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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HUGH HELD and KELLY RICHARDSON-WRIGHT, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

Case No.: 2:15-cv-1732

OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Hearing on Motion

Date: August 3, 2015
Time: 1:30 p.m.
Place: 312 North Spring Street, Los Angeles, CA 90012, Courtroom 15

Honorable Percy Anderson

Date: July 13, 2015

Respectfully submitted,

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INTRODUCTION

Named Plaintiffs seek to certify a Rule 23(b)(2) class to press equitable-relief claims against the Social Security Administration ("SSA") notwithstanding two facts dispositive to class certification: (i) their own claims for relief have been administratively resolved by SSA in their favor and (ii) such claims are fundamentally unsuitable for class treatment under Rule 23 in any event. SSA's resolution of Plaintiffs' individual claims – that recovery of Supplemental Security Income ("SSI") overpayments previously made to them be waived – has mooted this litigation, as there is no actual dispute remaining between Plaintiffs and SSA, no judicial redress available to Plaintiffs, and thus no case or controversy sufficient to confer subject-matter jurisdiction on this Court. And even if there remained a live case or controversy within the Court's jurisdiction, Plaintiffs have failed to satisfy their burden of establishing why their proposed class should be certified.

Like the putative class members they seek to represent, the two named Plaintiffs are SSI beneficiaries who are married to spouses of the same sex. Over a period following the Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013), striking down Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA") – which until Windsor had barred SSA from recognizing marriages between persons of the same sex – Plaintiffs received SSI overpayments attributable to the post-Windsor change in their marital-recognition status for SSI purposes. Because SSI is a needs-based program that takes into account spousal income and

resources for purposes of calculating benefit amounts, Plaintiffs became eligible for lower monthly benefits following Windsor than they had been eligible for prior to the decision, when SSA was required to treat them as single under DOMA. Nonetheless, while SSA brought its benefits programs into compliance with Windsor, Plaintiffs continued receiving SSI payments at the higher single-beneficiary level for a time before SSA processed their changes in marital-recognition status.

SSA's initial assessment that Plaintiffs had been overpaid – a proposition with which Plaintiffs do not fundamentally disagree – formed the crux of Plaintiffs' lawsuit when it was filed on March 10, 2015 (ECF No. 1). The complaint asserts claims under the Equal Protection Clause, the Due Process Clause, and the Social Security Act itself, all asserting variations of the argument that Plaintiffs should not be required to pay back their acknowledged overpayments. The same theory forms the basis for their requested relief as to each claim: that SSA should be ordered to wipe away, or waive, the overpayment debts.

But that relief has already been provided; SSA has waived recovery of Plaintiffs' overpayments, forgiving their debt and relinquishing its right to collect the overpayments. Plaintiffs acknowledge that recovery of their overpayments has been waived and that they do not have to pay them back. Waiver has mooted their individual claims, and likewise means that the Court lacks jurisdiction over their proposed class claims. Moreover, the failure of any potential class member to present their claims to the Commissioner or to exhaust administrative remedies by

actually seeking waiver means that their claims would not have fallen within the Court's jurisdiction in the first instance.

And even if any of Plaintiffs' claims were within the Court's jurisdiction, Plaintiffs have failed to meet their burden of establishing that class certification is warranted. Primarily, Plaintiffs have failed to establish commonality under Rule 23(a)(2), as they have not identified any common contention that would drive the resolution of any of their claims. Indeed, the fact-specific and individualized criteria governing SSA's decision whether recovery of SSI overpayments should be waived means that a claim centered on a substantive request for waiver inherently is not susceptible to class-wide resolution. For similar reasons, Plaintiffs have failed to satisfy the typicality and numerosity requirement of Rules 23(a) and the additional requirements necessary to certify a class under Rule 23(b)(2).

Accordingly, Plaintiffs' motion for class certification should be denied.

BACKGROUND

The statutory, regulatory, and factual background generally relevant to Plaintiffs' claims is set forth in Defendant's motion to dismiss, ECF No. 30-1 at 3-7, and in Defendant's opposition to Plaintiffs' motion for preliminary injunction, ECF No. 36 at 2-6. Of particular relevance to Plaintiffs' motion for class certification are the requirements, procedures, and standards governing requests for waiver of recovery of SSI overpayments ("waiver"), discussed in greater detail herein.

