

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

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STEPHANIE STEIGERWALD,	:	
<i>on behalf of herself and the class,</i>	:	
	:	CASE NO. 1:17-CV-1516
Plaintiffs,	:	
	:	
vs.	:	OPINION & ORDER
	:	[Resolving Doc. <u>76</u> ]
NANCY BERRYHILL, ACTING	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
<i>et al.</i>	:	
Defendants.	:	

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JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this class action, Plaintiffs allege that Defendants have systematically failed to properly calculate Social Security benefits. Plaintiffs now move the Court to approve their proposed notice to class members.

The Court **APPROVES** class notice in the form attached as Exhibit A to this opinion and order. The Court **ORDERS** Plaintiffs to bear the notice distribution costs. The Court also **APPROVES** Plaintiffs' proposed notice procedures.

### I. Background

Plaintiffs allege that the Social Security Administration ("SSA") has systematically underpaid individuals who simultaneously received retroactive payments under Title II of the Social Security Act and retroactive Social Security Income ("SSI") under Title XVI of that Act, and whose representative attorney fees were paid from the retroactive benefits.<sup>1</sup>

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<sup>1</sup> The Court has described the complicated mechanics of the alleged underpayments in greater detail in its decision denying Defendants' motion to dismiss. *See* Doc. 32.

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When the SSA awards retroactive benefits under both titles, the SSA makes a “Windfall Offset” determination that adjusts for the claimant’s income during the period in which the retroactive benefits were owed.

When the SSA makes an attorney fee award, SSA lowers monthly benefits to recoup the attorney fee award. The attorney fee award lowers the claimant’s income and qualifies the claimant for a slightly higher Windfall Offset payment. Here, the SSA did not perform an additional Windfall Offset calculation (a “Subtraction Recalculation”) after representatives’ fees are paid out of the beneficiary’s retroactive payments.

On July 12, 2018, the Court certified a nationwide class.<sup>2</sup> In a subsequent August 3, 2018 order, the Court modified the class definition.<sup>3</sup> As modified, the class is defined as:

Individuals who became eligible to receive Concurrent Payments for whom Representatives’ fees were paid out of the individual’s retroactive benefits between March 13, 2002 and October 31, 2017, and for whom the Social Security Agency (“SSA”) made a Windfall Offset determination before the amount of Representatives’ fees was determined and paid out of retroactive benefits, but for whom, after the amount of Representatives’ fees was determined and paid out of retroactive benefits, SSA did not perform the Subtraction Recalculation and therefore has not issued any Retroactive Underpayment that may be due.

In the same August 3, 2018, order, the Court invited the parties to present their proposed notice and notice procedures to the Court.<sup>4</sup> Plaintiffs then moved the Court to approve its proposed notice.<sup>5</sup>

## II. Discussion

### A. Legal Standard

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<sup>2</sup> Doc. 66.

<sup>3</sup> Doc. 74.

<sup>4</sup> *Id.*

<sup>5</sup> Doc. 76. Defendant opposes. Doc. 77. Plaintiffs reply. Doc. 78.

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Due process requires that class members in an action certified under Rule 23(b)(3)<sup>6</sup> receive notice of the action and an opportunity to opt out.<sup>6</sup> In line with that requirement, Rule 23(c)(2)(B) provides that

[f]or any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Aside from the requirement that the notice should contain “clear and easily understood language,” the Rule does not dictate the notice format. However, the advisory committee notes to the 2003 Rule 23 amendments observe that “[t]he Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point.”<sup>7</sup>

#### **B. The Approved Notice Conforms to Rule 23(c)(2)(B)**

For the most part, Plaintiffs and Defendants do not dispute whether Plaintiff’s proposed notice conforms to Rule 23(c)(2)(B). However, Defendants raise several issues touching on the notice’s compliance with Rule 23(c)(2)(B).

First, Defendants argue that the Plaintiffs’ statement of the issue in the lawsuit (“whether the Social Security Administration owes you past-due monetary benefits”) is misleading. They contend that the issue in the case is “whether [the Social Security

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<sup>6</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–812 (1985).

