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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff Stephanie Lynn Steigerwald ("Plaintiff" or "Ms. Steigerwald") on her own behalf and on behalf of the putative class, through undersigned counsel, files her Opposition to Defendants' the Social Security Administration ("SSA" or "the Agency") and Nancy A. Berryhill, Acting Commission of the Agency (collectively, "Defendants") Motion to Dismiss (the "Motion"), and in support thereof states as follows:

I. STATEMENT OF THE ISSUES

1. Has Ms. Steigerwald adequately presented her claim pursuant to 42 U.S.C. § 405(g), given that, prior to filing her Complaint: (i) she applied for and was found eligible to receive both Title II and SSI benefits, (ii) her attorney had filed a fee application, thereby triggering the Agency's non-discretionary obligation to perform the Windfall Offset, including the Subtraction Recalculation,[1] and (iii) after approval of her attorney's fee application, her attorney had sent a follow-up letter to the Agency requesting that the Agency release all withheld funds to Ms. Steigerwald, including those funds which had been withheld pending the Agency's completion of performance of the Windfall Offset, including the computation of the Subtraction Recalculation?

2. Is the putative class action Complaint moot, or should this Court adhere to clear and unambiguous Sixth Circuit precedent in finding that either or both of the "picking off" and the "inherently transitory" exceptions to the mootness doctrine apply to prevent the class action Complaint from becoming moot?

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[1] The terms "Windfall Offset" and "Subtraction Recalculation," as used herein, have the meaning defined in the Complaint. *See* ECF 1, ¶¶ 5, 8.

II. SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly emphasized that the presentment requirement inherent in 42 U.S.C. § 405(g) is a minimal one. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000). Courts throughout the country have held that the only thing the presentment requirement requires from a plaintiff seeking benefits from an agency is an informal request for benefits. *See, e.g., City of New York v. Heckler*, 742 F.2d 729, 735 (2d Cir. 1984) (presentment found where plaintiff "completed a Social Security questionnaire indicating in writing that he remained disabled and desired benefits.").

Here, Ms. Steigerwald requested, by a letter sent from her attorney to the Agency on September 15, 2016, that the benefits the Agency had withheld from her pending the result of her attorney's fee request be released to her. But this Court would not know that from Defendants' Motion, or the Declaration attached to it, which omitted this vital information. Providing the Court with only partial information extraneous to the pleadings, Defendants allege that Ms. Steigerwald never presented her claim to the Agency before filing this Complaint in federal court. Charitably, Defendants accusation is mistaken.

Defendants also misstate the clear law in this Circuit as to the potential mootness of Ms. Steigerwald's class action Complaint. Misquoting the language of *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017) and ignoring its holding, Defendants allege that, since they deposited money in Ms. Steigerwald's bank account, her claim is moot and her class action Complaint must be dismissed. *See* Motion, p. 12; *see also infra*, p. 16. Based on the Sixth Circuit's 2016 decision in *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016) and its decision again earlier this year in *Unan*, that is not the case. Instead, either or both of the two exceptions to the mootness doctrine for class action complaints that have not yet been certified applies here. Defendants' bald attempt to "pick off" Ms. Steigerwald's "inherently transient" claim must fail. *See Unan*, 853 F.3d at 285-87.

III. FACTUAL BACKGROUND

In the first half of 2009, Ms. Steigerwald filed an application for Title II benefits and SSI benefits. ECF 18-2, p. 1, ¶ 3.[2] On September 24, 2009, Ms. Steigerwald hired undersigned counsel Kirk B. Roose to represent her on her claims. Declaration of Kirk Roose (hereinafter, "Roose Declaration"), ¶ 2. On July 15, 2014 (over five years after filing her initial application for benefits), an Administrative Law Judge found that Ms. Steigerwald qualified for both Title II benefits and SSI benefits. ECF 18-2, p. 1, ¶ 4; *id.* at pp. 7-23.

On January 23, 2015, Roose submitted a fee petition to Defendant SSA in the amount of $17,059.25. ECF 18-2, p. 3, ¶ 13; *id.* at pp. 66-70. Pursuant to Defendant SSA's Program Operations Manual System (the "POMS"),[3] a primary source of information used by Social Security employees to process claims for Social Security benefits, the submission of this fee petition should have triggered commencement of the Subtraction Recalculation process. *See* POMS SI 02006.202(A)(1)(c); POMS SI 02006.205(C)(1)(b).

On August 31, 2016, the Regional Chief Administrative Law Judge awarded Roose $13,500.00 for services provided to the claimant (the "Final Order"). ECF 18-2, p. 4, ¶¶ 22-23; *id.* at pp. 126-128. Pursuant to the POMS, the Final Order should have triggered Defendants' immediate performance of the Subtraction Recalculation. *See* POMS SI 02006.202(A)(1)(c); POMS SI 02006.202(B); POMS SI 02006.210(B)(Step 2) ("Upon receipt of a fee authorization

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[2] Title II benefits are disability benefits to which an individual with a disability may be entitled under Title II of the Social Security Act. SSI benefits are supplemental security income benefits, which an individual with a disability and with limited income may be entitled to under Title XVI of the Act. *See* ECF 1, ¶ 4.

