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.	)	**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**
	)	
Defendants.	)	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

Plaintiff Stephanie Steigerwald ("Plaintiff" or "Ms. Steigerwald"), by undersigned counsel, respectfully submits this Reply in Support of Her Motion for Class Certification (the "Reply"). In support thereof, Ms. Steigerwald states as follows:

I. INTRODUCTION

Defendants the Social Security Administration ("SSA") and Nancy A. Berryhill (together, the "Agency") argue in Opposition to Ms. Steigerwald's Motion for Class Certification (the "Opposition") that, despite the fact that SSA has failed to perform the Subtraction Recalculation for tens of thousands of claimants,[1] no class should exist. At this relatively late date in this litigation, the Agency asserts that procedural hurdles remain barring the formation of a cognizable class. And, even without those procedural issues, the Agency asserts, no class could exist.

The Agency is wrong.

II. ARGUMENT

A. The Definition of the Proposed Class is Appropriate

1. Every Member of the Proposed Class Has Presented His or Her Claim

The Agency re-hashes a presentment argument that can now be dealt with in short shrift. In its Opposition to Summary Judgment, the Agency conceded that "putative class members *already are entitled* to the past-due benefits sought in this suit." Doc. 52, p. 12 (emphasis added). As the Agency explained, any money owed here derives from the claims of Plaintiff and the putative class members that are not new: "Here, each putative class member has previously received a favorable determination awarding benefits . . . Any additional money owed does not result from a new *claim* for benefits . . . ." *Id.*, p. 14 (emphasis in original).

[1] This and other defined terms used but not defined herein are defined in the Appendix located at Doc. 55-2.

Now, in opposition to class certification, the Agency makes the direct opposite argument, stating: "Allowing an *initial claim* for benefits to present *a later claim* would undermine the very purpose of the [presentment] requirement." Doc. 57, p. 11 (emphasis added). But the Agency cannot overcome its prior, factual admissions in its Opposition to Summary Judgment that the putative class members are already entitled to money because there is no *new claim* here, but rather that their entitlement is based on the *initial* claim that they had made.[2]

Given the Agency's concession that there is no new claim involved, in addition to its prior admission that money is owed here, Doc. 50-1, pp. 9-10, none of the members of the putative class would have to re-present any claim – which was already presented when each of those individuals initially filed for Title II and SSI benefits. *See Linquist v. Brown,* 813 F.2d 884, 887 n.11 (8th Cir. 1987) (finding presentment where, *inter alia,* "[T]he plaintiffs have presented their claims for benefits, and the agencies have found them entitled to benefits. This status has never been terminated."). *See also Briggs v. Sullivan*, 886 F.2d 1132, 1139 (9th Cir. 1989) ("The Secretary then conceded that there is no problem with *presentment* here, since the appellant-beneficiaries have already had their claims for entitlement resolved in their favor . . . Accordingly, having presented their claims for benefits to the Secretary once already, there was no requirement in this case that the class members 're-present' their claims . . . .") (Emphasis in original); *Tatum v. Mathews*, 541 F.2d 161, 164 (6th Cir. 1976) (finding presentment where "a claim for benefits was presented to the Secretary, and that *some decision* was made by the Secretary" and where "the district court's delineation of the plaintiff class excluded those who had not made a claim for benefits . . . ") (emphasis added)*; Nat'l Ass'n for Home Care & Hospice, Inc. v. Burwell*, 77 F.

[2] None of this takes away from the fact that class members still are claimants before this Court. *See* Doc. 54 pp. 13-15.

Supp. 3d 103, 109 (D.D.C. 2015) ("405(g) requires only that there be a 'final decision' by the Secretary *with respect to the claim of entitlement to benefits*") (quotation omitted) (emphasis in original); *Holden v. Heckler*, 584 F. Supp. 463, 480 (N.D. Ohio 1984) ("The requirement that individuals present a claim for benefits before a federal court has jurisdiction over them has been read to require [only] 'some decision by the Secretary.'") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)).

The Agency had its chance to follow the law and its own regulations and pay the claimants for whom the Subtraction Recalculation was not performed as it should have been. The Agency failed to do so. The filing of this suit as a class action complaint was therefore appropriate, as the claims that have not been paid to the members of the proposed class have already been presented to the Agency, in each and every instance. *See also generally* Doc. 25, pp. 6-14 (providing in detail Plaintiff's argument as to why presentment was satisfied when Plaintiff and all members of the putative class filed for Title II and SSI benefits).[3]

2. In Any Event, Every Member of the Proposed Class "Re-Presented" Their Claim When Their Prior Representative Requested Payment