<sup>7</sup> Fed. R. Civ. P. 23, 2003 advisory committee notes.

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Administration] failed to recalculate the windfall offset for class members.”<sup>8</sup> Defendants’ framing is not strictly inaccurate, but it is unnecessarily obtuse. The Court agrees with Plaintiffs that stating the issue in such narrow and technical terms makes the issue more difficult to understand.

The Court finds that the statement under the heading “What is This Case About?”— “The lawsuit claims that SSA wrongly reduced payments to individuals who qualified for both past-due [SSI and Title II] . . . benefit payments . . . for any of the same months concurrently”— is appropriate. This issue statement is easier to understand than Defendants’ proposal.

Secondly, Defendants argue that Plaintiffs’ proposed notice mischaracterizes their defenses. Plaintiffs’ proposed notice states that “SSA denies it did anything wrong.” The Court agrees with Defendants that this statement is potentially misleading. Defendants have conceded that the SSA is obligated to perform a Subtraction Recalculation and that it may owe some class members benefits, but has asserted jurisdictional and procedural defenses to class-wide relief. Thus, the proposed notice has been amended to read “SSA denies that it owes money to the Class as a whole and has sought to dismiss the lawsuit.”

Finally, Defendants argue that the proposed notice is unclear because it uses technical legal terms such as “monetary benefits” and “summary judgment.” Plaintiffs concede that replacing references to “monetary benefits” with “money benefits” is simpler, and the Court agrees. Thus, the approved notice refers to “money benefits” or “benefits” throughout. The reference to “summary judgment” may also be too technical for a lay reader. For this reason, the reference to summary judgment has been replaced with a sentence noting that “[t]he Court may also decide the case without a trial.”

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<sup>8</sup> Doc. 77 at 6.

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The Court has also made several non-substantive changes to the Plaintiffs' proposal for the sake of readability.

### **C. The Approved Notice Format is Appropriate**

Plaintiffs propose a one-page summary notice modeled on the Federal Judicial Center notice template.<sup>9</sup> Defendant's proposal, in contrast, takes the form of a letter printed on Social Security Administration letterhead. The Court agrees with Plaintiffs that a one-page summary notice modeled on the Federal Judicial Center template is appropriate. Defendants' proposal conveys the misleading impression that the communication issues from the Social Security Administration, and not the Court.

Defendants argue that the notice format, despite its conformity with the Federal Judicial Center template, may be mistaken for "junk mail." The Court disagrees. However, as an additional measure, the Court has amended the notice to include a bold and underlined heading at the top of the notice reading "UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO."

### **D. The Notice Accurately Describes Plaintiffs' Fee Request**

Defendants argue that Plaintiffs' proposal does not accurately describe their fee request. Plaintiffs' proposal says that "no class member will ever have to pay Plaintiffs' counsel out of pocket," and that Plaintiffs will ask that the Court deduct their fees from class members' alleged underpayment under 28 U.S.C. § 406(b). Defendants argue that the phrase "out of pocket" conveys the misleading impression that the Plaintiffs will not seek their fees from a potential class award.

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<sup>9</sup> Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, (September 21, 10:05AM), <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>.

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The Court agrees with Plaintiffs that their notice, as drafted, is not misleading. By stating that class members do not need to pay class counsel “out of pocket,” their proposal accurately conveys the idea that class members do not need to expend current personal funds to participate in the suit. Further, Plaintiffs’ proposed notice accurately states that “Class Counsel intend to ask the Court for an order to deduct attorneys’ fees from Class Members’ past-due monetary benefits of not more than 25% of each individual award to a class member.” This statement should be sufficient to dispel any impression that Plaintiffs’ counsel are not seeking their fees from a potential award.