Initially, where an SSI recipient is determined to have been overpaid, SSA generally is required to adjust or recover such overpayment: "Whenever the Commissioner of Social Security finds that more . . . than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall . . . be made[.]" 42 U.S.C. §1383(b)(1)(A). That statutory admonition to seek "proper adjustment or recovery" of overpayments is subject to limitation, however. Relevant here, the Commissioner "shall make such provision as [she] finds appropriate in the case of payment of more than the correct amount of benefits . . . with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this title, or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration of" Title XVI. Id. § 1383(b)(1)(B).

The Commissioner has prescribed regulations governing when recovery of overpayments is to be "waived" – that is, when a debt is to be forgiven, thereby relinquishing SSA's right to collect the overpayment. 20 CFR § 416.550 et seq. Waiver is to be granted where the overpaid individual was "without fault in connection with [the] overpayment," id. § 416.550(a), and adjustment or recovery of the overpayment would: (i) "[d]efeat the purpose of title XVI," (ii) "[b]e against

equity and good conscience," or (iii) "[i]mpede efficient or effective administration of title XVI due to the small amount involved." Id. § 416.550(b)(1)-(3).[1]

"Without Fault." The first factor that must be established for overpayment recovery to be waived is that the overpaid individual was "without fault." That determination "depends on all the pertinent circumstances surrounding the overpayment in the particular case." Id. § 416.552. As the Supreme Court has observed, the "without fault" evaluation is a fact-specific exercise that requires assessment of circumstances "including the recipient's 'intelligence . . . and physical and mental condition' as well as his good faith." Califano v. Yamasaki, 442 U.S. 682, 696-97 (1979) (quoting 20 CFR § 404.507 (1978)).

Importantly, the "without fault" determination "relates only to the situation of the individual seeking relief from adjustment or recovery of an overpayment." 20 CFR § 416.552. "The overpaid individual . . . is not relieved of liability and is not without fault solely because the Social Security Administration may have been at fault in making the overpayment." Id. (emphasis in original). In making the individual, fact-specific "without fault" determination, SSA considers the following six factors: (i) "the individual's understanding of the [overpayment] reporting requirements," (ii) "the agreement to report events affecting payments," (iii) "efforts to comply with the reporting requirements," (iv) "opportunities to comply with the

[1] By comparison to a request for waiver of recovery, a request for reconsideration on the underlying overpayment involves contesting the existence and/or amount of the overpayment determination. Program Operations Manual System ("POMS") SI 02201.005(H)(2).

reporting requirements," (v) "understanding of the obligation to return checks which were not due," and (vi) "ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition)." Id. In weighing those factors, SSA "will take into account any physical, mental, educational, or linguistic limitations (including any lack of familiarity with the English language) the individual may have." Id.[2]

"Defeat the Purpose of Title XVI." For overpaid individuals who are determined to be without fault, SSA will waive recovery where adjustment or recoupment of the overpayment would defeat the purpose of the SSI program. SSA considers adjustment or recovery to defeat the purpose of the SSI program "if the [overpaid] individual's income and resources are needed for ordinary and necessary living expenses[.]" Id. § 416.553(a). To make that determination, SSA looks to the criteria set forth in 20 CFR § 404.508(a), which defines "ordinary and necessary living expenses" for purposes of Title II benefits to include "[f]ixed living expenses[,]" "[m]edical, hospitalization, and other similar expenses[,]" "[e]xpenses for the support of others for whom the individual is legally responsible[,]" and "[o]ther miscellaneous expenses which may reasonably be considered as part of the

[2] Although SSA's finding "depends on all of the circumstances in the particular case," an overpaid individual "will be found to have been at fault . . . when an incorrect payment resulted from one of the following: (a) Failure to furnish information which the individual knew or should have known was material; (b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual's furnishing his opinion or conclusion when he was asked for facts), or (c) The individual did not return a payment which he knew or could have expected to know was incorrect." 20 CFR § 416.552.

individual's standard of living." 20 CFR § 404.508(a)(1)-(4). Alternatively, SSA considers an overpaid individual or couple to meet that test "if the individual's or couple's current monthly income . . . does not exceed" certain prescribed amounts. Id. § 416.553(b)(1)-(4).