[3] A link to a searchable table of contents including the sections of the POMS cited herein can be found at https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=05020.

notice in fee petition cases . . . use the notice as the source of the needed fee information (per SI 02006.202.)").

On September 12, 2016, Defendant SSA wrote to Roose, informing him that they had paid him the $13,500.00 awarded in the Final Order, and requesting a written statement from Roose in order "release the withheld benefits to the claimant." ECF 18-2, p. 4, ¶ 24; *id.* at p. 130. On September 15, 2016, Roose wrote a letter to Defendant SSA, requesting that Defendant SSA ***"[p]lease release the withheld benefits to the claimant."*** Roose Declaration, ¶ 7 (emphasis added); *id.* at p. 4.[4] Roose's written statement requesting the SSA to release all withheld benefits to the claimant should have again triggered Defendant SSA's obligation to pay Ms. Steigerwald *all* withheld benefits, including the benefits withheld pending performance of the Subtraction Recalculation. POMS SI 02006.205(C)(4) (". . . process recomputation when fee information is available."); POMS SI 02006.210(B)(Step 2).

Despite Roose having presented both his own fee application and his request, on behalf of Ms. Steigerwald, for recoupment of all withheld benefits to her, Defendants failed to perform the Subtraction Recalculation as Defendant SSA's regulations and the POMS require. On information and belief, such failure to perform the Windfall Offset (which no doubt the Subtraction Recalculation is a part thereof) at all is widespread, and is not limited to Ms. Steigerwald. Indeed, two recent reports from the Agency's Office of the Inspector General found that to be the case. *See* ECF 1-5, pp. 4-9; ECF 1-6, pp. 7-12. Ms. Steigerwald therefore filed her Social Security Class

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[4] Roose's letter was omitted from the Declaration of Janet Walker appended to Defendants' Motion (the "Walker Declaration"), and from the Exhibits thereto. *See infra*, pp. 7-8.

Action Complaint, on behalf of herself and a purported class of similarly situated individuals, on July 18, 2017. ECF 1.[5]

On Sunday, November 12, 2017, in a transparent effort to moot Ms. Steigerwald's claim and dispose of the class action without remedying what is almost certainly a systemic issue, Defendant SSA sent Ms. Steigerwald a notice, stating, *inter alia*: "You will soon receive a check for $5,392.08 *because we had withheld money from your benefits*." ECF 18-2, p. 136 (emphasis added); *see also id.* at p. 5, ¶ 27. Notably, Roose's September 15, 2016 letter to Defendant SSA (as to which Defendants omitted reference in their Motion) *specifically* had requested that Defendant SSA release "the withheld benefits to the claimant." Roose Declaration, ¶ 7.

IV. LEGAL STANDARDS

"When Congress statutorily confers subject-matter jurisdiction, it can require that certain prerequisites be met before a federal district court can exercise jurisdiction . . . When Congress establishes a jurisdictional prerequisite, a district court may admit extrinsic evidence and resolve disputed facts to decide if the asserted claim satisfies the jurisdictional prerequisite." *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 481 (6th Cir. 2009). "However, where a defendant argues that the plaintiff has not alleged sufficient facts in her complaint to create subject matter jurisdiction, the trial court takes the allegations in the complaint as true." *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) (citation omitted). "Aside from the resolution of jurisdictional prerequisites . . . a district court must generally confine its Rule 12(b)(1) . . . ruling to matters contained within the pleadings and accept all well-pleaded allegations as true." *Allred v. United States*, 689 F. App'x 392, 394 (6th Cir. 2017) (quoting *Tackett*).

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[5] Defendants' dismissive assertion that "the Complaint does not suggest, in all but the most conclusory way, what issues the claims that putative class members might have that are common to them all," Motion p. 19 n. 11, is belied by the specific, narrowly-tailored class definition clearly set out in paragraph 26 of the Complaint. ECF 1, ¶ 26.

V. ARGUMENT

A. Plaintiff and the Purported Class Have Satisfied their Presentment Requirement

42 U.S.C. § 405(g) provides, in pertinent part:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

The Supreme Court has interpreted Section 405(g)'s prerequisite to judicial review as consisting "of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary." *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976).

Where a claim brought by a party before a district court is "collateral to [the party's] claim for benefits," the court may "require the agency to excuse" the exhaustion requirement "where the agency would not do so on its own." *Shalala*, 529 U.S. at 15 (citing *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975)).[6] While the presentment requirement is non-waivable, it has been described by the Supreme Court as minimal. *Shalala*, 529 U.S. at 24 ("At a minimum . . . the matter must be presented to the agency prior to review in a federal court").

