

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

STEPHANIE LYNN STEIGERWALD,	)	CASE NO.: 1:17-CV-1516
	)	
<i>Plaintiffs,</i>	)	JUDGE JAMES S. GWIN
	)	
v.	)	
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	
	)	<b>DEFENDANTS' RULE 59(e)</b>
	)	<b>MOTION TO ALTER OR AMEND</b>
<i>Defendants.</i>	)	<b>JUDGMENT AND RULE 62(b) MOTION</b>
	)	<b>FOR STAY</b>

Defendants Nancy A. Berryhill, Acting Commissioner of Social Security and the Social Security Administration respectfully move this Court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend its January 25, 2019 Final Judgment requiring Defendants to complete windfall offset recalculations for the entire class within 90-days and to stay the imposition of the 90-day timeframe pending disposition of this motion and any appeal, pursuant to Rule 62. In addition, Defendants respectfully request clarification on the jurisdictional basis for the relief ordered because this Court's present relief exceeds its jurisdictional authority as contemplated under 42 U.S.C. § 405(g). In the alternative, Defendants respectfully request a 21-month extension of time, for a total of 24 months, to comply with this Court's January 25, 2019 Order and complete recalculations for all 129,695 class members.

The grounds in support of Defendants' Motion are set forth in the attached Memorandum in Support, which is incorporated herein by reference.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of February, 2019 a copy of the foregoing Rule 59(e) Motion to Alter or Amend Judgment and Rule 62 Motion for stay 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/Ruchi V. Asher  
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STEPHANIE LYNN STEIGERWALD,

*Plaintiffs,*

V.

NANCY A. BERRYHILL, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,

*Defendants.*

CASE NO.: 1:17-CV-1516

JUDGE JAMES S. GWIN

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' RULE 59(e)  
MOTION TO ALTER OR AMEND  
JUDGMENT AND RULE 62(b) MOTION  
FOR STAY**

On January 25, 2019, this Court granted summary judgment for the Plaintiff class and ordered the Social Security Administration [hereinafter “the agency” or “SSA”] “to perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days.” (ECF No. 88, Order Granting Summ. J., at PageID # 1069.) The certified class consists of 129,695 individuals, as opposed to the 37,765 set forth in the Court’s January 25, 2019 Order. The agency has made completion of this workload a top priority and is working diligently and devoting substantial resources to complete the recalculations. However, the number of calculations the agency must perform is roughly four times larger than that contemplated by the Court’s order, and the windfall offset recalculation required for each class member is a highly complex, manual, and therefore extremely labor-intensive process requiring close coordination between multiple, wholly separate agency components.

It is impossible for the agency to perform all class members’ recalculations within 90 days without causing a devastating effect on the agency’s public service mission and resulting in a manifest injustice for the agency and the American public. Indeed, the Supreme Court regularly accounts for the size and nature of the SSA’s mission in considering challenges to aspects of the program. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 399 (1971) (“The Social Security Act has been with us since 1935. . . . It affects nearly all of us. The system’s administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend.”); *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003), quoting *Heckler v. Campbell*, 461 U.S. 460, 461, n.2 (1952) (“[T]he Social Security hearing system is ‘probably the largest adjudicative agency in the western world.’...The need for efficiency is self-evident.”) Consequently, Defendants respectfully request that this Court amend its final judgment to permit the agency sufficient time to complete this massive workload and to stay the imposition of the 90-day timeframe pending disposition of this motion and any appeal, pursuant to Rule 62. In addition,

Defendants respectfully request clarification on the jurisdictional basis for the relief ordered because this Court's present relief exceeds its jurisdictional authority as contemplated under 42 U.S.C. § 405(g).

In the alternative, and for the same reasons fully set forth below, Defendants respectfully request a 21-month extension of time, for a total of 24 months, to comply with this Court's January 25, 2019 Order and complete recalculations for all 129,695 class members. Defendants propose filing status reports with the Court documenting the agency's progress every six months.

### **LEGAL STANDARDS**

A court may alter or amend its judgment under Federal Rule of Civil Procedure 59(e) to correct a clear error or "to prevent manifest injustice." *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999); *Stancik v. Deutsche Bank*, No. 1:17-CV-01809, 2018 WL 1070873, at \*1 (N.D. Ohio Feb. 26, 2018) (Gwin, J.). Motions under 59(e) are "entrusted to the Court's sound discretion" and "are not intended as an opportunity to relitigate previously considered issues, or to attempt to persuade the Court to reverse the judgment by offering the same arguments previously presented." *Stancik*, 2018 WL 1070873, at \*1. When the Court enters relief *sua sponte*, however, it is necessary for the Court to consider "the merits of [the affected party's] arguments unfettered by the procedural constraints of Rule 59(e)." *Wade v. Webb*, 83 F. App'x 703, 705 (6th Cir. 2003).

The question whether manifest injustice results from a final judgment requires "a fact-specific analysis." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 809-812 (N.D. Ohio 2010) (granting motion for reconsideration based on evidence presented in post-judgment affidavit). "What is clear from case law, and from a natural reading of the term itself, is that a showing of 'manifest injustice' requires that there exist a fundamental flaw in the court's decision that, without correction, would lead to a result that is both inequitable and not in line with applicable policy." *Banks v. Pugh*,

2014 WL 4441470, No. 4:13cv2522, at \*2 (N.D. Ohio Sept. 9, 2014) (citation omitted). In addition to a showing of injustice, a “manifest error of law or fact” will justify alteration of a judgment under Rule 59(e), as will a showing that a court “has made a mistake, not of reasoning, but of apprehension.” *Wendy’s Intl., Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 686 (M.D. Fla. 1996).

This Court also has discretion to stay execution of its judgment, pending resolution of a motion under Rule 59(e) and any appeal. Fed. R. Civ. P. 62; *Lentz v. City of Cleveland*, No. 1:04 CV 669, 2011 WL 4631917, at \*3 (N.D. Ohio Sept. 30, 2011). When determining if a stay is warranted, courts consider the factors necessary for a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Jpmorgan Chase Bank, N.A. v. Winet*, No. 08-13845, 2016 WL 627755, at \*1–2 (E.D. Mich. Feb. 17, 2016) (internal quotations omitted)); *see also Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (discussing factors for stay pending appeal). “These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” *Michigan Coal. of Radioactive Material Users, Inc.*, 945 F.2d at 153. As the party requesting the stay, Defendants bear the burden to show that the circumstances justify an exercise of the Court’s discretion. *Nken v. Holder*, 556 U.S. 418, 433–34 (2008).

