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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. STATEMENT OF THE ISSUES

1. Where the incontrovertible evidence shows that Defendants the Social Security Administration ("SSA") and Nancy A. Berryhill (together, "Defendants" or the "Agency") are liable as to the sole Count of Plaintiff Stephanie Lynn Steigerwald ("Plaintiff" or "Ms. Steigerwald")'s Class Action Complaint, should summary judgment be awarded to Plaintiff on this issue?

2. Are counsel who are representing Plaintiff and a proposed class eligible to receive reasonable attorneys' fees in accordance with 46 U.S.C. § 406(b)?

II. SUMMARY OF THE ARGUMENT

In their Motion to Dismiss, Defendants admitted that they failed to perform the requisite "Subtraction Recalculation" for Ms. Steigerwald and that they subsequently paid Ms. Steigerwald the Retroactive Underpayment she was due after the Class Action Complaint in this action was filed.[1] ECF 18-1, p. 18. By attempting to pick off Ms. Steigerwald's claim, the Agency has provided incontrovertible evidence that it has violated the law and has thus proven its liability as to the one Cause of Action of the Complaint brought on behalf of Ms. Steigerwald and the proposed class: "Violation of the Social Security Act and its Implementing Regulations." Doc. 1, p. 20 (casing fixed). Furthermore, as demonstrated below, Defendants also have now provided evidence, in the form of discovery responses verified under penalty of perjury, that the proposed

[1] The term "Subtraction Recalculation," which was coined for ease of reference by Plaintiff's counsel, is defined in Paragraph 8 of Plaintiff's Complaint. The term "Retroactive Underpayment," which also was coined for ease of reference by Plaintiff's counsel, is defined in Paragraph 10 of Plaintiff's Complaint. For purposes of this Motion, Plaintiff adopts the Agency's understanding of those terms. *See* pp. 9-10, *infra*, as to how the Agency has defined the required calculation that is the subject of this litigation and for which underpayments are due.

class contains at least approximately 28,510 members, for all of whom the Agency has failed to perform the Subtraction Recalculation and pay any Retroactive Underpayments that may be due.[2]

In her single count Class Action Complaint, Ms. Steigerwald alleges that Defendants failed to perform the Subtraction Recalculation as required, and thereby failed to pay her, and the other members of the proposed class, the Retroactive Underpayment due, in violation of 42 U.S.C. § 1320a–6, 20 C.F.R. § 416.1123(b)(3) and POMS SI § 02006.200. Doc. 1, ¶¶ 97-101. In its Motion to Dismiss and the attached Declaration of Janet Walker, the Agency conceded that this is so for Ms. Steigerwald. Doc. 18-2, p. 5, ¶¶ 26-27:

> [¶ 26] On November 6, 2017, SSA recalculated Ms. Steigerwald' s windfall offset to account for the attorneys' fees incurred in obtaining Title II benefits. [¶ 27] Based on the November 6, 2017 recalculation of the windfall offset to include attorneys' fees, on November 7, 2017, SSA paid an underpayment in the amount of $5,392.08 to Ms. Steigerwald via direct deposit. . . .

Further, in discovery responses, the Agency has now acknowledged its liability for tens of thousands of other proposed class members as well. Exhibit 1.

While the class in this case has not yet been certified, all members of the class are in the same situation as Ms. Steigerwald was at the start of this case. Namely, just as the Agency failed to perform the Subtraction Recalculation as required for Ms. Steigerwald and subsequently failed to pay her the money she was owed, Defendants have provided evidence to Plaintiff that they have failed to perform the Subtraction Recalculation for some 28,510 to 37,675 potential class members and have failed to pay thousands of them any Retroactive Underpayments that are due. This evidence is conclusive as to the Agency's class-wide liability. Accordingly, summary judgment

---

[2] *See* Exhibit 1, attached hereto. *See also infra*, pp. 9-11. These 28,510 people reside in all 50 States, the District of Columbia, Guam, Puerto Rico and nine foreign countries, per the response by Defendants to another discovery request in which Defendants have produced the names and addresses of the individuals.

as to the Agency's liability for the Cause of Action in Ms. Steigerwald's Class Action Complaint is appropriate.

Should the Court agree that the Agency is liable to Plaintiff and a class, 42 U.S.C. § 406(b) provides that counsel may be awarded "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment . . . ." In order to foreclose any doubt as to whether the language of 42 U.S.C. § 406(b) means what it says, Plaintiff respectfully requests summary judgment that this statutory section applies to the present case, *i.e.,* a Social Security Act class action.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Agency's Failure to Perform the Subtraction Recalculation as Required is Systemic and Pervasive

As this Court has already found, in July 2014, Ms. Steigerwald's attorneys "successfully recovered approximately five years of back SSI and Title II disability payments." Doc. 32, p. 3. On January 23, 2015, Ms. Steigerwald's attorneys submitted a fee petition to Defendant SSA in the amount of approximately $17,000. *Id.*, p. 4. SSA ultimately awarded Ms. Steigerwald's attorneys a finalized attorneys' fee of $13,500 in August, 2016. *Id.*

Pursuant to 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, SSA should have immediately, at that time, performed the Subtraction Recalculation. Doc. 32, p. 4. *See also* POMS SI 02006.202(A)(1)(c); POMS SI 02006.202(B); POMS SI 02006.205(C)(1)(b); POMS SI 02006.210(B)(Step 2) ("Upon receipt of a fee authorization notice

[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.

in fee petition cases . . . use the notice as the source of the needed fee information (per SI 02006.202.)"). Nevertheless, SSA failed to perform the Subtraction Recalculation for Ms. Steigerwald. Doc. 32, pp. 4-5.