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[6] Ms. Steigerwald's Complaint lays out in detail why Section 405(g)'s exhaustion requirement is either inapplicable or should be equitably waived. *See* ECF 1, ¶¶ 36-38. Defendants have not challenged these assertions in their Motion to Dismiss. *See* Motion, p. 1 (Statement of Issues, not including the waivable issue of exhaustion). Consequently, Defendants may not now contest Plaintiff's claims regarding exhaustion in any Reply brief. *Irwin Seating Co. v. Int'l Bus. Machines Corp.*, 2007 WL 518866, at *2 n. 2 (W.D. Mich. 2007) ("[T]he Sixth Circuit repeatedly has recognized that arguments raised for the first time in a party's reply brief are waived." (Collecting cases)). Plaintiff will therefore not address the issue of exhaustion herein, but reserves all rights in this regard.

Indeed, courts throughout the country have consistently construed the presentment requirement liberally, as requiring nothing more than "a formal or informal request for benefits." *Alexander v. Price*, 2017 WL 3228119, at *3 (D. Conn. 2017) (quotation omitted)); *Maynard v. Comm'r*, 2015 WL 4069356, at *2 (E.D.N.Y. 2015) (same); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 555 (N.D. Cal. 2007) ("This Court has already ruled that the presentment requirement should be interpreted liberally . . .); *Heckler*, 742 F.2d at 735 (presentment satisfied where plaintiff "indicat[ed] in writing that he remained disabled and desired benefits.").

1. Ms. Steigerwald and the Putative Class Presented Claims for Withheld Benefits Through Their Attorneys Who Sought Fees

Here, Ms. Steigerwald presented her claim to the Agency on three separate occasions. Most obviously Ms. Steigerwald unquestionably satisfied the presentment requirement regarding the withheld funds due her, by virtue of her attorney's September 15, 2016 letter to the Agency requesting that the "withheld benefits" be released to Ms. Steigerwald. *See* Roose Declaration, ¶ 7. These funds, of course, include *all* the benefits which were being withheld by the Agency as of that date, including those funds which were already then withheld due to Defendants' failure to perform the Subtraction Recalculation. *See* ECF 1, ¶¶ 79-80.

Mr. Roose's September 15, 2016 letter certainly satisfies the presentment requirement the Supreme Court has articulated. *See Shalala*, 529 U.S. at 24; *Heckler v. Ringer*, 466 U.S. 602, 617 (1984) ("All three respondents satisfied the nonwaivable requirement by presenting a claim for reimbursement for the expenses of their BCBR surgery."). It is unclear what good-faith reason Defendants had in withholding from this Court the vital information regarding Ms. Steigerwald's

clear presentment of her claim for her withheld benefits to the Agency, through her attorney, on September 15, 2016.[7]

Should Defendants contend in any Reply that Mr. Roose's September 15, 2016, presentment on behalf of his client was insufficient as not specific enough, such contention would be futile. First, the case law is clear that presentment requires only "a formal or informal request for benefits." *Price*, 2017 WL 3228119, at *3 (and see the other cases cited at p. 7, *supra*). Based on the extant case law, it was certainly sufficient satisfaction of the presentment requirement when Mr. Roose requested that the benefits being withheld by the Agency as of September 15, 2016 be released to Ms. Steigerwald. He did not need to specifically explain to the Agency why the Agency was wrongly withholding those benefits. Defendants have cited no case containing a contrary proposition.

Second, the Agency itself, when it finally, belatedly provided the wrongly withheld benefits to Ms. Steigerwald, used parallel language to Mr. Roose. ECF 18-2, p. 136 ("You will soon receive a check for $5,392.08 *because we had withheld money from your benefits*." (Emphasis added)). Defendants cannot have it both ways: *i.e.,* arguing that presentment is not sufficient because it is not specific when the Agency uses the very same language Mr. Roose used to present the claim in order to satisfy it. At the very least, it is certain that Ms. Steigerwald, and every other member of the purported class whose attorneys had requested release of all withheld benefits following approval of a representative fee, have adequately presented their claim to the Agency.[8]

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[7] Defendants' omission of Mr. Roose's request is all the more glaring due to the fact that Defendants specifically fault Mr. Roose for not doing just what Mr. Roose did. Motion, p. 16 ("Plaintiff cannot credibly suggest that any misunderstanding on her part about her rights to past-due benefits precluded her from asserting those rights. Her complaint goes out of its way to tout the relevant expertise of the attorney who has represented her throughout her claims process.").

