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
	)	JUDGE JAMES S. GWIN
Plaintiff,	)	MAGISTRATE JUDGE DAVID RUIZ
v.	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED NOTICE AND PROPOSED NOTICE PROCEDURES**
Defendants.	)	

Defendants Nancy A. Berryhill, Acting Commissioner of Social Security, and the Social Security Administration (Defendants) hereby submit their objections to the Motion of Plaintiff Stephanie Steigerwald, on behalf of the Class, for Approval of Plaintiffs' Proposed Notice to Class Members and Notice Procedures. Plaintiff's Proposed Notice is difficult to read, inadequately tailored to clearly communicate relevant information to the particular demographics of the class, and misstates material information. Furthermore, Plaintiff's attempt to shift her burden of distributing class notice to Defendants is inappropriate and should be rejected.

LAW AND ARGUMENT

Federal Rule of Civil Procedure 23(c)(2)(B) outlines the notice requirements for class actions certified pursuant to Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2)(B) provides that "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." *Id*. The notice must "be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections.'" *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984) (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Rule 23(c)(2)(B) specifically requires that:

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).

The legal standards for satisfying Rule 23(c)(2) (B) and the constitutional guarantee of procedural due process are "coextensive and substantially similar." *Fidel v. Farley*, 534 F.3d 508, 515 (6th Cir. 2008) (*quoting DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005)). "Rule 23 'accords a wide discretion to the District Court as to the form and content of the notice.' " *In re Gen. Tire & Rubber Co.*, 726 F.2d at 1086 (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1350–51 (9th Cir. 1980)).

I. Plaintiff's Proposed Class Notice Does Not Adequately Ensure Due Process for Class Members.

The class in this case is defined as follows:

> 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.

This class, by definition, consists of individuals who have qualified for and received disability benefits under both Title II (Federal Old Age, Survivors, and Disability Insurance

Benefits) and Title XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the Social Security Act. They are a uniquely vulnerable population and may include minor children, elderly individuals, blind individuals, and individuals with visual impairments. The class also includes individuals with varying levels of education who may not be able to read above a middle school reading level.[1] Some individuals in the class may also have limited or no proficiency with the English language. As illustration, in 2015, the U.S. Census found that 88 percent of adults possessed at least a high school diploma, a GED, or the equivalent. See, "Educational Attainment in the United States," Camille L. Ryan & Kurt Bauman, U.S. Census Bureau, March 2016, available online at https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf. In contrast, 60 percent of SSI recipients in 2013 had attained, at maximum, 12 years of education. See, "Characteristics of Noninstitutionalized DI and SSI Program Recipients, 2013 Update," Research and Statistics Note No. 2015-02m Michelle Stegman Bailey & Jeffrey Hemmeter, Social Security Administration September 2013, available online at https://www.ssa.gov/policy/docs/rsnotes/rsn2015-02.html. Roughly quarter of SSI recipients have less than a high school diploma. *Id.* In 2016, over 3.3 million SSI recipients possessed mental disorder diagnoses, including intellectual disabilities (over 1 million individuals) and developmental disabilities (278,125 individuals). "SSI Annual Statistical Report, 2016,"Social Security Administration, available online https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2016/sect06.html. The members of this class are largely a more vulnerable population than the average class action participant.

[1] For example, SSA's policy is that when communicating with claimants and beneficiaries, notices should be written at a sixth to eighth grade reading level. *See* POMS NL 00610.200.

Although elements of Plaintiff's Proposed Notice comport with the requirements of Fed. R. 23(c)(2)(B), as a whole, the notice fails to adequately provide due process for this particular class and demographic.

A. The Format of Plaintiff's Proposed Notice is Visually Challenging and Difficult to Follow.

Contrary to Plaintiff's assertion, her Proposed Notice does not conform to the Federal Judicial Center's recommendations and best practices. The FJC distinguishes between a summary notice, appropriate for publication, and a full notice intended for individual mailing. See, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide ("Notice Checklist"), Federal Judicial Center, p. 10, available online at https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf; *see also*, "Illustrative Forms of Class Action Notices: Overview," Federal Judicial Center, available online at https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction. Plaintiff's Proposed Notice appears to be more like a summary notice as opposed to a full notice suitable for individual mailing. Furthermore, the FJC cautions parties to avoid notices that appear to be "junk mail" and advises that notices "stand out as important, relevant, and reader-friendly[.]" See, Notice Checklist, p. 5.

