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

STEPHANIE LYNN STEIGERWALD, *Plaintiff*, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. *Defendants*.	)	CASE NO.: 1:17-CV-1516 JUDGE JAMES S. GWIN MAGISTRATE JUDGE DAVID RUIZ **OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

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STATEMENT OF THE ISSUES

1. Whether the Court should deny Plaintiff's motion for class certification where she has defined a class that would include thousands of individuals over whom the Court lacks jurisdiction and would include beneficiaries who were awarded benefits up to ten years prior to the time period about which she has submitted evidence.
2. Whether the Court should deny Plaintiff's motion for class certification where she has failed to meet the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a), and has failed to show that the class she seeks to represent comports with any of the types of classes certifiable under Rule 23(b).

SUMMARY OF THE ARGUMENT

Certification of any case as a class action, particularly one alleging a systemic pattern and practice, requires proof that putative class members' claims depend upon a common contention of fact or law central to the validity of each claim, and that the class representative's claim is typical, meaning that it arises from the same event or course of conduct as those of absent class members. The putative class must also fit one of the types of class actions permissible under Federal Rule of Civil Procedure 23(b); as relevant here, the class must either challenge a uniform act or failure to act by the defendant relative to all class members, *id.* § (b)(2), or show that class issues predominate and class adjudication is superior in an action seeking money damages, *id.* § (b)(3).

Plaintiff has failed in all of these respects. As with her recent Motion for Summary Judgment, Plaintiff simply points to evidence that the agency has not yet recalculated the windfall offset for some 28,510 individuals and insists that this undisputed fact necessarily entitles her to certification of a class consisting of not only those individuals, but many more as well. The mere fact that the agency may owe a duty to a group of individuals does not suffice to show that those claims may be resolved as a class action—nor does it show that Plaintiff can serve as a class

representative. As shown below, Plaintiff's class definition is fatally overbroad in that it includes individuals over whose claims the Court lacks jurisdiction and because it purports to include beneficiaries who were awarded benefits a decade prior to the evidence she has submitted. Furthermore, Plaintiff has not satisfied the commonality and typicality requirements of Rule 23(a). And she has not shown that the class she seeks to represent comports with any of the types of classes permissible under Rule 23(b). Plaintiff's motion for class certification should be denied.

BACKGROUND

Plaintiff sued the Social Security Administration (SSA) on July 18, 2017, alleging that SSA failed to perform a recalculation in connection with her claim for social security benefits. More specifically, Plaintiff alleged that because her benefit amount was subject to a windfall offset in light of her entitlement to benefits under two different programs, and because her attorney was entitled to fees in connection with work on her case, SSA should have recalculated her windfall offset to exclude authorized representatives' fees, resulting in an additional payment to her. (Compl., ECF No. 1, PageID # 1.) She styled her complaint as a putative class action. Although Plaintiff had not at that time identified any other individuals for whom SSA had not yet performed a windfall offset recalculation, she premised her class claims on allegations that "SSA continues to fail to regularly perform the Subtraction Recalculation and pay the Retroactive Underpayment." (*Id.* PageID # 5.); (*see also id.*) ("As a consequence of the wrongful practices described above …); (*id.*) ("This class action also seeks to permanently enjoin the SSA from applying its current and past practice … "); (*id.* PageID # 15.) ("CONSISTENT WITH ITS PATTERN AND PRACTICE, DEFENDANT SSA FAILS TO MAKE THE RETROACTIVE UNDERPAYMENTS TO PLAINTIFF") (capitalization original).

SSA has identified 28,510 individuals for whom SSA performed a windfall offset calculation before representatives' fees were authorized, for whom representatives' fees were then

paid out of retroactive benefits between September 1, 2012, and October 31, 2017, and for whom SSA has not yet recalculated the windfall offset to exclude representatives' fees and may be due additional past-due benefits. (Attach. A, ECF No. 50-2, PageID # 666.) These 28,510 individuals are the only identified individuals for whom Plaintiff could move for class certification.

Plaintiff moved for summary judgment on April 16, 2018. SSA opposed that motion on April 30, 2018, on the basis that Plaintiff failed to put forth any evidence to support her allegations that a systemic pattern and practice exists. Plaintiff replied on May 14, 2018, and the motion remains pending.[1] Plaintiff has now moved for certification of a class that would include members whose claims go back some ten years before the claims of the 28,510 individuals mentioned above. Aside from reference to the 28,510 claimants already mentioned, Plaintiff's motion is based on legal argument unsupported by evidence.

