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

STEPHANIE LYNN STEIGERWALD, *Plaintiff*, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. *Defendants*.	)	CASE NO.: 1:17-CV-1516 JUDGE JAMES S. GWIN **DEFENDANTS' REPLY IN SUPPORT OF RULE 59(e) MOTION TO ALTER/AMEND JUDGMENT AND RULE 62 MOTION FOR STAY**

INTRODUCTION

Defendants' Motion to Alter/Amend Judgment and the declaration supporting it demonstrated that the Social Security Administration (SSA) is unable to process 130,000 windfall-offset recalculations within 90 days. Instead, the agency requires two years to complete these recalculations in a manner that would not have catastrophic impacts on the agency's ability to serve the American public. Defendants' motion also demonstrated the relief that this Court ordered is only available, if at all, as an exercise of this Court's mandamus jurisdiction, and that the Court should immediately stay the requirement that Defendants comply with the Court's 90-day time limit to conduct the recalculations while this Motion is pending. Plaintiff, for her part, fails to come to grips with any of these arguments. Instead, Plaintiff relies upon an inadmissible and irrelevant declaration from a retired field-office employee, misconstrues prior proceedings in this case, launches unfounded attacks on the agency's declarant, and misapprehends the nature of this Court's jurisdiction. Accordingly, this Court should grant the agency's request and allow it to take two years to complete the windfall-offset recalculations for class members. In the meantime, and at minimum, the Court should enter an immediate stay now while this motion is pending (and pending any appeal if the Court does not grant the full two-year relief) because the agency is unable to comply with the Court's order before the 90-day timeframe elapses.

ARGUMENT

I. MR. PAYNE'S DECLARATION IS INAPPROPRIATE, FACTUALLY INACCURATE, AND UNSUPPORTED, AND THUS SHOULD NOT BE CONSIDERED BY THE COURT.

In opposing Defendants' request for additional time to complete the roughly 130,000 complex recalculations on a nationwide basis required by this Court's January 25, 2019 order, Plaintiff proffers the declaration of Gary Payne, a long-ago retired SSA employee of "a small

[field] office." Doc. 98-1, Decl. of Gary Payne (hereinafter "Payne Decl."), at ¶¶ 1, 5. Remarkably, Plaintiff suggests that Mr. Payne's declaration should be credited over the testimony of Janet Walker, who currently serves as the Associate Commissioner of the agency's Office of Public Service and Operations Support. *See* Doc. 96-2, Decl. of Janet Walker (hereinafter "Walker Decl."). There are myriad reasons the Court should reject this request and disregard the Payne declaration: his knowledge of the agency's resources and operations is both dated and incomplete; he lacks sufficient experience and first-hand perception to support his contentions; his factual assertions are demonstrably inaccurate; he offers inappropriate legal conclusions; he offers inappropriate opinion testimony not permitted by a lay witness; and Plaintiff provides no information on Mr. Payne's involvement in this case, including any financial or other stake he may have in its outcome.

Mr. Payne admits that he retired in September 2013, some 5.5 years ago, rendering his account of the agency's resources and operating procedures outdated. Payne Decl. at ¶ 1. As explained in Ms. Walker's reply declaration, over the past five years the agency has made significant changes regarding component and staffing responsibilities and the way it develops staff expertise in the field office. *See* Exh. A, Reply Decl. of Janet Walker (hereinafter "Walker Reply"), at ¶ 8. And while the office in which Mr. Payne worked may have employed generalists familiar with both titles administered by the agency, that is not the universal approach in Operations; there are many offices where technicians have expertise analyzing claims under either Title II or Title XVI, but not both. Walker Reply at 6-7; 9-12. There are also many offices which employ only a small number of staff experienced in even routine windfall-offset calculations. *Id.*

But even putting aside Mr. Payne's dearth of *recent* experience with the agency, his non-management field office role does not qualify him to opine on the steps required to coordinate

recalculations for nearly 130,000 individuals on a nationwide scale in an extremely compressed timeframe. Walker Reply at ¶¶7, 10. The speculative nature of his testimony reveals its lack of foundation: After explaining that employees in his "small office … were required to have a basic, working knowledge of both" Titles II and XVI, Mr. Payne "find[s] it *difficult to believe* that there aren't veteran, generalist Claims Representatives in the agency that aren't [sic] competent to handle windfall offset recalculations." Payne Decl. at ¶ 5. That is guesswork. By contrast, Ms. Walker's testimony is grounded in fact: She has more than 30 years' experience with the agency, most recently at the agency's headquarters, and she works closely with agency executives having direct responsibility for overseeing the more than 1,200 field offices and processing centers nationwide. Walker Reply at ¶¶ 1-2, 5, 9. Ms. Walker's experience, including her progressing roles in management and leadership, give her a broader expertise regarding the agency's practices and capabilities beyond that of an employee in a single field office.

