RECORD NO. 16-1371

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

DENISE HART; THEODORE VERBICH; JOHN JONES;
For Themselves and All Others Similarly Situated;
LARITTA FRY,

Plaintiffs - Appellants,

and

MARY L. GRICE, For Herself;
SHIRLEY JONES; JOSEPH MCCALLION,
For Themselves and All Others Similarly Situated; IDA GREER,

Plaintiffs,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security Administration,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

OPENING BRIEF OF APPELLANTS

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RULE 26.1 STATEMENT OF CORPORATE AFFILIATIONS

Pursuant to FRAP 26.1 and Local Rule 26.1, Plaintiffs/Appellants state:

1) No Appellant is a corporate entity or other publicly held entity.

2) No Appellant has any parent corporations.

3) No Appellant has issued stock.

4) No other corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

5) No Appellant is a trade association.

6) This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF JURISDICTION

Although the district court dismissed this case for lack of subject-matter jurisdiction, Appellants contend herein that the court had jurisdiction under 42 U.S.C. §405(g), and 28 U.S.C. §§1361 (mandamus) and 1331 (federal question), and did not lose jurisdiction because of mootness. The district court issued a final order dismissing all claims on March 14, 2016. Appellants filed a notice of appeal on April 1, 2016. This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in finding that Appellants Hart and Jones' claims for class relief were moot, where they had not been afforded a fair opportunity to show that class certification was warranted?
2. Whether the district court erred in denying Appellants Hart, Jones, and Verbich's initial claim for class certification?
3. Whether the district court erred in finding that the Defendant's issuance of waivers rendered Hart and Jones' individual claims moot?
4. Whether the district court erred in declining to exercise mandamus jurisdiction or, under the "*Michigan Academy*" exception, federal question jurisdiction over Appellants' challenges to Defendant's systemic due process violations?

5. Whether the district court erred in finding that Appellant Verbich failed to "present" his claims to the SSA, and therefore, that the court lacked jurisdiction over his claims under 42 U.S.C. §405(g)?
6. Whether the district court erred in denying the motion of Appellant Fry to join this lawsuit and file an amended complaint?

STATEMENT OF THE CASE

This appeal arises from the district court's dismissal of a class action lawsuit alleging that the Social Security Administration ("SSA") systemically violated due process by collecting alleged decades-old "overpayments" through the seizure of thousands of tax refunds without proper notice or reliable evidence, and without giving the taxpayers any opportunity to challenge the validity of the "debts." This appeal raises several important issues, including: (1) In a class action case filed by plaintiffs who had live claims when they filed the case, and who promptly moved for class certification, is the district court required to give plaintiffs a meaningful opportunity to seek class certification? (2) Does the district court have mandamus or federal question jurisdiction over a lawsuit challenging SSA's systemic failure to follow its own regulations and provide the procedural rights that are essential to the fair operation of the administrative processes under 42 U.S.C. §405(g)? Both questions should be answered in the affirmative, and this case should be reversed and remanded.

A. Overview of Conduct Giving Rise to Lawsuit.

In 2012, SSA began to use the Treasury Offset Program ("tax offsets") to collect old alleged overpayments dating as far back as the 1960s. The SSA's regulations once imposed a 10-year limitation on the use of tax offsets to collect overpayments, but in 2011, following a legislative amendment, SSA modified its regulations to remove the time limit. According to a July 2015 report of the SSA Office of Inspector General ("OIG"), from 2012 through 2014, SSA referred 10-year-old or older "debts" of more than 250,000 individuals to the Treasury Department for collection through tax offset. *See* "The Social Security Administration's Use of the Treasury Offset Program," SSA/OIG Report A-04-14-14014, July 2015 (the "SSA/OIG Report") (accessible at http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-04-14-14104_0.pdf) at 4, Joint Appendix ("JA") 258; Proposed Second Amended Complaint, ECF 63-1, JA 185, ¶119. As a result of publicity following this lawsuit, on April 14, 2014, the Acting Commissioner of SSA, Appellee Carolyn Colvin, temporarily suspended SSA's future use of tax offsets. SSA/OIG Report at 3, JA 257; ECF 63-1, JA 174, ¶65.

In recouping these old "debts," SSA violated the due process rights of taxpayers in at least five ways. First, SSA failed to provide reasonable pre-seizure notice to many of the taxpayers. Prior to the seizures, SSA sent many notices to former addresses where the taxpayers had not lived in decades, even though SSA

had information about their current addresses. *See* First Amended Complaint, ECF 15, JA 49-51, 59, ¶¶70-75, 107-109; ECF 63-1, JA 183-184, ¶109-112. More than half of the notices SSA sent to taxpayers were returned as "undeliverable," and in thousands of those cases, SSA still went ahead with the tax offset. SSA/OIG Report at 5, JA 259; ECF 63-1, JA 186, ¶119. Even when SSA sent notices to the right places, the notices failed to contain sufficient information for the taxpayers to recall the debts and their circumstances. SSA/OIG Report at 12-13, JA 266-267; ECF 63-1, JA 186, ¶119. Moreover, in many cases, there is no evidence that SSA had notified the taxpayers years earlier, when SSA had first determined there was an overpayment. SSA/OIG Report at 6, JA 260; ECF 63-1, JA 186, ¶119.

Second, many of the "debts" arose from overpayments not made directly to the taxpayers, who were children at the time, but instead made to adults (typically surviving parents or guardians) whom SSA had designated as "representative payees." SSA/OIG Report at 7, n.22, JA 261; ECF 15, JA 50-51, 59, ¶¶73-75, 79, 107-109; ECF 63-1, JA 183-184, 186, ¶¶109-112, 119. In SSA's view, however, even if an overpayment was made to a representative payee whom SSA designated to act on behalf of a child, the child is personally liable for the overpayment and must repay it upon turning 18. ECF 35 at 23.

Third, although the Government may sometimes revive expired civil claims by revoking a statute of limitations, under the circumstances here, the Government has violated due process. After the passage of so many years, the taxpayers had no reason to retain documentation relevant to the alleged overpayments – especially ones the taxpayers did not know about. ECF 15, JA 49, ¶69. Also, SSA had a policy of discarding evidence of overpayments after seven years. *Id*., JA 52, ¶81. Thus, for many of these alleged overpayments, SSA's only remaining "evidence" is a conclusory statement in its computer system saying that the taxpayer was overpaid — the kind of conclusory statement that would not satisfy a "plausibility" pleading standard.

Fourth, when the taxpayers, after learning that their tax refunds were seized, have asked for evidence of the alleged overpayments, SSA has refused to provide it. *Id*., JA 47, 50-51, ¶¶57-58, 71, 80.

Fifth, SSA has refused to permit the taxpayers to appeal SSA's original overpayment determination by seeking "reconsideration," the mandatory first step in appealing adverse SSA decisions. *Id*., ¶84. Instead, SSA has maintained that their sole remedy is to seek a "waiver" of enforcement of the debts. *Id*., JA 47, 53, 59, ¶¶60, 84, 110; EM-14032, ECF 67-2, JA 216-218.

By circumventing its own notice and appeal procedures, SSA has avoided ever having to prove that the taxpayers actually incurred the debts that SSA

forcibly recouped through tax offsets. In addition, by refusing to allow reconsideration, SSA has denied the taxpayers any opportunity to litigate important substantive legal questions in federal court.

B. Regulatory Background.

Under its own regulations, when SSA learns of a potential overpayment, it must make an "initial determination" based upon the preponderance of the evidence. 20 CFR §404.902. At this stage, the SSA has the burden of proving the existence and amount of the overpayment. *McCarthy v. Apfel*, 221 F.3d 1119, 1124 (9th Cir. 2000); *Cannuni ex rel. Cannuni v. Schweiker*, 740 F.2d 260, 263 (3d Cir. 1984); *United States v. Smith*, 482 F.2d 1120, 1124 (8th Cir. 1973). If SSA initially determines that there has been an overpayment, SSA must immediately send a notice to the person from whom SSA is seeking recovery. 20 CFR §404.502a. The notice must explain the amount of the overpayment, when and how it occurred, and the person's right to seek reconsideration of SSA's determination. *Id*.

To appeal SSA's initial determination of an overpayment, the person must make a timely request for reconsideration. §404.909; *Sipp v. Astrue*, 641 F.3d 975, 980 (8th Cir. 2011). SSA must then conduct a *de novo* evaluation of all the evidence on which it based its initial determination, along with any additional

evidence that the person may choose to submit, and make another decision based on the preponderance of the evidence. 20 CFR §404.920.

If SSA denies reconsideration of its overpayment decision, the person may request a hearing before an Administrative Law Judge ("ALJ"). §§404.930, 404.933. If the ALJ rules adversely, the person can appeal to SSA's Appeals Council. §404.968. If the Appeals Council upholds the ALJ's decision, this constitutes a final agency decision. Having now exhausted remedies within SSA, the person may challenge SSA's decision by bringing a civil action in the United States District Court for the judicial district in which the person resides. 42 U.S.C. §405(g). The district court must uphold SSA's determination if the findings are supported by substantial evidence and the SSA applied the correct law. *Id.*; *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990).

As a basic matter of due process, these appeal rights all presuppose that before SSA can consider any debt legally enforceable or attempt collection, SSA must have provided fair notice to the person from whom collection is sought, *see* 20 CFR §404.502a, and (2) a fair opportunity for reconsideration of SSA's initial overpayment determination, because this is the mandatory first step in the appeal process leading to judicial review of SSA's action. §404.905; *Sipp v.* Astrue, 641 F.3d at 980 (unless a person timely requests reconsideration, SSA's overpayment determination becomes "binding and not subject to judicial review").

After making a final determination that a person is liable to repay an overpayment that is "certain in amount, past due and legally enforceable," SSA may refer the overpayment to federal and state tax authorities for collection through offset of income tax refunds owed to the person. 20 CFR §404.520(b). Before making the referral, however, SSA must take additional steps to ensure due process. §404.520(a); 31 U.S.C. §3720A(b). SSA must first send a "written notice of intent" to the person. 20 CFR §404.521. The written notice must state, *inter alia*, the amount of the overpayment; that SSA will request a reduction in the person's federal and State income tax refunds unless, within 60 days, the person provides evidence that the overpayment is not past due or legally enforceable, or asks SSA to waive collection; that SSA will review any evidence presented that the overpayment is not past due or not legally enforceable; and that the overpaid person has the right to inspect and copy SSA's records related to the overpayment. §404.521-404.524. If the individual submits evidence disputing that the overpayment occurred or that it was legally enforceable, SSA must issue written findings that include a supporting rationale for the findings. After SSA issues such findings, it may refer the overpayment to the Department of Treasury for collection through the offset of tax refunds. §404.525.

Separate from its process for establishing that a person owes a legally enforceable debt, SSA has a "waiver" process through which the person may ask

SSA to forego recoupment of a debt. In seeking a waiver, a person does not contest the validity of SSA's overpayment determination. *Sipp v. Astrue*, 641 F.3d at 980. On the contrary, SSA's waiver form requires the person to acknowledge that he/she has been overpaid. *See* Form SSA-632-BK (accessible at https://www.ssa.gov/forms/ssa-632.pdf), JA 242-244, 249; ECF 63-1, J.A. 167, ¶36. SSA is supposed to grant the waiver if: (1) the person was not "at fault" for the overpayment; and (2) recoupment of the overpayment would result in severe financial hardship (defeating the purpose of the benefits program), or collection of the debt would be against "equity and good conscience." 42 U.S.C. §404(b); 20 CFR §404.506. The person seeking a waiver has the burden of proving entitlement to the waiver. *Sipp v. Astrue,* 641 F.3d at 981.

SSA construes the term "equity and good conscience" narrowly, and not to cover situations where child beneficiaries, upon turning 18, are being held liable for overpayments made to representative payees. 20 CFR §404.509; ECF 35 at 23.

