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

STEPHANIE LYNN STEIGERWALD, on behalf of herself and the class,	)	**CASE NO.: 1:17-CV-1516**
Plaintiffs,	)	**JUDGE JAMES S. GWIN**
v.	)	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, TO ENFORCE JUDGMENT[1]**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	
Defendants.	)	

[1] Defendants have purported to include within their Memorandum in Opposition to Plaintiffs' Motion a Rule 60(b)(6) Motion. Defendants' purported Rule 60(b)(6) Motion does not comply with the Local Rules. *See* Local Civil Rule 7.1(c) ("The moving party must serve and file ***with its motion*** a memorandum of the points and authorities on which it relies in support of the motion.") (Emphasis added). Here, Defendants have failed to file any motion at all. Instead, they have tacked on to the end of their Opposition brief arguments in favor of a (second) request for two years to complete the Subtraction Recalculations. *See* Doc. 118 at 14-15. To the extent (if any) that the Court considers Defendants' phantom Rule 60(b)(6) Motion, this Reply also serves as Plaintiffs' Opposition thereto.

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The Court's Order states: "Defendant shall perform the subtraction recalculation within eight months from January 25, 2019." Doc. 101 at 4. Although this Order is clear and straightforward, it is apparent that it needs to be clarified for *Defendants*. That is because the Social Security Administration ("SSA" or the "Agency") has taken this straightforward Order and has needlessly complicated it, thereby making it impossible to timely complete the Subtraction Recalculations for the Class – even within the two years the Agency has requested.

In its May 9, 2019 Status Report, the Agency asserted that it had performed **618** Subtraction Recalculations as of that date. Doc. 114 at 2.[2] This means that since the time of the Court's January 25, 2019 Order, the Agency has performed approximately **205** Subtraction Recalculations per month. Assuming this performance rate continues, the Agency will have completed approximately **1,640** Subtraction Recalculations by September 25, 2019, the end of the eight month period provided by the Court to complete all 129,695 Subtraction Recalculations. Even should the Agency be provided the entire two years it keeps repeating it needs, at its current rate the Agency will have completed **4,920** Subtraction Recalculations for Class Members by January 25, 2021. Even were the Agency to *double* its estimated current rate of performance, it would complete *less than 10,000* Subtraction Recalculations in two years.

Because it is evident that the Agency will not complete the Subtraction Recalculations in eight months, or even in two years, the Court must intervene, to order the Agency to truncate and streamline the elaborate process it has needlessly created. As explained below, at the very least

[2] In the two bi-weekly Status Reports Defendants have filed thus far, they highlight that over 100,000 "cases are being processed in Part 1." *See* Docs. 112 and 114 at 1. In plain English, this means nothing more than that Defendants are aware of the identities of the Class Members, and have inputted those identities into their tracking system. *See* Doc. 113-4 at 13 (Steigerwald Desk Guide, explaining that "[a] Steigerwald case entering stage one is beginning its court-ordered journey back through the windfall offset process."). *See also id.* at 14 ("In Phase I, the Steigerwald class action cases will be tracked and assigned . . . .").

the Court should order the Agency to end its time-consuming, unprecedented and repetitive "quality review" of 100% of Class Member's Subtraction Recalculations.

I. The Court Should Order The Agency To End Its Current 100% "Quality Review" Of The Subtraction Recalculation For Each And Every Class Member

The Agency reports that "the Office of Quality Review has dedicated more than one-third of its full-time Assistance and Insurance Quality Branch staff to quality review of the recalculation." Doc. 118 at 6. Indeed, the Agency is applying a cumbersome "quality review process" to each and every Subtraction Recalculation for 100% of Class Members. Doc. 118 at 9. To be clear, the Agency's addition of a 100% "quality review" is **not** the Agency's "standard business practice," Doc. 118 at 5, for performing Subtraction Recalculations. As Janet Walker's latest declaration explains: "The three-part process explained in my February 2019 declaration mirrors the agency's existing business process ***with the exception of the quality review process at the end of Parts 1 and 2***, as well as the steps needed to withhold and pay class counsel's fee." Doc. 118-1 at 4 ¶ 10 (emphasis added).