"Against Equity and Good Conscience." For overpaid individuals who are determined to be without fault, SSA will also grant waiver where adjustment or recovery of the overpayment "would be against equity and good conscience." 20 CFR § 416.554. As a general rule, this basis for waiver is limited to three scenarios: (i) where "an individual changed his or her position for the worse or relinquished a valuable right because of reliance upon a notice that payment would be made[,]" (ii) where such an individual "changed his position for the worse or relinquished a valuable right" because of "the incorrect payment itself[,]" or (iii) for part of an overpayment "not received, but subject to recovery under [20 CFR] § 416.570," the individual subject to recovery "is a member of an eligible couple that is legally separated and/or living apart[.]" 20 CFR § 416.554.[3]

[3] This general rule is subject to an exception for residents of states within the Ninth Circuit on the basis of an SSA Acquiescence Ruling defining the phrase "against equity and good conscience" more broadly in compliance with the Ninth Circuit's decision in Quinlivan v. Sullivan, 916 F.2d 524 (9th Cir. 1990). In determining whether recovery would be "against equity and good conscience" as to residents of those states, "the adjudicator will not limit his or her inquiry to the three specific circumstances set forth in the regulations." Acquiescence Ruling 92-5(9) (June 22, 1992). Rather, "[t]he decision must take into account all of the facts and circumstances of the case and be based on a broad concept of fairness. Factors such as, but not limited to, the nature of the claimant's impairment, the amount and steadiness of the claimant's income, and the claimant's assets and material resources should all be considered in the decision as to whether recovery of an overpayment should be waived on the basis that recovery would be 'against equity and good conscience.'" Id.

* * * * * * *

On March 10, 2015, Plaintiffs filed this action asking the Court to order SSA to set aside their overpayment assessments. See Compl., ECF No. 1. In late April 2015, SSA determined that waiver of the overpayments for both named Plaintiffs was warranted, and so informed both named Plaintiffs by letter dated April 30, 2015 (Held) and May 1, 2015 (Richardson-Wright). Declaration of Erik Jones, June 17, 2015 ("Jones Decl.") ¶¶ 11-13, 18-19 (Ex. 1). As a result of those determinations, neither Plaintiff has any outstanding overpayment balance, and neither owes SSA any money. Id. ¶¶ 14-15, 20-21.

Notwithstanding SSA's waiver of each named Plaintiff's overpayment, Plaintiffs filed the instant motion for class certification on June 16, 2015 (ECF No. 26), and filed a separate motion for a preliminary injunction on June 17, 2015 (ECF No. 29) (seeking preliminary relief that would require the waiver of overpayment recovery that SSA had granted six weeks prior). Defendant moved to dismiss the complaint for lack of jurisdiction on June 17, 2015 (ECF No. 30).

ARGUMENT

Rule 23 provides "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (quoting Califano v. Yamasaki, 442 U.S. at 700-01), but it allows for such an exception only where a would-be class representative meets a

series of conditions. See Fed. R. Civ. P. 23(a) ("[p]rerequisites" to class certification); Fed. R. Civ. P. 23(b) (additional requirements).

Plaintiffs have failed to satisfy the necessary conditions, including the threshold requirement of establishing the Court's subject-matter jurisdiction over their individual claims or those of the class they seek to represent.

I. PLAINTIFFS HAVE NOT ESTABLISHED JURISDICTION OVER THEIR PROPOSED CLASS CLAIMS.

As a threshold matter, a class cannot be certified because Plaintiffs have failed to establish the existence of subject-matter jurisdiction over their claims. O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (if no proposed class representative "establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594 (9th Cir. 2012); Lee v. Oregon, 107 F.3d 1382, 1390 (9th Cir. 1997). This is so for at least two reasons detailed in support of Defendant's motion to dismiss: (i) named Plaintiffs' claims have been mooted by SSA's waiver of their overpayments; and (ii) Plaintiffs have failed to administratively exhaust their claims, a jurisdictional prerequisite to federal court review. See ECF No. 30-1 at 7-13 (mootness), 14-20 (failure to exhaust). Plaintiffs' opening brief fails to evade these jurisdictional bars to class certification.