C. Commencement of this Lawsuit.

This lawsuit originated as an individual case (not a class action) when, on April 8, 2014, Plaintiff Mary Grice ("Grice") filed a Complaint. ECF 1. Grice alleged that SSA violated her due process rights by seizing her tax refund, without any prior notice, to repay an alleged overpayment of survivor benefits under the account number of her father, who died in 1960 when Grice was a child. ECF 15,

JA 30-31, 43-48, ¶¶7, 40-63. Grice received benefits as a student in the 1970s and was never aware of any overpayment. *Id*., JA 43, ¶41. Grice first learned of an alleged overpayment in February 2014, when she received notices stating that her federal and state tax refunds had been intercepted at the behest of SSA. *Id*., JA 44-45, ¶¶47-48. Grice contacted SSA and was told to go to a field office and request a waiver. *Id*., JA 45, ¶49. She then met with an SSA official, who said that in 2012, SSA had tried to send a notice to her at a North Carolina address. Grice had not lived there for about 35 years; moreover, SSA apparently knew Grice's current address in Maryland, where it had been sending Grice's annual Social Security Earnings Statements. *Id*., JA 44-46, ¶¶42, 46, 50-51. Grice asked the SSA official to provide her with relevant records, but he said he could only provide that information to the extent it pertained specifically to her – even though, he said, she could be held liable for overpayments made to other persons in her family. *Id*., JA 46-47, ¶¶56-57. He told Grice that she could request a waiver of the overpayment but said it "would be denied" because she was working and owned a home and car. *Id*., JA 47, ¶60. He did not advise Grice that she could request reconsideration of the overpayment. *Id*., JA 47, ¶59.

Grice's filing of the instant case, and its exposure of SSA's practices, received nationwide publicity, including coverage on the front-page of the April 11, 2014 edition of *Washington Post*, national CBS and ABC TV news broadcasts,

and Comedy Central's *The Daily Show*. *Id*., JA 48, ¶64. In the wake of this publicity, SSA paid Grice her tax refund on April 17, 2014, *id*., JA 48, ¶66, and Acting Commissioner Colvin announced the suspension of future referrals of 10-year-old or older debts for tax offsets pending an internal review. *Id*., JA 48, ¶65. At this point, however, SSA had already made 264,558 such referrals, *i.e.*, over two-thirds of the 372,838 10-year-old or older debts in SSA's system. SSA/OIG Report at 4, JA 258.

On June 20, 2014, Appellants Denise Hart, John Jones, and Theodore Verbich, whose tax refunds had also been seized by SSA, joined this lawsuit as Plaintiffs and filed an amended, class action complaint against SSA. ECF 15, JA 28. Having already received her tax refund, Grice did not seek to become a class representative, although she continued to pursue her own claims because SSA had not released her from her alleged debt.

D. Factual Allegations of Individual Appellants.

1. Theodore Verbich.

Appellant Theodore Verbich, a Maryland resident, was notified by SSA in July 1979 that he had received overpayments totaling $723.00, consisting of one alleged overpayment in the amount of $171.40 in January 1977, and another in the amount of $551.60 in March 1977. In 1979, Verbich disputed the $171.40 overpayment, and he and SSA reached a resolution whereby he would repay the

remaining $551.60. Verbich repaid that amount and the matter appeared to be closed. ECF 15, JA 49, ¶68; Declaration of Theodore Verbich, ECF 30-2, JA 91.

Verbich kept his records concerning the incident for approximately 25 years. In around 2004, believing the matter to have been settled, he shredded his records. ECF 15, JA 49, ¶69.

On March 23, 2014, Verbich received a notice stating that $171.40 had been "intercepted" from his State tax refund to satisfy a "debt" to SSA. Upon calling SSA, Verbich was told his tax refund was intercepted to repay an "overpayment" from January 1977. Verbich asked for records explaining how SSA had determined what Verbich owed, but he was told SSA could not provide them. Verbich asked why he hadn't been notified prior to the interception of his tax refund, and he was told that SSA had sent a notice to his "last known address." Verbich never received such a notice. Verbich has lived at his current address since July 1984, and SSA had sent his annual Social Security Earnings Statements to that address. *Id*., JA 49-50, ¶¶70-72.

2. John Jones.

Appellant John Jones, a Maryland resident, lost his father in 1967, when Jones was seven. While he was a child, his mother received SSA payments for survivor benefits. SSA never made payments to Jones himself. In March 2014, Jones received a notice stating that $3066.60 had been intercepted from his federal

tax refund and applied to a "debt" allegedly owed to the SSA. Jones had not received any prior notice concerning any alleged overpayment. Since 2007, Jones has lived at the same address, where he has received annual Social Security Earnings Statements. *Id.*, JA 50-51, ¶¶73-75; Declaration of John Jones, ECF 30-3, JA 95.

Soon afterwards, Jones went to his local SSA office. He was instructed to submit a request for a waiver, and he did. About a week later, SSA returned his completed waiver form by mail, along with a note saying: "Unfortunately, we can do nothing about this overpayment. The overpayment has been paid in full. No issues outstanding." Jones returned to the SSA office and was told that because his "debt" was "paid in full," SSA could not "re-open" his case. ECF 15, JA 51, ¶¶76-78. Jones asked when the last benefits payment had been made to his mother; he was told it was in August 1978, *i.e.*, before he turned 18. *Id.*, JA 51, ¶79. Jones asked to see the file concerning the overpayment, but he was told that he needed a lawyer to fill out a Freedom of Information Act request to receive the information – if it was available. Jones was told that SSA had sent notices concerning the overpayment to his mother at an address in Baltimore, Maryland. Jones had last lived at that address in 1980, and his mother had died in 1982. *Id.*, JA 51, ¶80.

On April 10, 2014, Jones received a voicemail message from the SSA employee whom Jones had met two days earlier. In the message, the SSA

employee said there "is no paper folder still existing" for Jones's case because "it is usually after seven years that they are destroyed." He said there was "no record of the notices that were sent because this was prior to the computer days." He also said he had mailed Jones a letter that stated SSA's "policy on who is liable for overpayments on the record. It's not just the person who was the number holder; it's also any auxiliaries on that record, such as wives and children." *Id.*, JA 52, ¶81.

On April 11, 2014, Jones sent a letter to SSA requesting reconsideration of his claim and appealing SSA's decision to take his tax refund without notice. Jones complained about being held responsible for a debt incurred by someone else while Jones was a minor, and about SSA's failure to provide him with evidence of the alleged debt. *Id.*, JA 52-53, ¶83. In May 2014, Jones received a written response from SSA. SSA said its records showed "that we sent proper notification to you and the Post office did not return this notice as undeliverable." It continued, "If you think you should not have to pay us back for another reason, you may request a waiver." Finally, it said: "Your Reconsideration request was dismissed by the Payment Center since the correct action should have been a waiver request. To file a Reconsideration, you must feel the overpayment was not a true overpayment and have proof to the contrary." *Id.*, JA 53, ¶84.

By dismissing Jones' Request for Reconsideration, rather than considering its merits, SSA foreclosed Jones' ability to appeal its decision. SSA's rules state:

"Dismissal of a Request for Reconsideration is the rejection of or refusal to accept the request. The action makes the prior determination the final determination of the Commissioner. A dismissal is not subject to appeal." SSA Program Operations Manual System ("POMS") GN 03102.100(C)(5).

3. Denise Hart.

Appellant Denise Hart (currently known as "Denise Smith," but referred to herein as "Hart") resides and works in Pennsylvania. Her mother died in 1976, when Hart was a minor, and Hart believes that her father received Social Security survivor benefits. On February 28, 2014, Hart received a federal tax refund that was $755 less than what she expected. Hart then learned that the $755 was set off against a "debt" to SSA. Although Hart had regularly received annual Social Security Earnings Statements at her current address, Hart had not received any prior notice concerning either the alleged overpayment or the tax offset. ECF 15, JA 59, ¶¶107-109; Declaration of Denise Hart, ECF 30-5, JA 99.

Hart called SSA and was told she should submit a waiver request. In March 2014, Hart submitted the waiver request at the local SSA office. She told an SSA employee that she had not received any notice prior to the tax offset; he laughed and said the notice would have been sent to the same

address where the benefits had been sent – *i.e.*, an address where Hart had not lived since 1981. ECF 15, JA 59, ¶¶110-111.

4. Laritta Fry.

Appellant Laritta Fry, a resident of Houston, Texas, has never received any benefit payments from SSA. She believes that, after her father died in 1967, her mother received SSA benefit payments, but Fry was a child at the time. In April 2014, she received a notice saying that her tax refund had been seized to offset a "debt" to SSA. This was the first notice Ms. Fry received about the alleged debt. On May 5, 2014, she submitted to SSA a Request for Reconsideration, claiming entitlement to all the money she had overpaid on her taxes, denying responsibility for any "debt" to SSA, and asking to see SSA's evidence pertaining to the alleged debt. ECF 63-1, JA 183-184, ¶¶109-112.

Later in May 2014, Fry called SSA to inquire into the status of her Request, and she was told it would take weeks or months for it to be resolved. She was also told she had been sent a notice regarding the overpayment in January 2013, but the SSA representative refused to say where SSA had sent the notice. ECF 63-1, JA 184, ¶113. In September 2014, Fry went to a local SSA field office. She was told to submit a waiver request, which she did. *Id.*, JA 184, ¶¶114-115.

In November 2014, Fry received a "Notice of Overpayment" from SSA, stating that Fry owed $1,627.00 and that SSA had previously sent "proper" notice to an address in Louisiana. Fry's mother last lived at that Louisiana address in 1986; Frey herself last lived there in 1982. The November 2014 notice said that if Fry could prove she had not received the earlier notice, SSA could refund the confiscated taxes, but that "refunding the money will not eliminate your overpayment," and SSA was willing to "discuss other repayment options." *Id.*, JA 184-185, ¶¶116-117.

In July 2015, Fry received another notice from SSA stating that SSA had become aware that Fry did not receive an earlier SSA notice. Fry called SSA at the number provided on the notice, but an SSA official said his office only collected money that had been overpaid, and he could not answer any of Fry's questions. *Id.*, ¶118. SSA still has not acted on her Request for Reconsideration or returned her tax refund.

E. Proceedings Below and Subsequent Factual Developments.

In their First Amended (class action) Complaint ("FAC") filed in June 2014, ECF 15, JA 28-82,[1] Appellants Hart, Jones, and Verbich alleged that SSA violated the Due Process Clause, as well as various statutes and regulations, by: failing to

[1] Appellants originally filed the FAC on June 20, 2014, but they were required to re-file the pleading on June 23, 2014. *See* ECF 10, 14, 15.

provide reasonable notice to Plaintiffs, and thousands of similarly situated persons, prior to collecting their alleged debts through tax offset, *id*., ¶¶70-72, 74-75, 108-111, 120-121, 138-143; collecting alleged debts that were more than 10 years old, where collection had once been time-barred and SSA had already destroyed its records pertaining to such debts, *id*., ¶¶68-71, 73-74, 81, 107-108, 120-121, 132-137; and collecting alleged debts from taxpayers other than those who were the actual recipients of Social Security benefit payments, including taxpayers who were children at the time of the alleged overpayments. *Id*., ¶¶73-74, 79, 107-108, 120-121, 144-155. The FAC further alleged that SSA failed to notify Appellants when SSA initially determined that they had received overpayments. *Id*., ¶¶4, 75, 109, 120. Finally, the FAC alleged that, after Appellants finally learned of the alleged debts and contacted SSA, SSA failed to disclose the underlying circumstances or provide any evidence concerning the debts, *id*., ¶¶71, 81, 110, and SSA failed to provide an opportunity for reconsideration. *Id*., ¶¶84, 87, 110. The FAC sought injunctive and declaratory relief forcing SSA to release the tax refunds taken from putative class members without prior notice, to stop engaging in unlawful, systemic practices, and to provide putative class members all the procedural and substantive rights to which they were entitled.

At the time they filed their class action complaint, Hart, Jones, and Verbich also filed a motion for class certification, along with a request to stay consideration

of the motion so that the parties could conduct class-related discovery and briefing. ECF 11, JA 14-27. Their motion said:

> Plaintiffs are filing this motion for class certification at this time in order to preempt the possibility that the Government might take actions as to the individual Plaintiffs that could render this lawsuit moot without enabling the putative class members to have their day in court. … Plaintiffs do not want to give the Social Security Administration the opportunity to "pick off" the other individual Plaintiffs … at this time and thereby render their class action allegations moot and deny relief to the many thousands of other persons who are similarly situated.

Id. at 10, JA 23. With SSA's consent, the court granted the request to defer consideration of the motion until the parties could engage in discovery and briefing on class certification issues. ECF 21, JA 83.

