IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHANIE LYNN STEIGERWALD on behalf of herself and the class,	)	
	)	**CASE NO.: 1:17-CV-1516**
Plaintiffs,	)	
	)	**JUDGE JAMES S. GWIN**
v.	)	
	)	**MOTION FOR APPROVAL OF PLAINTIFFS' PROPOSED NOTICE TO CLASS MEMBERS AND NOTICE PROCEDURES**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	
	)	
Defendants.		

Class Representative Stephanie Lynn Steigerwald, on behalf of herself and the class (collectively, "Plaintiffs"), by undersigned appointed Class Counsel and pursuant to Federal Rule of Civil Procedure 23(c)(2)(B) and the Court's Opinion and Order (Doc. 74), files this Motion for Approval of Plaintiffs' Proposed Notice to Class Members and Notice Procedures (the "Motion").[1] Plaintiffs' Proposed Notice to Class Members is attached hereto as Exhibit A (the "Proposed Notice").[2] Additionally, as explained herein, although Plaintiffs will undertake the mechanics for providing notice, because Defendants have now admitted their liability to the members of the Plaintiff class on numerous occasions, Defendants should be responsible for the costs of providing notice to the class.

In support of this Motion, Plaintiffs state as follows:

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[1] At a telephonic status conference held on August 1, 2018, the parties represented that they hoped to provide the Court with a joint proposed notice to class members by August 17, 2018. As explained herein, the parties have failed to reach agreement as to a joint proposed notice.

[2] The template for the Proposed Notice was taken from the website of the Federal Judicial Center. That template can be found at the following link: https://www.fjc.gov/sites/default/files/2016/ClaAct12.pdf.

I. LEGAL STANDARDS

"When a Court certifies a Rule 23(b)(3) class action, Rule 23(c)(2)(B) requires that a court 'must direct to class members the best notice that is practicable under the circumstances.'" *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 2009 WL 773869, at *4 (N.D. Ohio 2009) (quoting Fed. R. Civ. P. 23(c)(2)(B)). "The notice must clearly and concisely state in plain, easily understood language:

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

Fed. R. Civ. P. 23(c)(2)(B).

Additionally, the Manual for Complex Litigation explains that a notice provided to members of a 23(b)(3) class should:

> • describe succinctly the positions of the parties;
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> • identify the opposing parties, class representatives, and counsel;
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> • describe the relief sought; and
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> • explain any risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses.

Manual for Complex Litigation (Fourth) § 21.311 (2004). "A proposed notice that is incomplete or erroneous or that fails to apprise the absent class members of their rights will be rejected as it

would be ineffective to ensure due process." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 423 (6th Cir. 2012) (quoting 7B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1797.6 (2d ed. 1996)).

II. ARGUMENT

1. Plaintiffs' Proposed Notice Complies With the Federal Rules and the Manual for Complex Litigation

Plaintiffs' Proposed Notice complies with the Federal Rules and the guidelines established in the Manual for Complex Litigation. The very first sentence in the Proposed Notice states the nature of the action, complying with Rule 23(c)(2)(B)(i). *See* Proposed Notice ("You may be affected by a class action lawsuit about whether the Social Security Administration ("SSA") owes you past-due monetary benefits."). The Proposed Notice, in the section entitled: "ARE YOU AFFECTED?" then provides the definition of the class certified by the Court, pursuant to Rule 23(c)(2)(B)(ii). *Id.* ("The Class certified by the Court is comprised of: . . . .").

The Proposed Notice then explains, in plain language, what the case is about: *i.e.*, Plaintiffs' claims and SSA's defenses, in the section entitled: "WHAT IS THIS CASE ABOUT?", in compliance with Rule 23(c)(2)(B)(iii). *Id.* ("The Lawsuit claims that SSA wrongly reduced monetary payments to individuals . . . **SSA denies it did anything wrong, had sought to dismiss the case and has opposed summary judgment for the Class.**") (Emphasis in Proposed Notice). In crafting a notice, "[t]he amount of information on defenses that must be presented is minimal: 'A simple general statement that the defendants have denied liability will suffice or it may be more detailed and specific, which is especially suitable when affirmative defenses have been presented.'" *Van Horn*, 2009 WL 773869, at *5 (quoting 3 NEWBERG ON CLASS ACTIONS § 8:31). By stating that SSA denies that it did anything wrong, and referencing the motions filed by Defendants, which filings will be posted on a website for class members to review, *see* p. 10,

infra, the Proposed Notice satisfies Rule 23(c)(2)(B)(iii)'s requirement of providing SSA's defenses.

