IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brenda Kay Pfeiffer, On behalf of herself and all others similarly situated, *Plaintiff*, v. Margaret Spellings, in her official capacity as United States Secretary of Education, the United States Department of Education, and the United States of America, *Defendants*.	)	Civil No. 1:07-cv-00522 (EGS) CLASS ACTION

PLAINTIFF'S REPLY MEMORANDUM IN FURTHER SUPPORT OF HER MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

In its opposition brief, DOE concedes that this action should proceed as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3). (Defs.' Memo. at pp. 10-11). DOE challenges only the scope of the class, arguing that the Court should not certify the proposed class of negatively amortized student loan borrowers, but instead limit certification to a subclass of negatively amortized student loan borrowers whose actual payments were equal to or greater than the interest accruing on their loans. In support of its argument for limiting the scope of the class, DOE asserts that Dr. Pfeiffer has not satisfied Rule 23(a)'s typicality or adequacy requirements and, in any event, the class would be unmanageable. As explained in detail below, DOE's arguments miss the mark. Dr. Pfeiffer's legal theory and interests are identically aligned with the members of the class. Because individual damages are a function of payment amount, payment date and loan balance and, thus, formulaic in nature, there is no need for creating numerous subclasses as DOE suggests. Therefore, the Court should certify the class.

DOE also asserts that Dr. Pfeiffer should bear the cost of class notice. Although the plaintiff is generally responsible for advancing the cost of class notice, special circumstances here militate in favor of requiring DOE to "pay" for notice. If Dr. Pfeiffer prevails on her motion for partial summary judgment, then she will have conferred a benefit on the class supporting an interim award of costs against DOE, including the cost of issuing class notice. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970) (recognizing that once plaintiff class has established the defendant's liability, plaintiff class may be entitled to an award of costs). Moreover, DOE is uniquely situated to send notice at little additional expense by including it in one or more mailings sent to class members in the ordinary course of business. Accordingly, the Court should require DOE to bear the cost of class notice.

LEGAL ARGUMENT

I. DR. PFEIFFER'S LEGAL THEORY AND INTERESTS ARE CO-TERMINOUS WITH THE MEMBERS OF THE CLASS.

DOE's challenge to certification of the class is based on a fundamental misunderstanding of Dr. Pfeiffer's legal theory. Dr. Pfeiffer claims that DOE capitalized interest improperly on all negatively amortized student loans by capitalizing prematurely the amount of interest accrued between the borrower's June payment date and June 30, not just those negatively amortized loans for which the borrower's actual payments were equal to or greater than the interest accrual. Under Dr. Pfeiffer's legal theory, the amount of the borrower's scheduled payment – whether $0, $100 or some other amount – is wholly irrelevant to liability. DOE's annual systematic breach of the form promissory note results from the early capitalization of interest (on June 30) that is not due until the borrower's July payment date.

In an effort to create complexity out of simplicity, DOE offers hypothetical scenarios supported by unexplained spreadsheets that allegedly show that DOE's unlawful interest capitalization practice may benefit some members of the proposed class. All of the scenarios are premised on DOE comparing the results of its current practice to the results if it performed its capitalization calculations on the borrower's scheduled June payment date rather than on June 30. Plaintiff does not seek, however, an order compelling DOE to capitalize interest on the borrower's June payment date. Plaintiff's proposed order merely seeks a declaration that DOE's current practice is a breach of the form promissory notes and an injunction prohibiting DOE from capitalizing interest before it is due. DOE's spreadsheets are based on an assumption that

has no basis in the relief actually sought by plaintiff. Accordingly, DOE's spreadsheets assume a hypothetical that will never occur.[1]

DOE has not hypothesized a scenario under which a borrower would be better off with DOE's actual practice rather than a practice in which DOE continues to use June 30 as the date when it capitalizes interest, but only capitalizes interest not paid when due, *i.e.*, interest the borrower did not pay by their June payment due date. It cannot. A class member does not benefit from the premature capitalization of interest. No consumer benefits from paying an additional charge (in this case interest on capitalized interest from the scheduled payment date in June until June 30) that the consumer has not agreed to pay, all other things remaining unchanged. This is demonstrated in the accompanying declaration that compares eight different scenarios the impact of DOE's current practice of capitalizing all accrued interest through June 30 to a practice in which interest that has not been paid by the scheduled date is capitalized on June 30. Myers Decl.[2]

As is set forth therein, the amount of total accrued interest on June 30 each year is *always* going to be more than the amount of interest not paid when due as of June 30. Accordingly,

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[1] In fairness to DOE, plaintiff's opposition to summary judgment (at 4-5) stated that DOE "could" capitalize interest on borrowers' scheduled payment dates in June. Plaintiff has not asked the Court for such relief, however, and withdraws any suggestion that she seeks such relief.

