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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUGH HELD and KELLEY RICHARDSON-WRIGHT, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security, in her official capacity,

Defendant.

Case No. 2:15-cv-1732 PA (JCx)

[CORRECTED] PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Date: Monday, August 3, 2015
Time: 1:30 p.m.
Courtroom: 15

Honorable Percy Anderson

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Defendant's opposition to class certification rests primarily on a challenge to commonality. ECF 37 at 9 of 31. However, facts undisputed by the Commissioner plainly show that common questions abound. The Commissioner's arguments focus on the waiver adjudication process, claiming that this process is fact-based and based on individual waiver applications. But the Commissioner has placed the cart before the horse. What she overlooks is that this case is itself a challenge to SSA's overpayment and waiver procedures in the circumstances of this case. Here, the necessity of that waiver process is itself the direct consequence of SSA's continued, unlawful discrimination, SSA's admitted failure to consider the evidence already in its possession in making its initial determination of liability, and SSA's failure to abide by the express mandate of the Social Security Act to avoid penalizing recipients who are without fault where doing so would be against equity and good conscience.

In other words, SSA's arguments assume the legality of what Plaintiffs challenge here: the lawfulness of a process which, in these circumstances, is fundamentally incompatible with the Constitution's promises of equal protection and due process and with the requirements of the Social Security Act. In all other respects, including numerosity and typicality, Plaintiffs have met their burden and Defendant offers no direct rebuttal to Plaintiffs' evidence or the reasonable inferences drawn therefrom. To require putative class members to pursue their

claims individually will only compound and reinforce grievous constitutional harms raised by this case.

I. The Court has Subject Matter Jurisdiction

Plaintiffs fully address Defendant's primary arguments regarding subject matter jurisdiction, mootness, and exhaustion in greater detail in their opposition to the motion to dismiss. *See* ECF 35. With respect to the individual Named Plaintiffs, SSA's argument that their claims are fully mooted is wrong. The grant of a monetary waiver did not cure the harm Named Plaintiffs suffered by having to endure the threat of recoupment stemming from the agency's unconstitutional conduct. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (a deprivation of due process "is enough to invoke the procedural safeguards of the Fourteenth Amendment . . . whatever the ultimate outcome of a hearing"); *see also Obergefell v. Hodges*, 576 U.S. ___ (2015) (slip op. at 25) ("Dignitary wounds cannot always be healed with the stroke of a pen."); *id*. at __ (slip op. at 17) (harm caused by failure to recognize marriages "results in more than just material burdens").

The Commissioner also challenges presentment, an argument so weak that she did not make it in her motion to dismiss. But under Ninth Circuit law an initial request for benefits is sufficient to meet the presentment requirement of 42 U.S.C. §405(g), and a recipient need not "re-present" their claim after SSA subsequently terminates, reduces, or withholds benefits. *Briggs v. Sullivan*, 886 F.2d 1132, 1139

(9th Cir. 1989); *Lopez v. Heckler*, 725 F.2d 1489, 1503 (9th Cir. 1984), *vacated on other grounds*, *Heckler v. Lopez*, 469 U.S. 1082 (1984). Class members, who are all SSI recipients, by definition, have applied to receive SSI.

II. Common Questions Abound

As SSA's temporary Emergency Message implicitly acknowledges, this case raises common questions "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In *Dukes*, the Supreme Court found insufficient evidence to determine whether Wal-Mart engaged in a common policy or practice of discrimination. Here, by contrast, there is no dispute regarding the existence of a common SSA policy or practice.

