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

STEPHANIE LYNN STEIGERWALD, *Plaintiff,* v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, *Defendants.*	)	CASE NO.: 1:17-CV-1516 JUDGE JAMES S. GWIN **OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, TO ENFORCE JUDGMENT AND MEMORANDUM IN SUPPORT OF RULE 60(b)(6) MOTION**

On May 1, 2019, Plaintiffs filed a motion asking this Court to warn SSA that it could be in contempt of this Court's April 1, 2019 Order if it does not complete recalculations for class members by September 25, 2019. ECF No. 113, Mot., PageID # 1699. Plaintiffs contend that because "the Agency still makes mistakes and will never get it fully right," the Court should instruct SSA to entirely eliminate its quality review procedures and "simply take the amount of the attorneys' fees that were awarded and then input that into how that affects the monthly benefit." ECF No. 113-1, PageID # 1704, 1708.

Plaintiffs' position is, at best, ironic: Having filed this lawsuit to correct inaccurate entitlement payments, Plaintiffs now advocate for inaccuracy. But the law frowns upon cutting corners, and for good reason. Plaintiffs' approach would result in inaccurate payments the class members that they represent. Class counsel now disregard the interests of their own clients by urging that they could separately petition at a later date for SSA to go back and correct the mistakes that class counsel now embrace, all so that class counsel can expedite their collection of attorney's fees from the pockets of those very same class members.

Plaintiffs' position is inconsistent with the Federal Rules of Civil Procedure. Plaintiffs were provided with the opportunity to conduct post-judgment discovery, including the taking of a Rule 30(b)(6) deposition. Having taken that discovery, even Plaintiffs now concede that more time was needed than the 90 days that the Court originally provided to conduct the recalculations, noting that "[e]ght months are enough." *Id.* at 1713. Plaintiffs nonetheless filed a motion that fails to seek any substantive relief: The Court's judgment was clear, and it is premature for Plaintiffs to seek enforcement of that judgment months before its September compliance date.

In fact, the discovery that Plaintiffs conducted *supports* Defendant's original request for two years to conduct the recalculations. Accordingly, and for the reasons set forth below, Defendant moves under Federal Rule of Civil Procedure 60(b)(6) for the Court to modify its April 1, 2019

decision and afford Defendant an additional 16 months within which to complete the recalculations. Simply put, eight months is not enough; the evidence submitted by the Agency, as tested through discovery, confirms that two years is necessary. Requiring SSA to complete the recalculations in eight months will likely result in a marked degradation of the Agency's ability to provide non-*Steigerwald*-related services to SSA's many beneficiaries; it will also result in inaccuracies to class members' recalculations. This inequitable result serves nobody: It harms the class members who still will not receive accurate entitlement payments, and it harms the general public who rely upon SSA. The Court can—and should—remedy this problem by extending by 16 months the time afforded to Defendant to complete the recalculations.

1. Plaintiffs' Motion Has No Procedural Foundation.

Plaintiffs filed a motion "for Clarification or, in the Alternative, to Enforce [the] Judgment." ECF No. 113, PageID # 1699. There is no basis in law for either form of relief sought. Nor is there any legal basis for Plaintiffs' implicit request to modify the judgment to require Defendant to perform the recalculations in a slapdash manner.

With respect to the request for clarification, Plaintiffs assert that "[t]he Court should clarify that its Order means what it says[,] *[i].e.*, that the Agency should perform the Subtraction Recalculation for all Class Members within eight months." ECF No. 113-1, PageID # 1713-1714. But Plaintiffs' motion is not a request for clarification. "The general purpose of a motion for clarification is to explain or clarify something ambiguous or vague . . ." *Ebert v. Twp. of Hamilton*, No. CV 15-7331, 2018 WL 4961467, at *2 (D.N.J. Oct. 15, 2018). Plaintiffs do not profess to lack clarity about what deadline the Court ordered. *See* ECF No. 113-1, PageID # 1713-1714. Nor could they, for the Court stated the matter plainly. ECF Doc. No. 101, Order, PageID # 1381. Rather, Plaintiffs' motion is better understood as a motion for reiteration, which has no basis in law and disserves judicial economy. *See Howard v. Suntrust Inv. Servs., Inc.*, No. CV415-015, 2015 WL 898211, at *1 (S.D.

