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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY BELL,

Plaintiff,

vs.

No. CIV. S-10-2529 GGH

MICHAEL J. ASTRUE,

Defendant.

ORDER

_____ /

Defendant seeks dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction based on plaintiff's having brought a claim for relief under a class action settlement in the Northern District of California. The Commissioner also seeks dismissal of the complaint based on mootness and lack of exhaustion. Plaintiff, proceeding in pro se, has filed an opposition. The matter was set for hearing on October 6, 2011; however, plaintiff did not appear as the record reflects that he had his notice of the hearing returned as undeliverable. GERALYN GULSETH appeared telephonically for defendant. The parties have consented to the jurisdiction of the undersigned pursuant to 28 U.S.C. § 636(c).

Having reviewed the papers in support of and in opposition to the motion, the court now issues the following order.

\\

1 BACKGROUND

2 On September 17, 2010, plaintiff initiated this action by filing a “writ of mandate.”¹
3 Plaintiff, an SSI recipient, alleges that his situation is similar to a class action settlement in the
4 Northern District of California, Martinez v. Astrue, Civ.S. 08-4735 CW, which was settled on
5 September 24, 2009. (Def.’s Mot., Ex. 3.) That case addressed a “fugitive felon” policy of “denying or
6 suspending benefits to persons on the basis of an outstanding felony arrest warrant...” (Id., Ex. 1.) The
7 complaint is very confusing but appears to allege that plaintiff is a former felon who had a warrant
8 issued against him by the State of Michigan in 1987, which was not dismissed until July 1, 2005, some
9 18 years later. (Compl. ¶ 7.) Plaintiff alleges that the SSA discontinued his benefits in May, 2005
10 based on the warrant. (Pl.’s Opp. at 2.) Plaintiff claims that despite the dismissal of the warrant, he
11 was assessed an overpayment from 2003 through 2005, in the amount of \$20,021.34. (Id. at 3.) In
12 addition to collecting on the overpayment which to date amounts to \$5,460, plaintiff claims that the
13 SSA took his entire monthly allotment from May, 2005 through December, 2005, which totals
14 approximately \$5,000 to \$6,000.

15 The Commissioner submits the following grounds for dismissal: that any claim relating to
16 the Martinez settlement must be adjudicated in the Northern District as the proper forum; that the relief
17 plaintiff seeks has been provided pursuant to the Martinez settlement and therefore these claims are
18 moot; and to the extent any claims are made outside of the Martinez settlement, plaintiff has not
19 exhausted his administrative remedies. Defendant filed a supplemental statement which modifies its
20 position, as will be addressed *infra*.

21 DISCUSSION

22 I. LEGAL STANDARD FOR MOTION TO DISMISS

23 On a Rule12(b)(1) motion to dismiss for lack of subject matter jurisdiction, plaintiff bears
24 the burden of proof that jurisdiction exists. See, e.g., Sopcak v. Northern Mountain Helicopter Serv.,

25
26 ¹ Plaintiff’s filing of September 9, 2010, also entitled “writ of mandate,” is essentially a copy of the original filing, less attachments.

1 52 F.3d 817, 818 (9th Cir.1995); Thornhill Pub. Co. v. General Tel. & Electronics Corp., 594 F.2d 730,
2 733 (9th Cir. 1979). Different standards apply to a 12(b)(1) motion, depending on the manner in which
3 it is made. See, e.g., Crisp v. U.S., 966 F. Supp. 970, 971-72 (E.D. Cal. 1997).

4 First, if the motion attacks the complaint on its face, often referred to as a “facial attack,”
5 the court considers the complaint’s allegations to be true, and plaintiff enjoys “safeguards akin to those
6 applied when a Rule 12(b)(6) motion is made.” Doe v. Schachter, 804 F. Supp. 53, 56 (N.D. Cal.
7 1992). Presuming its factual allegations to be true, the complaint must demonstrate that the court has
8 either diversity jurisdiction or federal question jurisdiction. For diversity jurisdiction pursuant to 28
9 U.S.C. § 1332, plaintiff and defendants must be residents of different states. For federal question
10 jurisdiction pursuant to 28 U.S.C. § 1331, the complaint must either (1) arise under a federal law or the
11 United States Constitution, (2) allege a “case or controversy” within the meaning of Article III, § 2, or
12 (3) be authorized by a jurisdiction statute. Baker v. Carr, 369 U.S. 186, 198, 82 S. Ct. 691, 699-700, 7
13 L. Ed. 2d 663 (1962).

14 Second, if the motion makes a “factual attack” on subject matter jurisdiction, often referred
15 to as a “speaking motion,” the court does not presume the factual allegations of the complaint to be
16 true. Thornhill, 594 F.2d at 733. In a factual attack, defendant challenges the truth of the jurisdictional
17 facts underlying the complaint. “Faced with a factual attack on subject matter jurisdiction, the trial
18 court may proceed as it never could under Rule 12(b)(6). . . . No presumptive truthfulness attaches to
19 plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from
20 evaluating for itself the merits of jurisdictional claims.” Id. (quotations and citation omitted). The
21 court may hear evidence such as declarations or testimony to resolve factual disputes. Id.; McCarthy v.
22 United States, 850 F.2d 558, 560 (9th Cir. 1988).²

24 ² If the jurisdictional issue is intertwined with the merits of the case, the trial court cannot
25 determine the jurisdictional issue until such facts are appropriately resolved. See Roberts v.
26 Corrothers, 812 F.2d 1173, 1177-78 (9th Cir.1987); see also Trentacosta v. Frontier Pac. Aircraft
Indus., 813 F.2d 1553, 1558 (9th Cir. 1987) (summary judgment standard applied if motion determines
facts where jurisdictional issue and merits are intertwined).

