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

STEPHANIE LYNN STEIGERWALD on behalf of herself and the class,	)	
Plaintiffs,	)	**CASE NO.: 1:17-CV-1516**
v.	)	**JUDGE JAMES S. GWIN**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**MOTION FOR ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 406(b)**
Defendants.	)	

Pursuant to 42 U.S.C. § 406(b), Federal Rules of Civil Procedure 23 and 54, this Court's January 25, 2019 Opinion and Order Granting Summary Judgment to the Plaintiff Class, Docs. 88, and the Court's Order entering Judgment, Doc. 89, Class Counsel respectfully file this Motion requesting an award of attorneys' fees in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid to each Class Member as a result of this case (including but not limited to heirs, and all others receiving benefits as a result of this case). By this Motion, Class Counsel also respectfully requests the Court to Order Defendants to withhold whatever percentage of attorneys' fees is ultimately awarded to Class Counsel, and for Defendants to remit those fees directly to Class Counsel.

As explained more fully in the accompanying Memorandum, incorporated herein by reference, Class Counsel's diligent, time-consuming, and ultimately successful efforts to secure relief for the Class are deserving of the requested attorneys' fee award under 42 U.S.C. § 406(b). Moreover, pursuant to Supreme Court and Sixth Circuit case law, the requested fee is reasonable. Therefore, Class Counsel respectfully requests that the Motion be granted.

Pursuant to Federal Rule of Civil Procedure 23(h)(1)(3), "[i]n a certified class action," the Court "may hold a hearing" on fees. Class Counsel respectfully requests that the Court schedule a hearing on this Motion within fourteen (14) days of the completion of briefing on the Motion. Class Counsel intends to post notice of any hearing scheduled by this Court on this Motion on the website dedicated to this class action, http://www.steigerwaldclassaction.com.

The Class Notice in this case provided, in pertinent part, that Class Members must "have an opportunity to submit written comments or an objection to the Court" as to Class Counsel's fee request. In order to provide the Class with the opportunity to provide comments or objections to this Motion for Fees, Class Counsel plans to post the following statement along with this Motion, on http://www.steigerwaldclassaction.com:

> Class Counsel has filed a Motion requesting an award of attorneys' fees in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid to each Class Member as a result of this case (including but not limited to heirs, and all others receiving benefits as a result of this case). If you have any comment or objection to Class Counsel's Motion for Fees, please send it, by letter, to:
>
> United States District Court
> For the Northern District of Ohio
> Clerk of the Court
> Re: *Steigerwald v. Berryhill*, Case No. 17-cv-01516-JG
> Carl B. Stokes United States Court House
> 801 West Superior Avenue
> Cleveland, Ohio 44113-1838
>
> With a copy to:
>
> Ira T. Kasdan, Class Counsel
> Kelley Drye & Warren LLP
> 3050 K Street NW, Suite 400
> Washington, DC 20007

Respectfully submitted,

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Attorneys for Plaintiff and the class

Dated: February 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2019, a copy of the Motion for Attorneys' Fees and supporting documents 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*

Ira T. Kasdan
Attorney for Plaintiff and the class

IN THE UNITED STATES DISTRICT COURT
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Plaintiffs,	)	**CASE NO.: 1:17-CV-1516**
v.	)	**JUDGE JAMES S. GWIN**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 406(b)**
Defendants.	)	

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Pursuant to 42 U.S.C. § 406(b), Rules 23(h) and 54(d) of the Federal Rules of Civil Procedure and this Court's Opinion and Order Granting Summary Judgment and Entering Judgment, Docs. 88 ("Opinion") and 89, Class Counsel respectfully file this Memorandum in support of their Motion requesting an award of attorneys' fees in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid to each Class Member as a result of this case (including but not limited to heirs, and all others receiving benefits as a result of this case).[1] Although under § 406(b) Class Counsel may be entitled to up to "25 percent of the total of the past-due benefits," which also is the percentage amount set out in the contingency fee agreements in this case, Class Counsel is seeking only 20 percent.

The 20% fee is reasonable, and not an impermissible "windfall." It is fully supported by Class Counsel's highly capable and successful prosecution of the Class Members' claims; the substantial relief afforded to Class Members; the number of hours spent on this case by Class Counsel; and the considerable risks that Class Counsel undertook in pursuing this lawsuit. Moreover, it is consistent with the 20% award in *Greenberg v. Colvin*, 2015 WL 4078042 (D.D.C. 2015), the only other class action case which has awarded § 406(b) fees.

I. Factual and Procedural Background[2]

Pursuant to this Court's Opinion, the Social Security Administration ("SSA") shall "perform the Subtraction Recalculation[[3]] and pay any past-due benefits . . . within ninety days." Opinion at 9. As the Court is aware, many of these Retroactive Underpayments should have been made by SSA to Class Members as early as 2002. But for this lawsuit, the Retroactive

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1 Family benefits are properly included in the past-due benefits used to calculate fees. *Hopkins v. Cohen*, 390 U.S. 530, 534 (1968).

2 This Background section is based on the documents cited herein and the accompanying Declaration of lead Class Counsel Ira T. Kasdan ("Kasdan Decl.").

3 Capitalized terms not defined herein are defined in the Class Notice. Doc. 80-1, at 2.

Underpayments almost certainly would never have been made. *See* Doc. 66, at 10 ("[T]he Court finds important that Defendant Commissioner has presented no evidence – and has not even argued – that the agency had any intention of calculating and paying these past-due benefits without litigation.").

The grant of summary judgment to the Class is the culmination of years of initiative, investigation, research and due diligence by Class Counsel.[4] Prior to filing the Complaint on July 18, 2017, Doc. 1, Class Counsel had spent (literally) years and hundreds of hours researching the potential claims of Class Members, in order to draft and finalize a Complaint laying out clearly and succinctly the allegations on behalf of lead Plaintiff Stephanie Lynn Steigerwald and the Class. The fact that the Complaint never needed to be amended a single time – a rarity in the context of a complicated class action such as this one – is indicative of the care and time Class Counsel took in drafting its initial pleading, which was designed to read and persuade much like a brief in support of a motion for summary judgment.

Following the Complaint's filing, Class Counsel and Defendants' counsel engaged in a series of informal negotiations, which Class Counsel hoped would swiftly resolve the issues and claims meticulously laid out in the Complaint. *See* Doc. 16. Instead, Defendants attempted to "pick off" lead Plaintiff Ms. Steigerwald by paying her off, and then filed a Motion to Dismiss, claiming that the case was moot. *See* Doc. 18. Defendants' Motion also argued for dismissal on various other procedural grounds, including for the alleged lack of "presentment" by Ms. Steigerwald of her claims, *see* Doc. 18-1, at 12-18, and in support thereof annexed a 138-page Exhibit, which appeared to be a complete record of her case. *See* Doc. 18-2.

In response to Defendants' Motion to Dismiss, Class Counsel not only had to analyze and

[4] References to Class Counsel include attorney Kirk B. Roose, who tragically passed away during the pendency of this case. Doc. 51 ("Notice of Passing of Kirk B. Roose, Esq.").

refute complex legal questions raised by Defendants, but also carefully review Ms. Steigerwald's benefits record. Class Counsel's methodical review revealed that Defendants had chosen to omit one page from Ms. Steigerwald's file. That one-page letter was the "smoking gun," proving beyond the shadow of a doubt that Ms. Steigerwald indeed had "presented" her claim. *See* Doc. 25-1, at 4 (one-page letter from Ms. Steigerwald's attorney, missing from the 138-page Exhibit, requesting that Defendant SSA "release the withheld benefits to claimant."). In denying Defendants' Motion to Dismiss, the Court relied on and quoted this letter. Doc. 32, at 7. Therefore, but for Class Counsel's perseverance and thoroughness, this case might well have been dismissed early on with Class Members receiving nothing.

The action then proceeded to class certification discovery. At that stage, Defendants continued to thwart Class Counsel from prosecuting the case. In October 2017, Class Counsel issued discovery requests to identify the names of the Class Members and the temporal scope of the Class. In January 2018, Defendants' stated they would only consent to one year of Class Member discovery, from July 18, 2016 to July 17, 2017. *See* Doc. 34, at 2. Class Counsel objected, and Defendants' recalcitrance necessitated a prolonged discovery dispute. *See* Docs. 33-36, 40, 41-43.

The discovery matters under dispute were referred to the Magistrate. Doc. 35. The issues were extensively briefed in multiple letter filings and argued in two telephonic hearings. Thereafter, after further negotiation, Defendants finally agreed in March 2018 to provide class data for the period September 1, 2012 to October 31, 2017. That data indicated that SSA "has yet to perform a Subtraction Recalculation for 37,765 people, or approximately 39 percent of the total claimant pool [over that period of time]." Doc. 66, at 4 (citation omitted).

During class certification discovery, counsel for the parties conferred telephonically and

in person on multiple occasions to facilitate a settlement. Unfortunately, Defendants proved unwilling to compromise on a number of significant issues, and settlement negotiations stalled.

On May 29, 2018, Defendants requested that the proceedings be referred to the Magistrate for mediation. Doc. 56. Having spent months discussing settlement with Defendants in good faith before that time, and knowing that Defendants refused to compromise on several key terms predicate to settlement, Class Counsel opposed the request for a referral. Doc. 60, at 1. Defendants' Motion was granted, and the case was referred for mediation. Doc. 61. A full day mediation was held on July 16, 2018, but was unsuccessful. *See* Doc. 67.

Despite the fact that class certification discovery had shown that the Subtraction Recalculation was not performed for approximately 39% of individuals for whom it was supposed to have been performed between September 2012 and October 2017, Defendants persisted in forcing Class Counsel to litigate. *See* Docs. 55, 55-1, 57, 59. In Opposition to Class Certification, Defendants threw up new, elaborate legal arguments as to why a group of similarly situated (and similarly wronged) individuals numbering in the tens of thousands should not be allowed to form a class. *See* Doc. 57. Defendants also attempted to use their own dilatory discovery tactics to their advantage, arguing that because they had refused to provide data on Class Members before September 1, 2012, those Class Members should not be part of the Class. *See, e.g., id.* at 8-9. Class Counsel was forced to spend much time and energy rebutting Defendants. *See generally* Doc. 59. On July 12, 2018, the Court granted Class Counsel's Motion to Certify the Class, appointed Ms. Steigerwald as class representative and appointed the undersigned as Class Counsel. Doc. 66. Significantly, the Court also agreed with Class Counsel that the Class should include Members starting from 2002, and not 2012, as Defendants had argued. *See id.* at 16-18.

Next, Defendants "took issue" with Class Counsel's Proposed Class Notice. Doc. 77. Although Defendants claimed that they changed Class Counsel's Proposed Class Notice to make it "more readable," Doc. 76-3, Defendants' Proposed Class Notice materially altered the Proposed Class Notice to contain extraneous, biased information and mischaracterizations improperly designed to encourage Class Members to opt out of the class. *See* Doc. 76, at 5-9. Class Counsel was therefore forced to litigate the language of the Class Notice. *See* Docs. 76, 77, 78. On October 16, 2018, the Court issued an Opinion and Order, substantially adopting Class Counsel's Proposed Class Notice. Doc. 80.

