

In the United States Court of Federal Claims

ELECTRICAL WELFARE TRUST
FUND, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

No. 19-cv-353

Filed: November 11, 2022

ORDER

On November 7, 2022, Plaintiff Electrical Welfare Trust Fund filed a Motion for Extension of Time to Effectuate Class Notice. *See* ECF No. 87 (Mot.). Plaintiff requests that this Court extend all deadlines in the Court-approved notice plan (ECF No. 77) by 35 days. Mot. at 1. Plaintiff states that despite running a “vigorous notice campaign over the past few months,” it has experienced “unanticipated challenges,” including discovering incorrect contact information for several potential class members. *Id.* at 1-2, 4-5. According to Plaintiff, a 35-day extension is necessary “to allow for sufficient time to complete notice and for Exaction Class Members to submit opt-in forms.” *Id.* at 5.

Defendant opposes Plaintiff’s Motion. *See* ECF No. 89 (Resp.). Defendant is concerned that Plaintiff “continued to send class action notices to potential class members well after” the September 12, 2022 deadline. Resp. at 3. Defendant suggests any class action notices sent after the September 12, 2022 deadline “should be deemed invalid.” *Id.* at 4. Defendant further requests that should this Court grant Plaintiff’s relief, “any extension [should] be limited to the 165 potential class members to which class action notices were sent after September 12, 2022.” *Id.* at 6-7.

After reviewing the parties' expedited briefing and considering the parties' arguments, the Court **GRANTS** Plaintiff's Motion for Extension of Time to Effectuate Class Notice, ECF No. 87. This Court has "broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *see also Wolfchild v. United States*, 68 Fed. Cl. 779, 796-97 (2005). This authority naturally extends to the Court-ordered schedule governing a class action. *See* Rules 16(b)(4), 23(d). Plaintiff has demonstrated good cause to extend the deadline for potential members to opt-in to the Exaction Class, particularly given counsel's good faith declaration concerning the difficulty effecting notice on a quarter of the potential class members. *See* Mot. at 4-5; Declaration of Luiggy Segura, ECF No. 87-1 (Segura Decl.), ¶¶ 9, 14. Further, "[g]iven that notice . . . is intended to inform as many potential plaintiffs as possible of . . . their right to opt-in" to the class, this Court determines Plaintiff's requested extension is appropriate. *Chhab v. Darden Restaurants, Inc.*, No. 11-cv-8345, 2013 WL 5308004, at *16 (S.D.N.Y. Sept. 20, 2013).

Furthermore, Defendant will not be prejudiced by the requested extension. Indeed, Plaintiff has filed a pending motion for summary judgment related to the Exaction Class, *see* ECF No. 72, and Defendant has conceded that the Court's prior decision denying Defendant's motion to dismiss "resolves EWTF's summary judgment motion in [EWTF's] favor." Defendant's Response to Plaintiff's Motion for Summary Judgment, ECF No. 80 at 2. Plaintiff's requested extension simply imposes a modest and necessary delay before the Court will address the pending summary judgment motion, as requested by the parties. *See* Plaintiff's Reply in Support of its Motion for Summary Judgment, ECF No. 81 at 2 (Plaintiff requesting this Court rule on its motion for summary judgment only "after Class notice is complete and the opt-in period expires"); Joint Status Report, ECF No. 26 at 4 (Defendant "does not object to plaintiffs' proposed course of action

on the remaining portion of their illegal exaction claim,” including moving for summary judgment after class certification). Defendant will therefore not be prejudiced by such a brief extension to the opt-in period; nor has Defendant argued it will suffer any prejudice. *See Resp.*

Defendant contends this Court may grant Plaintiff’s request only if Plaintiff demonstrates “excusable neglect” pursuant to Rule 6(b)(1)(B). This Court disagrees. Plaintiff’s Motion seeks an extension to deadlines that have not yet passed — the November 14, 2022 deadline for potential class members to return opt-in forms and the December 29, 2022 deadline for class counsel to certify final membership of the class. *See* ECF No. 77 (Notice Schedule); *see also* Mot. at 1. Plaintiff’s request for an extension of time is therefore not a “motion made after the time has expired,” which would require a showing of “excusable neglect” under Rule 6(b)(1)(B). *See* Rule 6(b)(1)(B). Rather, Plaintiff’s motion is a “request . . . before the original time . . . expires” under Rule 6(b)(1)(A), which simply requires good cause. *See* Rule 6(b)(1)(A). As discussed above, Plaintiff has shown good cause to grant its motion.¹

Defendant’s primary concern is that, in its view, Plaintiff sent “a second round of notices” after the September 12, 2022 deadline, which “directly conflict[s] with the scheduling order the Court adopted.” *Resp.* at 3. The Court does not share Defendant’s concern.