Indeed, SSA admits that the overpayments challenged here are "attributable to the ***post-Windsor*** change in . . . marital-recognition status" caused by SSA's delay in "br[inging] its benefits programs ***into compliance*** with *Windsor*." ECF 37 at 7-8 of 31 (emphases added). It was not until about a year after *Windsor* that SSA even began recognizing the marriages of SSI recipients living with a spouse of the same sex who were residing in a state that recognized their marriage. *See* Held Decl. (ECF No. 26-2) ¶ 10; Richardson-Wright Decl. (ECF No. 26-3) ¶ 12; *accord* Jones Decl. (ECF 37-1) ¶¶ 9, 16. Thus, SSA admits that it continued to

discriminate after *Windsor* and failed to comply with the Supreme Court's *Windsor* mandate invalidating Section 3 of DOMA. In other words, SSA continued to implement DOMA long after the Supreme Court had decreed that it was dead and buried. Had the SSA complied with the law promptly, there would have been no overpayments, no demand for repayment, and no need for a waiver process at all. Given that fact, universally applicable to ***all*** class members, this case raises the following common question: **Is SSA's demand for repayment of overpayments caused by SSA's failure to comply with the Constitution lawful, or is that demand – and the resultant need for the discriminated-against individuals to navigate the waiver process – a vestige and consequence of the SSA's unlawful discriminatory conduct?**

Similarly, SSA admits that, in assessing these overpayments, it will issue a demand for repayment to any individual who has been overpaid. ECF 37 at 10 & 21 of 31. SSA will not consider the uniform evidence, already in SSA's possession, that the overpayment is SSA's, not the recipient's, fault, and whether a demand for repayment in those circumstances violates equity and good conscience. ECF 36 at 28 of 30 (consideration of fault occurs "after an overpayment has been assessed"); ECF 37 at 24 of 31 (admitting that consideration of equity and good conscience "does not even come into play until" until after the repayment demand is sent).

In this case SSA ***already has*** all the information it needs about the circumstances of the overpayment to find that the entire class of Plaintiffs is not at fault, and that recoupment is against equity and good conscience. Unfortunately, SSA simply ignores that evidence and reflexively issues a demand for repayment regardless of these facts.

Defendant's own admissions show that putative class members who were receiving SSI and were living with a spouse of the same sex on the date *Windsor* was decided will get the same notice of overpayment that Named Plaintiffs Held and Richardson-Wright received. When SSA complains that this case is about an "interim . . . outcome," ECF 37 at 22 of 31, it misses the gravamen of Plaintiffs' claims, which is that requiring Plaintiffs to endure and correct that outcome is the result of SSA's illegal conduct. Defendant asserts that "Plaintiffs do not challenge the process they received," *id.*, but this statement is simply untrue. Compl. (ECF 1) ¶ 99 (challenging SSA's failure to consider evidence in its possession).

Thus, in view of the facts universally applicable to the class, this case involves the following common question: **Where an agency possesses evidence that its unlawful application of a discriminatory statute caused an overpayment, can it simply ignore that evidence and put the burden on the discriminated-against individual to appeal the agency's arbitrary determination of liability, or, does Due Process and the Social Security Act**

require SSA to consider this evidence before issuing the repayment demand that operates as the agency's initial determination on the merits?

Lastly, the Social Security Act requires SSA to avoid "penalizing" individuals who are "without fault" if doing so is "against equity and good conscience." In view of the facts discussed above, universally applicable to the class, this case raises the following common question: **Does a demand for repayment of an overpayment caused by SSA's unlawful application of a discriminatory statute "penalize" a recipient who was "without fault" and is such a demand "against equity and good conscience"?**

Defendant argues that Plaintiffs would need to introduce evidence about other unnamed class members' specific intent and circumstances in order to establish commonality. This argument fails for several reasons. First, these overpayments were caused across the board by SSA's failure to implement *Windsor*. That alone is sufficient justification for a class-wide finding that the demands for repayment themselves violate the Constitution and the Social Security Act, regardless of the waiver process those demands trigger. Second, as Defendant concedes, SSA needed no additional evidence or a hearing from Named Plaintiffs Held or Richardson-Wright in order to grant them waiver of recoupment.[1] *See*

[1] In fact, neither asked for a waiver – each asked for reconsideration and SSA converted the request into a request for a waiver.