Such failure to perform the Subtraction Recalculation is systemic, widespread, and is not limited to Ms. Steigerwald. This is true, despite Defendants' earlier protestations to the contrary. *See, e.g.*, Doc. 41, p. 9 ("Plaintiff has identified one individual – herself – since 2002, for whom the SSA failed to perform a WO [Windfall Offset] recalculation [*i.e.*, the Subtraction Recalculation] to account for representatives' fees. This one instance, which occurred in 2016, is insufficient to justify requiring the agency to produce nationwide data for sixteen years going back to 2002."). *See also* Doc. 37-1, p. 3 (". . . Plaintiff has not identified any other individual who has been injured as Plaintiff has" and therefore, the class-certification discovery Plaintiff sought "will not help her win her claim . . . ."); Doc. 18-1, p. 19 n.11 ("[T]o establish that a class should be certified, Plaintiff must show that her broad allegations covering allegedly thousands of claims of past-due benefits articulate a common contention of such a nature that it is capable of classwide resolution . . . But 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." (Quotation omitted)).

Indeed, and contrary to Defendants' earlier assertions, class-certification discovery that Defendants have produced shows that, between September 1, 2012 and October 31, 2017, the SSA failed to perform the Subtraction Recalculation to account for representatives' fees **for 37,675**

claimants. Exhibit 1, pp. 1-2. And, the SSA has also determined that, of those 37,675 claimants, **approximately 28,510 are likely due a Retroactive Underpayment**. *Id.*[4]

To put these numbers in perspective, the same discovery produced by Defendants attests that the total number of individuals for whom SSA was obligated to perform the Subtraction Recalculation between September 1, 2012 and October 31, 2017 totaled 95,519. Exhibit 1, p. 2. Therefore, in failing to perform the requisite Subtraction Recalculation for 37,675 claimants between September 1, 2012 and October 31, 2017, **the SSA failure rate amounted to over 39% of cases in which the Subtraction Recalculation was supposed to be performed**.

Solely for the purpose of class-certification discovery, Plaintiff allowed Defendants to narrow the time-frame of affected individuals to the above dates (*i.e.*, from September 1, 2012 to October 31, 2017). However, there is no reason to believe that the Agency's failure to perform the Subtraction Recalculation began on September 1, 2012. Indeed, all of the evidence suggests that the Agency's failure goes back many more years, and likely implicates thousands more deserving claimants who did not receive the moneys they were owed. *See generally* Doc. 1, ¶¶ 39-74. Similarly, there is no reason to believe that, barring the prospective injunctive relief requested in the Complaint, this widespread and systemic program failure will not continue. As the limited class-certification discovery provided by Defendants shows, the problem this lawsuit was filed to address is not only real; it is pervasive and national in scope. *See* n.2, *supra.*

---

[4] Because the Agency has admittedly not yet performed the Subtraction Recalculation for these 28,510 individuals, it is unclear at this time the exact number of people due money and the amount of money each is due. However, Defendants have provided a sample of 50 anonymous, randomly-selected individuals from that group for whom they recalculated (for discovery purposes) potential underpayments. Exhibit 2. Of the 50 for whom recalculations were made, 33 were due money totaling $62,125.19. *Id.* at p. 3. Seventeen (or 34% of the 50) were not due any money, while 33 (*i.e.*, 66%) were. *Id.* The underpayments due (excluding the 17 for whom no money was due) ranged from a low of $32 to a high of $10,929. *Id.* The Agency has agreed to produce another sample of 50 randomly-selected cases on or before April 23, 2018.

IV. LEGAL STANDARDS

"Summary judgment should be granted where 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Farhner v. United Transp. Union Discipline Income Prot. Program*, 645 F.3d 338, 342 (6th Cir. 2011) (quoting Fed. R. Civ. P. 56(c)). "The ultimate question [for the Court] is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestle USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986)).

In order to prevail on summary judgment, the moving party "bears the initial burden and must inform the court of the basis for its motion. Further, the moving party must identify those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits' which demonstrate the absence of a genuine issue of material fact.'" *MDC Acquisition Co. v. N. River Ins. Co.*, 898 F. Supp. 2d 942, 947 (N.D. Ohio 2012) (citing and quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has met this burden, "the burden shifts to the nonmoving party to set forth specific facts showing a triable issue." *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 797 (N.D. Ohio 2002) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

In order to adequately defend against summary judgment, "the nonmoving party must do more than show that there is some metaphysical doubt as to the material facts." *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993) (citing *Matsushita*, 475 U.S. at 586 (1986)). Instead, the nonmoving party "must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary

judgment." *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir. 2002) (citing *Anderson*, 477 U.S. at 249-50).

