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

STEPHANIE LYNN STEIGERWALD, on behalf of herself and the class,	)	
Plaintiffs,	)	**CASE NO.: 1:17-CV-1516**
v.	)	**JUDGE JAMES S. GWIN**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**OPPOSITION TO MOTION TO AMEND/ALTER JUDGMENT PURSUANT TO RULE 59(e)**
Defendants.	)	

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I. INTRODUCTION

On January 25, 2019, this Court granted summary judgment to Plaintiff Stephanie Lynn Steigerwald and the certified Class (collectively "Plaintiffs"), and ordered the Social Security Administration ("SSA") to perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days. *See* Docs. 88 ("Opinion"); 89 ("Order"). By their Motion to Amend/Alter Judgment ("Motion"), Defendants seek to extend the Court-ordered 90-day deadline, arguing that: (1) the Court "misapprehended the size of the class," Motion at 4 (casing fixed), and that, regardless, (2) the Court's order would result in "manifest injustice." *Id.*

Defendants are wrong on both points. As to the first point, the Court was made aware (albeit by Plaintiffs, not Defendants) of the size of the Class months before issuance of the Opinion and Order. *See* Doc. 82. As to the second, there is no manifest injustice, as SSA is seeking to do *more* than what the Court ordered. SSA can and should streamline its process to comport with the Court's Opinion and Order.

Nonetheless, if Defendants can truly establish that the Court-ordered work cannot be completed within 90 days, Plaintiffs are amenable to a reasonable extension. However – especially on the facts provided – two years is unreasonable, and will unduly prejudice the Class. Accordingly, Plaintiffs request that the Court grant Defendants an additional 30 days to complete the Subtraction Recalculation, and that the Court hold a hearing at some point between day 90 and day 120 to evaluate how many Subtraction Recalculations and Retroactive Underpayments have been made, and to determine whether other extensions may be warranted.

Defendants also request "clarification" of the Court's jurisdiction. Motion at 2. There is nothing to clarify. The Court has already properly found § 405(g) jurisdiction, which under Supreme Court precedent allows the Court to grant mandatory injunctive relief, such as it has. *See Califano v. Yamasaki*, 442 U.S. 682, at 704-05 (1979). *See also Wayside Farm, Inc. v. Bowen*,

698 F. Supp. 1356, 1361 (N.D. Ohio 1988) ("nothing in the language or the legislative history of § 405(g) or § 1396i(c)(2) indicates that Congress intended to preclude injunctive relief in § 405(g) suits.").

II. LEGAL STANDARDS

Rule 59(e) motions, "though frequently brought, are granted only in rare and unusual circumstances." *Rainworks Ltd. v. Mill-Rose Co.*, 2009 WL 2382974, at *1 (N.D. Ohio 2009) (quoting *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). Such motions "run contrary to notions of finality and repose" and are therefore discouraged. *Id.* (quotation and citations omitted). The Rule "allows a party to file a Motion to Alter or Amend its Judgment when one of the following circumstances arises: (1) there is an intervening change in the controlling law; (2) evidence not previously available became available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice." *Stancik v. Deutsche Bank*, 2018 WL 1070873, at *1 (N.D. Ohio 2018) (Gwin, J.) (citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). "Manifest injustice does not include a party attempting to correct what has – in hindsight – turned out to be [a] poor strategic decision[.]" *Banks v. Pugh*, 2014 WL 4441470, at *2 (N.D. Ohio 2014) (citation and quotation omitted).

"[U]nder Rule 59(e), parties cannot use a motion for reconsideration to raise new legal arguments that could have been raised before a judgment was issued. Rather, a motion under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007) (collecting cases) (quotation omitted). "It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue." *Wheatt*

v. City of E. Cleveland, 2017 WL 3599187, at *1 (N.D. Ohio 2017) (Gwin, J.) (quotation omitted).

III. ARGUMENT

A. Far From Causing One, the Opinion *Remedies* a "Manifest Injustice"

Defendants do not cite "any particular clear error of law in the Court's analysis, any intervening change in controlling law, or any newly discovered evidence" in support of their motion. *See Stancik*, 2018 WL 1070873, at *2. Nor can Defendants meet these three controlling factors for granting reconsideration under Rule 59(e). In the absence of a true basis for filing their Motion, Defendants seek to manufacture a "manifest injustice" out of the Court's holding through two related (and equally wrong-headed) arguments.