## ARGUMENT

### **I. To Prevent Devastating Effects on the Agency and the Public and to Comply with the Jurisdictional Requirements of Section 405(g), This Court Should Alter and Amend its Judgment Under Rule 59(e) to Provide Relief from Its Order Requiring the Agency to Complete All Recalculations for the Class and Issue Any Payments Within 90 Days.**

As an initial matter, Defendants have not previously had an opportunity to present facts relating to the complexities of performing the windfall-offset recalculations for the Class and the

substantial resources the agency requires to complete that work. *C.f.*, *Stancik*, 2018 WL 1070873, at \*1. Indeed, Plaintiff moved for summary judgment specifically on the issue of liability, not remedy, seeking only to “limit and streamline the issues left before this Court, and allow the parties to proceed expeditiously to a final judgment on the merits.” (*see* ECF No. 50, Pl.’s Mot. for Summ. J., at PageID # 644-654). As a result, no briefing or discussion of the proper remedy has taken place, particularly since class discovery revealed the total number of class members in September 2018.<sup>1</sup> In light of this history, this Court should now consider Defendants’ arguments and evidence that the injunction will cause a manifest injustice and that the Court has exceeded its jurisdictional authority in directing the agency to complete the complex recalculations for all class members within 90 days. *See Wade*, 83 F. App’x at 705 (holding that, when a court enters relief *sua sponte*, it must consider “the merits of [the affected party’s] arguments unfettered by the procedural constraints of Rule 59(e)”).

#### **A. The Court’s Judgment Significantly Misapprehended The Size of The Class**

The Court’s January 25, 2019 Opinion ordered the agency to “perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days.” (ECF No. 88, Order Granting Summ. J., PageID # 1069.) The opinion noted that, “[b]ased on class discovery, Plaintiffs estimate that the Social Security Administration did not perform the Subtraction Recalculation for 37,765 class period claimants.” (*Id.* at PageID # 1063.) But the class actually

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<sup>1</sup> The Parties have briefed whether SSA has a duty to complete individual recalculations within a specific period of time. (Br. in Opp’n to Plaintiff’s Mot. for Summ. J., ECF No. 52, PageID # 689-90; Br. in Opp’n to Plaintiff’s Mot. for Class Cert., ECF No. 57, PageID # 788-89); (*see also*, Op. & Order, ECF No. 66, PageID # 873-874 n. 93) (When discussing the proper scope of the class, the Court recognized that “Plaintiff Steigerwald has presented no evidence about how quickly SSA can feasibly perform the Subtraction Recalculation,” and declined to define a “reasonable time” as ninety days given the large number of individuals for whom SSA must complete the recalculation.) This issue is distinct from how long it will take the agency to complete the recalculations for the entire class. In addition, briefing on class certification and summary judgment closed before the total size of the class was known.

numbers 129,695 members—roughly four times more beneficiaries than that contemplated by the Court’s order. (*See* ECF No. 86, Pl.’s Notice, at PageID # 1052 (updating the Court on the results “of the 129,859<sup>2</sup> mailings of the Class Notice).) As set forth more fully below, the windfall-offset recalculation is not automated and thus requires significant time and coordination between agency employees in multiple components for *each* recalculation. The number of individuals for whom the agency must perform a recalculation, and the discrepancy between that total and the number cited by the Court, by itself justifies relief from the 90-day deadline imposed by the judgment.

**B. The Agency Cannot Perform Nearly 130,000 Complex Windfall-Offset Recalculations in Less Than Two Years Without Devastating Effects on Its Ability to Serve the Public**

Aside from the number of recalculations required by this Court’s order, alteration of the 90-day timeline is warranted for the additional reason that the windfall-offset recalculation is one of the most complex and labor-intensive functions the agency performs, and it simply lacks the resources and ability to complete these actions within a 90-day time frame without devastating effects on the agency’s ability to serve the American public. *GenCorp, Inc.*, 178 F.3d at 834 (relief under Rule 59(e) available to prevent manifest injustice). Indeed, even to complete the 129,695 recalculations within one year would have substantial, deleterious effects on the public, negatively affecting an estimated 160,000 individuals per month.

Despite the impossibility of completing all of the required calculations within the 90-day deadline, SSA has made completion of the class-member workload a top agency priority and worked diligently during the pendency of this litigation to develop and execute a plan for expeditiously making class members whole. *See* Declaration of Janet Walker, attached as Exhibit A. The agency is performing the recalculations and expects to begin issuing underpayments in February 2019.

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<sup>2</sup> Plaintiff reports that 164 class members have opted out. (ECF No. 90, Pl.’s Mtn. for Atty Fees, PageID # 1107.)

Walker Decl. ¶¶ 4, 72. Strict compliance with the Court's order and completion of 129,695 recalculations within a 90-day span, however, would cripple the agency's ability to serve the public and fulfill its statutory mission, resulting in manifest injustice to the agency and to the American public. See, *Id.* ¶¶ 4, 50-61. As set forth more fully in the Walker declaration, to avoid a significant effect on its mission, it will take the agency no less than two years to process the class members' recalculations accurately and efficiently.

The windfall-offset recalculation is one of the agency's most complex workloads because related to individuals' Titles II and XVI benefits are housed in unique electronic records that do not interface with one another. The systems used in the recalculation process are some of the agency's oldest, and this process cannot be automated. Walker Decl. ¶ 11. Highly trained staff in SSA's field offices and processing centers must coordinate extensively to complete a single recalculation. *Id.* ¶¶ 12, 15-41, 42-49. Neither the field offices nor the processing centers can independently complete a recalculation. *Id.*, ¶ 12. For example, before calculating the Title XVI portion of the recalculation, a field office technician must rely on the processing center to investigate and verify the accuracy of an individual's Title II record. *Id.*, ¶¶ 12, 16-19. Then, the field office takes multiple steps to ensure accuracy of the Title XVI record, based on information from the processing center. *Id.*, ¶¶ 20-27. Then, the processing center completes the recalculation, releasing any underpayment. *Id.* ¶¶ 29-36.

In other words, one class member's windfall-offset recalculation is not performed by the mere press of a button. As explained, the complex recalculation cannot be performed by a single staff member or even a single office within the agency. See *Id.* ¶¶ 29-36. This results in an up to five-hour processing time per individual, *not including* any time necessary for the agency to obtain information it requires from sources outside its primary computer systems, which can take up to 90 days. See *Id.* ¶¶ 13-40, Ex. A (explaining in detail the steps required for each windfall-offset recalculation). Moreover, since the Court has held that Class Counsel is eligible for attorneys' fees

under 42 U.S.C. § 406(b), the agency will need to withhold the requested percentage from each recalculated award manually. *Id.*, ¶ 35. This involves reducing every award, on an award-by-award basis, by 20 percent, adding an additional step to the process. Once the Court issues an order determining the amount of fees, agency staff will need to be diverted from their day-to-day public service work, once again, to re-examine any class member cases already processed, potentially requiring further manual action and significant additional time. *Id.*, ¶¶ 25, 32-35. This will require significant further manual action and additional time to process each case.<sup>3</sup>

Relatively few of the agency's personnel have the requisite technical experience to perform this workload. Currently, approximately 330 qualified and experienced technicians between *both* SSA's field offices and processing centers have the requisite background to work on class recalculations, and training alone is insufficient to develop the skills need to do the recalculations independently and accurately. *Id.* ¶¶ 40-47. Nor can the agency quickly train and redeploy employees without causing severe disruption to critical agency services. *See generally, Id.* ¶ 42-44, 50-62. For instance, SSA's field offices serve approximately 43 million visitors annually and play a particularly important role in processing the needs-based Title XVI program on which vulnerable individuals rely to obtain food, clothing, and shelter. SSA's processing centers perform payment related functions for over 60 million Social Security beneficiaries and authorize payment for individuals under Title II. *Id.*, ¶¶ 5-6. Processing center employees also provide substantial support to SSA's national toll-free phone network, which receives nearly 30 million calls from members of the public