"The construction and interpretation of a statute is a question of law. Summary judgment is a preferred vehicle for disposing of purely legal issues. Consequently, th[e] issue [of statutory interpretation] is particularly suited to disposition by summary judgment." *Hawkins v. McGee*, 2005 WL 2407602, at *3 (W.D. Tenn. Sept. 29, 2005) (citations omitted). *See also Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 503 (6th Cir. 2012) ("Planned Parenthood's first challenge is well-suited for summary judgment because it involves only a question of statutory interpretation."). "In matters of statutory interpretation, [courts] look first to the text and, if the meaning of the language is plain, then 'the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1106 (6th Cir. 2010) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)).

V. ARGUMENT

A. The Agency Has Incontrovertibly Demonstrated Liability as to the Single Count of the Class Action Complaint; Summary Judgment on This Issue is Appropriate

The Agency has never alleged that it is not required to perform the Subtraction Recalculation, where required by the POMS, or to subsequently pay deserving claimants Retroactive Underpayments, in accordance with the POMS. Instead, the Agency has taken transparently contradictory positions as to its liability, both as to Ms. Steigerwald and as to any proposed class.

As to Ms. Steigerwald, at first the Agency claimed that she was entitled to no relief at all. Doc. 17, p. 14. Days later, the Agency deposited in Ms. Steigerwald's bank account the very monetary relief she requested for herself in the Complaint. Doc. 18-2, p. 136.

Similarly, despite the Agency's blanket denial of the class relief requested in the Complaint, the Agency has now confirmed that there are, at the very least, tens of thousands of claimants currently in the same position as Ms. Steigerwald had been before she was paid the Retroactive Underpayment. That is, contrary to the requirement in the POMS, the Agency "has not yet recalculated the windfall offset [for these individuals] and therefore has not issued an underpayment due." Exhibit 1, p. 1. This is a clear concession by the Agency as to liability, foreclosing the need for a trial on the merits. Summary judgment on this issue is appropriate.

1. The Evidence Conclusively Demonstrates the Agency's Liability as to Ms. Steigerwald

Count I of the Complaint alleges that the Agency has violated the Social Security Act and its Implementing Regulations by "fail[ing] to perform the Subtraction Recalculation, as required, and . . . subsequent[ly] fail[ing] to pay claimants [such as Ms. Steigerwald] the Retroactive Underpayments." Doc. 1, ¶ 99; *see also id.*, ¶¶ 100-101. The Complaint alleges that the Agency failed to perform the Subtraction Recalculation, as required, for Ms. Steigerwald. Doc. 1, ¶¶ 75-79. The Complaint goes on to allege that, because the Agency failed to perform the Subtraction Recalculation as required for Ms. Steigerwald, it necessarily also failed to provide Ms. Steigerwald the Retroactive Underpayment she was due. *Id.*, ¶ 80.

In its Answer, filed on November 6, 2017, the Agency denied that it owed Ms. Steigerwald anything, stating: "Defendants deny that Plaintiff is entitled *to any relief whatsoever* . . . ." Doc. 17, p. 14 (emphasis added). Nevertheless, on November 12, 2017 – only six days after filing its Answer denying that Ms. Steigerwald was entitled to any relief – the Agency sent her a letter, stating that she was due $5,392.08 and that this money would be immediately paid to her. Doc. 18-2, p. 136. In its Motion to Dismiss, the Agency asserted that the $5,392.08 it paid Ms. Steigerwald was a Retroactive Underpayment, made pursuant to the Agency's delayed Subtraction

Recalculation. Doc. 18-1, p. 18 ("Once Plaintiff raised her claim by filing this case, the SSA performed a recalculation of the windfall offset to account for representative's fees, which had been approved after the initial calculation of the windfall offset, and issued an underpayment of $5,392.08 to Plaintiff on November 7, 2017.").[5]

Despite the statement in its Answer that Ms. Steigerwald and, by extension, the proposed class were entitled to no relief whatsoever as to the allegations of the Complaint, the Agency's performance of the Subtraction Recalculation for Ms. Steigerwald immediately thereafter and its subsequent payment to her of the money she was owed is clear and convincing evidence of the Agency's liability as to Count I of the Complaint.

2. The Evidence Conclusively Demonstrates the Agency's Liability as to the Putative Class

Similarly, the Agency has now admitted that there are at least 37,675 claimants who are in the very same position as Ms. Steigerwald was before the Agency belatedly performed the Subtraction Recalculation for her. Exhibit 1, pp. 1-2. Namely, these 37,675 claimants became eligible to receive both Title II and Title XVI payments concurrently, and were represented by attorney or non-attorney representatives who made fee petitions which were granted and then authorized by SSA or any court, but the Agency failed to perform the Subtraction Recalculation as required and subsequently failed to pay the Retroactive Underpayment due. *See* Doc. 1, ¶ 26.

