

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

BORIS ERSHTEYN, IRINA ERSHTEYN,  
SARAH RAY, and MANOUCHEHR  
SORATPOUR, individually and on behalf all  
persons similarly situated,

Plaintiffs,

-against-

NANCY A. BERRYHILL, as Acting  
Commissioner of the Social Security  
Administration,

Defendant.

**18 Civ. 04872 (PKC)**

**AMENDED CLASS  
ACTION COMPLAINT**

**PRELIMINARY STATEMENT**

1. Plaintiffs Boris Ershteyn, Irina Ershteyn, Sarah Ray, and Manouchehr Soratpour bring this class action on behalf of themselves and a class of all current and future recipients of Supplemental Security Income (“SSI”) whose benefits have been or will be terminated or recouped due to an unlawful and improper determination by the Social Security Administration (“SSA”) that SSA itself recognizes should not be made.

2. The class consists of many thousands of vulnerable and indigent people who depend on SSI to meet their basic requirements for shelter, food, and clothing.

3. Approximately four times every year, in thousands of cases, SSA wrongfully counts as a recipient’s “resources” the monthly SSI benefits the agency itself has just deposited. SSA usually deposits monthly SSI benefits into recipients’ accounts on the first day of each month. However, when the first day of a month falls on a weekend or holiday, SSA deposits

recipients' benefits into their accounts on the last business day of the previous month ("Early Deposited Benefits"). SSA then routinely improperly counts these "Early Deposited Benefits" as resources and incorrectly concludes that recipients are over the statutory resource limit for SSI eligibility.

4. SSA's own policies recognize the potential for this mistake and prescribe procedures to avoid it, but those procedures are not followed.

5. As a result of these systemic miscalculations, SSA wrongly asserts that these recipients have been "overpaid" benefits in the months SSA incorrectly concluded they were ineligible, or are no longer eligible for SSI at all, when in fact they have not been overpaid and do remain eligible. SSA then proceeds to recoup portions of their benefits, or terminate the recipients from SSI altogether.

6. A small portion of these elderly and/or disabled recipients are able to follow the complex bureaucratic procedures for challenging SSA's determination, and when they do so, SSA eventually restores their benefits because it recognizes that Early Deposited Benefits must not be counted. But these recipients often wait for months without their full benefits. And many others lack the means or wherewithal to address the problem at all, and are thus improperly and permanently deprived of critical subsistence benefits because of SSA's completely avoidable practice.

7. Plaintiffs seek injunctive and declaratory relief from SSA's systemic practice of terminating or recouping SSI benefits because it has unlawfully counted Early Deposited Benefits as an available resource in the month of receipt, in violation of SSI regulations and administrative guidance, and the Due Process and Equal Protection guarantees of the Fifth Amendment to the U.S. Constitution.

**JURISDICTION AND VENUE**

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1361 and 2201, and 42 U.S.C. §§ 405(g) and 1383(c)(3).

9. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. §§ 405(g) and 1383(c)(3), because it is the judicial district in which Mr. and Ms. Ershteyn reside.

**PARTIES**

10. Named Plaintiff BORIS ERSHTEYN is a 78-year old SSI recipient who lives in Queens, New York.

11. Named Plaintiff IRINA ERSHTEYN is a 69-year old SSI recipient who lives in Queens, New York.

12. Named Plaintiff SARAH RAY is a 57-year old SSI recipient who lives in Silver City, New Mexico.

13. Named Plaintiff MANOUCHEHR SORATPOUR is an 81-year old SSI recipient who lives in Saratoga, California. Certain of SSA's records reflect Mr. Soratpour's name as "Manou Soratpour," a shortened form of his name.

14. Defendant NANCY A. BERRYHILL is the Acting Commissioner of SSA, and as such is responsible for the administration of SSI. She maintains an office at 6401 Security Boulevard, Gwynn Oak, Maryland.

**FACTS CONCERNING SSA'S UNLAWFUL PRACTICES**

*SSI Eligibility and Bank Matches*

15. SSI provides subsistence benefits for poor, elderly, or disabled individuals. 42 U.S.C. §§ 1381, 1381a. "The basic purpose underlying the [SSI] program is to assure a

minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level.” 20 C.F.R. § 416.110.

16. To be eligible for SSI, an individual must be either disabled or over the age of 64. 42 U.S.C. § 1382.

17. In addition, SSI recipients are subject to strict income and resource tests that are set by statute. 42 U.S.C. § 1382. In 2018, an SSI recipient living alone must have less than \$2,000 in available resources to be eligible for SSI; recipients living as a couple must have less than \$3,000 in available resources. 20 C.F.R. § 416.1205(c).

18. In 2018, an SSI recipient without any other income who lives alone receives \$750 per month and a married couple without any other income receives \$1125 per month.