The presentment requirement is a minimal one, requiring "only that a claimant made a formal or informal request for benefits." *Alexander v. Price*, 275 F. Supp. 3d 313 (D. Conn. 2017) (quoting *Mai v. Colvin*, 2015 WL 8484435, at *2 (E.D.N.Y. 2015)). Even assuming *arguendo*

[3] As has occurred in past filings in this litigation, the Agency again misstates the holding of a case it relies on regarding presentment. The Agency quotes *Wheeler v. Heckler*, 719 F.2d 595, 600 (2d Cir. 1983), for the following proposition: "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)." Doc. 57, pp. 5-6. The very next sentence of *Wheeler*, which the Agency does not quote, explains: "The District Court correctly ruled that '[a]s to this class, there has been no showing that the nonwaivable element of jurisdiction under § 405(g) – *the filing of a claim* – has been satisfied.'" 719 F.2d at 600 (emphasis added) (quoting *Wheeler v. Schweiker*, 547 F. Supp. 599, 610 (D. Vt. 1982)). In other words, *Wheeler* stands for the proposition that presentment is satisfied by the simple filing of a claim, which every member of the proposed class in *this* case indisputably has done.

that, despite the Agency's factual concession, the proposed class members' initial claim for benefits was not enough, presentment still would have been satisfied when each class member's prior Representative requested to be paid a final fee for his or her services. That Representative request, followed by payment of fees, should have triggered SSA's performance of the Subtraction Recalculation for each proposed class member. *Id.* citing POMS SI 02006.202(A)(1)(c)-(d) ("When a petition is received processing begins after payment of the retroactive title II and title XVI benefits . . . Thereafter, SSA or a District Court authorizes a fee and the PSC or ODIO or the FO pays the attorney/nonattorney from the withheld funds") and POMS SI 02006.202(B)(5) ("Subtract the entire amount of the authorized fee from the title II benefits of the named claimant(s).").

Indeed, that fee request by, and payment to, each class member's prior Representative are conditions for membership in the proposed class. *See* Doc. 55-1, p. 4 (class definition includes requirement that all proposed class members' have "Representatives' fees . . . determined and paid out of retroactive benefits . . . ."). A Representative's fee cannot be paid until a fee petition is filed. *See* POMS SI 02006.202(A)(1). Such a request and the subsequent payment fulfilled any (re-)presentment requirement (of which there is none). *See, e.g.*, *Linquist,* 813 F.3d at 1887 n.11 ("Once the entitlement decision has been made and settled, the original presentment a*nd subsequent earnings reports* [filed with the Secretary] suffice to invoke the district court's jurisdiction") (emphasis added); *Ellison v. Califano*, 546 F.2d 1162, 1164 (5th Cir. 1977) ("In the context of this case, a claim for benefits was presented to the Secretary *automatically* when the SSI recipient reported a separation from an eligible spouse") (emphasis added). *See also Scallop Shell Nursing & Rehab. v. Gaffett*, 2013 WL 5592736, at *6 (D.R.I. 2013) (presentment established

where "bills were presented to Medicare . . . and the amounts paid are somewhat lower than the amounts billed.").[4]

Because presentment (and then the superfluous "re-presentment") of their claim to SSA is a *requirement* for class membership that is included in the very definition of the class, *see* Doc. 55-1, p. 9, the Agency's argument that Plaintiff has somehow waived this issue, Doc. 57, p. 11, is nothing more than a red herring.[5] In any event, the Agency's admission in opposition to summary judgment that all proposed class members have already presented their claims should summarily settle this issue, as the Agency's factual concession made re-litigating the issue of presentment in a Motion for Class Certification clearly unnecessary.

3. Even Should the Court Conclude Not All Members of the Proposed Class Presented Their Claims to the Agency, Mandamus Should Apply to Allow Certification of the Class

Even if the Court were to find that not all members of the proposed class had presented, it can utilize its mandamus authority to satisfy jurisdiction.

The Supreme Court has not decided whether the district court mandamus statute, 28 U.S.C. § 1361, may apply to social security cases in light of 42 U.S.C. § 405(h). *See Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 456 n.3 (1999) ("We have avoided deciding this issue

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[4] The Agency argues that "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." Doc. 57, p. 14 n.6. That is true if no presentment or any claim whatsoever was ever made. Where, however as here, an original claim led to an entitlement to benefits which status never terminated, the Agency must continue to carry out its obligations. *See, e.g., Linquist, supra.*

[5] Presentment is inherent in the class definition because only "eligible" recipients of Title II and Title XVI benefits who actually received "retroactive benefits" are part of the class, and eligibility, or entitlement, to benefits is determined only after presentment of a claim is made. *See, e.g., Linquist*, 813 F.2d at 887 ("Presentment is procedurally necessary to establish entitlement to benefits . . . ."). "Re-presentment," albeit unnecessary, is in the definition which includes only members whose Representatives' fees were paid out – *i.e.,* after having requested fees – of the retroactive benefits. *See* Doc. 55-1, p. 4 for the class definition.