First, Defendants question the Court's knowledge of its own docket by asserting that the Court misapprehended the class size on summary judgment. Motion at 4-5. In fact, the Court did not "misapprehend" the class size when it issued its Opinion; the Court was made aware of the size of the Class (albeit by Plaintiffs, not by Defendants), months *before* issuance of its Opinion and Order.

Second, Defendants argue that they "have not previously had an opportunity to present facts relating to the complexities of performing the" Subtraction Recalculations. Motion at 3. To the contrary, the filings in this case manifest that Defendants already have done so.

Finally, Defendants' reliance on Janet Walker's Declaration to prove "manifest injustice" is misplaced. As but one example, Ms. Walker includes extraneous procedures neither necessary to, nor contemplated by, the Court's Opinion and Order, nor even by the Motion itself.

1. The Court Did Not "Misapprehend" the Size of the Class

Defendants improperly accuse the Court of "significantly misapprehend[ing] the size of the Class." Motion at 4 (casing fixed). This accusation is not true. What *is* true is that Defendants evidently attempted to hide the large size of the Class – perhaps out of embarrassment that their

earlier repeated assertions that Ms. Steigerwald was likely the only Class Member were proven so wrong. On September 12, 2018, Defendants filed a Notice with the Court, advising the Court that they had provided the names of the Class Members to Class Counsel. Doc. 79. Missing from that Notice was the number of Class Members: 129,859. *Plaintiffs* provided that number to the Court in a November 19, 2018 filing, Doc. 82 at 1, and in person at a November 20, 2018 Status Conference before the Court. Given this record, Defendants' bald assertion that the Court did not comprehend the size of the Class simply is incorrect.[1]

2. Defendants Have Previously Argued the Supposed Difficulty of Performing the Subtraction Recalculations

Next, Defendants claim "manifest injustice" because, they assert, they "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." Motion at 3-4. This too is untrue. In fact, they did so. *See, e.g.*, Doc. 57 at 10-11 (explaining the Subtraction Recalculation process).

But, even if Defendants did not expound on this issue as much as they would have liked, they certainly had the opportunity to do so. Defendants cannot credibly contend they lacked notice and an opportunity to be heard on the burden to perform the necessary windfall offset recalculations within 90 days. Defendants received notice of the 90-day timeframe for this remedy in the filing of the Complaint. In Plaintiffs' Prayer for Relief in the Complaint, Section (g)

[1] In arguing otherwise, Defendants selectively quote from the Court's Certification Opinion, which referenced Plaintiffs' estimate "based on class discovery" that "SSA did not do the Subtraction Recalculation in 39% of the cases where it should have" done so. Opinion at 3. But the reference to the class discovery numbers in the Opinion does not mean that the Court was unaware of the enlargement of the Class, which, of course, the Court itself had ordered. In its decision granting Class Certification, the Court explicitly extended the Class to 2002, ten years beyond the "five years of information" provided in class discovery, referenced in the Opinion. *See* Doc. 66 (the "Certification Opinion") at 17. For Defendants to imply that the Court was unaware of the Court's prior Certification Opinion in its Opinion is more than inappropriate.

requested Windfall Offset re-calculations to be conducted within 90 days of any order entered by this Court:

> (g) Preliminarily and permanently enjoin Defendants and order them immediately to re-calculate all Windfall Offset calculations for each class member by using the Subtraction Recalculation as required, and thereafter to make all required Retroactive Underpayments, within ninety (90) days following the date of any such order of this Court.

Without citing to any authority, Defendants further argue they were not afforded the opportunity for "briefing and discussion of the proper remedy" because Plaintiffs only sought summary judgment on the issue of liability – not remedy – for Plaintiffs' only Count. Motion at 4. Defendants are wrong, as a matter of law.