Nevertheless, out of an abundance of caution, the approved notice includes a sentence stating that “[y]ou do not have to pay Class Counsel now to participate as a Class member. Instead . . . Class Counsel intend to ask the Court for an order to deduct attorneys’ fees from Class members’ past-due money benefits of not more than 25% of each individual award.” The Court finds that this statement accurately reflects Plaintiffs’ position with regard to fees.

#### **E. Plaintiffs Shall Bear Notice Costs**

Generally, the party invoking the class action device bears class member notice distribution costs.<sup>10</sup> Though they acknowledge this principle, Plaintiffs argue that the Court should shift the notice costs to Defendants in this instance, because Defendants have admitted liability.<sup>11</sup> The Court disagrees.

While Defendants admit that the SSA may be obligated to re-calculate the Windfall Offset for some class members, the SSA contends that this failure does not give rise to legal

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<sup>10</sup> See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (“The usual rule is that a plaintiff must initially bear the cost of notice to the class.”).

<sup>11</sup> See, e.g., *Hook v. Baker*, No. C2-02-CV-901, 2004 WL 3113717, at \*2 (S.D. Ohio 2004).

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liability. Defendants' summary judgment motion, pending before the Court, asserts various procedural and jurisdictional defenses to liability. For this reason, it is not appropriate to shift the notice distribution costs to the Defendants.

#### **F. Plaintiffs' Proposed Notice Procedures are Adequate**

Plaintiffs plan to engage KCC, a claims administration firm, to mail the approved individual class members notices. KCC will also maintain a website with information about the case, such as the Court's previous orders and the parties' briefing.

The Court finds that this individual mailed notice procedure is adequate.<sup>12</sup> Plaintiffs are also directed to include the website address in the approved notice.

#### **III. Conclusion**

For the foregoing reasons, the Court **APPROVES** class notice in the form attached as Exhibit A to this opinion and order. The Court **ORDERS** Plaintiffs to bear the class member notice distribution costs. The Court also **APPROVES** Plaintiffs' proposed notice procedures

Dated: October 16, 2018

*s/ James S. Gwin*

JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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<sup>12</sup> See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 319 (1950) (holding that individual mailed notice is appropriate where the name and address of class members is available).

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**

**If you became eligible to receive Concurrent Payments from the Social Security Administration, and Representative's fees were paid for you between March 13, 2002 and October 31, 2017, and you meet certain other criteria, a class action lawsuit may affect your rights.**

**THE CLASS ACTION LAWSUIT**

You may be affected by a class action lawsuit about whether the Social Security Administration ("SSA") owes you past-due money benefits. You are receiving this notice because you must decide if you want to be part of the class.

The lawsuit is called *Steigerwald v. Berryhill*, Case No. 1:17-CV-1516 (the "Lawsuit") and is in the United States District Court for the Northern District of Ohio. The Court decided that this lawsuit should be a class action on behalf of a "Class," or group of people, that could include you.

There is an upcoming trial set for February 2019 to decide the lawsuit. The Court may also decide the case without a trial before then.

If you are receiving this notice, you have to decide whether to stay in the Class and be bound by the results of the lawsuit, or ask to be excluded and keep your right to sue SSA on your own. **There is no guarantee that you will receive any money from this lawsuit.**

**ARE YOU AFFECTED?**

The Class certified by the Court is comprised of: individuals who became eligible to receive Concurrent Payments for whom Representatives' fees were paid out of the individual's retroactive benefits between March 13, 2002 and October 31, 2017, and for whom SSA made a Windfall Offset determination before the amount of Representatives' fees was determined and paid out of retroactive benefits, but for whom, after the amount of Representatives' fees was determined and paid out of retroactive benefits, SSA did not perform the Subtraction Recalculation and therefore has not issued any Retroactive Underpayment that may be due. [The capitalized terms are defined on the other side of this notice.]