in the past . . . and we again find it unnecessary to reach it today."). *See also In re Sutton*, 652 F.3d 678, 679 n.1 (6th Cir. 2011) (acknowledging that "the Supreme Court has explicitly refrained from resolving the issue."). Nevertheless, "several circuits have allowed for mandamus jurisdiction in social security cases . . ." *id.* (citing *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 765-66 (5th Cir. 2011) (collecting cases)). And, in *Buchanan v. Apfel*, 249 F.3d 485, 492 (6th Cir. 2001), the Sixth Circuit held "that mandamus jurisdiction is available for" a social security claim.[6]

In its Order denying the Agency's Motion to Dismiss, the Court left open the possibility of allowing for mandamus jurisdiction in this case. Doc. 32, p. 11, n.49. Should the Court conclude that not all members of the proposed class have presented their claim, Plaintiff submits that mandamus jurisdiction would be appropriate in order to ensure that the Agency performs its duties and pays all deserving class members.

In this regard, *Clark v. Astrue*, 274 F.R.D. 462 (S.D.N.Y. 2011), is a potential roadmap. In that case, some, but not all, members of a proposed class had presented their claim to SSA before filing suit. The *Clark* court found that mandamus jurisdiction allowed even those members of the proposed class who had not definitely presented their claim to be part of the class. *Id.* at 467. The court in *Clark* concluded: "[C]lass members have a statutory right to eligibility determinations based on a preponderance of the evidence. And as this Court previously held, exhaustion of

[6] It is true that the Sixth Circuit in *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 (6th Cir. 2005) declined to invoke mandamus jurisdiction in a social security case. However, *BP Care* is distinguishable in that the plaintiff there had "completely failed" to file or present any claim "at all" to SSA. *Id.* at 551 n.3, n.4. Here, Ms. Steigerwald and the putative class members *have* made claims to the Agency, the Agency has violated its clear nondiscretionary duty to apply the Subtraction Recalculation and the Court has already waived any exhaustion requirement that may have existed, satisfying the criteria for invocation of mandamus. *See* p. 7, *infra.* It also is noteworthy that *In re Sutton* neither stated that the Sixth Circuit disavowed mandamus jurisdiction nor cited to *BP Care*.

administrative remedies in this instance is futile. Mandamus jurisdiction accordingly permits individuals who failed to satisfy the presentment requirement to participate in the class." *Id.* (citations omitted).

The same result should hold true here. Here, all members of the proposed class have a statutory right to have the Subtraction Recalculation performed for them, and to be paid any Retroactive Underpayment they are due. This Court has previously held that exhaustion of administrative remedies "in this instance is futile" and that "the Court will require Defendant Commissioner to excuse § 405(g)'s exhaustion requirement." Doc. 32, p. 11. Mandamus jurisdiction should, therefore, permit individuals who somehow failed to satisfy their presentment requirement to participate in the class.

4. The Temporal Definition of the Class is Appropriate

a. The Class Should Start on March 13, 2002

In November, 2017, Ms. Steigerwald sent her initial class certification discovery requests to the Agency. Those requests, as modified, asked the Agency "to produce the identities and numbers of individuals who are class members due to SSA's failure to perform the 'Subtraction Recalculation' going back to January 1, 2002." Doc. 34, p. 1. The Agency demurred, setting a unilateral deadline of March 5, 2018 to produce information regarding individuals for whom the Subtraction Recalculation was not performed for only a one-year period. As the Court is aware, the Agency's demurral was the subject of a discovery dispute between the parties.

The deadline for class certification discovery in this case was May 4, 2018. Doc. 28, p. 1. Given that the dispute was still ongoing in March, 2018, Ms. Steigerwald agreed on a compromise with the Agency, by which the Agency would provide information regarding individuals for whom the Subtraction Recalculation was not performed over a period of approximately five years. The Agency provided this information to Ms. Steigerwald on April 3, 2018. *See* Doc. 50-2.

Ms. Steigerwald never agreed to limit the class to individuals for whom the Subtraction Recalculation was not performed only between those dates (*i.e.*, September 1, 2012 and October 31, 2017). There is no equitable reason to do so.