The Complaint indisputably alleges only one claim. Under Rule 56, the sole claim that Plaintiffs sought judgment for is "composed of both the theory of liability and the remedies that that theory supports." *See Hamblin v British Airways PLC,* 717 F. Supp.2d 303, 307 (E.D.N.Y. 2010) (citing BLACK'S LAW DICTIONARY, 81-82 (9th ed. 2009) (defining "claim" both as "[t]he aggregate of operative facts giving rise to a right enforceable by a court" and as "[a] demand for money, property, or a legal remedy to which to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for" (*i.e.*, *the ad damnun clause*))). Under this analysis, the right and the remedy are each part of the "claim" as defined in Rule 56. *Id*. Plaintiffs did not seek – nor did the Court grant – bifurcation of liability and relief.

Defendants rely on *GenCorp, Inc. v. American Intern Underwriters*, 178 F.3d 804 (6th Cir. 1999), for the proposition that relief under Rule 59(e) is "available to prevent manifest injustice." But the Sixth Circuit *denied* relief in that case, refusing to correct a "poor strategic decision" made by counsel during the litigation. *Id*. at 834. The same result should hold true here. Defendants may have made poor strategic decisions throughout this litigation. That does not result in

"manifest injustice."

3. Janet Walker's Declaration is Suspect

In any event, the "burden" Defendants now present is of questionable accuracy. In support of their arguments, Defendants have submitted a Declaration from Janet Walker. Doc. 96-2 ("Walker Decl.").[2] She concludes that it would take at least two years to complete the entire Class' recalculations on a rolling basis. Walker Decl., ¶ 4.

The primary problem with Ms. Walker's Declaration is that she describes a process which is more complex than the Court's straightforward command to SSA to perform the Subtraction Recalculation. The Court's Order reads as follows: "The Court **ORDERS** Defendant to perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days." Opinion at 9. Ms. Walker has chosen to expand the Court's Order to include unnecessary and extraneous reviews and procedures, thereby slowing down the Subtraction Recalculation process. *See* Declaration of Gary Payne ("Payne Declaration"), attached hereto, ¶¶ 7-11.

Ms. Walker's assertion that SSA must check every case for underlying errors before performing the Subtraction Recalculation is particularly suspect. In the past, SSA has previously declined to "review cases" otherwise "processed correctly" stating to their own Inspector General: "We cannot agree to re-work these cases, because we do not have sufficient resources to devote to that effort and it would adversely affect other crucial workloads." Doc. 1-5 at 18. Moreover, in the Motion itself, SSA alleges: "[T]he windfall offset recalculation was merely the implementation of prior final decisions *that were correct*." Motion at 10 n.4. Given SSA's admission, there is no

[2] Ms. Walker is the same declarant who evasively supported Defendants' Motion to Dismiss, by excluding a crucial document from Class representative Stephanie Steigerwald's file. *See* Docs. 18-2, 25-1. Given her history in this case of withholding crucial information, Class Counsel is not inclined to trust the completeness of Ms. Walker's most recent Declaration, which may similarly exclude relevant facts unhelpful to Defendants.

need to review the correctness of those underlying decisions. *See* Payne Declaration, ¶ 10.[3]

Finally, it appears Ms. Walker failed to disclose several details to support her conclusions. For instance, she describes the manual labor component for the calculation and the technical experience required for the workload, but states that the windfall offset recalculation for each individual will take "up to five hours" by pointing to Exhibit A attached to her Declaration. *See* Walker Decl. at ¶ 67. Exhibit A, in turn, is a "Business Process Workflow" chart that provides no estimate of the time allotted per each step. The chart includes extraneous materials neither ordered by the Court nor necessary to fulfill the task at hand. In sum, Ms. Walker does not provide nearly the level of specificity to render her estimate of hours per individual fair, accurate or reliable.

* * *

Defendants have not made an adequate showing that they require an additional two years to perform the Subtraction Recalculations for the Class. Throughout this case, Defendants have complained about "the paucity of a rationale" for this case "and the significant agency resources required" by SSA to remedy their past injustices. *See* Doc. 41 at 10. Defendants cannot continue to shirk their obligations by seeking to do more than what the Court requires. At the very least, the Court should not grant such extraordinary relief – potentially harming over 120,000 Class Members – without a hearing on the issue, at which the testimony of Ms. Walker and other relevant persons can be taken.