ECF 37 at 24 of 31, n.4. SSA's decision with respect to their notices of overpayments stated no reason for granting a waiver, relied on no individualized facts, and was based on evidence about the circumstances of the overpayment that SSA had from the start. *See* Held Decl. (ECF 26-2) ¶ 12, Ex. F; Richardson-Wright Decl. (ECF 26-3) ¶ 33, Ex. K. Defendant offers no basis to conclude that other class members would be any different.[2]

III. The Named Plaintiffs are Typical of the Class

Defendant claims that Plaintiffs have failed to show that Named Plaintiffs Hugh Held and Kelley Richardson-Wright are typical of class members, yet fails to rebut anything in their declarations or to offer any evidence that they are atypical. Typicality is demonstrated when the claims of a named plaintiff are reasonably similar to those of the class. *Weinberger v. Thornton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986). "In government benefit class actions, the typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute,

[2] The fact that SSA, due to Acquiescence Ruling 92-5(9), uses a different standard for assessing "against equity and good conscience" in the Ninth Circuit than elsewhere is unpersuasive; couples in Massachusetts who previously suffered under DOMA are no less deserving of a waiver under the terms of the Social Security Act as couples in California. In fact, the Notices of Overpayment that were sent to Ms. Richardson-Wright in Massachusetts use the same language as the notice sent to Mr. Held in California saying that the overpayment can be waived if the individual can prove that s/he is without fault and recovery of the overpayment would be "unfair." Richardson-Wright Decl. Exs. E, F, Held Decl. Ex. D. In any event, the Acquiescence Ruling simply requires SSA to adhere to the Ninth Circuit's ruling in *Quinlivan v. Sullivan*, 916 F.2d 524 (9th Cir. 1990), which is binding on this Court.

regulation or policy as class members." *Rancourt v. Concannon*, 207 F.R.D. 14, 16 (D. Me. 2002) (quoting 5 H. Newberg & A. Conte, *Newberg on Class Actions* § 23:04). Mr. Held and Ms. Richardson-Wright are both SSI recipients subjected to SSA's discriminatory conduct, received notices of overpayment caused by that conduct where the SSA ignored the evidence in its possession, and are entitled to relief – as SSA has admitted – based on the evidence SSA had from the start. They share each of these pertinent characteristics with all other class members.

IV. The Evidence is Sufficient to Allow an Inference of Numerosity

Defendant does not (and cannot) deny that joinder is impractical for a class of low-income individuals scattered from coast to coast who receive benefits under the same national program. Defendant criticizes Plaintiffs' use of qualifiers in estimating size of the putative class and their reliance on evidence of demographic statistics but, notably, does not actually question the accuracy of Plaintiffs' evidence, the reasonableness of Plaintiffs' inferences therefrom, or submit rebuttal evidence that the class is not numerous. This is particularly significant because Defendant is solely positioned to know the exact size of the proposed class – or least how many people have already been harmed by receipt of overpayment notices caused by SSA's belated post-*Windsor* marriage recognition.

Courts have long found that there are no "absolute limitations" on the numerosity requirement. *Gen. Tel. Co. of the Nw., Inc., v. EEOC*, 446 U.S. 318,

330 (1980)*; see also Californians for Disability Rights, Inc. v. Cal. Dep't. of Transp.*, 249 F.R.D. 334, 347 (N.D. Cal. 2008) ("[P]laintiffs do not need to state the exact number of potential class members, nor is a specific number of class members required for numerosity.") (citing *Bates v. United Parcel Service*, 204 F.R.D. 440, 444 (N.D. Cal. 2001)). Here, based on demographic information and common sense reasoning, it is clear that the size of the putative class falls well within the accepted range. *See Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529, 543 (C.D. Cal. 2011) (noting that courts certify classes with as few as 39 members).