At the class certification stage, it is sufficient to show that members of the class are sufficiently numerous that joinder is not required. *Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 541 (6th Cir. 2012). It is not necessary for Plaintiff to be able to specify the identity of each and every member of the proposed class. *See Golden v. City of Columbus*, 404 F.3d 950, 965-66 (6th Cir. 2005) ("[W]hile the exact number of class members need not be pleaded or proved, impracticability of joinder must be positively shown . . . .") (quotation omitted); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) ("The district judge's finding of a class of 15,000 to 120,000 persons may not be unreasonable, especially since AMS has been producing penile prostheses for over twenty years, and has the largest share of the penile implant market."). By affirmatively showing that there are at least 28,510 members of the proposed class, Ms. Steigerwald has met her burden to show numerosity. Ms. Steigerwald has no need to specify how many more class members for whom the Subtraction Recalculation was not performed between March 13, 2002 and August 31, 2012 exist. It is enough for her to provide reasonable inferences that they exist at all. *Senter v. Gen. Motors Corp*., 532 F.2d 511, 523 (6th Cir. 1976).[7]

The Agency is correct that Ms. Steigerwald has used inferences to impute that there are likely tens of thousands of individual class members for whom the Subtraction Recalculation was not performed in violation of law between March 13, 2002 and August 31, 2012. Doc. 57, p. 8 n.2.

[7] Plaintiff has provided reasonable inferences for the class to begin on March 13, 2002 in her Memorandum in Support of Class Certification. *See* Doc. 55-1, pp. 6-7. The Agency's arguments in Opposition regarding the OIG Reports, the Agency's declarant, and the two prior cases relevant to the issues here were dealt with in advance in the Memorandum. Plaintiff rests on those arguments, and need not repeat them here.

This is entirely appropriate. The Court "is permitted to draw reasonable information based on the evidence before it at the class certification stage." *Snelling v. ATC Healthcare Servs. Inc.*, 2012 WL 6042839, at *5 (S.D. Ohio 2012) (citing *Young*, 693 F.3d at 541). It is reasonable to infer that there are at least some – and likely many – class members for whom the Subtraction Recalculation was not performed between March 13, 2002 and August 31, 2012, and for whom the Subtraction Recalculation will *never* be performed should they not be provided the opportunity to participate in the class.

The equities demand that these proposed class members be allowed to enter the class. Should Plaintiff and the proposed class receive a favorable judgment in this case, the Subtraction Recalculation will be performed for all members of the proposed class, and Retroactive Underpayments will be paid to those members of the proposed class to whom they are due. Nothing differentiates a proposed class member for whom the Subtraction Recalculation was not performed on August 31, 2012 (and who would not be part of the class, should the Agency's argument prevail) from a proposed class member for whom the Subtraction Recalculation was not performed on September 1, 2012. There *may* not be individuals for whom the Subtraction Recalculation was not performed on that earlier date, or in the days, weeks, and months before that. But what if – as the reasonable inferences indicate – there are?

There is no equitable reason to start the class later than March 13, 2002. That is the first date on which the Agency was no longer under court supervision, pursuant to the terms of an earlier case, *Willis v. Sullivan*, 730 F. Supp. 785 (M.D. Tenn. 1990), in which, by way of an agreed upon settlement, it was found that the Agency had wrongly failed to perform the Subtraction Recalculation. Any individual from that day forward for whom the Subtraction Recalculation was wrongly not performed deserves to be part of this class.

There is an additional equitable reason to start the class at March 13, 2002. There is a strong likelihood that claimants who are not a part of this class will *never* be able to ever receive relief on their own or through a future lawsuit. While the Court has excused the exhaustion requirement in this case, Doc. 32, p. 11, there is no guarantee that a future court would similarly do so for these otherwise-left-out class members. Additionally, the Agency has waived its statute of limitations defense in this case by failing to raise it on a jurisdictional motion to dismiss (or in Opposition to Ms. Steigerwald's Motions for Summary Judgment and to Certify Class). *See Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965, 973 (8th Cir. 1983) ("We also note that the Secretary has not raised the statute of limitations defense in her arguments concerning jurisdiction under § 405(g). Accordingly, this requirement is waived.") (Citing *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975). There is no guarantee it would do so in a future action. This litigation is, more likely than not, the only chance for these claimants to have the Subtraction Recalculation performed for them, and to be paid any Retroactive Underpayments they are owed.

b. The Class Should End on March 13, 2018

The Agency believes the class should not extend until March 13, 2018. Doc. 57, pp. 10-12. Although the Subtraction Recalculation is meant to be performed immediately,[8] Ms. Steigerwald agrees that SSA should be given an appropriate time to perform the Subtraction Recalculation before being held liable for not doing so. Ms. Steigerwald will agree with the Agency that 90 days is an appropriate amount of time. *See* Doc. 57, p. 11. Because the Agency

[8] The Agency contends that POMS SI 02006.210 does not mean that the Subtraction Recalculation should not be performed as soon as the finalized attorney's fee is received. Doc. 57, p. 10. Plaintiff disagrees. POMS SI 2006.205(C)(4) clarifies the situation, stating: "[P]rocess recomputation *when fee information is available*." (Emphasis added). When a regulation states that SSA must perform an action following the receipt of certain information, SSA must perform the action when it receives that information.

itself believes 90 days is reasonable, it should have no issue with having a 90-day period to perform the Subtraction Recalculation as required for deserving claimants.