[2] Four of the scenarios involve hypothetical borrowers with scheduled payment dates on the 7th, 14th, 21st, or 28th days of the month who make no payments of principal and interest. The other four scenarios use the same scheduled payment dates but hypothesize payments of $100 per month. Dr. Pfeiffer realizes that DOE's practice is to use actual receipt dates rather than scheduled dates in calculating interest to be capitalized. However, it is virtually impossible to hypothesize all the various permutations of actual payment dates, so scheduled dates are used as a simplifying assumption. The important point is that, regardless of the date on which money is received and regardless of the borrowers' payment amount, borrowers are *always* better off with DOE capitalizing only interest not paid when due on June 30 rather than capitalizing all accrued interest on June 30.

there are no members of the putative class who benefit from DOE's practice of capitalizing *all accrued interest* on June 30 each year rather than only capitalizing *interest not paid when due* on June 30. Myers Decl., ¶ 7.

A. Dr. Pfeiffer's Claim Is Typical of the Claims of Class Members Who Have No Scheduled Payment.

DOE concedes that Dr. Pfeiffer has met Rule 23(a)(2)'s commonality requirement. (Defs.' Memo. at p. 5). Nevertheless, it challenges Dr. Pfeiffer's satisfaction of Rule 23(a)(3)'s typicality requirement on the grounds that her claims "are not, and cannot, be based on the same legal theory" and that she has "never articulated how her asserted legal theory applies to members of the first proposed class, including but not limited to zero-payment borrowers." (Defs.' Memo. at p. 8).

As an initial matter, DOE's argument is puzzling as it overlooks the well-established legal principle that "the commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982), *quoted in Keepseagle v. Veneman*, 2001 U.S. Dist. LEXIS 25220, at **25-26 (D.D.C. Dec. 11, 2001) (Sullivan, J.). But more important, DOE has either ignored or misconstrued the arguments Dr. Pfeiffer has advanced in support of her motion for partial summary judgment. Indeed, Dr. Pfeiffer's claim arises from the same capitalization practice of DOE that affects all class members and her legal theory applies to the entire class. (Pltf.'s Summary Judgment Memo. at pp. 5-10).

The typicality requirement is satisfied "if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability." *Cohen v. Warner Chilcott Pub. Ltd. Co.*, 522 F. Supp. 2d 105, 115 (D.D.C. 2007). The mere fact that Dr. Pfeiffer has also proposed an alternative class or subclass in case the Court is persuaded by DOE's arguments does not

defeat typicality. *See Logan v. City of Pullman Police Dep't*, 2005 U.S. Dist. LEXIS 37811, *13-14 (E.D. Wash. 2005) (finding typicality for class of all persons in building at the time that police used pepper spray even though plaintiffs alternatively proposed subclasses of persons on different floors to respond to defendants' arguments that persons on different floors had different exposure and therefore different damages).

B. Dr. Pfeiffer's Interests Are Aligned with Class Members Who Have No Scheduled Payment.

Relying on its scenarios altering the date of capitalization, DOE next contends that Dr. Pfeiffer has "actual or potential conflicts" with the "zero-payment" class members who "*arguably* benefited" from its unlawful interest capitalization practice. (Defs.' Memo. at p. 6) (emphasis added). DOE's argument is without merit. As explained above, no class member could possibly benefit by having interest capitalized prematurely.

But even if it was possible for a class member to benefit by the unlawful practice, such hypothetical or potential conflicts are not sufficient to defeat Rule 23(a)(4)'s adequacy of representation requirement. *See Koger v. Barr*, 1992 U.S. Dist. LEXIS 20027, **3-8 (D.D.C. 1992) (in age discrimination action, rejecting argument that class could not be certified because some members of the putative class may have benefited from discriminatory features of promotion system); *Anderson v. Bank of the South*, 118 F.R.D. 136, 149 (M.D. Fla. 1987) (rejecting speculative conflict between class representative and class members); *Sheftelman v. Jones*, 667 F. Supp. 859, 865 (N.D. Ga. 1987) (rejecting "speculative" conflicts as basis for denying class certification); *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 622 (C.D. Cal. 1985) (rejecting "speculative" conflict between class representative and class members; noting that actual conflicts which arise later may be addressed when they arise); *Wilson v. Great Amer. Indus., Inc.*, 94 F.R.D. 570, 573-74 (N.D.N.Y. 1982) (in securities fraud action, defendant's

argument that class representative had potential conflicts with members of class rejected as premature; court could fashion appropriate relief or subclass if actual conflicts materialized).