Seeking to preemptively address the mootness of their own claims, named Plaintiffs posit that SSA's waiver of their overpayments – which they acknowledge

has satisfied their individual claims, Pls.' Mem. at 16 – does not affect their ability to maintain a class action. Id. They are wrong. Plaintiffs rely on Sosna v. Iowa, 419 U.S. 393 (1975); Pitts v. Terrible Herbst, Inc., 653 F.3d 1081 (9th Cir. 2011); and Gomez v. Campbell-Ewald, 768 F.3d 871 (9th Cir. 2014), cert. granted, 83 U.S.L.W. 3637, 83 U.S.L.W. 3851, 83 U.S.L.W. 3855 (U.S. May 18, 2015) (No. 14-857), for the proposition that a certified class "acquire[s] a legal status separate from the interest asserted by" named Plaintiffs, and thus may be maintained even where named Plaintiffs' individual claims concededly have been resolved. Pls.' Mem. at 16. But what Plaintiffs fail to explain is that those decisions are self-limited to class claims that are "inherently transitory" – that is, claims where "there is a constantly changing putative class . . . and where the trial court will not even have enough time to rule on a motion for class certification before the proposed representative's individual interest expires." Sze v. I.N.S., 153 F.3d 1005, 1008-09 (9th Cir. 1998) (internal citations and quotations omitted); see also Sosna, 419 U.S. at 402 (challenge to one-year residency requirement inherently transitory as "capable of repetition, yet evading review" by definition); Campbell-Ewald, 768 F.3d at 874-76 (unaccepted Rule 68 offer of judgment "inherently transitory"); Pitts, 653 F.3d at 1091-92 (same). Nothing about Plaintiffs' claims here even suggests that they are inherently transitory. To the contrary, assuming that any would-be plaintiff pursues an overpayment waiver request through the administrative process to a final decision by the Commissioner (which neither named Plaintiff even needed to do before their

overpayments were waived), there is no basis to infer that a putative class of such persons would see their individual interests expire before the trial court had sufficient time to decide class certification.

And as to presentment and administrative exhaustion, a Rule 23 class may not encompass persons who have not presented their claims to the Commissioner or exhausted their remedies and obtained a final decision from the Commissioner. Califano v. Yamasaki, 442 U.S. at 701-04. Yet Plaintiffs' opening brief fails entirely to establish that any proposed class member has met either requirement or that they are entitled to any exception as to exhaustion. Pls.' Mem., passim. Here, for the same reasons Plaintiffs' complaint should be dismissed for failure to exhaust, ECF No. 30-1 at 14-20, class certification likewise should be denied.

Lacking any basis for jurisdiction over Plaintiffs' individual claims or those of the putative class they seek to represent, the Court should deny class certification and instead dismiss for want of jurisdiction. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 19 L. Ed. 264 (1868)) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

II. PLAINTIFFS HAVE FAILED TO ESTABLISH COMMONALITY.

Although Plaintiffs' own claims have been mooted by SSA's waiver of their overpayments (leaving no viable dispute or need for judicial redress), they ask the

Court to allow them to assert the claims of unspecified other SSI beneficiaries. As a first step toward that, Rule 23(a)(2) requires them to show that "there are questions of law or fact common to the class." Plaintiffs have failed to make that showing.

Commonality does not mean that there need only be "'some aspect or feature of the claims which is common to all' of the class members," as Plaintiffs incorrectly state. See Pls.' Mem. at 14. To the contrary, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" Wal-Mart, 131 S. Ct. at 2551 (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982)). Thus, Plaintiffs' claims "must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id.; Mazza, 666 F.3d at 588.

The burden of proof to establish commonality is on Plaintiffs, and because "Rule 23 does not set forth a mere pleading standard[,]" Wal-Mart, 131 S. Ct. at 2551, Plaintiffs "must be prepared to prove that there are in fact . . . common questions of law or fact." Id. (emphasis in original). The Court, in turn, must be "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Id. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiffs' underlying claim. That cannot be helped." Id. at 2551-52.