As of the date of the filing of this Reply, 90 days have passed since March 13, 2018. If the Subtraction Recalculation was being performed correctly following October 31, 2017 (the end date of hard information provided by the Agency, Doc. 50-2), it will have been performed for all deserving claimants after that date. If the Subtraction Recalculation has not been performed for those members, the equitable reasons mentioned above should apply to allow proposed class members between November 1, 2017 and March 13, 2018 to form part of the class as well.

B. The Proposed Class Satisfies Rule 23(a)

In arguing that the proposed class fails to satisfy Federal Rule of Civil Procedure 23(a)'s typicality and commonality requirements, the Agency makes much of the supposed fact that Ms. Steigerwald's Social Security Class Action Complaint is actually a "pattern and practice" class action. *See, e.g.*, Doc. 57, pp. 13-15. This is not true. *See* Doc. 54, pp. 6-9. But even if it were, the Agency's attempt to conflate specific requirements for class actions based on a defendant's alleged *discrimination practices* with purported requirements to bring a class action for specific statutory violation practices by the Agency under the Social Security Act must fail.

The Agency extensively cites *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) for the proposition that "[b]ecause 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'* . . . ." Doc. 57, p. 13 (quoting *Dukes*, 564 U.S. at 352). It is highly misleading for the Agency to rely on *Dukes*, a gender employment discrimination case which is neither about SSA nor relevant to a case such as this one that is brought to remedy a violation under the Social Security Act.

This is especially so because the very next sentence in *Dukes* that the Agency left out from its brief clarifies that the heightened "pattern or practice" commonality standard *is unique to discrimination-based class actions, in which individualized motive on the part of the defendant is necessary to prove the claim*: "In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination. That is so because, *in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision*." 564 U.S. at 352 (emphasis added) (quotation and footnote omitted).

The Supreme Court in *Dukes* was repeating settled law that, in proving a Title VII discrimination claim, a plaintiff must be able to specify "the reason for a particular employment decision." *Id*. That obviously is not applicable here. In proving SSA's violation of its regulations and failure to perform the Subtraction Recalculation, Plaintiff and the proposed class need not establish any motive. They only need establish that SSA violated its regulations by failing to perform the Subtraction Recalculation for them – for whatever reason or for no reason at all. The Agency's attempts to migrate a heightened "pattern and practice" standard relegated specifically to discrimination-based class actions to this case is disingenuous at best, and should be rejected.

Indeed, courts consistently have found that where, as here, no individualized discrimination has been alleged or is statutorily required to be proven, specific "pattern and practice" allegations are unnecessary. *See Allan v. Realcomp II, Ltd.*, 2013 WL 12333444, at *7 (E.D. Mich. 2013) ("Certification is appropriate if class members complain of a pattern or practice that is generally applicable to the class as a whole.") (quotation omitted); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560-61 (N.D. Cal. 2007) ("Plaintiffs need not pinpoint a specific policy to satisfy the requirements for class certification . . . To the contrary, it is sufficient for Plaintiffs to allege that Defendant has

failed to take action . . . The lack of an identified system-wide policy or practice is therefore no bar to a finding of commonality." (Citations omitted).[9] Because the Agency's heightened "pattern and practice" standard is only applicable to cases in which individualized discrimination must be proven, it is irrelevant here.

The Agency is correct that "Plaintiff has offered no evidence . . . as to whether [SSA's] 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." Doc. 57, p. 14. These are all good theories as to why the Agency has failed to perform the Subtraction Recalculation as required in tens of thousands of cases, but Plaintiff need not theorize. In order to show commonality and typicality for purposes of class certification, Plaintiff simply must allege that SSA failed to perform the Subtraction Recalculation, as required, for her and the rest of the proposed class, at the time it was supposed to do so. Ms. Steigerwald has done this. *See* Class Definition, Doc. 55-1, p. 4.

In the Motion for Class Certification, Ms. Steigerwald stated: "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." Doc. 55-1, p. 9. The Agency states that this "bare assertion is insufficient" to show commonality. Doc. 57, p. 13. To the contrary, however, the common question Ms. Steigerwald set out in her Motion for Class Certification goes to the heart of Ms. Steigerwald's Complaint. *See* Doc. 1, ¶¶ 98-100. To wit: Has the Subtraction Recalculation been performed, where required, when it was supposed to have

[9] The Agency cited to these pages from *Situ* in the presentment argument section of its Opposition. See Doc. 57, p. 6. It is unclear why the Agency did so, as those pages do not deal with presentment. Still, having cited these pages, it is all the more unclear why the Agency failed to mention in its Opposition *Situ*'s pattern and practice holding – which runs directly counter to the Agency's pattern and practice argument.

been? The fact that the commonality and typicality of the class can be laid out simply and plainly speaks more to the obviousness of Plaintiff's satisfaction of these requirements than to her purported failure to do so.