LEGAL STANDARDS

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Class certification is governed by Federal Rule of Civil Procedure 23, and Plaintiff bears the burden of proving that each requirement of Rule 23 is satisfied. *See In Re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466-67 (6th Cir. 2017). "Rule 23 does not set forth a mere pleading standard," *Dukes*, 564 U.S. at 350; rather, Plaintiff is required "to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* "Class certification is appropriate if the court finds, after conducting a 'rigorous analysis' that the requirements of Rule 23 have been met." *In*

[1] Defendants' Motion for Referral to Mediation also remains pending. (*See* ECF No. 56.)

Re Whirlpool, 722 F.3d at 851 (quoting *Dukes*, 564 U.S. at 351). Ordinarily, the class determination should be predicated on evidence presented by the parties concerning the maintainability of the class action, and it necessarily may entail some overlap with the merits of the plaintiff's underlying claim. *Id*.; *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 ("a class is not maintainable as a class action by virtue of its designation as such in the pleadings"). Plaintiff has not met her burden to demonstrate that common questions of law and fact exist or that her claims are typical of those of the putative class; nor has she shown that this case fits any of the types of class actions which may be certified under Rule 23(b). Class certification should be denied.

ARGUMENT

I. Plaintiff's Putative Class Definition is Substantially Overbroad

Before addressing the Rule 23 requirements, as a threshold matter, a court must ascertain that the putative class is appropriately defined. "A court therefore should deny class certification where the class definitions are overly broad …." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 29 (D.D.C. 2012) (quotation marks omitted), *vacated on other grounds*, 725 F.3d 244 (D.C. Cir. 2013); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 137-38 (3d Cir. 2000) (affirming denial of certification based on overly broad class definition). Because certification is appropriate only after conducting a "rigorous analysis," *Dukes*, 564 U.S. 351, "the class determination should be predicated on *evidence* presented by the parties concerning the maintainability of the class action." *In re Whirlpool*, 722 F.3d at 851 (emphasis added); *accord In re Am. Med. Sys., Inc.*, 75 F.3d at 1079. As demonstrated below, Plaintiff has failed to define a properly certifiable class because the putative class she seeks to represent likely includes thousands of members over whose claims the Court lacks jurisdiction and because she has submitted no evidence to support her request to include beneficiaries whose claims date back to 2002.

A. The Proposed Class Cannot Be Certified Because It Includes Members Over Whose Claims the Court Lacks Jurisdiction.

The Social Security Act provides that district courts have jurisdiction to conduct judicial review of claims only to the extent explicitly authorized. *See* 42 U.S.C. § 405(h). For the type of claim at issue here, district courts can exercise review only if a claimant has received a final decision of the Commissioner, *see id.* § 405(g). Section 405(g) sets 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 Heckler v. Ringer*, 466 U.S. 602, 617 (1984); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) (A "'final decision' is a statutorily specified jurisdictional prerequisite.").

Rule 23 does not relieve a plaintiff of the burden to establish the court's jurisdiction, and the Supreme Court has held that both named and unnamed members of a class must meet the jurisdictional requirements of § 405(g). *See Yamasaki*, 442 U.S. at 701 (holding unnamed members of class must meet jurisdictional requirements of § 405(g)); *Salfi*, 422 U.S. at 764.

Although Plaintiff purports to invoke § 405(g) as a jurisdictional basis for her claims, (Compl. ¶ 20, PageID # 5), she ignores the express jurisdictional limit imposed by that provision. Indeed, her Motion for Class Certification includes no attempt to establish that the Court has jurisdiction over unnamed class members. Her class definition is therefore overbroad because it purports to include individuals who never presented to the Commissioner a claim regarding the recalculation of their windfall offset to exclude representatives' fees from countable income. The Court lacks jurisdiction over such beneficiaries and should deny certification of the proposed class. *See Wheeler v. Heckler*, 719 F.2d 595, 600 (2d Cir. 1983) ("With respect to the class plaintiffs, we agree with the District Court that they failed to surmount the threshold barrier imposed by the non-

waivable jurisdictional requirement of section 405(g)"); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560–61 (N.D. Cal. 2007) (restricting class to individuals who presented and exhausted).