The Proposed Notice also complies with Rule 23(c)(2)(B)(iv), by stating: "You may hire your own lawyer whom you will have to pay yourself, to represent you in this case at any time or to specifically appear in court at the hearing on fees, or you may appear in person yourself." *See* Proposed Notice, section "WHO REPRESENTS YOU?". The Proposed Notice in the "WHAT ARE YOUR OPTIONS?" section complies with Rule 23(c)(2)(B)(v), by explaining the procedure by which an individual class member may be excluded from the class. *Id.* ("If you ask to be excluded from the Class, you cannot get any past-due monetary benefits from this Lawsuit if any are awarded, but you will keep any rights you may have to sue SSA for these claims, now or in the future, and 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, that says words to the effect of 'I want to be excluded from the Class in *Steigerwald v. Berryhill.*'").

Plaintiffs' Proposed Notice also explains the binding effect of a class judgment on members who elect to remain in the class, in accordance with 23(c)(2)(B)(vi). *Id.* ("If you choose to stay in the Class, you will be legally bound by all orders and judgments of the Court, and you won't be able to sue, or continue to sue, SSA for the past-due monetary benefits that the Lawsuit seeks."). Finally, the Proposed Notice ends with a section entitled: "HOW CAN YOU GET MORE INFORMATION?" which directs class members to a website that Class Counsel will construct and on which court documents will be posted. These documents will include the Complaint, substantive briefs and Court Orders.

Accordingly, and in light of all the above, Plaintiffs' Proposed Notice is in clear compliance with the Federal Rules.

The Proposed Notice also conforms to the guidelines established in the Manual for Complex Litigation. As explained above, the Proposed Notice succinctly describes the positions of the parties. It identifies Ms. Steigerwald as the class representative and identifies Plaintiffs' counsel. It describes the relief sought ("any Retroactive Underpayment that may be due") and explains in clear and simple language the "risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses." Manual for Complex Litigation (Fourth) § 21.311 (2004). *See* Proposed Notice ("**The Court has not made a final decision whether the Class or SSA is right.** The lawyers for the Class will have to prove their claims at a trial set to begin in February 2019, unless the Court awards summary judgment to the Class before then.") (Emphasis in original). The Proposed Notice was written to be – and is in fact – compliant with the Manual for Complex Litigation and with court precedent.

2. Defendants' Proposed Notice Does Not Comply With the Federal Rules and the Manual for Complex Litigation

On July 27, 2018, Plaintiffs provided Defendants with a draft of the Proposed Notice for review and comment. Two weeks later, on the afternoon of Friday, August 10, 2018, Defendants sent Plaintiffs a completely modified proposed notice ("Defendants' Proposal"). Defendants' Proposal is attached hereto as Exhibit B.

In an August 10, 2018 email to which Defendants' Proposal was attached, Defendants' counsel wrote: "We took the draft notice you sent us and tried to work it into a more readable format with simpler language to reflect how SSA's standard notices appear." *See* Exhibit C.

SSA counsel's contention implying that the changes Defendants' made to the Proposed Notice were simply non-substantive and linguistic in nature is misleading to say the least as little

(if anything) of Plaintiffs' Proposed Notice remains in Defendants' Proposal. Instead, Defendants' Proposal is written in letter format on Social Security letterhead, does not follow the recommended form of the Federal Judicial Center which Plaintiff's Proposed Notice draft followed, *see* note 2, *supra,* and was seemingly drafted with the design to encourage Class members to opt out of the class. Furthermore, and most importantly, where Plaintiffs' Proposed Notice complies with the Federal Rules and the Manual for Complex Litigation, Defendants' Proposal pointedly does not.

Federal Rule of Civil Procedure 23(c)(2)(B) requires a clear and concise notice. Defendants' Proposal facially does not meet this standard as it is a two-page letter that lacks basic facts about the case and contains extraneous, biased information and mischaracterizations improperly designed to encourage class members to opt-out. *See*, *e.g.*, *Van Horn*, 2009 WL 773869, at *7 (rejecting language in a proposed notice because it "is not necessary to ensure the fairness and accuracy of the notice and would unreasonably discourage participation in this suit.").