The Agency has further provided documentary evidence proclaiming that approximately 28,510 of these claimants are owed Retroactive Underpayments. These are:

> Individuals for whom representatives' fees were paid out of retroactive benefits between September 1, 2012 and October 31, 2017, and for whom the Social Security Administration ("SSA") made a windfall offset determination before the amount of

[5] Notably, according to Defendants' Motion to Dismiss, the Agency performed the Subtraction Recalculation on November 7, 2017, *just one day after it filed its Answer*, which had stated unequivocally that Ms. Steigerwald was not entitled to any relief whatsoever.

> representatives' fees was determined and paid out of retroactive benefits, but, ***after the amount of fees was determined and paid out of retroactive benefits, SSA has not yet recalculated the windfall offset and therefore has not issued an underpayment due.***

Id. at p. 1 (emphasis added) (footnote omitted).

This statement, verified by an Agency employee "under penalty of perjury," Exhibit 1, p. 3, is a demonstration of the Agency's liability as to exactly what Count I of the Class Action Complaint alleges. The Complaint alleges, and the Agency now concedes, that SSA has failed to perform the Subtraction Recalculation as required for a proposed class of claimants, and has subsequently failed to pay the proposed class of claimants the Retroactive Underpayments they are owed. The Agency's admission – that the underlying allegations of the Complaint are accurate – summarily ends the question of whether the Agency has regularly, routinely, and systematically violated the Social Security Act and its implementing regulations. It has.[6]

Because the Agency has conclusively demonstrated its liability as to Count I, summary judgment is appropriate as to the Agency's liability on this Count. *See Dewald v. Minster Press Co.*, 494 F.2d 795, 797 (6th Cir. 1974) ("Following opening statements, counsel for Ross, noting Minster's admission of liability . . . effectively moved for a directed verdict . . . District Judge Philip Pratt, noting that Minster's admission in its opening statement injected a new variable not present at the time of the earlier [summary judgment] motion, granted the motion for directed verdict insofar as liability was concerned, leaving for the jury only the issue of damages."). *See also Joe Hand Promotions, Inc. v. Beech*, 2015 WL 1825331, at *4 (S.D. Ala. Apr. 22, 2015) ("In

---

[6] This result is no different for those persons, beyond the 28,510 already identified, who have not yet been identified by the Agency. Once identified, those persons will definitionally be in the very same position as Ms. Steigerwald was originally and as the 28,510 claimants already identified by the Agency are now. In other words, the Subtraction Recalculation will not have been performed for those yet-to-be-identified class members, and the resulting Retroactive Underpayments have not yet been paid.

its response to Joe Hand's motion for summary judgment, the Defendants concede that they are liable for violating § 605 . . . Accordingly, Joe Hand's motion for summary judgment as to liability on Count 1, brought under 47 U.S.C. § 605, is **GRANTED**." (Emphasis in original)); *Control Techniques, Inc. v. Oliver*, 1991 WL 47345, at *1 (D. Conn. Feb. 21, 1991) ("Oliver admits such liability. Thus, plaintiff is entitled to summary judgment on Count One of its Amended Complaint.").[7]

B. Counsel is Eligible for Reasonable Attorneys' Fees Pursuant to 42 U.S.C. § 406(b)

Given the pure legal nature of the question presented, the inquiry of statutory interpretation as to whether counsel for a class in this case is eligible for attorneys' fees under 42 U.S.C. § 406(b) is ripe for summary judgment at this time. *DeWine*, 696 F.3d at 503. Especially in light of Defendants' irrefutable liability, this Court can now also enter summary judgment on the relief requested in the Complaint, to wit: "(j) Allow, as part of the Court's judgment, a fee for representation of Plaintiff and the class . . . pursuant to 42 U.S.C. § 406(b)(1)(A)." Doc. 1, p. 22.

Of course, counsel is not at this time requesting a decision as to the amount of fees or the applicable percentage that may be awarded. If a class is certified, the Court will determine these matters following the filing of a petition for fees. Nevertheless, resolving the issue of attorneys' fees at this stage will, it is hoped, streamline the issues in this case and/or serve to promote the possibility of a potential settlement.[8]

---

[7] The Court has already "required Defendant Commissioner to excuse § 405(g)'s exhaustion requirement" in this case. Doc. 32, p. 11. This disposes of any legitimate affirmative defenses the Agency may have had.

[8] Plaintiff intends to file a Motion for Class Certification in the next few weeks, and certainly by no later than May 21, 2018, the date by which the Court's Scheduling Order requires the Class Certification Motion be filed.

"The starting point in interpreting a statute is its language[.]" *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)). In this circuit, a court's "'interpretation of legislative acts is limited, for '[i]f the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Nixon v. Kent County*, 76 F.3d 1381, 1386 (6th Cir.1996) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993))). "Departure from the language of the legislature and resort to judicially created rules of statutory construction is appropriate only in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . or when the statutory language is ambiguous.'" *Nixon*, 76 F.3d at 1386 (quoting *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 842 (6th Cir.1994)).

42 U.S.C. § 406(b)(1)(A) states:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

The language of this statute is clear and unambiguous. Pursuant to its terms, when a court issues a favorable judgment, the attorney may be entitled to a reasonable fee for the attorney's representation. Nothing in the text of the statute limits its application for use in a class action setting.