On August 15, 2014, SSA moved to dismiss the lawsuit for lack of subject-matter jurisdiction or, alternatively, for failure to state claims for relief. ECF 25. On August 22, 2014, SSA also moved to stay discovery. ECF 26. On September 23, 2014, Plaintiffs filed oppositions to SSA's motions to dismiss and to stay discovery. ECF 30, 31. Plaintiffs asked for immediate discovery on matters relating to jurisdiction and class certification. ECF 31 at 2-3. On December 2, 2014, the district court granted SSA's motion to stay discovery pending the disposition of the motion to dismiss. ECF 37.

On March 31, 2015, the district court issued a Memorandum Opinion and Order granting SSA's motion to dismiss in part, and denying it in part. ECF 46, JA

104-146; ECF 47, JA 147-148. The court declined to exercise mandamus or federal question jurisdiction over Plaintiffs' claims, and it dismissed Verbich from the lawsuit for failing to "present" his claims to SSA. The court permitted the remaining Plaintiffs (including Appellants Jones and Hart) to proceed with their claims, exercising jurisdiction under 42 U.S.C. §405(g). The court held that these Plaintiffs had adequately presented their claims to SSA, that Plaintiffs were excused from the "exhaustion" requirement, and that they plausibly stated claims for relief. ECF 46, JA 104-146.

The court also denied without prejudice Plaintiffs' June 20, 2014 motion for class certification. The court's justification for denying the motion was that "the motion has now been pending for approximately eight months without briefing." ECF 46 at 6 n.2, JA 109. *See also* Transcript of March 6, 2015 Hearing, ECF 55 at 60-63; ECF 85 at 12, JA 233.

Instead of filing an Answer, on May 1, 2015, SSA moved to have the case remanded to SSA for further factual findings as to the individual Plaintiffs. ECF 50. SSA argued that because the district court had asserted jurisdiction solely under 42 U.S.C. §405(g), Plaintiffs were forbidden from conducting any discovery, even on issues related to class certification. ECF 50-1. At the same time, SSA moved to extend its time for filing an Answer. ECF 51. Plaintiffs opposed both motions, ECF 52, 53, arguing that they would "further delay the onset of discovery

in this case." ECF 53 at 3. On May 7, 2015, the court granted SSA's motion to extend its time for filing an Answer. ECF 54.

On July 8, 2015, SSA filed a notice saying it had issued a "waiver" to Appellant Hart, purporting to release her "debt." ECF 57, 57-1, JA 149. The court then scheduled a motions hearing for Monday, August 3, 2015. ECF 59. However, on Friday, July 31, 2015, SSA filed a notice saying it was issuing "waivers" to the two remaining Plaintiffs, *i.e.*, Grice and Appellant Jones. ECF 60, 60-1, JA 150. Although Grice had never requested a waiver, and the SSA had refused Jones' earlier attempt to submit a waiver form, SSA said it was treating their participation in this lawsuit as "implied requests" for waivers. ECF 60-1, JA 150-151, ¶¶3, 7. SSA further said it was withdrawing its motion to remand and wished to adjourn the oral argument set for the following Monday. ECF 60. At Plaintiffs' request, however, the court converted the motions hearing to a status conference. At the status conference, SSA said it would be filing a new motion to dismiss based on mootness, and the court set a briefing schedule.

On August 17, 2015, SSA moved to dismiss based on mootness and lack of subject-matter jurisdiction. ECF 62. On September 3, 2015, Plaintiffs filed an opposition to SSA's motion to dismiss, arguing that SSA's issuance of waivers did not moot Plaintiffs' individual claims, and even if that were the case, that it did not moot their claims on behalf of the class. ECF 65. Plaintiffs also filed several

motions of their own: (1) to add two new plaintiffs, including Appellant Laritta Fry (a resident of Texas), and to file a Second Amended Complaint, ECF 63; (2) again seeking class certification, and an order staying that motion so the parties could conduct discovery and file appropriate briefs, ECF 64; and (3) asking the court to issue a scheduling order and permit immediate discovery. ECF 67. The district court held another motions hearing on November 15, 2015. ECF 76.

On March 14, 2016, the district court issued a Memorandum and Order granting SSA's motion to dismiss based on mootness, and denying Plaintiffs' second motion for class certification and motion for a scheduling order. ECF 85, JA 222-237; ECF 86, JA 238. The district court also denied Plaintiffs' motion to add two new plaintiffs, reiterating its earlier holding that its jurisdiction was based solely on 42 U.S.C. § 405(g), and further holding that, because both proposed new plaintiffs lived and worked outside Maryland, they failed to satisfy § 405(g)'s requirement that beneficiaries file suit in the judicial district where they reside or work. ECF 85 at 14-15, JA 235-236. Plaintiffs Hart, Jones, Verbich, and Fry filed a timely notice of appeal on April 1, 2016. ECF 87, JA 239-241.

SUMMARY OF ARGUMENT

The claims that Appellants Hart and Jones have asserted as class representatives are not moot, regardless of the status of their claims as individuals. The Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663

(2016) ("*Campbell-Ewald*"), acknowledges that "a would-be class representative with a live claim of her own must be afforded a fair opportunity to show that certification is warranted." *Id*. at 672. This principle derives from the fact that, when filing a class action case, the would-be representative has a personal stake in seeking class certification, in addition to the individual relief sought. When Hart and Jones filed their class action complaint, their individual claims were indisputably live, and they sought, but were denied, the opportunity for class certification.

The Supreme Court has also held that a would-be class representative has the right to appeal an adverse decision on class certification, even if subsequent events moot that person's individual claim for relief. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). Here, Hart and Jones filed a motion for class certification while their individual claims were live. Defendant moved to dismiss the case in August 2014, and while that motion was pending, the court refused to let Hart and Jones proceed with the class-related discovery needed to support the motion for certification. More than seven months later, when the court ruled on the motion to dismiss (denying it in part), the court denied Appellants' class certification motion because it had been pending on the court's docket for approximately eight months. The court's order denying the class certification

motion should be reversed, and Appellants should be allowed to pursue class-related discovery, submit briefing, and have their motion considered on the merits.

In any event, the individual claims of Appellants Hart and Jones are not moot. The "waivers" that SSA issued are mere promises that SSA could revoke after this litigation is terminated, and SSA never offered to consent to judgment affording them all the relief they sought in this case.

The district court also erred in rejecting mandamus and federal question jurisdiction over the claims asserted by Appellants Verbich, Hart, and Jones, and holding that 42 U.S.C. §405(g) provided the sole basis for jurisdiction. This case is controlled by *U.S. ex rel. Rahman v. Oncology Assoc., P.C.*, 201 F.3d 277 (4th Cir. 1999), where the defendants sought mandamus relief to compel the Government to process certain Medicare claims in accordance with the ordinary administrative review process. The Government countered that mandamus relief was inappropriate because the defendants could obtain adequate relief under §405(g). This Court held, as it should here, that mandamus relief was appropriate to compel Government officials to follow, rather than stymie, the administrative review process set forth in agency regulations.

The district court also should have exercised federal question jurisdiction under the "*Michigan Academy*" exception to the provision in §405(h) that ordinarily removes federal question jurisdiction over claims arising under the

Social Security Act. That exception applies here because SSA has denied Appellants any opportunity for reconsideration of the validity of SSA's overpayment determinations, and in so doing, has cut off Appellants' avenue for judicial review of those determinations under §405(g).

Even if the district court correctly found that its sole basis for jurisdiction was §405(g), which requires that claims be "presented" for a final agency decision, it erred in concluding that Appellant Verbich failed to meet that requirement. Here, prior to seizing the tax refunds, SSA rendered final decisions that there were enforceable debts. Moreover, in Verbich's specific case, in 1978, decades before SSA seized his tax refund, Verbich had disputed the overpayment decision, and he and SSA reached a compromise resolution. Even after the tax seizure, Verbich tried to invoke his right to inspect relevant documents -- which SSA refused -- again satisfying the "presentment" requirement. If Verbich is reinstated in this lawsuit, neither his individual claims nor his class action claims are moot.

Finally, the district court, having erroneously dismissed the claims of the other Appellants, also erred in denying Appellant Fry's request to join this lawsuit as an additional plaintiff and file an amended complaint.

STANDARD OF REVIEW

The district court's rulings on subject-matter jurisdiction, including its ruling on mootness, are reviewed *de novo*. *Simmons v. United Mortg. & Loan Inv., LLC*,

634 F.3d 754, 762 (4th Cir. 2011). The court's ruling on class certification is reviewed for abuse of discretion. *Brown v. Nucor Corp.*, 785 F.3d 895, 901 (4th Cir. 2015). The denial of leave to join additional plaintiffs and amend the complaint is reviewed for abuse of discretion. *Laber v. Harvey*, 438 F.3d 404, 426-29 (4th Cir. 2006) (*en banc*).

ARGUMENT

I. The Claims of Appellants Are Not Moot.

In dismissing the class action claims asserted by Hart and Jones as "moot," the district court erred in three respects. First, Hart and Jones had live claims when they filed this class action case in June 2014, but the court failed to give them a fair opportunity to pursue class certification. Second, the court denied their June 2014 motion for class certification without good cause. Third, the court erred in finding that their individual claims were moot, where the "waivers" granted by SSA were revocable, and SSA did not offer to consent to judgment or grant the other relief they requested.

Moreover, the claims of Appellants Verbich (dismissed on other grounds) and Fry (not permitted to join the lawsuit) are still unquestionably live. SSA never waived Verbich's or Fry's alleged debts, and SSA still holds Fry's tax refund. Verbich and Fry contend that the district court erred in its rulings with respect to them, and if those are reversed, their class action claims are not moot.

A. Class Action Plaintiffs Who Have Live Individual Claims for Injunctive and Declaratory Relief Are Entitled to a Fair Opportunity to Seek Class Certification, Regardless of Whether The Defendant Grants Full Relief to Plaintiffs as Individuals.

On June 20, 2014, when Appellants Hart and Jones filed their class action complaint, they unquestionably had "live claims." Their tax refunds had been seized to pay their alleged "debts," and SSA had not yet refunded their money or granted them waivers.

Hart and Jones brought several class action claims for injunctive and declaratory relief. First, they contended that SSA violated procedural due process by failing to provide (a) reasonable notice of SSA's initial determinations concerning their debts, (b) reasonable notice prior to using tax offsets, and (c) any opportunity, through reconsideration or further appeals, to challenge the validity of their "debts." Second, Hart and Jones contended that SSA violated substantive due process by (a) recouping money from people who were children at the time of the alleged overpayments and had not received benefit payments, and (b) using tax offsets to collect old debts, despite the fact that such recoupment had once been time-barred and SSA had discarded evidence of the debts.

In *Campbell-Ewald*, 136 S.Ct. 663, the Supreme Court stated that "a would-be class representative with a live claim of her own must be afforded a fair opportunity to show that certification is warranted." *Id*. at 672. Hart and Jones made every effort to advance their case towards class certification. When they

filed their class action complaint, they also moved for class certification. When SSA requested a stay on all discovery in September 2014, Hart and Jones asked the district court to permit discovery on jurisdictional and class-related issues. The court refused to permit any discovery, and then, in March 2015, denied the motion for class certification on the grounds that it had been "pending for approximately eight months without briefing." ECF 46 at 6 n.2, JA 109. In July 2015, having failed in its first motion to dismiss the claims of Hart and Jones, SSA decided to issue them "waivers."[2] Shortly afterwards, SSA moved to dismiss the case for mootness. In March 2016, the court granted the motion, despite never having afforded Appellants a fair opportunity to show that certification was warranted.[3]

Although this Court has not yet decided the issue, several other courts have addressed the question: If someone files a putative class action lawsuit, and while

[2] SSA did not give any reason for granting a waiver to Hart, ECF 57-1, JA 149, at ¶ 3, and its stated reason for granting waivers to Grice and Jones was "due to a lack of documentation" of their underlying "debts." ECF 60-1, JA 150-151, at ¶¶4, 8. SSA should have known this before seizing their tax refunds, and certainly shortly after they filed suit. Yet, instead of taking corrective action at those junctures, SSA moved to dismiss their lawsuit. It was only after SSA faced the prospect of this class action case going forward that it took any corrective action based on its "lack of documentation" of Plaintiffs' "debts."

