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

STEPHANIE LYNN STEIGERWALD,	)	**CASE NO.: 1:17-CV-1516**
	)	
Plaintiff,	)	**JUDGE JAMES S. GWIN**
	)	**MAGISTRATE JUDGE DAVID RUIZ**
v.	)	
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
	)	
Defendants.	)	
	)	

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I. INTRODUCTION

In their Opposition to Summary Judgment ("Opp."), Defendants the Social Security Administration ("SSA") and Nancy A. Berryhill (together the "Agency") do not (indeed, cannot) deny that SSA has not performed the Subtraction Recalculation, as required, for at least 28,510 people. The Agency has, thereby, again conceded liability as to its failure to perform the Subtraction Recalculation, as alleged in Plaintiff Stephanie Lynn Steigerwald ("Plaintiff" or "Ms. Steigerwald")'s Class Action Complaint. Doc. 1.[1]

Now, however, instead of swiftly moving to remedy the problem Plaintiff has uncovered in class certification discovery by accepting liability and working toward an equitable resolution in conjunction with this litigation, the Agency continues its attempts to throw up procedural roadblocks to prevent the thousands of deserving claimants from receiving a final judgment in their favor, and collecting the money they are owed. This the Court should not allow.

The Agency's liability has been proven in discovery. Despite the fact that the Agency has *admitted* without reservation that it failed to perform the Subtraction Recalculation as required for approximately 39% of beneficiaries for whom the Subtraction Recalculation was due to be performed for over five years, between September 1, 2012 and October 31, 2017, the Agency asserts with no compunction that Plaintiff has not met its burden to show the Agency is liable to do just that. The Agency's "argument"?: "Plaintiff has not established *anything more than* that some 28,510 people may be due additional past-due benefits" because the Agency has failed to perform the Subtraction Recalculation – as it was required to do – for those 28,510 people. Opp.

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[1] The term "Subtraction Recalculation," which was coined for ease of reference by Plaintiff's counsel, is defined in Paragraph 8 of Plaintiff's Complaint. As in Plaintiff's Memorandum in Support of Summary Judgment Motion ("Mem."), Plaintiff here again adopts the Agency's understanding of the term, found at Mem. 9-10. The Agency agrees with the usage of its own understanding for purposes of this briefing. *See* Opp. at 2, n.1.

at 7 (emphasis added). Respectfully, and contrary to the Agency's assertion, making a showing by way of admission that the SSA has failed to abide by the law in at least 28,510 cases over a period of some five years is sufficient to establish liability.

A similar strain of credulity is apparent in the Agency's opposition to the application of 42 U.S.C. § 406(b) to this Social Security Class Action Complaint. The Agency readily concedes that Section 406(b) can and does apply to class actions. Opp. at 16 ("SSA does not now contest that '[n]othing in the language of this provision remotely suggests that Congress intended to deprive courts of the ability to set reasonable attorney fees in class action lawsuits.'" (quoting *Greenberg v. Colvin*, 63 F. Supp. 3d 37, 48 (D.D.C. 2014)). Having abandoned the argument it raised in *Greenberg* that Section 406(b) can never apply to Social Security Act class actions, the Agency instead asserts that the statute only applies to attorneys or representatives of "claimants who became entitled to past-due benefits *by reason of a favorable judgment*," Opp. at 17 (emphasis in original), but that Plaintiff, a proposed class and counsel here somehow do not and will never be able to fit under this provision. As explained below, the Agency's statutory construction argument is facially meritless, and contradicts the Agency's current position as to its liability to a proposed class. Pursuant to its plain terms, 42 U.S.C. § 406(b) applies should the Court award Plaintiff and a proposed class a favorable judgment ordering the Agency to pay class member "claimants" their "past-due benefits."[2]

[2] As was clearly stated in the Motion, Plaintiff's counsel is not requesting an award of attorneys' fees at this time. Motion, p. 8 ("Of course, counsel is not at this time requesting a decision as to the amount of fees or the applicable percentage that may be awarded. If a class is certified, the Court will determine these matters following the filing of a petition for fees."). The Agency's contrary assumption, that Plaintiff's counsel is seeking an "award of fees at this juncture," Opp. at 10, is mistaken.

II. ARGUMENT

A. The Admitted and Uncontested Facts Prove the Agency's Liability

1. Summary Judgment is Available Pre-Certification to Settle the Issue of the Agency's Liability

The Court's Case Management Plan ordered that Dispositive Motions be filed by April 16, 2018, and that Class Certification Motion be filed approximately one month later by May 21, 2018. Doc. 28, p. 1. This makes sense, as it has allowed the parties and the Court to understand and potentially streamline the issues in the case in advance of the filing of a Motion for Class Certification.