Plaintiff's Proposed Notice does not conform to the FJC's sample notices intended for individual mailing and is not conducive to reaching the demographics of this particular class. Instead, it resembles "junk mail" or spam. The notice is too visually challenging to constitute appropriate notice to this particular class. The text is tiny, in what appears to be less than 11-point font with single spacing. The text is too tightly compressed to be easily readable. In contrast, for notices that are mailed individually, the FJC provides samples consisting of multiple-page documents, using larger text and spacing to make the notice visually easy to

follow. See, e.g. Products Liability Class Action Certification and Settlement: Full Notice, Federal Judicial Center, available online at https://www.fjc.gov/sites/default/files/2016/ClaAct04.pdf.

Defendants' Proposed Notice takes readability into account with appropriate use of spacing for a class member to easily follow. Defendant's Proposed Notice, organized as a letter, also more closely resembles official court communication, and, as such, is less likely to be disregarded as junk mail.

B. Plaintiff's Proposed Notice Does Not Use Plain and Appropriately Clear Language.

More problematic, however, is the fact that Plaintiff's Proposed Notice is not drafted using language sufficiently clear for the specific demographics of this class. The class consists of individuals who have received disability benefits under Title XVI and Title II of the Social Security Act. As explain, this group, on average, has a lower level of education and have diagnosed disabilities, with almost half of 2016 SSI recipients possessing a mental disability diagnosis. See, SSI Annual Statistical Report, *supra*; Characteristics of Noninstitutionalized DI and SSI Program Participants, 2013 Update, *supra*.

Throughout, the Proposed Notice contains instances of unclear language articulating material information. For example, in the section entitled "The Class Action Lawsuit," Plaintiff's Notice contains a complex, six-line, single sentence description of notice: "This notice summarizes your rights and options before an upcoming trial or a decision by the Court without a trial that the Class is right and SSA is wrong based on a motion for summary judgment that has been filed against SSA and which SSA has opposed." ECF No. 76-1, PageID # 952. In addition, the notice also states that the issue in this case is "about whether the Social Security Administration owes you past-due monetary benefits," without clearly defining "monetary

benefits," even while Plaintiff's Complaint alleges a failure to recalculate an individual's benefits. Thus, as explain in Defendants' Opposition to Class Certification, the issue in this case is whether SSA failed to recalculate the windfall offset for the class members, not whether SSA owes the class member some amount of "monetary benefits" resulting from an undefined injury.

In addition, Plaintiff's Proposed Notice is unclear as to who is affected by the lawsuit. The Notice contains two sections, one entitled, "Are you affected?" and another entitled "Who's affected?" containing slight variations. Both sections contain technical language, and neither section articulates, in plain, easy-to-understand language, how a class member can determine if they are affected. In contrast, Defendants' Proposed Notice describes who is affected using a bulleted list, articulated in simple language. Following this explanation, Defendants' Proposed Notice contains the class definition at the top of the second page, where it states, in a readable, list format:

> The court has certified a class of individuals who meet all of the following:
> 1) Became eligible for OASDI and SSI;
> 2) Representatives' fees were paid out of past-due benefits between March 13, 2002 and October 31, 2017;
> 3) SSA made a windfall offset calculation before the amount of representatives' fees was known and paid out of past-due benefits; and
> 4) After representatives' fees were known and paid out of past due benefits, SSA did not perform a windfall offset calculation.

ECF No. 76-2, PageID # 956. Although Plaintiff also contends that Defendants omit the class definition from its notice, this is incorrect. See, *Id.*

Furthermore, Plaintiff's notice fails to explain, among other legal terms, "summary judgment." ECF. No. 76-1, PAgeID # 952. Plaintiff defines the term "Retroactive

Underpayment" and "Subtraction Recalculation"[2] but uses different terminology in the actual notice.