Ga. Feb. 26, 2015) (noting that the plaintiff was "[w]asting th[e] Court's time" by asking it to clarify what was already clear). Thus, the Court should reject Plaintiffs' motion for clarification out-of-hand.

Plaintiffs' alternative formulation of their motion – as a motion to enforce the judgment – is no more meritorious. Plaintiffs cite (and quote) Federal Rule of Civil Procedure 70(a) as authority for the proposition that if a judgment requires a party to "perform any [ ] specific act", then the "the court may order the act to be done." Fed. R. Civ. P. 70(a); ECF No. 113-1, PageID # 1704. In doing so, Plaintiffs omit key portions of the rule, which reads, in relevant part, as follows: "If a judgment requires a party . . . to perform any other specific act and the party *fails to comply within the time specified*, the court may order the act to be done—at the disobedient party's expense—*by another person* appointed by the court." Fed. R. Civ. P. 70(a) (emphasis added). Setting aside the fact that Rule 70(a) authorizes the Court to order "another person appointed by the court" to fulfill a Court's order – relief that Plaintiffs do not seek in this context – the provision is inapplicable by its terms because the "time specified" by the Court for compliance with its order has not passed. A similar problem befalls Plaintiffs' subsequent invocation of Federal Rule of Civil Procedure 70(e). ECF No. 113-1, PageID # 1704-1705, 1714. Thus, if Plaintiffs' motion is considered a motion to enforce the judgment, it should be denied.

Plaintiffs' motion could also be read to encompass a request to modify the judgment to require Defendant to perform the recalculations in a truncated and inaccurate manner. Plaintiffs provide no procedural basis for seeking this relief, and none is apparent. Federal Rule of Civil Procedure 60 comes closest to providing a basis for this request, as it authorizes certain requests to modify a judgment that are filed more than 28 days after the judgment. *See* Fed. R. Civ. P. 60. But that rule by its own terms cannot apply here: The rule only authorizes a *non-prevailing* party to seek reconsideration of a judicial decision. *Singh v. Napolitano*, 2011 WL 13243932, at *1 (D.D.C. Feb. 25, 2011); *Cano v. Baker*, 435 F.3d 1337, 1340 (11th Cir. 2006). Plaintiffs here prevailed; with respect

to the recalculations, Plaintiffs are not subject to a final judgment from which they can seek relief. Instead, to the extent Plaintiffs ask the Court to order Defendant to perform the recalculation in a specific manner, they are seeking additional affirmative relief, which cannot be achieved through a Rule 60 motion.[1] *E.g.*, *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987).

2. The Court Should Reject Plaintiffs' Request to Require SSA to Complete the Recalculations Inaccurately.

Plaintiffs claim that SSA has overcomplicated the recalculation process by including a review of the quality and accuracy of the recalculations in an effort to delay providing relief to class members. ECF No. 113-1, PageID # 1705. This is absurd on its face: SSA receives no benefit from conducting unnecessary work by delaying recalculations. To the contrary, SSA has streamlined its normal business processes to complete the recalculations as quickly as possible without compromising either accuracy or the Agency's adherence to statutory obligations to the class members and the public.

a. SSA's Recalculation Process is a Streamlined Version of its Normal Business Practices.

The three-part process described in Ms. Walker's February 21, 2019 declaration is based on SSA's standard business practice for recalculating the windfall offset to account for later-authorized representatives' fees. Walker Decl., attached as Ex. A, ¶ 10; Walker Dep. 115:6-21; ECF No. 96-2, PageID # 1239-1244; ECF No. 113-4, PageID # 1775.

During the pendency of this litigation, SSA has worked to tailor its normal procedures to promote efficient and accurate recalculations for class members. Notably, SSA has foregone its standard practice of "whole case processing." Walker Decl. ¶ 20; ECF No. 113-4, PageID # 1786,

[1] The Court has never defined the recalculation process that must be performed. But, as explained below, statutes and regulations – along with logic – define the contours of the process.

1837. Normally, if a technician reviews a case for any reason, he must process and complete any required action identified. Walker Decl. ¶ 20; Walker Dep. 32:10-33:7. For purposes of this class action, however, SSA instructed its technicians to take actions only on issues that affect the windfall-offset period and representatives' fee subject to recalculation. *Id.*; ECF No. 113-4, PageID # 1786, 1837. All other issues that do not affect the windfall-offset period subject to recalculation are referred to other components and will not delay the completion of the recalculations. *Id*.