Plaintiffs have not satisfied that burden, as they have failed to identify any common questions "that will drive the answer to the [purported class] claims" on any factual or legal issue at the core of those claims. See Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 (9th Cir. 2014). As the Ninth Circuit stated in Jimenez, "[w]hether a question will drive the resolution of the litigation depends on the nature of the underlying claims that the class members have raised." Id. (citing Parsons v. Ryan, 754 F.3d 657, 676 (2014)) (finding that common questions "[drove] the answer to the plaintiffs' claims on one of [the] three elements" of their "off-the-clock" overtime claim). Plaintiffs have suggested four common questions, see Pls.' Mem. at 13-14, but analysis of those questions against the three underlying claims they assert makes clear that none of them will drive the resolution of the litigation.

A. "Whether SSA has violated Plaintiffs' Equal Protection Rights by failing to timely recognize their marriages[.]"

By self-definition, the first of Plaintiffs' four proposed common questions, Pls.' Mem. at 13, relates only to Plaintiffs' first claim – that SSA's assessment that they were overpaid post-Windsor violates the Equal Protection Clause. It does not support a finding of commonality as to that claim.

Determining the truth or falsity of the contention that SSA failed to timely recognize Plaintiffs' marriages would not drive the resolution of their Equal Protection claim. To prevail on that claim, Plaintiffs would have to prove differential treatment – that is, that they were treated differently than similarly

situated SSI beneficiaries married to opposite-sex spouses – and that such differential treatment was motivated by discriminatory purpose. Washington v. Davis, 426 U.S. 229, 240 (1976); see also Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 272 (1979). And the "timeliness" of SSA's recognition of Plaintiffs' marriages (post-Windsor) simply is not "central to the validity" of such claim. Wal-Mart, 131 S. Ct. at 2551. For instance, Plaintiffs have not demonstrated any evidence of the requisite differential treatment – that is, that SSI recipients married to opposite-sex spouses whose marriages were only recognized by SSA some period after-the-fact experienced a delay in the recalculation of their monthly benefit to reflect such newly recognized status, yet were not determined by SSA to have been overpaid for such period. Nor have Plaintiffs even alleged (much less provided the requisite evidence of) some discriminatory motive on the part of SSA. Thus, Plaintiffs have failed to meet their burden of showing commonality as to this purported common question. Id. (requiring evidentiary demonstration to satisfy commonality requirement, rather than "mere pleading standard").

B. "Whether SSA has violated Plaintiffs' Constitutional rights and the Social Security Act by seeking recoupment of overpayment[.]"

Plaintiffs' second proposed common question purports to concern each of their three claims, but it would not drive the resolution of any of the three, and thus fails to support a finding of commonality.

This contention has no bearing on the resolution of Plaintiffs' Equal Protection claim. It is essentially tautological – the question of whether SSA violated the Equal Protection clause by seeking recoupment, Pls.' Mem. at 13, cannot logically constitute a contention that would drive the resolution of a claim that "seeking recoupment violated the Equal Protection Clause." Wal-Mart, 131 S. Ct. at 2551. Further, to prevail on an Equal Protection claim in this context, Plaintiffs must prove that in "seeking recoupment" of overpayments they received over a period following Windsor, SSA intentionally discriminated against them, and they have not even alleged – much less shown through the required evidentiary submissions – the elements of a constitutional discrimination claim. See Part II.A, supra. Indeed, they could not plausibly do so, as SSA is generally required to assess overpayments where SSI beneficiaries have been overpaid, see Background, supra, and the respective mechanisms for setting aside such overpayment determinations or forgiving the overpayment debt – reconsideration or waiver – are by definition available only after the overpayment has been assessed.

The same holds true for Plaintiffs' procedural due process claim, which also fails for the independent reason that it does not amount to a colorable assertion that SSA has violated their procedural due process rights. What procedural due process requires is no more than a meaningful opportunity for a claimant to have his or her claim fairly considered – "the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal

citations and quotations omitted). What it does not require is any particular outcome. Id.; Simmons v. Gillespie, 712 F.3d 1041, 1044 (7th Cir. 2013); Schindler v. Schiavo, 403 F.3d 1289, 1295 (11th Cir. 2005). Yet Plaintiffs do not challenge the process they received; instead, they challenge only the outcome – and the interim (and since waived) outcome at that. Thus, Plaintiffs' procedural due process claim must fail, which defeats class certification in and of itself. Wal-Mart, 131 S. Ct. at 2551-52. And what is more, it fails for reasons individual to each Plaintiff (and for each proposed class member they seek to represent), rather than reasons generalized across an entire class, which defeats class certification just as surely. Id.