Mr. Payne also miscomprehends the nature of the work required here. As set forth in the Walker Reply, field-office employees, including Technical Experts, are proficient at performing routine operations, including a windfall-offset *calculation* (as distinct from a recalculation)[1] when the representatives' fee amount is known, i.e., fee agreement cases. Walker Reply at ¶¶ 16-17.

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[1] Mr. Payne's declaration repeatedly conflates two different agency operations, the windfall-offset calculation that occurs shortly after benefits are awarded, and the *recalculation* that must be performed in the minority of cases in which fees are authorized after the initial calculation. In that regard, Mr. Payne misquotes the Walker declaration to try to dispute her assertion that "the windfall offset calculation is one of SSA's most complex workloads and remains a largely manual process that is not automated"—even though Ms. Walker's declaration actually referred to "the windfall offset recalculation." *Compare* Payne Decl. ¶ 7 *to* Walker Decl. ¶ 11. Mr. Payne then describes the automation available for an initial windfall-offset calculation, which is not available for the class member recalculations here, as described *infra.* This distinction is critical because, as explained in the Walker reply ¶¶ 11-15, 18-21, more complex cases such as these recalculations are not automated due to systems limitations. Mr. Payne's assertion that there is virtually no additional "complexity" in recalculations for fee-petition cases, Payne Decl. ¶ 7, is simply wrong. *See* Walker Reply ¶¶ 18-22 (describing the complexities presented by class member claims).

While these simpler processes can be automated, they are not relevant here. Mr. Payne's assertion that, "once the fee is known and re-entered, the remaining steps should all be automatic," Payne Decl. at ¶ 7, simply conflates the process for performing the recalculations at issue here with the far simpler initial calculations where fees are known. *See* Walker Reply at ¶ 18-22. Class members' recalculations are far from routine, and cannot be performed via the simplified procedures Mr. Payne describes.[2] For example, Title XVI records are terminated after twelve months without payment, and, due to the age of class members' awards and the fact that beneficiaries frequently go in and out of eligibility for income-based Title XVI payments, the vast majority of class members will likely require manual rebuilding of the Title XVI record by a field office technician center before the recalculation can begin. *Id.* The age of the records also means that the processing center likely will need to review the extensive Title II payment history prior to the recalculation. *Id.* There is no indication that Mr. Payne has encountered such cases or even would recognize that limitation.

Mr. Payne also fails to recognize that many class members have multiple windfall-offset periods and/or multiple fee periods, which significantly complicates the calculation by requiring a manual examination to determine which windfall periods or fee periods contain the correct numbers with which to recalculate. Walker Reply at ¶¶ 13-15. And because of the age of many class members' eligibility determinations, it is likely that the requisite fee and other information will not be found in the electronic file and will require manual retrieval. *Id.* Systems limitations also prevent automated recalculations in class member cases because: (1) SSA never before has withheld attorneys' fees from the benefits payable after a windfall-offset recalculation and must

[2] The Walker Declaration adequately supports the five-hour average timeline per recalculation. *See* Walker Decl. ¶¶ 15, 21, 30.

manually withhold fees here, per counsel's request, requiring creation of a new process to do so; (2) in some cases a spouse or child has also paid legal fees on benefits received. *Id.* ¶ 21.

In addition to these factual deficiencies, Mr. Payne also proffers testimony inappropriate for a lay witness. First, he offers legal conclusions about the scope of the class definition and the correct interpretation of this Court's order. *See* Payne Decl. at ¶ 7 (attempting to interpret the class definition); *id.* ¶ 9 ("In my opinion, the process described by Ms. Walker … is adding unnecessary steps and time to the process … than what the Court ordered. Namely, performance of the Subtraction Recalculation."); *id.* at ¶ 10 (providing the inaccurate opinion that "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 … performed."). Mr. Payne has no basis on which to opine on the scope of this Court's injunction or the legal claims presented. *Cf. Mitroff v. Xomox Corp.*, 797 F.2d 271, 276-77 (6th Cir. 1986) (remanding for new trial where lay witness had testified as to legal conclusion).