To further promote efficiency, SSA has created four Central Processing Locations (CPLs) staffed with hundreds of employees dedicated to completing this workload. ECF No. 113-4, PageID # 1774. SSA has dedicated all 330 employees with the requisite background to perform the recalculations to the CPLs, and they are working full-time to complete the recalculations. Walker Decl. ¶ 23; Walker Dep. 33:5-7. Additionally, 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. Richardson Decl., attached as Ex. B, ¶ 7. SSA has also created two custom tools to track cases, support communication between the technicians, and manage the process efficiently. ECF No. 96-2, ¶¶ 70-71, PageID # 1252; ECF No. 113-4, PageID # 1773, 1776-1779.

While SSA has worked to make the recalculation process more efficient, Plaintiffs' demand to be paid fees out of the moneys owed to class members under 42 U.S.C. § 406(b) has increased the work necessary to complete the recalculations, lengthening the process that would otherwise take place. Because of class counsel's fee request, SSA technicians must manually withhold 20% of underpayments for payment of the fee and then, once the Court has determined the final percentage of the fee, revisit the case to adjust the fee amount, if necessary, release the funds, and document the fee for IRS reporting requirements. ECF No. 96-2, ¶¶ 34-35, PageID # 1243.

b. SSA Cannot Perform the Windfall Offset Recalculation Without First Recreating the Initial Calculation.

This Court has recognized that to account for later authorized representatives' fees, SSA "may need to calculate the windfall offset twice: once when a claimant is initially paid retroactive benefits, and again after the claimants representatives' fee is finalized." ECF No. 32, Order, PageID # 468. To perform the second calculation, SSA must first obtain the inputs used in the initial calculation (the month-by-month breakdown of Title II and Title XVI benefits paid during that period) and the corresponding representatives' fee. Walker Decl. ¶ 15-16. Plaintiffs' suggestion that SSA simply use only the bottom-line windfall offset figure from the initial calculation is inapposite. That figure does not provide the month by month comparison of benefits needed to perform the second calculation. *Id.*; *see also* POMS SI 02006.200C. And the month-by-month comparison is not stored in SSA's systems, ready for a technician to perform the recalculation; on the contrary, it must be recreated for each case. Walker Decl. ¶ 15. Likewise, SSA cannot simply "take the amount of the attorney fee and put it into the calculation." ECF No. 113-1, PageID # 1708. Doing so would not even ensure that the correct windfall period was recalculated using the corresponding representatives' fee—which is the purpose of performing these recalculations in the first place. Walker Decl. ¶¶ 11-12. The declarations filed with this brief contain a more detailed explanation of the process.[2] *See* Walker Decl. ¶¶ 10-19; Wiggins Decl., attached as Ex. C, ¶ 3.

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[2] Defendant did not argue in a previous discovery dispute that "anything that occurred prior to the Subtraction Recalculation is irrelevant to Plaintiffs' claim," as Plaintiffs' assert. ECF No. 113-1, PageID # 1705-06. Rather, Defendant argued that Plaintiffs were not entitled to discovery related to individuals for whom SSA performed the windfall offset calculation when representatives' fees were known at the outset—in other words, individuals for whom no second windfall-offset calculation is necessary—because that situation is not at issue in this case. ECF No. 41, PageID # 528.

Moreover, Defendant did not state that development and correcting the record was "altogether unrelated" to the recalculations. ECF No. 113-1, PageID # 1705. In fact, Defendant disclosed SSA's anticipated recalculation procedure, which included review of the record for accuracy and development, to Plaintiffs in discovery in July of 2018. Def's Obj. & Resp. to Pltf's First Gen. Set of Interrogs., # 3, attached as Ex. D.

c. Quality Review Is Necessary to Accurately Pay Class Members

Plaintiffs fault SSA for implementing a quality-review procedure after discovering a 34.5% error rate in the initial processing of the recalculations. ECF 113-1, PageID # 1707-08. They contend that because SSA will "never achieve 100% accuracy," [3] the 34.5% error rate is acceptable and the quality review should be eliminated entirely. *Id*. at 1707-09. Plaintiffs' *two out of three ain't bad* philosophy betrays the very class members that class counsel represent. 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. *Id.* at 1714 n.11.