Finally, this contention would not drive resolution of Plaintiffs' Social Security Act claim – that they are entitled "to waiver under the Social Security Act, because proposed class members were without fault for the overpayment and recoupment from them would be against equity and good conscience[,]" Pls.' Mem. at 8 – for similar reasons. The "without fault" and "against equity and good conscience" determinations that govern SSA's waiver decision-making as a regulatory matter are inherently fact-specific and individualized, see Background, supra – hence the due process requirement for in-person hearings at the appropriate level of review, see Califano v. Yamasaki, 442 U.S. at 693-94 – and thus cannot properly be the subject of one-size-fits-all judicial review across Plaintiffs' proposed class (even if considerations related to the implications of Windsor in this context are considered by SSA on some generalized level). Wal-Mart, 131 S. Ct. at 2551-53. Moreover,

Plaintiffs have not even alleged, much less submitted evidence, that any putative class member has actually requested waiver and been denied. (And, of course, named Plaintiffs themselves have received waivers of their overpayments.) Lacking evidentiary submissions that would support such (unmade) allegation, Plaintiffs have failed to carry their burden of showing commonality as to this claim. Id. at 2551-52.

C. "Whether Plaintiffs as a class are without fault with respect to these post-Windsor overpayments[.]"

Likewise, Plaintiffs' third proposed common question would not drive the resolution of any of their three claims, and thus fails to establish commonality. By its own terms, the contention that Plaintiffs "as a class are without fault" as to their acknowledged overpayments, Pls.' Mem. at 14, is not subject to a generalized answer common to the proposed class. As noted in Part II.B, supra, the "without fault" determination that must be satisfied for waiver to be granted, 20 CFR § 416.550(a), is inherently fact-specific and individualized. See also 20 CFR § 416.552. In light of that fact-specific nature, SSA provides for in-person hearings at every level of review at which evidence (including witness testimony) can be introduced by the overpaid individual. See 20 CFR § 416.557 (initial field office review); §§ 416.1429, 416.1433, 416.1444, 416.1453 (de novo Administrative Law Judge review); §§ 416.1467-416.1468, 416.1470 (Appeals Council review); see also Califano v. Yamasaki, 442 U.S. at 693-94. Without even a plausible hint (much less the required evidence) that SSA has systemically ignored this regulatory process as to waiver requests by

overpaid individuals similarly situated to Plaintiffs – systemically denying them waiver in the process – there can be no common contention that would drive the resolution of any of Plaintiffs' claims. Wal-Mart, 131 S. Ct. at 2551-52.[4]

D. "Whether collection of overpayments in this circumstance violated equity and good conscience."

Finally, Plaintiffs' fourth proposed common question would not drive the resolution of any claim; thus, it too fails to show commonality. On its face, the contention that "collection of overpayments in this circumstance violated equity and good conscience," Pls.' Mem. at 14, is not subject to any answer common to the proposed class. As a threshold matter, Plaintiffs have failed to allege, much less demonstrate through evidence, that any proposed class members have sought waiver and been denied on this basis. That failure is critical, as the "against equity and good conscience" analysis does not even come into play until an overpaid individual has been notified that SSA proposes to seek recovery of the overpayment and has requested waiver. See 20 CFR § 416.550(b). Without such evidence, this purportedly common contention is hollow of any meaning, and thus cannot support commonality. Wal-Mart, 131 S. Ct. at 2551-52.

[4] Moreover, while SSA was able to determine that waiver was appropriate for both named Plaintiffs at the initial-review level without the need for a hearing (thus mooting their individual claims, at a minimum), Plaintiffs fail to even allege, much less submit evidence, that any other putative class member has even satisfied the jurisdictional presentment requirement, or has sought waiver and been denied. Without submitting any evidence that any putative class member has presented his or her claim to the Commissioner and completed the administrative-review process – Plaintiffs cannot even plausibly suggest that commonality is satisfied on the basis of this proposed common question. Wal-Mart, 131 S. Ct. at 2551-52.