**WHAT IS THIS CASE ABOUT?**

The lawsuit claims that SSA wrongly reduced payments to individuals who qualified for both past-due Supplemental Security Income ("SSI") benefit payments under Title XVI of the Social Security Act (the "Act") and Old Age Survivors and Disability Insurance ("OASDI") benefit payments under Title II of the Act, for any of the same months concurrently. **SSA denies that it owes money to the Class as a whole and has sought to dismiss the lawsuit.**

**The Court has not made a final decision whether the Class or SSA is right.**

**WHO REPRESENTS THE CLASS?**

The Court has appointed the law firms of Kelley Drye & Warren LLP of Washington D.C. and Roose & Ressler, a Legal Professional Association, of Lorain, Ohio to represent you as "Class Counsel" and Plaintiff Stephanie Steigerwald as the Class Representative. You may hire your own lawyer at your own expense to represent you in this case at any time and to appear in court. You may also appear in person yourself.

You do not have to pay Class Counsel now to participate as a Class member. Instead, if the Class obtains past-due money from SSA, Class Counsel intend to ask the Court for an order to deduct attorneys' fees from Class members' past-due money benefits of not more than 25% of each individual award to a Class member. SSA has opposed the award of any fees to Class Counsel. The Court will decide what percentage, if any, to award Class Counsel after a hearing on fees.

You also have an opportunity to submit written comments or an objection to the Court in advance instead of making an appearance at the hearing on fees. The time, date and location of the fees hearing will be posted at [www.xxx.com](http://www.xxx.com) shortly after the information becomes available.

**WHAT ARE YOUR OPTIONS?**

**You must decide whether to stay in the Class by no later than December 18, 2018.**

If you choose to stay in the Class, you do not have to do anything now. You will be legally bound by all orders and judgments of the

Court. You won't be able to sue, or continue to sue, SSA for the past-due benefits that the lawsuit seeks. If past-due money benefits are awarded, you will be notified about what to do, if anything, to obtain any owed money benefits.

You may also ask to be excluded from the class. If you do, you cannot get any past-due benefits from this lawsuit, but you will keep any rights you may have to sue SSA for these claims. You will not be bound by any orders or judgments of the Court. To ask to be excluded, send a letter or postcard postmarked by December 18, 2018, including your name, address, and telephone number to the address below. It should say words to the effect of "I want to be excluded from the Class in *Steigerwald v. Berryhill*."

**HOW CAN YOU GET MORE INFORMATION?**

If you have any questions or want to review court documents about this lawsuit, visit [www.xxx.com](http://www.xxx.com), or write to: SSA Class Action, Attn: Ira T. Kasdan, Kelley Drye & Warren LLP, 3050 K Street NW, Washington, DC 20037.

**Who's affected?**

Individuals who became eligible to receive Concurrent Payments for whom Representatives' fees were paid out of the individual's retroactive benefits between March 13, 2002 and October 31, 2017 and who meet certain other criteria.



**Defined Terms**

**Concurrent Payments:** Payments that a claimant becomes eligible to receive, or to have received, for both past-due SSI Payments and Title II Payments for any of the same months concurrently.

**Representative:** An attorney or non-attorney who represented you before the Social Security Administration (“SSA”) or in federal court to help you obtain Concurrent Payments

**Retroactive Underpayment:** The past-due benefits payment that SSA is required to make to a claimant following completion of the Subtraction Recalculation.

**SSI Payments:** Supplemental Security Income payments under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, *et seq.*

**Subtraction Recalculation:** The calculation SSA is required to make after a court or the SSA determines the amount of fees to which an attorney or qualified non-attorney representative (a “Representative”) is entitled for having represented a claimant in obtaining Concurrent Payments, and after the Representative is paid such fees out of retroactive benefits. This calculation, when properly performed, yields the total amount of Retroactive Underpayment(s) payable to the claimant.

**Title II Payments:** Old-Age, Survivors, and Disability Insurance Benefit payments under Title II of the Social Security Act, 42 U.S.C. §§ 201, *et seq.*

**Windfall Offset:** A calculation SSA is required to apply when a claimant receives Concurrent Payments in order to ensure that the claimant does not receive more benefits than he or she would have been entitled to if the benefits had been paid when due.