Moreover, Mr. Payne offers opinion testimony purportedly based on his technical experience and specialized knowledge gained through work at the agency, and thus inappropriate for a lay witness. He second-guesses Ms. Walker's recitation of the steps required to complete class-member recalculations and insists that SSA "can eliminate the Processing Center and the quality reviewers … right up front," and instead "have the Field Office technician assume that the available information … [is] correct as shown, and thus … immediately perform the Subtraction Recalculation." Payne Decl. at ¶ 10. Far from being "rationally based on the witness's perception," Federal Rule of Evidence 701(a), this assertion is wholly untethered from his personal experience, as he has never worked in a processing center and provides no basis to know what errors and inaccuracies are involved. Moreover, because this opinion, if credited, would rely on "technical[]

or other specialized knowledge," *id.* 701(c), gained through his work at the agency rather than personal observation, Mr. Payne is offering improper expert testimony.[3] *See United States v. White*, 492 F.3d 380, 401-404 (6th Cir. 2007) (holding district court erred by permitting Medicare employees to proffer opinion testimony because it "required them to apply knowledge and familiarity … well beyond that of the average lay person" and "relied to a significant degree on specialized knowledge acquired over years of experience" with the agency) (internal quotations and alterations omitted).[4] Plaintiff cannot claim to have overlooked this distinction, given that one year ago she provided Mr. Payne's work history as a purported "expert disclosure" during discovery. *See* Exhibit B, Email from Bezalel Stern to Defendants' Counsel.

Finally, Mr. Payne's declaration merits particular skepticism because Plaintiff has provided no information on how he came to be involved in this litigation, what stake he may have in its outcome, and whether he is being compensated by class counsel (as Plaintiff's "expert disclosure" suggests). For these reasons as well, the Court should afford the Payne Declaration no weight.

II. PLAINTIFF'S BASES FOR OPPOSING THE AGENCY'S REQUEST FOR ADDITIONAL TIME TO PERFORM RECALCULATIONS ARE MERITLESS

In opposing the Government's request for additional time to perform windfall-offset recalculations, Plaintiff misapprehends the scope of Rule 59, ignores the plain language of the

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[3] The assertion that SSA should cut corners to speed the process is misguided on its face. As explained by Ms. Walker, these quality-control steps are necessary. Walker Decl. at ¶¶ 14, 16-17, 23-26 (explaining the importance of review and development of issues that may affect payment amount). Although the agency is committed to processing these cases as expeditiously as possible, that speed should not come at the expense of accuracy.

[4] Any suggestion from Plaintiff that Ms. Walker's affidavits are improper on the same grounds would be baseless because, unlike Mr. Payne, Ms. Walker offers testimony drawn directly from her first-hand experience and responsibilities at the agency and has provided the Court with *facts* relevant to the agency's resources and needs, not *opinions*. Indeed, since Ms. Walker is directly responsible for implementing the Court's order, her testimony is essential to understanding the agency's limitations.

Court's summary judgment order, mischaracterizes prior proceedings, and mounts an unsupported attack on the credibility of a high-ranking agency official. None of Plaintiff's arguments warrant the denial of relief.

As an initial matter, Plaintiff's contention that reconsideration can be granted on the basis of only a *legal*—as opposed to factual—error is simply incorrect. *See* Pl.'s Opp. to 59(e) Mot. (hereinafter "Pl.'s Opp.") at 3. Instead, relief is available to correct misapprehension of *law or fact*. *See, e.g., In re Oak Brook Apts.*, 126 B.R. 535, 536 (S.D. Ohio 1991); *Wendy's Intl., Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 686 (M.D. Fla. 1996) (alteration of judgment warranted where court "has made a mistake, not of reasoning, but of apprehension").

Plaintiff's insistence that Defendants have acted "improperly" and "more than inappropriate[ly]" by "accus[ing] the Court" of erring regarding the size of the class is, to put it bluntly, bizarre. *See* Pl.'s Opp. at 3, n. 1.[5] Defendants' motion for reconsideration brought to the Court's attention a significant error of fact: specifically, that the class size is roughly four times larger than contemplated in the Order. That correction conveyed no disrespect; it certainly did not "accuse" the Court of anything. Indeed, "[t]he purpose of Rule 59(e) is to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008).

Moreover, Plaintiff falsely claims that Defendants' argument regarding the Court's mistake of fact was based on "selectively quot[ing] from the Court's Certification Opinion," which was

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[5] In making this claim, Plaintiff surmises without evidence that Defendants tried to hide the class size "out of embarrassment that their earlier repeated assertions that Ms. Steigerwald was likely the only Class Member were proven so wrong." Pl.'s Mot. at 3-4. It is telling that this assertion is made without citation; although Defendants accurately pointed out in moving to dismiss Plaintiff's class claims that she had not then identified any similarly situated individuals, at no time have they argued that "Ms. Steigerwald was likely the only Class Member." *See* ECF No. 18, Mot. to Dismiss, at 14-15.

