UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHANIE LYNN STEIGERWALD	)	CASE NO.: 1:17-CV-1516
	)	
Plaintiff,	)	JUDGE JAMES S. GWIN
	)	MAGISTRATE JUDGE DAVID RUIZ
v.	)	
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	DEFENDANT'S MOTION TO STAY THE COURT'S APRIL 1, 2019 ORDER PENDING APPEAL
Defendant.	)	

Pursuant to Federal Rule of Civil Procedure 62(d) and Federal Rule of Appellate Procedure 8(a)(1), Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, respectfully moves this Court to stay the requirement in its April 1, 2019 Order that the Social Security Administration recalculate the windfall offsets for 129,691 class members and to issue payments to those class members by September 25, 2019, pending Defendant's appeal to the United States Court of Appeals for the Sixth Circuit. (Op. & Order, ECF No. 101; Not. of Appeal, ECF No. 121). Defendant noticed an appeal on May 30, 2019, and that appeal is docketed as *Steigerwald v. Commissioner of Social Security*, No. 19-3527 (6th Cir.).

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2019, a copy of the foregoing "Motion to Stay the Court's April 1, 2019 Order Pending Appeal and Memorandum in Support" was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ *Ruchi V. Asher*
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Defendant incorporates her Rule 59(e) Motion to Alter or Amend Judgment and Rule 62 Motion for Stay (ECF No. 96), Reply in Support (ECF No. 99), and Opposition to Plaintiff's Motion to Enforce/Rule 60 Motion (ECF No. 118), herein by reference. As the government explained, SSA simply cannot complete the recalculations for the approximately 130,000 class

members in eight months without causing inaccuracies to class members' recalculations and significant degradation in SSA's services to the public. Defendant acknowledges that it previously requested that the Court provide a total of two years within which it could complete the recalculations (instead of the three months it had originally been allotted), and the Court, in turn, provided Defendant a total of eight months. Op. & Order, ECF No. 101. The relief granted by the Court, while preventing an immediate crisis in the Social Security system, did not solve the underlying problem: Requiring SSA to complete the recalculations in eight months will require diverting 990 technicians – the majority of whom would not have the training, experience, and expertise necessary to perform the work with reasonable accuracy – from their day-to-day direct public service functions, resulting in a loss or significant delay of service to an estimated over 237,000 members of the public *each month*. ECF No. 118-1, Declaration of Janet Walker, ¶ 24. This inequitable result serves no one: It harms the class members who will not receive accurate payments, and it harms the general public who rely upon SSA to perform a vast array of services that directly affect nearly 70 million beneficiaries, and more broadly, virtually every American.

For these reasons, as set forth in more detail below, Defendant respectfully requests that this Court issue a stay pending appeal of its Order imposing an eight-month timeframe to complete the recalculations and to issue payments, and to do so no later than June 24, 2019. During that stay, SSA intends to continue conducting recalculations and issuing payments, consistent with Defendant's representations in this action. Moreover, and in order to streamline the recalculation process during the appeal, Defendant also requests that the Court issue a decision as soon as possible on the amount of attorneys' fees to be awarded. Issuing a prompt decision on fees would ensure that class members receive the maximum recalculations that they are due as soon as their individual recalculations are completed.

ARGUMENT

A. A Stay Pending Appeal Is Warranted Because Imposing An Eight-Month Deadline That Harms Hundreds Of Thousands Of Social-Security Beneficiaries Was Improper.

This Court has discretion to stay execution of its judgment pending resolution of an appeal. Fed. R. Civ. P. 62; *Lentz v. City of Cleveland*, No. 1:04 CV 669, 2011 WL 4631917, at *3 (N.D. Ohio Sept. 30, 2011). When determining if a stay is warranted, courts consider the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014); *see also Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (discussing factors for stay pending appeal). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). As the party requesting the stay, Defendant bears the burden to show that the circumstances justify an exercise of the Court's discretion. *Nken v. Holder*, 556 U.S. 418, 433–34 (2008). Here, all of the factors support the issuance of a stay pending appeal. *See Ohio State Conference of N.A.A.C.P.*, 769 F.3d at 387.