Defendants also opposed summary judgment as to liability. Doc. 52. Class Counsel, therefore, was obligated to litigate this matter as well. *See* Docs. 50, 50-1, 54. Not only did Defendants object procedurally and on the merits to the relief requested in the Complaint, they also compelled Class Counsel to litigate the applicability of 42 U.S.C. § 406(b). *See id.* This, even though Defendants *admitted* in their Opposition to Summary Judgment, filed in April 2018, that § 406(b) applies in the class action context. Doc. 52, at 18 ("*It is not the class-action context that renders § 406(b) inapplicable here*, but the nature of the claim itself.") (emphasis added).

From the outset of the case in 2017 to the present, Defendants had at least four attorneys – from the Department of Justice and from the Social Security Administration – actively participating in and working on this litigation.[5] This number does not include the various other attorneys who were overseeing those attorneys. Class Counsel was forced to fight tooth and nail at every step of the way. This required Class Counsel to expend thousands of man hours.

On January 25, 2019, the Court granted Plaintiffs' Motion for Summary Judgment, as to both Defendants' liability and Class Counsel's eligibility for § 406(b) attorneys' fees. With

[5] At the Court-Ordered Mediation, a total of *seven* attorneys attended on behalf of the Defendants. *See* Doc. 67.

respect to the latter question, the Court aligned itself with the only other federal district court case to have examined this issue, *Greenberg v. Colvin*, 63 F. Supp. 3d 37 (D.D.C. 2014). Opinion at 9 ("Thus, the Court joins the *Greenberg* court in holding that Plaintiffs' counsel are eligible § 406(b) fees, in an amount to be decided at a later date.").

II. Legal Standards

42 U.S.C. § 406(b)(1)(A) states, in pertinent part:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment . . . .

In *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002), the Supreme Court abolished the use of the "lodestar method" in 406(b) cases, requiring instead that "[w]ithin the 25 percent boundary" of 406(b) "the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered." *Id.* at 807. In conducting a 406(b) analysis, *Gisbrecht* points courts to "look[] first to the contingent-fee agreement" between plaintiff and counsel before proceeding with the reasonableness inquiry. *Id.* at 808. The *Gisbrecht* Court held that "§ 406(b) does not displace contingent-fee agreements within the statutory ceiling; instead, § 406(b) instructs courts to review for reasonableness fees yielded by those agreements." *Id.* at 808-09.[6] Under the reasonableness test, "[i]f the attorney is responsible for delay," or if the contingency fee would result in a "windfall[]" for counsel, then a reduction in the contingency fee may be appropriate. *Id.* at 808.

[6] For this reason, Class Counsel's argument herein is not based on a lodestar calculation, and the Court can make its reasonableness determination without any reference to the lodestar in this case. *See, e.g., Sykes v. Comm'r of Soc. Sec.*, 144 F. Supp. 3d 919, 925 (E.D. Mich. 2015) ("[T]he Commissioner's fixation on the hourly rate is contrary to the plain holding of *Gisbrecht*, in which the Supreme Court rejected the lodestar method of fee review in non-fee-shifting cases.").

In *Hayes v. Sec'y of Health & Human Servs*., 923 F.2d 418, 420-21 (6th Cir. 1990), the Sixth Circuit explained that

> In *Rodriquez* [*v. Bowen*, 865 F.2d 739 (6th Cir. 1989)] we did not hold that all large fees are *per se* unreasonable. Rather, deductions for large fees are permissible under only two circumstances:
>
> > Deductions generally should fall into two categories: 1) those occasioned by improper conduct or ineffectiveness of counsel; and 2) situations in which counsel would otherwise enjoy a windfall *because of either an inordinately large benefit award or from minimal effort expended.*
>
> Where none of these reasons applies, an agreement for a 25% fee, the maximum permitted under § 206(b) of the Social Security Act, 42 U.S.C. § 406(b), is presumed reasonable. [Citations omitted; emphasis added in original.]

The Sixth Circuit has also found that "a windfall can never occur when, in a case where a contingent fee contract exists, the hypothetical hourly rate determined by dividing the number of hours worked for the claimant into the amount of the fee permitted under the contract is less than twice the standard rate for such work in the relevant market." *Hayes*, 923 F.2d at 422 (footnotes omitted). *Hayes* emphasized that "a hypothetical hourly rate that is less than twice the standard rate is *per se* reasonable, and a hypothetical hourly rate that is equal to or greater than twice the standard rate may well be reasonable" as well. *Id.* The court explained that, in cases where the hypothetical hourly rate is greater than the standard rate, a district court may consider the following two non-exclusive factors in determining the reasonableness of the fee: "[1] a consideration of what proportion of the hours worked constituted attorney time as opposed to clerical or paralegal time and [2] the degree of difficulty of the case." *Id.*

"To aid the Court in its determination of the reasonableness of the fee resulting from a fee agreement, *Gisbrecht* instructs courts to consider an attorney's usual non-contingent rate and time expended representing her client into the calculation of a reasonable 406(b) rate." *Green v. Comm'r of Soc. Sec. Admin*., 2017 WL 3394738, at *3 (N.D. Ohio 2017). However, "a court

should not limit fees under § 406(b) to an amount based on an hourly rate that a particular court deems reasonable." *Scappino v. Comm'r of Soc. Sec. Admin.*, 2015 WL 7756155, at *3 (N.D. Ohio 2015). Indeed, "the practice of capping an hourly rate based on regional standards is precisely what the Sixth Circuit instructed against." *Bowman v. Colvin*, 2014 WL 1304914, at *6 (N.D. Ohio 2014) (citing *Hayes*, 923 F.2d at 421).

"An award under § 406(b) differs from an EAJA award, which uses the 'lodestar' concept to set a reasonable hourly rate for fees. The percentage-based fee award was designed to 'assure adequate compensation' to the attorney and 'encourage attorney representation' by taking into account the inherent risk in pursuing an uncertain claim." *Reagan v. Comm'r of Soc. Sec.*, 2017 WL 108047, at *2 (E.D. Tenn. 2017) (quoting *Rodriquez*, 865 F.2d at 743-44). "In assessing the reasonableness of a contingent fee award, [a court] cannot ignore the fact that the attorney will not prevail every time. The hourly rate in the next contingent fee case will be zero, unless benefits are awarded." *Royzer v. Sec'y of Health & Human Servs.*, 900 F.2d 981, 982 (6th Cir. 1990). As another district court in the Sixth Circuit observed in reliance on *Royzer*:

> [T]he hypothetical hourly rate is simply an outer boundary or a "sanity check" that might give one indication that the fee agreement would result in a disturbingly large fee *for only nominal effort expended by plaintiff's counsel*. But as courts have observed (and which by now should be obvious), it is inherent to the nature of contingent fee practice that fees in winning cases will overcompensate counsel for the work actually performed, because it is unavoidable that fees in losing cases will undercompensate counsel – by resulting in a fee of $0 for otherwise diligent and worthy practice.

Sykes v. Comm'r of Soc. Sec., 144 F. Supp. 3d 919, 925 (E.D. Mich. 2015) (emphasis added).

Finally, *Royzer* also stresses that "Congress has put the responsibility on the federal judiciary to make sure that fees charged are reasonable *and do not unduly erode the claimant's benefits*," 900 F.2d at 982 (emphasis added), thereby implicitly recognizing that if a claimant's benefits are not "unduly eroded" by a fee award, the § 406(b) fees awarded are not a "windfall."

III. Argument

"The centerpiece of the § 406(b) analysis is the contingent-fee agreement between the claimant and his or her attorney." *Ballatore v. Comm'r of Soc. Sec.*, 2015 WL 5830836, at *3, *report and recommendation adopted*, 2015 WL 5772000 (E.D. Mich. 2015) (citing *Gisbrecht*, 535 U.S. at 808-09).[7] In this case, Class Counsel entered into contingency fee agreements with the lead Class Plaintiff, Stephanie Lynn Steigerwald. *See* Kasdan Decl., Exhibit 1. Those agreements provide, in pertinent part: "In the event of a favorable determination, Kelley Drye and Roose & Ressler together intend to charge 25% (twenty-five percent) of your and the class's past due benefits resulting from the Matter, subject to court approval." *Id.* at 7; *see also id.* at 13. Thus, the Court should begin with the 25% attorneys' fee provision in the retainer agreement, which is presumptively reasonable. *Hayes*, 923 F.2d at 421. As stated above, Class Counsel are *not* seeking a 25% fee award here, but instead seek a 20% award. Such an award is reasonable and not a "windfall."

A. The Difficulty of the Case Favors Grant of the Requested Fee

Hayes posits that, in determining whether a proposed § 406(b) fee is reasonable, the Court consider "the degree of difficulty of the case." 923 F.2d at 422. The difficulty of this case is underscored by the intricate legal and factual arguments Defendants raised throughout this litigation, in order to curtail or limit relief for the Class. *See supra*, pp. 1-6. Every step of the way, Class Counsel provided effective responses to Defendants' sallies. *See id.* Doing so required thousands of hours of time and effort on the part of Class Counsel – all relatively senior attorneys, ranging from Senior Associate to Partner, in strategizing, filing and litigating a

[7] Of course, § 406(b) is applicable even in the absence of an explicit contingent-fee agreement. *See Greenberg*, 63 F. Supp. 3d at 50 (collecting cases for the proposition that "courts have held that fees under § 406(b) may be available where there is no contingency arangement between the claimant and his counsel.").

complex, national class action. Kasdan Decl., ¶¶ 5, 7-29. Clearly, Class Counsel's efforts were not merely "nominal." *Sykes,* 144 F. Supp. 3d at 925.

In its Opinion, the Court recognized that the issues surrounding the Complaint "are fairly byzantine." Opinion at 1. Class Counsel certainly recognized the "byzantine" nature of the Subtraction Recalculation – as Class Counsel spent literally hundreds of hours studying the mechanics of the Subtraction Recalculation and potential Retroactive Underpayments due by reviewing, *inter alia,* SSA Office of Inspector General Reports, law review articles, treatises and cases – in preparing the Complaint and bringing the case to court. Class Counsel also reviewed the files and records of scores of individuals before filing the Complaint, in order to determine whether the Subtraction Recalculation was being applied properly or incorrectly, or simply was being ignored. Kasdan Decl., ¶¶ 5, 8-9. In contrast to the position Defendants held for a long time in this case, namely, that the Complaint failed to make a "showing that the agency [SSA] is not properly performing" the Subtraction Recalculation, Doc. 41, at 10, Class Counsel was incredibly diligent in attempting to ascertain how pervasive the failure to perform the Subtraction Recalculation was. *See* Doc. 1.[8]

Following the drafting of the Complaint, and as discussed in more detail above, pp. 1-6, Class Counsel actively engaged with Defendants simultaneously on two fronts. Class Counsel advocated for the Class on the adversarial track, through this litigation, while at the same time attempting good-faith (albeit ultimately unsuccessful) negotiations in the hope of obtaining an

[8] That said, Class Counsel's analysis could have been wrong, and bringing this contingent class action was always inherently risky for a multitude of reasons. *See* Kasdan Decl., ¶ 10. If, for example, as Defendants continually suggested until proven otherwise, the size of any certified class would have been small or even negligible, counsel would still have been ethically obligated to continue this litigation. Any § 406(b) fee stemming from such a theoretical litigation would likely have been commensurately smaller than the one contemplated here. Class Counsel should not be punished because the well-researched allegations in its Complaint turned out to be correct.

amicable, quick settlement. Both of these approaches were time-consuming and work-intensive.