1 “[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not
2 restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony,
3 to resolve factual disputes concerning the existence of jurisdiction.” McCarthy v. U.S., 850 F.2d 558,
4 560 (9th Cir. 1988). The burden of proof on a Rule 12(b)(1) motion is on the party asserting
5 jurisdiction. Thomson v. Gaskill, 315 U.S. 442, 445, 62 S.Ct. 673, 675 (1942); Thornhill Publishing
6 Co. v. General Tel. & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979). Thus, plaintiff has the
7 burden of proof in connection with the instant motion.

8 II. ANALYSIS

9 A. Martinez Settlement

10 Plaintiff in part claims that the SSA discontinued payment of benefits to him in May, 2005
11 based on a warrant posted in 1987, that was not dismissed until July, 2005, and kept his monthly
12 benefits from May, 2005 through December, 2005.

13 The Martinez Settlement Agreement defines “Pre-2007 Class members” as all Class
14 Members for whom SSA made an initial suspension or initial denial based on an outstanding felony
15 arrest warrant ... on or after January 1, 2000, but before January 1, 2007, and who did not obtain an
16 administrative appeal denial on or after January 1, 2007; or who did not have a pending administrative
17 claim on August 11, 2008 appealing such a suspension or denial.” (Def.’s Mot., Ex.1, Stipulation of
18 Settlement, at 4.)

19 According to SSA records, plaintiff was entitled to relief as a pre-2007 class member, and
20 would have been sent a notice regarding relief under the Martinez Settlement in September, 2010.
21 (Def.’s Mot., Baker Decl., ¶ 5.) In April, 2011, the SSA states that it removed the remainder of an
22 outstanding overpayment in the amount of \$20,021.34 from plaintiff’s record. (Id., ¶ 6.) Just prior to
23 the hearing, however, the SSA submitted a statement indicating that upon further research, it has
24 determined that plaintiff was in fact not a Martinez class member but is eligible for mandatory good
25 cause relief under the SSA’s policy which entitles him to additional relief in the form of an
26 underpayment in the amount of \$4,439.66. (Baker Decl., ¶¶ 8,9, Def.’s Stmt., filed October 5, 2011.)

1 According to the SSA, plaintiff is entitled to greater relief than permitted by the Martinez
2 Settlement because he has established by his evidence attached to the complaint that the State of
3 Michigan dismissed the charges underlying the warrant against him which had been used to suspend
4 his SSI payments from May, 2003 to May, 2005. See 42 U.S.C. § 1382(e)(4)(B) & (C). At the
5 hearing, the SSA represented that it was preparing to return the aforementioned sum to him.

6 Based on this information, and the fact that plaintiff failed to appear at the hearing to
7 counter it, plaintiff is not subject to the Martinez Settlement and therefore defendant's argument that he
8 has raised this issue in the wrong forum or that it is moot based on the Martinez Settlement, is
9 considered withdrawn. To the extent that plaintiff is owed money which the SSA indicates it will
10 refund him, a claim based on the SSA's failure to return the money is not yet ripe as the SSA needs
11 time to correct its records and issue a refund.

12 B. Exhaustion of Claims Outside of Mandatory Good Cause Relief

13 Defendant's other ground for dismissal is that plaintiff has not exhausted the remainder of
14 his claims. Defendant construes the difficult to discern complaint to allege "that [plaintiff] was never
15 subject to the fugitive felon policies that lead to the overpayment assessment." As it has now been
16 determined that plaintiff was not subject to the Martinez Settlement, but was subject to the mandatory
17 good cause policy based on dismissal of the charges against him in Michigan, such a claim is moot.

18 Nevertheless, the claim that the SSA is continuing to deduct 10% from plaintiff's monthly
19 benefits may or may not be a separate claim. If it is a separate claim, it is not exhausted. The
20 Commissioner is correct in that the Social Security Act provides only for judicial review of final
21 decisions of the Commissioner of Social Security. 42 U.S.C. § 405(g). Section 405(g) requires a final
22 judgment from the Secretary before seeking judicial review. The Commissioner has promulgated
23 regulations that define a "final decision." Under these regulations, a claimant must follow a set
24 procedure: (1) an initial decision in the state agency; (2) a request for reconsideration thereof; and (3)
25 a request for a hearing before an Administrative Law Judge ("ALJ") for the Social Security
26 Administration. 20 C.F.R. §§ 404.933, 416.1433. Regardless of whether the ALJ grants the hearing,

1 the claimant must take a fourth step and appeal the ALJ's decision to the Appeals Council. A "final
2 decision" of the Secretary results only if the Appeals Council grants the review and renders a decision
3 in the case, or if the claimant makes a timely demand for review that is denied. 20 C.F.R. §§ 404.981,
4 416.1481; Heckler v. Day, 467 U.S. 104, 106-7 (1984).

5 Therefore, to the extent plaintiff has a claim separate from the fugitive felon overpayment
6 (now underpayment), it is not exhausted and must be dismissed.

7 CONCLUSION

8 Accordingly, IT IS ORDERED that: Defendant's motion to dismiss, filed May 31, 2011,
9 (dkt. no. 14), will be granted. However, the case will not be ordered dismissed until the Commissioner
10 files proof in this court that he has sent the promised underpayment to plaintiff. The Commissioner
11 shall file such proof within 90 days of the filed date of this order.

12 Dated: October 20, 2011

13 /s/ Gregory G. Hollows
14 UNITED STATES MAGISTRATE JUDGE

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