That "exception of the quality review process" referenced in Ms. Walker's declaration has the likely practical effect of *doubling* the time it takes to perform every single Subtraction Recalculation. This is because the Office of Quality Review ("OQR")'s process ***completely redoes*** the work already performed by the Agency's initial Subtraction Recalculation process, while also "do[ing] a deeper dive, because that's the purpose of a quality branch." *See* Doc. 113-1 at 6 (quoting 113-2 at 195:2-7).[3]

On this point, it is important to clarify a crucial distinction between the Agency's prior failure to perform the Subtraction Recalculations *at all* for Class Members (resulting in no Class

[3] By contrast, withholding the 20% for Class Counsel's maximum potential 406(b) fee is no more difficult than taking a calculator, multiplying each Retroactive Underpayment by 0.2, and withholding that amount pending the Court's ruling on fees.

Member's receiving any money at all), and the Agency's stated "34.5% error rate in the initial processing of the recalculations." Doc. 118 at 8. As to the former, without this lawsuit no Class Members would ever have received any Retroactive Underpayments at all. As to the latter, a 34.5% error rate **does not mean** that 34.5% of Class Members were incorrectly not receiving Retroactive Underpayments. It means instead that the Retroactive Underpayments allotted to those 34.5% of Class Members were not necessarily accurate *down to the last cent*. For example, if a Class Member was found to have been owed a Retroactive Underpayment of $200.00, and the extensive and time-consuming quality review undertaken by the OQR found that the Class Member was in fact owed a Retroactive Underpayment of $199.99, the Agency apparently considers that an unforgiving "error."

The following colloquy between the Court and the Agency's counsel at the April 4 Hearing illustrates this point:

> THE COURT: How much did they amount to?
> MS. BAILEY: *Well, they were errors that changed the recalculation*.
> THE COURT: Okay. But how much do they change the recalculation?
> MS. BAILEY: That I don't know, but I think *from the agency's position, it's not acceptable to have the recalculation be wrong . . . .*

But as the Court replied:

> THE COURT: Well, it's probably not acceptable for each of these claimants to have to wait ten years for you to get it perfect down to the cent.

Doc. 109 at 46:11-25 (emphasis added).

The Agency had earlier stated that it was implementing the OQR 100% review of Subtraction Recalculations for all Class Members for a "ten week" trial period. Doc. 102 at 3 ("personnel within the Office of Quality Review (OQR) will review 100 percent of the cases at key steps in the process for at least ten weeks, to ensure that these remedial measures have been effective."). Although it has been more than ten weeks since the Agency let the Court know

what it was doing, the Agency has now acknowledged that the 100% OQR review will likely ***never*** cease, stating: "When the error rate improves ***to an acceptable level, which is a sustained 95% accuracy***, the 100% quality review process can be eliminated." Doc. 118 at 9 (emphasis added). Respectfully, for the Agency, "a sustained 95% accuracy" is an impossible goal. *See*, *e.g.*, Doc. 113-1 at 7-12.

Plaintiffs do not, as the Agency disdainfully attributes, have a "*two out of three ain't bad* philosophy" when it comes to the Retroactive Underpayments. *See* Doc. 118 at 8. Instead, Plaintiffs believe promptness should not be completely and entirely sacrificed here for complete and total accuracy.[4] In short, Plaintiffs believe Class Members should get paid whatever they are due – hopefully, while they are still alive. The Agency should not be allowed to create a further bureaucratic hurdle through the OQR review process, which obviously results in an extreme delay in the Agency making Retroactive Underpayments.

II. The Agency's Scramble To Blame Others For Its Delays Is Unacceptable

The Agency's Opposition emphasizes one thing above all else: The Agency's continuing refusal to take responsibility for its past errors, and its continuing delay, in performing the Subtraction Recalculations for the Class. In seeking to shift the blame from itself to someone – anyone! – other than itself, the Agency focuses its ire on Class Counsel and on the Court. The truth, of course, is that the blame for the Agency's continued delay lies squarely at its own feet.