Defendant's reliance on *Celano* for the proposition that census data, and equivalent statistical information, may not establish numerosity is unavailing. In fact, courts routinely rely on census data and statistics to determine numerosity. *Shields*, 279 F.R.D. at 544 (rejecting defendant's argument that under *Celano* statistical data is insufficient) (citing *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199 (N.D. Cal. 2007) (distinguishing *Celano*) and *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 608 (N.D. Cal. 2004)); *see also Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). Particularly relevant here, courts have routinely turned to census data and other demographic reports in class action lawsuits where putative class members are same sex

couples. *Harris v. Rainey*, 299 F.R.D. 486, 490 (W.D. Va. 2014); *Strawser v. Strange*, 2015 U.S. Dist. LEXIS 66399, at *4-11 (S.D. Ala. May 21, 2015).

Furthermore, as discussed above, it is certain, based on Defendant's procedures, that ***all*** unnamed individuals who were receiving SSI and were living with a spouse of the same sex as of the date of the *Windsor* decision will get the same demand for recovery of the overpayment that Mr. Held and Ms. Richardson-Wright received, and thus will be members of the class.[3] SSA admits that it issued notices of overpayments with a demand for recovery whenever an overpayment exists, and admits that it systematically failed to bring its marriage-recognition procedures into compliance with *Windsor* until well after that case was decided.

This is very different from *Celano*, in which the plaintiffs asked the district court to speculate about the percentage of people with disabilities "who *would* like to play golf on [Marriott courses] if accessibility, independence, education, and social-acceptance barriers were reduced." 242 F.R.D. 544, 550 (N.D. Cal. 2007) (emphasis in original). Here, by contrast, there is no need to speculate as to people's desires in a counter-factual world. Defendant's inaction and delay in implementing *Windsor* and its systemic policy of seeking to collect the overpayment affects ***all*** same-sex couples on SSI in marriage recognition states.

[3] Counsel for Plaintiffs have been contacted by other class members in several states. McIntyre Decl. at ¶ 6.

This policy affects all putative class members by virtue of their identity and state of residence. *Situ v. Leavitt*, 240 F.R.D. 551, 559-60 (N.D. Cal. 2007) (class action lawsuit challenging government policy where numerosity was met based on declarations and common sense inferences from uncontested demographic data).

Defendant cannot plausibly dispute that joinder is impracticable. Joinder is impracticable for any nationwide class numbering in the hundreds when individual members of the putative class are unknown and cannot be readily identified by Plaintiffs. *Shields*, 279 F.R.D. at 545; *see also Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal. 1984) (class members are by definition poor, disabled, and do not have the economic means to pursue remedies on an individual basis), *aff'd*, 747 F.2d 528 (9th Cir. 1984).

V. This is a Prototypical Rule 23(b)(2) Class Action

This case fits easily within the criteria for certification under Rule 23(b)(2), because SSA "has acted or refused to act on grounds that apply generally to the class." Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 131 S. Ct. at 2557. As discussed above, this case involves a challenge to SSA's policies and procedures on a class-wide basis based upon undisputed facts universally applicable to all class members. In *Wal-Mart*, the Supreme Court held that Rule 23(b)(2) certification was inappropriate where each class member would be

entitled to an individualized award for damages; in contrast, as the Ninth Circuit has clearly stated, civil rights suits for declaratory and injunctive relief are exactly the kinds of cases that Rule 23(b)(2) was intended to authorized. *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). SSA describes waiver of Plaintiffs' overpayment as "forgiving their debt," ECF 37 at 8 of 31, but this offensive characterization misses the point entirely: Plaintiffs, as a group, cannot be found to owe a debt arising from the Commissioner's own illegal and unconstitutional practice.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court certify this class, appointing Named Plaintiffs as class representatives and Justice in Aging, Gay & Lesbian Advocates & Defenders, and Foley Hoag LLP as class counsel.

Dated: July 28, 2015.

HUGH HELD and
KELLEY RICHARDSON-WRIGHT

By their attorneys,

/s/ Stephen T. Bychowski

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