Nonetheless, the Agency objects: "A decision on Plaintiff's Summary Judgment Motion prior to class certification would bind only Plaintiff and thus have no effect . . . ." Opp. 5. That is not so. Contrary to the Agency's assertion, there is nothing preventing *the Agency* from being bound by a finding that it is liable to perform the Subtraction Recalculation in accordance with the law where it has failed to do so. *See Bowers v. Windstream Kentucky E., LLC*, 2012 WL 216616, at *1 (W.D. Ky. 2012) ("The Sixth Circuit has consistently held that a district court is not required to rule on a motion for class certification before ruling on the merits of [a] case.") (quotation omitted) (collecting cases).

A finding of summary judgment on the *issue* of liability that Plaintiff seeks here is appropriate even though it does not end the case. *See Brauer v. Pannozzo*, 232 F. Supp. 2d 814, 818 (N.D. Ohio 2002) ("Rule 56 clearly empowers a court to enter summary judgment which decides only the *issue* of liability and allows for a trial on the matter of damages.") (emphasis added). Plaintiff is not at this time asking the Court to order particular relief, *e.g.*, that the Agency be immediately required to perform the Subtraction Recalculation, and pay any past-due benefits

owed to a proposed class members. Plaintiff does not ask for such relief at this time, because a class has not yet been certified.

What Plaintiff *is* requesting is a finding on the issue of the Agency's *admitted liability*. That issue has been conclusively proven. The Agency has provided undisputed evidence that it has failed to follow the law and its own regulations. *See* Doc. 50-2. Notably, nowhere in its Opposition does the Agency even attempt to refute this fact. The Agency should not be able to escape summary judgment based on its *own admission* because a class has not yet been certified.

Although the Agency has not raised in Opposition and thus has waived potential application of the "one-way intervention rule," Plaintiff is mindful of this issue.[3] *If* the Court believes an award of summary judgment on the issue of liability based on the Agency's own admissions will (or even may) invoke the "one-way intervention rule,"[4] Plaintiff respectfully requests that the Court hold in abeyance a decision on this aspect of the Motion pending a ruling on class certification, or, (at worst) deny the Motion without prejudice to its re-filing if a class is certified and Rule 23(b)(3) opt out notice is required. *See, e.g., Charlessaint v. Persion Acceptance*

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[3] Under certain circumstances, "[t]he rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action." *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 432 (6th Cir. 2012). However, when a defendant fails to raise the issue, it is waived. *Taha v. County of Bucks,* 862 F.3d 292, 300 (3d Cir. 2017) (waiver found where "defendants had multiple opportunities to raise the one-way intervention issue in the District Court but failed to do so"). *See also Block v. Meharry Med. Coll.*, --- Fed. App'x ----, 2018 WL 501392, at *5 (6th Cir. 2018) ("Block, however, did not raise these arguments in his response to Meharry's motion for summary judgment in the district court, and they are therefore waived.").

[4] Logically, the rule should not apply to prevent a class action in a case such as this one where liability is *admitted,* any more so than where a defendant attempts (as occurred here) to avoid class action liability by impermissibly trying to moot a claim. *Cf.* Doc. 32, p. 14 ("[R]efusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses.") (quotation omitted).

Corp., 110 F. Supp. 3d 303, 310 (D. Mass. 2015); *In re Cablevision Consumer Litig.*, 2014 WL 1330546 at *15-16 (E.D.N.Y 2014); *Weir v. Jolly,* 2011 WL 6043024, at *2 (D. Or. 2011).[5]

This is not to say Plaintiff believes that summary judgment on the issue of the Agency's liability is inappropriate or untimely. So long as any order of this Court may be revisited, the one-way intervention rule should not apply. *Cf. Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) (approval of pre-certification preliminary injunction in favor of plaintiff does not invoke the one-way intervention rule). Moreover, the one-way intervention rule does not apply if certification here is appropriate under Fed. R. Civ. P. 23(b)(2). *Gooch*, 672 F.3d at 433 ("[W]e find no support for applying the prohibition on one-way intervention to Rule 23(b)(2) class certifications, in which class members may not opt out and therefore make no decision about whether to intervene. . . . The bar on one-way intervention does not prohibit preliminary injunctions that precede class certification, nor does it apply to mandatory classes."). Here, Plaintiff will be seeking certification under 23(b)(2) *and/or* (b)(3) – which precisely is the dual certification that *Gooch* examined and yet did not apply the one-way intervention rule. *Id.* (the Supreme Court decision in "*Wal–Mart* does not forbid Rule 23(b)(2) certification for declaratory relief simply because parties may use that relief as a predicate for monetary damages, particularly when Gooch sought monetary certification under Rule 23(b)(3) – and the district court has yet to rule on that issue."). Nevertheless, if the Court disagrees with Plaintiff's analysis, Plaintiff requests that the Court not prejudice Plaintiff or a putative class by applying the one-way

[5] It is to be noted that the Agency has asked that this part of the Motion be denied, albeit without stating whether it should be with or without prejudice. By contrast, with respect to the Section 406(b) fees issue, the Agency seeks denial "with prejudice." Opp. at 4. The inference is that their request for denial with respect to the issue of liability is "without prejudice."

intervention rule under any circumstance but rather wait until class certification is resolved before ruling on this prong of the Motion.