[8] Given Mr. Roose's September 15, 2016 letter to the Agency, Defendants' reference to, and extensive reliance on, alleged "notice" language in an earlier January 22, 2016 letter from the

While Ms. Steigerwald certainly satisfied her presentment requirement through her attorney's September 15, 2016 letter to the Agency, the presentment requirement was also satisfied even earlier, through Mr. Roose's application for attorney's fees. *See, e.g.*, ECF 18-2, pp. 66-69. That fee request – a condition of being a member of the Plaintiff class – necessarily triggers the Subtraction Recalculation. 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."); POMS SI 02006.202(B)(5) ("Subtract the entire amount of the authorized fee from the title II benefits of the named claimant(s)."). *See also* POMS SI 02006.202(B).[9]

Because (contrary to Defendants' assertions) the representatives of Plaintiff and the other members of the class presented their claims for attorney's fees to the Agency, the presentment standard was already met at this, earlier stage. *See, e.g.*, *Scallop Shell Nursing & Rehab. v. Gaffett*, 2013 WL 5592736, at *6 (D.R.I. 2013) (Presentment satisfied where "bills were presented to Medicare . . . and the amounts paid are somewhat lower than the amounts billed.").

Agency to Mr. Roose is nothing more than a red herring. *See* Motion, pp. 9-10; *id.* at p. 16. In fact, contrary to the representations Defendants made to the Court in their Motion, Mr. Roose did request that the Agency release the "withheld benefits" of Ms. Steigerwald's that were *being* withheld following his receipt of the Agency's January 22, 2016 letter.

[9] Citing POMS SI 02006.202(B), Defendants claim: "One way a recalculation may be triggered is for a beneficiary to bring a fee authorization notice into the field office, at which time, the Claims Specialist will adjust the windfall offset." Motion, p. 5. This is misleading, at best. In fact, the POMS makes clear that it is the Agency's responsibility to make the Subtraction Recalculation once the Agency authorizes the attorney representative's fee. *See* POMS SI 02006.202(B)(1)(a) ("[F]or all title II claims when SSI is involved, *the PSC or ODIO sends a copy of any notice authorizing a fee to the servicing FO* or annotates the Special Message field of the MBR with the authorized fee amount. **Use the amount shown in this notice or MBR field to *adjust the title II income.***" (Emphasis added)).

2. Ms. Steigerwald and the Putative Class Also Satisfied the Presentment Requirement by Originally Filing for – and Qualifying for – SSI and Title II Entitlement Benefits

Although, as explained above, Ms. Steigerwald and the rest of the purported class almost certainly presented their claims at least twice, Ms. Steigerwald and the other members of the purported class satisfied their presentment requirement yet a third time, and even *earlier*, when the Agency determined that they were entitled to both Title II benefits and SSI benefits. Because the relief sought in this lawsuit is a continuing and uninterrupted entitlement to benefits Plaintiff and the class have already achieved, there is no requirement to "present" such a request for relief. Of course, even if there is such a requirement to "re-present," Ms. Steigerwald and the rest of the purported class members satisfied it by their attorney or non-attorney representative requesting a fee, as detailed *supra*. But, as explained below, this Court should find that no such "re-presentment" requirement exists.

The Supreme Court explained in *Eldridge* that, in order to satisfy the "non-waivable" presentment prong of 42 U.S.C. § 405(g), "a claim for benefits shall have been presented to the Secretary." 424 U.S. at 328. This makes sense, as "[a]bsent such a claim there can be no 'decision' of any type." *Id.* As *Eldridge* intuits, "[p]resentment is procedurally necessary to establish *entitlement* to benefits, and presentment of a claim is the natural first step that any individual seeking benefits would take." *Linquist v. Brown,* 813 F.2d 884, 887 (8th Cir. 1987) (emphasis in original). *See also Nat'l Ass'n for Home Care & Hospice, Inc. v. Burwell*, 77 F. 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*.") (Quoting *Eldridge*) (emphasis in *Burwell*).

Defendants' presentment argument, Motion pp. 13-17, is premised on the assumption that Ms. Steigerwald's Complaint is asking this Court to find that she is entitled to a *new* entitlement

benefit. This is not so. Instead, the Complaint alleges that Ms. Steigerwald and the rest of the purported class are entitled to *recoupment* of the underpayments owed to them based on the SSI and Title II entitlements the Agency *already determined they were qualified for*. *See* POMS SI 02006.210(B)(Step 10) (requiring the Agency to "[p]rocess any *underpayment* or correction of an overpayment amount . . . ." (emphasis added)).

There is a fundamental difference between a request for a new entitlement benefit from an agency and a request for a recoupment of money the Agency already owes. In *Gould v. Sullivan*, 131 F.R.D. 108 (S.D. Ohio 1989), the Agency made a similar claim regarding presentment in the context of the Agency's failure to properly calculate benefits. Here, as in *Gould*, the plaintiffs, on their own behalf and on behalf of a purported class, sought certification of a class and class-wide relief relating to Defendant SSA's miscalculation of benefits. *Id.* at 109. As here, the Agency "asserted that those potential class members who had never sought reconsideration or other administrative review of their assertion that their SSI benefits had been improperly calculated had not 'presented' a claim to the Secretary, and that such a presentment is a jurisdictional prerequisite to suit under 42 U.S.C. § 405(g)." *Id.* at 110. The Agency therefore urged the *Gould* court to dismiss the case. The *Gould* court refused to take up the Agency's invitation, instead disposing of the Agency's presentment argument. The court, *id.*, explained that the presentment requirement had already been satisfied, as:

> [E]ach potential class member had adequately presented his or her claim to the Secretary because the Secretary had the opportunity to calculate benefits properly when making an SSI award, and that such a situation was distinguishable from a case where the claimant never provided the Secretary with any opportunity to take appropriate action with respect to the claim at issue.