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<sup>3</sup> The impossibility of the 90-day timeline would be further compounded under Class Counsel's interpretation that the Court's order to release any underpayment due within 90 days includes resolution of the amount of their attorney fee and the release of any difference to the class members. In the normal § 406(b) context, the amount of the attorney fee is not determined until after the total amount of the past-due benefit is known. Defendants agree that such normal procedures should not apply here because of the vast administrative difficulties imposed by revisiting each class member's recalculation. However, even under the shortest fee briefing schedule possible, the attorney fee amount in this case cannot be quantified until almost half of the 90 days have elapsed.

annually. *Id.* And both field office and processing center employees play a critical role in administering the Medicare Hospital Part A Insurance and Part B Supplementary Medical Insurance programs and process millions of additional transactions under the Medicare Prescription Drug, Improvement and Modernization Act of 2003. *Id.* ¶ 7. The agency cannot simply train and shift large numbers of its staff to processing class-member recalculations rather than serving the existing beneficiaries and members of the public who call and visit with their own unique needs each business day.

The time needed to process nearly 130,000 class-member recalculations will divert field office and processing center staff from performing approximately two million actions, including those that directly impact current benefit payments and medical coverage. Walker Decl., ¶¶ 50-59. To comply with this Court's January 25, 2019 Order and complete recalculations for all 129,695 class members, SSA would need to divert 1,500 processing center employees and 1,200 field office employees to completing the recalculations for the Class full-time. *Id.* ¶ 61. Again, only approximately 330 employees have the requisite experience and expertise, and training alone cannot render an employee qualified to accurately perform one of the SSA's most complex workloads. *Id.* ¶¶ 42-44. Even if it were possible, diverting 2,700 technicians from their day-to-day direct public service functions will have a dramatic, negative impact on SSA's ability to assist and pay benefits to the American public, affecting hundreds of thousands of individuals each month. *Id.* ¶¶ 56-57, 62. Even completing the recalculations within one year would result in a loss or significant delay of services to over 160,000 members of the public *each month*. *Id.* ¶ 63 (emphasis added). If SSA were able to complete the recalculations over two years, the impact – though still significant – would be reduced substantially.

As set forth above, although the agency has been working diligently to comply with the Court's Order and is devoting substantial resources to completing the class recalculations, SSA

requires two years to complete the recalculations without dramatically damaging its ability to meet its other statutory obligations to the American public. Failure to provide the necessary time to complete the recalculations will result in manifest injustice.

**C. A Mandatory 90-Day Timeframe To Complete The Recalculations For The Entire Class Is Outside The Scope Of The Relief Available Under 42 U.S.C. § 405(g).**

Defendants also respectfully request clarification of the basis for this Court's order setting a 90-day time-frame for the agency to complete the recalculations and issue any past-due benefits. Although this Court previously determined that it had jurisdiction to hear Plaintiffs' claims under 42 U.S.C. § 405(g), its Orders do not identify a decision of the Commissioner it is reviewing or the statutory basis for its mandate that recalculations for the entire class be performed within 90 days. Such an order is outside the scope of the relief under 42 U.S.C. § 405(g). Instead, and as described below, the Mandamus Act provides the only source of jurisdiction for the relief that the Court provided, and this Court must analyze the appropriateness of the extraordinary remedy of mandamus before proceeding with such relief. To the extent the Court's injunction rests on mandamus jurisdiction, and exceeds the authority to review final decisions conferred in 42 U.S.C. § 405(g), an award of fees under 42 U.S.C. § 406(b) is plainly inappropriate. This Court should therefore reconsider its determination that plaintiffs are eligible for attorney's fees under § 406(b).

Review under § 405(g) is limited to any "final decision" of the Commissioner of Social Security, and relief is limited to "affirming, modifying, or reversing the decision of the Secretary." 42 U.S.C. § 405(g). Section § 405(g) "clearly limits judicial review to a particular type of agency action, a 'final determination of the Secretary made after a hearing.'" *Califano v. Sanders*, 430 U.S. 99, 107-108 (1977). But this Court has never identified *any* decision of the Commissioner that the Court is reviewing. By extension, there is no identifiable agency decision upon which the 90-day injunction is based. Instead, the district court appears to be seeking to compel agency action, which

may only fall under its mandamus jurisdiction, as discussed below. Indeed, in denying Defendants' Motion to Dismiss, the Court found that jurisdiction over Plaintiff's claim was proper under 42 U.S.C. § 405(g) and that Plaintiff Steigerwald "presented" her claim when her attorney requested the release of any remaining withheld benefits, but nowhere did the Court identify the decision of the Commissioner it is reviewing. (*See*, Op. & Order, ECF 32, PageID # 472-81) The Court stated, "[w]ithout the knowledge that SSA had failed to perform a second windfall offset calculation and did not intend to do so, Plaintiff Steigerwald says there was **no decision to appeal** and no remedy to exhaust." (*Id.* at PageID # 475) (emphasis added). The Court characterizes the claim as "simply an attempt to force SSA to finish calculating the amount of the benefits that SSA admits it owes her" and as a request simply "that SSA hurry up." (*Id.* at 475, 477.) Yet once the Court ruled on Plaintiff's motion for class certification, it determined that presentment occurred when the class members' original attorneys submitted fee petitions. There, the agency decision was in granting fee petitions, but there is no indication that this Court is somehow reviewing other attorneys' fee awards as the "final decision" under 42 U.S.C. 405(g).

Significantly, in its order granting Summary Judgment, the Court identified no decision upon which it passed review, and the only available relief under Section 405(g) is one that takes judicial action on a final decision of the agency. Nor can relief be entered on the basis of review of a final decision, as every final decision of the agency was accurate at the time of its issuance.<sup>4</sup> The

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<sup>4</sup> The windfall offset recalculation was merely the implementation of prior final decisions that were correct. For example, SSA's decisions as to Steigerwald's award of past-due Title XVI benefits in August 2014 (ECF No. 18-2, Ex. A2) and termination of ongoing Title XVI benefits in November 2014 (ECF No. 18-2, Ex. A4) were correct at the time they were issued, as were SSA's decisions awarding ongoing Title II benefits in December 2014 (ECF No. 18-2 Ex. A3) and retroactive Title II benefits in December 2015, which included an initial windfall offset, (ECF No. 18-2 Ex. A5). Similarly, SSA's February 6, 2017 letter indicating that it would release the funds previously withheld for the purpose of paying Attorney Roose's fees (ECF No. 18-2 Ex. A14) was correct at the time issued and was not indicative of a windfall offset. *See*, Reply in Support of Mot. to Dismiss, ECF No. 30, PageID # 52 (explaining that the letter relates to a wholly separate issue.)

