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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHANIE L. STEIGERWALD, Case No. 1:17-cv-1516
Plaintiff, Cleveland, Ohio

vs. WEDNESDAY, JUNE 12, 2019

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

TRANSCRIPT OF TELEPHONE STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

Chief Court Reporter: Sarah E. Nageotte, RDR, CRR, CRC
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
(216) 357-7186

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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APPEARANCES:

For the Plaintiff: BEZALEL A. STERN, *Esquire*
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Federal Programs Branch
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Washington, DC 20001

1 (Proceedings commenced at 1:11 p.m.)

2 - - -

3 THE COURT: Hello?

4 MR. STERN: Hello, Your Honor.

13:11:13 5 This is Bezalel Stern on behalf of the plaintiff.

6 MS. BRIZIUS: Good afternoon, Your Honor.

7 This is Erin Brizius on behalf of the defendants.

8 I believe we're still waiting for Justin Sandberg from
9 D.C. from the Department of Justice as well.

13:11:29 10 THE COURT: Okay. While -- even while we're
11 waiting, and -- what's the update on the process? How many
12 process -- how many claims have been processed or claimants
13 have been processed in the more recent time?

14 MS. BRIZIUS: As --

13:11:46 15 - - -

16 (Telephonic interruption:

17 Justin Sandberg and Brad Rosenberg joined the call)

18 - - -

19 THE COURT: I had just asked how many total or
13:11:57 20 additional claimants had been processed.

21 MS. BRIZIUS: Your Honor, this is Erin
22 Brizius.

23 As of June 10th, 1,792 recalculations have been
24 completed.

13:12:13 25 THE COURT: And the total that remain to be

1 done is how many again?

2 MS. BRIZIUS: It is -- the total are close to
3 128,000, Your Honor.

4 THE COURT: I have reviewed some of the
13:12:42 5 submissions on this, but I confess, I still don't understand
6 why the -- the processing is taking as long as it is.

7 And can you walk me through, or correct me, if I give
8 kind of a thumbnail as to what I thought was involved with
9 this?

13:13:17 10 So the thumbnail is that -- is the recalculation,
11 basically, gives some reflection to the fact that the
12 retirement -- the retirement benefit has to take into
13 consideration other income or assets available to the -- to
14 the retirement beneficiary and that one of those would be
13:13:53 15 the disability benefits?

16 Is that kind of the core calculation that has to be
17 made?

18 MS. BRIZIUS: Your Honor, it is.

19 The disability benefits have to be -- sorry -- the SSI
13:14:11 20 benefits have to take into account the other income, which,
21 in this case, is the disability benefits.

22 THE COURT: And the disability benefits --
23 after the attorney fees are paid, the disability benefits
24 are slightly reduced for purposes of going forward to
13:14:38 25 reflect the fact that some attorney has received a payment

1 for the representation during the disability, right?

2 MS. BRIZIUS: Yes, Your Honor.

3 THE COURT: How much does the -- and, in
4 general, aren't the attorney fee awards within a fairly
13:15:11 5 narrow range?

6 MS. BRIZIUS: Your Honor, I believe that there
7 is some variation. If it's a fee agreement, there's a
8 regulatory max, which I believe is around \$6,000.

9 But all counsel have the ability to petition the
13:15:28 10 agency or the Court for an amount above that, so I believe
11 there is variation in the amount that is actually awarded.

12 THE COURT: But isn't it within a fairly
13 narrow range?

14 MS. BRIZIUS: I mean --

13:15:42 15 THE COURT: The average is probably somewhere
16 around 4 to \$7,000?

17 MS. BRIZIUS: I don't know that that's
18 correct, Your Honor.

19 I believe that the fee petition -- the fee agreement
13:16:01 20 cap is \$6,000, so these will roughly be above that, and I
21 believe that the fee award in this case, in the Steigerwald
22 case, was somewhere between 10 and \$12,000.