[3] In its March 14, 2016 Memorandum Opinion dismissing this lawsuit, the district court acknowledged that a class representative with a "live claim of her own must be accorded a fair opportunity to show that certification is warranted," but held that Hart and Jones no longer had live claims. ECF 85 at 13-14, JA 234-235. The court failed to address the fact that Hart and Jones had live claims at the time they filed the class action case in June 2014, but they were never given the opportunity to show that certification was warranted.

the case is pending but before a class has been certified, a defendant provides the full relief that the person could have obtained by filing an individual lawsuit, must the court dismiss the class action claims as moot? This issue was presented to the Supreme Court in *Campbell-Ewald*, but having found that the individual's claims were not moot, the Court declined to decide it. As Appellants will argue below, SSA also failed to provide the full relief that Hart and Jones as individuals could have obtained through their lawsuit. However, assuming *arguendo* that Hart and Jones were provided with full relief as individuals, the district court erred in dismissing their class claims as moot.

In *Chen, et al. v. Allstate Ins. Co.*, 819 F.3d 1136, 2016 WL 1425869 (9th Cir. Apr. 12, 2016) ("*Chen*"), the Ninth Circuit addressed a similar situation. One of the plaintiffs, Florencio Pacleb, filed a class action suit alleging that he and other similarly-situated persons had received automated telephone calls from Allstate Insurance Co. ("Allstate"), in violation of the Telephone Consumer Protection Act. Pacleb sought statutory damages and injunctive relief. Before Pacleb moved for class certification, Allstate offered to pay his full statutory damages, but Pacleb refused the offer. 2016 WL 1425869 at *2. Shortly after the Supreme Court decided *Campbell-Ewald*, Allstate "deposited $20,000 in a bank escrow account 'pending entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to Pacleb, requiring Allstate to stop

sending non-emergency telephone calls and short message service messages to Pacleb in the future and dismissing this action as moot.'" *Id*. at *4.

The Ninth Circuit found that Allstate had in fact consented to the entry of a judgment that would have provided all the statutory damages and injunctive relief that Pacleb could have obtained in his individual capacity. *Id*. at *4-*5. The court held, however, that "[e]ven if, as Allstate proposes, the district court were to enter judgment providing complete relief on Pacleb's individual claims for damages and injunctive relief before class certification, fully satisfying those individual claims, Pacleb still would be entitled to seek certification." *Id*. at *5. In so holding, the Ninth Circuit reaffirmed one of its earlier cases, *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011), which held that a named plaintiff's claim is "transitory in nature and may otherwise evade review" in light of a defendant's tactic of "picking off" lead plaintiffs to avoid a class action. *Chen*, 2016 WL 1425869 at *6.

In the present case, the district court concluded that the Ninth Circuit's reasoning in *Pitts* could not be reconciled with the subsequent Supreme Court case of *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) ("*Genesis*"). *See* ECF 85 at 10, JA 231. In *Genesis*, a collective action suit under the Fair Labor Standards Act ("FLSA"), the Court held that if the individual plaintiff's claim was moot, he could not maintain a collective action suit under FLSA. However,

Genesis emphasized that class action suits under Fed.R.Civ.P. 23 were "fundamentally different from collective actions under the FLSA." 133 S.Ct. at 1529. Consequently, unlike the district court in the present case, many other courts have declined to apply *Genesis* in the class action context. *See, e.g., Wilson v. Gordon*, No. 14-6191, 2016 U.S. App. LEXIS 9374, 2016 WL 2957155, at *11 (6th Cir. May 23, 2016); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016) ("courts have universally concluded that the *Genesis* discussion does not apply to class actions."); *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 707 (11th Cir. 2014); *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, 974 F. Supp. 2d 856, 863 (D. Md. 2013) (Williams, J.); *Vinas v. Chase Receivables, Inc.*, 2015 U.S. Dist. LEXIS 39222 (D. Md. March 27, 2015), at *4 (Chasanow, J.); *Craftwood II, Inc. v. Tomy Int'l, Inc.*, 2013 U.S. Dist. LEXIS 99350, 2013 WL 3756485, at *4 (C.D. Cal. July 15, 2013) ("[*Genesis*] does not cover class actions ….).

The *Chen* court further considered the question of whether, as Allstate had requested, the district court should have ordered the monetary and injunctive relief that Pacleb sought in his individual claims, thereby mooting them, before Pacleb could seek class certification. The *Chen* court answered "no," holding:

> *Campbell-Ewald* clearly suggests it would be inappropriate to enter judgment under these circumstances. As *Campbell-Ewald* explained, '[w]hile a class lacks independent status until certified, *a would-be class representative with a live claim of her own must be accorded a*

> *fair opportunity to show that certification is warranted*." … Accordingly, when a defendant consents to judgment affording complete relief on a named plaintiff's individual claims before certification, but fails to offer complete relief on the class claims, a court should not enter judgment on the individual claims, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification.

Chen, 2016 WL 1425869 at *9 (emphasis in original) (citations omitted).

The *Chen* court further justified its conclusion on the basis of Supreme Court case law noting that a named plaintiff had a "personal stake" in obtaining class certification, recognizing that certain claims are so "inherently transitory" that the trial court does not have time to rule on a class certification motion before the proposed representative's individual interest has expired, and disapproving of the "picking off" of named plaintiffs to deny a would-be class representative a fair opportunity to seek class relief. *Id*., citing *Geraghty*, 445 U.S. at 399, 404 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). *But cf. Genesis*, 133 S. Ct. at 1529-32 (applying *Geraghty* and *Roper* narrowly in the context of an FLSA collective action case). The *Chen* court also pointed out that its holding was consistent with leading treatises on civil procedure,[4] as well as

[4] *See* 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §3533.2 (3d ed. 3015); 13C *id*. §3533.9.1; 5 James Wm. Moore, *Moore's Federal Practice §23.64[1][b]* (3d ed. 2016) ("To the extent that defendants may avoid a class action by 'picking off' the named plaintiffs, the class claims are 'inherently transitory' and evade review, making an exception to the mootness rule appropriate.").

several district court cases decided after *Campbell-Ewald*.[5] *Chen*, 2016 WL 1425869 at *10.

In *Roper*, 445 U.S. 326, the Supreme Court considered whether a class representative could appeal a decision denying class certification when, after the denial of certification, the defendant tendered full payment of the amount the plaintiff could have recovered on his individual claims, plus legal interest and court costs. *Id.* at 329. The Court held that the plaintiff retained an individual interest in his claim for class-wide relief, and that he could therefore appeal the decision denying class certification. *Id.* at 340. The Court recognized that a class action case may be the only viable means through which an individual plaintiff can litigate a relatively small claim — in effect, by shifting the costs of the litigation (including attorneys' fees) to the class as a whole. *Id.* at 338. In that sense, the individual has a "personal stake" not only in his own claim for damages, but also in the outcome of the class certification decision. The Court reasoned:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. … Requiring

[5] The *Chen* court cited *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, 2016 U.S. Dist. LEXIS 28805, 2016 WL 872914, at *1 (S.D.N.Y. Mar. 7, 2016); *Brady v. Basic Research*, LLC, 312 F.R.D. 304, 306 (E.D.N.Y. 2016). *See also South Orange Chiropractice Center, LLC v. Cayan LLC*, No. 15-13069, 2016 U.S. Dist. LEXIS 49067, *16-21 (D. Mass. Apr. 12, 2016) (holding that the defendant's attempt to moot class fell within "inherently transitory" exception "because the class issues will likely evade review").

> multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover, it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

445 U.S. at 339.

In the present case, a class action suit is the only feasible way in which aggrieved persons can effectively challenge SSA's policies and practices in recouping old overpayments. Most of the individual overpayments that SSA already recouped — according to the SSA/OIG report, JA at 258, SSA recouped about $48 million from 68,498 tax offsets, an average of about $700 per offset — were relatively small in comparison to the time and effort that would be involved in contesting SSA's decision. *See* ECF 15, JA 54, ¶88 (Jones spent days meeting with SSA, gathering information, and completing and submitting forms). Also, it is rarely feasible for an individual to find an attorney to defend against a SSA overpayment claim, for several reasons: (1) such cases are time-consuming, and the fees would usually exceed the amount in dispute; (2) individuals often cannot afford to pay counsel's fees; and (3) even if individuals are willing and able to pay counsel's fees, SSA limits the amounts that lawyers can charge in these cases, *see* 42 U.S.C. §206, which deters counsel from taking them. To put things in perspective, in this case Appellant Hart disputed SSA's seizure of $755; attorney's fees aside, Hart would have had to pay a $400 court fee just to file a lawsuit.

In *Geraghty*, 445 U.S. 388, another class action case, the named plaintiff was a prisoner who challenged federal parole guidelines and sought injunctive relief. He appealed a district court decision denying his motion for class certification, and while the appeal was pending, he was released from prison. The Supreme Court held that he could continue to appeal the decision denying class certification, even though he could not be granted any further relief as an individual. The Court explained: "Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id*. at 399. The Court discussed several examples of "cases found not to be moot, despite the loss of a 'personal stake' in the merits of the litigation by the proposed class representative," and surmised that "[t]hese cases demonstrate the flexible character of the Art. III mootness doctrine." *Id*. at 400. The Court held:

> [T]he fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. … We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined.

Id. at 402-04 (citations omitted).

In summary, the guiding principle from *Geraghty* and *Roper* is this: A defendant in a class action case cannot, by unilaterally taking action that would moot the representative plaintiffs' claims for individual relief, thereby moot their claims for class-wide relief, when the representative plaintiffs have not yet been "afforded a fair opportunity to show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672. Otherwise, defendants would have the power to make the plaintiffs' claims expire before a court has had the opportunity to rule on class certification, which is tantamount to making the claims "inherently transitory." *Cf. Geraghty*, 445 U.S. at 399. In cases of this nature, the named plaintiff should be allowed to seek class certification, with certification "relating back" to the time the complaint was filed. *See Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991).

The Sixth Circuit recently applied these principles in *Wilson v. Gordon*, *supra*, 2016 U.S. App. LEXIS 9374, 2016 WL 2957155. There, eleven plaintiffs challenged the failure of Tennessee's Medicaid program to render timely eligibility decisions on their Medicaid applications. Plaintiffs filed a class action complaint together with a motion for class certification. Before the motions hearing, TennCare enrolled all eleven individual plaintiffs. The court held that, although the plaintiffs' individual claims were moot, their class action claims were not. The court based its holding on the "inherently transitory" exception to mootness

described in *Geraghty*, and the "picking off" exception described in *Roper*. *See also South Orange Chiropractic Center, LLC v. Cayan LLC*, No. 15-13069, 2016 U.S. Dist. LEXIS 70680 (D. Mass. May 31, 2016) ("a defendant cannot moot a proposed class action solely by paying off the named plaintiff.").

In *Campbell-Ewald*, 136 S.Ct. at 672, the Supreme Court summarily addressed, and rejected, the position that SSA has advocated in the present case: namely, that the defendant should be permitted, by taking unilateral action to resolve an individual's claim, to avoid exposure to a far-reaching class-wide judgment. In response to the dissent's concern that the Court was transferring authority from the federal courts to the plaintiff, the Court responded: "Quite the contrary. The [position rejected by the majority] would place the defendant in the driver's seat." *Id*. (citation omitted). The Court noted that it once "encountered a kindred strategy" in an earlier case, and that "[t]he Court rejected this gambit." *Id*.

B. The District Court Wrongly Denied Appellants' Motion for Class Certification.

Anticipating that SSA might attempt to "pick off" the named plaintiffs in order to moot their class action lawsuit, when they filed the class action complaint in June 2014, Appellants Hart, Jones, and Verbich also filed a motion for class certification, along with a request that the motion be stayed so that the parties

could engage in appropriate discovery and briefing. ECF 11, JA 14-27. With SSA's consent, in July 2015 the district court granted the stay. ECF 21, JA 83.

Fed.R.Civ.P. 23(c)(1)(A) provides: "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." However, in the present case, the court never permitted the parties to commence discovery on the class-related issues so that it could promptly decide the issue of class certification. SSA filed a motion to dismiss on August 16, 2014, ECF 25, and one week later, sought a stay of all discovery during the pendency of its motion. ECF 26. Appellants objected, ECF 31, but the court granted the stay. ECF 37. Then, in its March 31, 2015 Order dismissing Verbich from the case but denying SSA's motion to dismiss Hart and Jones, the district court also denied Appellants' motion for class certification without prejudice, because the motion had been "pending for approximately eight months without briefing." ECF 46 at 6 n.2, JA 109. In June 2015, SSA issued waivers to Hart, Jones, and Grice, the three remaining Plaintiffs in the case.