obligation to recalculate the windfall offset under 42 U.S.C. § 1320a-6 and 20 C.F.R. § 416.1123 is instead an agency duty to revisit a prior determination of benefits that was previously correct but now may be incorrect. That obligation is analogous to the factual scenario in *Califano v. Sanders*, where the Supreme Court determined that the denial of a petition to reopen a previously-unsuccessful claim for benefits was not a final decision under § 405(g). 430 U.S. 99, 107-08 (1977). The Court articulated the limits of 405(g), stating that “[t]his provision clearly limits judicial review to a particular type of agency action, a ‘final decision of the Secretary made after a hearing’” and that “‘Congress’ determination so to limit judicial review to the original decision denying benefits is a policy choice [...] Our duty, of course, is to respect that choice.” *Id.*

Moreover, this Court’s January 25, 2019 Order mandating that the agency complete windfall offset recalculations within 90 days is not the *type* of relief supported by the text of 42 U.S.C. § 405(g), which anticipates only judgments “affirming, modifying, or reversing the decision of the Secretary.” 42 U.S.C. § 405(g). In completing those permitted judicial actions within its jurisdiction, the Court may order other equitable or injunctive remedies in aid of those action. For instance, in *Califano v. Yamasaki*, the Supreme Court acknowledged that courts normally “retain their equitable power to issue injunction in suits over which they have jurisdiction” and therefore a court could “stay” the agency’s “decision concerning prerecoupment rights” because absent that stay the court “for all practical purposes would be unable to ‘reverse’ a decision” that had already recouped money from the beneficiary. 442 U.S. 682, 702-704 (1979). But *Yamasaki* plainly involved review of a final decision – a decision to recoup money – whereas no such relief is at issue here. *Id.* at 64-67.

In *Yamasaki*, moreover, the Supreme Court made clear that the scope of injunctive relief, even in cases heard under 42 U.S.C. § 405(g), is dictated by the extent of the violation. *Id.* at 702. As a general rule, injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *See id.* at 702 (finding that “[i]f a class action is otherwise

proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.”). For the reasons above, the mandate to recalculate the windfall offset for nearly 130,000 individuals in 90 days is substantially more burdensome than necessary to effectuate SSA’s obligation under 42 U.S.C. § 1320a-6 and 20 C.F.R. § 416.1123. This is particularly true where, as the Court correctly noted in its Order on Class Certification, no statutory requirement mandates that a windfall offset must be recalculated within 90 days, or any specific time. (*See*, Op. & Order, ECF No. 66, PageID # 874, n. 92; 42 U.S.C. § 1320a4.) As such, the Court is without authority under § 405(g) to impose such an injunction.

Indeed, in *Heckler v. Day*, the Supreme Court, proceeding under 42 U.S.C. § 405(g), considered “whether it is appropriate for a federal court, without statutory authorization, to prescribe deadlines for agency adjudication of Title II disability claims and to order payment of interim benefits in the event of noncompliance.” *Heckler v. Day*, 467 U.S. 104, 110 (1984). As in this case, the agency had an obligation to undertake a statutorily-mandated action but no statutory requirement to undertake that action in any specific period of time. *Id.* For that reason, a widespread injunction imposing “judicially-prescribed deadlines” for the statutorily-mandated action was deemed “contrary to congressional intent and constitutes an abuse of the court’s equitable power.” *Id.* at 111. The obligation to recalculate the windfall offset after the authorization of attorneys’ fees is found in the same comprehensive statutory scheme as the obligation to adjudicate Title II claims in a reasonable time, and the order to provide relief within a court-created, unjustifiably burdensome time limit is outside the scope of this Court’s equitable power under § 405(g).

The only potential basis which supports the type of relief ordered – compelling performance of an agency action within a specific time-frame – is under the Mandamus Act, which grants a court jurisdiction over an “action [...] to compel an officer or employee of the United States or any agency

thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361. Such jurisdiction may be appropriate where the officer’s duty to perform “is so far ministerial that its performance may be compelled by mandamus.” *Miguel v. McCarl*, 291 U.S. 442, 454 (1934) (internal citations omitted). Indeed, this Court left open the question of whether mandamus jurisdiction was proper. (*See*, Op. & Order, ECF 32, PageID # 477 n.49. (“Because the Court finds that it has jurisdiction under § 405(g), the Court expresses no opinion on whether it might also have mandamus jurisdiction.”))

Courts of appeals have repeatedly recognized the limits of § 405(g) jurisdiction and identified when district courts must proceed under their mandamus jurisdiction, if such relief is proper. When an agency’s actions “result in a hearing and a final decision on the merits,” only then does it “produce the particular type of agency action that is subject to judicial review under § 405(g).” *Slone v. Secretary of HHS*, 825 F.2d 1081, 1084 (6th Cir. 1987). At that point, mandamus jurisdiction becomes unavailable. *Id.* The Sixth Circuit has therefore held that in assessing agency conduct occurring *following* a final decision, mandamus jurisdiction lies “to consider whether the Commissioner has failed to comply with his own regulations.” *Buchanan v. Apfel*, 249 F.3d 485, 492 (6th Cir. 2001). Similarly, this Court is not entering relief on a final agency decision, but to control the parameters of post-decision action.

To properly enter the instant relief, the Court would still need to assess whether mandamus relief – an extraordinary remedy that is not automatically granted – is appropriate, and Defendants do not concede that the Court’s order would be appropriate under mandamus jurisdiction. There is no specific statutory or regulatory duty, moreover, to complete windfall-offset recalculations within 90 days. And a mandamus order is only appropriate where lawful compliance is, in fact, possible. *Am. Hosp. Ass’n v. Price*, 867 F.3d 160, 166-168 (D.C. Cir. 2017) (reversing mandate to resolve Medicare reimbursement appeal backlog according to statutory deadlines). The principle extends equally to cases where the impossibility is the result of insufficient congressional appropriations or

agency staff. *Id.* And, as explained above, recalculating the windfall offset for the entire class in 90 days is simply not possible without devastating effects on the agency's ability to continue its other statutorily mandated functions for the American public.

For the reasons articulated above, the Court has issued the relief in excess of the available jurisdictional authorities.

## **II. A Stay of the 90-day Timeline is Warranted Pending Consideration of Defendants' Rule 59(e) Motion and Any Appeal**

Finally, Defendants respectfully move to stay the 90-day timeframe in which to complete the 129,695 recalculations and issue payments to class members, pending the Court's consideration of the 59(e) Motion and any appeal. Fed. R. Civ. P. 62; *Lentz*, 2011 WL 4631917, at \*3. All of the factors support the issuance of a stay. *See Michigan Coal. of Radioactive Material Users, Inc.*, 945 F.2d at 153; *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014).

First, Defendants have made a strong showing that they are likely to succeed on the merits of the 59(e) motion. *See Nken*, 556 U.S. at 433; *Ohio State Conference of N.A.A.C.P.*, 769 F.3d at 387. Defendants do not seek to alter or amend the Court's order that the agency is required to complete the recalculations for the class members and issue any payments due. The agency is performing the recalculations and will continue to do so even if the requested stay is entered. Rather, Defendants seek to alter the Court's imposition of a 90-day timeline to complete 129,695 complex recalculations, each of which take up to five hours each to complete. As set forth above, alteration of this timeline is necessary to prevent manifest injustice: a devastating impact on the agency's ability to continue its other statutorily mandated functions for the American public. Therefore, particularly when balanced against the harm to the Defendants if a stay is not granted, Defendants have met their burden to show a likelihood of success on the merits of the 59(e).