entered before the size of the class had even been determined. Pl.'s Opp. at 4 n.1. To the contrary, Defendants' motion for reconsideration quoted directly from this Court's summary judgment opinion, which itself included the estimated class size of 37,765 claimants that had been applicable *before* certification. *See* ECF No. 96, Defs.' Rule 59(e) Mot., at 4-5 (quoting ECF No. 88, Order Granting Summ. J.). And Defendants notified the Court in their Motion that the updated class size (129,859 before opt-outs) could be found in a notice filed by Plaintiff at ECF No. 86. Given that the larger class size was never included in a substantive filing by either party before the summary judgment order, and that, as Plaintiff admitted, the Court had only been "made aware of the size of the Class … months *before* issuance of its Opinion and Order" in a simple notice of class mailings, Pl.'s Opp. at 3, it seems unsurprising that the larger class size may have been overlooked. But the fact remains that this Court ordered the agency to perform recalculations within 90 days for an estimated 37,000 class members when more than 129,000 actually exist. This discrepancy alone warrants a substantial extension of time.

Plaintiff next contends that Defendants should not be permitted to submit evidence of the time required to complete class recalculations because that issue has been previously argued. Pl.'s Opp. at 4. This also is false. Plaintiff cites to a brief discussion in Defendants' Opposition to Class Certification, ECF No. 57 at 10-11, in which Defendants provide a high-level overview of the steps necessary to process a windfall offset in routine cases to demonstrate that the agency has no duty to perform recalculations *immediately* upon payment of representatives' fees, in each individual case to come before the agency. That discussion has no bearing on the far more complex scenarios presented by class member recalculations, *see supra*, nor the administrative limitations impacting the time required to perform 130,000 such actions.

Plaintiff's suggestion that Defendants should have included factual evidence as to remedy at summary judgment, based on the prayer for relief in her complaint, falls equally flat. *See* Pl.'s Opp. at 4-5. When Plaintiff pleaded her request for an injunction ordering the agency to perform "all Windfall Offset calculations for each class member … within ninety (90) days," ECF No. 1, Compl. at 21, neither she nor the agency had any idea whether there would be one million beneficiaries for whom the agency owed a windfall-offset recalculation or none at all. She cannot credibly claim that the prayer for relief in her claim warranted a 90-day timeline *regardless* of the number of class members to whom it ultimately applied. Equally irrelevant is her argument that "[t]he complaint indisputably alleges only one claim," Pl.'s Opp. at 5, because she indisputably argued that "summary judgment as to the Agency's *liability* … is appropriate," with no mention of relief. ECF No. 50, Pl.'s Mot. for Summ. J. at 2-3 (emphasis added); *see also id.* at 8 ("This is a clear concession by the Agency as to liability, foreclosing the need for a trial on the merits. Summary judgment on this issue is appropriate."). In fact, there is no doubt that Plaintiff contemplated further proceedings—not final relief—following summary judgment because she expressly argued that a ruling in her favor could facilitate *settlement. Id.* at 18 ("A full grant of this Motion will, it is hoped, limit and streamline the issues left before this Court, and allow the parties to proceed expeditiously to a final judgment on the merits and/or facilitate settlement."); *id.* at 11 (presenting same argument). Additionally, Plaintiff moved for summary judgment before the size of the class was known, meaning that neither party possessed sufficient information to argue the proper scope of relief at that time—particularly on a fact-heavy determination such as the proper timeframe. Defendants have not, as Plaintiff portrays, made a "poor strategic decision" not to argue the issue previously, Pl.'s Opp. at 5, but have had no opportunity to present these facts to the Court, *especially* once the size of the class was determined.

Finally, Plaintiff attacks Ms. Walker's credibility, asserting that "Class Counsel is not inclined to trust the completeness of Ms. Walker's most recent Declaration." Pl.'s Mot. at 6-7 & n.2. But "clear evidence" is required to overcome the presumption of regularity that federal employees have properly discharged their official duties. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); *see also Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 575 (6th Cir. 1998) (applying presumption of regularity to action by SSA "in the absence of clear evidence to the contrary"); *Safecard Svcs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) ("agency affidavits are accorded a presumption of good faith" that is not rebutted by pure speculation). Plaintiff has offered no such evidence. Instead, Plaintiff merely argues that the Walker Declaration "describes a process which is more complex than the Court's straightforward command to SSA" and urges the Court to credit the account of Mr. Payne, the retired former field-office employee, disputing the necessity of the process employed by the agency. Pl.'s Opp. at 6. This contention is groundless for the reasons stated above.[6] Nor does Plaintiff's suggestion that Ms. Walker cannot be trusted because she "evasively supported Defendants' Motion to Dismiss" and "withh[eld] crucial information," Pl.'s Opp. at 6 n.2, undercut the presumption of regularity. Plaintiff casts these aspersions because Defendants' motion to dismiss did not affirmatively rely upon a document already within Plaintiff's possession. But the agency never purported to, nor was required to, produce every document from Plaintiff's file in its motion to dismiss.