19. Federal regulation provides that “[i]tems received in cash or in kind during a month are evaluated first under the income counting rules and, if retained until the first moment of the following month, are subject to the rules for counting resources at that time.” 20 C.F.R. § 416.1207(d); *see also* 20 C.F.R §§ 416.1110-416.1112 (income counting rules for earned income); 20 C.F.R. §§ 416.1120-416.1124 (income counting rules for unearned income).

20. SSA does not evaluate the same asset under both income and resource counting rules in the same month. POMS SI 01120.005(A)<sup>1</sup>; POMS SI 01110.600(B)(3).

21. In other words, cash received in a particular month may or may not be income depending on applicable rules, but it cannot be treated as a “resource” for that month. If the cash is retained until the following month, however, it can be counted as a resource at that time

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<sup>1</sup> The SSA Program Operations Manual System (“POMS”), a manual promulgated by the Commissioner of Social Security, is SSA’s authorized means for issuing written program instructions for adjudicating claims and performing its mission. The POMS is a primary source of information used by SSA employees to process claims.

if not otherwise excludable. 20 C.F.R. § 416.1207(d); POMS SI 01110.600(B)(3).

22. Accordingly, SSA is not permitted to count SSI benefits paid for a given month as a resource in that month.

23. SSA may only count SSI benefits as a resource in the month following the month for which they are paid, if any portion of the benefits is retained until the following month.

24. SSA periodically reviews an SSI recipient's financial eligibility. SSA's review seeks to assess a recipient's available resources, including bank account balances, at 12:01 a.m. on the first day of each month to determine whether a recipient's resources exceed the allowable limit for that month.

25. To assess recipients' account balances, SSA may inspect bank records at periodic "redetermination meetings." 20 C.F.R. § 416.204. SSA also requires recipients' authorization to access their bank records electronically, and routinely checks SSI recipients' bank accounts electronically as of 12:01am on the first day of each month. The electronic examination is known as a "bank match" or as an Access to Financial Institutions (AFI). SSA may perform the bank match in real time, or may perform the bank match for a particular month retroactively at a later date. POMS SI 01140.200.

26. If the redetermination meeting review or bank match shows a balance over the allowable SSI resource limit for the current month, SSA determines that the recipient is no longer eligible for SSI benefits. SSA then sends a notice of termination of benefits and schedules an adverse action—specifically, a termination of benefits. 20 C.F.R. § 416.1336. On information and belief, this process can be accomplished automatically by SSA's computer system or manually by a SSA employee.

27. If the redetermination meeting review or bank match shows a balance over the

allowable SSI resource limits for a prior month or months, but not for the current month, SSA determines that the recipient was overpaid for the past month or months, sends a notice of recoupment, and schedules an adverse action—specifically, recoupment of benefits. 20 C.F.R. § 416.1336. On information and belief, this process can be accomplished automatically by SSA’s computer system or manually by a SSA employee.

28. Recoupment generally entails reducing a recipient’s benefits by 10% each month until the full balance of the alleged overpayment is repaid. 20 C.F.R. § 416.570.

*SSI Early Deposit Months*

29. SSA normally deposits SSI benefits on the first of each month. 20 C.F.R. § 416.502. SSA deposits the money either in a recipient’s bank account or onto a debit card provided for these purposes.

30. Four times per year, the first day of the month falls on a weekend or a holiday. In those months, to avoid a late payment, SSA deposits SSI benefits for that month on the prior Friday or non-holiday weekday to avoid a late payment of benefits. 20 C.F.R. § 416.502. That prior non-holiday weekday is, of course, in the month prior to the month for which the benefit is paid by a day or a few days, but represents the payment for the month that is about to start.

31. As a result of this early payment, there are four months per year (“Early Deposit Months”) when the redetermination review of bank records as of the first of the month, or bank match performed at 12:01am on the first day of the month, will show a balance that includes both the recipient’s actual available resources and their monthly SSI benefit for that month, which was deposited just days before.

32. If the total of the recipient’s actual available resources and the just-received Early Deposited Benefits exceeds the allowable resource limits, SSA’s bank match or

redetermination review will conclude that the recipient is over the resource limit and not eligible for SSI for that month.

33. SSA is aware of these four Early Deposit Months in advance and in fact publishes a calendar each year so that SSA employees are informed of the payment schedule.

34. SSA's POMS provides specific guidance to SSA employees regarding Early Deposit Months, and explicitly directs them not to include Early Deposited Benefits in determining an SSI recipient's available resources:

Pay close attention to balances that might indicate an SSI payment is part of the first of the month balance. Review the case according to the following procedures if the amount of the SSI payment could be material to eligibility.

***a. Early deposit months***

Determine whether we issued the SSI payment and any applicable federally administered State supplement prior to the first of the month by reviewing the list of early deposit months found at SM 01315.005.