Second, Defendants will suffer substantial and irreparable harm should the stay be denied. *See Michigan Coal. of Radioactive Material Users, Inc.*, 945 F.2d at 155 ("the harm alleged should

be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant”). To comply with the Court’s 90-day timeline, the agency must divert 2,700 technicians from their day-to-day direct public service functions on a full-time basis to process the recalculations for the class. Walker Decl., ¶ 62. Doing so would have a dramatic, debilitating impact on the agency’s ability to assist and pay benefits to American public, resulting in the inability to timely take and process new claims, service existing beneficiaries, and assist the public with everyday requests, affecting hundreds of thousands of individuals each month. *Id.*, ¶¶ 56-57, 62. The harm to the public is not speculative and there is no corrective relief that could be provided to the agency or to those hundreds of thousands of individuals.

Finally, the balance of the equities and the public interest favor a stay. Although some class members would not receive their recalculations and any payments as quickly as desired, the recalculations and issuance of payments would continue during the stay. Allowing the agency more time to complete the recalculations would ensure that they are performed by experienced technicians, thereby increasing their accuracy, while ensuring that the agency is able to continue to meet its public service obligations. And any harm to the class members by a further delay in receiving additional funds from the agency is by far outweighed by public interest in ensuring that the agency is able to continue meeting its obligations to hundreds of thousands of members of the American public per month.

### **CONCLUSION**

For the foregoing reasons, this Court should (1) alter or amend its judgment, giving the agency until January 25, 2021 to complete recalculations and issue underpayments for the 129,695 class members, (2) to grant an immediate stay of the 90-day requirement while the agency’s Rule 59(e) Motion is pending and any appeal; and (3) clarify the jurisdictional basis for the relief ordered. In the interim, the agency proposes to file status reports every six months documenting its progress.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)**

Pursuant to 28 U.S.C. § 1746, undersigned declares under penalty of perjury that this Rule 59(e) Motion to Alter or Amend Judgment and Rule 62 Motion for stay is 15 pages in length and is within the page limitation for standard track cases.

/s/Ruchi V. Asher  
Ruchi V. Asher  
Assistant U.S. Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of February, 2019 a copy of the foregoing Rule 59(e) Motion to Alter or Amend Judgment and Rule 62 Motion for stay 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/Ruchi V. Asher  
Ruchi V. Asher  
Assistant U.S. Attorney

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

STEPHANIE STEIGERWALD,	)	CASE NO.: 1:17-CV-1516
	)	
Plaintiff,	)	JUDGE JAMES S. GWIN
	)	MAGISTRATE JUDGE DAVID RUIZ
v.	)	
	)	
NANCY A. BERRYHILL, ACTING	)	
COMMISSIONER OF SOCIAL	)	
	)	
Defendants.	)	

DECLARATION OF JANET WALKER

I, Janet Walker, pursuant to 28 U.S.C. § 1746, do hereby make the following declaration in support of the Social Security Administration's request for two years to complete 129,695 windfall offset recalculations and state:

**Introduction**

1. I am the Associate Commissioner of the Office of Public Service and Operations Support, which is a component of the Office of Operations of the Social Security Administration ("SSA" or "the agency"). I have been employed in this position since August 8, 2016. I have been employed by SSA since January 6, 1986.
2. In my position, I work closely with my fellow Associate Commissioners in the Office of Operations and the various regional executives having direct oversight of SSA's Processing Centers and Field Offices nationwide, which are responsible for processing the windfall offset recalculations at issue in this case. The Office of Public Service and Operations Support, which I oversee, provides operations support to the Processing Centers and Field Offices as well as to other agency components involved in the delivery

of services to the public under the retirement, survivors, and disability insurance (“Title II”), supplemental security income (“Title XVI”), and Medicare health insurance programs. My component plans, implements, and manages the delivery of agency services to the public.

3. Because of my role overseeing this component, I am familiar with SSA’s operational structure, the more than 100 different workloads our employees process to administer SSA’s programs and serve the American public, and the procedures necessary to perform the particularly complex windfall offset recalculation. I am also familiar with SSA’s Operations resources, including staffing levels in SSA’s Processing Centers and Field Offices. Consequently, I have knowledge regarding the time and resources necessary to complete the windfall offset recalculations for the 129,695 members of the class in *Steigerwald v. Berryhill* (“the Class”) as expeditiously as possible without jeopardizing SSA’s ability to serve the public.
4. SSA has started performing recalculations and will continue to do so until we complete all the Class’ recalculations and issue any underpayments that are due. Completing these windfall offset recalculations requires SSA to direct experienced technicians from handling the most difficult direct public service workloads and day-to-day services for the American public. For the reasons explained in this declaration, 90 days is simply an impossible time period to complete this complex workload for the Class. To recalculate the windfall offset with accuracy and efficiency, and ensure proper payments to eligible class members, SSA requires a total of at least two years to complete the entire Class’ recalculations on a rolling basis. Attempting to complete these recalculations in less than two years, even in a one-year period, would significantly harm SSA’s ability to serve the

public in other important areas.

**Overview: SSA Field Offices and Processing Centers**

5. SSA's approximately 1,200 Field Offices are the front lines of SSA's public service efforts, and provide mostly face-to-face service in communities across the country. Field Offices perform important functions and serve approximately 43 million visitors annually. Staff in the Field Offices establish individual records, pay benefits, update records, and determine continued eligibility to SSA's programs. SSA's Field Offices serve a particularly critical role in processing SSA's needs-based Title XVI program. Title XVI recipients are a vulnerable population whose day-to-day needs for food, clothing, and shelter often depend on the benefits paid by SSA and the services of our employees. Generally, it takes technicians in our Field Offices several years to acquire a level of proficiency in administering the agency's multi-faceted programs.
6. Apart from our Field Offices, SSA has eight Processing Centers in centralized locations across the country performing payment related functions for our over 60 million Social Security beneficiaries, and authorizing payment for individuals under Title II. Processing Center employees also provide substantial support to SSA's national toll-free phone network, where they assist in answering calls on our busiest days when call volumes are high. SSA employees handle over 30 million calls from members of the public annually, on issues related to all the programs that SSA administers.
7. SSA's Field Offices and Processing Centers also play a critical role in administering the Medicare Hospital Part A Insurance and Part B Supplementary Medical Insurance programs. SSA employees process millions of additional transactions under the Medicare

Prescription Drug, Improvement and Modernization Act of 2003, in addition to processing applications for Medicare Part A and Part B programs.

8. The Title XVI program's intent is to provide a nationally uniform program of income to individuals who are aged, blind, or disabled and who have financial needs. The means-testing element of Title XVI, which determines whether an individual or family is eligible for government assistance, requires complex eligibility rules and requires lengthy, in-depth reviews of applicants' living arrangements and income and resources, including bank accounts and personal and real property. SSA must determine individuals' financial needs for each month, independently, further adding to the complexity of administering the Title XVI program.
9. SSA has approximately 6,500 Field Office employees who are trained to administer the Title XVI program and 3,500 Processing Center employees who are trained to administer the Title II program.