The Agency failed to perform the Subtraction Recalculation for Ms. Steigerwald, as it failed to perform the Subtraction Recalculation for tens of thousands of others. For purposes of certifying a class pursuant to the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a), the Agency's motives and reasons for doing so are irrelevant.[10]

C. The Proposed Class Satisfies Rule 23(b)

The Agency claims that, even if Ms. Steigerwald satisfies the requirements of Federal Rule of Civil Procedure 23(a), she cannot satisfy those of Federal Rule of Civil Procedure 23(b). Doc. 57, p. 15. It cites Newberg on Class Actions for the proposition that there are cases in which a plaintiff satisfies Rule 23(a), but not Rule 23(b). *Id.* There certainly are such cases. This is not one of them. Ms. Steigerwald's Class Action Complaint satisfies both Rules 23(b)(2) and 23(b)(3).

> Rule 23(b)(2) authorizes a class action when a party [here, the Agency] has taken or refused to take action with respect to a class, and final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole . . . subdivision (b)(3) permits a class action in all other circumstances where the prerequisites of Rule 23(a) are met, and two additional criteria are satisfied: (1) that questions of law or fact common to members of the class predominate over any questions affecting only individual members and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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[10] In a footnote, the Agency attempts to contest Plaintiff's meeting of Federal Rule 23(a)'s numerosity requirement. Doc. 57, p. 15 n.7. This attempt should be ignored, as Plaintiff has already shown that at least 28,510 individuals should qualify to be members of the proposed class, and the Agency has already conceded that the Subtraction Recalculation is due to be performed for those 28,510 individuals – all of whom the Agency has already identified. In any case, "[f]ederal courts routinely decline to consider issues raised only in a footnote and in a perfunctory manner." *Wandering Dago Inc. v. New York State Office of Gen. Servs.*, 992 F. Supp. 2d 102, 134 (N.D.N.Y. 2014) (quotation omitted) (collecting cases). For that reason alone, the Agency's objection to Plaintiff's clear satisfaction of the numerosity requirement should be ignored.

2 Newberg on Class Actions § 4:1 (5th ed.) (quotation and citation omitted).[11] As explained in Ms. Steigerwald's Memorandum in Support of Class Certification, Doc. 55-1, pp. 11-15, and as further explained below, Ms. Steigerwald has fulfilled the requirements for either or both a Rule 23(b)(2) and/or a Rule 23(b)(3) class.

1. Plaintiff Has Established the Requirements for a 23(b)(2) Class

In order to satisfy Rule 23(b)(2), Ms. Steigerwald must adequately allege that the Agency "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). Not only has Ms. Steigerwald adequately alleged this in her Class Action Complaint, it has also been conclusively proven – as to at least a portion of the class – in discovery.

In her Class Action Complaint, Ms. Steigerwald alleged that SSA had failed to perform the Subtraction Recalculation for a large but (at the time) indeterminate amount of claimants. *See* Doc. 1, ¶¶ 27, 98-99. In her Prayer for Relief, Ms. Steigerwald requested that this Court ". . . permanently enjoin Defendants and order them immediately to re-calculate all Windfall Offset calculations for each class member by using the Subtraction Recalculation as required . . . ." *Id.* at p. 23, Prayer for Relief § (g).

As the Court is now aware, in discovery the Agency provided uncontested factual evidence that the Subtraction Recalculation was not performed, as required, in at least 37,675 cases. Doc. 50-2, p. 3.[12] This lawsuit seeks to enjoin the Agency to perform the Subtraction

[11] The same section of Newberg on Class Actions also specifies: "While each part of Rule 23(b) describes a different type of fact situation, a single case may be certified under more than one part of the rule." 2 Newberg on Class Actions § 4:1 (collecting cases for so-called "hybrid" class actions, certifiable under both Rule 23(b)(2) and Rule 23(b)(3)).

[12] This number includes 9,165 instances for which the Agency has asserted without explanation that, even though the Subtraction Recalculation was not performed as required, the claimant at issue would not have been owed any money. *See* Doc. 50-2, pp. 2-3 ("Category 2").