A. Ms. Walker's Latest Declaration Attempting To Shift Blame Away From The Agency Cannot Be Trusted, As It Contradicts Her Deposition Testimony

At her 30(b)(6) deposition, Ms. Walker was asked why the Agency did not start to perform the Subtraction Recalculation "process" for Class Members in February 2018, when it

[4] There is nothing "ironic" about Plaintiffs' strenuous advocacy that the Agency not be permitted to hold up Subtraction Recalculations in the quest of recompiling each Class Members' previous Title II and Title XVI records and reconciling every single past payment down to the last cent. *See* Doc. 118 at 1.

learned that 37,000 Subtraction Recalculations had wrongly not been performed for Class Members. Doc. 113-2 at 184:8-9 ("Why didn't the Agency take these actions back in February of 2018?").[5] On behalf of the Agency, Ms. Walker explained that the delay was "because it involved so much coordination to try to get us where we needed to be with identifying the right people to do the work, you know, having our -- putting our processes in place, putting the Desk Guide together with what was needed, building the [tracking] tool." Doc. 113-2 at 185:4-9.

In her 30(b)(6) deposition Ms. Walker did not attribute the Agency's delay in beginning performance of Subtraction Recalculations to any request by Class Counsel for fees. She certainly never blamed the Court for the delay.

Now, however, the Agency or its counsel have invented a *post-hoc* rationale for the Agency's slow start, blaming both Class Counsel (for its fee petition) and the Court (for its "late" ruling). The Agency now states: "The parties disagreed over the legal ability of class counsel to recover fees under § 406(b) . . . It was not until January 25, 2019, that the Court determined that class counsel could recover fees under § 406(b). ECF No. 101." Doc. 118 at 10. In support, Ms. Walker *now* declares in her latest declaration (the fifth she has filed with this Court): "the agency's [earlier] position was that it did not have the authority to withhold a percentage of underpayments for potential attorneys' fees under 42 U.S.C. § 406(b)." Doc. 118-1 at 2 ¶ 5.

In fact, contrary to the Agency's newfound position, withholding funds pending a Court's ruling on attorney's fees ***is exactly what the POMS requires***. *See* POMS SI 02006.202(A)(1)(c)

[5] Throughout her 30(b)(6) deposition, Ms. Walker made the representation that the Agency was already aware that the Subtraction Recalculation had not been performed as required for approximately 37,000 individuals in February 2018. *See, e.g.*, Doc. 113-2 at 57:5; *id.* at 59:12-13; *id.* at 60:17-18. In a footnote in its Opposition, the Agency now asserts that Ms. Walker's 30(b)(6) testimony was wrong, and that the Agency did not learn about the 37,000 until March 2018. Doc. 118 at 9 n.4. Regardless, the fact remains that the Agency knew that its failure to perform the Subtraction Recalculations affected at least 9,400 individuals in February 2018, knew about 37,000 individuals one month later, and did nothing about it for nearly a full year.

("When a [fees] petition is received processing begins after payment of the retroactive title II and title XVI benefits, ***with 25% of the past-due title II and title XVI benefits withheld to pay any authorized attorney/nonattorney fee***.") (Emphasis added). Moreover, at her 30(b)(6) deposition, Ms. Walker was *specifically asked* whether the Agency could have withheld 25% of 406(b) fees before the Court issued its Order, stating 406(b) fees are appropriate here. In admitting at her deposition that the Agency could have done so, Ms. Walker's response was clear:

> Q: So you could have withheld 25 percent [of fees pursuant to 42 U.S.C. § 406(b)] last year [*i.e.*, in 2018, before the Court issued its Opinion and Order], correct?
> A: That's where we started before we ended up – we were withholding 25 percent.
> Q: Okay. *So you could have done that and that's what you're doing, correct*?
> A: *Correct*.

Doc. 113-2 at 198:17-199:1 (emphasis added).

Ms. Walker's latest declaration, stating that the Agency believed it had no legal basis for withholding attorney's fees, directly contradicts both her 30(b)(6) testimony and the POMS. Accordingly, it is a "sham affidavit" and should be discarded as such:

> [A] party should not be able to create a disputed issue of material fact where earlier testimony on that issue by the same party indicates that no such dispute exists . . . when a party has access to the evidence before the earlier testimony, the access usually results in finding that the later affidavit was submitted to create a sham issue of fact.