To be sure, given the massive size and scope of the programs SSA administers, SSA will never be perfect. That does not mean, however, that SSA should abandon its efforts to improve the accuracy of its recalculations. An error rate of 34.5% is not acceptable, Walker Dep. 131:22-132:2, nor is placing such a burden on class members. As the Supreme Court observed in *Califano v. Boles*, 443 U.S. 282, 285 (1979), "the Court has been sensitive to the special difficulties presented by the mass administration of the social security system. After the legislative task of classification is completed, the administrative goal is accuracy and promptness in the actual allocation of benefits pursuant to those classifications. . . . Fairness can best be assured by Congress and the Social Security Administration through sound managerial techniques and quality control designed to achieve an acceptable rate of error." Among the "sound managerial techniques" that SSA has implemented for

[3] In support of its argument that SSA will not reach 100% accuracy in the recalculation process, Plaintiffs cite to an entirely separate issue that has nothing to do with the substance of the relief that the Court has ordered. As discussed previously, ECF No. 102, an anomaly present in this case has led to issues in which class counsel have received communications about class members on issues unrelated to this case. Defense counsel promptly worked with the Agency to determine the cause of these communications and informed class counsel of its cause. SSA is making all efforts to resolve the issue. In the interim, defense counsel has encouraged class counsel to continue bringing such matters to our attention for prompt resolution.

this case is a 100% quality review after Part 1 and Part 2 of the recalculation process for a period of at least ten weeks in an effort to improve the error rate. When the error rate improves to an acceptable level, which is a sustained 95% accuracy, the 100% quality review process can be eliminated. Walker Dep. 138:22-139:1. Although this process has temporarily slowed completion of the recalculations, it is necessary to ensure that the class members receive accurate *entitlement* payments.

3. SSA Has Not Delayed Commencing the Recalculations.

Plaintiffs assail SSA for not starting recalculations in February 2018, when it first learned that a significant number of individuals were owed a recalculation.[4] ECF No. 113-1, PageID # 1703. Plaintiffs argue that "[t]he Agency's decision to delay performance of its obligation is consistent with its consistent delaying tactics throughout this case, in moving to dismiss, opposing discovery, opposing class certification, opposing the class notice, opposing summary judgment, moving to amend the judgment and threatening to appeal." ECF No. 113-1, PageID # 1703 n. 2.

SSA has made completion of the recalculations a top agency priority and has worked continuously during the pendency of this litigation to develop and execute a plan for making class members whole. *See* ECF No. 96-2, PageID # 1233. But planning to complete tens of thousands of recalculations, which had built up over years, was not a simple process. SSA could not undertake over 129,000 recalculations without a plan that would ensure that they are performed (i) with a high level of accuracy, (ii) consistent with statutory and regulatory requirements, and (iii) with as little disruption as possible to the Agency's performance of its other important duties for the more than 60 million beneficiaries it serves. The Agency had to determine which workers would perform the

[4] Although Ms. Walker testified that SSA first learned that 37,000 individuals required a recalculation in February of 2018, this testimony was mistaken. SSA learned that 9,404 individuals required a recalculation in February of 2018, but did not learn that the potential class size would be 37,000 until it received the results of a later data pull in late March 2018. Walker Decl. ¶¶ 2-3.

recalculations, how they would be organized, what tools they would use, how they would be trained (and by whom), what quality review procedures would be used, and other issues of the like. Walker Dep. 185:7-9, 187:7-9; Walker Decl. ¶¶ 4, 6-7. And this task changed over time: The potential class size tripled from late March 2018 to late August 2018, and the plan needed to properly perform less than 40,000 recalculations varies drastically from the plan for doing the same for a class that is more than three times larger. Walker Decl. ¶ 8.The need to fundamentally restructure this plan furthered delayed the Agency's ability to begin performing recalculations.

Uncertainty over whether the Court would award attorneys' fees to Class Counsel under 42 U.S.C. § 406(b) further compounded the difficulty faced by SSA in trying to commence recalculations. Walker Decl. ¶¶ 5, 9. Fees paid under § 406(b) are subtracted from payments made to Social Security beneficiaries (here, the class members). The parties disagreed over the legal ability of class counsel to recover fees under § 406(b) rather than from the government under EAJA with the Government advocating for EAJA fees and class counsel insisting on being paid out of their clients' entitlement checks. It was not until January 25, 2019, that the Court determined that class counsel could recover fees under § 406(b). ECF No. 101. Prior to that Order, SSA did not, in its view, have a legal basis for withholding fees from payments to beneficiaries. But the Agency also recognized that class counsel could be prejudiced if SSA made payments to class members, without withholding any fees, as class counsel would have had to contact any class members who received full payment to attempt to recover their fees.[5] *See* GN 03920.055.