Recalculation, as required, in those 37,675 cases, and for the other as yet unidentified members of the class. This injunctive relief is generally applicable to the class, as each member of the class, definitionally, has not (as of yet) had the Subtraction Recalculation performed for him or her. Rule 23(b)(2)'s requirement that the injunctive or declaratory relief "apply generally to the class" is certainly satisfied, as is the Rule's requirement that the eventual relief (if ordered), be "appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

As to this point and contrary to the Agency's assertion, Doc. 57, p. 17, Ms. Steigerwald's Class Action Complaint certainly complies with Rule 23(b)(2)'s "act requirement" which deals with whether class members have been treated by a defendant's act in a similar way.

Here, all the class members have been (mis)treated similarly, in that the Agency has failed to apply the Subtraction Recalculation in each member's case. The fact that after such application some members will receive Retroactive Underpayments and some will not have been similarly injured in that regard is immaterial. As Newberg explains, and the Agency tellingly omits from the Opposition: "Courts have followed the Advisory Committee's approach, finding that certification of a Rule 23(b)(2) class is proper despite the fact that not all class members may have suffered the injury posed by the class representatives so long as the challenged policy or practice was generally applicable to the class as a whole." 2 Newberg on Class Actions § 4:28 (collecting cases).[13] *See Turner v. Grant Cty. Det. Ctr*., 2008 WL 821895, at *19 (E.D. Ky. Mar. 26, 2008) ("For (b)(2) not every member of the class must have been damaged by defendants' allegedly

[13] In its Opposition, the Agency quotes only the sentence of Newberg on Class Actions immediately following the one quoted above. Doc. 57, p. 16. That sentence states: "The requirement focuses on the defendant and questions whether the defendant has a policy that affects everyone in the proposed class in a similar fashion." This is certainly true, but quoting only that sentence without quoting the immediately prior sentence, which states that "not all members need to have suffered the same injury, so long as the challenged policy or practice was generally applicable to the class as a whole," misrepresents the treatise.

wrongful conduct . . . ."); *McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 391 (S.D. Ohio 2001) ("That Linda McGee may be the only member of the class actually to have suffered an allegedly illegal consolidation is of no moment here, provided it [was] based on grounds which have general application to the class") (quotation omitted).

"[S]ection (b)(2) is designed simply to facilitate class actions in which injunctive relief plays a central role. Whether the injunction would bind all members of a defendant class or benefit all members of a plaintiff class, or both, should be of no consequence so long as the complaint raises issues common to the class." *United States v. Trucking Emp., Inc*., 75 F.R.D. 682, 692 (D.D.C. 1977). The Class Action Complaint here has raised issues common to all members of the class, and seeks injunctive relief common to all members. Whether or not all members of the proposed class are ultimately entitled to monetary relief through the issuance of a Retroactive Underpayment from the Agency for its failure to perform the Subtraction Recalculation is of no consequence to the certification of a (b)(2) class. What *is* indisputably common to all members of the proposed class is that the Agency failed to perform the Subtraction Recalculation for them. For the Court to compel the Agency by way of an injunction to perform the Subtraction Recalculation for all class members falls squarely within the parameters of Rule 23(b)(2).

2. Plaintiff Has Established the Requirements for a 23(b)(3) Class

According to the Agency, "Plaintiff continues to insist that underpayments potentially due to putative class members are money damages despite on-point Supreme Court authority to the contrary . . . ." Doc. 57, p. 20 (citations omitted). However, states the Agency, "any underpayments due to putative class members here are not damages . . . [and] a (b)(3) class is designed for money-damages suits." *Id.*, pp. 19-20. Thus, the Agency asserts, Rule 23(b)(3) should not apply to the proposed class "because there are no monetary damages at issue" in this case. *Id.*, p. 18 (casing fixed).

The Agency misstates Plaintiff's position as well as the law relating to Rule 23(b)(3).

As a matter of fact, Plaintiff consistently characterized the Retroactive Underpayments due as "monetary *relief*" – not "damages." *See* Doc. 1, ¶ 309 ("putative members of the class in seeking redress by way of the monetary and injunctive relief sought in this Complaint . . . ."). *See also* Doc. 55-1, p. 9 ("Each class member is entitled to . . . monetary relief, in the form of any past-due benefits (*i.e.*, Retroactive Underpayments) that the Agency has wrongly withheld from them"); *id.*, p. 11 (". . . Plaintiff seeks injunctive, declaratory and monetary relief . . . ."); *id.*, p. 12 ("[I]f the Agency performs the Subtraction Recalculation correctly, the monetary relief . . . consisting of any Retroactive Underpayment due to them. . . "); Doc. 54, p. 11 ("the Complaint claims, *inter alia*, *monetary relief* . . . .") (emphasis in original); *id.* at p. 12 ("the Court should reject the Agency's mischaracterization of the Complaint which seeks *both* injunctive and monetary relief.") (emphasis in original). That is because: "Not all forms of monetary relief are money damages." *Steele v. United States*, 200 F. Supp. 3d 217, 225 (D.D.C. 2016) (quotation omitted). Rather, monetary relief can come in the form of "restitution," that is, as here, recovery of money that is due someone. *See Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) ("we conclude that the back pay awarded here constituted restitution, and therefore is an equitable remedy . . . .").