#### **SSA Process for the Windfall Offset Recalculations**

10. The Class is comprised of individuals who are entitled to benefits under both Title II and Title XVI. The programs SSA administers under Titles II and XVI are vastly different, especially in regards to entitlement factors, benefit eligibility criteria, the payment amounts, and the systems used to process the payments. Therefore, our employees are often trained separately in the distinct programs—either Title II or Title XVI.
11. The windfall offset recalculation is one of SSA's most complex workloads, and remains largely a manual process that is not automated. The recalculation workload involves significant coordination and use of electronic records that do not interface, due to the unique nature of the two distinct programs. The systems used in this process are our

oldest systems, and we cannot simply automate these calculations because we first need to address the independent systems' revisions. The agency is addressing these revisions as part of our Information Technology Modernization project, a multi-layered, strategic plan covering multiple years.

12. Neither the Field Offices nor the Processing Centers can independently complete the complex windfall offset recalculations and process any resulting underpayments. Rather, both offices must rely on each other to handle this work. Therefore, processing these cases requires us to obtain assistance from both Field Offices and Processing Centers to review records under both Titles. Because many of the procedures necessary to recalculate the windfall offset are not supported by SSA's current systems and are not automated, the recalculations will have to be performed manually by a limited number of SSA staff with the requisite technical experience.
13. As outlined in Exhibit A, each individual windfall offset recalculation will take up to five hours to process to completion, not including any additional time needed to obtain required information from outside sources.
14. Proper and thorough development is essential to ensure we pay the proper amount of any underpayments that may be due to the class members. Experienced and qualified Field Office and Processing Center technicians, who are proficient in processing windfall offset cases, must review the records to determine whether they have sufficient information to perform the recalculation. If the technicians identify issues that may affect the benefit amounts or delivery of any underpayment due, they must further research and analyze the issues to ensure that they process an accurate payment. Examples include:

- The Underpayment Amount: Any issues that affect periods of eligibility will

likely result in inaccurate payments to the class members. For example, if there should have been no Title II payment made in a certain month, this affects the amount of Title XVI past-due benefits the individual is now eligible to receive for that same month. A Title II payment may not have been due because SSA has learned of an unreported issue that should have suspended or ceased the individual's benefits (i.e., incarceration). In addition, if the individual failed to report a divorce, the individual may be due additional benefits under Title XVI. Additionally, a class member may not have reported working, but SSA may have received information from the Internal Revenue Service regarding wages posted on the class member's record. SSA will need to contact the class member to resolve this issue and determine whether the wages affect the amount of benefits due in the retroactive period. This cross-checking and verification must be completed manually by an experienced technician on each case—there are no automated processes to perform these tasks.

- The Delivery of the Underpayment: Examples of this required activity include identifying a current address because SSA's last correspondence was returned as undeliverable. In addition, some individuals are unable to manage their own funds, and SSA needs to ensure that the payment goes to the proper, current representative payee. Due to the age of these cases, the individual may have a new representative payee managing their funds, and may have changed addresses several times. Again, this is a manual, individualized verification process that adds additional complications to processing each case.

**Part 1 of the Windfall Offset Recalculation:**

15. Recalculating the windfall offset begins with qualified and experienced technicians in the Processing Center. This stage of the recalculation takes at least 30 minutes to complete for each case. This does not include any time required to develop outstanding issues that may affect eligibility or benefit amounts.
16. Because the Field Office technician needs correct Title II information to calculate the Title XVI payment amount, a specially-trained technician in the Processing Center must first use multiple agency systems to review the accuracy of the Title II record. The Processing Center technician must also complete any necessary development, discussed above, based on a current review of the record, to identify any other pending actions that may affect the benefit amount or where the payment will be delivered.
17. If necessary development requires requests for information, SSA would attempt to contact the class member or other sources to obtain the needed information. These actions can take up to 90 days due to unsuccessful contacts and repeated follow-up requests for information.
18. When the experienced technician in the Processing Center finishes the actions necessary for the Field Office to recalculate the windfall offset, the Processing Center creates and sends notification to the Field Office providing the Title II information that may affect the evaluation of the Title XVI record. The qualified technician does this by using the transfer tool we built specifically for these cases. While this tool ensures that the Processing Center and Field Office technicians know who needs to take action, it does not automate the workload and does nothing to speed up the various necessary manual processes.

19. The Processing Center updates the class action tracking tool, also built specifically for these cases, which we are using to monitor and track actions on the class members' cases until completed, with annotations and information. As with the "transfer tool," the class action tracking tool simply tracks case status, and does not automate or speed up the manual processes. The tracking tool ensures that all SSA employees will be able to determine the status of each Class case to respond to inquiries.
20. Upon completion of the first step of the three-step process, SSA's quality reviewers will perform randomized sampling of processed cases, to check for policy compliance and accuracy of the benefit computation. Depending on the outcome of the quality review, the quality reviewer will either return the case to the Processing Center for correction or send the case to the Field Office employee to complete step two of the three-step process.

**Part 2 of the Windfall Offset Recalculation:**

21. Experienced Field Office technicians perform the tasks associated with phase two of this three-step process, which takes over two hours total to complete for each case.
22. A specially trained technician in the Field Office reviews the information sent from the Processing Center to ensure accuracy.
23. Due to the nature of the needs-based Title XVI program, the technician will assess the individual's eligibility for each month in the retroactive period, which is likely to change more often than a typical case because the period of time often spans years and occurred many years ago. These factors change often, so there are often multiple independent records for various periods of eligibility, each of which must be reviewed. Due to the age of many class members' cases and the fact that their eligibility for needs-based benefits may have changed, the individual's record(s) may be no longer be active in our systems.

In these instances, qualified Field Office technicians will have to manually rebuild the record. Correctly rebuilding the record normally takes several days due to systems complications. Many of our records update in our systems only during overnight hours. Therefore, reestablishing a Title XVI record can take multiple days.

24. In some instances, the Field Office will even need to request that SSA's central folder storage location in Missouri pull and mail the Title XVI paper file folder(s) from the archives, thus taking more time.
25. The Field Office technician performs an in-depth review of the Title XVI record(s) for accuracy; identifies any necessary development; and determines other pending actions that may affect the underpayment amount.
26. Due to the age of these cases, and because many factors are involved in determining an individual's eligibility for Title XVI, the technician will likely need to contact outside parties and potentially the class member to help develop necessary information related to eligibility. These actions alone normally take several weeks, even when all parties cooperate, and require another in-depth review.
27. When the Field Office has all the information necessary for the recalculation, the technician must manually calculate the monthly offset amount, monthly benefit amounts, and prior attorney fees paid on the retroactive windfall offset period. Due to the nature of the Title XVI program, it is common for the benefit amount to change multiple times during each period of eligibility, making this recalculation even more complex. Properly executing each step in the recalculation is extremely time-consuming, but very important to ensure accuracy. The Field Office must also verify and manually update the record(s) in our systems.