As in *Gould*, the Agency here already had the opportunity to calculate the Subtraction Recalculation properly. Indeed, the POMS requires that it do so. *See* POMS SI 02006.205(B)

(mandating that the PSC or ODIO send a copy of the attorney or non-attorney representative authorized fee amount, and that the amount of Subtraction Recalculation be subsequently determined by the field office); POMS SI 02006.205(C) (requiring performance of Subtraction Recalculation); POMS SI 02006.210 (detailing steps of Subtraction Recalculation, and pointedly not requiring additional "presentment" by the claimant before Subtraction Recalculation must be performed). *See also* POMS SI 02006.202(B)(1)(a).

There was no requirement for Plaintiff and the rest of the purported class to re-present their underlying entitlement claims to Title II and SSI benefits before filing this action. Defendants' failure to perform the Subtraction Recalculation was not the failure to make a decision as to whether Plaintiff and the purported class were entitled to benefits. It was the failure, on the part of Defendants, to make a necessary recalculation (*i.e.*, the Subtraction Recalculation).

In *Linquist,* the plaintiff and class members were found to have presented their claim for money wrongly withheld by the Agency as a result of an improper double offset made by the agency. As the District Court did in *Gould*, the Eighth Circuit in *Linquist* found that the jurisdictional presentment requirement under Section 405(g) of the Act was met by virtue of the claimants' original presentment to SSA for their benefits, which led to a final decision granting them entitlement to those benefits, and the submission of earnings reports that demonstrated that the offsets should not have been made.

Key to the Eighth Circuit's analysis was that the "Secretary is quite aware of the recipient's uninterrupted claim for the full benefits allowed by the law, whether or not the particular recipient has actually challenged the double offset." *Linquist*, 813 F.2d at 887. As the court further elaborated:

> [T]he plaintiffs have presented their claims for benefits, and the agencies have found them entitled to benefits. This status has never been terminated. Instead, the

> present dispute is outside the traditional scope of 42 U.S.C. § 405(h), which requires entitlement decisions to be finalized inside the agency before any suit in federal court. Once the entitlement decision has been made and settled, the original presentment and subsequent earnings reports suffice to invoke the district court's jurisdiction.

Id., n. 11.[10] The analysis in *Linquist* aligns with the pronouncement of the Supreme Court in *Eldridge* that "[Section] 405(g) requires only that there be a 'final decision' by the Secretary with respect to the claim of entitlement to benefits." 424 U.S. at 329.

Ms. Steigerwald and the rest of the purported class have already been found to be entitled to both SSI and Title II benefits. *See, e.g.*, ECF 18-2, p. 7 ("Notice of Decision – Fully Favorable"). This prerequisite presentment was properly pled in the Complaint. *See* ECF 1, ¶¶ 75-80. Those paragraphs detail the following facts: Ms. Steigerwald applied for both Title II and SSI Payments; she received a favorable final decision, meaning that she was eligible to receive those benefits; she was paid her SSI benefits in full but her Title II benefits only partially; her attorney submitted a fee petition which was approved in part by SSA; SSA subsequently failed to perform the Subtraction Recalculation, as required under the Windfall Offset, resulting in Defendants withholding her Title II past-due benefits.

The class definition proposed in the Complaint encompasses the same factual scenario applicable to Ms. Steigerwald. *See* ECF 1, ¶ 26. The purported class is comprised of persons who, like Ms. Steigerwald, became eligible to receive or to have received both Title II and SSI benefits, *i.e.,* their eligibility is based on their *prior* successful application(s) for those benefits, for which their attorney or non-attorney representative successfully requested, and were awarded, fees, but

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[10] The Agency knew that it was required to perform the Subtraction Recalculation, because it received Ms. Steigerwald's and the other putative class members' attorney or non-attorney representative's request for fees – parallel to the earnings reports submitted in *Linquist* which put the agency there on notice not to withhold benefits – and it granted them (at least in part).

who (*i.e.*, the class members) did not receive all the money due them because SSA did not perform the Subtraction Recalculation, as required under the Windfall Offset. Defendants are aware that they are not properly following their own POMS and regulations and are systematically and secretly withholding money from persons, such as Plaintiff and the other members of the purported class, who have *already* presented both SSI and Title II claims and received favorable final determinations establishing their entitlement to those benefits. Complaint ¶¶ 93-95. On these facts, this Court should conclude that further presentment is unnecessary.