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[6] Plaintiff insists that the agency should eliminate critical quality-control assurances in performing class-member recalculations while *admitting* that "[s]ome Class Members have informed Class Counsel of their belief that Defendants have made various types of mistakes within their cases other than" that at issue here, and suggests that the agency should overlook such concerns while telling class members they "may request SSA to look into their underlying benefits apart from" the windfall-offset recalculation. Pl.'s Opp. at 7 n. 3. This admission demonstrates the need for SSA to ensure accuracy while performing this large workload, and Plaintiff's attempt to sacrifice accuracy for expediency (with no concern for the impact that may have on the class members that they represent) should not be countenanced.

In challenging Ms. Walker's credibility, Plaintiff elides one additional fact: She had the opportunity to depose Ms. Walker during discovery, including about the recalculations at issue. A deposition actually was scheduled last summer but Plaintiff canceled and neglected to reschedule after the Court extended discovery. Her speculation that Ms. Walker's account of the time needed to complete recalculations is exaggerated therefore provides no reason for the Court to deny the agency's request. In particular, Plaintiff's suggestion that the Court grant the agency "an additional 30 days" and "hold a hearing at some point between day 90 and day 120 to evaluate" the agency's progress is woefully insufficient, given (1) the fact that the class is four times larger than that articulated in the Court's order, and (2) the detailed and unrebutted evidence submitted by the agency of its inability to complete the recalculations without catastrophic impacts in less than two years. Ms. Walker's declarations provide a sufficient basis for this Court to grant the relief requested and amend the judgment accordingly. If the Court wishes to hear live testimony from Ms. Walker on these matters, however, Defendants will promptly make her available.

III. PLAINTIFF FAILS TO DEMONSTRATE THAT JURISDICTION IS PROPER UNDER 42 U.S.C. § 405(g).

The claim at issue here—a contention that the agency has failed to perform a mandatory duty with a request for injunctive relief ordering performance—can *only* be cognizable under mandamus jurisdiction, if such relief is available at all. *See Heckler v. Day*, 467 U.S. 104 (1984). This is because jurisdiction rests on 42 U.S.C § 405(g) only when a final decision of the Commissioner is under review, yet there is *no* final decision under review here. Plaintiff cites no pertinent authority to the contrary and misconstrues the cited case law. Rather than grapple with the lack of final decision, Plaintiff chooses to conflate the presentment requirement with the separate final agency decision requirement for jurisdiction under 42 U.S.C. § 405(g). The jurisdictional defect here is not related to presentment, but the fact that this Court has never

identified any final decision under review. *See Mathews v. Eldridge*, 424 U.S. 319, 328 (1976) ("[S]ome decision by the Secretary is clearly required by the statute.").

First, Plaintiff is wrong to contend that Defendant's position is inconsistent with *Califano v. Yamasaki*, 442 U.S. 682 (1979), which authorized courts to issue injunctions when reviewing decisions under § 405(g). Plaintiff ignores the fact that *Yamasaki* involved review of a final decision to recoup money from beneficiaries, whereas here, the claim at issue is a failure to undertake a required action. Defendants do not claim this Court lacks jurisdiction to issue an injunction where a final decision (or many of them) are under review. But *Yamasaki* does not stand for the proposition that a court may enjoin any agency action—or inaction—that it wishes, even where a court is not purporting to review a final decision under § 405(g).

Although Plaintiff identifies several decisions she contends are under review by this Court, none of the identified decisions are at issue in this suit. For example, Plaintiff first contends that the final decision upon review is the initial decision entitling the class members to benefits. Pl.'s Opp. at 9-10. As Plaintiff acknowledges, however, these decisions were correct at the time they were made, and the windfall offset recalculation is a subsequently arising obligation to review the amount of past-due benefits due an individual once representatives' fees are known. The question before this Court, then, is not the validity of the initial benefits determination, but the absence of an action to recalculate once fees are paid. At bottom, Plaintiff's complaint is that the agency has delayed too long in taking an action required by its rules, rendering it analogous to *Califano v. Sanders*, in which the Supreme Court determined that jurisdiction could not be founded upon § 405(g) due to the lack of a final decision. 430 U.S. 99, 107-08 (1977). Plaintiff alternatively contends that a final decision occurred when representatives' fees were finalized. Pl.'s Opp. at 10. This, too, is incorrect, because this Court is not *reviewing* the agency's decisions to award fees to other representatives (and Plaintiff is not challenging those earlier decisions). On the contrary, this