This case involved over 3,100 recorded hours by Class Counsel. *See* Kasdan Decl., ¶ 21. Class Counsel's efforts included, *inter alia*, formulating the case, drafting and filing the Complaint, effectively responding to Defendants' Motion to Dismiss, litigating and negotiating key discovery and class notice disputes and successfully litigating class certification and summary judgment. All the while, Class Counsel interacted with Defendants, including through Court-ordered mediation, in an attempt to settle the case or otherwise dispose of the remaining issues in a less-litigious manner – a time-consuming process in and of itself. In toto, these efforts underscore the high degree of difficulty of this case, and weigh heavily in favor of the requested fee award.

When factoring in the difficulty of this lawsuit, the Court must also recognize that – precisely because of that difficulty – there were numerous inherent and significant risks in Class Counsel undertaking this class action case. *See* Kasdan Decl., ¶ 10 (enumerating risks). These risks, therefore, also weigh in favor of a 20% attorneys' fee award. Indeed, Class Counsel took this action on a wholly contingent basis, assuming the biggest risk of the possibility of no recovery whatsoever. Class Counsel's contingency fee agreement states, in pertinent part: "In the event the lawsuit is not successful in obtaining past-due benefits, neither you nor any member of a class, individually or collectively, will have any obligation of any nature to pay any attorney fees under this agreement." Exhibit 1, at 6; *see also id.* at 12. The fact that Class Counsel has succeeded must be weighed against the contrary fact that, had Class Counsel not prevailed, Class Counsel would have received nothing. *See, e.g., Ballatore*, 2015 WL 5830836, at *11 (granting in part 406(b) application for attorney's fees where the attorney "effectively advanced his client's interest and achieved excellent results. Success remained uncertain throughout, and

consequently the contingency fee adequately gauged the case's inherent risk.").

B. The Overwhelming Amount of Work on the Case Was By Attorneys

None of the briefing in this case was formulaic. Instead, much of the briefing and advocacy in this case on the part of Class Counsel required intense legal research and skill.

It is not surprising, then, that the overwhelming amount of the time recorded on this case was for work performed by the Class Counsel attorneys. In fact, of the more than 3,100 hours spent on this case through the grant of summary judgment, only approximately 77 hours represent time recorded by non-attorneys or junior attorneys with less than five years' experience. The rest of the time was spent by seasoned attorneys, with between ten and forty years of post-law school experience. *See generally* Kasdan Decl., ¶¶ 9, 24. This second of the two *Hayes* factors, "consideration of what proportion of the hours worked constituted attorney time as opposed to clerical or paralegal time," 923 F.2d at 422, is thereby satisfied.

C. There is No "Windfall" Here

Defendants will be expected to argue that due to the large size of the Class, a 20% fee award will yield an impermissible "windfall." The Court should reject any such assertion.

First, a 20% fee award, which is less than the 25% found in the contingent fee agreements, presumptively is "reasonable." *Hayes*, 923 F.2d at 421. Moreover, it is consistent with the 20% fee granted by Judge Collyer in *Greenberg*, the only other § 406(b) class action case. 2015 WL 4078042, at *10.

Second, as noted above, a "windfall" occurs when counsel acts improperly or is ineffective, or where there is an "inordinately large benefit award," or counsel has expended "minimal effort." *See Hayes,* 923 F.2d at 421. None of these factors are present here.

Certainly there is no impropriety or ineffectiveness. Class Counsel pushed the case hard to obtain the fastest relief for the Class, and achieved an excellent result. As the Supreme Court

has noted, "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained*." *Hensley v. Eckerhart*, 461 U.S. 424, 436, (1983) (emphasis added). Per the *Hensley* factor, Class Counsel's success in potentially benefitting 129,695 Class Members, of whom 100,404 are "Category 1" Class Members,[9] weighs heavily in Class Counsel's favor.

Additionally, there can be no question of a "minimal effort" here; to the contrary, Class Counsel worked extremely hard and, through the entry of Judgment on January 25, 2019, has put nearly 3,200 hours into the case. And, Class Counsel continues to work hard. To wit, Class Counsel continues to communicate with Class Members by phone and through written correspondence regarding their questions, and fully expects to continue to do so for the foreseeable future. *See* Kasdan Decl., ¶¶ 19, 34. Moreover, Class Counsel continues to litigate this case. And for all one knows, Defendants may still appeal the Court's rulings while seeking a stay of the Court's rulings pending appeal, further delaying performance of the Subtraction Recalculation and payment of Retroactive Underpayments due. Class Counsel, of course, will not be compensated for any activity following the Court's award of fees. Class Counsel's future work must therefore be taken into account now. *See Greenberg*, 2015 WL at *8 n.11 (crediting argument regarding ongoing work in awarding 20% fee).

Finally, there is no "inordinately large benefit award" here, especially when measured against the possibility of "unduly erode[d]" benefits for Class Members. *Royzer*, 900 F.2d at 982.

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[9] The Class includes both "Category 1" and "Category 2" Class Members. Defendants have posited that no Category 2 Class Members will be owed Retroactive Underpayments. *See* Doc. 82, at 1. Assuming for the moment that Defendants are correct – something that will not be verified until the Subtraction Recalculation is actually performed for Category 2 Class Members – only 109 Category 1 Class Members opted out of this lawsuit, leaving 100,404 with the possibility of recovering money according to Defendants' categorization of them. Kasdan Decl., ¶ 30.

In discovery, Defendants provided Class Counsel with a sample of the Retroactive Underpayments that were due to be paid to 100 members of Category 1 (*i.e.*, the only Class Members whom Defendants believe may be due Retroactive Underpayments). *See* Kasdan Decl., Exhibit 2. Because Category 1 Class Members consist of 100,404 individuals, the provided small sample size is not necessarily statistically accurate. Any calculations therefrom should be taken with a large grain of salt.[10] However, simply for illustrative purposes, the 100 Category 1 Class Members sampled were owed, on average, $1,426.08 in Retroactive Underpayments, ranging from a low of $0 to a high of $10,929.23. *See id.* Should this average amount turn out to be representative, a 20% attorneys' fee to Class Counsel would amount to only $285.22 from each Category 1 Class Member – by no means a "windfall." *See Royzer*, 900 F.2d at 982 (judiciary should ensure that fees "do not unduly erode the claimant's benefits.").

Defendants will undoubtedly assert that the Court should focus on the total fees that Class Counsel may reap and any high hypothetical hourly rate derived therefrom. But even assuming that the hypothetical hourly rate here would be greater than Class Counsel's rates,[11] that does not render the return here a "windfall." *See Hayes*, 923 F.2d at 422. What is important is the "benefit award" per individual, which is not "unduly eroded" here.

Moreover, the 3,100-plus hours that Class Counsel spent on the case were needed to obtain similar relief for each individual Class Member. Stated otherwise, the same amount of time necessarily had to be spent in the litigation to have the Court conclude that the Subtraction Recalculation be performed for each Class Member – even those who will receive a zero dollar Retroactive Underpayment, and for whom Class Counsel will receive no fees. Based on the

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[10] In *Greenberg*, SSA overestimated the potential payment to class members and potential fee return to class counsel based on similarly preliminary data. *See* Kasdan Decl., ¶ 32 n.8.

[11] Class Counsel's hourly rates are listed in Kasdan Decl., ¶¶ 25-27, 29.

above data taken from a tiny sample size, Class Counsel is estimated to receive a return of $285.22 for each Category 1 Class Member who receives a monetary Retroactive Underpayment and a return of zero dollars for each Category 1 Class Member (and per Defendants, every Category 2 Member) who will receive no money. If the fee awards turns out to be on the relatively high side for some, they will certainly be low or zero vis-a-vis many others. This is precisely the nature of a contingent case: "Contingent fees generally overcompensate in some cases and undercompensate in others. It is the nature of the beast." *Royzer*, 900 F.2d at 982.

On average, the fee received by Class Counsel from each individual Class Member likely will be low. Especially given the time and effort Class Counsel expended on this case, the difficulty of the case and the overwhelmingly positive resolution for Class Members, this variable victory for Class Counsel should not render deserved fees to be a "windfall."[12]

IV. Conclusion

Class Counsel respectfully requests the Court grant this Motion, award fees of 20% of each payment of past-due benefits made by SSA as a result of this case, and require Defendants to directly remit the fees to Class Counsel.[13] A Proposed Order is attached.[14]

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[12] Class Counsel is not seeking EAJA fees herewith. Remittance of EAJA fees spread across the Class would be unduly burdensome, necessitating a different *pro rata* share of EAJA fees reimbursed to each deserving Class Member. Class Counsel estimates that EAJA fees, at best, would approximate $600,000 ($189 x 3,175 hours). *See*, *e.g.*, *Thrasher v. Berryhill*, 2018 WL 454254, at *1 (N.D. Ohio 2018) ($189.37 rate deemed reasonable for 2017-18). Based on the small sample size provided by Defendants, this would result in reimbursement of approximately $6.00 to each deserving Class Member. Class Counsel's reduced § 406(b) request of 20% (instead of 25%) allows each Class Member to retain, on average, more than $70 in award benefits (5% x $1,426.08), more than covering any EAJA reimbursement amount.

[13] Per the Class Notice, Class Counsel is posting this Memorandum on the Class website, http://www.steigerwaldclassaction.com/, and is inviting Class Members to submit written comments or any objections to the Court. Class Counsel reserves the right to respond in writing as appropriate, and/or to present additional argument at any fees hearing that the Court may set.

[14] Class Counsel has emailed Defendants' counsel on two occasions since the Court's grant of summary judgment to discuss SSA's withholding of 406(b) fees and to provide information regarding remittance of any potential fee award directly to Class Counsel. To date, Class Counsel has not received a response to these queries. *See* Kasdan Decl., ¶¶ 35-37.