Deduct the value of the SSI payment and any applicable federally administered State supplement from the account balance if all of the following are true:

- The SSI payment is pertinent to determining eligibility because the recipient's resources exceed the resource limit by an amount equal to or less than the SSI payment plus any applicable federally administered State supplement;
- The month is an early deposit month listed in SM 01315.005; and
- The SSI payment and any applicable federally administered State supplement were direct deposited to the account.

POMS SI 01140.200 ("Checking and Savings Accounts"), § 6 ("SSI payments included in first of month balances").

35. On information and belief, in the Early Deposit Months, the determination that a SSI payment was issued early and must be subtracted from the bank balance requires a manual action by an SSA employee.

36. Despite the prohibition against counting a month's benefit payment as a resource in the month of receipt, and despite the provision of the POMS clearly explaining that Early Deposited Benefits must be subtracted from the balance on the first of the month, SSA routinely

fails to deduct them. As a result of this failure, SSA routinely terminates or recoups, or threatens to terminate or recoup, SSI recipients' benefits.

*Reconsideration and Appeal Process*

37. Any SSI recipient who receives a notice of overpayment or termination has the right to challenge that determination by requesting a reconsideration. 20 C.F.R. § 416.1413(b).

38. In response to a notice of termination, the recipient must file her reconsideration request within ten days (plus five days for mailing) to continue to receive unchanged benefits while the local SSA office considers the request. 20 C.F.R. § 416.1336(b); POMS SI 02301.300. If the recipient files the request after ten days but within sixty days (plus five days for mailing), the recipient's benefits will be terminated while the local SSA office considers the request. After sixty days (plus five days for mailing), the recipient can no longer challenge the termination at all.

39. In response to a notice of overpayment, the recipient must file her reconsideration request within sixty days (plus five days for mailing) to continue to receive unchanged benefits while the local SSA office considers the request. 20 C.F.R. § 416.1413(b); POMS SI 02220.017. After sixty days (plus five days for mailing), the recipient can no longer challenge the overpayment determination at all.

40. In practice, even when recipients timely file their reconsideration requests, SSA routinely fails to adequately or timely process the request. Recipients and/or their advocates often must contact SSA repeatedly to ensure that requests are processed.

41. In practice, even recipients who timely raise valid reasons for reconsideration in fact often have their benefits recouped or terminated.

42. For a notice of overpayment, the recipient may request a "waiver"—that is, a



decision by SSA to waive recoupment of the purported overpayment—instead of reconsideration. 20 C.F.R. § 416.550. The waiver request may be filed at any time. POMS SI 02220.017. Upon receipt of a waiver request, SSA is required to stop recoupment while the local SSA office considers the waiver request. POMS SI 02260.001.

43. In practice, SSA routinely fails to stop recoupment pending a determination on the request. As a result, recipients who file waiver requests often nonetheless have their benefits recouped during the pendency of the waiver application.

44. SSA routinely takes many months to adjudicate a reconsideration or a waiver request.

45. In the majority of cases in which recipients are working with advocates, SSA grants the reconsideration or waiver requests.

46. On information and belief, many (if not most) recipients who are not working with advocates are unable to understand and/or effectively present arguments regarding the improper counting of Early Deposited Benefits. As a result, on information and belief, many recipients fail to request reconsideration of SSA's adverse action or seek a waiver. Of those that do request reconsideration or a waiver, SSA often denies those recipients' reconsideration or waiver requests unless the recipients are able to argue that the erroneous overpayment or termination decision is because SSA improperly counted Early Deposited Benefits.

47. If SSA denies a recipient's reconsideration request, the recipient may appeal the determination by requesting a hearing before an administrative law judge.

48. If SSA denies a recipient's waiver request, the recipient may appeal the determination by requesting a reconsideration of the waiver denial. If that reconsideration is denied, then the recipient may appeal the determination by requesting a hearing before an

administrative law judge.

49. While the recipient's hearing request is pending, SSA may terminate or recoup the recipient's benefits.

50. Recipients regularly wait 18 to 24 months before an administrative law judge holds the hearing and issues a decision.

*Harm to Recipients*

51. The reconsideration and appeal process is insufficient to redress SSA's systemic unlawful practices in counting Early Deposited Benefits as resources.

52. SSI recipients are, by definition, low-income and either elderly, disabled, or both elderly and disabled.

53. Even recipients who are able to invoke the procedures to challenge SSA's unlawful counting of Early Deposited Benefits often suffer an erroneous deprivation of benefits.

54. Because SSA routinely fails to timely docket reconsideration or waiver requests, many recipients who timely file valid requests for reconsideration are nonetheless terminated, or have their benefits recouped, for a period of time.

55. Because of extensive delays in SSA's processing of reconsideration or waiver requests and appeals from denials of such requests, recipients routinely wait years to have even obvious errors corrected.