As a whole, the language Plaintiff's Proposed Notice is insufficiently clear and comprehensible for the demographics of this class.

C. Plaintiff's Proposed Notice Fails to Provide Enough Information for Class Members to intelligently decide whether to Opt Out of the class

In addition to the explicit requirements in Fed. R. Civ. P. 23(c), a notice of class action "should contain information reasonably necessary to make a decision whether to remain a class member and be bound by the final judgment or to opt out of the action. The standard is that notice must contain information a reasonable person would consider material in making an informed, intelligent decision of whether to opt out of or to remain a member of the class and be bound by a final judgment." *Bremiller v. Cleveland Psychiatric Inst.*, 898 F. Supp. 572, 581 (N.D. Ohio 1995) (*citing In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir.1977)). Plaintiff's Proposed Notice and Motion seeks to omit information material to making an informed, intelligent decision of whether to opt out or remain a part of the class.

1. Plaintiff's Proposed Notice Incorrectly Maintains that Counsel Will Not Seek Attorneys' Fees from Class Members.

First, Plaintiff's Proposed Notice fails to notify potential class members how class counsel is to be compensated. Indeed, Plaintiff's assertions as to how class counsel is to be compensated flatly mischaracterizes her § 406(b) fee request. This is improper.

[2] "Subtraction Recalculation" is defined to include individuals who are not affected by the lawsuit, not encompassed within the class definition, and are not entitled to a re-calculation of their windfall offset to account for authorized representatives' fees.

Class members must have full opportunity to opt-out of the class. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 395 (1996), *citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The class certification notice conveys the information absent class members need to decide whether to opt-out and the opportunity to do so. Manual for Complex Litigation, Fourth, § 21.31, p. 285. As such, a class notice must contain information regarding how class counsel will be compensated.

Plaintiff does not deny that she requests attorneys' fees under § 406(b), which are, by definition, to be paid out of any underpayment resulting from the recalculation of every class members' benefits, if any underpayment is due. See, ECF No. 76, PageID # 944 ("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.") Nonetheless, Plaintiff insists that "In fact, no class member will ever have to pay Plaintiffs' counsel out of pocket." *Id*.

This assertion is legally and factually incorrect. The very language of § 406(b) uses the word "fee," and states that fees authorized under § 406(b) are to be paid out of a beneficiary's "past-due benefits." See, 28 U.S.C. § 406(b). The statute expressly contemplates that a beneficiary forgo funds belonging to them as compensation to their attorney. It is improper for Plaintiff to both request that her counsel be paid out of funds belonging to class members *and* insist that class members need not pay counsel if Plaintiff's request is approved.

If Plaintiff's intent is to notify class members that she has merely requested fees, and that fees have not yet been authorized, Defendant may be willing to agree to language further highlighting the pending nature of the fee request. The fact of the matter is that Plaintiff seeks attorney fees under § 406(b), to be paid out of a class members' potential underpayment resulting

from a recalculation of their windfall offset. This information is relevant and necessary for a potential class member to determine whether or not to opt-out.

2. Plaintiff's Notice Grossly Misstates Defendants' Legal Position.

As set forth in Rule 23, it is the duty of the Court to provide the best notice practicable to the members of the class. The initial notice to class members has the critical function of apprising class members of "accurate and impartial information regarding the status, purposes and effects of the class action." *Kleiner v. First National Bank of Atlanta,* 751 F.2d 1193, 1202 (11th Cir. 1985). However, in Plaintiff's Motion and Proposed Notice she makes a number of misrepresentations regarding Defendants' legal position and obligations.

First, Plaintiff describes SSA's position in the litigation as: "SSA denies it did anything wrong." This statement mischaracterizes Defendants' position. Although Defendants appreciate that it is difficult to articulate a jurisdictional and procedural position in plain language, the reality of their legal position is not to deny that some class members may be owed a recalculation of the windfall offset, but rather that there are jurisdictional and procedural pre-requisites to bringing a lawsuit in federal court, among other arguments. Plaintiff's mischaracterization is designed to mislead and confuse class members, and it fails to accurately convey the status, purpose, and effect of this lawsuit.