Forgues v. Select Portfolio Servicing, Inc., 2016 WL 1588665, at *1 (N.D. Ohio 2016), *aff'd*, 690 F. App'x 896 (6th Cir. 2017) (Gwin, J.) (quotation omitted).

B. The Term "Manual," As Used By The Agency, Apparently Means Data Entry

As it has before, the Agency's Opposition emphasizes that much of the Subtraction Recalculation process must be performed "manually." The Agency now asserts that such "manual" performance at least partially accounts for the Agency's extreme slowness when it comes to performing the Subtraction Recalculations. *See, e.g.*, Doc. 118 at 6 ("Because of class

counsel's fee request, SSA technicians must manually withhold 20% of underpayments for payment of the fee . . . ."); Doc. 118-1 at 4 ¶ 10 (Ms. Walker's declaration asserting that "the windfall offset recalculation is one of our most complicated, ***manual*** workloads . . . .") (Emphasis added).

But Ms. Walker explained at her 30(b)(6) deposition that "manual" does not mean that human beings have to do the calculations. Instead, "manual," as used by the Agency, means only that an Agency employee has to type a number into a computer:

> Q: Can you define what you mean by "manual process" . . . .
> A: As opposed to automated. It's – you have to manually key in all of the calculation amounts. We are transcribing information from one place, putting it in another place . . . It's manual keying that information into the system . . . the computer will do the work to issue the underpayment . . . .

Doc. 113-2 at 126:4-21. This is not rocket science. What the Agency has described as "among the most complex workloads performed at the Agency" seems, in fact, very akin to data entry. The Agency should not get a pass for performing this "manual" data entry work slowly.

C. The Agency Should Only Search For Potential Underlying Errors Upon Request

The Agency knowingly distorts the record when it states:

> Plaintiffs fault SSA for implementing a quality-review procedure after discovering a 34.5% error rate [in performing the Subtraction Recalculations] in the initial processing of the recalculations . . . According to class counsel, class members can individually bear the burden and expense of appealing to SSA to correct ***these errors***, but only *after* class counsel have collected their fees from class members. [Citing Doc. 113-1 at 13 n.11.]

Doc. 118 at 8 (emphasis added). In this paragraph, the Agency misrepresents Plaintiffs' Motion in an attempt to portray Class Counsel as bad actors.

The 34.5% error rate that the Agency bemoans above relates to the Agency's *current* performance of the Subtraction Recalculation, and is more fully explained in Section I, *supra*. By contrast, "these errors" referenced in footnote 11 of Plaintiffs' Motion *have nothing to do*

with the current performance of the Subtraction Recalculations. Instead, Plaintiffs requested that the Court clarify that the Agency not go back into each Class Members' *underlying* records to look for errors, but should instead assume those underlying records are correct – unless a Class Member requests that they be reviewed:

> Class Counsel is mindful of those Class Members who may want the Agency to take a deeper dive into their files. Accordingly, we have suggested in a prior brief and at the hearing the following solution: "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." Doc. 98 at 10 n.3.

Doc. 113-1 at 13 n.11 (emphasis added).

In re-examining the entirety of all 129,695 Class Members' underlying records, the Agency is both wasting its own time and further delaying Retroactive Underpayments to deserving Class Members. Unless a Class Member specifically requests that his or her underlying record be re-examined, Plaintiffs do not believe the Court's Order requires *or permits* the Agency to comb through those files in search of potential errors – which the Agency admitted in the recent past are outside the scope of this litigation. *See, e.g.*, Doc. 96-1 at 11 n.4 (Defendants assert that "[t]he windfall offset recalculation ***was merely the implementation of prior final decisions that were correct***.") (Emphasis added). The Agency's attempt to besmirch Plaintiffs' good-faith effort to streamline the Subtraction Recalculation is troubling, to say the least.