Finally, Plaintiffs criticize Defendant's decisions to defend itself in this litigation, implying that SSA should have simply capitulated to Plaintiff's demands and begun recalculations before

[5] In her deposition, Ms. Walker testified that the Agency could have withheld fees prior to the Court's January 25, 2019 order. That is true as a functional matter. But it is also true that the Agency did not believe that it had the legal authority to do so. Walker Decl. ¶ 5.

this Court entered a judgment ordering it to do so. *See* ECF No. 113-1, PageID # 1703 n.2 (criticizing defendants for "moving to dismiss, opposing discovery, opposing class certification, opposing the class notice, opposing summary judgment, moving to amend the judgment and threatening to appeal"). At bottom, Plaintiffs' argument appears to be that any disagreement with them constitutes unreasonable delay. That argument refutes itself. The important point is this: The Agency is working diligently to perform the recalculations expeditiously and correctly.

4. Defendant Has Not Made Misrepresentations to this Court.

The remainder of Plaintiffs' motion consists of unfounded allegations that Defendant has misled this Court. In so doing, Plaintiffs distort the record and the recalculation process.

First, Plaintiffs complain that SSA is paying underpayments to more individuals than originally expected. Plaintiffs point to the fact that underpayments have been issued to three class members who were identified as being in Category 2 as evidence that SSA has somehow made factual misrepresentations to this Court. ECF No. 113-1, PageID # 1710-1711; Walker Dep. 114: 3- 115:5. Defendant has done no such thing. As Defendant has previously explained, Defendant determined that, for individuals in Category 2, accounting for the authorized representatives' fees, does not affect the windfall period. ECF No. 75, PageID # 993. Defendant did not state that no individuals in Category 2 would ever receive any underpayment. In fact, Defendant informed the Court that it would not seek to exclude these individuals from the class because "further review of these cases was needed to determine if their Title XVI benefits nevertheless would be otherwise impacted by the exclusion of representatives' fees from Title II income." *Id.*; *see also* ECF No. 82-1, PageID # 1035 n. 1. SSA is processing these cases in the same manner as cases in Category 1, and while SSA does not expect that many individuals in Category 2 will receive an underpayment, such an outcome remains possible.

Second, Defendant's April 25, 2019 Status Report correctly stated that, as of that date, no overpayments had been assessed. ECF No. 112, PageID # 1697. Plaintiffs point to one notice that references an overpayment. ECF No. 113-8, PageID # 197. As the notice makes clear, the windfall-offset recalculation for this class member resulted in an underpayment of $2,443.35, *but* the class member owed a pre-existing debt to SSA. *Id.* Nothing in this Court's Order prohibits SSA from following its statutorily mandated procedures to recover the overpayment. *See* 42 U.S.C. § 404(a).

Third, as Defendant has previously informed Plaintiffs, overpayments are a possible outcome of performing windfall-offset recalculations for the class.[6] *See* December 4, 2018 Correspondence, attached as Ex. E; *see also* Wiggins Decl. ¶ 4. This is because SSA is required, by statute, to assess an overpayment "[w]henever the Commissioner of Social Security finds that more or less than the correct amount of payment has been made to any person under this title." 42 U.S.C. § 404(a); *see also* 20 C.F.R. § 404.501(a). Whether overpayments are assessed, however, is a separate question from whether or not those funds will be recovered from the beneficiaries. *See* 42 U.S.C. § 404(b)(1) ("In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.") SSA will follow its normal procedures for determining if

[6] At the April 4th hearing on class counsel's fees motion, the Court asked defense counsel "[i]f you find that the earlier calculation had been somewhat off, are you going back to the beneficiary and say, Give us the money back?" *See* ECF 109, Fees Hr'g Tr., at 50:7-9. Defense counsel's answer was, unfortunately, imprecise. Defense counsel intended to clarify that the purpose of Part 1 in the recalculation process is intended to "account[] for the attorney's fees" because "many of these claimants have had multiple attorneys' fees or multiple windfall offset periods," so the Agency must "apply the correct fee to the correct period." *Id.* 50:10-15. Although defense counsel did not intend to imply that the Agency would ignore errors it discovers in the initial calculation, her answer was ambiguous, and the Agency therefore clarifies in the attached declaration, Wiggins Decl. ¶ 4, the circumstances under which an overpayment will be assessed.

an overpayment assessed as a result of the recalculation of the windfall offset should be waived. *See* 20 C.F.R. §§ 404.506 -509.