Respectfully submitted,

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s/ Ira T. Kasdan, admitted *pro hac vice*
s/ Joseph D. Wilson, admitted *pro hac vice*
s/ Bezalel Stern, admitted *pro hac vice*
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Attorneys for Plaintiff and the Class

Dated: February 7, 2019

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned declares under penalty of perjury that the foregoing Memorandum in Support of Motion for Attorneys' Fees complies with the page limitations for a Standard matter, and is 15 pages long.

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the class

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.	)	
	)	**DECLARATION OF IRA T. KASDAN**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**IN SUPPORT OF MOTION FOR ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 406(b)**
Defendants.	)	

I, Ira T. Kasdan, declare under penalty of perjury as follows:

1. I am a member of the bar of the District of Columbia and a member of the firm of Kelley Drye & Warren LLP ("Kelley Drye"), appointed along with the law firm of Roose & Ressler, a Professional Corporation ("Roose & Ressler"), as Class Counsel for Plaintiffs in the above-captioned action ("Plaintiffs" or "Class Members"). Kelley Drye's offices are located at 3050 K Street NW, Suite 400, Washington, D.C. 20007. Roose & Ressler's offices are located at 6150 Park Square Drive, Suite A, Lorain, OH 44053.[1]

2. I make this declaration based on my personal knowledge. I submit this declaration in support of Class Counsel's Motion for Attorneys' Fees Pursuant to 42 U.S.C. § 406(b) (the "Motion").

3. The Motion seeks compensation for Class Counsel in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid to

[1] References to Class Counsel include attorney Kirk B. Roose, who tragically passed away during the pendency of this case. Doc. 51 ("Notice of Passing of Kirk B. Roose, Esq.").

each Class Member as a result of this case (including but not limited to heirs, and all others receiving benefits as a result of this case), pursuant to this Court's Opinion and Order Granting Summary Judgment and entry of Judgment dated January 25, 2019. Docs. 88, 89 (hereafter collectively, the "Opinion"). Through the Motion, Class Counsel seek reasonable attorneys' fees for the time expended investigating and prosecuting the claims in this action, and in obtaining an overwhelmingly favorable result.

4. Roose & Ressler and Kelly Drye demonstrated a strong commitment and devoted abundant resources to effectively litigate this case, from the initial pre-filing stage to its successful conclusion. Class Counsel remain committed to doing what is necessary to ensure Defendants abide by the Court's grant and entry of summary judgment in the Opinion so that Class Members who deserve to be compensated through payment of any Retroactive Underpayments[2] receive their due in a timely manner.

5. During the period prior to Class Counsel's filing of the Complaint on July 18, 2017, the two law firms were led in preparing for this case primarily by Kirk Roose (a founding partner of Roose & Ressler). Mr. Roose painstakingly and meticulously investigated and researched, over a period of *years*, SSA's past performance, and prior failures of performance, of the Subtraction Recalculation, and the possibility of SSA's continued failure to perform the Subtraction Recalculation. This investigation and research entailed, *inter alia*, examining the possibility of bringing the underlying class action on a national level, researching Ms. Steigerwald's claims and the claims of other potential lead counsel, and evaluating the possible defenses and procedural bars that SSA could raise against Ms. Steigerwald and any potential class. This work also included Class Counsel's review of SSA's Office of Inspector General

[2] Capitalized terms not defined herein are defined in the Class Notice. Doc. 80-1, at 2.

Reports, law review articles, treatises and cases regarding the Subtraction Recalculation and related calculations performed (or supposed to be performed) by SSA. Attorney Roose, in particular, also reviewed numerous files and records of individuals who potentially could have been negatively impacted by SSA's failure to perform the Subtraction Recalculation before filing the Complaint, in order to determine whether the Subtraction Recalculation was being applied properly, incorrectly performed or simply ignored.

6. On June 28, 2017, Class Counsel entered into Engagement Letter Agreements with class representative Stephanie Lynn Steigerwald. *See* Exhibit 1, attached hereto (the "Contingency Fee Agreements"). The Contingency Fee Agreements provide, in pertinent part, under the Section entitled "**Attorneys' Fees: Twenty-Five Percent Contingency Fee Agreement**": "In the event of a favorable determination, Kelley Drye and Roose & Ressler together intend to charge 25% (twenty-five percent) of your and the class's past due benefits resulting from the Matter, subject to court approval." *Id.* at 7; *see also id.* at 13. The same section of the Contingency Fee Agreements also state: "In the event the lawsuit is not successful in obtaining past-due benefits, neither you nor any member of a class, individually or collectively, will have any obligation of any nature to pay any attorney fees under this agreement." *Id.* at 7; *see also id.* at 13.

7. The actual prosecution of the class action litigation, from the time of the drafting of the Complaint to date, was the primary responsibility of a three-member team of Kelley Drye attorneys: Partner Ira T. Kasdan; Special Counsel Joseph B. Wilson; and Senior Associate Bezalel A. Stern. Kelley Drye was chosen by Ms. Steigerwald and Kirk Roose, who had represented Ms. Steigerwald in administrative proceedings before SSA, to head up the litigation because Kelley Drye had successfully sued SSA and achieved a highly favorable result in a

different class action case. *See Greenberg v. Colvin*, 63 F. Supp. 3d 37 (D.D.C. 2014); *Greenberg v. Colvin*, 2015 WL 4078042 (D.D.C. 2015).

8. On July 18, 2017, Class Counsel filed the Social Security Class Action Complaint in this case. Preparation for the drafting and filing of the Complaint, as I noted above, included researching the possible affected Class Members, examining the byzantine provisions relating to the payment of Retroactive Underpayment benefits under the Social Security Act and developing legal arguments and citations, many of which were included in the Complaint. The Complaint was drafted, and was meant to persuade, almost like a memorandum in support of summary judgment in an effort to convince Defendants to settle the case at an early stage, and thus bring as fast as possible relief to deserving individuals.

9. Over a period of several *years* leading up to and culminating with the actual filing of the Complaint, Roose & Ressler and then later joined by Kelley Drye spent a combined approximately 1170 hours (Roose & Ressler, approximately 931 hours and Kelley Drye, approximately 239 hours), on, *inter alia*, the extensive pre-filing due diligence described above; meeting and communicating with Ms. Steigerwald; and researching, developing, drafting and finalizing the Complaint.[3] It is a result of that comprehensive, and extremely time-consuming due diligence care and case preparation that the Complaint never had to be amended, survived

[3] After the filing of the Complaint, Roose & Ressler spent an additional approximately 345 hours on the case, participating in every aspect of the litigation from that time forward, including without limitation by reviewing and contributing to every discovery request or reply prepared, and each motion/brief/report or notice filed; participating in court conferences and Court-ordered mediation; strategizing on settlement negotiations and litigation tactics; and engaging with the client, etc. For purposes of this Declaration, however, because Kelley Drye has been lead litigation counsel in this matter from the time of the filing of the Complaint, and because Mr. Roose died while this case was ongoing, I have broken out only Kelley Drye's but not Roose & Ressler's time by the various categories of litigation activities that I detail below that transpired after the Complaint was filed.

dismissal and was the basis for class certification and entry of a final judgment – no easy accomplishment in a complex, nation-wide class action case like this one.

10. Nonetheless, Class Counsel knew from the outset, and throughout the litigation, that they were taking inherent risks in bringing a class action case like this against the SSA on a contingent basis. There certainly was no guarantee or assurance that SSA would settle quickly – if at all, or that the case would not be dismissed, or that it would be certified as a class action, or that there would be enough Class Members to make the case financially viable, or that the case would be won at all, let alone on summary judgment. An award to Class Counsel of EAJA fees, based on the statute's low hourly rates, cannot compensate Class Counsel adequately and fairly for the time and effort needed to litigate and the risks entailed in litigating a complex social security class action like this one. This case would not have been brought, and Class Counsel would not have been incentivized to invest the time and effort it knew would be required in this litigation, without the prospect that a court would award a not insignificant § 406(b) percentage for fees in the event of a successful outcome.

11. Shortly after filing the Class Action Complaint, Class Counsel entered into informal settlement negotiations with Defendants, while also initiating discovery as required by the Court's September 25, 2017 Order. Doc. 15, at 3. The settlement negotiations between the parties ended unsuccessfully when SSA tried to "pick-off" Ms. Steigerwald and moot the case by paying her $5,392.08. *See* Doc. 18.

12. On November 30, 2017, Defendants filed a Motion to Dismiss the Class Action Complaint and a Motion to Stay Discovery. Docs. 18, 19. In responding to Defendants' Motion to Dismiss, Class Counsel was forced both to analyze and refute complex questions of law raised by Defendants and to carefully review Ms. Steigerwald's benefits record, which was only

partially provided to the Court by Defendants. *See generally* Docs. 25, 25-1. Kelley Drye, as lead litigation counsel, spent approximately 129 hours in connection with defeating the Motion to Dismiss, which Motion the Court denied on January 17, 2018. Doc. 32.

13. Class Counsel subsequently renewed class certification (and other) discovery against Defendants. Defendants resisted by serving various and sundry objections, especially with regard to the temporal scope of the potential Class, which Defendants wanted to limit to a one year period, July 18, 2016 to July 17, 2017. *See* Doc. 34, at 2. These discovery disputes lasted several months, during which time some of the disputes were referred to the Magistrate for resolution. The Magistrate conducted two telephonic hearings and the parties submitted two rounds of letter-briefings to the Magistrate – the first outlining the dispute prior to the first telephonic hearing before the Magistrate, and the second following the Magistrate's order to do so at the end of the first telephonic hearing. Following the second telephonic hearing before the Magistrate on February 20, 2018, the Magistrate scheduled an in-person hearing on the dispute for March 29, 2018.

14. Class certification discovery was scheduled to terminate on May 4, 2018. Doc. 28, at 1. Because Defendants had provided no substantive class certification discovery to Class Counsel as of February 21, 2018, Class Counsel believed it prudent to compromise by negotiating a limited temporal scope of class certification discovery with Defendants, rather than waiting until the end of March for a third hearing before the Magistrate. Based on the parties' agreement, Class Counsel withdrew its discovery disputes, and Defendants provided some class certification discovery to Class Counsel in March 2018 going back to 2012. Over the course of the entire case, Kelley Drye spent approximately 495 hours dealing with discovery requests, responses, and objections and all the briefing and conferences related thereto.

15. During the class certification discovery period, counsel for the parties conferred by email, telephonically and in person on multiple occasions in a renewed attempt to facilitate a settlement. Still, Defendants remained unwilling to compromise on a number of significant issues, including the temporal scope of the class and the applicability of § 406(b) attorneys' fees. Settlement negotiations, therefore, stalled.