Second, Plaintiff takes issue with the articulation of the class members' rights upon opt-out because Defendant does not specify its legal strategy as to any future claims or lawsuits. This is illogical. Defendants have no obligation at this point in time to commit to or articulate a legal theory or defense in hypothetical litigation, brought by a hypothetical plaintiff, in the event that a class member opts out and choses to file suit.

II. Plaintiff's Notice Procedures

Although Defendants received Plaintiff's Proposed Notice Procedures for the first time upon receiving her Motion, Defendants generally do not oppose the proposal that Plaintiff herself send notices via U.S. Mail.[3] See, *Trollinger v. Tyson Foods Inc.*, at *8. 2007 WL 4260817 (E.D. Tenn. Dec. 3, 2007) ("Class members are more likely to fully consider a class notice received through first-class mail, which is the norm for distribution.") However, Defendants do oppose Plaintiff's request that Defendants use public funds to bear the entire cost of sending a class notice, using a unilaterally-selected, private vendor, and according to procedures determined by Plaintiff. Plaintiff has not received judgment in her favor, Defendants have not admitted liability as to their legal defenses, and as such, her request is inappropriate and should be rejected.

Courts have long held that plaintiffs must bear the cost of notice in class actions, including the expense of identifying the class members. See, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-179 (1974) ("the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit"); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 (1978) ("The general rule must be that the representative plaintiff should perform the tasks [necessary to send class notice], for it is he who seeks to maintain the suit as a class action and to represent other members of his class."); Manual for Complex Litigation, Fourth § 21.311, p. 290 ("In a Rule 23(b)(3) class, the parties seeking class certification must initially bear the cost of preparing and distributing the certification notice, including the expense of identifying the class members.") Indeed, it is one of her core obligations as a Plaintiff bringing suit. *See,* Alba Conte & Herbert Newberg, Newberg on Class Actions § 5.26 at 5-28 ("as in all litigation, the plaintiff

[3] Defendants' Proposed Notice contains a header reflecting SSA's letterhead; however, if Plaintiff bears responsibility to send out the notices then this letterhead would not be included.

is obligated to pay litigation costs"); *see also*, *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977) ("Upon commencing a class action, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members *as well as paying the costs of their individual notice*.") (emphasis added).

In rare, case-specific circumstances, a court may shift that burden where a defendant's liability has been established. This is not such a case. This Court has not issued a ruling on summary judgment, and Defendants have not, and do not, concede liability as a legal matter. Plaintiff conflates liability, imposed through a court order determining the merits of a party's legal position, with Defendants' assertions that they has an obligation to re-calculate the windfall offset for beneficiaries receiving concurrent, retroactive Title II and Title XVI benefits once the amount of authorized representatives' fees become known. Defendants' representation that they "intends to examine the records of everyone receiving the notice – even if they ask to be excluded from the lawsuit," just as they did for Plaintiff, does not equate to a waiver of their legal defenses.

In any case, Defendants have already undertaken part of Plaintiff's burden by bearing the cost, expense, and significant burden of providing the names and last known addresses of all class members by September 12, 2018, as ordered by this Court.

Finally, Defendants propose that it would be appropriate for Plaintiff to, within fourteen days or other Court-determined period of time following the opt-out deadline, notify the Court of any individuals who have opted out of the class. See, *Wilson v. Anthem Health Plans of Kentucky, Inc.*, Slip Copy, 2017 WL 1089193, at *4 (E.D. Ky. March 21, 2017).

CONCLUSION

For the reasons articulated above, Defendants request that this Court deny Plaintiff's Motion For Approval of Plaintiff's Proposed Notice to Class Members, order that Defendants' Proposed Notice be distributed to Class Members, and Deny Plaintiff's requests that Defendants bear the cost of distributing class notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2018, a copy of the foregoing Objections to Plaintiff's Proposed Notice and Proposed Notice Procedure to 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/ Ruchi V. Asher
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