3. The Cases Relied Upon by Defendants Support Ms. Steigerwald

The Ninth Circuit's decision of *Haro v. Sebelius*, 747 F.3d 1099 (9th Cir. 2014), which Defendants rely on for their assertion that an initial determination of entitlement to benefits does not satisfy the presentment standard, is readily distinguishable for the simple reason that Ms. Steigerwald *did* present her claim for withheld funds. Furthermore, in *Haro*, unlike in the present case, the plaintiff beneficiaries' federal complaint was not related to their presentment to the agency at all. Instead, the plaintiffs "challenge the Secretary's policy of demanding up front reimbursement, a policy that has no bearing on the reimbursement calculations questioned by the beneficiaries at the administrative level." *Id.* at 1113. Here, by contrast, the instances of presentment documented above all relate directly to the benefits withheld by the Agency. As explained in detail above, the September 15, 2016 letter from Mr. Roose to the Agency, which the Agency failed to provide to the Court, clearly relates directly to the benefits already awarded to Ms. Steigerwald, but were withheld by the Agency, despite her continuous and "uninterrupted" entitlement to them. *See Linquist*, 813 F.2d at 887.

Similarly, the district court in *Situ*, 240 F.R.D. 551 explicitly "ruled that the presentment requirement should be interpreted liberally, and it is therefore sufficient for a plaintiff to have made a phone call to or otherwise contacted CMS with a complaint . . . ." *Id.* at 555. Ms. Steigerwald,

unlike the plaintiff in *Situ*, *did* contact the Agency through her attorney to request that her benefits be released to her. Therefore, *Situ* supports a finding of presentment here. By contrast, no case cited by Defendants supports their position that Ms. Steigerwald did not satisfy her presentment requirement by her attorney's request that the Agency release all withheld benefits to her.

B. The Complaint is Not Moot

"In order to demonstrate Article III standing, a plaintiff must show: (1) a concrete injury; (2) fairly traceable to the challenged action of the defendant; (3) that is likely to be redressed by a favorable decision." *Haro*, 747 F.3d at 1108 (9th Cir. 2014) (citation omitted). "Standing is to be determined as of the time the complaint is filed." *Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir. 2004) (quotation omitted).

Even though a plaintiff may have Article III standing at the time a complaint is filed, the Sixth Circuit has determined that a case may "become moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Unan,* 853 F.3d at 285 (quotation omitted). This rule is known as the "mootness doctrine." The mootness doctrine has an important qualification, as it is "'flexible' in the case of class actions." *Id.* (quoting *Wilson*). In those instances, "the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and the defendant exists." *Id.* (quotation omitted).

Moreover, even if a class has not yet been certified, a class action complaint can prevent mootness under certain specific exceptions to the mootness doctrine. "Although dismissal is ordinarily required when the named plaintiff's claim becomes moot before certification," there are "some exceptions to this general rule." *Unan*, 853 F.3d at 285 (citing *Wilson*, 822 F.3d at 942).[11]

[11] Notably, Defendants quote the first half of this sentence in their Motion to Dismiss, but lop off the second half, imposing a period after the word "certification," thereby wrongly representing that the Sixth Circuit has not specified any clear exceptions to this general rule. *See* ECF 18-1, p. 19.

The two exceptions to the mootness doctrine analyzed in *Unan*, *i.e.*, the "picking off" and the "inherently transitory" exceptions, are applicable here. As next explained, Ms. Steigerwald's putative class action Complaint is not moot, even if Defendants have paid her money.[12]

1. The "Picking Off" Exception to the Mootness Doctrine Prevents the Complaint from Being Mooted

One week after the parties filed their Joint Motion to stay the case in order to discuss the possibility of settlement and exchange informal discovery, Defendant SSA deposited $5,392.08 in Ms. Steigerwald's bank account. ECF 18-2, p. 5, ¶ 27. By letter dated Sunday, November 12, 2017 (during the stay period imposed by the Court), the Agency wrote to Ms. Steigerwald: "Per your request, we have reviewed the amount withheld from your benefits due to your receiving Supplemental Security benefits . . . you are due an underpayment of $5,392.08." *Id.* at p. 136.

The Sixth Circuit has explained that the "picking off" exception is applicable where "the defendant is on notice that the named plaintiff wishes to proceed as a class, and the concern that the defendant therefore might strategically seek to avoid that possibility exists." *Unan*, 853 F.3d at 285 (quoting *Wilson*, 822 F.3d at 947). Defendants certainly were on notice that Ms. Steigerwald wished to proceed on behalf of herself and a class when they attempted to pick her off.

First, the Complaint itself was styled as a "**Social Security Class Action Complaint**." ECF 1, p. 1. Indeed, Defendants concede such knowledge in their Statement of Facts: "On July 18, 2017, Plaintiff filed a complaint in this court, individually *and on behalf of a purported class*."