2. Plaintiff is Entitled to Summary Judgment as to the Agency's Liability

As already noted, the Agency admitted in discovery that it has wrongfully failed to perform the Subtraction Recalculation for at least 28,510 people over a period of more than five (5) years. In its Opposition, the Agency has again conceded this fact. Opp. at 7. The Agency contends, though, that this admitted concession is not enough. Instead, the Agency believes that Plaintiff "must demonstrate" not only that the Agency failed to perform as required under the law, but also "that a systemic pattern and practice exists." *Id.*

The Agency is wrong. Even assuming *arguendo* and against all common sense that the Agency's failure to follow the law in 39% of cases over a five year period, *see* Mem. at 5, does not manifest a systemic pattern and practice (which it does), there is no need to show a "pattern and practice" where, as here, the Agency has provided – and has failed to contest on summary judgment – hard evidence proving that it has not abided by the relevant statute and regulations.

In support of its "pattern and practice" argument, the Agency cites (Opp. at 7, 10) to paragraph 94 of Plaintiff's Complaint, which is found not in the Complaint's Cause of Action or in its Prayer for Relief, but in the section of the Complaint entitled "WAIVER OF THE 60-DAY REQUIREMENT FOR CLASS." *See* Doc. 1, p. 19.[6] Plaintiff alleged a "pattern and practice" violation for purposes of its equitable tolling argument. The "pattern and practice" of the Agency's

[6] The Agency has never contested Plaintiff's request in the Complaint that the Court waive 42 U.S.C. § 405(g)'s 60-day statute of limitations requirement, despite having ample opportunity to do so in their Motion to Dismiss and their Opposition. They have now waived their opportunity to do so. *Block, supra.*

admitted violations of its own laws is not a requisite element of proof of the Agency's liability on the merits for failing to follow the law in at least 28,510 instances.

The Agency is liable for violating 42 U.S.C. § 1320a–6, 20 C.F.R. § 416.1123(b)(3), and POMS SI § 02006.200 in those cases even if the violation would not be considered part of a consistent pattern or practice. *See Wilson v. Comm'r of Soc. Sec*., 378 F.3d 541, 545 (6th Cir. 2004) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations."); *Medina v. Comm'r of Soc. Sec. Admin.*, 2014 WL 4748496, at *7 (N.D. Ohio 2014) ("[T]he Sixth Circuit had held that an agency is bound to follow its own regulations . . . .") (citations omitted); *U.S. v. Anderson*, 2014 WL 2742810, at *2 (D. Nev. 2014) ("If [a] statute contains an intelligible principle, the court must then determine whether the agency has properly followed the statute.") (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Agency's violation of the aforementioned rules in at least 28,510 cases on its face is evidence of a systemic problem that only underscores the Agency's liability.

The Agency cites *Dixon v. Shalala*, 54 F.3d 1019, 1029 (2d Cir. 1995) for the proposition that Ms. Steigerwald "must prove not only that SSA failed to recalculate her windfall offset but that SSA's error in applying 42 U.S.C. § 1320a-6, 20 C.F.R. § 416.1123(b)(3), and POMS SI 02006.200 is 'sufficiently pervasive and systemic to justify class relief.'" Opp. at 7. The Agency's citation to *Dixon* is disingenuous. *Dixon* does not deal with, and makes no mention of, 42 U.S.C. § 1320a-6, 20 C.F.R. § 416.1123(b)(3) or POMS SI 02006.200.

More importantly, the quote from *Dixon* represents SSA's argument in that case, ***which the* Dixon *court rejected***. The full sentence from *Dixon*, of which the Agency quoted only a portion, states: "*The Secretary contends*, first, that the district court erred as a matter of law in finding the SSA's misapplication of Step Two sufficiently pervasive and systemic to justify class

relief." *Id.* at 1029 (emphasis added). The Second Circuit rejected the Secretary's assertion, concluding: "We find the Secretary's attempt to cast doubt on the probativeness of plaintiffs' evidence entirely unconvincing." *Id.*[7] Indeed, the *Dixon* court concluded – in direct opposition to the Agency's assertion and reliance thereof – that "overwhelming statistical evidence" of SSA's failings was enough to show the Agency's liability. *Id.* Here, the "overwhelming statistical evidence" proffered by Plaintiff – that the Agency has been derelict in its duties in approximately 39% of cases over more than five years – is enough to establish the Agency's liability.