In *Steele*, the district court accepted the government's argument that the Administrative Procedure Act "waives sovereign immunity [only] for action[s] seeking relief other than money damages." *Id.* at 222. Yet the court still certified a hybrid class under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), because "plaintiffs do not seek money damages – but rather 'restitution,' a form of equitable relief . . . " Accordingly, the Court adopted "a hybrid approach to certify the class under FRCP 23(b)(2) as to plaintiffs' claims for declaratory relief and under FRCP 23(b)(3) as to plaintiffs' claims for restitution." *Id.* at 222.

Steele's "hybrid" approach is similar to the "divided certification" approach that Plaintiff suggested in its Motion for Class Certification and that has been tacitly approved by the Sixth Circuit in *Gooch v. Life Inv'rs Ins. Co., of Am.*, 672 F.3d 402, 412 (6th Cir. 2012) and more directly by other courts. *See generally* Doc. 55-1, pp. 12-13. This Court can follow the same path even if technically no "monetary *damages*" are at issue here. The Court could choose to certify the class, as the *Steele* court did, as a hybrid class, with the Rule 23(b)(2) enjoining the Agency to perform the Subtraction Recalculation and Rule 23(b)(3) compelling the Agency to pay *monetary relief* in the form of all Retroactive Underpayments due to the class members.

However, the Court is not so limited, and can certify the class exclusively under Rule 23(b)(3) as did the court in *Greenberg v. Colvin*, 63 F. Supp. 3d 37 (D.D.C. 2014). The court there, *id.* at 45 n.3, approved the class under Rule 23(b)(3) without the need to certify the class under (b)(2) because (as here) the recovery sought was for "monetary relief," explaining:

> In the alternative, Plaintiff seeks to certify the class either as a Rule 23(b)(2) class or as a hybrid 23(b)(2)/(b)(3) class. However, because Plaintiff is not seeking monetary relief that is only "incidental," certification under Rule 23(b)(2) alone is inappropriate. *See Wal-Mart Stores, Inc. v. Dukes*, ___ *U.S.* ___, 131 S.Ct. 2541, 2557, 180 L.Ed.2d 374 (2011). Further, "[b]ecause the class[ ] will be certified under Rule 23(b)(3), the Court need not reach [the] request" to certify the class as a hybrid. *Hardy*, 283 F.R.D. at 26 n.3.

Because the proposed class is seeking monetary relief, it is within the Court's power to grant it. Contrary to the Agency's belief, granting such relief raises no issue of sovereign immunity. 42 U.S.C. § 405(g) states, in pertinent part: "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." *See also* 42 U.S.C. § 1383(c)(3) ("The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided

in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title."). Should the Court order the Agency to perform the Subtraction Recalculation on behalf of all proposed class members and pay any Retroactive Underpayments due – an order fully within the Court's domain pursuant to the Agency's clear and explicit waiver of sovereign immunity in 42 U.S.C. § 405(g) – the Agency will necessarily provide monetary relief, in the form of Retroactive Underpayments, to all members of the class for whom Retroactive Underpayments are due.

Finally, Ms. Steigerwald has clearly alleged that common questions of law and of fact predominate among all the proposed class members, as required by Rule 23(b)(3). *See* Doc. 1, ¶ 28 ("There are questions of law and fact common to all class members that predominate over questions only affecting individual class members. These questions include: whether SSA . . . has violated the regulation and the POMS by not performing the Subtraction Recalculation as required, resulting in those claimants not receiving the Retroactive Underpayments to which they were entitled."). The Agency twists the language of Ms. Steigerwald's Memorandum in Support of Class Certification when it states "that the *only* issue Plaintiff purports to identify is the calculation of individual damages . . . ." Doc. 57, p. 20 (emphasis in original). In fact, the brief stated that the *only* issue that *distinguished* the members of the proposed class is the amount of their individual damages. Doc. 55-1, p. 13 ("Here, [t]he only individual questions would be the calculation of individual damages . . . .") (quotation omitted). In all other respects, the differences between every member of the proposed class (to the extent there are any differences at all) are immaterial.

III. CONCLUSION

The Court should grant the Motion, certifying the proposed class.

Respectfully submitted,

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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, as modified by the Court, and is 20 pages long.

/s/ *Ira T. Kasdan*

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2018, a copy of the foregoing Reply in Support of 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.

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