56. In addition, SSA routinely makes the same mistake with regard to Early Deposited Benefits for the same recipients again and again, so that even if a recipient succeeds in having his or her benefits restored once, he or she is at risk of suffering further unlawful terminations or recoupments.

57. SSA is aware that this failure to follow correct procedure recurs repeatedly.

58. Many SSI recipients are unable to invoke the procedures to challenge SSA's wrongfully counting Early Deposited Benefits at all.

59. Because SSI recipients are low-income and either elderly or disabled or both, they are very unlikely to understand when SSA has wrongly determined their eligibility, or wrongly calculated their benefits. They are also very unlikely to understand, and be able to pursue, procedures available for correcting errors in the determination of their eligibility or benefits.

60. SSA's current practices require each recipient to separately appeal the improper counting of Early Deposited Benefits. As a result, SSA operates, *de facto*, with two standards of benefit eligibility: one for recipients who appeal (and are eventually able to have their benefits restored) and one for recipients who do not.

61. SSA's continued practice of erroneously counting Early Deposited Benefits has the profoundly unfair result of depriving needy, fully eligible SSI recipients of the basic subsistence benefits to which they are entitled.

62. Members of the proposed class depend on SSI benefits to cover their most basic needs for shelter, food, and clothing. Without the full benefits to which they are entitled, they face a host of ills, including homelessness, hunger, and loss of critical medical coverage.

63. SSI's routine counting of Early Deposited Benefits is entirely avoidable, since SSA knows the Early Deposit Months in advance.

64. SSA publishes a calendar of payment dates every year which includes the four Early Deposit Months for that year.

65. On information and belief, legal services advocates have repeatedly informed SSA that this unlawful practice is widespread and persistent, and have repeatedly requested that

SSA promptly ensure that the practice stops.

66. Nonetheless, SSA has continued this unlawful practice unabated.

*The Class*

67. Named Plaintiffs Boris Ershteyn, Irina Ershteyn, Sarah Ray, and Manouchehr Soratpour bring this action, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and as representatives of a class consisting of:

current and future recipients of Supplemental Security Income whose benefits have been or will be terminated or recouped, or threatened to be terminated or recouped, due to alleged excess resources resulting from SSA's unlawful counting of Early Deposited Benefits as an available resource.

68. Plaintiffs and the putative class challenge SSA's systemic practice of failing to follow its own regulations and administrative guidance in assessing financial eligibility for benefits.

69. The class is so numerous that joinder of all class members in this action would be impracticable. Over 8,100,000 individuals receive SSI benefits and are subject to potential arbitrary termination or recoupment of their benefits when their Early Deposited Benefits are unlawfully counted as an available resource.

70. The Disability Advocacy Project at the New York Legal Assistance Group ("NYLAG") provides free legal advice and representation to low-income individuals whose SSI benefits are wrongfully denied or terminated. The Disability Advocacy Project assists approximately 100-150 clients per year in challenging terminations or overpayments for reasons other than disability determinations (that is, determinations regarding their financial eligibility).

71. In the experience of the Disability Advocacy Project's staff, in approximately one-fifth to one-third of the cases in which SSA has determined that a client was over the resource limit, that determination rested on the improper counting of Early Deposited Benefits

for one or more of the months involved.

72. The Disability Advocacy Project regularly confers with other legal services providers in New York City and around the country. Many of these providers have reported that they also see individuals whose SSI benefits SSA wrongfully recouped or terminated, or threatened to recoup or terminate, because SSA incorrectly counted the recipients' Early Deposited Benefits as resources.

73. On information and belief, many SSI recipients whose benefits SSA wrongfully recoups or terminates because SSA incorrectly counted the recipients' Early Deposited Benefits as resources are unable to find legal assistance.

74. Very few providers of legal services are able to assist a substantial number, if any, SSI recipients faced with termination or recoupment for reasons of purported financial ineligibility. On information and belief, the majority of legal services providers that assist SSI recipients in challenging benefits denials or terminations assist only, or primarily, with challenging disability determinations.

75. Members of the class are, by definition, disabled and elderly indigent individuals, and rely on their SSI benefits to meet their basic shelter and nutritional needs.

76. Without certification of a class action seeking common redress for these individuals, members of the putative class are unlikely to be able to obtain individual redress for their claims. Their rights under the law may well be meaningless without certification of a class.

77. Plaintiffs and the putative class members are not seeking to have their benefits reinstated outside the normal SSA procedures; rather, they are seeking to have SSA procedures followed.

78. As a result of the practices described above, there are questions of fact common to the class, including whether SSA routinely counts SSI recipients' Early Deposited Benefits as an available resource and whether SSA routinely terminates or recoups benefits as a result of counting Early Deposited Benefits as resources.