The Agency's reliance on *Unan v. Lyon*, 853 F.3d 279, 291 (6th Cir. 2017), is similarly misplaced. In *Unan*, the plaintiff class contended as the very basis for their class action complaint that the state agency there had "a systemic computer problem that erroneously assigned thousands of non-citizens, who may have been eligible for comprehensive Medicaid coverage, to Emergency Services Only ("ESO") Medicaid." *Id.* at 282. As a defense, the state agency alleged that the mistakes were not (as the class action complaint alleged) "a systemic computer problem" but were instead "a result of human error." *Id.* at 290-91. If the state agency were correct, that might have been a defense to the plaintiff class's class action complaint – which specifically pled as its basis that the issue stemmed from "a systemic computer problem" and not human error.

By contrast, Ms. Steigerwald has not pled that the Subtraction Recalculation was not performed as required due to computer error. *See* Doc. 1, *passim*. Plaintiff has no idea why the Agency failed to perform the Subtraction Recalculation as required in approximately 39% of cases over a five-year period; scienter for the violations the Agency is accused of here is not required. What Plaintiff did allege in her Complaint, and what Plaintiff now knows, is that the Subtraction

[7] This is not the first time the Agency has attempted to mislead the Court by selectively (mis)quoting cases. *See* Doc. 25, p. 15, n.11.

Recalculation was not performed, as required, for at least 28,510 claimants. *See* Doc. 1, ¶¶ 97-101; Doc. 50-2. That is all the Court needs to know to find the Agency liable.

Finally, the Agency states that requiring it to follow the law and abide by the statute at issue "would turn the Social Security Act into a strict-liability statute." Opp. at 8. "[A] strict liability statute, mean[s] that a [plaintiff] may recover statutory damages . . . even if the [plaintiff] suffered no actual damages." *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (citations omitted). The Social Security Act does not allow Plaintiff and the purported class to recover if no harm was suffered. Plaintiff has never made a contrary claim. Instead, the statute – like all laws – must be followed. If the law is flouted, and, as here, harm results, there must be consequences – even in the absence of "strict liability." *See Edgar v. JAC Products, Inc.*, 443 F.3d 501, 507–08 (6th Cir. 2006) ("[T]he FMLA is not a strict-liability statute . . . Employees seeking relief under the entitlement theory must therefore establish that the employer's violation caused them harm."). Here, the Agency did not follow the law, resulting in injury to certain claimants. The Agency is liable for depriving Ms. Steigerwald (until she brought suit) and a putative class (upon certification and entry of final judgment) of past-due benefits to which they are entitled.

3. The Agency Should Have Previously Performed the Subtraction Recalculation as Required

The Agency contends that "agencies are given a reasonable time to complete a required action when no specific time is required by statute." Opp. 10. But POMS SI 02006.210(B)(1) provides that the Subtraction Recalculation should be done "when a copy of the notice or information is received" – in other words, immediately upon receiving notice of a finalized attorneys' fee. *See* Motion, p. 3. Because a "specific time is required" by the POMS, the Subtraction Recalculation should have been performed as soon as it was possible.

Moreover, the delay here (in some cases over five years) is *per se* unreasonable. *Cf. Blankenship v. Sec'y of Hew,* 587 F. 2d 329, 332 n.4 (6th Cir. 1978) (crediting argument that "delays beyond a certain period are unreasonable [p]er se under applicable statutes . . . regardless of unique factors in particular situations."). Additionally, and even if the Agency had a "reasonable time" to complete the Subtraction Recalculation, the Agency has done nothing to show that it is waiting for a reasonable time period in order to perform the Subtraction Recalculation at some unidentified point in the future. To the contrary, all the evidence indicates that, but for the existence of this lawsuit, the Subtraction Recalculation will never be performed for the 28,510 claimants (or more) for whom it should have been but has not been performed as required.

Crucially, on this point, the Agency never asserts in the Opposition – when given every opportunity to do so – that the Subtraction Recalculation would have been performed for these claimants absent this lawsuit. Common sense dictates it would not have been – especially given the fact that, during class certification discovery, the Agency argued vociferously against having to search for or identify *any* individuals for whom the Subtraction Recalculation was necessary. *See* Doc. 37-1, pp. 3-6; Doc. 41, pp. 8-13. The Agency still refuses to identify claimants for whom the Subtraction Recalculation was not performed, as required, prior to September 1, 2012. In any case, the Agency's argument that it can only be liable for failure to perform the Subtraction Recalculation on or after September 1, 2012, Opp. at 8-9, conflates the Motion currently before the Court, and the Motion for Class Certification. That latter motion will be filed shortly, on time, and will seek certification for eligible class members for whom the Subtraction Recalculation has not been performed from dates beginning March 13, 2002.[8]

[8] Plaintiff will address the Klein Declaration (Doc. 52-1), attached to the Agency's Opposition, in her Motion for Class Certification, which is the appropriate filing for which the Court to decide the scope of the class period in terms of how many years the class should cover.