As discussed above, a class representative retains the right to appeal the denial of a motion for class certification, even though subsequent events may have mooted the representative's individual claims for relief. *Roper*, 445 U.S. 326; *Geraghty*, 445 U.S. 388. In *Lusardi v. Xerox Corp*., 975 F.2d 964 (3d Cir. 1992), the Third Circuit held that a named plaintiff may pursue class certification on

appeal if "he has a live individual claim when the district court decides the class certification issue or, at the very least, he had a live claim when he filed for class certification." *Id*. at 977; *see Jobie O. v. Spitzer*, 2007 U.S. Dist. LEXIS 91460, 2007 WL 4302921 (S.D.N.Y. Dec. 5, 2007), at *22-*25. Appellants had live claims both when they filed their motion for class certification on June 20, 2014, and when the district court denied the motion on March 31, 2015. Thus, even if SSA's issuance of waivers to Hart and Jones in July 2015 rendered their individual claims moot, they may still appeal the district court's order denying their motion for class certification. And, if Verbich was wrongly dismissed from the case (as he contends below), he also may appeal that order.

The district court stated that its reason for denying Appellant's motion for class certification was to remove a stale motion from its docket. ECF 46 at 6 n.2, JA 109; ECF 55 at 60. However, the reason the motion had become stale was the district court's own decision — at SSA's request and despite Appellants' objection — not to allow Appellants to engage in class-related discovery during the lengthy time the court was considering SSA's motion to dismiss.

It would not serve the interests of justice if Appellants were precluded from pursuing their class action claims because the district court, acting at the request of SSA, prevented them from getting a prompt decision on class certification in accordance with Rule 23(c)(1)(A), and then denied their motion for class

certification because it was pending for too long. The district court abused its discretion in denying Appellants' motion for class certification without first giving them the opportunity to conduct discovery and submit briefs on the merits of the motion. Having filed the motion while their claims were live, Hart and Jones (along with Verbich) should be permitted to continue seeking class certification, even if their claims for individual relief are now moot. The district court's denial of the motion for class certification should be reversed, and this case should be remanded so that Appellants may conduct class-related discovery and submit further briefing on the motion.

C. Appellants' Individual Claims Are Not Moot.

In explaining that a plaintiff with live claims must be given a fair opportunity to seek class certification, the Ninth Circuit in *Chen* presupposed that the defendant had offered to consent to a judgment ordering all the relief requested by the plaintiff, including injunctive relief. Likewise, in *Campbell-Ewald*, the Supreme Court reserved decision on a situation where "a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." 136 S. Ct. at 672. In the present case, however, SSA never consented to, and the district court never entered, a judgment ordering all the relief that Appellants requested for themselves as individuals. Thus, their individual claims for relief are not moot.

Hart and Jones alleged that, in holding them responsible for overpayments and recouping the overpayments by seizing their tax returns, SSA first failed to apply the proper substantive legal standards, and then failed to afford them fair notice and the right to reconsideration, which would have placed the burden on SSA to prove the validity of the debts. Instead of consenting to a judgment under which SSA would have to reconsider Appellants' alleged debts under the proper substantive legal standards, SSA short-circuited the process by simply issuing "waivers," which are tantamount to promises to forego the collection of otherwise valid debts. SSA retains the power to revoke "waivers" such as the ones it issued to Hart and Jones — for up to one year for any reason, and four years for "good cause." POMS GN 04001.010.

Although SSA now promises not to try to collect Appellants' so-called debts, such promises ring hollow in light of the fact that this case arose from an initiative by SSA to collect debts that it had previously written off for decades. Without a judgment saying these debts are not valid and enforceable, or at least setting forth the substantive law and procedures that would govern any future recoupment attempt, Hart and Jones have to worry that SSA may again try to come after them.

In *Simmons v. United Mortg. & Loan Inv.*, LLC, 634 F.3d 754, this Court considered whether a defendant's promise to pay a specified amount, rather than

make an unconditional offer of judgment, rendered the plaintiff's case moot. Recognizing that "[f]rom the view of the Plaintiffs, a judgment in their favor is far preferable to a contractual promise by the Defendants," this Court held that the defendant's offer did not moot the case. *Id*. at 763.

Likewise, SSA's "waivers" do not have the same force of law as a judgment entered by the court, and they do not guarantee that, in the future, SSA will not engage in the same unlawful conduct with respect to Hart or Jones. Because SSA has not provided the full relief that Hart and Jones could have achieved in this lawsuit, their individual claims are not moot. *See Tracey v. First Am. Title Ins. Co.*, 935 F. Supp. 2d. 826, 838 (D. Md. 2013).

II. The District Court Erred in Holding that its Sole Basis of Jurisdiction Was 42 U.S.C. § 405(g) and Dismissing Verbich from the Case.

The district court held that the sole basis of its jurisdiction over all the Plaintiffs' claims was 42 U.S.C. §405(g), which provides for judicial review of claims "arising under" title II of the Social Security Act ("the Act"). ECF 46 at 16-19, JA 119-122. That statutory provision incorporates a non-waivable requirement that such claims be "presented" to SSA, and a waivable requirement that "the administrative remedies prescribed by [SSA] be exhausted." *Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976). The court considered and rejected Appellants' contention that the court also had mandamus jurisdiction. ECF 46 at 30, JA 133.

The court rejected (without addressing) Appellants' contention (*see* ECF 30 at 24-25) that the court also had jurisdiction over their claims under the rule set forth in *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986), which provides federal jurisdiction over constitutional questions where judicial review would otherwise be foreclosed by the administrative processes. Finally, the district court dismissed Appellant Verbich from the case, concluding that he failed to satisfy the "presentment" requirement of §405(g). ECF 46 at 23-24, JA 126-127. Appellants Hart, Jones, and Fry again sought to invoke mandamus jurisdiction when, in September 2015, they moved to add Fry as a Plaintiff and to file a Second Amended Complaint, ECF 63-1, JA 159, at ¶11; *see also* ECF 71 at 3-5, but the district court reiterated its earlier holding rejecting mandamus jurisdiction. ECF 85 at 15 n.11, JA 236. Appellants Verbich, Hart, Jones, and Fry contend that the district court erred in these rulings.

A. Mandamus Jurisdiction Is Appropriate.

42 U.S.C. §405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, … may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." The Supreme Court has held that §405(g) is designed to "channel" a broad range of disputes through the agency,

even if they involve questions of statutory or constitutional interpretation. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 5-6 (2000) ("*Illinois Council*"). But the plain language of §405(g), which provides a person the right to seek judicial review of an adverse SSA decision "made after a hearing to which he was a party," presumes that, in making the decision, SSA has afforded that person the fundamental features of procedural due process, *i.e.*, notice and an opportunity to be heard.

Mandamus jurisdiction under 28 U.S.C. §1361 is appropriate for this kind of case, where, by systemically violating its own regulations, SSA has completely denied Appellants and others the ability to challenge SSA's overpayment determinations through the ordinary administrative process. When SSA determines that there has been an overpayment, SSA must "immediately" notify "the individual from whom [SSA is] is seeking … recovery," and SSA must advise that individual of the right to seek reconsideration. 20 CFR §404.502a. Then, prior to referring the debt for collection through tax offset, SSA must again notify the individual, §404.521, who has the right to examine SSA's evidence and contest SSA's determination. §404.521. SSA has completely failed to perform these duties. Then, when confronted by Appellants and others who have first learned about their alleged liability for decades-old "debts," SSA officials have denied them any opportunity to seek reconsideration, telling them they must either repay

the debts or seek waivers. ECF 15, JA 47, 53-54, 59, ¶¶ 60, 84, 87, 110; ECF 63-1, JA 184-185, ¶¶ 115-117. In so doing, SSA officials are carrying out agency-wide policy set forth in an internal SSA document which instructs them to say: "If you think you should not have to pay us back …, you may request a waiver." *See* EM-14032, ECF 67-2, JA 216-218.

The rights to timely notice and the opportunity to seek reconsideration of overpayment determinations are fundamental parts of the administrative process that SSA has established pursuant to §405(g). Without those rights, Appellants and others have no opportunity (a) to make SSA bear its burden of proving the validity of the underlying debts based upon *de novo* reviews of all the evidence, 20 CFR §404.920, and (b) to seek further appeals and, ultimately, judicial review of SSA's decisions concerning the existence and amounts of the debts, §404.905. By denying Appellants (and others) the opportunity to contest these decades-old debts, SSA has avoided ever having to prove that the debts were correctly assessed.

The present case is controlled by this Court's decision in *U.S. ex rel. Rahman v. Oncology Assoc., P.C.*, 201 F.3d 277 (4th Cir. 1999). In *Rahman*, the Government suspended the administrative process for making overpayment determinations as to certain medical providers, who were defendants in a Medicare fraud case. The Government argued that mandamus relief was not available because the defendants could attain adequate relief through the administrative

review process under 42 U.S.C. §405(g). This Court dismissed that argument, saying that it "blinks the procedural reality. The defendants seek judicial relief here not to circumvent the administrative process, but to compel its resumption." 201 F.3d at 290. This Court held that the district court properly exercised mandamus jurisdiction and ordered the Government officials to fulfill their administrative duties in accordance with the applicable regulations. *Id*.

In *Rahman*, this Court set forth the conditions that a party seeking a writ of mandamus must satisfy. "[T]he party seeking the writ must demonstrate that (1) he has a clear and indisputable right to the relief sought; (2) the responding party has a clear duty to do the specific act requested; (3) the act requested is an official act or duty; (4) there are no other adequate means to attain the relief he desires; and (5) the issuance of the writ will effect right and justice in the circumstances." *Id.* at 286.

Here, all those conditions are satisfied. Appellants have a "clear and indisputable right" to the relief they are seeking: namely, a judgment (a) compelling SSA officials to return any wrongfully taken funds and, (b) requiring SSA, in the event of further recoupment efforts, to provide Appellants with all the due process protections they have always been entitled to, including notice, the opportunity to review relevant evidence, and the opportunity to make SSA prove the underlying debts in accordance with the correct interpretation of substantive

law. SSA itself admitted to due process violations when, in an internal document, it said: "We determined that some debtors with debts 10 years or more delinquent did not receive proper due process before an offset occurred." ECF 67-2 at 1, JA 214.

Under the applicable regulations, SSA officials have clear, official duties (1) to provide timely notice of overpayment determinations, 20 CFR §404.502a; (2) to provide an opportunity to seek reconsideration, *id*.; and (3) to refrain from referring any debts for collection through tax offset without affording additional procedural protections. §§404.521-404.525. There are no other adequate means to attain the relief that Appellants desire, because here, as in *Rahman*, SSA officials have precluded Appellants from utilizing SSA's own administrative review process to challenge either the lawfulness or factual basis of SSA's overpayment determinations.

Finally, in this case, the issuance of the writ is necessary to effect right and justice. As the district court recognized, the claims here "are not challenges to individual procedures taken against one claimant. … Plaintiffs challenge the SSA's systemic approach to the collection of overpayments as a violation of constitutional and statutory law. Thus, even if the SSA reviewed the individual claims, it would be unlikely that the SSA would change its procedures for deciding whom to collect overpayments from simply because one claimant appealed and

challenged the process." ECF 46 at 29, JA 132. Because §405(g) was designed to cover individual disputes over benefits, it contains restrictions that might impede Appellants' ability to prove the systemic nature of SSA's misconduct and obtain the kind of broader remedies necessary to redress the resulting problems. For instance, in the ordinary case under §405(g), the factual record should be complete by the time the case arrives in federal court, and the court's review is limited to determining whether SSA's factual findings were supported by substantial evidence and its legal findings were correct. Here, by contrast, Appellants will need to conduct discovery into SSA's agency-wide policies and practices in order to demonstrate the scope of SSA's procedural violations and the resulting harms. Section 405(g) also limits venue to the judicial district where the beneficiary lives; in this case, however, since SSA's violations have been occurring on a nationwide basis, Appellants' class action suit should include representative plaintiffs and class members from all judicial districts, rather than forcing individuals to seek relief from systemic problems on a piecemeal basis. Thus, the issuance of the writ will be necessary for Appellants to achieve an effective remedy in this case.