23 It was \$13,000, Your Honor.

24 THE COURT: But you'd have computerized
13:16:23 25 records as to the specific amount, right?

1 MS. BRIZIUS: Yes, Your Honor.

2 The issue has been that there are individuals in this
3 class have -- may have, and in a lot of cases do have,
4 multiple awards of concurrent benefits from multiple
13:16:44 5 windfall periods which we're looking at, and multiple fee
6 awards, so they have to make sure that they're using the
7 correct attorney fee and that the fee document on the record
8 is correct, as well as the correct corresponding default
9 period, which -- which if they're not correct, the
13:17:04 10 calculation is going to be wrong.

11 THE COURT: So the attorneys' fees, why would
12 there be more than one?

13 Because the reduction analysis, wouldn't it all be
14 associated with disability awards?

13:17:28 15 MS. BRIZIUS: So, Your Honor, my understanding
16 is that many of these individuals go on and off disability
17 benefits over the years, so they may have applied and been
18 awarded retroactive benefits with the corresponding attorney
19 fee, and then, at some point, have gone off of those
13:17:45 20 benefits and had to reply with a new attorney, or some
21 combination thereof.

22 So we do know that, you know, when they pull up the
23 record here, they only see the most recent awards, the most
24 recent attorney fees, the most recent windfall period, but
13:18:02 25 that may not be the windfall period that corresponds to

1 attorney fees, and so, they have to review the historical
2 record to make sure that they're getting the right windfall
3 period with the right attorney fee.

4 THE COURT: Would there be any way that the
13:18:19 5 parties could agree on some survey of how much this varies?

6 And the general idea would be, I would assume there
7 might be some difference between individual claimant A or
8 individual claimant B or C, but I would think that among the
9 universe, there would be a -- that it wouldn't vary that
13:19:01 10 much between each of these hundred thousand plus, and wonder
11 whether between you, you might be able to come to some
12 negotiation that for each of them, you could come up with an
13 agreed-upon average that, by agreement or by order, could be
14 applied to all the claimants that are in the class.

13:19:44 15 They might vary, you know, as between -- a small
16 amount between various claimants, but it would seem that the
17 amount would be fairly narrow in terms of how much was
18 involved.

19 MS. BRIZIUS: Your Honor, that's not my
13:20:11 20 understanding of what we're seeing so far.

21 I understand that the highest underpayment was
22 approximately \$8,000. And we have a fair number of
23 individuals that are entitled to no benefits at all.

24 So given that these are entitlements, I'm, you know,
13:20:27 25 not -- and we have a statutory obligation to pay them the

1 amount they're due, I'm not sure how some sort of average
2 would work in practice.

3 THE COURT: Could you -- so you've completed
4 about a thousand of them, right? Or what's the total that
13:20:51 5 you -- that you've completed?

6 MS. BRIZIUS: The most recent number that I
7 have are they've completed 1,792.

8 THE COURT: So is there -- have you completed
9 a calculation as to how much the 1,700 payments, how much
13:21:26 10 they vary across those 1,700 payments, how much they vary
11 from the median payment?

12 MS. BRIZIUS: I don't have those figures, Your
13 Honor.

14 But I can tell you that of those cases, 1,002 had an
13:21:47 15 underpayment due, 767 had no underpayment or overpayment
16 due, and 24 had an overpayment assessed.

17 THE COURT: And what was your final statement?

18 MS. BRIZIUS: 24 had an overpayment that was
19 assessed.

13:22:12 20 THE COURT: What I would like to do is I would
21 like to get some better information as to how close the
22 payments were as between themselves.

23 You've given an explanation that the payments vary,
24 but I would like to get some -- get the government to give a
13:22:55 25 better description as to how much the varying payments have

1 been and whether there might not be some way to settle the
2 process by trying to come up with the most representative
3 underpayment that might be a good representative of the
4 average underpayment for all of the hundred thousand or so
13:23:47 5 people that are in the class.