Fourth, Plaintiffs contend that the average time needed for each recalculation is suspect because, in response to Interrogatories propounded earlier in this litigation,[7] SSA provided the results of 100 sample recalculations within one month. This comparison fails. As explained in the Richardson Declaration, *see* Ex. B, the process employed by staff in the Office of Quality Review ("OQR") during discovery differed from the steps necessary to accurately pay class members in a manner consistent with the Agency's statutory and regulatory obligations. Specifically, because the payment of attorneys' fees was in dispute at the time that OQR reviewed the 100-case sample, the sample calculations were completed on paper for workload planning purposes and used by Plaintiffs for fee guidance; it did not require the degree of accuracy necessary to actually make payments in a manner consistent with all of SSA's obligations.[8] Richardson Decl.¶ 3. As part of this first attempt at evaluating the recalculation process, OQR staff did not perform the verifications in Part 1 of the

[7] Plaintiffs appear primarily concerned about the reliability of the sample as it relates to estimation of class counsel's attorneys' fees. Defendant has consistently maintained that the sample recalculations provide only an estimate of the total amount due, not a statistically significant representation of the amount owed to the entire class. *See e.g.*, ECF No. 113-9, PageID # 1983; ECF No. 95, PageID # 1173 ("By Class Counsel's own math, such an award would likely amount to nearly 30 million dollars. . ."); *Id.*, PageID # 1186 (referring to *estimated* total amount of payments due to the class); ECF No. 109, PageID # 1470, 8:17-9:6 (same).

[8] Plaintiffs fault Janet Walker for not being familiar with the sample recalculations during her 30(b)(6) deposition. As the transcript reflects, defense counsel objected to Plaintiffs' questions on this topic as outside the scope of the 30(b)(6) deposition. *See, e.g.,* Walker Dep. 93:1-9, 93:20-94:6. Despite noticing eight topics and numerous sub-topics for the 30(b)(6) deposition, Plaintiffs did not identify the sample recalculations as a deposition topic. ECF No. 110-2, PageID # 1526-1531; Correspondence re 30(b)(6) Topics, attached as Ex. F. Where a party fails to identify a topic in a Rule 30(b)(6) notice with reasonable particularity, it may not be heard to complain when the opposing party is not prepared to address the topic at deposition. *See Sollitt v. Keycorp*, No. 1:09-CV-43, 2009 WL 2424551, at *1 (N.D. Ohio Aug. 3, 2009); *see also Schneider v. CitiMortgage, Inc.*, No. 13-cv-4094, 2016 WL 362488, at *2 (D. Kan. 2016).

process that are critical to ensuring that the correct amount of attorneys' fees and the correct windfall period are used for the actual recalculations.[9] *Id.* ¶ 4. Because underpayments were not being released at that time, OQR's sample cases did not have to proceed through all of the steps in the recalculation process, including the majority of the steps in Part 3, such as: manually preparing notices; documenting the underpayment in SSA's systems; preparing and releasing any underpayment; withholding 20% for payment of class counsel's fee; and, eventually, preparing and releasing class counsel's fee. *Id.*; ECF No. 96-2, ¶¶ 33-37, PageID # 1243. Thus, Plaintiffs' attempt to tie SSA's process for conducting *actual* recalculations[10] now to a *sample* process conducted during the discovery stages of this litigation compares apples to oranges. The comparison is particularly inapt given that SSA estimates Part 3 to take over one and a half hours to complete (an amount significantly longer than Part 1, which Plaintiffs vociferously advocate for SSA to skip, despite it taking only an average of 30 minutes). ECF No. 96-2, ¶ 30, PageID # 1243. These facts demonstrate that the average time for quality-review staff to perform recalculations during discovery is not indicative of the time required to comply with this Court's order.