The present case is remarkably similar to *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983), another class action lawsuit challenging SSA's actions in a large-scale initiative to recoup millions of dollars of old overpayments. In the early 1980s, SSA was attempting to recoup overpayments that apparently resulted

from a computer glitch in 1974-75; in that case, as here, SSA failed to provide proper notice before recouping the alleged debts. The court invoked mandamus jurisdiction, *id*. at 596, and found SSA's actions unconstitutional. *Id*. at 600-01.

Although *Ellender* was a district court case, many other circuit courts have held that it is appropriate to exercise mandamus jurisdiction in cases like the one here, *i.e*., involving challenges to the procedures followed by SSA but unrelated to the merits of the individual benefits claims. *See, e.g.*, *Wolcott v. Sebelius*, 625 F.3d 757, 765-66 (5th Cir. 2011) (mandamus jurisdiction appropriate to challenge procedures in cases arising under the Act); *Burnett v. Bowen*, 830 F.2d 731, 737-38 (7th Cir. 1987) (same); *Belles v. Schweiker*, 720 F.2d 509, 511-13 (8th Cir. 1983) (same); *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 707, 813 (D.C. Cir. 2001) (same); *Cordoba v. Massanari*, 256 F.3d 1044, 1047 (10th Cir. 2001) (same); *Buchanan v. Apfel*, 249 F.3d 485, 491-92 (6th Cir. 2001) (same); *Briggs v. Sullivan*, 886 F.2d 1132, 1142 (9th Cir. 1989) (same); *City of New York v. Heckler*, 742 F.2d 729, 739 (2nd Cir. 1984), *aff'd sub nom., Bowen v. City of New York*, 476 U.S. 467 (1986). Appellants Verbich, Hart, Jones, and Fry have adequately alleged that the district court had mandamus jurisdiction, and the district court erred in failing to recognize that basis of jurisdiction.

B. The "*Michigan Academy*" Exception is Also Applicable.

In addition to raising issues of procedural due process, Appellants' claims against SSA raise important substantive questions of statutory and constitutional interpretation. For example, Appellants have challenged whether SSA is permitted to recoup overpayments from people who were children at the time the overpayments were made to other people whom SSA had designated as "representative payees," ECF 15, JA 23-24, 59, 62-65, 73-74, ¶¶73-74, 79, 107-108, 120-121, 144-155, and whether SSA is permitted to recoup debts that may have once been time-barred, after SSA had destroyed the relevant evidence. *Id*., JA 49-50, 52, 59, 62-65, 68-71, ¶¶ 68-71, 73-74, 81, 107-108, 120-121, 132-137.

In general, 42 U.S.C. §405(h) precludes courts from exercising federal question jurisdiction over claims arising under the Social Security Act, even when such claims involve issues of statutory or constitutional interpretation. *Illinois Council*, 529 U.S. at 5-6. However, there is an exception to this rule -- the "*Michigan Academy*" exception [6] -- for situations where claimants, if forced to follow the administrative processes under §405(g), would be denied any opportunity for judicial review of constitutional claims. *See id.* at 17.

In the present case, by failing to provide Appellants with proper notice after determining that they owed money to SSA, and then refusing to permit Appellants

[6] *See Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986).

to seek reconsideration of SSA's initial determinations of the alleged overpayments, SSA completely cut off Appellants' opportunity to seek judicial review of their constitutional claims under §405(g). *See Sipp*, 641 F.3d at 980. Consequently, this case falls under the *Michigan Academy* exception, the district court should have exercised jurisdiction under 28 U.S.C. §1331, and the court erred in dismissing Verbich from the lawsuit. *See Council for Urological Interests v. Sebelius*, 668 F.3d 704, 711 (D.C. Cir. 2011) (holding that when an entire category of persons is denied an avenue for administrative and judicial review of a Medicare rule, the *Michigan Academy* exception excuses the necessity of first getting a final decision from the Secretary); *Ohio Hospital Ass'n v. Shalala*, 201 F.3d 418, 424 (6th Cir. 1999), *cert. denied*, 531 U.S. 1071 (2001) (§ 405 did not bar suit for declaratory judgment by hospitals that claimed the government was illegally attempting to recover alleged overpayments, where hospitals otherwise had no avenue for seeking judicial review); *Nat. Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 38-39 (D.D.C. 2000).

C. Verbich Satisfied §405(g)'s "Presentment" Requirement.

Having asserted jurisdiction solely on the basis of §405(g), the district court held that it lacked jurisdiction over Appellant Verbich's claims because he had "not satisfied the nonwaivable presentment requirement because he failed to note any disagreement with the agency's decision after he learned that the overpayment

debt had been taken from his tax refund." ECF 46 at 23-24, JA 126-127. The court acknowledged that Verbich "requested more information on how much he owed and why he had not been notified," but it concluded that this did not constitute "presentment" of his claim. *Id*., JA 126-127.

In holding that Verbich failed to "present" his claim, the district court erred in three ways. First, the basis for the "presentment" requirement is §405(g)'s provision that, before seeking judicial review, an aggrieved claimant must give the Commissioner the opportunity to render a "final decision" on the disputed claim. Like all other overpayment disputes, however, Verbich's overpayment dispute began when SSA made an initial determination that he was liable for the overpayment. Then, at some point before referring the debt for collection through tax offset 35 years later, the SSA must have reached a final decision that the debt was legally enforceable. *See* 20 CFR §404.520(b) (SSA uses tax offset procedure "to collect overpayments that are certain in amount, past due and legally enforceable, and eligible for tax refund offset…"). Because SSA made a "final decision" in Verbich's case, the presentment requirement was satisfied. Likewise, for all the other similarly situated persons whose tax refunds were seized by SSA

without prior notice, SSA made "final decisions" that the debts were "past due and legally enforceable," so the presentment requirement was satisfied.[7]

The second way the court erred was by overlooking the fact that Verbich actually did contest his claim with SSA when he disputed the alleged debt in 1978. At that time, Verbich and SSA reached an agreement that he would pay back most of the amount that SSA claimed he owed, and he repaid the agreed-upon amount. ECF 15, JA 49, ¶68; Verbich Declaration, ECF 30-2, JA 91, at ¶3. About 35 years later, apparently having no record of the agreement, SSA came after Verbich for payment of the balance of the amount originally in dispute. *Id*.; ECF 15, JA 49-50, ¶70. When he contested the debt in 1978, which led to a settlement, Verbich satisfied §405(g)'s presentment requirement. Nothing in §405(g) imposes a "double presentment" requirement, and the court should not have dismissed Verbich's claim because he failed to present it a second time.

The third way the court erred was in holding that Verbich's post-tax seizure communications with SSA in 2014 were inadequate to constitute "presentment" of his claim. SSA's regulations state that, before SSA refers a debt for tax offset, the taxpayer must be notified of his right to "inspect and copy [SSA's] records related

[7] A separate issue from "presentment" is the question of whether a claimant has properly exhausted all available remedies. In this case, the district court correctly held that, by failing to provide proper notice or an opportunity for reconsideration, SSA waived the exhaustion requirement as to those plaintiffs who satisfied the presentment requirement. ECF 46 at 19-30, JA 122-133. *See also Bowen v. City of New York*, 476 U.S. 467, 473-75 (1986).

to the overpayment." If the taxpayer exercises this right, SSA must inform him "as to where and when the inspection and copying can be done." 20 CFR 404.521(e). Upon learning that SSA seized his tax refund, Verbich took a reasonable first step: he demanded that SSA produce any records that would explain the basis for his alleged debt, but SSA refused. ECF 15, JA 50, ¶71. Verbich's demand for those records constituted "presentment" of his claim.

D. If Verbich's Claims Are Reinstated, They Are Not Moot.

Assuming this Court reverses the district court's order dismissing Verbich from this lawsuit, his claims against SSA are not moot. Shortly after he filed suit, SSA returned Verbich's tax refund, while still maintaining that Verbich owed the debt. *See* Verbich Declaration, ECF 30-2, JA 92-93, at ¶4 and Exhibit TV-1 ("This refund does not eliminate your overpayment. If you want to discuss repayment options or request a waiver, please contact us."). Consequently, after the district court dismissed him from the case, rather than risk jeopardizing his credit or have his next tax refund seized, Verbich sent SSA a payment for his alleged debt of $171.40, which SSA still retains. Verbich is entitled to the relief he seeks in this lawsuit, including his demand to have a class certified.

III. The District Court Should Have Permitted Fry to Join the Lawsuit.

On September 3, 2015, Appellants Hart, Jones, and Fry filed a motion for leave to add Fry, who resides and works in Texas, as a plaintiff in the lawsuit, and to file a Second Amended Complaint. ECF 63.[8] In its Memorandum Order of March 14, 2016, the court considered the motion. The court reiterated its earlier holding that the sole basis of its jurisdiction was §405(g), which requires a plaintiff to file an action in the judicial district where she resides or works. Having concluded that it lacked subject-matter jurisdiction over the claims of the existing plaintiffs (because of mootness), the district court then held that it was improper for Fry, who lives and works in Texas, to file her lawsuit in the District of Maryland. On that basis, the court denied the motion to add Fry to the action and file the Second Amended Complaint. ECF 85 at 14-15, JA 235-236.

The court erred for two reasons. First, as discussed above, the district court should have exercised mandamus jurisdiction over this case. Had the court done so, it would have been proper for Fry to file her action in the District of Maryland. In a mandamus action, where the Defendant is an officer or employee of the United States acting in her official capacity (as is the case here), venue is proper where the

[8] Appellants also filed a second motion for class certification, along with another request that consideration of the motion be stayed pending discovery and full briefing, ECF 64, and a motion the issuance of a scheduling order and leave to commence discovery. ECF 67. Having determined that it lacked subject-matter jurisdiction, the district court denied these motions as moot. ECF 85 at 15, JA 236.

Defendant resides. 28 U.S.C. §1391(e)(1). The Defendant in this case, Carolyn Colvin, resides in the District of Maryland. Moreover, venue in a mandamus action is proper in any judicial district where a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred. *Id*. Here, a substantial part of these events occurred at the headquarters of SSA, which is located in the District of Maryland. ECF 15, JA 32, ¶9.

Second, as discussed above, the district court erred in holding that the class action claims of Appellants Hart and Jones were moot, and that it lacked subject-matter jurisdiction over the claims of Appellant Verbich. Jones and Verbich are both residents of Maryland, so even if the sole basis of jurisdiction is §405(g), it was appropriate for them to file suit in the District of Maryland. If venue was proper as to Jones and Verbich, then venue was also proper as to Hart and Fry. *See Fournier v. Johnson*, 677 F. Supp. 2d 1172, 1174 (D. Ariz. 2009) ("[T]he venue provision in 42 U.S.C. §405(g) should be interpreted in harmony with 28 U.S.C. §1391(e), such that venue is proper in an action under §405(g) for all plaintiffs so long as it is proper for at least one plaintiff."). Furthermore, when Hart, a Pennsylvania resident, joined the lawsuit in June 2014, SSA raised no objection to her participation on venue grounds; accordingly, SSA appears to have waived any objection to non-Maryland plaintiffs participating in the lawsuit, provided that at least one Maryland plaintiff was participating.

Accordingly, if this Court reverses the district court as to any of its holdings dismissing Hart, Jones, and Verbich from this lawsuit, or as to its holding that mandamus jurisdiction was appropriate, then the Court should also direct the district court to permit Fry to join this lawsuit, and to grant Fry and the other Appellants leave to file an amended complaint, since such leave must be "liberally granted" and an amended complaint would not be futile. *See Laber v. Harvey*, 438 F.3d at 426; Fed.R.Civ.P. 15(a)(2).

CONCLUSION

For all the reasons set forth herein, Appellants respectfully request that this Court reverse the orders and judgment of the district court and remand this case to that court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellants believe that, in light of the complexity and novelty of the issues raised herein, oral argument would assist the Court in the disposition of this case.

CERTIFICATE OF COMPLIANCE

This brief is formatted in proportionally-spaced Times New Roman 14-point font, has parallel citations to docket entries and the Joint Appendix, and consists of 13,961 words (excluding the corporate disclosure statement, tables of contents and authorities, request for argument, addendum, and certificates of compliance and service).

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, the foregoing opening brief and joint appendix were filed via hand delivery and electronically upon the Clerk of the United States Court of Appeals for the Fourth Circuit using the Court's ECF/CM online system which will send notice of such filing to opposing counsel of record as follows:

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ADDENDUM
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42 USCS § 405

§ 405. Evidence, procedure, and certification for payments

(g) Judicial review. Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia [United States District Court for the District of Columbia]. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

42 USCS § 405

§ 405. Evidence, procedure, and certification for payments

(h) Finality of Commissioner's decision. The findings and decisions of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28, United States Code [28 USCS § 1331 or 1346], to recover on any claim arising under this title [42 USCS §§ 401 et seq.].