B. Counsel is Eligible for Attorneys' Fees Pursuant to 42 U.S.C. § 406(b)[9]

In direct conflict with the arguments made in the first half of its Opposition, wherein the Agency disclaimed any liability to pay any member of a class, in the Opposition's second half the Agency asserts that all of the putative class members "*already* are owed" the money the Agency is currently withholding from them. Opp. at 10 (emphasis in original). *See also* Opp. at 12 (the "putative class members [here] *already are entitled to the past-due benefits sought in this suit*") (emphasis added). Thus, the Agency asserts in the second half of the Opposition that, because the Agency is "*already*" liable to pay all of the members of the proposed class the money they are owed (the same proposed class members over whom the first half of the Opposition asserts the Agency has no liability), 42 U.S.C. § 406(b) should not apply. The Agency's contention in this regard is both contradictory and flawed as a matter of clear statutory interpretation.

At the outset, however, Plaintiff is constrained to point out the Agency's immediate misrepresentation of the Complaint at the beginning of its argument concerning Section 406(b). The Agency states: "The claim in this case is not for a ruling that putative class members are entitled to benefits, ..." Opp. at 10. In fact, the Complaint claims, *inter alia, monetary relief* to remedy the Agency failings, including a request that the Court order the Agency "to make all required Retroactive Underpayments [to the members of the putative class], within ninety (90) days following the date of any such order of this Court." Doc. 1, p. 21; *see also id.* at ¶ 19 ("Accordingly, this class action seeks to recover for Plaintiff and the other putative class members

[9] The parties agree that the Court should decide on Summary Judgment the issue whether Section 406(b) applies. *See* Opp. at 4. *See also* Committee Notes to Fed. R. Civ. P. 23(g) ("Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique."). Resolution of this issue should not invoke the one-way intervention rule. Again, however, if the Court feels otherwise, it should postpone a ruling on this part of the Motion as well.

the Retroactive Underpayments which they are owed."). The Complaint defines "Retroactive Underpayments" to mean: "[T]he increase *in past-due benefits* due to them – *i.e.*, the amount, if any, they were underpaid based on the Subtraction Recalculation (the "Retroactive Underpayment(s)"), and thus clearly contemplates the Court ordering the Agency to pay *the past-due benefits to which Plaintiff and a class may be entitled.* Of course, Section 406(b) expressly allows for the recovery of fees based on a percentage of the "*past-due benefits*" that a Court awards. Thus, in reviewing this part of the Agency's brief on Section 406(b), the Court should reject the Agency's mischaracterization of the Complaint which seeks *both* injunctive and monetary relief.

1. The Court Should Reject the Agency's Strained Textual Interpretation of 42 U.S.C. § 406(b)

42 U.S.C. § 406(b) applies "[w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney . . . ." Should the Court render a favorable judgment in this case, by its clear terms 42 U.S.C. § 406(b) would apply. The Agency misconstrues the plain meaning of the words in Section 406(b), contending the statute does not mean what its express language states. As next explained, the Agency is mistaken.

a. Resolution of This Case Will Involve a "Judgment," Resulting, if Favorable, in an "Entitlement"

The Agency's first argument is that the resolution of the case before this Court will involve "no judgment" because "this case concerns only benefits to which putative class members already are entitled." Opp. at 2. This argument fundamentally misrepresents the judicial process. Here, Plaintiff argues that she and deserving members of a proposed class are entitled to a certain amount of past-due benefits. The Agency argues that it is not liable to Plaintiff and a proposed class. *See generally* Opp. at 5-10. Assuming a class is certified, and Plaintiff prevails in her claims, this Court ultimately will issue a final judgment, entitling deserving class members to the past-due benefits the Agency has disputed are owed. This is what the term "final judgment" means. *See*

Final Judgment, Black's Law Dictionary (10th ed. 2014) ("A court's last action *that settles the rights of the parties* and *disposes of all issues* in controversy . . . .") (emphasis added).