And even if Plaintiffs had produced such evidence, it would mean nothing for purposes of commonality, as the determination is fact-specific and individualized. See Background, supra. Much like the "without fault" determination, see Part II.C, supra, the factors applicable to this determination cannot be generalized across a class, and without some legitimate basis on which to conclude that SSA systematically disregarded the regulatory process applicable to waiver requests, there can be no common contention that would "resolve an issue . . . central to the validity of [any of Plaintiffs'] claims in one stroke." Wal-Mart, 131 S. Ct. at 2551.[5]

III. PLAINTIFFS HAVE FAILED TO ESTABLISH TYPICALITY.

Just as Plaintiffs have failed to establish any question common to the class they ask the Court to certify, Plaintiffs have further failed to show that the "claims or defenses of the representative parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3), for much the same reason: they have failed to make any evidentiary showing at all. Wal-Mart, 131 S. Ct. at 2551. Wal-Mart makes clear that Rule 23 "does not set forth a mere pleading standard." Instead, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id. Yet Plaintiffs ignore

[5] In addition, proposed class members that reside in any state within the Ninth Circuit are subject to a different standard for assessing the "against equity and good conscience" factor than proposed class members residing anywhere else in light of SSA Acquiescence Ruling 92-5(9). See note 3, supra. Such distinctions between two subsets of any proposed nationwide class would defeat commonality as to such a proposed class for that independent reason.

the binding requirement of Wal-Mart, opting to do no more than plead typicality. They allege that named Plaintiffs' claims are typical of those (unidentified) potential class members they seek to represent, but they do nothing to show that those claims are in fact typical. See Pls.' Mem. at 15-16. This simply does not suffice in light of the evidentiary burden they are required to meet to obtain certification. On that basis, they have failed to satisfy the requirement of typicality.

IV. PLAINTIFFS HAVE FAILED TO ESTABLISH NUMEROSITY.

Plaintiffs also fail to satisfy their burden of establishing numerosity under Rule 23(a)(1). Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. Identification of an "exact" number of potential class members is not required, and there is no specific minimum number of potential members. Celano v. Marriott Intern., Inc., 242 F.R.D. 544, 548 (N.D. Cal. 2007). But Plaintiffs must provide something more than "rank speculation untethered to real facts[]" to satisfy their burden of showing numerosity. Id. at 550; see also Wal-Mart, 131 S. Ct. at 2551 (party seeking class certification "must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."). This is where Plaintiffs have fallen short.

The entirety of Plaintiffs' showing as to numerosity is a speculative exercise in the number of putative class members that might exist; in Plaintiffs' own words, "[g]iven the large groups from which class members may be drawn, there may be well over a thousand putative class members." Pls.' Mem. at 11 (emphases added).

Plaintiffs' methodology for this speculative effort is to begin with SSA's statistics as to the numbers of SSI recipients in April 2015 (8.3 million); estimate a percentage of the United States population that is lesbian, gay, or bisexual (3.5 percent); note that the poverty rate among that group is "as high or higher than that of the U.S. population at large[]" (unspecified); and, finally, estimate the number of same-sex marriages recognized by states as legal prior to the decision in Windsor (between 50,000 and 80,000). Id. The upshot of this effort is Plaintiffs' inference that there "may be" well more than 1,000 members. Id.

This is insufficient to meet Plaintiffs' evidentiary burden. Wal-Mart, 131 S. Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard."). Indeed, the district court in Celano held that a similarly speculative but significantly more substantiated showing by the plaintiffs there failed to satisfy the numerosity requirement. 242 F.R.D. at 548-50. Much like Plaintiffs here, the plaintiffs in Celano argued on the basis of demographic statistics and estimates that their proposed class satisfied numerosity, suggesting on the strength of estimates drawn from four separate sources that the class numbered 1.5 million members. Id. at 548-49. In addition, the plaintiffs submitted twenty-one declarations from potential class members (including three named plaintiffs) in support of that contention. Id. at 548. But the plaintiffs' estimates were insufficient despite being buttressed by multiple declarations, the court held, concluding that the plaintiffs' "census data and statistics are too ambiguous and speculative to establish numerosity." Id. at 549. The court

noted that it did not "expect or require that plaintiffs show the number of potential class members with certainty. But the court does expect that any common sense inferences that plaintiffs urge the court to make[] be based upon something other than rank speculation untethered to real facts." Id. at 550.