20 CFR 404.502a

TITLE 20 -- EMPLOYEES' BENEFITS
CHAPTER III -- SOCIAL SECURITY ADMINISTRATION
PART 404 -- FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)
SUBPART F -- OVERPAYMENTS, UNDERPAYMENTS, WAIVER OF ADJUSTMENT OR RECOVERY OF OVERPAYMENTS, AND LIABILITY OF A CERTIFYING OFFICER

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20 CFR 404.502a

§ 404.502a Notice of right to waiver consideration.

Whenever an initial determination is made that more than the correct amount of payment has been made, and we seek adjustment or recovery of the overpayment, the individual from whom we are seeking adjustment or recovery is immediately notified. The notice includes:

(a) The overpayment amount and how and when it occurred;

(b) A request for full, immediate refund, unless the overpayment can be withheld from the next month's benefit;

(c) The proposed adjustment of benefits if refund is not received within 30 days after the date of the notice and adjustment of benefits is available;

(d) An explanation of the availability of a different rate of withholding when full withholding is proposed, installment payments when refund is requested and adjustment is not currently available, and/or cross-program recovery when refund is requested and the individual is receiving another type of payment from SSA (language about cross-program recovery is not included in notices sent to individuals in jurisdictions where this recovery option is not available);

(e) An explanation of the right to request waiver of adjustment or recovery and the automatic scheduling of a file review and pre-recoupment hearing (commonly referred to as a personal conference) if a request for waiver cannot be approved after initial paper review;

(f) An explanation of the right to request reconsideration of the fact and/or amount of the

overpayment determination;

(g) Instructions about the availability of forms for requesting reconsideration and waiver;

(h) An explanation that if the individual does not request waiver or reconsideration within 30 days of the date of the overpayment notice, adjustment or recovery of the overpayment will begin;

(i) A statement that an SSA office will help the individual complete and submit forms for appeal or waiver requests; and

(j) A statement that the individual receiving the notice should notify SSA promptly if reconsideration, waiver, a lesser rate of withholding, repayment by installments or cross-program adjustment is wanted.

20 CFR 404.506

TITLE 20 -- EMPLOYEES' BENEFITS
CHAPTER III -- SOCIAL SECURITY ADMINISTRATION
PART 404 -- FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)
SUBPART F -- OVERPAYMENTS, UNDERPAYMENTS, WAIVER OF ADJUSTMENT OR RECOVERY OF OVERPAYMENTS, AND LIABILITY OF A CERTIFYING OFFICER

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20 CFR 404.506

§ 404.506 When waiver may be applied and how to process the request.

(a) Section 204(b) of the Act provides that there shall be no adjustment or recovery in any case where an overpayment under title II has been made to an individual who is without fault if adjustment or recovery would either defeat the purpose of title II of the Act, or be against equity and good conscience.

(b) If an individual requests waiver of adjustment or recovery of a title II overpayment within 30 days after receiving a notice of overpayment that contains the information in § 404.502a, no adjustment or recovery action will be taken until after the initial waiver determination is made. If the individual requests waiver more than 30 days after receiving the notice of overpayment, SSA will stop any adjustment or recovery actions until after the initial waiver determination is made.

(c) When waiver is requested, the individual gives SSA information to support his/her contention that he/she is without fault in causing the overpayment (see § 404.507) and that adjustment or recovery would either defeat the purpose of title II of the Act (see § 404.508) or be against equity and good conscience (see § 404.509). That information, along with supporting documentation, is reviewed to determine if waiver can be approved. If waiver cannot be approved after this review, the individual is notified in writing and given the dates, times and place of the file review and personal conference; the procedure for reviewing the claims file prior to the personal conference; the procedure for seeking a change in the scheduled dates, times, and/or place; and all other information necessary to fully inform the individual about the personal conference. The file review is always scheduled at least 5 days before the personal conference. We will offer to the individual the option of conducting the personal conference face-to-face at a place we designate, by telephone, or by video teleconference. The notice will advise the individual of the date and time of the personal conference.

(d) At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decisionmaker or another SSA representative who is prepared to answer questions. We will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

(e) At the personal conference, the individual is given the opportunity to:

(1) Appear personally, testify, cross-examine any witnesses, and make arguments;

(2) Be represented by an attorney or other representative (see § 404.1700), although the individual must be present at the conference; and

(3) Submit documents for consideration by the decisionmaker.

(f) At the personal conference, the decisionmaker:

(1) Tells the individual that the decisionmaker was not previously involved in the issue under review, that the waiver decision is solely the decisionmaker's, and that the waiver decision is based only on the evidence or information presented or reviewed at the conference;

(2) Ascertains the role and identity of everyone present;

(3) Indicates whether or not the individual reviewed the claims file;

(4) Explains the provisions of law and regulations applicable to the issue;

(5) Briefly summarizes the evidence already in file which will be considered;

(6) Ascertains from the individual whether the information presented is correct and whether he/she fully understands it;

(7) Allows the individual and the individual's representative, if any, to present the individual's case;

(8) Secures updated financial information and verification, if necessary;

(9) Allows each witness to present information and allows the individual and the individual's representative to question each witness;

(10) Ascertains whether there is any further evidence to be presented;

(11) Reminds the individual of any evidence promised by the individual which has not been presented;

(12) Lets the individual and the individual's representative, if any, present any proposed summary or closing statement;

(13) Explains that a decision will be made and the individual will be notified in writing; and

(14) Explains repayment options and further appeal rights in the event the decision is adverse to the individual.

(g) SSA issues a written decision to the individual (and his/her representative, if any) specifying the findings of fact and conclusions in support of the decision to approve or deny waiver and advising of the individual's right to appeal the decision. If waiver is denied, adjustment or recovery of the overpayment begins even if the individual appeals.

(h) If it appears that the waiver cannot be approved, and the individual declines a personal conference or fails to appear for a second scheduled personal conference, a decision regarding the waiver will be made based on the written evidence of record. Reconsideration is then the next step in the appeals process (but see § 404.930(a)(7)).

20 CFR 404.509

TITLE 20 -- EMPLOYEES' BENEFITS
CHAPTER III -- SOCIAL SECURITY ADMINISTRATION
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20 CFR 404.509

§ 404.509 Against equity and good conscience; defined.

(a) Recovery of an overpayment is against equity and good conscience (under title II and title XVIII) if an individual--

(1) Changed his or her position for the worse (Example 1) or relinquished a valuable right (Example 2) because of reliance upon a notice that a payment would be made or because of the overpayment itself; or

(2) Was living in a separate household from the overpaid person at the time of the overpayment and did not receive the overpayment (Examples 3 and 4).

(b) The individual's financial circumstances are not material to a finding of against equity and good conscience.

Example 1. A widow, having been awarded benefits for herself and daughter, entered her daughter in private school because the monthly benefits made this possible. After the widow and her daughter received payments for almost a year, the deceased worker was found to be not insured and all payments to the widow and child were incorrect. The widow has no other funds with which to pay the daughter's private school expenses. Having entered the daughter in private school and thus incurred a financial obligation toward which the benefits had been applied, she was in a worse position financially than if she and her daughter had never been entitled to benefits. In this situation, the recovery of the payments would be against equity and good conscience.

Example 2. After being awarded old-age insurance benefits, an individual resigned from employment on the assumption he would receive regular monthly benefit payments. It was

discovered 3 years later that (due to a Social Security Administration error) his award was erroneous because he did not have the required insured status. Due to his age, the individual was unable to get his job back and could not get any other employment. In this situation, recovery of the overpayments would be against equity and good conscience because the individual gave up a valuable right.

Example 3. M divorced K and married L. M died a few years later. When K files for benefits as a surviving divorced wife, she learns that L had been overpaid $ 3,200 on M's earnings record. Because K and L are both entitled to benefits on M's record of earnings and we could not recover the overpayment from L, we sought recovery from K. K was living in a separate household from L at the time of the overpayment and did not receive the overpayment. K requests waiver of recovery of the $ 3,200 overpayment from benefits due her as a surviving divorced wife of M. In this situation, it would be against equity and good conscience to recover the overpayment from K.

Example 4. G filed for and was awarded benefits. His daughter, T, also filed for student benefits on G's earnings record. Since T was an independent, full-time student living in another State, she filed for benefits on her own behalf. Later, after T received 12 monthly benefits, the school reported that T had been a full-time student only 2 months and had withdrawn from school. Since T was overpaid 10 monthly benefits, she was requested to return the overpayment to SSA. T did not return the overpayment and further attempts to collect the overpayment were unsuccessful. G was asked to repay the overpayment because he was receiving benefits on the same earnings record. G requested waiver. To support his waiver request G established that he was not at fault in causing the overpayment because he did not know that T was receiving benefits. Since G is without fault and, in addition, meets the requirements of not living in the same household at the time of the overpayment and did not receive the overpayment, it would be against equity and good conscience to recover the overpayment from G.

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20 CFR 404.520

§ 404.520 Referral of overpayments to the Department of the Treasury for tax refund offset -- General.

(a) The standards we will apply and the procedures we will follow before requesting the Department of the Treasury to offset income tax refunds due taxpayers who have an outstanding overpayment are set forth in §§ 404.520 through 404.526. These standards and procedures are authorized by 31 U.S.C. 3720A and are implemented through Department of the Treasury regulations at 31 CFR 285.2.

(b) We will use the Department of the Treasury tax refund offset procedure to collect overpayments that are certain in amount, past due and legally enforceable, and eligible for tax refund offset under regulations issued by the Department of the Treasury. We will use these procedures to collect overpayments only from persons who are not currently entitled to monthly Social Security benefits under title II of the Act. We will refer overpayments to the Department of the Treasury for offset against Federal tax refunds regardless of the length of time the debts have been outstanding.

20 CFR 404.521

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20 CFR 404.521

§ 404.521 Notice to overpaid persons.

Before we request the collection of an overpayment by reduction of Federal and State income tax refunds, we will send a written notice of intent to the overpaid person. In our notice of intent to collect an overpayment through tax refund offset, we will state:

(a) The amount of the overpayment; and

(b) That we will collect the overpayment by requesting that the Department of the Treasury reduce any amounts payable to the overpaid person as refunds of Federal and State income taxes by an amount equal to the amount of the overpayment unless, within 60 calendar days from the date of our notice, the overpaid person:

(1) Repays the overpayment in full; or

(2) Provides evidence to us at the address given in our notice that the overpayment is not past due or legally enforceable; or

(3) Asks us to waive collection of the overpayment under section 204(b) of the Act.

(c) The conditions under which we will waive recovery of an overpayment under section 204(b) of the Act;

(d) That we will review any evidence presented that the overpayment is not past due or not legally enforceable;

(e) That the overpaid persons has the right to inspect and copy our records related to the

overpayment as determined by us and will be informed as to where and when the inspection and copying can be done after we receive notice from the overpaid persons that inspection and copying are requested.

20 CFR 404.522

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20 CFR 404.522

§ 404.522 Review within SSA that an overpayment is past due and legally enforceable.

(a) Notification by overpaid individual. An overpaid individual who receives a notice as described in § 404.521 has the right to present evidence that all or part of the overpayment is not past due or not legally enforceable. To exercise this right, the individual must notify us and present evidence regarding the overpayment within 60 calendar days from the date of our notice.

(b) Submission of evidence. The overpaid individual may submit evidence showing that all or part of the debt is not past due or not legally enforceable as provided in paragraph (a) of this section. Failure to submit the notification and evidence within 60 calendar days will result in referral of the overpayment to the Department of the Treasury, unless the overpaid individual, within this 60-day time period, has asked us to waive collection of the overpayment under section 204(b) of the Act and we have not yet determined whether we can grant the waiver request. If the overpaid individual asks us to waive collection of the overpayment, we may ask that evidence to support the request be submitted to us.

(c) Review of the evidence. After a timely submission of evidence by the overpaid individual, we will consider all available evidence related to the overpayment. If the overpaid individual has not requested a waiver we will make findings based on a review of the written record, unless we determine that the question of indebtedness cannot be resolved by a review of the documentary evidence. If the overpaid individual has asked us to make a waiver determination and our records do not show that after an oral hearing we had previously determined that he was at "fault" in accepting the overpayment, we will not deny the waiver request without first scheduling an oral hearing.