79. There are also questions of law common to the class, including whether SSA's practice of counting SSI recipients' Early Deposited Benefits violates federal regulation and administrative guidance, and the Due Process and Equal Protection protections of the United States Constitution.

80. The claims of Named Plaintiffs Boris Ershteyn, Irina Ershteyn, Sarah Ray, and Manouchehr Soratpour are typical of the claims of the class in that they were subject to SSA's erroneous counting of Early Deposited Benefits as resources.

81. Named Plaintiffs will adequately represent the interests of the class. They are members of the proposed class and there are no conflicts of interest between them and other proposed class members in that all proposed class members would benefit from the relief sought in this action.

82. Plaintiffs are represented by NYLAG, a public interest law firm with extensive experience in litigating class action cases, including numerous cases involving public benefits. For example, NYLAG was class counsel in *Hercules v. Doar*, 10 Civ. 6350 (E.D.N.Y. 2010) (challenging erroneous deprivation of public assistance benefits); *Johnson v. Shah*, 11 Civ. 1956 (E.D.N.Y. 2011) and *Spitzer v. Shah*, 11 Civ. 3157 (E.D.N.Y. 2011) (challenging wrongful denial of Medicaid-funded home health services); and *Shakhnes v. Eggleston*, 740 F. Supp. 2d 602 (S.D.N.Y. 2010) (certifying Rule 23(b)(2) class of Medicaid home health care recipients), *aff'd sub nom Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012).

83. A class action is the appropriate method for a fair and efficient adjudication of this matter in that the Defendant has acted or refused to act in a manner generally applicable to the class as a whole and a class action will avoid numerous separate actions by class members that would unduly burden the courts and create the possibility of inconsistent decisions, thereby making final injunctive and declaratory relief appropriate as to the class as a whole.

### **FACTS CONCERNING NAMED PLAINTIFFS**

#### *Boris and Irina Ershteyn*

84. Boris and Irina Ershteyn are a married couple who live together in Far Rockaway, Queens. Boris Ershteyn is a 78-year-old man. Irina Ershteyn is a 69-year-old woman.

85. Boris and Irina Ershteyn are natives of Russia, and neither speaks fluent English.

86. SSI is their only source of income. They use it to pay for rent, food, and utilities.

87. On July 30, 2018, Mr. and Mrs. Ershteyn each received a Notice of Overpayment from SSA in English.

88. Boris Ershteyn's notice stated that he had been paid \$1676.50 in excess SSI benefits over the course of three separate months between January 2017 and July 2018, specifically: in January 2017, he was paid \$551.50; in April 2018, he was paid \$562.50; and in July 2018, he was paid \$562.50. The notice stated that in each of these three months, he should have been paid \$0.00 because his and his wife's combined countable resources surpassed the eligibility limit for the month.

89. Irina Ershteyn received an identical notice on the same date alleging SSI overpayments in January 2017, April 2018, and July 2018, also totaling \$1675.50.

90. January 2017, April 2018, and July 2018 were all Early Deposit Months.

91. In fact, at 12:01 a.m. on the first of each of those months, Mr. and Mrs. Ershteyn's combined resources did not exceed the \$3,000 SSI eligibility limit.

92. In each of these months, their countable resources included the following: Mr. Ershteyn's checking account; Mrs. Ershteyn's checking account; Mr. Ershteyn's savings account; and the cash surrender value of Mrs. Ershteyn's TexasLife life insurance policy.

93. On January 1, 2017 at 12:01 a.m., these countable resources totaled \$2,393.24. On April 1, 2018 at 12:01 a.m., these countable resources totaled \$2,431.05. On July 1, 2018 at 12:01 a.m., these countable resources totaled \$2,358.17.

94. On information and belief, SSA erroneously concluded that Mr. and Mrs. Ershteyn's available resources exceeded the eligibility limit in those months because SSI unlawfully counted their Early Deposited Benefits as available resources.

95. For example, Mr. and Mrs. Ershteyn received their Early Deposited Benefits for the month of April 2018 on March 30, 2018, in the amount of \$1125.00. Because those Early Deposited Benefits were incorrectly counted as an available resource, Mr. and Mrs. Ershteyn's combined resources appeared to total \$3,556.05.

96. SSA also notified Mr. and Mrs. Ershteyn on July 25, 2018 that SSA was indefinitely suspending their SSI benefits.

97. Starting in August 2018, SSI suspended Mr. and Mrs. Ershteyn's benefits. As of the date of this Complaint, they have not received their August 2018 benefits.

98. Mr. and Mrs. Ershteyn sought the assistance of a social worker, who referred them to NYLAG.

99. On August 16, 2018, NYLAG assisted Mr. and Mrs. Ershteyn in filing a request for reconsideration of the overpayment determination. The request detailed Mr. and Mrs.