Dr. Pfeiffer's interests are wholly aligned with all class members, regardless of the amount of their respective scheduled payments or whether their loans reach the 10% limitation on interest capitalization. The differing amounts of each class member's scheduled payment, together with his or her payment date and loan balance, obviously impact individual damages; but every member of the class was damaged by DOE's practice of capitalizing all accrued interest on June 30 each year. Accordingly, there are no antagonistic interests between Dr. Pfeiffer and the other class members.

II. THE CLASS IS MANAGEABLE.

DOE's assertion that the larger class is "wholly unmanageable" because it would "require subclasses whose composition changes from day to day" is fatally flawed. (Defs.'s Memo. at p. 10). As explained above, DOE's argument rests on two hypothetical scenarios premised on a change in DOE's practice that Dr. Pfeiffer does not seek. Once this inaccurate assumption in DOE's analysis is eliminated, nothing in DOE's analysis shows that any proposed class member benefited from DOE's practice.

Granted, there are differences in amount of damages among class members, but there is no need to create numerous subclasses to resolve the amount of each class member's damages. Such issues can be easily addressed by computer-aided mathematical calculations. *See Brown v. Pro Football, Inc.*, 146 F.R.D. 1, 12 (D.D.C. 1992) ("In cases where the fact of injury and damage breaks down on what may be characterized as "virtually a mechanical task," "capable of mathematical or formula calculations," the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability."). Finally, even assuming

arguendo that the class is not manageable for purposes of damages, it should be certified under Rule 23(b)(2), which does not contain a "manageability" requirement.

III. DOE SHOULD BEAR THE COST OF CLASS NOTICE.

DOE accurately cites the general rule that plaintiffs bear the cost of sending notice to the class. A well-recognized exception to this general rule, however, applies here: when the defendant's liability has been established, then the defendant bears the cost of sending class notice. *Hartman v. Wick*, 678 F. Supp. 312, 328-329 (D.D.C. 1988) ("As the Court has already found defendant liable, defendant must bear the full expense of this notification task.") (citations omitted); *Macarz v. Transworld Systems, Inc.*, 201 F.R.D. 54, 58-59 (D. Conn. 2001); *Catlett v. Missouri State Highway Comm.*, 589 F. Supp. 949, 951-52 (W.D. Mo. 1984); *Meadows v. Ford Motor Co.*, 62 F.R.D. 98, 101-02 (W.D. Ky. 1973).

As the Court is well aware, the parties cross-moved for summary judgment at the same time plaintiff moved for class certification. If DOE prevails on its summary judgment motion, then no class notice will be sent out. On the other hand, if plaintiff prevails on her motion for partial summary judgment, DOE's liability will have been established and class notice would be appropriate. In short, class notice only will be sent out in this action if DOE's liability is established. Accordingly, if class notice is sent out DOE must bear the cost of sending notice.

It is particularly appropriate for a defendant that routinely sends written communications to the class members to bear the cost of notice because class notice could be included in these regular communications. *See Kansas Hosp. Ass'n v. Whiteman*, 167 F.R.D. 144, 145-46 (D. Kan. 1996) (where defendants sent monthly "medical cards" to class members, class notice ordered to be included in these monthly letters to class members; defendants also ordered to bear cost of class notice). Here, DOE sends monthly billing statements to members of the class.

Class notice should be included in those regular billing statements. That is the easiest and least expensive method of delivering class notice. To the extent some class members no longer receive monthly billing statements from DOE, counsel for the respective parties should be ordered to meet and confer to determine the best method for reaching those members of the class.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in her opening brief, plaintiff Dr. Brenda Pfeiffer respectfully requests that the Court grant her motion for class certification and enter her proposed order.

Dated: March 14, 2008

Respectfully submitted,

/s/ Steven M. Sprenger

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Brenda Kay Pfeiffer,	)	
On behalf of herself and all others similarly situated,	)	Civil No. 1:07-cv-00522 (EGS)
Plaintiff,	)	CLASS ACTION
v.	)	
Margaret Spellings, in her official capacity as United States Secretary of Education, the United States Department of Education, and the United States of America,	)	
Defendants.	)	

DECLARATION OF HEIDI M. MYERS

I, Heidi M. Myers, hereby declare and state as follows:

1. I am over the age of eighteen years. I have personal knowledge of the facts set forth herein, and am competent to testify thereto.

2. I graduated in 1988 from The McConnell School in Minneapolis, Minnesota and received a Certificate of Business Administration. I have been a practicing accountant since 1989.

3. Plaintiff's counsel asked me to analyze the amount of interest that would be capitalized on a student loan under two different scenarios: 1) where all accrued interest is capitalized on June 30, as DOE currently does; and 2) where only interest that the borrowers had not paid as of their June payment due date was capitalized on June 30 each year.