Defendants' Proposal omits many material terms required by the Federal Rules and the Manual for Complex Litigation: It fails to identify or name Ms. Steigerwald as the class representative, in contravention of the Manual for Complex Litigation. It fails to provide the class definition, in derogation of Rule 23(c)(2)(B)(ii). It never states that a class member may enter an appearance through his or her own attorney, in contravention of Rule 23(c)(2)(B)(iv). It never states that a class member who opts out of the class will not be eligible to receive a Retroactive Underpayment pursuant to any Court order, in violation of Rule 23(c)(2)(B)(vii). And, perhaps most shockingly, Defendants' Proposal nowhere states Defendants' position as to the litigation, or any of Defendants' defenses, in violation of Rule 23(c)(2)(B)(iii). *See* Defendants' Proposal, *passim*.

In fact, Defendants' Proposal seems to be intended to make SSA look like the Agency has *never opposed the relief sought* and is offering up *no defenses at all.* Instead, Defendants claim that "SSA intends to examine the records of everyone receiving this notice – even if they ask to be excluded from the lawsuit – to determine if they are owed additional benefits." Defendants' Proposal, p. 1. Such a statement is effectively meaningless, and serves no purpose other than to incentivize potential class members to opt out of the class.[3] Without a Court order requiring Defendants to perform the Subtraction Recalculation and subsequently to pay any Retroactive Underpayments due, the unbacked and non-specific "intent" of SSA as stated in Defendants' Proposal carries no weight. This is especially true given SSA's poor track record in complying with the Subtraction Recalculation requirement in the past. *See, e.g., Guadamuz v. Heckler,* 662 F. Supp. 1060, 1069 (N.D. Ca. 1986) (*reversed in part on other grounds*); *Willis v. Sullivan,* 730 F. Supp. 785, 786-87 (M.D. Tenn. 1990). *See generally* Complaint, Doc. 1 ¶¶ 39-74.

Indeed, while Defendants' Proposal states that a class member who opts out of the class "may retain [her] own attorney to pursue the issue on [her] behalf," *id.* at p. 4, the proposed notice does *not* state whether SSA will attempt to quash the claims of members who opt-out through the use of defenses, including through those defenses it has attempted in this litigation that have failed, such as presentment, waiver, and exhaustion. Defendants' Proposal promises claimants who opt-out the illusion of a benefit despite Defendants' vociferous, consistent opposition to the relief sought in this case through its motion to dismiss, opposition to class certification and opposition

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[3] Tellingly, while Defendants' Proposal claims its "intent" to perform the Subtraction Recalculation for all individuals whether or not they remain in the class, Defendants' Proposal never claims that it will pay class members who opt out of the class any Retroactive Underpayments they are owed.

to Plaintiffs' motion for summary judgment. At this juncture, any of the Agency's promises cannot be trusted and will need enforcement and monitoring through judgment in favor of Plaintiffs.[4]

A plain reading of Defendants' Proposal leaves the impression that Plaintiffs' counsel provided no services or substantive benefits to class members in this case, and that SSA will willingly perform the Subtraction Recalculation for all individuals who receive the notice. This obviously is not true. At the same time that Defendants' Proposal attempts to paint Plaintiffs' counsel in such poor light, it also wrongly characterizes Plaintiffs' good-faith belief that 42 U.S.C. § 406(b) applies in this case:

> If you stay in the class and get money because of the lawsuit, [Plaintiffs' counsel has] asked the court to deduct their fees from the money you get. SSA opposes this request. If the court grants that request, the court will decide how much of that money to award to these attorneys, but it will not be more than 25% of any money you get from the lawsuit. If you stay in the class but do not get money from the lawsuit, you will not owe these attorneys a fee. If you do not stay in the class, you will not owe these attorneys a fee, even if you file a separate lawsuit or ask SSA on your own to look at your claim again.

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[4] In their most recent filing, Defendants have now backed away from an earlier representation to the Court that they would seek a change in the class definition to eliminate at least 9,165 potential class members from class coverage. *See* Doc. 74 ("Defendants' Notice Regarding Class Definition"). Defendants stated in their Notice: "Defendants have concluded that further review of these cases may be needed to determine if their Title XVI benefits nevertheless would be otherwise *impacted* by the exclusion of representatives' fees from Title II income." *Id.* at Page ID #: 934 (emphasis added).