Although this Court previously found that Plaintiff herself met the presentment requirement, that finding does not apply to absent class members. This Court reasoned that a letter from Plaintiff's attorney to SSA about her specific situation satisfied presentment because:

> SSA knew Plaintiff Steigerwald had demanded SSA perform a second, updated windfall offset calculation, and SSA had all of the information it needed to perform this calculation. Presentment does not require more than this. The Court finds that by making SSA aware that the attorneys' fees issue was final and that SSA should release her withheld benefits, Plaintiff Steigerwald presented her claim.

(Op. & Order, ECF No. 32, PageID # 473-477.) Plaintiff has put forth no evidence, and indeed has made no argument, that unnamed members of the proposed class have presented their claims at all—let alone by alerting the agency to the finality of the fee request, as did Plaintiff's attorney.

Plaintiff might attempt to rely in her Reply on her previous arguments, not reached by the Court, that presentment by the unnamed class members is satisfied by an initial claim for benefits or the filing of a fee request. (Opp'n to Mot. to Dismiss, ECF No. 25, PageID # 403.) Those arguments should be rejected. Plaintiff has not included any reference to presentment in her Motion for Class Certification or articulated how her previous arguments apply in this context, and she has therefore waived such arguments. *Cf. Lexicon, Inc. v. Safeco Ins. Co. of Am., Inc.*, 436 F.3d 662, 676 (6th Cir. 2006) (confirming that arguments raised in reply should not be considered).

Moreover, a holding that presentment is satisfied by any initial claim for benefits would eviscerate the requirement itself. 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 for Ms. Steigerwald) without burdening the courts. *See Shalala*, 529 U.S. at 14. Allowing an initial claim for benefits to present a later claim would undermine the very purpose of the requirement—with the result that virtually any case even remotely connected to a benefits claim

could proceed directly to federal court. (*See* Reply, ECF No. 30, PageID # 454.) Numerous courts have rightly rejected such arguments. *Action All. of Senior Citizens v. Leavitt*, 483 F.3d 852, 857 (D.C. Cir. 2007) (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;" 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*, 240 F.R.D. at 557 (rejecting argument that initial application for benefits satisfied presentment requirement because it "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"). The filing of a fee request, which necessarily comes before any fee authorization of the sort that is a necessary predicate for Plaintiff's merits position, likewise could not have presented the claim of unnamed class members that SSA failed to perform the recalculation after representatives' fees were authorized. (*Id.* PageID # 455.)

Plaintiff has not established that absent putative class members ever presented any claim for recalculation of a windfall offset to the agency. This Court should therefore deny Plaintiff's Motion for Class Certification or, at a minimum, exclude from the class definition individuals who never presented their claims to the Commissioner.

B. Plaintiff Fails to Provide Evidence to Support Certification of a Nationwide Class Dating Back to 2002.

Plaintiff asks this Court to certify a class of individuals who, among other requirements, "became eligible to receive Concurrent Payments between March 13, 2002 and March 13, 2018." (ECF No. 55-1, PageID # 749.) This request is substantially overbroad because, as Plaintiff herself admits, she "at this time has no exact data regarding" any putative class members prior to

September 1, 2012. (*Id.* PageID # 751.) As support, Plaintiff asserts that, because SSA identified 28,510 beneficiaries who were awarded benefits between September 1, 2012 and October 31, 2017, and for whom SSA has not yet performed a windfall offset recalculation, that group of individuals "is likely a fraction of the entire class." (*Id.* PageID # 750.) This Court can overlook her evidentiary failure, Plaintiff insists, by "assuming SSA's failure rate remained constant" over a *sixteen year period*. (*Id.* PageID # 751.) Plaintiff's argument is specious: she bears the burden to establish the existence of a certifiable class, and this Court cannot infer or assume that the putative class is broader by a decade more than the relevant evidence could support. [2]

Plaintiff's attempts to avoid this outcome are non-sequiturs. She first contends the lack of pre-2012 evidence is unnecessary because "[t]he only evidence that the Agency has proffered of its compliance with the laws requiring it to perform the Subtraction Recalculation is the existence of a settlement agreement" in *Willis v. Sullivan*, 730 F. Supp. 785 (M.D. Tenn. 1990), and because, Plaintiff alleges, "*[t]he Agency* has no proof that SSA's failure sprouted … on September 1, 2012". (ECF No. 55-1, PageID # 747)[3] (emphasis added). These transparent attempts to shift Plaintiff's burden to prove class certification to the agency cannot excuse her failure to proffer pre-2012