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[3] As Plaintiffs argue *infra*, what indeed is incorrect is the final amount awarded to each Class Member because the Subtraction Recalculation was not done.

Some Class Members have informed Class Counsel of their belief that Defendants have made various types of mistakes within their cases other than failure to perform the Subtraction Recalculation. When sending out letters regarding any additional past-due benefits awarded (or not), Plaintiffs suggest that Defendants include a notice telling Class Members that they may request SSA to look into their underlying benefits apart from the Subtraction Recalculation, *but that SSA will only do so upon request*. Based on SSA precedent, there is no need for SSA to do so for every Class Member.

B. Defendants' Request for "Clarification" of the Court's Authority to Issue its Opinion and Order is, at Best, Misguided

Defendants assert that the Court issued relief in excess of its authority. They argue that the "Mandamus Act provides the only source of jurisdiction for the relief" that the Court could provide. Motion at 9. Defendants' position is directly contrary to the position they had previously – and, until now, consistently – taken in this litigation. When otherwise convenient, Defendants argued in their Motion to Dismiss: "this Court [] *lacks* jurisdiction over [Plaintiffs'] class action complaint under the Mandamus Act, 28 U.S.C. § 1361." Doc. 18-1 at 17 (emphasis added). And, in Opposition to Class Certification, Defendants argued – contrary to what they say now – that "injunctive relief requiring the government to perform the windfall offset recalculation for putative class members . . . *would presumably be accomplished by way of remand to the agency under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g)* . . . ." Doc. 57 at 20 (emphasis added).

It is only now, *after* the Court determined that Plaintiffs had presented their claims under 42 U.S.C § 405(g) (*see* Docs. 32 at 6; 66 at 6), and *after* the Court granted summary judgment to the Class (*see* Opinion), that Defendants' legal theories evince a sudden tectonic shift. This new position is directly inconsistent with Defendants' prior positions on this issue. The Court should reject it for this reason alone. *See U.S. v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) ("Judicial estoppel will be invoked against the government when it conducts what appears to be a knowing assault upon the integrity of the judicial system.") (Quotation omitted).

But there is another, more fundamental reason to reject Defendants' latest position. To wit, it is inconsistent with Supreme Court precedent. In *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Supreme Court was tasked with deciding whether 42 U.S.C. § 405(g) allows for injunctive relief. *See id.* at 704-05. The government there argued – as Defendants argue here, Motion at 11 – that the statutory provision "speaks only of the power to enter a judgment

'affirming, modifying, or reversing the decision of the Secretary,' [and] does not encompass the equitable power to direct that the statute be implemented through procedures other than those authorized by the Secretary." *Id.* The Supreme Court rejected that argument, explaining:

> The Secretary's reading of the statute is too grudging. Absent the clearest command to the contrary from Congress, *federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction. Nothing in either the language or the legislative history of § 205(g) indicates that Congress intended to preclude injunctive relief in § 205(g) suits*.

Id. at 705 (citations omitted) (emphasis added).

Defendants attempt to sweep aside the import of *Califano*, arguing that it is inapplicable here because *Califano* "plainly involved review of a final decision – a decision to recoup money – whereas no such relief is at issue here." Motion at 11 (citing to pages 64-67 of *Califano*, pages which do not exist). Defendants are wrong, for at least the following reasons.

First, there is nothing in the language of *Califano* quoted above limiting this Court's jurisdiction in the manner Defendants assert. Second, there was of course a final decision in this case. In fact, there were many: 129,695 of them.[4] *See, e.g.*, Certification Opinion at 7 ("The Supreme Court held in *Matthews v. Eldridge* that '§ 405(g) requires only that there be a 'final decision' by the Secretary with respect to the claim of entitlement to benefits.'" (Quoting 424 U.S. at 329 and citing *Weinberger v. Salfi*, 422 U.S. 749, 764-67 (1975)). In arguing otherwise, Defendants ignore the final decisions of SSA entitling the Class Members to benefits and their original attorneys to fees.

The decisions encompassed in the Court's Opinion and Order were the final favorable decisions of the Class Members entitling them to benefits, but which inaccurately shortchanged them, resulting in this lawsuit. This Court's Order requires Defendants to *modify* those earlier

[4] This number does not include the 164 individuals who opted out of the Class.

decisions to account for SSA's failure to perform the Subtraction Recalculation. *See* Opinion at 9 ("The Court **ORDERS** Defendant to perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days.").