20 CFR 404.523

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20 CFR 404.523

§ 404.523 Findings by SSA.

(a) Following the hearing or a review of the record, we will issue written findings which include supporting rationale for the findings. Issuance of these findings concerning whether the overpayment or part of the overpayment is past due and legally enforceable is the final Agency action with respect to the past-due status and enforceability of the overpayment. If we make a determination that a waiver request cannot be granted, we will issue a written notice of this determination in accordance with the regulations in subpart J of this part. Our referral of the overpayment to the Department of the Treasury will not be suspended under § 404.525 pending any further administrative review of the waiver request that the individual may seek.

(b) Copies of the findings described in paragraph (a) of this section will be distributed to the overpaid individual and the overpaid individual's attorney or other representative, if any.

(c) If the findings referred to in paragraph (a) of this section affirm that all or part of the overpayment is past due and legally enforceable and, if waiver is requested, we determine that the request cannot be granted, we will refer the overpayment to the Department of the Treasury. No referral will be made to the Department of the Treasury if, based on our review of the overpayment, we reverse our prior finding that the overpayment is past due and legally enforceable or, upon consideration of a waiver request, we determine that waiver of our collection of the overpayment is appropriate.

20 CFR 404.524

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20 CFR 404.524

§ 404.524 Review of our records related to the overpayment.

(a) Notification by the overpaid individual. An overpaid individual who intends to inspect or copy our records related to the overpayment as determined by us must notify us stating his or her intention to inspect or copy.

(b) Our response. In response to a notification by the overpaid individual as described in paragraph (a) of this section, we will notify the overpaid individual of the location and time when the overpaid individual may inspect or copy our records related to the overpayment. We may also, at our discretion, mail copies of the overpayment-related records to the overpaid individual.

20 CFR 404.525

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20 CFR 404.525

§ 404.525 Suspension of offset.

If, within 60 days of the date of the notice described in § 404.521, the overpaid individual notifies us that he or she is exercising a right described in § 404.522(a) and submits evidence pursuant to § 404.522(b) or requests a waiver under § 404.506, we will suspend any notice to the Department of the Treasury until we have issued written findings that affirm that an overpayment is past due and legally enforceable and, if applicable, make a determination that a waiver request cannot be granted.

20 CFR 404.902

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20 CFR 404.902

§ 404.902 Administrative actions that are initial determinations.

Initial determinations are the determinations we make that are subject to administrative and judicial review. We will base our initial determination on the preponderance of the evidence. We will state the important facts and give the reasons for our conclusions in the initial determination. In the old age, survivors' and disability insurance programs, initial determinations include, but are not limited to, determinations about --

(a) Your entitlement or your continuing entitlement to benefits;

(b) Your reentitlement to benefits;

(c) The amount of your benefit;

(d) A recomputation of your benefit;

(e) A reduction in your disability benefits because you also receive benefits under a workmen's compensation law;

(f) A deduction from your benefits on account of work;

(g) [Reserved]

(h) Termination of your benefits;

(i) Penalty deductions imposed because you failed to report certain events;

(j) Any overpayment or underpayment of your benefits;

(k) Whether an overpayment of benefits must be repaid to us;

(l) How an underpayment of benefits due a deceased person will be paid;

(m) The establishment or termination of a period of disability;

(n) A revision of your earnings record;

(o) Whether the payment of your benefits will be made, on your behalf, to a representative payee;

(p) Your drug addiction or alcoholism;

(q) Who will act as your payee if we determine that representative payment will be made;

(r) An offset of your benefits under § 404.408b because you previously received supplemental security income payments for the same period;

(s) Whether your completion of, or continuation for a specified period of time in, an appropriate program of vocational rehabilitation services, employment services, or other support services will increase the likelihood that you will not have to return to the disability benefit rolls, and thus, whether your benefits may be continued even though you are not disabled;

(t) Nonpayment of your benefits under § 404.468 because of your confinement in a jail, prison, or other penal institution or correctional facility for conviction of a felony;

(u) Whether or not you have a disabling impairment(s) as defined in § 404.1511;

(v) Nonpayment of your benefits under § 404.469 because you have not furnished us satisfactory proof of your Social Security number, or, if a Social Security number has not been assigned to you, you have not filed a proper application for one;

(w) A claim for benefits under § 404.633 based on alleged misinformation; and

(x) Whether we were negligent in investigating or monitoring or failing to investigate or monitor your representative payee, which resulted in the misuse of benefits by your representative payee.

*** This document is current through the May 11, 2016 issue of the Federal Register ***

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20 CFR 404.905

§ 404.905 Effect of an initial determination.

An initial determination is binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

20 CFR 404.920

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20 CFR 404.920

§ 404.920 Reconsidered determination.

After you or another person requests a reconsideration, we will review the evidence we considered in making the initial determination and any other evidence we receive. We will make our determination based on the preponderance of the evidence.

Program Operations Manual System (POMS)

TN 7 (01-13)

GN 03102.100 The Reconsideration Process

A. Introduction to the reconsideration process

This subchapter contains general policies and procedures for developing and processing reconsideration requests under title II and reconsideration requests on Medicare entitlement under title XVIII. For appeal policies and procedures for other issues, see the following instructions:

- for title XVI reconsiderations, see SI 04020.000,
- for reconsiderations of medical denials, see DI 81010.150,
- for reconsideration of benefits for special veterans, see VB 02502.001,
- for the Centers for Medicare and Medicaid Services (CMS) processing of appeals of the amount paid or covered services for Medicare Parts A and B, see HI 00208.070 and HI 01205.005,
- for appeals of Medicare Income Related Monthly Adjustment Amounts (IRMAA), see HI 01140.000, and for the appeal process for Medicare Part D subsidy determination, see HI 03040.001.

B. Definitions for the reconsideration process

1. Reconsideration

Reconsideration is the mandatory first step in the administrative review process that the Social Security Administration (SSA) provides to a claimant dissatisfied with an initial determination. Exceptions to the mandatory reconsideration step and in which a hearing is the first level of review are listed in 20 CFR 404.930(a) (2), (6), and (7).

Reconsideration involves a thorough reexamination of all evidence on record. The person

reviewing the case will make the reconsideration determination based on all evidence used in the initial determination and any additional evidence or information submitted with the appeal. The reviewer must not have been involved in the initial determination.

2. Processing Centers (PC)

PC refers to all program service centers (PSC), the Office of Disability Operations (ODO), and the Office of Central Operations (OCO). For a list of title II non-medical reconsideration requests that are the jurisdiction of the PCs, refer to GN 03102.175B.

C. Policy for reconsideration requests

1. Who has the right to a reconsideration

Any party to the initial determination or any party who shows in writing that his or her rights may be adversely affected by the initial determination has the right to a reconsideration. For more information about the appeal of an initial determination, see GN 03101.040.

2. Who may request a reconsideration

The claimant, his or her appointed representative, representative payee, or other third party on behalf of the claimant can file a request for reconsideration. The SSA employee must provide to the claimant a copy of the request for reconsideration as notification that SSA received the appeal.

NOTE: Effective March 16, 2012, appointed representatives have the affirmative duty to use the iAppeals (i561 (Internet Request for Reconsideration), i501 (Internet Request for Hearing by Administrative Law Judge), and i3441 (Internet Disability Report-Appeal)) application to file a request for reconsideration or a request for hearing on a medically denied claim if they request direct fee payment on that matter. For more information on the policy on affirmative duties for representatives, see GN 03970.010B.

3. What constitutes a writing for a reconsideration request

Any writing (SSA-561-U2, letter, facsimile, or email) or timely submission of additional evidence after receiving a notice of initial determination by the claimant, his or her representative payee, or his or her appointed representative which clearly implies disagreement with the initial determination constitutes a request for reconsideration. A signature is not required on a written request for reconsideration.

A claimant may submit the iAppeals i561 to request a reconsideration of an initial disability

claim. For information on the iAppeals process for title II claims, see GN 03101.125.

A request for reconsideration must be in writing. An oral inquiry such as a phone call to the national 800 number network or to a field office (FO) to request forms is not a valid request for reconsideration and does not protect the date of an appeal.

4. What is not a request for reconsideration

A mere request for information or an explanation of SSA's determination does not constitute a request for reconsideration.

Actions that are not initial determinations are not subject to reconsideration. For examples of actions that are not initial determinations, see GN 03101.080.

5. Dismissal of a request for reconsideration

Dismissal of a request for reconsideration is the rejection of or refusal to accept the request. The action makes the prior determination the final determination of the Commissioner. A dismissal is not subject to appeal. For more information on grounds for dismissal of an appeal, see GN 03102.200B.

6. Time period to request reconsideration

The appeal period is generally 60 days. The 60 days start the day after the individual receives the notice of the determination or decision. SSA presumes the date that the individual receives the notice is 5 days after the date on the notice, unless the individual can show us that he or she did not receive the notice within the 5 days.

Exceptions:

- Do not add 5 days for mailing when you hand the notice to the claimant.
- Extend the time to include the next full workday when the period for requesting the appeal ends on a Saturday, Sunday, legal holiday or any other day, all or part of, which is a non-workday for Federal employees.
- Use the stamp cancellation or "postmark" date on the envelope for a mailed appeal if the receipt date would result in the loss or lessening of the claimant's rights or benefits. If the postmark is unreadable or there is no postmark, we consider the appeal timely filed if we receive it by the 70th day after the date on the notice of the determination or decision. For instructions on good cause for extending the appeal period, see GN 03101.020.

7. Where to submit a request for reconsideration

A claimant can submit a request for reconsideration to any SSA office, Veterans Administration Regional Office in the Philippines, or any Railroad Retirement Board Office if the claimant has at least 10 or more years or after December 31, 1995 has at least 5 years of railroad service (see RS 01601.110A.1.).

8. SSA cannot reconsider an initial determination on its own motion

SSA may not reconsider a determination on its own motion. However, without a request from the claimant, SSA may correct an error in an initial determination under the rules of administrative finality. For more information on administrative finality, see GN 04001.000.

9. Reconsideration filed early

a. Initial determination not made

Send the claimant a letter that explains that we have not made a decision and that he or she can file an appeal after we make a decision. See the exhibit letter for an appeal requested before a decision is made on a case in NL 00703.470.

b. Notice pending release or in transit

If a notice is pending release or is in transit, e.g., SSA made the initial determination and the notice appears on Online Retrieval System (ORS), but the claimant has not received it, accept the appeal.

10. Reconsideration filed late

a. Claimant submits request for reconsideration or submits additional evidence after the 60–day period for requesting reconsideration

Accept the request for reconsideration. SSA may extend the time limit for requesting a reconsideration if the request for an extension is in writing and the claimant shows good cause for missing the time limit. In most cases, the component responsible for making the reconsideration determination will make the good cause determination. The claimant cannot appeal a determination where SSA did not find good cause. For instructions on obtaining and processing a good cause statement, see GN 03101.020.

b. Claimant submits additional evidence after the 60–day period for requesting reconsideration

Accept the evidence and develop for good cause. See GN 03101.020 for instructions on obtaining and processing a good cause statement.

11. Notice of reconsidered determination

The notice advises the claimant of the determination and its basis, and informs him or her of the right to a hearing. If appropriate, an explanation of the Expedited Appeals Process is included. For instructions on reconsideration notices of determination, see GN 03102.425. For instructions on the expedited appeals process, see GN 03107.100.

D. References

- SI 04020.000 Reconsideration - SSI
- GN 03101.070 Appeals of Actions Which Are Initial Determinations
- DI 12005.000 Reconsiderations – Initial Claims
- DI 12025.000 Reconsideration – Postentitlement
- VB 02502.000 Reconsideration
- GN 03108.000 Medicare Procedures
- DI 80830.050 Initial Claims and Reconsideration Actions

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TN 3 (01-89)

GN 04001.010 When and Why SSA Reopens — Policy Principle

SSA can reopen incorrect determinations:

Within one year of the date of the notice of initial determination **for any reason**; or

Within 4 years of the date of the notice of initial determination **for good cause**(GN 04010.001); or

At any time for reasons explained in GN 04020.001ff.

NOTE: See RS 00601.010 for the tolerance rule which should be applied before reopening and revising computations of the benefit amount.

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GN 04001.010 - When and Why SSA Reopens -- Policy Principle - 09/24/2010
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