Indeed, if and when the Agency pays members of a proposed class the past-due benefits sought in this lawsuit, it will be "*as a result of the court's decision*" ordering such payment (or approving a final settlement ordering such payment). Opp. at 12 (quoting Hearings on H.R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 258 (1965)) (emphasis in Opposition). This case will be terminated one way or another by entry of a judgment of the Court. If the judgment is favorable to Plaintiff and a class, 42 U.S.C. § 406(b) should apply.

b. Plaintiff and the Rest of Any Class Members are "Claimants" Seeking "Past-Due Benefits"

Next, the Agency alleges that Plaintiff and the rest of any proposed class members are not "claimants" but instead are "beneficiaries." Opp. at 13-14. In the Agency's opinion, "a claimant is an individual seeking an award of benefits from the agency. By contrast, class members here have already been awarded benefits and, as such, are beneficiaries." Opp. at 13 (citing nothing). Both the relevant statutes and the case law – as well as the Agency's position in prior filings in this case – undercut this argument.

Beneficiaries and claimants are not mutually exclusive. While it is true that proposed "class members here have already been awarded" *some* "benefits," they may not have been paid *all* of the benefits they were due. Specifically, they can still be owed additional "past-due benefits."[10] That is the very fact that necessitated Plaintiff's Social Security Class Action Complaint. While the claimants are "beneficiaries" as to what they have already received, they

[10] The POMS defines "past-due benefits" as, either, "[b]enefits due, but unpaid, that accrued prior to the month payment was effectuated," or "[a]ny adjustment to benefits that results in an accrual of unpaid benefits." POMS SI 02101.010(A)(3). (A third definition of past-due benefits provided by the same section of the POMS is not relevant here.)

are also and always remained "claimants" as to the additional, past-due benefits they may not yet have received.

Courts have routinely understood the term "claimant" in this manner in the context of the Social Security Act, finding that a party is a claimant "where the [Administrative Law Judge] awarded *benefits and the claimant seeks additional benefits*." *Lind v. Astrue*, 370 F. App'x 814, 815 (9th Cir. 2010) (emphasis added) (quotation omitted). In other words, a party can be both a beneficiary and a claimant, when the party has been provided some benefits by the Agency but believes the Agency owes him/her more.

Indeed, the Agency has previously conceded this fact, by referring to Plaintiff and a proposed class as "claimants" in earlier filings before this Court, and in SSA's correspondence with Plaintiff prior to the filing of this suit. *See* Doc. 18-1, p. 8 ("[A] Social Security *claimant* who believes that the SSA has unlawfully failed to provide [additional] benefits cannot establish a federal court's jurisdiction over her claim unless she first presents it to the SSA . . . .") (emphasis added); Doc. 18-2, p. 101 ("*If a claimant thinks more SSI benefits are due, and has not received more money or a letter within 90 days of this authorization notice, he or she should contact SSA*.") (Quoted with emphasis in Agency's Memorandum in Support of Motion to Dismiss, Doc. 18-1, p. 7). Given the Agency's prior use of the term "claimant" in this action to refer to Plaintiff, the Agency should be estopped from asserting a contrary position now. *See Harrah v. DSW Inc.*, 852 F. Supp. 2d 900, 904 (N.D. Ohio 2012) ("The Sixth Circuit has recognized judicial estoppel as an equitable doctrine that 'is utilized in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.'") (quoting *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002)).

That a "claimant" does not cease to be a claimant when she is first paid something by SSA is underscored by the text of 42 U.S.C. § 406(b) itself. As the Agency would have it, no attorney would ever be able to collect attorneys' fees pursuant to 42 U.S.C. § 406(b) if the underlying claimant had been awarded *any benefits at all* at the agency level before filing suit: By the Agency's reckoning, once any benefit is awarded, the "claimant" ceases to be one and becomes instead a "beneficiary," whereupon Section 406(b), which covers attorneys of "claimants" would not apply. This interpretation is nonsensical as it would vitiate Section 406(b) fee awards.

By its own terms, the statute applies to cases where benefits may have been received by a claimant before the claimant's attorney files a lawsuit on the claimant's behalf. That is why the attorney who represents the claimant before a court may only collect up to 25% of the claimant's "*past-due benefits*" – to distinguish from any prior benefits *which may have already been paid* to the claimant, and from which the attorney before the court may not claim a percentage.

Past-due benefits are "benefits due but unpaid" *i.e.*, benefits which should have, but which have not yet, been paid to the claimant. *See* n.10, *supra* (citing POMS SI 02101.010(A)(3)). An attorney who brings a case and then persuades a court that the heretofore unpaid benefits should be paid – *i.e.*, the "past-due" ones – may seek a percentage of the recovery in court under Section 406(b). Applied here, an award by this Court will order the Agency to pay out the "past-due benefits" to the "claimants" represented by class counsel (assuming class certification). The appointed class counsel, therefore, will be eligible to receive percentage fees under Section 406(b). Any other construction of Section 406(b) contradicts the statutory "plain meaning rule" and would be inappropriate. *See In re Stockburger*, 106 F.3d 402, 402 (6th Cir. 1997) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (quotation omitted).