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[12] Because Defendants have not provided Ms. Steigerwald with an Offer of Settlement pursuant to Federal Rule of Civil Procedure 68, and because the November 12, 2017 letter Ms. Steigerwald received did not state that the funds provided by Defendants were sufficient to compensate her for the monetary allegations in her Complaint, Ms. Steigerwald cannot be sure at this time that Defendants have paid her all of the money she is owed. *See* ECF 18-2, pp. 136-38. Ms. Steigerwald intends to depose Janet Walker in order to determine whether Ms. Steigerwald did in fact receive all of the funds she deserves.

Motion, p. 11 (emphasis added). *Second*, the Complaint itself explains not just why Ms. Steigerwald is entitled to relief, but why *all the other members of the purported class* are entitled to relief as well. *See* ECF 1, pp. 9-15, ¶¶ 39-74 (explaining how Defendants have been failing to perform the subtraction recalculation for Ms. Steigerwald *and* the other members of the purported class); *id.* at pp. 16-20, ¶¶ 83-96 (explaining why exhaustion and the 60-day 42 U.S.C. § 405(g) requirement are inapplicable or should be waived for Plaintiff and the purported class).

Defendants may not now assert that because Plaintiff has not yet filed her Motion for Class Certification, her claim can be mooted. The logic of *Unan* dictates the illogic of Defendants' argument. In rejecting a similar claim, one court explained that allowing a pre-certification offer of settlement pursuant to F.R.C.P. 68 to moot a claim would be highly unequitable:[13] "[I]f the putative class representatives' claims could be mooted by a settlement offer tendered before the certification motion is filed – each side will endeavor to beat the other to the punch. Plaintiffs will be forced to swiftly file their certification motions, possibly before completing class-related discovery, in order to maintain their claims." *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008) (concluding that "treating pre-certification settlement offers as mooting the named plaintiffs' claims would have the disastrous effect of enabling defendants to essentially opt-out of Rule 23.") (Citations omitted).

Indeed, courts have held that a class action complaint is not mooted because the named plaintiff has been compensated before filing a motion for class certification, even where the named plaintiff accepts an offer of settlement. *See Eckert v. Equitable Life Assurance Soc'y of U.S.*, 227

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[13] As noted, Defendants have not made an Offer of Settlement pursuant to F.R.C.P. 68 to Ms. Steigerwald. They have not explained how they would remedy her claim for injunctive relief, and they have not offered to pay Plaintiff's reasonable costs. Therefore, it is doubtful that Plaintiff's claim could be considered satisfied in any event.

F.R.D. 60, 63 (E.D.N.Y. 2005) (class action complaint not mooted where named plaintiff accepted offer of settlement before motion for class certification filed; the court explained "in situations where a plaintiff has not yet had a reasonable opportunity to file a motion for class certification, namely, where there has been no 'undue delay,' the court retains subject matter jurisdiction despite the plaintiff's failure to move for class certification.") (collecting cases).[14] And a court in this circuit recently denied a premature motion for class certification, based on the Sixth Circuit's "picking off" exception, explaining that in light of the "picking off" exception there should be no rush to file such a motion. *Sobol v. Imprimis Pharm., Inc.*, 2016 WL 9488978, at *1 (E.D. Mich. Dec. 15, 2016) ("Plaintiff's class action will not become moot if Defendant 'picks off' his individual claims, so a placeholder class certification is unnecessary.").

Despite Defendants' attempt to "pick off" Ms. Steigerwald and thereby avoid remedying the systemic flaws detailed in her Complaint, Sixth Circuit precedent will not allow such easy shirking of Defendants' responsibilities. Defendants' mootness claim fails.

2. The "Inherently Transitory" Exception to the Mootness Doctrine Prevents the Complaint from Being Mooted

"[I]n cases where the claims asserted on behalf of the class are 'so inherently transitory' that the named plaintiff's claims will "expire" before the district court can even rule on a motion for class certification, the plaintiff is deemed to have standing to sue – notwithstanding that her claim has 'expired,' *i.e.*, that the relief available for the claim can no longer do her any good – so long as she had standing to sue 'at the time the . . . complaint was filed[.]'" *Price v. Medicaid Dir.*, 838 F.3d 739, 746 (6th Cir. 2016) (quoting *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-

[14] Here it would have been impossible for Ms. Steigerwald to have prematurely filed her Motion for Class Certification prior to Defendants funding her account while at the same time remaining compliant with the Local Rules, which mandate that such a motion be filed after the parties' 26(f) planning meeting. *See* Local Rule 23.1(c).

52 (1991)). *See also Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013) ("[T]he relation-back doctrine may apply in Rule 23 cases where it is certain that other persons similarly situated will continue to be subject to the challenged conduct and the claims raised are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.").