D. The Agency Does Not Have Clean Hands

Finally, the Agency asserts its right "to defend itself in this litigation," Doc. 118 at 10, arguing that "Plaintiffs' argument appears to be that any disagreement with them constitutes

unreasonable delay." *Id.* at 11. Not so.

Like any defendant, the Agency has the right to defend itself. However, the Agency is *not* any defendant. The Agency is an arm of the government of the United States of America. As such, it should be held to a higher standard, especially in a case like this. If the Agency knew (as it did) that it had a problem – a major problem – in failing to perform the Subtraction Recalculation for tens of thousands of people, the Agency should have worked at an early stage to attempt to remedy its problem. The Agency did no such thing. In fact, at every step of this litigation, the Agency was *actively working* against the interests of the Plaintiff Class.

The Agency attempted to moot out the case from the outset, in December 2017, by paying off the lead Plaintiff, and attempted to scuttle the case on procedural grounds. Doc. 18. The Agency was aware that the Class consisted of at least 37,000 individuals – who the Agency admitted were wronged by the Agency's failure to perform the Subtraction Recalculation for them – since at least March of 2018. Yet, in June of 2018, the Agency opposed certification for the entirety of the Class. Doc. 57. The Agency knew it was obligated to perform the Subtraction Recalculation for the Class, as the POMS require, and it knew that it had not yet done so, in at least 37,000 cases, yet it opposed summary judgment as to its liability. Doc. 52. Once the Class was certified, the Agency attempted to provide a Class Notice to the Class which wrongly claimed that the Agency would perform the Subtraction Recalculation for all individuals, whether or not they opted out of the Class, in an obvious attempt to persuade individuals to opt out. Docs. 76-2; 77.

The Agency has made it perfectly clear throughout this litigation that it does not have the best interests of the Class at heart. There is no reason to believe its interests have changed, even though it now categorizes itself as a "trustee" of the Class. *See* Doc. 93 at 1.

The one constant in this litigation is the Agency's trying to turn everything in this case into a dispute about attorneys' fees, to paint Class Counsel as greedy plaintiffs' lawyers and to willfully ignore Class Counsel's strenuous advocacy for the Plaintiff Class. The Court should see through this. Despite the Agency's protests to the contrary, the underlying Motion is not about Class Counsel's fees. It *is* about the Agency's delay in paying the Plaintiff Class what they are due. That delay is unconscionable. The fault of that delay lies solely at the Agency's feet.

III. The Agency's Inaccuracies Continue

The Agency claims that it "has not made misrepresentations to this Court." Doc. 118 at 10 (casing fixed). It claims that Plaintiffs' proofs to the contrary are "unfounded." *Id.* Unfortunately, that is not true. As shown below, even when the record contradicts its latest assertions, the Agency stands by them. Justice may be blind. This Court is not. The Court should not condone the Agency's continued falsehoods.

First, in its Opposition, the Agency asserts: "Defendant did not state that no individual in Category 2 would ever receive an underpayment." Doc. 118 at 11. In fact, the Agency repeatedly stated, unequivocally, that "no underpayment would [ever] be due" to individuals in Category 2. *See* Doc. 82-1 at 1 n.1. In fact, in the interrogatory responses the Agency attached to its Opposition, the Agency affirmed this belief (which is couched as a statement of fact), stating: "SSA knows that the 9,165 individuals identified in Category 2 of its Supplemental Responses To Interrogatories 1-3 In Plaintiff's First Set Of Interrogatories **would not be due an underpayment even upon performing the windfall offset recalculation** . . . ." Doc. 118-4 at 14 (emphasis added).

The Agency's untruth – in the face of its previous, repeated assertions – is problematic. Not, as the Agency strangely asserts, because Plaintiffs are somehow upset that more Class

Members may be owed money. *See* Doc. 118 at 11 (alleging that Plaintiffs "complain that SSA is paying underpayments to more individuals than originally expected."). Instead, the Agency's prevarication is problematic for the more obvious reason that it shows the Agency cannot be trusted to be forthcoming. It is one thing for the Agency to have been wrong. It is quite another for it to deny about having been wrong, and to assert it was always correct, in the face of evidence to the contrary.