6 Because, in many ways, this processing seems to be
7 very expensive for the Social Security Administration, both
8 in terms of manpower costs and in terms of the opportunity
9 costs for the government. All these people could be doing
13:24:27 10 other things. And so, the times that are going to be
11 required to complete these, seems like you're spending
12 government money, oftentimes approaching -- government time
13 and money on the calculation that could be used for, you
14 know, other work.

13:25:00 15 I'm kind of wondering why it is that we -- why you
16 couldn't consider or do some analysis as to what -- and then
17 negotiate, as between the plaintiff and the defendant, as
18 to -- even if not perfect, but a negotiated amount that
19 might be able to be assigned to each of these people and
13:25:43 20 avoid this expense to the government on the recalculation
21 and delay to the claimants.

22 MS. BRIZIUS: Yes, Your Honor. We can
23 certainly submit further briefing explaining that.

24 My understanding of the reason we can't do that is
13:26:03 25 because they're entitlements. You know, each person is due

1 under the law specific amounts, and I don't know that we
2 have the ability to compromise that on their behalf.

3 THE COURT: What's the plaintiffs' position of
4 whether -- in terms of how much that varies over this
13:26:30 5 universe of the 1,700 that have been paid?

6 MR. STERN: Thank you, Your Honor.

7 So plaintiff has received approximately 620 notices of
8 payment so far and the payments have -- have ranged from,
9 well, a low of zero dollars to a high of about \$4,700, with
13:26:56 10 an average of that in the mid hundreds, I think 3 to 600.

11 You know, Your Honor, I think your idea is, frankly, a
12 very good one, and we would certainly be open to considering
13 it and negotiating something like that with defendants.

14 You know, our high priority is to get these payments
13:27:11 15 to the class mem -- the class members as quickly as
16 possible, and we don't see at the rate they're going at this
17 point how they can even do it within the requested two
18 years, and I think some sort of negotiated settlement is
19 probably the most equitable solution for the class at this
13:27:30 20 point.

21 THE COURT: What I'm going to require to maybe
22 better understand this is I'm going to require that the
23 defendants in this case provide both the Court and plaintiff
24 counsel with a listing of the specific amounts that were
13:28:09 25 paid to -- of all the ones that have been completed -- for

1 both the plaintiffs and the Court to better understand how
2 much the payments have varied among the ones that have been
3 completed.

4 It sounds, generally, like each of these would
13:28:47 5 potentially vary as between -- potentially vary among
6 themselves, but it would seem helpful to the Court and to
7 the plaintiffs to better understand how much the payments do
8 vary.

9 And I understand there may be some that don't get any
13:29:22 10 payment, but it would seem to be helpful to understand if
11 that's 5 percent or 20 percent. And then, among the people
12 that do get payments, to try to get some universe as to how
13 much those payments vary and how much statistically they
14 have generally been around, one general average.

15 Because it would seem that you've had a universe or
13:30:14 16 you've had -- did you say, generally, 1,800 at this point?

17 MS. BRIZIUS: Close to 1,800, yes, Your Honor.

18 THE COURT: I would think from that number,
19 both you and the plaintiffs should be able to see if the
13:30:41 20 payments are, you know, within kind of an average number
21 that you could then consider negotiating, you know, a sum
22 that could be applied against all.

23 From the government's standpoint, it -- I've kind of
24 observed, and correct me if I'm wrong, that you're almost
13:31:21 25 spending more money on the recalculation than the total

1 amount of payment that you're making.

2 MS. BRIZIUS: I'm not aware of the precise
3 dollar figure to the agency, but I can tell you they are
4 devoting extremely substantial resources to completing the
13:31:41 5 recalculation.

6 THE COURT: Because how many -- do you have an
7 understanding as to what the average number of hours it's
8 taking to compute this?