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[9] Counsel were not made aware of the fact that the 100 sample recalculations omitted the Part 1 verifications until the Richardson Declaration was prepared in support of this motion. This means that, at the time of the April 4th fee hearing, defense counsel were unaware that the 100-person sample likely is inaccurate for purposes of conducting actual recalculations for at least some class members. Although this renders the prior, sample recalculations a poor indicator of class counsel's likely fee, the Agency now has completed more than 600 accurate recalculations, *see* ECF No. 114, and the average underpayment resulting from those recalculations provides a better estimate of class counsel's requested fee. The Agency's recent supplemental response on fees, filed in accordance with this Court's order to brief the reasonableness of class counsel's claimed hours, relied on the updated, actual recalculations—not the earlier estimates from quality-review staff. Regardless, the Agency reiterates that the uncertainty surrounding the final amount of benefits at-issue in this litigation weighs in favor of a sum certain award of attorneys' fees under EAJA.

[10] Contrary to Plaintiff's implication, SSA did not spend three months working only on 206 recalculations. ECF No. 113-1, PageID # 1712. Rather, as of April 25, 2019, SSA had completed Part 1 for 27,466 cases and had begun processing an additional 100,745 cases; completed Part 2 for 788 cases and was processing an additional 412; and additional 73 cases were in Part 3. ECF No. 112, PageID # 1696-97.

Finally, SSA's two-year estimate of the time needed to complete the recalculations is reliable. The Agency arrived at this estimate by using captured task time information based on work sampling as well as anecdotal experience of SSA's subject matter experts. Walker Decl. ¶ 22. Specifically, SSA evaluated the individual tasks that make up each part of the three-part recalculation process, *see* ECF No. 96-2, PageID # 1254, and compared those tasks to the recorded average task times for similar actions. Walker Decl. ¶22. The Agency is better situated to determine its limitations and requirements in performing this massive workload than is class counsel.

5. The Court Should Grant Defendants an Additional 16 Months to Complete the Recalculations

For the reasons set forth above, Plaintiffs' arguments that "[e]ight months are enough," are deeply flawed. ECF No. 113-1, PageID # 1713. More time is necessary. *See* Walker Dep. 183:7-20; 126:4-127:19. Without it, SSA's ability to provide (non-*Steigerwald*) services to its many beneficiaries will be degraded. To avoid this injustice, Defendant asks the Court to modify its April 1, 2019 Order and afford Defendant an additional 16 months to complete the recalculations.

Defendant, of course, 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), ECF No. 96, and the Court, in turn, granted Defendant a total of eight months, ECF No. 101. This extension undoubtedly helped stave off the "dramatic negative impact on SSA's ability to assist and pay benefits to the American public," ECF No. 96-2, ¶ 61, PageID # 1249, that would have occurred had SSA been required to perform more than 100,000 time-intensive recalculations in only 90 days. But the limited relief granted by the Court, while preventing an immediate crisis, did not solve the underlying problem: If the Agency is required to perform 129,000 recalculations in eight months, there will be grave impacts on the American public. Walker Decl. ¶¶ 23-25. Those impacts will take the form of incorrect recalculations for class

members and significantly decreased resources for providing the multi-fold non-*Steigerwald*-related services that the Agency provides to its millions of beneficiaries on a daily basis. *Id.*

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, however, has many critical workloads. 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.

The Federal Rules of Civil Procedure include a mechanism for solving this problem: A modification of the April 1, 2019 decision under Rule 60(b)(6). This rule provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The Sixth Circuit has interpreted it to apply "only in unusual and extreme situations where principles of equity mandate relief." *Moreland v. Robinson*, 813 F.3d 315, 327 (6th Cir. 2016). But it has also explained that the trial court is left with "especially broad" discretion to apply the rule. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir.1989). And as noted above, this is a situation in which equity demands relief. The burden of a too-short period for recalculation will likely be significant, Walker Decl. ¶ 24, and, crucially, it will be felt most significantly not by the Agency itself, but by the many beneficiaries SSA serves. Equity demands protecting these beneficiaries, not diminishing the services available to them because SSA did not initially perform these complex recalculations.

This backlog of unexecuted recalculations built up over 15 years. It will therefore take more than 90 days, or even eight months, for SSA to catch up. Accordingly, the Court should use its especially broad discretion to lengthen the period to complete recalculations by another 16 months, extending the period of compliance from September 2019 to January 2021.

Respectfully submitted,

JUSTIN E. HERDMAN
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned declares under penalty of perjury that this Response is 15 pages in length and is within the page limitation for standard track cases.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, the foregoing *Opposition* 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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