In 2014, Judge Rosemary Collyer of the District Court for the District of Columbia was faced with the very issue placed before this Court by this Motion. *Greenberg v. Colvin*, 63 F. Supp. 3d 37 (D.D.C. 2014). There, SSA contended that § 406(b) does not apply in class actions. *Id.* at 47. The *Greenberg* court disagreed, concluding that § 406(b) applied to allow "Plaintiff's counsel [to] seek a fee award from past-due benefits owed to class members in an amount no greater than twenty-five percent of any individual's payment." *Id.*

In the District of Columbia Circuit, as here, "unless otherwise defined, the words of a statute must be construed according to their common meaning." *Id.* at 48 (citing *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009); *compare Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443, 447 (6th Cir. 2009) ("'[W]e give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.'" (Quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000))). The *Greenberg* court found:

> § 406(b) explicitly states that when the Court renders a favorable judgment awarding a claimant past-due Social Security benefits, it may also determine and allow a reasonable fee for the claimant's attorney. 42 U.S.C. § 406(b). Nothing in the language of this provision remotely suggests that Congress intended to deprive courts of the ability to set reasonable attorney fees in class action lawsuits.

63 F. Supp. 3d at 47.

In *Greenberg*, SSA argued that the text of § 406(b) should only be applicable where a plaintiff's counsel represents a single claimant, not in the class action context. The *Greenberg* court made short shrift of this argument finding that both "the language and context of § 406(b) suggest that attorney fees are allowable in cases with multiple claimants." *Id.* at 48. As to the language of the statute, the *Greenberg* court explained:

> While no court [prior to *Greenberg*] has explicitly found that the language of § 406(b) extends to class actions, the Supreme Court has held that § 405(g) of the Social Security Act allows for class

> relief, despite the fact that it authorizes a singular "individual," "plaintiff," or "claimant" to challenge a decision of the Social Security Commissioner. *Califano v. Yamasaki*, 442 U.S. 682, 700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) . . . Accordingly, given that the statute consistently refers to individual claimants and the Supreme Court has construed such language to allow class actions, the Court finds that the use of the term "claimant" in § 406(b) does not render attorney fees unavailable in class actions to recover SSA Benefits.

Id. at 48-49 (footnote omitted).[9]

Pursuant to Sixth Circuit precedent, it is unnecessary to examine the legislative history of the statute where, as here, the text of the statute is clear. *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007) ("While legislative history may sometimes usefully add to our understanding of a statute where the statutory language is ambiguous, it cannot alter the plain meaning of the text." (Citations omitted)). Nevertheless, the *Greenberg* court concluded that the context in which 42 U.S.C. § 406(b) was adopted underscores that the text of the statute should be read literally, that is, "to include fee recovery in class action cases." 63 F. Supp. 3d at 50. Having analyzed the legislative history of the statute, the *Greenberg* court determined:

> The legislative history of § 406(b) indicates the provision was motivated by two main concerns: first, that attorneys were collecting "inordinately large fees" in social security cases; and second, that attorneys should be able to collect reasonable fees . . . Thus, a "broader reading of § 406(b)(1)," to include fee recovery in class action cases, "is the more appropriate reading" to promote representation in Social Security cases while ensuring that attorney fees remain reasonable.

Id. at 49-50 (footnote omitted).

---

[9] Even if somehow the term "claimant" in 42 U.S.C. § 406(b) could only be interpreted singularly, in this class action case, upon certification of the class and appointment of class counsel, the latter would, by definition, be representing each individual "claimant," allowing the statute to apply. *See* David F. Herr, Annotated Manual for Complex Litigation, Author's Comments to Section 21.33 (4th Ed. 2017) ("After certification, every class member is considered a client of the lawyers for the class.") (citing Manual Section 30.24).

The Agency may oppose the applicability of 42 U.S.C. § 406(b) regarding the proposed class due to the fact that there is no separate contingency fee agreement between counsel and each individual class member, other than with Ms. Steigerwald herself (as is the case here with her contingent fee agreement). Such opposition would be mistaken.

While the existence of a fee agreement between a claimant and her attorney does create a "rebuttable presumption" that the percentage of fees requested under § 406(b) is reasonable, the absence of such an agreement does not mean that § 406(b) is inapplicable. *See Walton v. Comm'r of Soc. Sec.*, 2013 WL 1855990, at *1 (N.D. Ohio 2013) (When calculating fees pursuant to 42 U.S.C. § 406(b), "[a] court 'begin[s] by using twenty-five percent of the past due benefits as a benchmark.' Next, a court considers whether a fee agreement has been executed by the plaintiff – 'if the agreement states that the attorney will be paid twenty-five percent of the benefits awarded, it should be given the weight ordinarily accorded a rebuttable presumption.'" (Quoting *Rodriquez v. Brown*, 865 F.2d 739, 746 (6th Cir.1989))).

