of Civil Procedure 23(b)(2) or, in the alternative, pursuant to both Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3).

Respectfully submitted,

s/Jon H. Ressler, Ohio Bar No. 0068139
ROOSE & RESSLER
A Legal Professional Association
6150 Park Square Drive
Suite A
Lorain, Ohio 44053
Telephone: (440) 985-1085
Facsimile: (440) 985-1026
jressler@rooselaw.com

s/ Ira T. Kasdan, admitted *pro hac vice*
s/ Joseph D. Wilson, admitted *pro hac vice*
s/ Bezalel Stern, admitted *pro hac vice*
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
Washington, DC 20007
Telephone: (202) 3442-8400
Facsimile: (202) 342-8451
ikasdan@kelleydrye.com
jwilson@kelleydrye.com
bstern@kelleydrye.com

Attorneys for Plaintiff and the putative class

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Memorandum in Support of Motion for Class Certification complies with the page limitations for a Standard matter, and is 15 pages long.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the putative class

EXHIBIT A

APPENDIX
(Definition List)

Concurrent Payments: Payments that a claimant becomes eligible to receive, or to have received, for both past-due SSI Payments and Title II Payments for any of the same months concurrently.

Retroactive Underpayment: The past-due benefits payment that SSA is required to make to a claimant following completion of the Subtraction Recalculation.

SSI Payments: Supplemental Security Income payments under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, *et seq.*

Subtraction Recalculation: The calculation SSA is required to make after a court or the SSA determines the amount of fees to which an attorney or qualified non-attorney representative (a "Representative") is entitled for having represented a claimant in obtaining Concurrent Payments, and after the Representative is paid such fees out of retroactive benefits. This calculation, when properly performed, yields the total amount of Retroactive Underpayment(s) payable to the claimant.

Title II Payments: Old-Age, Survivors, and Disability Insurance Benefit payments under Title II of the Social Security Act, 42 U.S.C. §§ 201, *et seq.*

Windfall Offset: A calculation SSA is required by 42 U.S.C. § 1320a–6 to apply when a claimant receives Concurrent Payments in order to ensure that the claimant does not receive more benefits than he or she would have been entitled to if the benefits had been paid when due.

EXHIBIT B

Summary of Kelley Drye & Warren LLP's Class Action Experience

Kelley Drye is a firm of more than 350 lawyers and other professionals practicing in New York, New York; Washington, D.C.; Los Angeles, California; Chicago, Illinois; Stamford, Connecticut; Parsippany, New Jersey; and Houston, Texas.

The firm has active class action practices, focusing principally on the defense of consumer class actions and wage and hour class actions. Combined, Kelley Drye attorneys have dozens of years of experience litigating class actions. Kelley Drye can draw on this wealth of experience whether it is providing representation for the defense of a class action or prosecuting a class action.

Kelley Drye attorneys have received honors for their class action work. *Law360* named the firm's consumer class action attorneys as a 2017 "Consumer Protection Practice Group of the Year." The honor recognized these attorneys' noteworthy victories in class actions, including ones before the United States Courts of Appeals for the First and Sixth Circuits. The group was also recognized in the 2017 edition of *Legal 500*, as an "excellent group exceling in class actions and mass tort litigation, with a particular niche in Telephone Consumer Protection Act (TCPA) cases."

Summary of Ira T. Kasdan, Esq.'s Class Action Experience

1. Mr. Kasdan was the lead attorney for the plaintiff class in *Greenberg v. Colvin*, No. 1:13-cv-01837-RMC, D.D.C. This class action was brought against the Social Security Administration (SSA) for failure to pay OASDI benefits that were due because of SSA's misapplication of the Windfall Elimination Provision. The case resulted in a class-wide settlement agreement. Mr. Kasdan led a team of attorneys that, *inter alia*, prepared a successful motion for class certification; negotiated and drafted the settlement agreement; and administered the settlement, including answering questions from class members. To date, more than five hundred individuals have received past-due benefits totaling over $7 million in past-due benefits pursuant to the settlement agreement. In the case, Mr. Kasdan and his team argued that fees were awardable under Section 406(b) of the Social Security Act in a class action, and, in a precedent-setting decision, the district court agreed. *See Greenberg v. Colvin,* 63 F.Supp.3d 37 (D.D.C. 2014). The court later awarded counsel twenty percent of each payment of past-due benefits SSA made as a result of the case. *See Greenberg v. Colvin*, 2015 WL 4078042, *10 (D.D.C. 2015).

2. Lead counsel in the defense of a telecommunications firm and principals in putative class action brought in United States District Court for the District of Arizona; obtained a dismissal of the claims against the defendants for lack of jurisdiction.

3. Lead counsel in defending company in advertising field against putative class action brought in a New Jersey state court; convinced plaintiff's counsel that case was unsupported and not certifiable as a class action; case settled for nominal amount.

4. Lead co-counsel in defense of a class action brought against storage company in Maryland state court; case settled without plaintiff obtaining class certification after court made favorable discovery rulings in favor of client.

Summary of Joseph D. Wilson, Esq.'s Class Action Experience

1. Mr. Wilson as an integral member of the team of attorneys that represented the plaintiff class in *Greenberg v. Colvin*, No. 1:13-cv-01837-RMC, U.S. District Court for the District of Columbia. This class action was brought against the United States Social Security Administration. The case resulted in a class-wide settlement agreement. To date, more than five hundred individuals have received past-due benefits totaling more than $7 million in past-due benefits to claimants pursuant to that settlement agreement.

2. Member of team that represented JPMorgan Chase & Co. in defense of a consolidated securities class action litigation (known as the *Newby* case) brought by Enron shareholders in the Southern District of Texas and related bankruptcy proceeding.

3. Member of team that defended a company in advertising field against putative class action brought in a New Jersey state court; case settled for nominal amount without client having to file an answer after plaintiff's counsel was persuaded that case was unsupported and not certifiable as a class action.

4. Member of team defending class action brought against storage company in Maryland state court; case settled without plaintiff obtaining class certification after court made favorable discovery rulings in favor of client.

Summary of The Roose & Ressler Law Firm and Jon H. Ressler, Esq.'s Experience with Social Security Law

- Roose & Ressler, A Legal Professional Association -

Roose & Ressler is a northern Ohio law firm with staffed offices in Lorain, Toledo, and Wooster. In its 40-year history, the firm has focused on the representation of disabled claimants for Social Security Disability and Supplemental Security Income benefits before the Social Security Administration and before the federal district courts. The firm currently consists of four attorneys. The firm's attorneys have frequently presented at various continuing legal education seminars.

- Jon H. Ressler, Esq. -

Jon Ressler has represented disabled claimants for Social Security Disability and Supplemental Security Income benefits before the Social Security Administration since 1997, starting at the Wooster-Wayne Legal Aid Society. He has represented thousands of claimants at all levels of administrative appeal and has briefed cases and represented claimants at the federal district federal court level. He joined Roose & Ressler in 2000 and became a principal in 2003.

He has lectured on Social Security disability law at conferences of the National Organization of Social Security Claimants' Representatives (NOSSCR) and other Continuing Legal Education seminars for lawyers. He most recently presented on "Social Security Disability: Proving Mental Impairment" in 2017 and "Social Security Disability Bootcamp" in 2015.

He is a member of the National Organization of Social Security Claimants' Representatives, the Ohio State Bar Association, and the bar associations of Wayne, Richland, and Lorain Counties. Mr. Ressler earned his B.A. degree at the University of Akron and his J.D. degree at Case Western Reserve University.