Court is reviewing the agency's failure to undertake a later statutory action that the Secretary must take after fees were finalized. *See* 42 U.S.C. 1320a-6. The failure to recalculate, moreover, is a failure to issue any decision on the recalculation whatsoever. Plaintiff finally contends that the final decision upon review is the final decision of the Commissioner releasing the remainder of the 25 percent of the originally awarded funds withheld for the purpose of paying attorney fees for each class member. Pl.'s Opp.at 10-11. That also does not constitute a final decision under review, regardless whether that act satisfied the presentment requirement. The release of withheld funds is separate from the obligation to recalculate a benefits determination. *See* ECF 18-2, Ex. A3 (withholding for fee), Ex. A5 (withholding based on windfall offset).

Nothing in *Livermore v. Heckler*, 743 F.2d 1396 (9th Cir. 1984), or *Wayside Farm v. Bowen*, 698 F. Supp. 1356, 1360-61 (N.D. Ohio Nov. 22, 1988) (Dowd, J.), contradicts Defendants' position, as neither case involves a situation where the Secretary *failed* to issue any decision. *Livermore v. Heckler* involved a challenge to the Secretary's actual determination of the amount of SSI benefits for individuals formerly receiving benefits under a repealed portion of the Social Security Act. *See* 743 F.2d at 1398-1400. That class action necessarily challenged a final agency decision: A determination on the amount of benefits. *Id.* at 1405. Similarly, in *Wayside Farm v. Bowen*, plaintiff did indeed challenge a final decision to terminate a Medicaid Provider Agreement. Again, this is different from this case, where Plaintiff is challenging the agency's failure to take action by recalculating the windfall offset.

Plaintiff's reading of *Holman v. Califano*, 835 F.2d 1056 (3d Cir. 1987), is impermissibly broad. As explained above, the jurisdictional defect here concerns the lack of final decision—not the scope of relief granted.

Finally, Plaintiff's argument that judicial estoppel bars a jurisdictional challenge is misplaced. It is well-settled that a jurisdictional challenge may be raised at any time in the

litigation. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). That is no less true here.

Because this Court has not identified a final agency decision that it is reviewing, the relief ordered by this Court is outside the scope of jurisdiction under § 405(g).

IV. ENTRY OF A STAY PENDING APPEAL IS WARRANTED

Finally, an immediate stay of 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, is warranted. Fed. R. Civ. P. 62. As discussed above, Defendants are likely to succeed on the merits and have properly supported its claims of irreparable harm to its operations and to the public it serves. (*See*, ECF No. 96-1). Despite Plaintiff's inaccurate claims to the contrary, Defendants acknowledge that, while recalculations would continue during any stay, some class members would not receive their recalculations and any subsequent payments as quickly as desired. (ECF No. 96-1 PageID # 1230.) But Plaintiff disregards the fourth stay factor: where the public interest lies. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). What Plaintiff fails to acknowledge is that the Social Security Administration is not a private defendant; rather, it is tasked with administrating one of the largest government programs in the world, affecting over 61 million beneficiaries and close to five million more claimants every year. Substantial harm to the agency's operations necessarily means substantial harm to the American public. The agency shares a commitment to efficiently and accurately recalculate nearly 130,000 individuals' windfall offset, and indeed has already begun to do so. But any impact on the individual class members must be balanced against the certain and irreparable harm to the agency's ability to serve the American public. Because it is impossible for the agency to perform all class members' recalculations within 90 days without devastating negative impacts not only to the agency, but to the public generally, an immediate stay of the 90-day timeline is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion to Alter/Amend Judgment under Rule 59(e) and grant an immediate stay under Rule 62.

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 ***Reply in Support of Motion to Alter/Amend Judgment*** is 15 pages in length and is within the page limitation for standard track cases.

s/ Kate Bailey
Kate Bailey
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, the foregoing ***Reply in Support of Motion to Alter/Amend 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/ Kate Bailey
Kate Bailey
Trial Attorney

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

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

REPLY DECLARATION OF JANET WALKER

I, Janet Walker, pursuant to 28 U.S.C. § 1746 and in lieu of an affidavit, do hereby make the following declaration and state:

1. I am the Associate Commissioner of the Office of Public Service and Operations Support ("OPSOS"), which is a component of the Office of Operations of the Social Security Administration ("SSA"). I have been the Associate Commissioner since August 8, 2016. I have been employed by SSA since January 6, 1986.

2. My component provides operations support to SSA's nationwide network of Processing Centers and Field Offices. Because of my role overseeing this component, I am familiar with SSA's operational structure and the general job duties and qualifications of Field Office technicians. I am also familiar with SSA's Operations resources, including staffing levels in the Field Offices and Processing Centers, and the time and resources necessary to complete the windfall offset recalculation for class members.