The Agency has conceded in the Opposition that 42 U.S.C. § 406(b) applies in the class-action context. Opp. at 18 ("*It is not the class-action context that renders § 406(b) inapplicable here*, but the nature of the claim itself") (emphasis added). But "the nature of the claim itself" at issue in this lawsuit is for *past-due* benefits that the Agency wrongly withholds from (putative class member) *claimants*. The Court should conclude that 42 U.S.C. § 406(b) can apply here.

2. *Greenberg v. Colvin* Was Correctly Decided

To Plaintiff's counsel's knowledge, the only case prior to this one raising the question of whether attorneys' fees pursuant to 42 U.S.C. § 406(b) can be applied in a class-action context is *Greenberg v. Colvin*, 63 F. Supp. 3d 37 (2014). *Greenberg* is a well-reasoned, in-depth opinion, issued only after the matter was thoroughly briefed by the SSA and class counsel there (who are Plaintiff's counsel here). Indeed, as noted above, the Agency accepts *Greenberg's* conclusion that 42 U.S.C. § 406(b) can apply to class actions. Accordingly, the Court should reject the Agency's attempts in the Opposition to otherwise disparage *Greenberg* "as deeply flawed" (Opp. at 15) and, instead, view *Greenberg* as strong and persuasive guidance to apply Section 406(b) here, should class certification be granted.

The Agency attacks the *Greenberg* court as misguided for (allegedly) "construe[ing] the underpayments due to class members as *damages*." Opp. at 15 (emphasis in original). But *Greenberg*'s reference to "damages" was not in analyzing whether Section 406(b) applied. Instead, *Greenberg* mentioned damages in deciding whether and how the class should be certified. 63 F. Supp. 3d at 45-46 (reviewing "Rule 23(b) Requirements"), not in determining whether Section 406(b) applies to social security class actions. *See id.* at 47-53.[11]

[11] In any event, a reference to "damages" under the Social Security Act may be taken to mean precisely what "past due benefits" are, *i.e.*, "*money claimed by, or ordered to be paid to, a person for* compensation *for* loss or *injury.*" *Damages*, Black's Law Dictionary (10th ed. 2014) (emphasis added). The ability to sue for the recovery of damages in the form of "past-due benefits" is based

The Agency similarly misconstrues *Greenberg*'s purported "reli[ance] on cases applying the common-fund doctrine." Opp. at 16. As the Agency notes in a footnote, the *Greenberg* court chose not to analyze the common-fund doctrine at all, recognizing it was not necessary to its decision. Opp. at 16 n.9; *see* 63 F. Supp. 3d at 47 n.4 ("Plaintiff contends that attorney fees are warranted under the common fund doctrine. The Court declines to reach this issue as it is unnecessary to the decision."). The Agency's reference to *Greenberg*'s supposed reliance on the "common-fund doctrine" is nothing more than a red herring.

The Agency next claims that "*Greenberg* is readily distinguishable from this case because class members there had not paid attorney's fees to different counsel on the same money they received by virtue of the settlement." Opp. at 17. This the Agency cannot know as there is no indication anywhere in the *Greenberg* opinion as to whether class members had paid attorneys' fees to different counsel.

The Agency's attempts to distinguish *Greenberg* are facile. However, even if the *facts* in *Greenberg* were distinguishable, the Agency's concession that *by law* fees can be appropriately sought pursuant to 42 U.S.C. § 406(b) in Social Security Act class actions, settles the matter.[12]

3. If the Proposed Class is Certified, There is No Policy or Equitable Reason Why 42 U.S.C. § 406(b) Should Not Apply Here

Although 42 U.S.C. § 406(b) applies as a matter of law, and the Agency has conceded that 42 U.S.C. § 406(b) can be applicable in the class action context, the Agency offers a number of

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on the grant of federal court jurisdiction under 42 U.S.C. § 405(g), that constitutes a waiver of any sovereign immunity claims the government might have (and, which in turn, disposes of whatever sovereign immunity argument the Agency is attempting to make here. *See* Opp. at 16.).

[12] It is particularly noteworthy that the Agency has not qualified this admission or responded to Plaintiff's argument (Mem. at 16-17) that Section 406(b) applies *regardless* whether a class is certified under Rule 23(b)(2) or (b)(3) – another issue that the Agency has waived and can no longer dispute.

policy and equitable arguments against its use here. These arguments are futile as "equity may not, in the service of its equitable desire, wipe out rights that have become fixed by statute." *U.S. v. Haddix & Sons, Inc.*, 415 F.2d 584, 588 (6th Cir. 1969). Nevertheless, Plaintiff addresses the Agency's points below.