9 MS. BRIZIUS: Yes, Your Honor.

13:31:56 10 We believe each recalculation should take over four
11 hours, four or five hours, over five hours without the
12 additional 100 percent quality review.

13 THE COURT: And --

14 MS. BRIZIUS: And we do have 330 employees,
13:32:13 15 including the quality review teams, spending full --
16 full-time on these cases right now.

17 THE COURT: And their salaries would be,
18 generally, how much, the people doing these reviews?

19 MS. BRIZIUS: That I don't know, Your Honor.

13:32:28 20 THE COURT: Well, they're probably making
21 somewhere between 60,000 per year to 110,000 per year.

22 MS. BRIZIUS: Your Honor, I wouldn't want to
23 speculate, but I can tell you that they are putting some
24 higher level case technicians on this work.

13:32:53 25 THE COURT: So the amount they're spending on

1 it, if they're spending four to five hours per review, it
2 would seem the government's, you know, devoting huge amounts
3 of expenses to this effort. And, going forward, it would
4 seem that you're -- you know, you can predict that the
13:33:21 5 expenses to complete this are going to be very large, at a
6 time -- at a time when you've got all other kind of
7 responsibilities that these people could be -- could be
8 working on.

9 MR. SANDBERG: Your Honor, if I might?

13:33:45 10 This is Justin Sandberg. I'm co-counsel for the
11 federal defendant.

12 We agree that this is sort of an expensive and
13 time-consuming process. You know, we feel that we have a
14 need to undertake it however. And the question is really
13:33:59 15 one of how long this takes. As we've laid out, we think we
16 need two years.

17 And we've looked into this matter previously, and as
18 my colleague, Ms. Brizius, said, we don't think this is
19 something we can settle because they have a statutory
13:34:14 20 entitlement to this money, and we don't believe that we have
21 the ability to settle the amount of money that they're
22 entitled to receive under the statute.

23 MR. STERN: Your Honor, this is plaintiffs'
24 counsel.

13:34:28 25 If I may?

1 I don't -- I don't understand why, with notice, there
2 could not be a settlement giving -- giving something certain
3 to each class member, as in any other typical class action.

4 MR. SANDBERG: Your Honor, we believe we have
13:34:50 5 a statutory obligation. We're bound by statute. We don't
6 think that this is something we can settle. The government,
7 of course, is constrained by statutory obligations, so
8 settlements must be confined to those limits, and we don't
9 believe that the settlement in this case would be within
13:35:05 10 those limits, given that it's an entitlement.

11 And, in fact, of course, the point of the suit was
12 to -- was to correct the mistake, the failure to recalculate
13 that was made, and we don't want to compound that by sort of
14 -- yet again, sort of failing to provide people their -- the
13:35:25 15 amount to which they're entitled.

16 THE COURT: Well, except people settle cases
17 as to which they've got specific statutory rights all the
18 time.

19 MR. SANDBERG: I mean, the plaintiffs -- I
13:35:46 20 mean, a plaintiff can choose to say that I'm entitled to X,
21 but I'm going to, you know, take Y.

22 But if we're obligated, if the government is obligated
23 by the statute to do something, we cannot -- we cannot,
24 quote/unquote, settle that obligation.

13:35:59 25 Somebody can take less than they're entitled to by

1 statute, but if the statute obligates the government to take
2 some path, we cannot waive that obligation.

3 THE COURT: Even if the claimant agrees to
4 give up a claim to potentially more?

13:36:16 5 MR. SANDBERG: Yeah. The statute binds our
6 conduct and it precludes us, as we understand it, from doing
7 anything other than providing them their entitlement.

8 THE COURT: Okay. What I'd like to have you
9 do is within ten days file a brief explaining what statute
13:36:40 10 you rely on that would foreclose and prevent a settlement
11 at, you know, an agreed upon amount.