First, Defendant has made a strong showing that it is likely to succeed on the merits of the appeal. *See Nken*, 556 U.S. at 433; *Ohio State Conference of N.A.A.C.P.*, 769 F.3d at 387. The order that requires completion of 130,000 recalculations on an eight-month schedule is in excess of the Court's authority under 42 U.S.C. § 405(g) and improper under these circumstances. *See*

ECF No. 96, PageID # 1224-1228; ECF No. 99, PageID # 1324-1327. The Supreme Court in *Heckler v. Day*, 467 U.S. 104 (1984) made clear that "it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines" in areas where Congress was silent. *Id.* at 119. Similarly, this Court failed to address whether an eight-month deadline was "more burdensome than necessary to redress the complaining parties," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and this Court has never made the predicate findings, *Blankenship v. Secretary of HHS*, 858 F.2d 1188, 1193 (6th Cir. 1988). This Court has never identified any authority, or any need, to impose an eight-month deadline as opposed to deferring to SSA on what timeline was feasible without imperiling SSA's ability to process other Social Security claims by members of the public or to carry out the agency's other obligations. Thus, as discussed below, alteration of the eight-month timeline is necessary to prevent manifest injustice: a devastating impact on the agency's ability to continue its other statutorily mandated functions. In other words, it would be impossible for the agency to comply with the Court's imposed eight-month time frame without sacrificing its obligations to over 237,000 members of the American public each month. Therefore, particularly when balanced against the harm to the public if a stay is not granted, Defendant has met its burden to show a likelihood of success on the merits of the appeal.[1]

Second, Defendant, and the public it serves, will suffer substantial and irreparable harm

[1] Furthermore, Defendant has explained that the claim at issue here—review of a contention that the agency has failed to perform a subsequent mandatory duty, and not review of a final decision on an original claim for benefits—is outside the scope of jurisdiction under 42 U.S.C. § 405(g) and could only be cognizable under the Court's mandamus jurisdiction if at all. *See ee Smith v. Berryhill*, No. 17-1606, Slip. Op. at 12 (May 28, 2019) (suggesting that judicial review is available under Section 405(g) for the agency's resolution of the claimant's "primary claim for benefits"); *see also Califano v. Sanders*, 430 U.S. 99, 107-08 (1977); *Buchanan v. Apfel*, 249 F.3d 485, 492 (6th Cir. 2001); *Slone v. Secretary of HHS*, 825 F.2d 1081, 1084 (6th Cir. 1987). Even under mandamus jurisdiction, however, the present relief would be improper, as in all cases, this Court must make factual findings regarding whether "lawful compliance would be

should the stay be denied. *See Michigan Coal. of Radioactive Material Users, Inc.*, 945 F.2d at 155 ("the harm alleged should be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant"). SSA has worked diligently to adjust staffing and prepare a plan to implement the complex and time-consuming recalculations. *See* ECF No. 96, ECF No. 99, ECF No. 118. As set forth in Defendant's Opposition to Plaintiffs' Motion to Enforce/Rule 60 Motion, to comply with the Court's eight-month timeline, SSA would need to re-allocate a total of 990 employees, two-thirds of whom "simply would not have the training, experience, and expertise necessary to perform this complex work with a reasonable degree of accuracy." ECF No. 118-1, Walker Decl. ¶ 23, PageID # 2323. Doing so would not only result in incorrect recalculations; it would have a dramatic, debilitating impact on the agency's ability to assist and pay benefits to the American public, resulting in the inability to timely take and process new claims, service existing beneficiaries, and assist the public with everyday requests, affecting an estimated 237,000 members of the public *each month*. *Id.*, ¶¶ 23-25, PageID # 2323-2324. The harm to the public is not speculative, and there is no corrective relief that could be provided to the agency or to those hundreds of thousands of individuals.

Third and fourth, the balance of the equities and the public interest favor a stay. Although some class members would not receive their recalculations and any payments as quickly as Plaintiff desires, the recalculations and issuance of payments would continue during the stay. That is, SSA is committed to completing recalculations for all 130,000 class members, and is simply requesting a timeframe to do so without jeopardizing other interests in the Social Security system.