In fact, courts have routinely awarded attorneys' fees pursuant to Section 406(b) even where no fee agreement existed between the claimant and his or her counsel for the services rendered in court – and even where SSA argued to the court not to allow such fees. *See, e.g., Thomas v. Astrue*, 359 Fed. App'x. 968, 975 (11th Cir. 2010) ("Even though there was no valid contingency agreement in the present case, *Gisbrecht*'s principles should guide the district court in determining a reasonable § 406(b) fee."); *Artrip v. Colvin*, 2013 WL 1399046, *2 (W.D. Va. 2013) ("[T]he Commissioner is correct that the fee agreement provided to the court pertains only to work performed before the Social Security Administration. However, that does not foreclose plaintiff's counsel from seeking a fee under 42 U.S.C. § 406(b) for work performed in this court."). *See also Tantillo v. Barnhart*, 2011 WL 2680536, *7 (E.D.N.Y. 2011) ("[E]ven without the [fee

agreements governing representation in court], Goldstein had the right under § 406(b) to apply for a 25% contingent fee for work in the district court. The presence of an agreement is one factor that Judge Trager could and did consider, but he still had the ability under § 406(b) to award the fee that he in fact awarded."), *vacated in part on other grounds*, 2011 WL 6114755 (E.D.N.Y. 2011); *Selvage v. Sec. of HHS*, 1990 WL 164743, *1 (N.D. Ohio May 16, 1990) (awarding attorneys' fees under 42 U.S.C. § 406(b) without reference to the existence of a fee agreement between the claimant and his attorney).

Moreover, it is untenable for any class counsel to obtain engagement letters from each class member. Any such requirement would eviscerate class actions, is clearly not in the public interest and is by no means required. As the *Greenberg* court concluded: "[A]ttorney fees in a class action may be awarded in the absence of individual fee agreements as long as absent class members are aware of the arrangement and are given the opportunity to object." 63 F. Supp. 3d at 51 n.10. *See also* Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1803.1 (3d ed. 2013) ("As a practical matter, the attorney will not be able to secure a fee agreement from each class member.").

The Agency may attempt to argue in opposition that *Greenberg* is inapplicable because the *Greenberg* court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(3), and not pursuant to Federal Rule of Civil Procedure 23(b)(2). Here, Plaintiff has pled the applicability of both types of classes. Doc. 1, ¶ 25. In any case, there is no distinction between (b)(2) and (b)(3) classes for purposes of attorneys' fees – under § 406(b) or otherwise. It is clear that class members of *any* class certified pursuant to Federal Rule of Civil Procedure 23 will have the right to object

to a class counsel's request for attorneys' fees. *See* Fed. R. Civ. P. 23(h)(2) ("A class member, or a party from whom payment is sought, may object to the motion [for attorneys' fees].").[10]

Applying 42 U.S.C. § 406(b) to Social Security Act class actions is clearly in the public interest, as it incentivizes competent class-action attorneys to bring cases, such as this one, where the Agency has been derelict in its duties for years if not decades. As Wright & Miller explains:

> Even if the attorney's efforts on behalf of the class are successful, any extant formal fee agreements will not be significant enough to provide plaintiff's attorney with anything approaching adequate compensation for the work and the risks involved. If counsel did not have the prospect of an award that took account of the risks and uncertainties, the necessary incentive would be lacking and a major weapon for enforcing various public policies would be blunted.

7B Fed. Prac. & Proc. Civ. § 1803.1.

It would be hypocritical for the Agency to object to the plain statutory language and the *Greenberg* precedent on the grounds that the Agency is a "fiduciary" or a "trustee" for beneficiaries, whose underpayments would be reduced by a 42 U.S.C. § 406(b) award. This claim rings especially hollow here, where the Agency moved to dismiss the case early on procedural grounds with the intended effect of *entirely* depriving the thousands of potential class members of the moneys due to them. In any case, "[b]ecause the SSA has no direct interest in how much of the award goes to counsel and how much to the disabled person, the *district court* has an

---

[10] Plaintiff believes that at least 23(b)(3) class certification is warranted here because individualized monetary claims are present. *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 363 (2011) ("[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)"). *See also Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 429 (6th Cir. 2012) ("certifying declaratory relief under Rule 23(b)(2) is permissible even when the declaratory relief serves as a predicate for later monetary relief, which would be certified under Rule 23(b)(3)."). Moreover, *Greenberg* also involved monetary relief and the Agency and the plaintiff there jointly sought certification through a consent motion for a 23(b)(3) class. 63 F. Supp. 3d at 41. Regardless, for the purpose of interpreting and applying 42 U.S.C. § 406(b), which type of class or classes is certified is of no consequence.

affirmative duty to assure that the reasonableness of the fee is established." *Crawford v. Astrue*, 586 F.3d 1142, 1149 (9th Cir. 2009) (emphasis added).