Defendants twist the record when they state: "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.'" Motion at 10 (selectively quoting from Doc. 32 at 9, 11). These quotes are taken from the section of the Court's Opinion Denying Defendants' Motion to Dismiss ("MTD Opinion"), where the Court explained why Ms. Steigerwald's *exhaustion* of remedies would have been futile. There, the Court explained that it was excusing the exhaustion requirement because SSA provided no "final *notice* or a notice with explicit information about the windfall offset recalculation (or lack thereof) . . . ." *Id.* at 11 (emphasis added). Because (in part) there was no final *notice* provided in this case, the Court excused the exhaustion requirement. *See generally* MTD Opinion at 8-11 (Section **B. Exhaustion**).[5] Because there was no notice to Plaintiffs, the Court held there was nothing for Plaintiffs to appeal from with respect to that notice. The Court did not, however, hold that no *final decision* was made.

Indeed, to the contrary, in the Presentment section of the MTD Opinion, the Court was *clear* that there was a final decision. *See* MTD Opinion at 6. The Court was again clear in the Certification Opinion as to what it was reviewing, stating: "The Court now holds that Plaintiff Steigerwald and the other prospective class members adequately presented their claims when their representatives submitted a fee request *and those representatives' fees were finalized*." Certification Opinion at 6 (emphasis added).

[5] Defendants' Motion does not see fit to make the Court aware of the fact that Defendants quote only from the "Exhaustion" section of the Court's MTD Opinion. Indeed, the word "exhaustion" does not appear in Defendants' latest Motion at all. *See* Motion, *passim*.

Defendants undertake linguistic contortions in order to reinterpret the clear language of the Certification Opinion on this point (which they reference, but do not quote, in their Motion). *See* Motion at 11. Defendants state: "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)." Motion at 10. Despite Defendants' misreading of the Court's Certification Opinion, the issue under review in this case was obviously not whether SSA "grant[ed] fee petitions" for "other attorneys." Rather, it is whether the Agency performed the Subtraction Recalculation for Class Members *after* each fee petition was granted.[6]

Similarly, Defendants' argument that "the Court identified no decision upon which it passed review," Motion at 10, is nonsense. In fact, the Court's decision "reviewed" the final decisions of the Commissioner, which remitted benefits to Class Members but failed to perform the Subtraction Recalculation, as required, thus rendering the Agency's final decisions incorrect.[7] SSA failed to perform the Subtraction Recalculation, as required. Thus, the "final decisions" of

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[6] The Court, in its Certification Opinion was clear on this point, stating:

> Because SSA's operating manual states that SSA will process the Subtraction Recalculation when it receives notification that a representative's fee is finalized, *class members adequately presented their benefits claim when they finalized their representatives' fees*. At that point, Defendant Commissioner knew that putative class members sought their Subtraction Recalculation-related benefits.

Certification Opinion at 8 (emphasis added). *See generally* Certification Opinion at 6-8.

[7] In a footnote, Defendants again ignore the Court's denial *of their Motion to Dismiss*. They state, contrary to the facts of the case and the Court's MTD Opinion, that "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." Motion at 10 n.4. Defendants again here deny that they did anything wrong, *even related to Ms. Steigerwald*. In their defense, they cite to a non-existent page of their Reply brief in Support of their Motion to Dismiss, arguing that Mr. Roose's "letter relates to a wholly separate issue." Motion at 10 n.4 (citing Doc. 30, PageID # 52, which does not exist). Although this has long been Defendants' position in this case, and is purportedly why they chose to withhold the letter from the Court, *see* Doc. 34 at 5, the Court has already ruled that – contrary to Defendants' bluster – Mr. Roose's letter means what it says. *See* MTD Opinion at 6; *see also* Doc. 25-1 at 4 (requesting that SSA "release the withheld benefits to" Ms. Steigerwald).

the Commissioner awarded many Class Members less past-due benefits than they were due.