Ershteyn's financial information, including an accurate description of their available resources in each month supported by bank statements and other documents attached. The request stated that "[t]he overpayments should be removed from the couple's record and both of their benefits should be reinstated."

100. No decision has been made on that request as of the date of this Complaint, so their benefits remain suspended.

101. Before Mr. and Mrs. Ershteyn consulted a NYLAG representative, they believed that SSA's determination about their eligibility must have been correct and that there was nothing they could do about the suspension of their benefits. They therefore took steps to reduce their countable resources. Mr. Ershteyn closed his savings account, and used the \$991.31 he withdrew to pay forward three months of rent.

102. Mrs. Ershteyn closed her life insurance policy in exchange for its cash surrender value of \$197.32. As a result, Mrs. Ershteyn no longer has a life insurance policy with which her survivors could have paid for her burial in the event of her death. Mrs. Ershteyn paid over \$2000 into this policy over time and, had she not cashed it out, it would have paid her survivors approximately \$10,000 toward her burial expenses.

103. Neither Mr. Ershteyn nor Mrs. Ershteyn would have taken these potentially harmful actions had they not received incorrect overpayment and suspension notices from SSA.

104. Mr. and Mrs. Ershteyn's SSI Medicaid stopped because of SSA's wrongful determination that they were ineligible.

105. Mr. and Mrs. Ershteyn are currently being harmed because they do not have sufficient funds to pay for their basic necessities and their uncertain access to health care.

*Sarah Ray*

106. Sarah Ray is a 57-year-old woman who lives in Silver City, New Mexico.

107. SSI is her only source of income. She uses it to pay for rent, food, and utilities.

108. On March 26, 2018, Ms. Ray received a Notice of Overpayment from SSA.

109. The notice stated that Ms. Ray had been paid \$9,529.00 in excess SSI benefits over the course of thirteen separate months between August 2015 and October 2016, including August 2015, November 2015, and January 2016. The notice stated that in each of these months, she should have been paid \$0.00 because her countable resources surpassed the eligibility limit for the month.

110. August 2015, November 2015 and January 2016 were Early Deposit Months.

111. In fact, at 12:01 a.m. on August 1, 2015, November 1, 2015, and January 1, 2016, Ms. Ray's resources did not exceed the \$2,000 SSI eligibility limit.

112. In each of those months, Ms. Ray's countable resources included Ms. Ray's savings account, her checking account, and one non-exempt vehicle worth \$200. On August 1, 2015, these countable resources totaled \$827.41. On November 1, 2015, these countable resources totaled \$625.70. On January 1, 2016, these countable resources totaled \$720.82.

113. On information and belief, SSA erroneously concluded that Ms. Ray's available resources exceeded the eligibility limit in those months because SSA unlawfully counted her Early Deposited Benefits as an available resource.

114. In addition, on information and belief, SSA erroneously counted an exempt vehicle purportedly worth \$1,175 in each of those months, instead of the non-exempt vehicle worth \$200.

115. The March 26, 2018 notice also notified Ms. Ray that SSA would begin

recouping her benefits.

116. On April 16, 2018, Ms. Ray received a second Notice of Overpayment from SSA.

117. The notice stated that Ms. Ray had been paid \$8,844.00 in excess SSI benefits over the course of twelve additional separate months between March 2015 and February 2018, including January 2017, October 2017 and January 2018. The notice stated that in each of these months, she should have been paid \$0.00 because her countable resources surpassed the eligibility limit for the month.

118. January 2017, October 2017 and January 2018 were Early Deposit Months.

119. In fact, at 12:01 a.m. on January 1, 2017, October 1, 2017 and January 1, 2018, Ms. Ray's resources did not exceed the \$2,000 SSI eligibility limit.

120. In all three of those months, Ms. Ray's countable resources included Ms. Ray's savings account and her checking account, as well as, in January 2017 only, a non-exempt vehicle worth \$200. On January 1, 2017, these countable resources totaled \$1,444.66. On October 1, 2017, these countable resources totaled \$697.85. On January 1, 2018, these countable resources totaled \$135.63.

121. On information and belief, SSA erroneously concluded that Ms. Ray's available resources exceeded the eligibility limit in those months because SSA unlawfully counted her Early Deposited Benefits as available resources.

122. In addition, SSA erroneously counted an exempt vehicle purportedly worth \$1,175 in each of those months. In January 2017, SSA should have counted the non-exempt vehicle worth \$200. In October 2017 and January 2018, Ms. Ray had no non-exempt vehicle.

123. As to the other months listed in the March 26, 2018 and April 16, 2018 notices,

SSA erroneously concluded that Ms. Ray had been overpaid in multiple months because SSA committed a host of additional errors, including examining months past the two year limit for administrative finality, improperly counting or overcounting the value of her vehicle, and improperly counting benefits that Ms. Ray's bank had deposited early in months that were not Early Deposit Months.