16. The initial, compromise class certification discovery provided by Defendants showed that SSA failed to perform the Subtraction Recalculation in 39% of cases in which it was required to do so between September 1, 2012 and October 31, 2017. *See* Doc. 55-1, at 7. Nevertheless, Defendants informed Class Counsel that they would oppose Class Counsel's Motion for Class Certification, and threw up novel, elaborate legal arguments in Opposition to certification of the Class of similarly situated individuals numbering in the tens of thousands. Defendants also objected to the Rule 23(b) form of class certification (which requires class notice) that Class Counsel sought. Class Counsel was therefore forced to spend time and energy drafting and fully briefing multiple class certification issues. *See* Docs. 55, 55-1, 57, 58, 59. Kelley Drye spent approximately 196 hours in researching and briefing the various class certification-related issues. On July 12, 2018, the Court granted the Motion for Class Certification, certifying the Class, extending its temporal period back to 2002, requiring notice to Class Members, appointing Kelley Drye and Roose & Ressler as Class Counsel and appointing Ms. Steigerwald as Class representative. Doc. 66.

17. Several days after the Court issued its Order granting class certification, the parties met for an all-day, Court-ordered, mediation with the Magistrate. Once again, no settlement was achieved. Overall, during the entirety of the case, Kelley Drye spent a total of approximately 215 hours on settlement issues, settlement negotiations, related calls,

communications and meetings, etc. with Defendants, as well on all Court-ordered mediation-related activities.

18. Defendants next "took issue" with Class Counsel's Proposed Class Notice. Although Defendants claimed that they changed Class Counsel's Proposed Class Notice to make it "more readable," Doc. 76-3, Defendants' Proposed Class Notice materially altered Class Counsel's Proposed Class Notice to contain extraneous, biased information and mischaracterizations improperly designed to encourage Class Members to opt out of the Class. *See* Doc. 76, at 5-9. Class Counsel was therefore forced to litigate the language of the Class Notice. *See* Docs. 76, 77, 78. On October 16, 2018, the Court issued its Opinion and Order, substantially adopting Class Counsel's Proposed Class Notice. Doc. 80. Kelley Drye spent approximately 128 hours in drafting and litigating the Proposed Class Notice, in engaging a vendor, KCC, to deliver the proposed notice, and in working with KCC to create a website for the Class, www.steigerwaldclassaction.com. KCC's costs for acting as claims administrator in this case – which Kelley Drye is responsible to pay – are over $105,000.

19. Following issuance of the Class Notice, Class Counsel engaged with hundreds of Class Members who called, wrote and emailed Class Counsel to ask questions about the case. As of January 25, 2019, when the Court entered summary judgment, Kelley Drye had spent approximately 117 hours related to communications with Class Members, and drafting and filing reports with the Court regarding such post-Notice matters. Class Counsel continues communicating with Class Members to this day, who themselves continue to make inquiries about the case, and anticipates continuing to do so as this matter moves forward.

20. Defendants also opposed Plaintiffs' Motion for Summary Judgment, both as to Defendants' liability and to the applicability of 42 U.S.C. § 406(b) to this class action case.

Class Counsel was compelled to litigate these issues as well. *See* Docs. 50, 50.1, 52, 54. Kelley Drye spent approximately 180 hours on summary judgment, including on all briefing and filings with the Court related thereto. On January 25, 2019, the Court granted Plaintiffs' Motion for Summary Judgment, as to both Defendants' liability and Class Counsel's eligibility for § 406(b) attorneys' fees.

21. In sum, Class Counsel – including Class Counsel Kelley Drye and Class Counsel Roose & Ressler– recorded a total of approximately 3,172 hours on this case through the entry of summary judgment by this Court on January 25, 2019.[4]

22. It is to be noted that from the outset of the case in 2017 to the present, Defendants had at least four attorneys – from the Department of Justice and from the Social Security Administration – actively participating in and working on this litigation. At the Court-Ordered Mediation, a total of seven attorneys attended on behalf of the Defendants. *See* Doc. 67. In order to prevail in this litigation, Class Counsel was forced to fight tooth and nail at every step of the way, yet litigated efficiently by using (predominately) only three very experienced attorneys, who, nonetheless, had to expend close to 2,000 man hours.

23. None of the briefing in this case was cookie-cutter. Instead, much of the briefing and advocacy in this case on the part of Class Counsel required intense legal research and skill.

24. The overwhelming amount of the time recorded on this case was for work performed by Class Counsel, *i.e.*, attorneys as opposed to paralegals or staff. Through January

[4] This time does not include time spent by numerous, more senior attorneys at Kelley Drye on its Executive and Contingent Case Committees who evaluated the case and ultimately had to approve taking it on. This total also does not account for any time spent by Class Counsel after January 25, 2019, including the time thereafter in preparing the fees motion and related papers. It *does* include, for Kelley Drye attorneys, approximately 116 hours related to preparation and travel for and attendance at court appearances in Cleveland and judicial phone conferences; approximately 55 hours related to advance preparation of a fees motion; and approximately 21 hours of miscellaneous research and matters relating to this case.

25. 2019, when the Court entered Judgment in favor of Plaintiffs, Kelley Drye had recorded a total of approximately 1896 hours on this case, of which less than 40 hours were recorded by paralegals or other staff. Of the hours recorded by the Kelley Drye attorneys, approximately 33 are by junior attorneys with less than five years of post-law school experience. The rest of the time was recorded by Messrs. Kasdan (665 hours), Wilson (326 hours) and Stern (828 hours). These attorneys are all very experienced and seasoned, with between ten and forty years of post-law school experience.[5]

25. I have 40 years of post-law school experience. In 2017, when this litigation commenced, my standard hourly billing rate was $690/hr. In 2018, it was $720/hr. and this year it is $750/hr.

26. Joseph D. Wilson has 20 years of post-law school experience. In 2017, when this litigation commenced, Mr. Wilson's standard hourly billing rate was $655/hr. In 2018, it was was $680/hr. and this year it is $705/hr.

27. Bezalel A. Stern has 10 years of post-law school experience. In 2017, when this litigation commenced, Mr. Stern's standard hourly billing rate was $515/hr. In 2018, it was $580/hr and this year it is $620/hr.

28. As of January 25, 2019, Roose & Ressler recorded 1275 hours of which approximately 70 hours are paralegal Diane Shriver's time. The remaining time is that of Kirk Roose (1175) and Jon Ressler (30.7).

29. Jon Ressler has 20 years of post-law school experience. Karl Roose had 40 years of post-law school experience. [6] Mr. Roose did not and Mr. Ressler does not have regular hourly

[5] The bios for Messrs. Kasdan, Wilson and Stern are found on the Kelley Drye website, located at www.kelleydrye.com.

[6] The bios and backgrounds of Messers. Roose and Ressler are found on their firm's website, located at http://www.rooselaw.com/.

billing rates, as most of their work is on Social Security cases done on a contingency basis. However, in their internal records, Roose & Ressler assigned hourly billing rates as follows: for Kirk Roose, $350/hr.; for Jon Ressler, $300/hr. and for Ms. Shriver, $50/hr.

30. The Class includes 100,404 "Category 1" Class Members and 29,291 "Category 2" Class Members.[7] Defendants have posited that no Category 2 Class Members will be owed Retroactive Underpayments. *See* Doc. 82, p. 1. Assuming that Defendants are correct – something that will not be verified until the Subtraction Recalculation is actually performed for *all* 129,695 Class Members – a maximum of 100,404 Class Members (the "Category 1" Class Members) will potentially receive a Retroactive Underpayment.

31. In response to discovery propounded by Class Counsel, Defendants provided samples of 100 Retroactive Underpayments that are currently owed to Category 1 Class Members. *See* Exhibit 2, attached hereto.

32. Because Category 1 consists of 100,404 Class Members, the sample size of 100 Class Members is not necessarily statistically significant. Moreover, from my personal experience in the *Greenberg v. Colvin* case for which I was the lead class counsel, I can say that preliminary data provided by SSA is not always entirely accurate.[8] Nonetheless, assuming the accuracy of the sample numbers provided by SSA, the money owed the 100 persons selected by Defendants varied widely, from a low of $0.00 to a high of $10,929.23. *See generally* Exhibit 2.

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[7] Of the original 129,859 total Class Members, one hundred nine (109) Category 1 and fifty five (55) Category 2 Class Members opted out, leaving 100,404 Category 1 Class Members and 29,291 Category 2 Class Members.

[8] For example, SSA had estimated in *Greenberg* (albeit with caveats) that 1,000 class members in *Greenberg* would be entitled to reimbursements of roughly a little more than $20,000 per person for a total of approximately 22 million dollars. In fact, based on my personal knowledge, less than half that number of persons in that case received money and the total recovery for past due benefits was in the range of 7 to 8 million dollars.

33. The average amount of Retroactive Underpayments owed to all 100 Category 1 Class Members sampled is $1,426.08 ($80,482.57 for the first 50 cases sampled plus $62,125.19 for the second 50 cases sampled divided by 100). That means that if Class Counsel receives a 20% fee award, the average fee to Class Counsel would amount to only $285.22 from each Category 1 Class Member.[9]

34. Class Members have greatly appreciated Class Counsel's work, which likely will benefit tens of thousands of people. Some of the compliments from the hundreds of Class Members who have communicated by phone with Class Counsel include: (1) On a November 23, 2018 call, a Class Member thanked me for calling him back and explaining the case to him and stated, "there should be more people like you." (2) On a December 5, 2018 call with another Class Member, after I explained the case to her, she thanked and "blessed" me. (3) On January 2, 2019, after returning a Class Member's call, explaining the case to him, and explaining that if we prevailed in this case, we would seek a § 406(b) fee, to which he had the right to object if he stayed in the Class, the Class Member stated: "why would I [object]; I would not have known about this without you," he expressed his appreciation and thanked me for bringing the case. (4) On a February 5, 2019 call, a Class Member thanked me for bringing and winning the class

[9] Another way of looking at the numbers is that in 68 of the 100 sample Category 1 cases Retroactive Underpayments were owed; in 32 cases no Retroactive Underpayments were owed. Under that circumstance, the average payment to the smaller pool of Class Members who would receive money is $2,097 (($80,482.57 + $62,125.19) / 68), and the average fee to Class Counsel, based on a 20% fee award, would be $419.43 from each Class Member who will receive a monetary Retroactive Underpayment. Either way, $285 or $419 for individual fee awards are relatively small. For example, in *Greenberg,* based on the 20% fee award granted by Judge Collyer in that case, most of the individual fees that Kelley Drye received were in the thousands of dollars.

action, and expressed pleasure that there were "finally lawyers that care." It is also noteworthy that only 164 persons have opted out of a class of 129,695, a fraction of the total class.[10]

35. On January 28, 2019 Senior Associate Bezalel Stern emailed Defendants' counsel, stating, in part: "We expect that, following performance of the Subtraction Recalculation over the next 90 days, the Agency will withhold 25% of any Retroactive Underpayments due pending the Court's ruling on the amount of fees appropriate. If the Agency does not intend to do so let us know as soon as possible so we may inform the Court." *See* Exhibit 3, attached hereto.