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impossible," and such findings are absent here. *American Hosp. Ass'n v. Price*, 867 F.3d 160, 169 (D.C. Cir. 2017). Even though the jurisdictional basis is therefore immaterial to this stay motion, as the government has explained, whether jurisdiction is proper under § 405(g) determines whether this Court could properly award fees under the Social Security attorney's fee provision in § 406(b).

The harm to the class members thus reduces to waiting some extra amount of time for their windfall-offset recalculations. Those recalculations, however, are only a fraction of the past-due benefits that class members have already received, many class members will receive $0 in recalculation payments, and there is no evidence that the lack of a windfall-offset recalculation has substantially harmed these class members since the end of the class period in 2017.

Additionally, allowing the agency more time to complete the recalculations would ensure that they are performed by experienced technicians, thereby increasing their accuracy to ensure that class members receive the amounts that they deserve, while ensuring that the agency is able to continue to meet its public service obligations. And any harm to the class members by a further delay in receiving additional funds from the Agency is far outweighed by the public interest in ensuring that SSA is able to continue meeting its obligations to hundreds of thousands of members of the American public per month. None of this is said to diminish the importance of this case and the need to perform these recalculations as expeditiously as possible. The Agency has many critical workloads, however. At bottom, it is a zero sum game: SSA has only so many resources. But with more time, the severity of the potential impact on non-*Steigerwald* matters would be greatly diminished.

B. This Court Should, In Any Event, Expedite Its Consideration Of Class Counsel's Motion For Attorney's Fees Under Section 406(b).

Finally, this Court should expedite its consideration of class counsel's fee motion under 42 U.S.C. § 406(b). Currently, SSA is withholding from class members' recalculation payments 20% for the potential award of attorney's fees. Once attorney's fees are determined, SSA will then need to take additional steps and disburse an additional amount to the class members. In order to ensure that class members receive the maximum recalculation amount to which they are entitled as expeditiously as possible, Defendant requests that the Court issue, as soon as it can, a decision on

attorneys' fees. If the Court acts now on the fee motion, then SSA will be able to make payments of the full amount that the class members are entitled to immediately, once the recalculation is made. Class Counsel have submitted their billing records, and the parties have now fully briefed the issue, and Class Counsel are entitled to a small sum in fees based on their own records. The government has stated that fees are only proper under the Equal Access to Justice Act, and if the Court were to award fees only under the EAJA as opposed to under § 406(b), SSA could pay class members 100% of any payments due as soon as the recalculations are conducted, without withholding sums for their attorneys. That is, if this Court were inclined to proceed under EAJA, class members would not lose additional benefits payments to Class Counsel at all, and SSA has informed the Court that such EAJA fees are the proper recourse in this case.

Furthermore, even if the Court awards fees from class members' past-due benefits (as it has previously indicated it would do), knowing the precise amount of those fees would enable SSA to provide class members with complete and accurate payments as quickly as possible while eliminating the administrative inefficiencies currently caused by the need to withhold potentially excess fees, only to later calculate the precise amount of fees from each class member after the Court rules and refund the balance to class members. As articulated in its Opposition to Plaintiffs' Motion for Summary Judgment, even though Defendant continues to object to the propriety of fees under § 406(b), without finality on the amount of fees awarded, SSA cannot fully effectuate accurate payment to class members owed a recalculation.[2]

CONCLUSION

Thus, for the reasons articulated above, Defendant respectfully requests that this Court grant its Motion to Stay the Court's April 1, 2019 Order. Defendant requests such a decision no

[2] Even if this Court's order on fees does not represent a final ruling on this issue, an expeditious decision would aid class members by speeding the issue's ultimate resolution.

later than June 24, 2019, and absent relief by this Court, the government intends to seek relief from the United States Court of Appeals for the Sixth Circuit. Defendant also requests that the Court issue a decision on the amount of attorneys' fees to be awarded as expeditiously as possible, which this Court may properly award under EAJA.

Respectfully submitted,

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