It is unclear what this "impact" Defendants reference may or is intended to be. However, to the extent that Defendants are hinting that they may *charge* potential class members with "*overpayments*" that would have to be re-paid by class members, Plaintiffs object. The relief that this Court should impose and that has been requested is the performance of the Subtraction Recalculation and the payment of any Retroactive Underpayments due. The Court should not allow Defendants to use this litigation to obtain the return of any purported overpayments. To the degree that Defendants feel compelled to do so in proceedings separate and apart from this case, the Court's final judgment, if favorable to Plaintiffs, should restrict Defendants from doing anything in this matter other than performing the Subtraction Recalculation and making Retroactive Underpayments to deserving class members. *See*, *e.g.*, *Guadamuz,* 662 F. Supp. at 1069 ("The Secretary shall identify all underpaid claimants who can be identified by computer, calculate the amount of their underpayment, and distribute reimbursement checks within six (6) months from the date of this order.").

Defendants' Proposal, p. 2.

This paragraph contains multiple misrepresentations and obfuscations. First, while (as mentioned above) Defendants' Proposal never states that SSA opposed this class action and relief for members of the class, it highlights that SSA opposes attorney's fees pursuant to 42 U.S.C. § 406(b). This selective recitation of the facts is disingenuous. Second, the paragraph implies that a class member who stays in the class will owe Plaintiffs' counsel a fee.[5] This is inaccurate. In fact, no class member will ever have to pay Plaintiffs' counsel out of pocket. Instead, if the Court rules that 42 U.S.C. § 406(b) applies in this case, Plaintiffs' counsel will be paid by being provided a percentage of the Retroactive Underpayments each class member is due. Third, the paragraph again implies that if a class member who opts out "file[s] a separate lawsuit or ask[s] SSA on [his] own to look at [his] claim again" the Agency will do so, and will not contest the request. The history of this case, as outlined above, indicates that this assumption is unlikely.

Because Defendants' Proposal is unacceptable, counsel for Plaintiffs reached out to counsel for Defendants on August 15, 2018 (three business days after receiving Defendants' Proposal), telling Defendants' counsel that they could not abide by Defendants' Proposal. Exhibit D. At the same time, Plaintiffs' counsel again asked if Defendants would be willing to confer regarding Plaintiffs' Proposed Notice. Responding the next day, Defendants represented that they would not join in the submission of the Proposed Notice, and did not express a desire to confer any further.

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[5] Defendants' Proposal's statement that "[i]f you stay in the class but do not get money from the lawsuit, you will not owe these attorneys a fee" implies that if a class member remains in the class and *does* get money from the lawsuit, she will have to pay Plaintiffs' counsel out-of-pocket. Of course, this is not so. While Defendants attempt to portray this lawsuit as nothing but a money-grab by Plaintiffs' counsel, the Court is well aware that the Subtraction Recalculation would almost certainly not be performed for any members of the class were it not for the filing of this action.

3. Plaintiffs' Proposed Notice Procedures

Because the parties could not agree on a draft notice form, Plaintiffs no longer desire Defendants to mail the notice to the members of the class. Plaintiffs' counsel consequently is in the process of engaging KCC, a nationally-recognized claims administrator, to mail out the notices approved by the Court to the members of the class. Information regarding KCC is attached hereto as Exhibit E.[6]

Defendants have until September 12, 2018, to provide Plaintiffs with the names and addresses of all putative members of the class. Doc. 74. Plaintiffs, through KCC, will provide direct mail notice to all putative class members within 30 days of receipt of this information (by no later than October 12, 2018). Putative class members will then have 60 days – until December 11, 2018 – to choose to opt-out of the class.

Additionally, Plaintiffs (through KCC) will create a website, which will become active and live no later than October 12, 2018. The website will include a copy of the notice approved by the Court, as well as the Complaint in this action, Doc. 1, the Court's Orders on Defendants' Motion to Dismiss, Doc. 32, and Class Certification, Doc. 66, the parties' briefs related thereto, and, briefs relating to Plaintiffs' Motion for Summary Judgment. The website will be updated to include the additional information noted in the notice (such as information regarding any hearing on attorneys' fees), as well as any additional Court Orders that become relevant (such as any order on Plaintiffs' pending Motion for Summary Judgment).