28. When all Title XVI actions are complete, the Field Office responds to the notification from the Processing Center to inform them that the Field Office's work is complete. The technician in the Field Office updates the class action tracking tool with annotations and information. The Field Office also documents the transfer of responsibility back to the Processing Center.
29. After the Processing Center's actions, upon the Field Office's completion of the second step of the three-step process, SSA's Title XVI quality reviewers will review a sampling of cases and recalculations for policy compliance and payment accuracy. Depending on the outcome of the quality review, the quality reviewer will return the case to the Field Office for correction or send to the Processing Center to complete the final step of the three-step process.

**Part 3 of the Windfall Offset Recalculation:**

30. Experienced Processing Center technicians perform the tasks associated with the last phase of this three-step process, which takes over one and a half hours total to complete.
31. A qualified technician in the Processing Center reviews the information sent from the Field Office.
32. The Processing Center technician compares, month-by-month, what Title II benefits were paid versus what should have been paid to determine the underpayment amount due, if any. Due to the age of these cases and the complex nature of windfall offset, this process for class members will take more time than the usual approximately one hour for a complex case in order to ensure the class members are paid fully and accurately.
33. The Processing Center takes necessary actions in our systems to document the underpayment and class counsel's fee. The experienced technician will also manually

prepare a notice for the class member to explain the decision and actions.

34. If SSA underpaid the class member, the Processing Center will prepare and release the payment. In cases processed before the percentage of class counsel's fee is known, SSA will withhold 20% of the underpayment for potential attorney fees. This represents the percentage of each class member's past-due benefits that class counsel has asked the Court to approve.
35. After the Court determines class counsel's fee amount, the Processing Center will prepare and release class counsel's fee, as well as document our appointed representative database, which is necessary to comply with our IRS reporting obligations. At a later date, Processing Center staff will need to be diverted from their day-to-day public service work to re-examine class members' cases already processed in order to pay the Court-ordered fee. If the fee percentage ultimately ordered by the Court is different from the 20% amount withheld from the underpayment, each case will need to be revisited for further manual action, requiring significant additional time to process each case.
36. The qualified Processing Center technician verifies all information and completes the final documentation of the case in our systems.
37. The Processing Center performs the final update in the tracking mechanism to document completion of the case.
38. Just as the quality reviewers did earlier in the process, our Title II quality reviewers will review a sampling of cases and recalculations for policy compliance and payment accuracy. Depending on the outcome of the quality review, the case is returned to the Processing Center for correction or final preparation for release of payment and notice(s).

39. To ensure the accuracy of class members' recalculations and underpayments, SSA's Office of Quality Review will divert 121 employees, full-time, from other targeted, critical quality review workloads. As mentioned in parts 1, 2, and 3 of the recalculation process, quality reviewers will select a random sample of cases from the respective component, Processing Centers or Field Offices, at each step in the review process.
40. In addition to a sample review of cases during all three parts of the recalculation process, to ensure a very high level of case accuracy, SSA's quality reviewers will perform a comprehensive review when we finish the recalculations and payment of the underpayments for the Class.
41. As depicted, the process is complex; SSA must use its most qualified employees to ensure accurate payments to the class members.

**Only Experienced and Qualified Employees  
Can Perform the Windfall Offset Recalculations**

42. Due to the complexity of processing windfall offset recalculations, only highly experienced and trained employees can perform this task. For windfall offset recalculations, we require experienced and qualified technicians in order to ensure accuracy. These cases require someone with a distinct aptitude, as well as years of experience and exposure to our programs. A period of training alone does not provide employees with the skills necessary to do these complicated recalculations independently and accurately.
43. Of the approximately 6,500 Title XVI Field Office employees, SSA has approximately 1,500 Title XVI technical experts nationwide. SSA identified approximately 150 technicians (10% of the total volume of technical experts) who are qualified with the required skillset, specialized training, and expertise necessary to process the recalculation

of the windfall offset for the Class.

44. Additionally, SSA has 180 skilled technicians in the Processing Centers to support the Field Office technicians by performing the Processing Center steps in the recalculation process. Thus, SSA has approximately 330 employees (Field Office and Processing Centers combined) with the requisite background to perform the windfall offset recalculations required for the Class.
45. SSA's experienced technicians function as the agency's technical resources to support and coordinate highly sensitive workloads, and they are the focal point for ensuring high quality case processing of the most complex claims. They have comprehensive knowledge of the provisions of the SSA programs related to their respective job duties and how the provisions interface, all while considering and evaluating numerous interrelated facts or conditions in light of technical complexities and unusual combinations of issues.
46. These experienced technicians develop, adjudicate, and authorize the most complex, non-routine cases, typically those that are highly unusual, without precedent, and usually involve a number of different SSA administered programs.
47. This comprehensive knowledge and level of competency is essential when performing the windfall offset recalculation. Rushing this process and doing the Class' cases in less than two years by quickly training other employees to do these complex recalculations will adversely affect our ability to accurately perform the recalculations and pay Class members the proper underpayment due, if any.
48. In addition to the experienced technicians' role in directly supporting SSA employees on the most complex cases, they are also often the points of contact for Federal agencies and

other SSA components, such as the Hearing Offices and Office of the Inspector General. Most of these experienced technicians serve as the key technical resources for the public, such as employees of State government, beneficiary representatives, attorneys, law enforcement agencies, and public/private organizations. Also, most of these qualified technicians are the liaison with employers, payee organizations, and other State/local entities to resolve complex cases or to explain agency policy. These organizations also rely on these same technicians as a resource for complex issues.

49. While processing the required windfall offset recalculation for the Class, the unavailability of the agency's most experienced and qualified technicians will cause a delay in serving those members of the public with complex benefit issues. Complex issues are often associated with the most vulnerable members of the public whose day-to-day needs for food, clothing, and shelter often depend on the benefits paid by SSA and the skilled support provided by our experienced technicians.

**Impact to the American Public Due to SSA  
Recalculation of Class Windfall Offset Payments**

50. To minimize the negative impact on the public, the recalculations must be spread out over time such that Field Offices and Processing Centers can accurately process this workload without dramatically affecting the public and our employees' ability to process critical, complex, and ongoing workloads.
51. SSA is committed to performing the necessary windfall offset recalculations and applicable payments for the Class. However, this massive workload will result in fewer services that we can provide to the American public while the work is in process.
52. Therefore, SSA has determined that it can efficiently perform the necessary recalculations and payments, within two years, without widespread degradation of

services to the American public. The two-year timeframe was determined based on the following:

53. The staff who will process the Class' cases are part of the same front-line staff who serve the public every day, including over 60 million beneficiaries, who include vulnerable populations that need our assistance, such as approximately 10 million military veterans, 11 million widowed individuals, and 5 million children in need.
54. Because the employees' time will be diverted to the windfall offset recalculations, there will be delays in SSA's public service. Performing the recalculations over the course of two years will negatively affect approximately 80,000 members of the public each month, who will be unable to get assistance in Field Offices via the 800 number or will experience greater delays in having their benefits processed.
55. We estimate that we will have to delay processing approximately two million actions on beneficiaries' records, which is the amount of work that equates to the work time necessary to complete the necessary actions for the Class.
56. To demonstrate the volume of work that will not be performed due to the recalculations, these are a few examples of how SSA's Field Offices will divert resources away from approximately 1 million actions which include the most complex work associated with:
  - approximately 300,000 actions needed to pay benefits to Title II and Title XVI individuals, most of which are new claims;
  - approximately 200,000 actions needed that may affect eligibility for Title II and Title XVI;
  - approximately 150,000 actions related to changing the representative payee on our records, which if not done, will cause individuals to not receive a payment or

for the payment to go to the wrong payee;

- approximately 170,000 individuals needing a change of address to ensure payments and notices are properly received; and
- visitors and callers may experience longer wait times in our Field Offices and a lower rate of their calls being answered as well as increased time to resolve their issues on the back-end because the experienced technicians are unavailable for guidance.