3. My February 21 declaration correctly illustrates the complexity of the windfall offset recalculation and the steps required to process these recalculations for class members.

GOVERNMENT EXHIBIT
A

4. I have reviewed the March 5, 2019 declaration of Gary Payne that has been submitted in this matter, Dkt. No. 98-1. As evidenced by the statements in his declaration, Mr. Payne, who held a position in a small agency Field Office over 5 years ago, is unfamiliar with the nationwide strategy necessary for processing a large workload such as that involved in this case, which requires cross-component coordination and planning to most efficiently use agency resources.

5. My progressing roles in management and leadership give me broader expertise in the agency's practices and capabilities. Part of my job is to marshal the agency's most experienced technical experts across the country to formulate a plan for handling these complex recalculations in a manner that includes a robust quality review process to ensure the cases are processed correctly.

6. Mr. Payne identifies himself as a "generalist Claims Representative" and a "generalist Technical Expert." A Field Office "generalist" is a claims specialist, formerly referred to as a claims representative, who has been trained in both the Title II and Title XVI programs. A "claims technical expert," who is considered a generalist, is an individual who has been trained in both titles as a claims specialist, has been promoted to the role of "claims technical expert," and in that role provides technical assistance to his or her office in both Title II and Title XVI. However, specific duties vary by office.

7. Mr. Payne does not indicate that he has experience in management. Many Field Offices assign claims technical experts to specific technical workloads because specialization promotes efficiency and improves quality for particular workloads, such as manual computations and windfall offset. The decision as to what particular workloads to "specialize" is left to the discretion of local Field Office management, and so the various

specialized workloads may vary significantly from one office to the next. In many offices, only a very small number of staff specialize in the windfall offset workload, which includes the initial windfall offset calculations and the separate, subsequent recalculations.

8. Since 2013, when Mr. Payne states that he left the agency, there have been significant changes regarding component and staffing responsibilities, and how the agency develops staff expertise in the Field Offices and Processing Centers.

9. In addition, the approach taken in Mr. Payne's small office in Northern Ohio is not the approach taken in all of SSA's approximately 1,200 Field Offices nationwide. In many offices, technicians only have expertise analyzing cases under one title. Even when technicians are trained to take claims under both titles, in many offices, the technicians are not trained to adjudicate cases or take actions on established records for both titles.

10. Based on Mr. Payne's description of his background working in a small Field Office, his experience there would not give him any first-hand knowledge or observation into the value and intricate details of Processing Center actions. He also would not have any expertise in the quality-control process developed by headquarters. He therefore would have no basis to know whether and why such procedures are important for the agency.

11. The windfall offset is a highly technical workload that requires a deep understanding of Title XVI eligibility and computations, appointed representative policy and systems inputs, as well as a working knowledge of the computations and systems involved in calculating the windfall offset.

12. While generalists receive training on aspects of both titles, and many are able to intake simple applications under both titles, they do not necessarily adjudicate claims or perform

records maintenance and corrections for both titles. Some generalists have a stronger aptitude for Title II or Title XVI, but maintain a skillset sufficient to advise on simpler and more common issues arising under both titles. The agency has a process in place for technicians to seek guidance from experienced technicians for more difficult cases involving complex issues that are seen less frequently.

13. Class members' windfall offset recalculations are very different from intake of simple applications for both titles. The recalculations are not routine due to the age of these cases and additional complicating factors such as the fact that Title XVI records are no longer active after 12 months, meaning that the agency will need to reconstruct on a case-by-case basis the records of most class members before recalculating, and withhold attorneys' fees from any resulting underpayment, which must be done manually because fees are not usually withheld from these funds.

14. Since the vast majority of the class members' Title XVI records are no longer active, which is not the case when processing an initial award and performing an initial calculation, these recalculations are not supported by our systems or any automation available to the agency. Due to this, the Processing Center has an even more integral part in processing these recalculations than would be true for routine windfall-offset actions.

15. In routine windfall offset cases, the retroactive period(s) can often be determined by an experienced Field Office technician. However, when the records are as old as most of the records for the class here, the Processing Center must become involved because they are familiar with historical Title II records, including payments made. Due to the age of the records, many class members will have multiple windfall-offset periods and/or multiple fee awards, or both, and the Processing Center must determine the correct periods for

recalculation. The Field Office cannot perform the recalculation without the Processing Center's input, otherwise, the Field Office computations would likely be inaccurate because they would not know the correct Title II benefit payments and attorney fee amount needed for the recalculation.