36. On January 30, 2019, Mr. Stern emailed Defendants' counsel again. Mr. Stern provided Defendants' counsel with relevant information regarding payment of § 406(b) fees to Class Counsel, and closed the email by stating: "Please let us know immediately if the Agency will need anything else in order for Class Counsel to be paid directly from the Agency out of the Retroactive Underpayments that will be due. If you have any questions or comments or if you want to discuss anything, let us know." *Id.*

37. While Defendants and Class Counsel have corresponded regarding the 164 opt-outs since Mr. Stern sent his emails, Defendants' counsel has not responded to either of Mr. Stern's two above-referenced queries.

I declare under penalty of perjury that the foregoing is true and correct.

Executed February 7, 2019 at Washington, District of Columbia.

/s/ Ira T. Kasdan
Ira T. Kasdan

[10] In Class Counsel's December 18, 2018 Notice, Doc. 76, Class Counsel mistakenly reported the number of Class Members who had opted out as of December 17, 2018. That number was incorrect, and was the result of a scrivener's error by Class Counsel. The final, correct number of individuals who opted out of the Class is 164.

EXHIBIT 1

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IRA T. KASDAN
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June 27, 2017

BY HAND

Stephanie Lynn Steigerwald
[redacted]

Re: Engagement Letter Agreement

Dear Ms. Steigerwald:

We are very pleased that you have agreed to have Kelley Drye & Warren LLP serve as your legal counsel, together with Roose & Ressler (with whom you will have a separate engagement letter), to represent you as a named plaintiff in a class action lawsuit against the Social Security Administration ("SSA") and its Commissioner in federal district court. This letter and the attached Terms and Conditions shall constitute our agreement to provide legal services. As used herein, the terms "Kelley Drye," "Firm," "we" and "our" refer to Kelley Drye & Warren LLP, and the terms "you" and "your" refer to you, Ms. Steigerwald.

Scope of Representation. You have engaged us to bring a lawsuit against SSA and its Commissioner on behalf of a proposed class of concurrent OASDI and SSI benefits payment beneficiaries whose past-due benefits have been improperly reduced by SSA (the "Matter"). Our clients in this matter will be you, as the named plaintiff in the class action lawsuit, and, if the court certifies a class, the members of the plaintiff class in the lawsuit. **Please refer to the attached "Terms and Conditions" that are hereby incorporated herein, for information regarding the scope and limits of our representation of you.**

After execution of this engagement letter, changes may occur in the provisions or interpretation of applicable laws or regulations that may have an impact upon your future rights and liabilities. Unless you specifically engage us and we agree to do so, the scope of our engagement does not include advice with respect to future legal developments.

Initialed by Stephanie Lynn Steigerwald: [redacted]

Conflicts of Interest. There is no conflict of interest that we are aware of that would preclude our representation of you or other potential class members if class certification ultimately is granted.

Kelley Drye is a general service law firm that represents numerous clients, nationally and internationally, over a wide range of industries and matters. These may include debtors, creditors, and competitors of you. As a result, a conflict of interest might arise that could deprive you or other clients of the right to select Kelley Drye as their counsel. Accordingly, you agree to consider and discuss with us in good faith waiving any conflict of interest that Kelley Drye may bring to your attention that involves another client who has interests adverse to you on any matter that is not substantially related to (a) the legal services in the Matter, and (b) other legal services that Kelley Drye has rendered, is rendering, or will render to you.

If a conflict arises through no fault of our law firm, you agree that such circumstances will not be a basis for you to disqualify Kelley Drye in this or any other matter in which we may be representing you. If a conflict arises because Kelley Drye merges with another law firm or a particular lawyer joins our firm, you agree that it will be a sufficient remedy to screen such lawyer or lawyers causing the conflict from our engagement(s) for you, including from access to any relevant documents.

Duties as a Class Representative. You understand that Kelley Drye will file a class action lawsuit on behalf of you and others similarly situated against SSA. You understand and agree that you will be a named plaintiff in the case and designated as a potential class representative at our discretion and subject to court approval. You acknowledge that we have explained to you the duties and responsibilities of a class representative. By signing this agreement, you acknowledge and agree that you:

- Can fairly and accurately represent the interests of the class;
- Have a substantial interest in the outcome of the lawsuit;
- Will assist us and Roose & Ressler representing our clients in this case in their prosecution of this case;
- Will sit for a deposition, if requested;
- Will not receive any separate or additional payment or amount for acting as a class representative, even if the law might permit class representative to obtain a separate or additional payment or amount on account of serving as a class representative.

Initialed by Stephanie Lynn Steigerwald: [redacted]

You further recognize and agree that, if class certification is granted, Kelley Drye has a fiduciary obligation to prosecute this case in a manner that is fair, equitable and in the best interests of the entire class. With your input, Kelley Drye shall determine whether any offer of settlement is reasonable and shall, subject to court approval, have the right to settle class claims on such terms as are deemed fair, equitable and in the best interests of the class.

Staffing and Attorney Compensation. I will be the Partner to whom you may turn if you have any special concerns or questions about our representation. Under my direction, we may use other attorneys and legal assistants in our Firm in the best exercise of my and their professional judgment. **Please refer to the attached "Terms and Conditions" that are hereby incorporated herein, for information regarding our fees and compensation and related details.**

Opinions Expressed by Counsel. We will endeavor to serve you effectively and strive to represent your interests vigorously. Any expressions on our part concerning the outcome of your legal matters are expressions of our best professional judgment, but are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on the state of the law at the time they are expressed. You acknowledge that the outcome of this Matter is uncertain, and you understand that we have made and can make no promise or guarantee, by this letter or otherwise, about the outcome.

Cooperation of Client. In order for us to provide our services effectively, you agree to disclose fully and accurately all pertinent facts and to keep us apprised of all developments relating to any issues involved in this Matter. You further agree to cooperate fully with us and to be available to attend any meetings, conferences, hearings, and other proceedings as appropriate.

Please review this agreement carefully. If you have any questions concerning this agreement or our Terms and Conditions, do not hesitate to contact me. You are free to obtain independent legal advice about any of the provisions of this agreement about which you have questions.

If this agreement is acceptable to you, please acknowledge that you have reviewed it, understand it, and desire to retain us on the basis of the terms of this letter and the attached Terms and Conditions by signing, initialing and delivering to us the signed copy. We recommend that you retain a copy of this letter and our Terms and Conditions for your records.

We strive for our clients to be completely satisfied with our services. To that end, please contact me or any of the other attorneys with whom you are working if you ever have any questions or suggestions about how we might improve.

Initialed by Stephanie Lynn Steigerwald: [redacted]

Thank you for allowing us to be of service. We look forward to working with you.

Very truly yours,

Ira T. Kasdan

cc: Kirk B. Roose, Esq.

THE ABOVE AGREEMENT IS
ACCEPTED AND AGREED TO:

[redacted]
Stephanie Lynn Steigerwald

Date: 6/28/17

Initialed by Stephanie Lynn Steigerwald: [redacted]

KELLEY DRYE & WARREN LLP

Terms and Conditions re Stephanie Lynn Steigerwald Engagement Letter

TERMS AND CONDITIONS OF ENGAGEMENT

1. **Termination:** You have the right to terminate our representation by written notice at any time, subject to court approval, if required. We have the same right to terminate our engagement for any reason, consistent with the applicable rules of professional responsibility; if you insist upon taking action that we consider repugnant or with which we have a fundamental disagreement; or for any other conduct that we deem to be inconsistent with the rules of professional conduct or any other law. If required, we will provide notice to or obtain permission from a court or other tribunal prior to terminating our representation.

2. **Applicable Law:** The laws of Ohio will govern the interpretation of this agreement and our attorney-client relationship.

3. **Confidentiality.** We take reasonable measures to treat as confidential all confidences and secrets of our clients, to the extent permitted by law. Under the rules of professional responsibility, a lawyer is generally permitted to reveal client confidences, among other reasons, when reasonably necessary to prevent substantial bodily harm, prevent the client from committing certain crimes or fraud, secure legal advice about the lawyer's compliance with the rules of professional responsibility, and in a controversy between the lawyer and client.

4. **Dispute Resolution.** Any dispute relating to this engagement shall be decided exclusively by a state or federal court sitting in Ohio without a jury. **Both Kelley Drye and you consent to the jurisdiction of those courts and waive any right to a trial by a jury.**

5. **Retention of Records.** Our policy is to keep each client's legal records for a reasonable time after an engagement has ended, after which we may destroy those records according to our retention schedule. We will use reasonable efforts to give you at least 30 days notice before we destroy your records. You are responsible to notify us about any change in your name or address so that we may provide such notice. If you want to make any special arrangements, you should raise them with us at or prior to conclusion of the engagement.

6. **Attorney-Client Privilege for Internal Communications.** We believe that it is in our clients' interest that Kelley Drye have the protection of the attorney-client privilege (which restricts disclosure of confidential communications between attorney and client in connection with internal reviews of our work for you. You agree that (a) any communication between any of our lawyers or staff and a lawyer at Kelley Drye who may be reviewing their work for compliance with professional conduct rules will be protected by the Firm's own attorney-client privilege, and (b) any such review will not constitute a conflict between our interests and your interests.

7. **Scope of Representation.** We will be representing you, currently as the sole named plaintiff in a class action lawsuit. You understand and agree that this action will be brought on behalf of you, individually, and also as a representative of a proposed class of similarly situated claimants, against the SSA. That means that if the class is certified, you will be required to act in the best interests of the class as a whole. You recognize that even though you are acting as a

Initialed by Stephanie Lynn Steigerwald: [redacted]

class representative, you are not entitled to, and will not receive, any separate payment for acting in this capacity.

Kelley Drye has a fiduciary obligation to prosecute this case in a manner that is fair, equitable and in the best interests of the class. With your input, Kelley Drye and Roose & Ressler shall determine when any offer of settlement is reasonable and shall, subject to court approval, have the right to settle class claims on such terms as are deemed fair, equitable and in the best interests of the class.

Kelley Drye agrees to represent you in the Matter at the federal district court level. If the Matter results in an unfavorable ruling from the court (including but not limited to one that does not reach the merits, *e.g.*, if the government moves to dismiss and prevails on a theory that you did not exhaust your administrative remedies), we will have sole discretion in determining whether or not to represent you in any appeal of that ruling. Thus, we reserve the absolute right to opt not to pursue any appeals, or any further action on your behalf.

8. **Costs**. To the extent permitted by applicable rules of attorney ethics, you will not be responsible for advancing any costs, nor be responsible to pay any expenses or fees in connection with the Matter, other than fees from past-due benefits.

9. **Attorneys' Fees: Twenty-Five Percent Contingency Fee Agreement.** Kelley Drye and Roose & Ressler will represent you in the Matter on a contingency fee basis. In this case, you will not directly pay Kelley Drye or Roose & Ressler for their professional legal services in their representation of you in the Matter, because our fees for representing you will be paid by SSA out of your past-due benefits, and only if you receive a favorable determination from the court and/or the SSA, by settlement or by judgment. A "favorable determination" means a judgment from the court and/or settlement by SSA that SSA is obligated to pay you past-due or back payments. Similarly, our fee for representing the class (if one is certified) will be paid by SSA out of the past-due benefits of each of those class members who receive a favorable determination from the court and/or the SSA.