Most importantly, the text of 42 U.S.C. § 406(b) is clear. Where "a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation . . . ." Courts in this district have regularly applied 42 U.S.C. § 406(b) to do just that. *See, e.g., Green v. Comm'r of Soc. Sec. Admin.*, 2017 WL 3394738, at *1 (N.D. Ohio Aug. 8, 2017) (granting attorneys' fees under 42 U.S.C. § 406(b) after finding, that ". . . as part of the judgment rendered in favor of a plaintiff, a court may award a reasonable fee for an attorney's representation in court which, if awarded, are to be paid out of a plaintiff's past-due benefits . . ."). Given the clear language and legislative history of the statute, there is no reason 42 U.S.C. § 406(b) should not apply here. The Court should find that it does.

VI. CONCLUSION

The Agency has admitted liability for its failure to perform the Subtraction Recalculation and pay any subsequent Retroactive Underpayment in thousands of cases. The text of 42 U.S.C. § 406(b) is clear, as is its legislative history. These matters are ripe for summary judgment.

A full grant of this Motion will, it is hoped, limit and streamline the issues left before this Court, and allow the parties to proceed expeditiously to a final judgment on the merits and/or facilitate settlement. The Court respectfully should grant the Motion.

Respectfully submitted,

s/Kirk B. Roose, Ohio Bar No. 0018922
s/Jon H. Ressler, Ohio Bar No. 0068139
ROOSE & RESSLER
A Legal Professional Association
6150 Park Square Drive
Suite A
Lorain, Ohio 44053
Telephone: (440) 985-1085
Facsimile: (440) 985-1026
kroose@rooselaw.com
jressler@rooselaw.com

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

Attorneys for Plaintiff and the putative class

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Opposition to Defendants' Motion to Dismiss complies with the page limitations for a Standard matter, and is 18 pages long.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the putative class

EXHIBIT 1

DEFENDANTS' SUPPLEMENTAL RESPONSES TO INTERROGATORIES 1-3 IN PLAINTIFF'S FIRST SET OF INTERROGATORIES

Below is supplemental data responsive to Plaintiff's Interrogatories 1-3. These responses are subject to the objections set forth in Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories, conveyed to Plaintiff on January 12, 2018.

I. Response to Interrogatories 1-3

Category 1: Individuals for whom representatives' fees were paid out of retroactive benefits between September 1, 2012 and October 31, 2017,[1] and for whom the Social Security Administration ("SSA") made a windfall offset determination before the amount of representatives' fees was determined and paid out of retroactive benefits, but, after the amount of fees was determined and paid out of retroactive benefits, SSA has not yet recalculated the windfall offset and therefore has not issued an underpayment due.

The names, addresses, and telephone numbers of the individuals in Category 1 are being produced under the Protective Order entered December 13, 2017, ECF No. 23, and subject to the terms of the Protective Order.

Category 2: Individuals for whom representatives' fees were paid out of retroactive benefits between September 1, 2012 and October 31, 2017 and for whom SSA made a windfall offset determination before the amount of representatives' fees was determined and paid out of retroactive benefits, but, after the amount of fees was determined and paid out of retroactive benefits, the records reflect that SSA has not yet recalculated the windfall offset,[2] but to whom no underpayment would be due even upon performing the windfall offset recalculation to account for representatives' fees.

---

[1] It is significantly more difficult and labor-intensive to identify the date representatives' fees were authorized than it is to identify the date representatives' fees were paid out of retroactive benefits. In particular, because the date representatives' fees were authorized is not stored in an SSA database, and is instead located in PDF form in individual records, obtaining that information would require the SSA to convert each individual PDF through optical character recognition ("OCR") software and then manually retrieve the authorization date in each instance. Accordingly, the Office of Systems used the date representatives' fees were paid out of retroactive benefits as a proxy for the date fees were authorized. This substitution does not reflect SSA's policy, and accordingly will result in data that is both under-inclusive and over-inclusive. For instance, some authorized fees are not paid out of retroactive benefits. Accordingly, individuals for whom a windfall offset recalculation may be warranted under SSA's policy but whose representatives' fees were not paid out of retroactive benefits will not be included in this number. Additionally, some fees that were known at the time the windfall offset determination was made may not be paid until shortly after the windfall offset determination, making the data over-inclusive. These two examples of how the use of this proxy affects the accuracy of the data produced are merely illustrative and not an exhaustive list of the impact the proxy will have on the data.

[2] Within this category, there are cases where there is no fee deduction posted on the record to

Category 3: Individuals for whom representatives' fees were paid out of retroactive benefits between September 1, 2012 and October 31, 2017, and for whom SSA:

a. made a windfall offset determination before the amount of representatives' fees was determined and paid out of retroactive benefits, AND

b. after the amount of representatives' fee was determined and paid out of retroactive benefits

   i. recalculated the windfall offset to account for representatives' fees and released an underpayment to the individual, OR

   ii. correctly determined that no underpayment was due as a result of the recalculation.

Category	Count of Individuals
Category 1	28,510
Category 2	9,165
Category 3.b.i	43,677
Category 3.b.ii	12,486
Unable to determine into which category these individuals fall because there was either no windfall data on the SSR. The windfall offset calculations may have been processed manually and, as a result, the computation information was not on the SSR.	1,681
Total	95,519

indicate that the SSA recalculated the windfall offset to account for representatives' fees; however, the SSA may have correctly recalculated the windfall offset manually and determined that no underpayment was due and, as a result, did not adjust the initial windfall offset amounts. Due to time constraints, the SSA has not yet had the opportunity to manually review the comments in these records to determine whether there are indications that a manual recalculation was performed. There are other cases where the fee deduction that was posted was less than the approved fee amount on the Master Beneficiary Record ("MBR"), but even with the additional fee, no underpayment would be due.