[2] Plaintiff cites *Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir. 1976) to support her argument that the Court may infer the class extends to March 2002. (ECF No. 55-1, PageID # 752.) Plaintiff's reliance is misplaced. Although *Senter* held that in ruling on a motion for class certification, the court may "consider reasonable inferences drawn from facts before him at that stage of the proceedings," *Senter*, 532 F.2d at 523, Plaintiff asks the Court to go much farther than that here. Plaintiff asks the Court to extend the class by ten years based on her own speculation and without providing any relevant evidence that the problem she alleges existed in March 2002. Plaintiff "may not rely on pure speculation to satisfy Rule 23's requirements." *Owner Operator Indep. Drivers Assoc. Inc. v. Arctic Express Inc.*, No. 2:97-CV-750, 2001 WL 34366624, at *4 (S.D. Ohio Sept. 4, 2001).

[3] Plaintiff also relies on *Guadamuz v. Heckler*, 662 F. Supp. 1060 (N.D. Cal. 1986), *rev'd on other grounds sub nom. Guadamuz v. Bowen*, 859 F.2d 762 (9th Cir. 1988). That case resulted in SSA adopting the very POMS provision upon which she bases her claims in this lawsuit and therefore cannot support her contention that a class should be certified beginning March 13, 2002.

evidence. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (granting writ of mandamus and instructing district court to decertify class where "the district judge impermissibly shifted the burden of proof . . . ."). Even putting that aside, *Willis* was settled by entry of an agreed order in 1993, with a specific finding by the presiding court that "the government ha[d] completed its obligations under the settlement agreement" as of March 12, 2002. (Attach. A, ECF No. 41-1, PageID # 539.) Plaintiff makes no attempt to justify her assumption that the agency fell out of compliance with that order the very next day; that case was resolved to the satisfaction of the court and simply provides no evidence whatsoever to support certification of a class dating back to 2002. Despite Plaintiff's attempts to distort the legal standards applicable to this case, SSA has no burden to show that it "remained in compliance after March 12, 2002."[4] (ECF No. 55-1, PageID # 747.)

Plaintiff's attempted reliance on two irrelevant reports from SSA's Office of Inspector General (OIG), (Compl. ¶¶ 44-74, PageID # 10-15), cannot carry her burden either. The agency has already provided this Court the declaration of James Klein, Acting Deputy Assistant Inspector General for Audit-Program Audits and Evaluations, attesting that those reports "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." (Klein Decl. ¶ 3, ECF No. 52-1, PageID # 703.) Instead, the audits examined whether windfall offset actions were processed at all; if processed, whether there was an obvious clerical error or an error in failing to pay the amount that the SSA had determined was due; and whether the windfall offset determinations were processed in a timely manner. (*Id.* ¶ 12.) The audits simply did not examine whether SSA was correctly and consistently accounting for representatives' fees. (*Id.*) To the contrary, Plaintiff's

[4]Plaintiff brought to the Court's attention a discovery dispute on January 30, 2018, seeking to compel SSA to provide class certification discovery to 2002. (ECF No. 34, PageID # 484.) Plaintiff withdrew her discovery dispute on March 8, 2018. (Order, ECF No. 46, PageID # 626.)

attempted reliance on the OIG Reports impermissibly conflates the general windfall offset calculation with the specific issue in this case: whether representatives' fees are consistently excluded from Title II benefits countable as income in *recalculating* a windfall offset. (*See* ECF No. 55-1, PageID # 752) (insisting that the OIG Reports "indisputably" provide support for Plaintiff's claim without acknowledging that those reports concern a separate calculation from that at issue here)). The Court's order denying the motion to dismiss in this case recognizes that Plaintiff's claim is limited to challenging the windfall offset *recalculation*, (ECF No. 32, PageID #469) (citing Compl. ¶¶ 11-15). It is undisputed that Plaintiff has not challenged her initial windfall offset calculation, which she concedes the agency performed correctly. (Compl. ¶¶ 77-78, PageID #15-16.) Because the OIG Reports analyzed an entirely distinct issue, they do not, as Plaintiff asserts, "suggest the Agency cannot fulfill its legal obligations." (ECF No. 55-1, PageID # 752.)