57. Additionally, in our Processing Centers, SSA must divert resources from performing approximately 900,000 actions, which include the most complex work associated with:

- approximately 500,000 individuals needing post-entitlement actions reviewed in order to determine whether we can process their claim or require further development;
- approximately 130,000 actions that directly impact current Title II benefit payments, such as payments to individuals in critical need situations (e.g., dire financial need, such as eviction or homelessness; non-receipt or interruption of benefit checks that has caused a hardship);
- approximately 100,000 individuals awaiting a decision on their appeal or action to implement an appeal decision;
- approximately 75,000 actions related to enrolling or ensuring individuals have medical coverage; and,
- compounded follow-ups from the public and their representatives because they will be waiting longer for SSA to take their actions, exacerbating the situation further.

58. Since Processing Center employees also support SSA's national toll-free phone service, an additional approximately 10% of callers to our 800 number will experience a busy signal when calling while we are processing the Class' cases.
59. As shown, since these approximately 2 million Field Office and Processing center actions are the actions employees would handle if not recalculating the Class underpayments, allowing two years for SSA to complete class members' recalculations will clearly have much less of a dire impact on the American public, who depend on SSA for benefit payments and medical insurance to live. Any degradation of service will spill over and impact all of our other 100-plus workloads.
60. Completing the required recalculations in the 90 days stated in the Court's January 25, 2019 Order would be impossible for SSA. Completing this workload in 90 days would require SSA to divert 1,500 Processing Center employees and 1,200 Field Office employees (combined 2,700 employees) to completing the recalculations for the Class full-time. Well over 90% of these employees simply would not have the training, experience, and expertise necessary to perform this complex work within 90 days.
61. Diverting 2,700 technicians from their day-to-day direct public service functions would have a dramatic, negative impact on SSA's ability to assist and pay benefits to the American public. Diverting 2,700 front line employees would result in over 600,000 members of the public receiving no services or unacceptably delayed services during the 90-day period. We would have very little flexibility or ability to choose what actions to delay, meaning work directly affecting payments would be affected, presenting a significant hardship to the public. In this short period, inquiries from the public would also likely increase as individuals question why, for example, their direct deposit,

income, or address information has not been updated. The impact of not performing millions of processing actions during this period would create unprecedented workload backlogs and failures in the agency.

62. In making its determination on the time required to process the Class' recalculations, SSA did consider whether performing the work in a shorter period, such as one year, would adversely affect our public service. However, we have determined that completing the Class' recalculations in one year would result in a loss or significant delay of services to over 160,000 members of the public each month. This would result in significant delays and backlogs on benefits for potentially hundreds of thousands of vulnerable Americans seeking aid and benefits, both financial and medical.
63. In addition, it would take 669 employees working full time exclusively on class members' recalculations to complete these recalculations in one year. As explained, SSA does not have 669 employees who possess the requisite skill to process these complex cases.
64. If given two years, we estimate that approximately 80,000 members of the public would be affected per month. While this is still significant, we would use our 330 most qualified technicians to complete the work, while instructing other staff to prioritize actions that would cause the most hardship to the public if not acted upon.
65. Allowing more time for SSA to complete these actions will reduce the negative impact on the American public, who depend on SSA for benefit payments and eligibility for medical insurance to live. These above degradations of service will be compounded exponentially the shorter the timeframe, and will pull directly against our commitment to the public for years to come.

66. While the consequences of performing the Class' recalculations in two years are significant, SSA is committed to completing these actions while maintaining an acceptable level of service to the American public.
67. In addition, as discussed in paragraph 13 and Exhibit A, each of the 129,695 class member recalculations take up to five hours to process to completion. That means it will take up to 648,000 hours to perform the windfall offset recalculation for the entire class, not counting mandatory breaks, holidays, and leave. If the amount of class counsel's fee is not known at the time of the recalculation, that may result in additional work to complete the process once that fee amount is determined by the Court. SSA has approximately 330 employees (Field Office and Processing Centers combined) with the requisite background to perform the windfall offset recalculations required for the Class. Therefore, it will take approximately 24 months for these qualified staff members to perform the full Class' recalculations accurately and efficiently, while maintaining an acceptable level of public service.

**Preparation Already Taken by SSA and  
Commitment to Complete Class Recalculations**

68. To ensure our commitment to the Court and the Class, SSA has been diligently working during this litigation. We have devoted significant resources and thousands of hours in preparation for accurately and efficiently processing the Class' windfall offset recalculations.
69. Completing the recalculations of the windfall offset and issuing underpayments for members of the Class is a top priority. As detailed herein, these recalculations are a largely manual process and among the most complex workloads performed at the agency. We have worked diligently to develop and execute a plan for processing these complex

cases.

70. To manage such a massive workload, we have developed detailed plans for staffing, budgeting, and workload displacement, as well as contingency plans for addressing projected impacts on critical public services. Since receiving the Complaint, we have allocated in excess of 25,000 hours from other priorities in preparation for this complex workload. This required using a methodical approach to identify staffing resources nationwide; develop and administer necessary, detailed, step-by-step instructional material; and expedite development of class action case tracking and transfers tools. We reprioritized our support staff and programming resources away from other critical priorities to develop the plans and tool, which will allow us to monitor case progress and resolution. Because of the scope of this Class and its nationwide reach, the complexity of the workload, and the need to balance it with competing obligations, we have taken extensive proactive measures toward a commitment to reviewing and processing the windfall offset recalculation for the Class.
71. We coordinated with systems experts to prioritize development of custom case tracking software and a custom Field Office and Processing Center communication tool for processing these windfall offset cases. While these tools do not automate or speed-up the manual recalculation process, they will allow us to more accurately track the status of the cases and move them through the process. Additionally, we developed and started a comprehensive plan to train our experienced and qualified technicians on the unique business process instructions necessary when handling the Class' cases.
72. As mentioned above, we have begun the windfall offset recalculations, and our experienced and qualified technicians will be dedicated to this workload and will

continue until completion of the Class' cases. We anticipate issuing the first underpayments to eligible Class members in February 2019.

73. Considering our ongoing mission to serve the American public, as described above, we can minimize the detriment to the public by completing the Class' recalculations over two years. Performing the recalculations within two years will help us continue to meet much of our public service obligations with the least disruption to the American public, while utilizing highly skilled technicians, who are capable of processing our most complex workloads, to ensure accurate payments to the Class.

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

Executed this <sup>21</sup>~~24~~ day of February 2019.

A handwritten signature in cursive script, reading "Janet Walker". The signature is written in dark ink and is positioned above a horizontal line.

Exhibit A: *Business Process Workflow for Windfall Offset Recalculations*