In *Livermore v. Heckler*, 743 F.2d 1396 (9th Cir. 1984), where, as here, "[t]he district court ordered recalculation of benefits erroneously calculated," *id.* at 1405, SSA made the same erroneous argument as here. There, the Ninth Circuit made short shrift of SSA's argument: "The Secretary contends on appeal that the sovereign immunity of the United States precludes any relief other than prospective relief. This is incorrect. 42 U.S.C. § 405(g), the section of the Social Security Act authorizing judicial review, is a broad waiver of sovereign immunity *which authorizes injunctive and other relief*." *Id.* (emphasis added). Here too, the Court's Opinion and Order, for SSA to recalculate benefits erroneously calculated, is clearly within the ambit of § 405(g). *See also Wayside Farm*, 698 F. Supp. at 1360-61 ("In *Califano v. Yamasaki*, the Court addressed whether a district court had the power to grant injunctive relief in a case in which jurisdiction was based upon 42 U.S.C. § 405(g) . . . The Supreme Court concluded that '[n]othing in either the language or the legislative history of § 205(g) indicates that Congress intended to preclude injunctive relief in § 205(g) suits.'. . . Here, the Court reaches a similar conclusion in that nothing in the language or the legislative history of § 405(g) or § 1396i(c)(2) indicates that Congress intended to preclude injunctive relief in § 405(g) suits.") (Citations omitted).

C. Defendants Have Failed to Meet their Burden to Justify a Stay

"The burden of the party requesting the stay is to show the following: 1. It will succeed on the merits of its appeal; 2. It will suffer irreparable injury unless the stay is granted; 3. Plaintiffs will not be substantially harmed by the stay; and 4. No harm will be done to the public interest." *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983). Based on these factors, Defendants have failed to meet their burden to obtain a stay.

First, as explained *supra*, Defendants are not likely to succeed on the merits of their Rule 59(e) Motion or any appeal. In fact, given its insinuations that the Court made a mistake because

it ignored its own docket, and its assertion that the Supreme Court in *Califano* did not mean what it says, it is more likely that the Motion will be found to be entirely meritless.

Second, Defendants claim of irreparable harm is based solely on Ms. Walker's Declaration. However, as discussed *supra*, Ms. Walker's Declaration is suspect in numerous respects. Without the opportunity to probe Ms. Walker's testimony at a hearing, the Court should not blindly rely on it. At this time, at least, Defendants claim of irreparable harm should fail.

Third, Plaintiffs will be substantially harmed by a stay. Defendants do not even address this prong in their stay argument, ignoring the real harm to Plaintiffs if the Subtraction Recalculations are postponed and Plaintiffs are not paid money they have been owed, in many cases, for over a decade. Instead, ***Defendants balance their own harm against their own harm***:

> [A]lteration 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).

Motion at 14. Defendants "balance" the harm to "the agency" on the one hand ("to continue its other statutorily mandated functions") with harm to "Defendants" (*i.e.*, "the agency") on the other. In this prong, as they have done for the last 17 years, Defendants continue to ignore the ongoing harms to Plaintiffs. Then, they unsurprisingly conclude that only Defendants' harms matter. By ignoring the harm of a stay to Plaintiffs, Defendants have failed to meet their burden on this prong.

Fourth, Defendants assert that the sky will fall should the Court's Order not be stayed. Plaintiffs respectfully disagree. As Plaintiffs stated at the outset of this brief, Plaintiffs would not contest the Court providing Defendants an initial extra 30 days to perform the Subtraction Recalculation, with a hearing to take place during that time to determine how many Subtraction Recalculations had been performed in the initial 90 day period, as well as probe the accuracy of

Ms. Walker's Declaration.[8]

Regardless, Defendants' questioning of the Court's authority to provide a timeline based on *Heckler v. Day*, 467 U.S. 104 (1984) is misplaced. In *Heckler*, the Supreme Court found it "improper for a court to issue an injunction imposing deadlines with respect to the processing of *future disability claims under the Social Security Act*, given Congress' decision that mandatory deadlines for the processing of claims are inappropriate." 4 Soc. Sec. Law & Prac. § 55:88 (citing *Heckler*) (emphasis added). *See Heckler*, 467 U.S. at 112 ("Congressional concern over timely resolution of disputed disability claims under Title II began at least as early as 1975. It has inspired almost annual congressional debate since that time. The consistency with which Congress has expressed concern over this issue is matched by its consistent refusal to impose on the Secretary mandatory deadlines for resolution of disputed disability claims.") (Citations omitted). In this case, there is no disputed claim. On the contrary, Defendants have *admitted* that they are obligated to perform the Subtraction Recalculation, as the POMS requires. As the Third Circuit has explained in dealing with a similar issue to the one the Court encounters here, *Heckler* is inapposite:

> *Heckler v. Day* dealt with establishment of mandatory deadlines for administrative determination of disputed disability claims. There the court held that judicial intrusion into the administrative process was unwarranted because Congress had repeatedly rejected proposals for mandatory adjudicatory deadlines in disability cases, even though in situations involving other types of claims under the Social Security Act it had established deadlines for adjudications in administrative hearings. 467 U.S. at 118, 104 S.Ct. at 2257. *Heckler v. Day*, however, is not controlling here for, as noted in *Chagnon v. Bowen*, 792 F.2d [299] at 302 [(2d Cir. 1986)], *there is no comparable legislative history demonstrating that Congress has*

[8] Of course, the Fee Hearing already scheduled and noticed to Class Members should not be postponed, as the parties agree that knowledge of the Court-approved fee amount will allow SSA to withhold the proper amount for attorneys' fees and expedite the process. *See* Motion at 7 n.3 ("In the normal § 406(b) context, the amount of the attorney fee is not determined under 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.").

rejected deadlines for the payment of benefits for persons found eligible for them. *Holman v. Califano*, 835 F.2d 1056, 1058 (3d Cir. 1987) (emphasis added).

In fact, Defendants have previously conceded that the Court has the authority to provide a timeline for performance of the Subtraction Recalculation and payment of any past-due benefits due to that calculation, provided the timeline is reasonable. In their Opposition to Summary Judgment, they stated, "agencies should be given a reasonable time to complete a required action when no specific time is provided by statute." Doc. 57 at 11. Plaintiffs agree. Defendants have not adequately shown, however, that 90 days is *per se* unreasonable. At this time, at least, Defendants request for a "reasonable time" of two years is too much.

IV. CONCLUSION

The Court should deny the Motion.

Respectfully submitted,

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
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 Class

Dated: March 6, 2019

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing complies with the page limitations for a Standard matter, and is 15 pages long.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the class

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2019, a copy of the foregoing Opposition to Motion to Amend/Alter Judgment was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the class

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

STEPHANIE LYNN STEIGERWALD,	)	**CASE NO.: 1:17-CV-1516**
	)	
Plaintiff,	)	**JUDGE JAMES S. GWIN**
	)	
v.	)	
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**DECLARATION OF GARY PAYNE**
	)	
Defendants.	)	

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

The following analysis is based on my experience and my review of the Declaration of Associate Commissioner of Social Security Janet Walker.

1. I retired from the Social Security Administration, having been employed as a generalist Claims Representative and then as a generalist Technical Expert. I was employed by Social Security from December 1976 until my retirement in September 2013.

2. In my position, I worked with both the Title 2 and Title 16 programs and was proficient at all aspects of both programs, including windfall offset (how it works and how it is processed).

3. Because of my role as a generalist Claims Representative, and as a generalist Technical Expert, I also am familiar with the time it takes to do a windfall offset calculation/recalculation,

from the perspective of a Field Office employee. And I am aware of what resources are needed by the Field Office employee to do the correct calculation.

4. Regarding the agency handling of the recalculation of windfall offset, Ms. Walker states that the agency has started performing the recalculations. She has not stated when the recalculations began and how many have been completed so far. This information might give the Court better insight as to the time frame necessary to process an individual case or estimate the time for the entire population of cases.

5. In paragraph 9 of her declaration, Ms. Walker states the agency has approximately 6500 employees that are trained to administer the SSI program. In other words, she is stating that they are specialized and do SSI cases only. What she doesn't state is the number of generalist Claims Representatives that the agency employs who have to have knowledge of both Title 2 and Title 16. The office I was employed in was a small office in Northern Ohio (Sandusky) which was an office staffed by generalist Claims Representatives. All these employees were required to have a basic, working knowledge of both programs. I find it difficult to believe that there aren't veteran, generalist Claims Representatives in the agency that aren't competent to handle windfall offset recalculations.