Finally, Plaintiff has provided no basis for the Court to credit her assertion that the class should include individuals awarded benefits through March 13, 2018. Plaintiff premises her argument on an unsupported assertion that SSA "must recalculate the windfall offset *immediately* upon receiving notice of a finalized attorney's fee," (*id.* PageID # 747 n.2), citing only POMS SI 02006.210(B). That provision, which summarizes step-by-step procedures to subtract authorized representatives' fees from retroactive Title II benefits in windfall offset cases, does not impose a requirement to complete the recalculation immediately upon authorization of representatives' fees.[5] Nor has Plaintiff provided any authority for her assertion that the agency is required to perform this complex calculation immediately upon receipt of the necessary information (i.e., the final,

[5] Step 2 of POMS SI 02006.210(B) instructs:

> Upon receipt of a fee authorization notice in fee petition cases or when the claimant/representative notifies you that a fee has been determined, or upon completion of preparation of the notice based upon the title XVI past-due benefits, use the notice as the source of the needed fee information (per SI 02006.202.)

authorized representative's fee). Instead, she selectively quotes from the POMS provision and conflates the field office's receipt of a fee authorization notice with the authorization of the fee petition in the first instance. The field office does not authorize fee petitions; they are authorized by a payment center or a hearing office, and authorization of the fee petition must then be communicated to a field office. POMS GN 03950.005.015. Authorization of a fee petition by an administrative law judge (ALJ) in a hearing office, for example, first requires coordination between the ALJ and the payment center. In general, the payment center issues a payment from the past due Title II benefits to the representative based on the authorized fee. Only then does the payment center notify the field office of the fee approval and amount issued to the representative from the past due Title II benefit. POMS GN 03930.080C.1.

Similarly, Plaintiff provides no support for her argument that SSA should be permitted only 60 days to complete the recalculation; to the contrary, agencies should be given a reasonable time to complete a required action when no specific time is provided by statute—generally much more than 60 days. *See generally*, *Blankenship v. Sec'y of HEW*, 587 F.2d 329 (6th Cir. 1978) (declining to impose 90 day limit on agency action); *Heckler v. Day*, 467 U.S. 104, 119 (1984) (holding that imposing a class-wide limit on adjudicating disability claims would "be an unwarranted judicial intrusion into this pervasively regulated area"). And the notice that SSA provides to beneficiaries upon authorization of representatives' fees instructs them to "contact SSA" 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." (Ex. A8 to Mot. to Dismiss, ECF No. 18-2, PageID # 287); *see also* 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). Given that no duty to

immediately recalculate the windfall offset upon payment of fees exists, Plaintiff has provided no basis for the class to extend to March 13, 2018.

In short, Plaintiff has not met her burden to support certification of a class predating September 1, 2012 or postdating October 31, 2017. Even if she could satisfy each element of Rule 23—and she cannot—any class this Court certifies should be limited to no more than the 28,510 individuals identified in discovery.

II. Plaintiff's Proposed Class Fails to Satisfy Rule 23(a)

Under Rule 23(a), the party seeking certification must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Plaintiff failed to identify common questions of law or fact capable of classwide resolution. Furthermore, she has not developed any argument that her claims are typical of the putative class and has therefore waived the issue.

A. Plaintiff Has Not Identified Common Questions of Law or Fact That Can be Resolved in a "Single Stroke."

A class action may not be certified unless "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This means Plaintiff is required "to demonstrate that the class members have suffered the same injury." *Dukes*, 564 U.S. at 350. The Supreme Court has cautioned that the language of Rule 23(a)(2) "is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'" *Id.* at 349 (citations omitted). The "claims must depend upon a common contention … of such a nature that it is capable of classwide resolution." *Id.* at 350. Determination of whether the contention is true or false must "resolve an issue that is

central to the validity of each one of the claims in one stroke." *Id.*; *see also id.* at 352 (requiring "some glue holding the alleged *reasons* for all those [challenged] decisions together").

Because Plaintiff bases her case on an alleged pattern and practice by SSA of avoiding its obligation to recalculate the windfall offset, such "proof of commonality necessarily overlaps with the merits contention that [SSA] engages in a *pattern or practice* … ." *Id.* Critically, it is not enough to show "merely that [putative class members] have all suffered a violation of the same provision of law." *Id.* at 350. Rather, their "claims must depend upon a common contention … of such a nature that it is capable of classwide resolution." *Id.*; *see also Miller v. Countrywide Bank, N.A.* (*In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.*), 708 F.3d 704, 707-10 (6th Cir. 2013).