Second, again in the face of contrary record evidence the Agency asserts that "Defendant's April 25, 2019 Status Report correctly stated that, as of that date, no overpayments have been assessed." Doc. 118 at 11. This is not true. As shown in the document attached to Plaintiff's Motion, on April 22, 2019 (three days before the Agency issued its Status Report saying no overpayments had been assessed) the Agency assessed an overpayment to a Class Member. *See* Doc. 113-8 at 2 ("The total amount of the overpayment is $1,036.24."). Again, the issue here is less the Agency's failure to get this right and more the Agency's complete and total lack of accountability. Even in the face of the Agency's inaccuracies, the Agency refuses to acknowledge that it made a mistake.

Third, the Agency takes issue with the fact that its interrogatory responses from April 2018 – which were "verif[ied] under penalty of perjury" by Associate Commissioner for SSA's OQR Vera Bostick Borden, Doc. 113-9 at 19 – have been proven to be unreliable. Somehow, the Agency tries to make this Class Counsel's fault. It is not. In fact, the Agency stated at the time that it was "provid[ing] recalculations ***of any underpayments owed***" for the 100 Class Member's sample. *Id.* at 6 (emphasis added). There was no contemporaneous qualification of this statement.

Now, the Agency has found another individual, only employed with SSA's OQR since

January 2019 (Doc. 118-2 at 1 ¶ 1), to claim that the Agency's earlier interrogatory responses "did not involve an in-depth review of the Title II or Title XVI records for accuracy or events that may alter the windfall offset calculation." *Id.* at 2 ¶ 3. But the Agency has never withdrawn its earlier interrogatory responses, which claimed to be comprehensive, representing "any underpayments owed" to those 100 Class Members. Either the Agency is wrong now, or it was wrong then. If it is wrong now, it does not need to be pursuing "an in-depth review of the Title II or Title XVI records" of each and every Class Members in order to perform the Subtraction Recalculations for them. If it was wrong then, the Agency's counsel wrongfully relied on those interrogatory responses at the April 4 Hearing, and wrongfully represented to the Court that they were accurate as to those 100 Class Members, albeit not "statistically significant" – in that they may not represent average payments made to each and every Class Members. That is unacceptable.

The Agency has not been straightforward with the Court. Given that the Agency has not shown how it could complete all 129,695 Subtraction Recalculations using its current methods in two years, there is no reason the Agency should be trusted to do so in that time. To the contrary, the history of this case has shown that the Agency will continue to slow walk unless the Court compels it to move faster.

IV. A Motion for Clarification Or Enforcement Is An Appropriate Vehicle Here

The Agency objects to the procedural predicates of Plaintiffs' Motion. Namely, the Agency alleges that neither a Motion for Clarification nor a Motion to Enforce Judgment are appropriate here. Doc. 118 at 3-5. The Agency is wrong.

In support of its position that a Motion for Clarification is inappropriate, the Agency mis-cites a case out of the Southern District of Georgia. *See* Doc. 118-1 at 3-4 (citing *Howard v. Suntrust Inv. Servs., Inc.*, 2015 WL 898211, at *1 (S.D. Ga. Feb. 26, 2015) for the proposition

that "the plaintiff was '[w]asting th[e] Court's time' by asking it to clarify what was already clear.")). In fact, in its two-paragraph opinion, the *Howard* court stated that the plaintiff was "[w]asting this Court's time [by] hand-deliver[ing] to the undersigned's chambers a letter-motion for clarification." 2015 WL 898211, at *1. The *Howard* court had no issue with the *substance* of the plaintiff's motion for clarification – indeed, *the court granted the motion*. The court's ire was directed at the party's improper *method* of filing the motion.[6]

Defendants' claim: "Plaintiffs do not profess to lack clarity about what deadline the Court ordered." Doc. 118 at 3. True enough. However, Plaintiffs *do* believe that the Agency is intentionally complicating and thereby misinterpreting the Court's Order. *See* Section I, *supra*.