6. In paragraph 10, I agree with her observation that the rules and factors of entitlement are vastly different under Title 2 and Title 16. And she is correct when stating that employees are trained separately in the distinct programs; however, my experience was that after being trained in one program, and becoming familiar and proficient with that program, claims representatives were then provided with training in the other program at a later date.

7. Paragraph 11 states that "the windfall offset calculation is one of SSA's most complex workloads and remains a largely manual process that is not automated." That is not correct. I refer to Document 37 in this case. Specifically, on page 6, the last two paragraphs read:

> "However, in cases ***where the amount of the fee is known*** at the time of the initial windfall offset calculation, as is the case in most instances involving fee agreements, ***a Field Office employee simply processes the award for the case. Generally, the system performs all of the necessary calculations and interfaces, and a windfall offset calculation that accounts for the amount of the authorized fee is completed***.
>
> In the majority of cases involving windfall offset calculations and representative's fees, the fees are known at the time the initial windfall offset calculation is made, and therefore the system performs the calculation to account for those fees. Although there are a variety of factors that can affect the complexity of processing any case, all else being equal, ***fee petition cases are more complex to process than fee agreement cases because of the amount of the fee is generally not known at the time the initial windfall is processed."***

Thus, the fee petition process is identical to the fee agreement process ***once the attorney's fee is determined***. The only "complexity" added by the fee petition process is by the agency using a fictitious amount of money for the attorney fee ($.01) and then later requiring a corrected amount once the exact fee is known. However, once the fee is known and re-entered, the remaining steps should all be automatic. It is my understanding that based on the Class Definition in this case, at this point all of the original attorney's fees have been determined, because all of the Class Members' original attorney or non-attorney representatives have been paid.[1]

8. Paragraphs 12 through 29 discuss the SSA process for the Windfall Offset Recalculation. Ms. Walker states that processing of the cases requires assistance from both the

[1] The Class Definition in this case is: "Individuals who became eligible to receive Concurrent Payments for whom Representatives' fees were paid out of the individual's retroactive benefits between March 13, 2002 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 for whom, ***after the amount of Representatives' fees was determined and paid out of retroactive benefits***, SSA did not perform the Subtraction Recalculation and therefore has not issued any Retroactive Underpayment that may be due."

Field Office and the Processing Centers in order to review the record and that the recalculations will have to be performed by hand. She goes on to describe a process where the case is initially reviewed in the Processing Center, eventually the case is then transferred to the Field Office for the new computation of windfall offset (*i.e.*, the Subtraction Recalculation). Then, once that is completed, the case is then transferred back to the Processing Center where eventually notices are sent to the claimant and attorney, and any underpayment is processed and paid to the claimant.

9. In my opinion, the process described by Ms. Walker is adding unnecessary steps and time to the process based on what the Court ordered in this case. The conclusion of Judge Gwin's judgment of January 25th, 2019 states: "the Court **ORDERS** Defendant to perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days." The process described by Ms. Walker adds much more to the process than what the Court ordered. Namely, performance of the Subtraction Recalculation.

10. One can eliminate the Processing Center and the quality reviewers, as described in paragraphs 15-20 of Ms. Walker's declaration, right up front. Instead, have the Field Office technician assume that the available information regarding past payments under both Title II and Title XVI are correct as shown, and thus the Field Office can then begin its review accordingly and immediately perform the Subtraction Recalculation as ordered by the Court. As well, the steps Ms. Walker describes in paragraphs 25 and 26 should be eliminated. Ms. Walker appears to be concerned with a Class Member's current eligibility. However, this case is about whether the Class Members were eligible for both Title II and Title XVI benefits at the time the Subtraction Recalculation should have been (but was not) performed. The Processing Center would need to send the notices and make payment after the Field Office completed their work.

11. In sum, so long as the Field Office has the correct information regarding what the original attorney was paid, they should be able to process the Subtraction Recalculation immediately.

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

Executed this 5th day of March, 2019

By:

/s/ Gary Payne

Gary Payne