Class certification must be denied here because Plaintiff has failed to demonstrate the existence of common questions of law or fact capable of classwide resolution. The only common questions Plaintiff purports to identify consist of "whether the Subtraction Recalculation has been performed and whether any Retroactive Underpayments have been made, as required by law." (ECF No. 55-1, PageID # 754.) This bare assertion is insufficient. As set forth fully in Defendants' Opposition to Summary Judgment, (ECF No. 52, PageID ## 687-88), Plaintiff has established nothing more than that some 28,510 people might be due additional benefits—but that does not, in and of itself, demonstrate the existence of a systemic pattern and practice (especially when, as Plaintiff admits, the agency performs the recalculation as required in greater than 50% of cases). Just as Plaintiff has failed to identify any particular error or policy underlying her pattern-and-practice claim, *see Unan v. Lyon*, 853 F.3d 279, 290-91 (6th Cir. 2017), she has similarly failed to point to specific common questions of law or fact amenable to classwide resolution. It is not enough to posit that putative class members "have all suffered a violation of the same provision of law," *Dukes*, 564 U.S. at 350. The only arguably common question she points to—whether SSA has violated 42 U.S.C. § 1320a-6, 20 C.F.R. § 416.1123(b)(3), and POMS SI 02006.200—is articulated

at an unacceptably high level of generality and does not have a common answer that may be satisfied with the same proof. Even if it did, Plaintiff has not attempted to show as much. Plaintiff has offered no evidence—or even theorized—as to whether the alleged failure to recalculate the windfall offset resulted from human errors, insufficient or outdated systems, computer malfunctions, the failure of individuals to adhere to agency policy, or some combination thereof. Her failure to identify any common questions the resolution of which would advance her pattern and practice claim[6] dooms her attempt to establish commonality.

B. Plaintiff Has Not Established That Her Injury is Typical.

Plaintiff acknowledges that 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 (quoted at ECF No. 55-1, PageID # 749). Despite reciting this language, Plaintiff fails to identify any "event or practice or course of conduct" or even a cogent theory, underlying her claim that SSA has a pattern and practice of failing to perform the windfall offset recalculation to account for attorney's fees. Her sole assertion regarding typicality is that "the Agency failed to perform the Subtraction Recalculation for Ms. Steigerwald, and subsequently failed to pay her any Retroactive Underpayment she was due" and that "[b]y definition, these facts—which have already been conceded by the Agency—make Ms. Steigerwald's claim typical to each member of the proposed

[6] After the agency opposed summary judgment on the ground, *inter alia*, that Plaintiff had failed to submit any evidence to support her pattern and practice claim, Plaintiff attempted in her reply to disavow the reliance in her complaint on pattern-and-practice allegations. (ECF No. 54, PageID # 721-22.) This attempt is unavailing. As demonstrated in the Background section of this opposition, *supra*, Plaintiff's complaint is replete with examples of her reliance on pattern and practice allegations to support her class claims. And in any event, the Social Security Act is not a strict-liability statute; Plaintiff is not entitled to judgment automatically by showing that the agency may owe an unfulfilled duty to individuals. As explained above, Plaintiff is incorrect to suggest that the sort of recalculation at issue here must be done within her preferred timeframe.

class." (ECF No. 55-1, PageID ## 749-50.) This articulation fundamentally misframes the typicality inquiry; it is not enough merely to set forth facts tending to show that a group of people may have suffered the same injury without even attempting to identify a "practice or course of conduct" alleged to have caused those injuries. Moreover, Plaintiff's assertions regarding typicality are so perfunctory and undeveloped that the Court may deem this issue waived. *See Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 257 n.1 (6th Cir. 2012) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (quotation omitted). This alone provides ground to deny Plaintiff's motion.[7]

III. Plaintiff's Proposed Class Fails to Satisfy Rule 23(b)

Compliance with Rule 23(a) is not enough: If those requirements have been met, a plaintiff then must demonstrate that the proposed class is maintainable under at least one of the prongs of Rule 23(b), which describes the types of cases that are maintainable as class actions. *See Dukes*, 564 U.S. at 345. "No class that fails to satisfy all four of the prerequisites of Rule 23(a) may be certified, and each class meeting those prerequisites must also pass at least one of the tests set forth in Rule 23(b)." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). Accordingly, "the unstated implication of Rule 23(b) is that *there are cases that satisfy the Rule 23(a) criteria*—numerous individuals with common questions whose rights are being pursued by an adequate class representative with typical claims—*but that are unworthy of class certification on those grounds alone*." 2 Newberg on Class Actions § 4:1 (5th ed.) (emphasis added). Even if Plaintiff could satisfy the commonality and typicality requirements of Rule 23(a) and her class

[7] Because as discussed *supra* Plaintiff has not established that the Court has jurisdiction over any other members of the putative class, she likewise cannot meet her burden to show that the class is so numerous that joinder is impractical. Fed R. Civ. P. 23(a)(1).

definition were not substantially overbroad, she has failed to demonstrate that the putative class here fits either Rule 23(b)(2) or (b)(3), the two aspects of the rule on which she relies.