That is precisely what Plaintiffs have done here: base their assertion of numerosity on sheer speculation "untethered to real facts." And by contrast to the plaintiffs in Celano, they have not introduced a single declaration from anyone other than the two named Plaintiffs (both of whose claims have been resolved in any event). Satisfaction of the numerosity requirement, like the other elements of Rule 23(a), is an evidentiary burden, not a pleading standard. Wal-Mart, 131 S. Ct. at 2551. Whatever the size of the theoretical class that Plaintiffs seek to represent might happen to be, Plaintiffs have not met that evidentiary burden, and thus have not shown numerosity.

V. PLAINTIFFS HAVE NOT SATISFIED THE REQUIREMENTS OF RULE 23(b).

Finally, even if Plaintiffs had satisfied all of the requirements of Rule 23(a) – and they have not – they have failed to meet their additional burden under Rule 23(b)(2) (the only provision of Rule 23(b) under which they seek to certify a class, see Pls.' Mem. at 18-20).

"Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different

injunction or declaratory judgment." Wal-Mart, 131 S. Ct. at 2557. Class relief must be "indivisible," premised on "conduct . . . that . . . can be enjoined or declared unlawful only as to all of the class members or as to none." Id. Indeed, "the (b)(2) class is distinguished . . . by class cohesiveness . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries." Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155 n.8 (11th Cir. 1983); see also Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO, 216 F.3d 577, 580 (7th Cir. 2000) ("Rule 23(b)(2) operates under the presumption that . . . the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members.").

As set forth in Part II, supra, the relief to which a potential class would be entitled should it prevail on any of the claims asserted – setting aside, arguendo, the fact that named Plaintiffs, at least, would be entitled to nothing, as they have already received the relief they sought when they filed suit – would be anything but cohesive. The essence of the proposed class claims and the requested relief alike is that the potential members' post-Windsor overpayments should be wiped away, never to be recouped. In a nutshell, what Plaintiffs seek is judicially mandated waiver – a regulation-driven process by which SSA forgives overpayment debts if overpaid individuals can establish that they were without fault for the overpayments and that recovery "would defeat the purpose of [the SSI program] or would be against equity and good conscience." 20 CFR § 416.550. The standards for each of these criteria

are individualized, fact-specific, and not susceptible to generalization across a class. See Background, Parts II.B, II.C, II.D, supra. Thus, any injuries proven by the members of Plaintiffs' proposed class by definition would not be capable of being remedied through the type of cohesive, indivisible injunction (or declaration) that is the sine qua non of a Rule 23(b)(2) class.

For this reason, the chief case on which Plaintiffs rely for their Rule 23(b) argument, the Supreme Court's decision in Califano v. Yamasaki, is inapposite. There, the claim asserted was procedural rather than substantive, and narrow in a way Plaintiffs' claims here are not. The plaintiffs there argued simply that they were entitled to pre-recoupment oral hearings from SSA where waiver of overpayment was requested. 442 U.S. at 697. This straightforward procedural claim satisfied Rule 23(b)(2) (as well as the commonality requirement of Rule 23(a)(2)), the Supreme Court held: "The ultimate question is whether a prerecoupment hearing is to be held, and each individual claim has little monetary value. It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." 442 U.S. at 701. Here, by contrast, Plaintiffs do not seek a procedural remedy, much less one as constrained in scope as a pre-recoupment oral hearing. Rather, they seek to have overpayments wiped away for an entire proposed class of overpaid SSI beneficiaries – a remedy that would be substantially affected by "differences in the background of each claim." See id.

In sum, Plaintiffs' suit cannot proceed as a Rule 23(b)(2) class, and certification should be denied accordingly.

CONCLUSION

Ultimately, Plaintiffs have not satisfied their burden of establishing jurisdiction over their claims; their individual claims have been mooted and cannot be salvaged by their class allegations, and they have failed to establish that any putative class member has presented his or her claim to the Commissioner or exhausted required administrative remedies. See Part I. And Plaintiffs have failed to meet their burdens under Rule 23(a) of establishing commonality, typicality, and numerosity or demonstrating that uniform injunctive or declaratory relief would be appropriate under Rule 23(b)(2). Thus, Plaintiffs' motion for class certification should be denied.