CERTIFICATION

I, Elizabeth K. Graham, am a Lead IT Specialist. I believe, based on reasonable inquiry, that the foregoing supplemental responses to Interrogatories 1, 2, 3 in Plaintiff's First Set of Interrogatories are true and correct to the best of my knowledge, information and belief.

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

Dated: 4/3/2018

By: */s/ Elizabeth K. Graham .*
Elizabeth K. Graham
[LEAD IT SPEC (SYSANA)]

EXHIBIT 2

As to the Objections:

s/ [redacted]
Ruchi V. Asher
Assistant U.S. Attorney
Office of the U.S. Attorney, Northern District of Ohio

RESERVATION OF OBJECTIONS

The foregoing objections to Definitions and Instructions and the following specific objections are based upon (a) Defendants' interpretation of the specific requests posed by Plaintiff and (b) information available to Defendants as of the date of this document. Defendants reserve the right to supplement these objections based upon (a) information that Plaintiff purports to interpret the requests differently than Defendants and/or (b) the discovery of new information supporting additional and/or amended objections.

INTERROGATORIES

(1) What is the total dollar amount of underpayments due for: Category (1)(a)(i) beneficiaries and Category (1)(a)(ii) beneficiaries as reported in your Response to Interrogatories 1-3 to Plaintiff's First Set of Interrogatories.

RESPONSE:

Defendants object on the basis that determining the total dollar amount of underpayments due for Category (1)(a)(i) and Category (1)(a)(ii) beneficiaries is unduly burdensome and disproportionate to the needs of the case. Determining the total amount of underpayment, if any, for a single beneficiary is a complex and time-consuming process, and the burden of performing such calculations is disproportionate to any relevance of that information.

As to the Objections:

s/ [redacted]
Ruchi V. Asher
Assistant U.S. Attorney
Office of the U.S. Attorney, Northern
District of Ohio

RESERVATION OF OBJECTIONS

The foregoing objections to Definitions and Instructions and the following specific objections are based upon (a) Defendants' interpretation of the specific requests posed by Plaintiff and (b) information available to Defendants as of the date of this document. Defendants reserve the right to supplement these objections based upon (a) information that Plaintiff purports to interpret the requests differently than Defendants and/or (b) the discovery of new information supporting additional and/or amended objections.

INTERROGATORIES

(1) What is the total dollar amount of underpayments due for: Category (1)(a)(i) beneficiaries and Category (1)(a)(ii) beneficiaries as reported in your Response to Interrogatories 1-3 to Plaintiff's First Set of Interrogatories.

RESPONSE:

Defendants object on the basis that determining the total dollar amount of underpayments due for Category (1)(a)(i) and Category (1)(a)(ii) beneficiaries is unduly burdensome and disproportionate to the needs of the case. Determining the total amount of underpayment, if any, for a single beneficiary is a complex and time-consuming process, and the burden of performing such calculations is disproportionate to any relevance of that information.

U/P Amount
$110.50
$488.67
$2,364.00
$32.00
$0.00
$1,281.31
$735.00
$1,834.00
$0.00
$1,947.50
$2,884.02
$2,884.02
$0.00
$0.00
$535.00
$488.67
$0.00
$1,714.50
$0.00
$0.00
$3,665.00
$1,466.00
$4,725.40
$7,642.29
$0.00
$2,141.00
$0.00
$1,454.00
$977.34
$0.00
$967.00
$733.00
$1,671.00
$733.27
$961.34
$10,929.23
$473.34
$0.00
$0.00
$0.00
$661.88
$1,915.35
$0.00
$488.67
$1,149.88
$605.01
$0.00
$1,466.00
$0.00
$0.00

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 IRA T. KASDAN, ESQ.**
	)	
Defendants.	)	

I, Ira T. Kasdan, state as follows:

1. I am a partner with the law firm of Kelley Drye & Warren LLP, attorneys for Plaintiff Stephanie Lynn Steigerwald and the proposed class.

2. I submit this Declaration in support of Plaintiff's Motion for Summary Judgment.

3. Attached as Exhibit 1 to the accompanying Memorandum in Support of Plaintiff's Summary Judgment Motion is a true and correct copy of Defendants' Supplemental Responses to Plaintiff's First Set of Interrogatories Numbered 1 through 3, which I received from Defendants' counsel via email on April 4, 2018.

4. Attached as Exhibit 2 to the accompanying Memorandum in Support of Plaintiff's Summary Judgment Motion is a true and correct copy of a portion of Defendants' Objections and Responses to Plaintiff's Fourth Set of Interrogatories, which I received from Defendants' counsel via email on April 9, 2018.

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

Executed on: April 16, 2018

/s/ Ira T. Kasdan
Ira T. Kasdan