A. Plaintiff Has Not Established The Requirements for a Mandatory Class Under Rule 23(b)(2).

Plaintiff urges certification under Rule 23(b)(2), "which applies when 'the party opposing the class 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.'" *Dukes*, 564 U.S. 345 (quoting Fed. R. Civ. P. 23(b)).[8] The Supreme Court interpreted this to "appl[y] only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* at 360. Class relief must be "indivisible," premised on "conduct … that … can be enjoined or declared unlawful only as to all of the class members or as to none." *Id.* "[T]he (b)(2) class is distinguished … by class cohesiveness … Injuries remedied through (b)(2) actions are really group, as opposed to individual, injuries." *Homes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n.8 (11th Cir. 1983); *see also Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000). "The requirement focuses on the defendant and questions whether it has a policy that affects everyone in the proposed class in a similar fashion." 2 Newberg on Class Actions § 4:28. A (b)(2) class is a mandatory class because "the relief sought must perforce affect the entire class at once." *Dukes*, 564 U.S. at 361-72.

[8] Plaintiff appears to argue that certification under Rule 23(b)(2) is proper anytime the Rule 23(a) requirements have been met and a plaintiff seeks declaratory or injunctive relief. After saying "[s]hould Rule 23(b)(2) apply to the class, no additional showing needs to be made above and beyond the prongs of Rule 23(a)," Plaintiff does not analyze the questions of class cohesiveness and the all-or-none nature of relief that are central to Rule 23(b)(2). (*See* ECF No. 55-1, PageID # 751.) This is not supported by applicable law. "Once those [Rule 23(a)] conditions are satisfied, the party seeking certification must also demonstrate that it falls within at least one of the subcategories of Rule 23(b)."). *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079.

In this regard, Plaintiff asserts that Rule 23(b)(2) is satisfied because she seeks declaratory and injunctive relief and that money owed to putative class members would be incidental to that injunctive relief. (ECF No. 55-1, PageID # 751.) But this reverses the proper inquiry; Plaintiff is not entitled to certification under (b)(2) simply because she seeks equitable relief. Rule 23(b)(2) also contains an "act requirement," which "focuses on the defendant and questions whether the defendant has a policy that affects everyone in the proposed class in a similar fashion," Newberg § 4:28; *Senter*, 532 F.3d at 525 (confirming that allegations of classwide discrimination properly certified under (b)(2) because claim that defendant "acted or refused to act on grounds generally applicable to the class … is susceptible to a single proof and subject to a single injunctive remedy") (quoting Fed. R. Civ. P. 23(b)(2)). Tellingly, Plaintiff's discussion of Rule 23(b)(2) is devoid of any analysis of this requirement and its application to Plaintiff's putative class. Nowhere does she identify the uniform actions or failures to act that she believes underlie her claim.

More critically, Plaintiff makes no effort to reconcile this case with the fact that certification under (b)(2) is proper only where "the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360. That directive cannot be squared with the claim here—which is, by nature, an *individual* inquiry into whether the agency has properly excluded representatives' fees from countable income for each beneficiary. This would be a very different case were, for example, Plaintiff challenging an express policy of the agency that, in contravention of its statutory requirement, it had *never* performed a windfall offset calculation and refused to do so. But Plaintiffs' claim here is nothing of the sort—rather, she claims that SSA is inconsistent in fulfilling its obligation.[9] That claim is not "indivisible" in any

[9] In fact, Plaintiff admits in her Motion for Class Certification that the agency does perform the windfall offset recalculation in greater than 50% of cases. (*See* ECF No. 55-1, PageID #747.) Plainly, Plaintiff is not alleging, and the agency does not have, a general policy *not* to exclude

way, s*ee id.*, since each putative class member could call their local field office and request a recalculation at any time. In fact, SSA's notice specifically advises beneficiaries to do so if they have not received anything from the agency 90 days after authorization of attorney's fees. This is not a case where "class members' interests are so inherently intertwined that final injunctive relief for some would necessarily be final injunctive relief for all," Newberg § 4:33, because each beneficiary's claim stands alone. Absent some identifiable agency policy or practice that necessarily affects all class members, this case is fundamentally unlike the mandatory classes that properly may be certified under Rule 23(b)(2). Plaintiff's cursory references to her request for injunctive relief do not cure that deficiency.