16. In some offices, many or all technicians may have enough basic knowledge of the windfall offset process to explain the general computation process; however, becoming proficient at the level needed to accurately process more complex cases, such as class members' recalculations, requires significant experience with routine cases before progressing to some of the more complex issues encountered by Field Office technicians.

17. In general, most Field Office technicians are proficient enough to process routine cases but not the most complex cases. Many, if not most, class members' recalculations will be among the most complex, for the reasons stated above, including their age, the lack of active Title XVI records, and the presence of multiple windfall-offset and/or fee periods. For that reason, many generalist claims technical experts lack the ability to do this very complex work without extensive training and practice, which evolves through years of experience.

18. There are many differences between the processes involved in calculating the windfall offset for cases involving fee agreements versus fee petitions. Mr. Payne's declaration asserts that the computation process for those two categories of cases is identical once the amount of the representative's fee is known. This is simply incorrect, and demonstrates a lack of experience with the more complex process required in fee petition cases.

19. The simplest of windfall offset calculations can be performed with assistance from our systems. These include cases in which a representative's fee agreement is quickly

approved and the amount of his or her fee is known at the time of the initial windfall offset calculation. However, even those simple cases still require that a technician conduct a manual review and enter the correct information into the system.

20. In more complex cases, such as those involving multiple periods of eligibility, manual action may be necessary to ensure that the correct underpayment is paid to the right person. Both the Processing Centers and the Field Offices play a role in processing these complex cases.

21. Although Mr. Payne appears familiar with the basics of the windfall offset calculation, his declaration does not reflect familiarity with the distinct processes involved in recalculating the windfall offset when representatives' fees are paid after the initial calculation. Instead, he describes the process exclusively from the perspective of an initial award, and an initial calculation, rather than a recalculation, and does not consider the uniqueness of class members' cases – particularly that they involve situations that negate our ability to use automated systems functions. Situations that present such systems limitations include:

a. Withholding a percentage of any underpayment for potential attorney fees in the context of a recalculation. This is a novel process that the agency has never been required to do before in this context. Therefore, it is not supported by our automated processes. Because of its novelty, Mr. Payne would be unfamiliar with the unique complications presented by this fee structure.

b. Due to the age of these cases and the fact that Title XVI records terminate after 12 months of ineligibility, many class members' Title XVI records may no longer be active, requiring manual action to reconstruct the record to identify the Title XVI information

necessary for the recalculation. Termination of a Title XVI record precludes automated processing of even the initial windfall offset calculation, much less a recalculation after a fee petition has been approved.

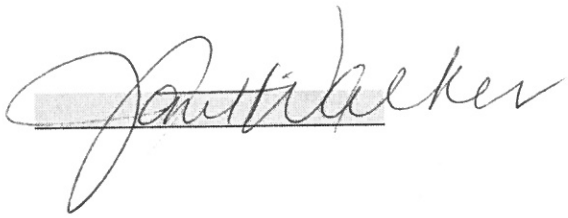
c. Cases in which a class member's spouse or child is eligible for or has been awarded benefits and has also paid legal fees, which affects the amount paid on the beneficiary's record, and thus, the recalculation of the windfall offset.

22. An additional complicating factor is that some class members have multiple windfall offset periods and more than one fee period. These cases must be manually examined to determine which windfall period or fee period contains the appropriate figures to use in the required recalculation. Without this analysis, which must be performed by the Processing Center, a recalculation performed even by an experienced Field Office technician would likely be incorrect because the wrong periods or fees may be used.

23. In addition, Mr. Payne's declaration does not appear to acknowledge the necessary and distinct Processing Center and Field Office roles in the recalculation process. For example, the Field Office will not always have the Title II data needed to perform a windfall offset recalculation and will need Processing Center input prior to performing the recalculation. However, this assumption is not reflective of the actual characteristics of class members' cases as explained in paragraphs 15 and 22 above.

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

Executed this 13th day of March, 2019.



From: Stern, Bezalel
To: Newton, Emily S. (CIV); Bailey, Kate (CIV); Brizius, Erin E. (USAOHN); Asher, Ruchi (USAOHN)
Cc: Kasdan, Ira; Wilson, Joseph D.; "Kirk Roose"; jressler@rooselaw.com
Subject: Steigerwald v. Berryhill: Expert Disclosure
Date: Friday, March 16, 2018 4:34:35 PM
Attachments: image001.png

Counsel,

Pursuant to Judge Gwin's Order, please see the below expert disclosure:

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Professional Experience

Consultant on Social Security: November 2013 - present

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April 2002 - September 2013 (retired)

Claims Representative: Social Security Administration-Sandusky Ohio
August 1977 - April 2002

Contact Representative: Internal Revenue Service - Cleveland Ohio
December 1976 - May 1977

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Have a nice weekend,

Bez

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