124. SSA also notified Ms. Ray on April 16, 2018 that SSA would begin recouping her benefits.

125. Ms. Ray sought the assistance of a community-based organization. The organization assisted her in timely requesting a reconsideration of SSA's overpayment determinations. The organization also referred her to a local legal services office.

126. With the assistance of an attorney, Ms. Ray subsequently submitted additional evidence to SSA in support of her reconsideration request.

127. Notwithstanding her timely reconsideration request, SSA has recouped her benefits by \$75 per month each month starting in June 2018.

128. No decision has been made on her reconsideration request as of the date of this Amended Complaint, so Ms. Ray's benefits continue to be recouped.

129. The recoupment has caused severe harm to Ms. Ray. Among other things, the recoupment has impaired her ability to purchase food, leading her to depend for survival on food banks and other charitable sources of food.

130. SSA's erroneous determination that Ms. Ray owed SSA the amount of the overpayments has also caused her serious emotional distress.

*Manouchehr Soratpour*

131. Manouchehr Soratpour is an 81-year-old man who lives in Saratoga, California.

132. His only source of income is SSI. He uses it to pay for rent, food, and utilities.

133. On June 20, 2018, Mr. Soratpour received a letter from the SSA stating that he he had received an overpayment.

134. On August 11, 2018, Mr. Soratpour received a Notice of Overpayment from SSA.

135. The notice stated that Mr. Soratpour had been paid \$1370.80 in excess SSI benefits in the months of February and March 2015 and that “[f]or (Enter Year) the limit on the value of the things you own which we included as your resources was \$(Enter Resources Limit).”

136. The notice further stated that in each of the two months, Mr. Saratpour should have been paid \$0.00 because his countable resources surpassed the eligibility limit for the month.

137. February 2015 and March 2015 were early deposit months.

138. In fact, at 12:01 a.m. on February 1, 2015 and March 1, 2015, Mr. Soratpour’s resources did not exceed the \$2,000 SSI eligibility limit.

139. In both of those months, Mr. Soratpour’s countable resources included his savings account and his checking account. On February 1, 2015, those countable resources totaled \$1440.58. On March 1, 2015, those countable resources totaled \$1421.98.

140. On information and belief, SSA erroneously concluded that Mr. Soratpour’s available resources in those two months exceeded the eligibility limit because SSA unlawfully counted his Early Deposited Benefits of \$685.40 per month as available resources.

141. SSA also notified Mr. Soratpour on August 11, 2018 that SSA would continue recouping his benefits at a rate of \$25 per month. His benefits were already being recouped at

this rate because of a prior, incorrect alleged overpayment.

142. Although the August 11, 2018 notice stated that SSA would continue to recoup \$25 per month from Mr. Soratpour's benefits, SSA instead began recouping \$60 per month beginning in September 2018.

143. Mr. Soratpour cannot meet his monthly expenses with such a significant recoupment.

144. Mr. Soratpour sought the assistance of an attorney. That attorney has filed a request for reconsideration, which is still pending.

145. Mr. Soratpour has previously suffered from an incorrect alleged overpayment due to Early Deposited Benefits being counted as an available resource.

146. On that occasion, he was notified of the alleged overpayment by Notice of Change in Payment dated February 16, 2015. That notice stated that Mr. Soratpour had been overpaid for seventeen months in 2013 and 2014. The notice stated that in each of those seventeen months, he should have been paid \$0.00 because his countable resources surpassed the eligibility limit for the month.

147. Six of those months of alleged overpayment – June 2013, September 2013, January 2014, February 2014, September 2014, November 2014 - were Early Deposit Months.

148. In fact, at 12:01 a.m. on the first day of each of those months, Mr. Soratpour's countable resources did not exceed the eligibility limit of \$2,000.

149. With the help of an attorney, Mr. Soratpour filed an earlier Request for Reconsideration contesting all seventeen months of overpayment.

150. On May 20, 2015, SSA sent Mr. Soratpour a partially favorable Notice of Reconsideration that removed the six early deposit months from his alleged overpayment. The

notice states: “[w]e went through your record and excluded every early SSI deposit from your bank records.”

151. Mr. Soratpour continues to contest the remaining months of alleged overpayment, which are not at issue here.

**FIRST CAUSE OF ACTION**  
***Violation of Federal Regulation***

152. Defendant Berryhill’s custom and practice of threatening to terminate or recoup, and of actually terminating or recouping, SSI benefits because SSA has improperly counted the recipient’s SSI benefits as an available resource violates Plaintiffs’ and putative class members’ rights under 20 C.F.R. § 416.1207(d), as well as POMS SI 01140.200.

153. Plaintiffs and putative class members have been harmed by this custom and practice and remain at risk of future harm if Defendants’ unlawful practices are not enjoined.