12 And so, within -- what day is today?

13 THE LAW CLERK: It's the 12th.

14 THE COURT: What day of the week is the 20th?

13:37:14 15 THE LAW CLERK: The --

16 THE COURT: Let's say by the 24th, I want the
17 government to -- the defendant to file a brief laying out
18 your best argument as to why you think it's -- you're
19 prevented from trying to settle it by coming up with a
13:37:41 20 representative amount that would -- could be offered to
21 individual plaintiffs.

22 MR. SANDBERG: Yes, Your Honor. I understand.

23 I did want to raise that, you know, as you know, we
24 filed our motion to stay and we've indicated that after
13:38:00 25 June 2 -- on or around June 24th, we're going to move in the

1 Sixth Circuit for a stay of the proceedings as well.

2 THE COURT: Okay. I mean, you can do that.

3 At some point, don't you have some responsibility to
4 the government to try to avoid the Social Security
13:38:25 5 Administration spending, you know, probably \$500 for each of
6 these claims?

7 You've got people spending five hours, they're
8 probably being paid somewhere around \$100 an hour to
9 complete this, and isn't there some responsibility not to
13:38:50 10 throw good money after bad from the government's standpoint?

11 MR. SANDBERG: Certainly, Your Honor, we do
12 have a responsibility to the government and, obviously, to
13 the people that Social Security serves, and we're trying to
14 discharge that responsibility in accord with our statutory
13:39:06 15 obligations.

16 THE COURT: I mean, don't you have some
17 responsibility to taxpayers and to the claimants themselves?

18 It sounds like --

19 MR. SANDBERG: Yes, Your Honor. It --

13:39:17 20 THE COURT: It sounds like you're saying, that
21 you make some argument that under the statute you have to
22 spend 6 or \$700 of the government's money to complete the
23 review for each of these claimants so that you can pay them
24 somewhere, you know, plus or minus, a certain amount of
13:39:43 25 dollars on these back awards, so --

1 MR. SANDBERG: Yes, Your Honor.

2 THE COURT: -- after you submit the -- after
3 you submit that on the 24th, I'd like a plaintiff response
4 by the 1st of July in terms of whether you believe there's
13:40:12 5 an ability or mechanism where a representative amount might
6 be able to be submitted to the claimants and let the
7 claimants decide whether, you know, they'd be willing to
8 accept a representative amount that is, you know, a fair
9 estimate as to the amount that they would be entitled and
13:40:46 10 whether they would have an ability to waive claim for any
11 amount beyond that.

12 MR. STERN: Yes, Your Honor.

13 THE COURT: And, also, if you have a
14 recommendation regarding what procedure you think could be
13:41:06 15 implemented to both protect the government and -- and -- in
16 terms of a payment with a waiver from your clients or the
17 class members as to how much -- you know, a waiver of -- so
18 that the government would be protected from future claims
19 that the payment hadn't been complete.

13:41:43 20 MR. STERN: Understood.

21 THE COURT: All right. Well, file those by
22 then.

23 And in the meantime, I'll make a decision, because the
24 general thought would be that we've got to get this thing
13:41:59 25 off the mark, and it seems like you're spending huge amounts

1 of time on something that might be able to otherwise be
2 resolved, without, you know, foregoing -- if the
3 government's got some argument to the Sixth Circuit or
4 otherwise that you shouldn't have to pay any of these, you
13:42:19 5 know, I wouldn't be asking you to give that up. But in the
6 meantime, I think it's -- this delay is unconscionable.

7 Okay. Thanks, everyone.

8 Goodbye.

9 MR. SANDBERG: Thank you, Your Honor.

13:42:37 10 MS. BRIZIUS: Thank you, Your Honor.

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12 (Proceedings concluded at 1:42 p.m.)

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C E R T I F I C A T E

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I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter
18 prepared from my stenotype notes.

19

/s/ Sarah E. Nageotte 6/14/2019
SARAH E. NAGEOTTE, RDR, CRR, CRC DATE

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