B. This Case Cannot Be Certified Under Rule 23(b)(3) Because There Are No Monetary Damages At Issue.

Plaintiff alternatively argues that a class may be certified under Rule 23(b)(3), which allows certification when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Supreme Court has explained that this "'most adventuresome' innovation … added to the complex-litigation arsenal class actions *for damages* designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (emphasis added) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'") (quoting Prefatory Note to

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representative's fees from qualifying income when performing a windfall offset.

the 1965 Rules Amendments). Indeed, the Court recently confirmed: "Given that structure [of Rule 23(b)], we think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes*, 564 U.S. at 362 (explaining that greater procedural protections contained in (b)(3) are designed to address due-process concerns specific to absent class members being bound by judgment affecting entitlement to monetary relief); *see also Coleman v. Gen. Motors Corp.*, 296 F.3d 443, 448 (6th Cir. 2002) (explaining that heightened notice and opt-out requirements "are necessary in Rule 23(b)(3) classes precisely because claims for money damages involve individual interests that are necessarily heterogenous in nature."); 2 Newberg on Class Actions § 4:47 ("Rule 23(b)(3) class actions are money damages class actions.").

For this reason (among others), Plaintiff's attempt to certify a class under Rule 23(b)(3) fares no better than under 23(b)(2). In endeavoring to show that class issues predominate—the first requirement of 23(b)(3)—Plaintiff contends that the "*only* individual questions would be the calculation of individual damages." (ECF No. 55-1, PageID # 753) (emphasis added, quotation omitted). But that statement evidences a fundamental misunderstanding of both the relief potentially available to putative class members here as well as the nature of a claim under § 405(g) of the Social Security Act. As explained in Defendants' Opposition to Summary Judgment, (ECF No. 52, PageID # 695-96), any underpayments due to putative class members here are not damages. Not only is there no waiver of sovereign immunity for damages under the Social Security Act, *see Giesse v. Sec'y of Dep't of Health & Human Servs.*, 522 F.3d 697, 703–04 (6th Cir. 2008), but an equitable action seeking payment of money owed by the government does not seek "'damages' as that term is used in the law." *Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988) ("Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for … 'the

recovery of specific property or monies' … The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). This suit seeks injunctive relief requiring the government to perform the windfall offset recalculation for putative class members and pay any money already owed, which would presumably be accomplished by way of remand to the agency under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), not recompense for an injury by way of a money judgment.

This point is critical, given that a (b)(3) class is designed for money-damages suits. Despite the fact that Defendants fully raised this issue in their Opposition to Summary Judgment, Plaintiff's Motion for Class Certification does not identify a single case in which a class was certified under (b)(3) where money damages were not at issue. Defendants likewise have failed to find any such authority. Rather, Plaintiff continues to insist that underpayments potentially due to putative class members are money damages, *see* (ECF No. 55-1, PageID # 753-54), despite on-point Supreme Court authority to the contrary, *see Bowen*, 487 U.S. at 893.

Plaintiff has failed to establish that class issues predominate. Subdivisions (b)(3) and (a)(2) both require that common issues exist, "but subdivision (b)(3) contains the more stringent requirement that common issues 'predominate' over individual issues." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996.) Given that the *only* issue Plaintiff purports to identify is the calculation of individual damages, (*see* ECF No. 55-1, PageID # 758), in this non-damages case, she has not shown that any classwide issues exist—much less that they predominate. Plaintiff's arguments are unavailing and the Court should deny her request for certification under Rule 23(b)(3).

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion for Class Certification. At a minimum, the Court should reject Plaintiff's overbroad proposed class definition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned declares under penalty of perjury that this ***Opposition to Plaintiff's Motion for Class Certification*** is 20 pages in length and is within the page limitation for standard track cases.

/s/ Erin E. Brizius
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, the foregoing ***Opposition to Plaintiff's Motion for Class Certification*** 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.

/s/ Erin E. Brizius
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