Plaintiff avers it did not issue a second round of notices after the September 12 deadline. *Reply* at 2. Rather, Plaintiff explains that it only tried to ensure delivery of the notices to potential class members who, for various reasons, did not initially receive the notices. *Id.* at 2-5. Such communications do not violate the Court’s Notice Schedule. Indeed, the Notice Schedule adopted by the Court is silent as to follow-up emails or notices sent to putative class members where initial,

¹ Even if Plaintiff was required to demonstrate excusable neglect, the Court finds that Plaintiff has clearly satisfied that burden. *See* Plaintiff’s Reply in Support of its Motion for Extension of Time, ECF No. 91 (Reply) at 6 n.5. In any case, therefore, Rule 6 does not counsel against granting Plaintiff’s relief.

timely contact efforts were unsuccessful. *See* Notice Schedule. The Notice Schedule simply requires that class counsel “distribute the notice to the potential class members . . . by September 12, 2022” and that “[p]utative class members must return opt-in forms . . . by November 14, 2022.” *Id.* at 1. The Notice Schedule does not expressly forbid the conduct of which Defendant complains, and Defendant does not cite any authority supporting its position. In fact, Plaintiff’s proposed notice plan (ECF No. 76) — which Defendant did not oppose — contemplates that class counsel’s class action administrator may follow up with potential class members to “reach as many potential class members as possible.” Declaration of Gina M. Intrepido-Bowden Concerning Proposed Notice Program, ECF No. 76-4, ¶ 9; *see generally id.*, ¶¶ 9–17. Accordingly, Plaintiff did not ignore the Court’s Notice Schedule.

Similarly, Plaintiff states 165 potential class members did not receive the initial notices sent prior to September 12 due to invalid email addresses, invalid mailing addresses, or no contact information at all. *See* Mot. at 4-5; Segura Decl., ¶ 14. Plaintiff was forced to update those potential class members’ contact information and re-serve the notices. Mot. at 4-5; Segura Decl., ¶¶ 14-16. Even when contact information was accurate, Plaintiff explains the notices often did not reach the responsible potential class member representative. *See* Reply at 3-5. Plaintiff’s efforts to contact unreachable potential class members are not tantamount ignoring the Court’s schedule. It was reasonable and proper, even necessary, for Plaintiff, as class representative, to ensure each potential class member received a notice.² *See* Rule 23(c)(2)(B) (requiring “best notice that is practicable” and “reasonable effort” in effecting notice).

² While it is unclear that such a scenario occurred, to the extent Plaintiff sent second notices even when there was no indication the first notice was not received, the Court agrees that best practice would have been for Plaintiff to first request leave to issue those second notices. *See, e.g., Health Republic Ins. Co. v. United States*, No. 16-cv-259, D.I. 51 (Fed. Cl. Mar. 27, 2017) (ruling on Plaintiff’s motion to supplement class notice); *Mueller v. Chesapeake Bay Seafood House Assocs., LLC*, No. 17-1638, 2018 WL 1898557, at *2 (D. Md. Apr. 20, 2018) (ruling on plaintiffs’ request

The Court also declines to adopt Defendant’s suggestion that the extension of the opt-in period “be strictly limited to the 165 potential class members to which the class action notices were sent after September 12, 2022.” Resp. at 6-7. The roughly three-quarters of all potential class members who have not yet opted-in to the class should receive the benefit of the brief extended opt-in period. Plaintiff’s Motion seeks a minor, 35-day extension of time, for good cause shown. Denying the Motion and accordingly denying willing potential class members entry into the class would be inefficient and would subvert the goal of a legitimate class action. *See Am. Pipe & Constr. Co.*, 414 U.S. at 553.

Accordingly, the Court **GRANTS** Plaintiff’s Motion for Extension of Time to Effectuate Class Notice, ECF No. 87, and **ORDERS** the following deadlines:

- By **December 19, 2022**, putative class members must return opt-in forms (either through the dedicated website or by returning a copy via mail, FedEx, UPS, or email).
- By **February 2, 2023**, class counsel shall certify final membership in the Exaction Class by identifying the name of each member of the Exaction Class to the Court and providing, to the Court and Defendant, a copy of the opt-in form completed by each Exaction Class member and submitted to Class Counsel.

IT IS SO ORDERED.



Eleni M. Roumel
 ELENI M. ROUMEL
 Judge

to “be allowed to send additional class notice”). Nonetheless, denial of Plaintiff’s motion for extension of time on such basis — thus denying many potential class members the ability to participate in this class action — is inappropriate. The “efficiency and economy of litigation . . . is a principal purpose of” the class action. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). Efficiency and economy of litigation are not served if the Court excludes from the Exaction Class potential class members to whom Plaintiff sent a second notice.