For the inherently transitory exception to the mootness doctrine to apply, the Sixth Circuit has held that two factors must exist: First, the plaintiff's injury must be "so transitory that it would likely evade review by becoming moot before the district court can rule on class certification." *Wilson*, 822 F.3d at 945. Additionally, it must be clear that "other class members are suffering the injury." *Id.*

In *Wilson*, the Sixth Circuit applied the inherently transitory exception to the mootness doctrine to keep alive a class action complaint where the group of plaintiffs' "claims for a hearing on Medicaid eligibility could be resolved quickly by the state Medicaid agency." *Id.* (citing *Wilson*, 822 F.3d at 946). The point there, as here, was that resolution of the plaintiff's complaint was entirely in the hands of the state agency. It could take weeks or months to be resolved, or it could be resolved tomorrow (or, "fortuitously," as soon as a plaintiff becomes the named plaintiff in a class action complaint). The Sixth Circuit explained that "[w]here resolution involves such uncertainty, we conclude that the injury is 'so transitory that it would likely evade [judicial] review.'" *Unan*, 853 F.3d at 287 (quoting *Wilson*, 822 F.3d at 947).

Here, as in *Wilson*, because the value of each class-members individual claim is relatively small, Defendants can easily dispose of each claim as soon as a new plaintiff is named, in order to prevent the class action from going forward. This is exactly what the inherently transitory exception to the mootness doctrine is intended to prevent: "[T]he crux of the 'inherently transitory'

exception is the uncertainty about the length of time a claim will remain alive. Where a state may quickly and unilaterally grant relief to an individual once litigation begins, we have found that a claim may be transitory even where the claim could theoretically remain live for weeks, if not months." *Unan*, 853 F.3d at 287. The first prong of the inherently transitory test certainly is met.

As to the second prong, Plaintiff has shown in her Complaint that, as in *Unan*, the Agency's failure to perform the Subtraction Recalculation "occurred as a result of systemic, rather than human, error." *Id.* To cite but one example, the Office of Inspector General Reports submitted along with Plaintiff's Complaint show that the issue of the Agency's failure to properly apply the Windfall Offset, if at all (and thus also the Subtraction Calculation) is systemic, long-standing, and affects many individuals other than Plaintiff herself. *See* ECF 1, ¶¶ 58-61; 66-72. On these facts, this Court should follow the clear holdings of the Sixth Circuit in *Unan* and *Wilson*, and find that the inherently transitory exception to the mootness doctrine applies to allow Ms. Steigerwald's class action complaint to proceed.

VI. CONCLUSION

The Court should deny the Motion.

Respectfully submitted,

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Attorneys for Plaintiff and the putative class

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2017, a copy of the foregoing Opposition to Defendants' Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the putative class

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Opposition to Defendants' Motion to Dismiss complies with the page limitations for a Standard/Unassigned matter, and is 20 pages long.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the putative class

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

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

I, Kirk B. Roose, declare as follows:

1. I am an attorney at Roose & Ressler, a Legal Professional Association, attorneys for Plaintiff Stephanie Lynn Steigerwald ("Ms. Steigerwald").

2. On September 24, 2009, Ms. Steigerwald hired me to represent her on her claims for Social Security Disability Insurance benefits under Title II of the Social Security Act ("Title II Benefits") and Supplemental Security Income payments under Title XVI of the Social Security Act ("SSI Benefits").

3. On July 15, 2014, an Administrative Law Judge found that Ms. Steigerwald qualified for both Title II Benefits and SSI Benefits.

4. On January 23, 2015, I submitted a fee petition to Defendant the Social Security Administration (the "Agency"), requesting attorney's fees in the amount of $17,059.25.

5. On August 31, 2016, the Regional Chief Administrative Law Judge entered an Order awarding me $13,500.00 in attorney's fees.

6. On September 12, 2016, the Agency sent me a letter, requesting a written statement from me in order to release the benefits of Ms. Steigerwald that had been withheld pending the receipt of my attorney's fees.

7. On September 15, 2016, I responded to the Agency by letter. In my letter to the Agency, I requested that the Agency "[p]lease release the withheld benefits to the claimant," Ms. Steigerwald. A true and correct copy of the letter I sent to the Agency on September 15, 2016, with redactions for privacy, is attached as Exhibit A to this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 29, 2017

/s/ Kirk B. Roose

Kirk B. Roose

Exhibit A

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September 15, 2016

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Baltimore, MD 21241-2913
Fax: (410)966-0769 - 1 page(s)

Re: Miss S[redacted]
SS#: [redacted]

Dear Office of Central Operations:

We were notified that additional money is being withheld for our fee in a Social Security Notice dated September 12, 2016.

We are writing to inform you that we are not petitioning the United States District Court for the Northern District of Ohio for the balance of our fee. Please release the withheld benefits to the claimant.

Very truly yours,

[redacted]
Kirk B. Roose

KBR:djs
c: Miss S[redacted]