In the event of a favorable determination, Kelley Drye and Roose & Ressler together intend to charge 25% (twenty-five percent) of your and the class's past-due benefits resulting from the Matter, subject to court approval. You agree to have SSA pay twenty-five percent of the past-due benefits, subject to court approval, to pay your attorney fee. Kelley Drye and Roose & Ressler will divide all fees as they may agree, given their joint responsibility and availability for consultation in representation of you and the class.

In the event the lawsuit is not successful in obtaining past-due benefits, neither you nor any member of a class, individually or collectively, will have any obligation of any nature to pay any attorney fees under this agreement.

10. **Electronic Communications.** You agree that unless you specifically advise us otherwise, we are authorized to communicate with you electronically without encryption, notwithstanding such risks as interception, unauthorized access, authorized access by the owner if you are not the owner of the device used to communicate, viruses, and delays in

transmission. We shall not be responsible for the effect on any computer system of any communication transmitted by this means, unless caused by our negligence.

11. Severability. Any provision of this agreement that is unenforceable in whole or in part shall be severed to the extent possible and necessary to make this agreement enforceable, unless that would materially change the intended effect of this agreement.

12. Entire Agreement. Our letter of engagement and these Terms and Conditions constitute the entire agreement between you and us with respect to our engagement in this matter. Any previous understanding, agreement, representation or warranty relating to our engagement is replaced by this agreement, is not being relied upon, and shall have no further effect. Any change to this agreement must be in writing and signed by you and us.

Initialed by Stephanie Lynn Steigerwald: [redacted]

ROOSE & RESSLER
A LEGAL PROFESSIONAL ASSOCIATION

SOCIAL SECURITY DISABILITY
Lorain · Toledo · Wooster · Mansfield

KIRK B. ROOSE, Lorain
JON H. RESSLER, Wooster, Mansfield and Lorain
MARY T. MEADOWS, Toledo
MELISSA L. KUNDER, Lorain
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6150 Park Square Drive, Suite A
Lorain, Ohio 44053-4143
(440) 985-1085
(800) 448-4211
FAX (440) 985-1026
lorain@rooselaw.com

June 27, 2017

Stephanie Lynn Steigerwald
[redacted]

Re: Engagement Letter Agreement

Dear Ms. Steigerwald:

We are very pleased that you have agreed to have Roose & Ressler serve as your legal counsel, together with Kelley Drye & Warren LLP (with whom you will have a separate engagement letter), to represent you as a named plaintiff in a class action lawsuit against the Social Security Administration ("SSA") and its Commissioner in federal district court. This letter and the attached Terms and Conditions shall constitute our agreement to provide legal services. As used herein, the terms "Roose & Ressler," "Firm," "we" and "our" refer to Roose & Ressler, A Legal Professional Association, and the terms "you" and "your" refer to you, Ms. Steigerwald.

Scope of Representation. You have engaged us to bring a lawsuit against SSA and its Commissioner on behalf of a proposed class of concurrent OASDI and SSI benefits payment beneficiaries whose past-due benefits have been improperly reduced by SSA (the "Matter"). Our clients in this matter will be you, as the named plaintiff in the class action lawsuit, and, if the court certifies a class, the members of the plaintiff class in the lawsuit. **Please refer to the attached "Terms and Conditions" that are hereby incorporated herein, for information regarding the scope and limits of our representation of you.**

After execution of this engagement letter, changes may occur in the provisions or interpretation of applicable laws or regulations that may have an impact upon your future rights and liabilities. Unless you specifically engage us and we agree to do so, the scope of our engagement does not include advice with respect to future legal developments.

Conflicts of Interest. There is no conflict of interest that we are aware of that would preclude our representation of you or other potential class members if class certification ultimately is granted.

Duties as a Class Representative. You understand that Roose & Ressler and Kelley Drye will file a class action lawsuit on behalf of you and others similarly situated against SSA. You understand and agree that you will be a named plaintiff in the case and designated as

a potential class representative at our discretion and subject to court approval. You acknowledge that we have explained to you the duties and responsibilities of a class representative. By signing this agreement, you acknowledge and agree that you:

- Can fairly and accurately represent the interests of the class;
- Have a substantial interest in the outcome of the lawsuit;
- Will assist us and Kelley Drye representing our clients in this case in their prosecution of this case;
- Will sit for a deposition, if requested;
- Will not receive any separate or additional payment or amount for acting as a class representative, even if the law might permit class representative to obtain a separate or additional payment or amount on account of serving as a class representative.

You further recognize and agree that, if class certification is granted, Roose & Ressler has a fiduciary obligation to prosecute this case in a manner that is fair, equitable and in the best interests of the entire class. With your input, Roose & Ressler and Kelley Drye shall determine whether any offer of settlement is reasonable and shall, subject to court approval, have the right to settle class claims on such terms as are deemed fair, equitable and in the best interests of the class.

Staffing and Attorney Compensation. I will be the attorney to whom you may turn if you have any special concerns or questions about our representation. Under my direction, we may use other attorneys and legal assistants in our Firm in the best exercise of my and their professional judgment. **Please refer to the attached "Terms and Conditions" that are hereby incorporated herein, for information regarding our fees and compensation and related details.**

Opinions Expressed by Counsel. We will endeavor to serve you effectively and strive to represent your interests vigorously. Any expressions on our part concerning the outcome of your legal matters are expressions of our best professional judgment, but are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on the state of the law at the time they are expressed. You acknowledge that the outcome of this Matter is uncertain, and you understand that we have made and can make no promise or guarantee, by this letter or otherwise, about the outcome.

Cooperation of Client. In order for us to provide our services effectively, you agree to disclose fully and accurately all pertinent facts and to keep us apprised of all developments relating to any issues involved in this Matter. You further agree to cooperate fully with us and to

be available to attend any meetings, conferences, hearings, and other proceedings as appropriate.

Please review this agreement carefully. If you have any questions concerning this agreement or our Terms and Conditions, do not hesitate to contact me. You are free to obtain independent legal advice about any of the provisions of this agreement about which you have questions.

If this agreement is acceptable to you, please acknowledge that you have reviewed it, understand it, and desire to retain us on the basis of the terms of this letter and the attached Terms and Conditions by signing and initialing and delivering to us the enclosed copy. We recommend that you retain a copy of this letter and our Terms and Conditions for your records.

We strive for our clients to be completely satisfied with our services. To that end, please contact me or any of the other attorneys with whom you are working if you ever have any questions or suggestions about how we might improve.

Thank you for allowing us to be of service. We look forward to working with you.

Very truly yours,

Kirk B. Roose

Kirk B. Roose

cc: Ira T. Kasdan, Esq.

THE ABOVE AGREEMENT IS
ACCEPTED AND AGREED TO:

[redacted] Date: 6/28/17

Stephanie Lynn Steigerwald

Initialed by Stephanie Lynn Steigerwald [redacted]

Stephanie L. Steigerwald, Terms and Conditions
June 27, 2017

TERMS AND CONDITIONS OF ENGAGEMENT

1. **Termination:** You have the right to terminate our representation by written notice at any time, subject to court approval, if required. We have the same right to terminate our engagement for any reason, consistent with the applicable rules of professional responsibility; if you insist upon taking action that we consider repugnant or with which we have a fundamental disagreement; or for any other conduct that we deem to be inconsistent with the rules of professional conduct or any other law. If required, we will provide notice to or obtain permission from a court or other tribunal prior to terminating our representation.

2. **Applicable Law:** The laws of Ohio will govern the interpretation of this agreement and our attorney-client relationship.

3. **Confidentiality.** We take reasonable measures to treat as confidential all confidences and secrets of our clients, to the extent permitted by law. Under the rules of professional responsibility, a lawyer is generally permitted to reveal client confidences, among other reasons, when reasonably necessary to prevent substantial bodily harm, prevent the client from committing certain crimes or fraud, secure legal advice about the lawyer's compliance with the rules of professional responsibility, and in a controversy between the lawyer and client.

4. **Dispute Resolution.** Any dispute relating to this engagement shall be decided exclusively by a state or federal court sitting in Ohio without a jury. **Both Roose & Ressler and you consent to the jurisdiction of those courts and waive any right to a trial by a jury.**

5. **Retention of Records.** Our policy is to keep each client's legal records for a reasonable time after an engagement has ended, after which we may destroy those records according to our retention schedule. We will use reasonable efforts to give you at least 30 days notice before we destroy your records. You are responsible to notify us about any change in your name or address so that we may provide such notice. If you want to make any special arrangements, you should raise them with us at or prior to conclusion of the engagement.

6. **Attorney-Client Privilege for Internal Communications.** We believe that it is in our clients' interest that Roose & Ressler have the protection of the attorney-client privilege (which restricts disclosure of confidential communications between attorney and client in connection with internal reviews of our work for you. You agree that (a) any communication between any of our lawyers or staff and a lawyer at Roose & Ressler who may be reviewing their work for compliance with professional conduct rules will be protected by the Firm's own attorney-client privilege, and (b) any such review will not constitute a conflict between our interests and your interests.

7. **Scope of Representation.** We will be representing you, currently as the sole named plaintiff in a class action lawsuit. You understand and agree that this action will be brought on behalf of you, individually, and also as a representative of a proposed class of similarly situated claimants, against the SSA. That means that if the class is certified, you will be required to

Initialed by Stephanie Lynn Steigerwald: [redacted]

act in the best interests of the class as a whole. You recognize that even though you are acting as a class representative, you are not entitled to, and will not receive, any separate payment for acting in this capacity.

Roose & Ressler has a fiduciary obligation to prosecute this case in a manner that is fair, equitable and in the best interests of the class. To the extent permitted by applicable rules of attorney ethics, with your input, Roose & Ressler and Kelley Drye shall determine when any offer of settlement is reasonable and shall, subject to court approval, have the right to settle class claims on such terms as are deemed fair, equitable and in the best interests of the class.

Roose & Ressler agrees to represent you in the Matter at the federal district court level. If the Matter results in an unfavorable ruling from the court (including but not limited to one that does not reach the merits, *e.g.,* if the government moves to dismiss and prevails on a theory that you did not exhaust your administrative remedies), we will have sole discretion in determining whether or not to represent you in any appeal of that ruling. Thus, we reserve the absolute right to opt not to pursue any appeals, or any further action on your behalf.

8. **Costs**. To the extent permitted by applicable rules of attorney ethics, you will not be responsible for advancing any costs, nor be responsible to pay any expenses or fees in connection with the Matter, other than fees from past-due benefits.