**SECOND CAUSE OF ACTION**  
***Violation of Due Process Clause***

154. The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides in relevant part that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”

155. Defendant Berryhill’s custom and practice of threatening to terminate or recoup, and of actually terminating or recouping, SSI benefits because SSA has improperly counted the recipient’s SSI benefits as an available resource is irrational, arbitrary, capricious, and/or fails to apply ascertainable standards in a rational and consistent manner, in violation of Plaintiffs’ and class members’ rights under the Due Process clause of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V.

156. Plaintiffs and putative class members have been harmed by this custom and

practice and remain at risk of future harm if Defendants' unlawful practices are not enjoined.

**THIRD CAUSE OF ACTION**  
***Violation of Equal Protection Clause***

157. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, as incorporated into the Fifth Amendment to the U.S. Constitution, provides in relevant part that the United States shall not deny to any person within its jurisdiction the equal protection of the laws.

158. Defendant Berryhill's custom and practice of threatening to terminate or recoup, and of actually terminating or recouping, SSI benefits because SSA has improperly counted the recipient's SSI benefits as an available resource, then consistently reversing that decision on appeal creates two unequal standards of benefit calculation: one for claimants who appeal, and another for claimants who do not, even though the eligibility of all claimants for benefits is conceded. This custom and practice violates Plaintiffs' and class members' rights to equal protection under the Due Process clause of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V.

159. Plaintiffs and putative class members have been harmed by this custom and practice and remain at risk of future harm if Defendants' unlawful practices are not enjoined.

**FOURTH CAUSE OF ACTION**  
***Mandamus***

160. Federal regulation, and the POMS, prohibit Defendant Berryhill from counting Early Deposited Benefits as an available resource. 20 C.F.R. § 416.1207(d); POMS SI 01140.200.

161. Defendant's actions in unlawfully counting Early Deposited Benefits as an available resource are official actions.



162. Defendant's duty to not to count Early Deposited Benefits as an available resource is plainly prescribed and without discretion.

163. Plaintiffs and putative class members have the right to receive SSI benefits if they are eligible under applicable statute and regulation. Plaintiffs and putative class members also have the right not to be deprived of their property by arbitrary, capricious, or irrational government action.

164. In unlawfully counting Early Deposited Benefits as an available resource, Defendant fails to perform her non-discretionary duty to properly assess SSI recipients' financial eligibility, including their income and resources, in accordance with applicable regulations. This duty is owed to all SSI recipients. Defendant's failure to perform her nondiscretionary duty results in the threat of unlawful termination and recoupment, or in actual termination and recoupment, of Plaintiffs' and putative class members' SSI benefits, and denies Plaintiffs and putative class members their rights under federal law.

165. Plaintiffs seek to compel Defendant to perform this non-discretionary duty pursuant to 28 U.S.C. § 1361.

166. No alternative means of relief exists.

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment:

1. Certifying this case as a class action, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, with the class defined as:

current and future recipients of Supplemental Security Income whose benefits have been or will be terminated or recouped, or threatened to be terminated or recouped, due to alleged excess resources resulting from SSA's unlawful counting of Early Deposited Benefits as an available resource.

2. Declaring that:

a. Defendant Berryhill's custom and practice of threatening to terminate, and actually terminating, SSI benefits without first determining whether SSA has improperly counted Early Deposited Benefits an available resource violates Plaintiffs' rights under 20 C.F.R. § 416.1207(d) and SSA's administrative guidance; and the Due Process and Equal Protection guarantees of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V.

b. Defendant Berryhill's custom and practice of threatening to recoup, and actually recouping, SSI benefits without first determining whether whether SSA has improperly counted Early Deposited Benefits as an available resource violates Plaintiffs' rights under 20 C.F.R. § 416.1207(d) and SSA's administrative guidance; and the Due Process and Equal Protection guarantees of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V.

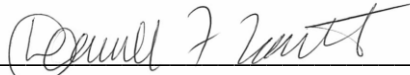
3. Enjoining Defendant Berryhill from threatening to terminate or recoup, and from actually terminating or recouping, SSI benefits as a result of improperly counting Early Deposited Benefits as an available resource;

4. Enjoining Defendant Berryhill to identify all class members whose benefits were terminated or recouped based on a finding that they had excess resources as a result of improperly counting Early Deposited Benefits as an available resource, subtract Early Deposited Benefits from total resources in each month in which Early Deposited Benefits were improperly counted, make new determinations on class members' eligibility in those months, repay improperly recouped and reinstate improperly terminated benefits, and send adequate notice to class members of any changes in their benefits.

5. Awarding reasonable attorney's fees, costs and disbursements; and
6. Granting such other and further relief as the Court may deem just and proper.

Dated: November 21, 2018  
New York, New York

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