At her 30(b)(6) deposition, Janet Walker stated that, according to the Agency's "interpretation" of the Court's Order, the Order *requires* the Agency to perform the slogging process described in the Steigerwald Desk Guide and the OQR Manual. *See* Doc. 113-2 at 158:22-159:12. This is simply not true. The Court's Order certainly does not require the Agency to have its Office of Quality Review review each and every Subtraction Recalculation after it has already been performed. At the very least, the 100% "quality review" process currently underway should be discarded as duplicative, wasteful and not in the best interests of justice or the Class. The Agency asserts that "[t]he Court's judgment was clear." Doc. 118 at 2. Yet the Court's Order nowhere approved or allowed the Agency to buttress the Subtraction Recalculation process with a duplicative, cumbersome, time-consuming OQR review. The Motion for Clarification underlying this brief provides the Court a vehicle to give clarification on this matter, and to prevent the Agency from continuing to misinterpret the Court's Order to the

[6] It begs credulity to believe that the Agency's counsel was not aware that they were taking the language of the two-paragraph case they cited out of context. Unfortunately, this is not the first time the Agency has mis-cited cases. *See, e.g.*, Doc. 97 at 5 n.2.

detriment of the Plaintiff Class.

As to Plaintiffs' Motion to Enforce, the cases Plaintiffs cited in its opening Memorandum dictate that such a Motion *can be used* to force a party to comply with the Court's Order. *See Stark v. Comm'r of Soc. Sec.*, 2017 WL 4475921, at *2 (N.D. Ohio 2017) ("[U]nder Rule 70, a Court has jurisdiction to enforce judgments requiring specific acts."); *U.S. v. Work Wear Corp.*, 1977 WL 1407, at *1 (N.D. Ohio 1977) (imposing a fine pursuant to Fed. R. Civ. P. 70 of $5,000 per day for each day the defendant failed to comply with the court's order). *See* Doc. 113-1 at 3-4. In Opposition, Defendants fail to deal with or even acknowledge those on-point cases. Instead, Defendants cite no cases at all, citing only to the text of Rule 70(a) and ignoring the way the Rule has been interpreted by courts in this District. Doc. 118 at 4. Defendants' opposition to the procedural aspects of Plaintiffs' Motion fails.[7]

V. Conclusion

In their Opposition, Defendants quote the Supreme Court's opinion in *Califano v. Boles* for the proposition that "'the [Agency's] administrative goal is accuracy and promptness in the actual allocation of benefits . . . .'" Doc. 118 at 8 (quoting 443 U.S. 282, 285 (1979)). The Supreme Court in *Califano* mandated that the Agency have ***twin goals***: (a) accuracy and (b) ***promptness***. Here, the Agency has sacrificed promptness in a quixotic quest for accuracy, down to the last penny. Plaintiffs believe that – especially given the facts of this case, where Class Members have been waiting for years and years for the money owed to them – that trade-off is inappropriate. Giving the Agency two years (with a likely request for further time down the line

[7] Defendants' state: "A similar problem befalls Plaintiffs' subsequent invocation of Federal Rule of Civil Procedure 70(e)." Doc. 118 at 4. Defendants do not deign to elaborate as to what this supposed "problem" may be. In fact, as the Sixth Circuit case cited in Plaintiffs' Memorandum (which Defendants do not address) makes clear, a finding of contempt is appropriate where a party fails to abide by a court's order. *See* Doc. 113-1 at 4 (quoting *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000)).

when those two years expire) simply is not acceptable.

The Motion should be granted. The Court should clarify that the Subtraction Recalculation "process" should be streamlined by, at the very least, the Agency omitting the onerous OQR recalculation of the Subtraction Recalculation. If the Agency fails to complete the Subtraction Recalculations for each Class Member by September 25, 2019, it should be sanctioned.

Respectfully submitted,

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Dated: May 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2019, a copy of the foregoing Reply in Support of Motion for Clarification or, in the Alternative, to Enforce 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 the Plaintiff Class

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Reply in Support of Motion for Clarification or, in the Alternative, to Enforce Judgment complies with the page limitations for a Standard matter, and is 15 pages long.

/s/ *Ira T. Kasdan*

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