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[6] Additional information can be found on KCC's website, http://www.kccllc.com/class-action/what-we-do/claims-administration.

4. Defendants Have Admitted Liability and Should Be Responsible for the Cost of Sending the Notice

The cost of providing notice to class members "usually" lies with the plaintiff. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79 (1974). *See also Allen v. Leis*, 2002 WL 1752279, at *2 (S.D. Ohio 2002). This practice makes sense, because it is the plaintiff representative who seeks to maintain the lawsuit as a class action, and usually, at the time of service of notice on class members, the issue of a defendant's liability has yet to be resolved.

Contrariwise, "'interim litigation costs, including class notice costs, may be shifted to defendant after plaintiff's showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure.' Alba Conte & Herbet Newberg, Newberg on Class Actions § 8.6 at 180 (4th ed. 2002). Accordingly, some courts have shifted the cost of notice to the defendant where liability has been established." *Hook v. Baker*, 2004 WL 3113717, at *2 (S.D. Ohio 2004). Indeed, district courts throughout the country have shifted the costs of class action notice to the defendant once the defendant's liability has been established. *See*, *e.g.*, *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009) ("many district courts have placed notice costs on the class action defendant once the defendant's liability has been established") (collecting cases); *Bickel v. Whitley Cty. Sheriff*, 2010 WL 5564634, at *3 (N.D. Ind. Dec. 27, 2010), *report and recommendation adopted sub nom. Bickel v. Sheriff of Whitley Cty.*, 2011 WL 91032 (N.D. Ind. Jan. 11, 2011); *Hook*, 2004 WL 3113717, at *4; *Allen*, 2002 WL 1752279, at *2.

Here, Defendants' liability has been established. Although Defendants' liability has not at this time been determined *by a Court order*, Defendants here *have admitted liability, and continue to do so*. *See generally* Doc. 50-1, pp. 7-11. Since the filing of Plaintiffs' Motion for Summary Judgment, Defendants have continued to affirm their liability, while at the same time continuing

to contest the relief sought in this case. For example, in an Interrogatory Response dated July 23, 2018, Defendants expressly stated that they "***do not contend*** that between March 13, 2002 and August 31, 2012, SSA conducted the Subtraction Recalculation for all individuals for whom it was obligated to perform it over that period." Exhibit F, p. 2 (emphasis added). In this Interrogatory Response, Defendants again admit that they failed to perform the Subtraction Recalculation, as required, for individuals for whom they were liable to do so. This is a clear and unequivocal admission of liability.[7]

III. CONCLUSION AND REQUEST FOR EXPEDITED RULING

"Notice must be prompt, clear, and concise. Notice must also be informative and allow absent class members to make an informed choice on participation." *Van Horn*, 2009 WL 773869, at *8. Plaintiffs' Proposed Class Notice complies with these mandates. Defendants' does not. The Court should approve Plaintiffs' Proposed Class Notice and Plaintiffs' proposed notice procedures, and reject Defendants' alternative proposal. Additionally, because Defendants have admitted liability in this action, the Court should require Defendants to bear the costs of mailing the notices to members of the class.[8]

Due to the advanced timeline of this case, and to the fact that Plaintiffs' counsel hopes to send notices to class members shortly after the September 12, 2018 deadline for Defendants to

[7] As recently as August 10, Defendants again tacitly admitted liability in Defendants' Proposal, which advocates SSA's "inten[t] to examine the records of everyone receiving this notice – even if they ask to be excluded from the lawsuit – to determine if they are owed additional benefits." Exhibit B, p. 1. There would be no need to examine the records of the members of the class if the Subtraction Recalculation had been performed as required for them.

[8] If the Court agrees that costs should be shifted to Defendants, Plaintiffs will provide the Court with an invoice for postage and related matters following the mailings. At this time, KCC's estimated postage for a class of 37,000 members is $17,336; for a class of 70,000 members the estimate is $32,797.

provide Plaintiffs with a list of the names and addresses of all members of the class, Plaintiffs respectfully request an expedited ruling on this Motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Motion for Approval of Plaintiffs' Proposed Notice to Class Members and Notice Procedures complies with the page limitations for a Standard matter, and is 13 pages long.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the class

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2018, a copy of the foregoing Motion for Approval of Plaintiffs' Proposed Notice to Class Members and Notice Procedures was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Ira T. Kasdan*

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