First, the Agency argues that allowing Plaintiff's counsel to receive attorneys' fees pursuant to the statute would lead to an "absurd result" of claimants having to pay multiple counsel "on the same award of benefits." Opp. at 12. This argument is flawed for the same reason the Agency's statutory interpretation of 42 U.S.C. § 406(b) is flawed. The "award of benefits" that the Court has the authority to issue here is an award of "*past-due* benefits," which, absent this case, deserving class members would not have received.

Thus, the Agency's assertion that there is "no basis for counsel seeking to represent putative class members to disgorge *additional* representatives' fees from past-due benefits," Opp. at 14 (emphasis in Opposition), is fundamentally faulty. The fees (if any) that will be awarded pursuant to the statute will be the *only* fees awarded from "past-due benefits" pursuant to 42 U.S.C. § 406(b). *See supra*, n.10 (explaining that "past-due benefits" means benefits that were already due to claimants, but that the Agency has not paid).

What is more, the Agency concedes that the "absurd result" of having multiple counsel be awarded fees pursuant to 42 U.S.C. § 406(b) is actually "not unusual." Opp. at 12, n.7. The Agency attempts to distinguish those other situations by stating: "[H]ere, beneficiaries would be paying fees for work unrelated to their award of benefits – a situation for which § 406(b) does not, by its terms, apply." Opp. at 13 n.7. But, as noted, Section 406(b) does not discuss "benefits;" rather, it contemplates "*past-due* benefits" – exactly what Plaintiff and a proposed class seek here.

The Agency's second argument is that other class counsel have chosen not to invoke 42 U.S.C. § 406(b), so counsel in this case should not be allowed to do so. Opp. at 18-20. It is true that some class counsel in other Social Security Act class-action cases have chosen to request fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), in lieu of requesting fees under 42 U.S.C. § 406(b). The fact that they have done so does nothing to prevent 42 U.S.C. § 406(b) from applying where the statute says it can apply.

Notably all the cases cited by the Agency for the proposition that SSA has been a defendant in "many successful class-action lawsuits" in which class counsel sought attorneys' fees, were originally brought by public-interest organizations. *See* cases cited in Opp. at 18-19. These cases, thereby, should be seen as the proverbial exceptions that prove the rule: If class-counsel could only receive attorneys' fees under EAJA, no attorneys other than non-profit public interest organizations, or firms willing to take on complicated cases *pro bono,* would be able to afford or otherwise be incentivized to bring such class actions. There is nothing in the statute that states or implies that Social Security Act class-actions could/should be brought only on a *pro-bono* basis.

In this regard, the Agency's hearty opposition to class counsel receiving attorneys' fees pursuant to 42 U.S.C. § 406(b) is suspect. It seems that the Agency is more concerned in limiting class actions against it than in ensuring that deserving persons receive their past-due benefits when the SSA fails to follow its statutory and regulatory obligations.

Finally, the Agency notes that "courts routinely deny or reduce fees for attorneys who seek fees only under § 406(b)." Opp. at 19. That may be so – and is a matter reserved for the Court's future consideration if and when a class is certified and a fee application is submitted by appointed class counsel. 42 U.S.C. § 406(b) ("the court may determine and allow as part of its judgment a reasonable fee for such representation . . . ."). *See also Greenberg*, 63 F. Supp. 3d at 52 ("The

statute does not require a court to choose between EAJA and § 406(b); rather, it provides that an attorney representing a Social Security claimant may be awarded fees under both EAJA and § 406(b) . . . .'") (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002)). The issue before the Court is the potential application of Section 406(b), an issue that remains ripe for present decision, and the answer to which should facilitate continued progress toward resolution of the case, including the possibility for settlement. *See* Mem. at 11, 18. *See also* n.9, *supra*.

In the final analysis, the Agency's citation to cases where Section 406(b) fees were reduced does not "illustrate a presumption in favor of EAJA fees." Opp. at 20. If Congress wanted class action attorneys to collect fees only under EAJA, it would have said so. Significantly, it did not.

III. CONCLUSION

The Agency's contradictory assertions – on the one hand claiming it is not liable to perform the Subtraction Recalculation where it has failed to do so, and on the other asserting Section 406(b) should not apply because the Agency is already liable to perform the Subtraction Recalculation – should not be countenanced. The Court should find the Agency liable for failing to perform the Subtraction Recalculation. Should Plaintiff and a proposed class of claimants prevail in this suit and obtain "past-due benefits," Section 406(b) should apply. The Court should grant the Motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Reply in Support of Motion for Summary Judgment complies with the page limitations for a Standard matter, and is 20 pages long.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2018, a copy of the foregoing Reply in Support of Motion for Summary 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.

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