9. **Attorneys' Fees: Twenty-Five Percent Contingency Fee Agreement.** Roose & Ressler and Kelley Drye will represent you in the Matter on a contingency fee basis. In this case, you will not directly pay Roose & Ressler and Kelley Drye for their professional legal services in their representation of you in the Matter, because our fees for representing you will be paid by SSA out of your past-due benefits, and only if you receive a favorable determination from the court and/or the SSA, by settlement or by judgment. A "favorable determination" means a judgment from the court and/or settlement by SSA that SSA is obligated to pay you past-due or back payments. Similarly, our fee for representing the class (if one is certified) will be paid by SSA out of the past-due benefits of each of those class members who receive a favorable determination from the court and/or the SSA.

In the event of a favorable determination, Roose & Ressler and Kelley Drye together intend to charge 25% (twenty-five percent) of your and the class's past-due benefits resulting from the Matter, subject to court approval. You agree to have SSA pay twenty-five percent of the past-due benefits, subject to court approval, to pay your attorney fee. Roose & Ressler and Kelley Drye will divide all fees as they may agree, given their joint responsibility and availability for consultation in representation of you and the class.

In the event the lawsuit is not successful in obtaining past-due benefits, neither you nor any member of a class, individually or collectively, will have any obligation of any nature to pay any attorney fees under this agreement.

10. **Electronic Communications.** You agree that unless you specifically advise us otherwise, we are authorized to communicate with you electronically without encryption, notwithstanding such risks as interception, unauthorized access, authorized access by

the owner if you are not the owner of the device used to communicate, viruses, and delays in transmission. We shall not be responsible for the effect on any computer system of any communication transmitted by this means, unless caused by our negligence.

11. Severability. Any provision of this agreement that is unenforceable in whole or in part shall be severed to the extent possible and necessary to make this agreement enforceable, unless that would materially change the intended effect of this agreement.

12. Entire Agreement. Our letter of engagement and these Terms and Conditions constitute the entire agreement between you and us with respect to our engagement in this matter. Any previous understanding, agreement, representation or warranty relating to our engagement is replaced by this agreement, is not being relied upon, and shall have no further effect. Any change to this agreement must be in writing and signed by you and us.

Initialed by Stephanie Lynn Steigerwald: [redacted]

EXHIBIT 2

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

STEPHANIE STEIGERWALD, *Plaintiff*, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. *Defendants*.	)	CASE NO.: 1:17-CV-1516-JG JUDGE JAMES S. GWIN MAGISTRATE JUDGE DAVID RUIZ

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFF'S FOURTH SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants hereby provide their objections and responses to Plaintiff's Fourth Set of Interrogatories.

OBJECTIONS AND RESPONSES TO DEFINITIONS AND INSTRUCTIONS

1. Defendants object to the definition of the term "Instructional Material" in Definition No. 12 to the extent its reference to "drafts" would require the disclosure of information protected by the deliberative process privilege, attorney-client privilege, or work product doctrine.

2. Defendants object to the definition of the terms "SSA," "you" and "your" in Definition No. 18 because it includes, among other things, "all . . . attorneys" acting on behalf of Defendants, which implicates the attorney-client privilege or the work product doctrine, or both.

3. Defendants object to Definition No. 19 as overbroad and irrelevant to the extent it purports to include any individual whose representatives' fees were known prior to the date of the initial windfall offset determination, rather than those, like Plaintiff, who claim that SSA did

As to the Objections:

s/ Ruchi V. Asher
Ruchi V. Asher
Assistant U.S. Attorney
Office of the U.S. Attorney, Northern District of Ohio

RESERVATION OF OBJECTIONS

The foregoing objections to Definitions and Instructions and the following specific objections are based upon (a) Defendants' interpretation of the specific requests posed by Plaintiff and (b) information available to Defendants as of the date of this document. Defendants reserve the right to supplement these objections based upon (a) information that Plaintiff purports to interpret the requests differently than Defendants and/or (b) the discovery of new information supporting additional and/or amended objections.

INTERROGATORIES

(1) What is the total dollar amount of underpayments due for: Category (1)(a)(i) beneficiaries and Category (1)(a)(ii) beneficiaries as reported in your Response to Interrogatories 1-3 to Plaintiff's First Set of Interrogatories.

RESPONSE:

Defendants object on the basis that determining the total dollar amount of underpayments due for Category (1)(a)(i) and Category (1)(a)(ii) beneficiaries is unduly burdensome and disproportionate to the needs of the case. Determining the total amount of underpayment, if any, for a single beneficiary is a complex and time-consuming process, and the burden of performing such calculations is disproportionate to any relevance of that information.

As to the Objections:

s/ Ruchi V. Asher
Ruchi V. Asher
Assistant U.S. Attorney
Office of the U.S. Attorney, Northern
District of Ohio

Subject to and without waiving the foregoing objection, the Defendants respond as follows:

In accordance with the Parties' agreement, Defendants are providing the results of recalculations of any underpayments owed for 50 randomly chosen beneficiaries identified in Category 1 of Defendants' Responses to Plaintiff's Interrogatories 1-3 of Plaintiff's First set of Interrogatories. The results will not necessarily be statistically representative of the data set requested in this interrogatory. Defendants intend to supplement with the results of recalculations of any underpayments owed for an additional 50 randomly chosen beneficiaries identified in Category 1 of Defendants' Responses to Plaintiff's Interrogatories 1-3 of Plaintiff's First set of Interrogatories by April 23, 2018.

(2) What is the total dollar amount of underpayments due for beneficiaries as to which you have agreed to report from September 1, 2012 to July 17, 2016, excluding the dollar amount provided in response to Interrogatory One above?

RESPONSE:

Defendants object on the basis that determining the total dollar amount of underpayments due for each beneficiary denied as responsive to Plaintiff's Interrogatories 1-3 of Plaintiff's First Set of Interrogatories, from September 1, 2012 to July 17, 2016, excluding the dollar amount provided in response to Interrogatory One above, is unduly burdensome and disproportionate to the needs of the case. Determining the total amount of underpayment, if any, for a single

U/P Amount
$110.50
$488.67
$2,364.00
$32.00
$0.00
$1,281.31
$735.00
$1,834.00
$0.00
$1,947.50
$2,884.02
$2,884.02
$0.00
$0.00
$535.00
$488.67
$0.00
$1,714.50
$0.00
$0.00
$3,665.00
$1,466.00
$4,725.40
$7,642.29
$0.00
$2,141.00
$0.00
$1,454.00
$977.34
$0.00
$967.00
$733.00
$1,671.00
$733.27
$961.34
$10,929.23
$473.34
$0.00
$0.00
$0.00
$661.88
$1,915.35
$0.00
$488.67
$1,149.88

$605.01
$0.00
$1,466.00
$0.00
$0.00

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

STEPHANIE STEIGERWALD, *Plaintiff*, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. *Defendants*.	)	CASE NO.: 1:17-CV-1516-JG JUDGE JAMES S. GWIN MAGISTRATE JUDGE DAVID RUIZ

DEFENDANTS' OBJECTIONS AND SECOND SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FOURTH SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants hereby provide their objections and responses to Plaintiff's Fourth Set of Interrogatories.

OBJECTIONS AND RESPONSES TO DEFINITIONS AND INSTRUCTIONS

1. Defendants object to the definition of the term "Instructional Material" in Definition No. 12 to the extent its reference to "drafts" would require the disclosure of information protected by the deliberative process privilege, attorney-client privilege, or work product doctrine.

2. Defendants object to the definition of the terms "SSA," "you" and "your" in Definition No. 18 because it includes, among other things, "all . . . attorneys" acting on behalf of Defendants, which implicates the attorney-client privilege or the work product doctrine, or both.

3. Defendants object to Definition No. 19 as overbroad and irrelevant to the extent it purports to include any individual whose representatives' fees were known prior to the date of

As to the Objections:

s/ Ruchi V. Asher

Ruchi V. Asher
Assistant U.S. Attorney
Office of the U.S. Attorney, Northern
District of Ohio

RESERVATION OF OBJECTIONS

The foregoing objections to Definitions and Instructions and the following specific objections are based upon (a) Defendants' interpretation of the specific requests posed by Plaintiff and (b) information available to Defendants as of the date of this document. Defendants reserve the right to supplement these objections based upon (a) information that Plaintiff purports to interpret the requests differently than Defendants and/or (b) the discovery of new information supporting additional and/or amended objections.

INTERROGATORIES

(1) What is the total dollar amount of underpayments due for: Category (1)(a)(i) beneficiaries and Category (1)(a)(ii) beneficiaries as reported in your Response to Interrogatories 1-3 to Plaintiff's First Set of Interrogatories.

RESPONSE:

Defendants object on the basis that determining the total dollar amount of underpayments due for Category (1)(a)(i) and Category (1)(a)(ii) beneficiaries is unduly burdensome and disproportionate to the needs of the case. Determining the total amount of underpayment, if any, for a single beneficiary is a complex and time-consuming process, and the burden of performing such calculations is disproportionate to any relevance of that information.

As to the Objections:

s/ Ruchi V. Asher
Ruchi V. Asher
Assistant U.S. Attorney
Office of the U.S. Attorney, Northern
District of Ohio

Subject to and without waiving the foregoing objection, the Defendants respond as follows:

In accordance with the Parties' agreement, on April 9, 2018, Defendants provided recalculations of any underpayments owed for 50 randomly chosen beneficiaries identified in Category 1 of Defendant's Responses to Plaintiff's Interrogatories 1-3 of Plaintiff's First Set of Interrogatories. Defendants are now supplementing their response by providing the results of recalculations of any underpayments owed for an additional 50 randomly chosen beneficiaries identified in Category 1 of Defendants' Responses to Plaintiff's Interrogatories 1-3 of Plaintiff's First Set of Interrogatories. The results will not necessarily be statistically representative of the data set requested in this interrogatory.

(2) What is the total dollar amount of underpayments due for beneficiaries as to which you have agreed to report from September 1, 2012 to July 17, 2016, excluding the dollar amount provided in response to Interrogatory One above?

RESPONSE:

Defendants object on the basis that determining the total dollar amount of underpayments due for each beneficiary denied as responsive to Plaintiff's Interrogatories 1-3 of Plaintiff's First Set of Interrogatories, from September 1, 2012 to July 17, 2016, excluding the dollar amounts

U/P Amount
$0.00
$552.50
$3,112.50
$2,427.35
$986.80
$0.00
$0.00
$1,129.00
$0.00
$954.01
$2,884.00
$3,167.50
$977.34
$3,168.00
$577.00
$0.00
$786.00
$488.67
$1,420.02
$0.00
$9,343.26
$0.00
$0.00
$2,403.35
$177.50
$599.83
$2,199.00
$2,932.02
$2,932.02
$3,390.00
$977.34
$0.00
$3,658.72
$0.00
$0.00
$939.38
$2,932.02
$0.00
$2,403.35
$1,821.00
$4,126.00
$0.00
$4,718.00

$1,148.56
$5,728.40
$2,556.28
$2,411.35
$0.00
$454.50
$0.00

EXHIBIT 3

From: Stern, Bezalel
Sent: Wednesday, January 30, 2019 3:09 PM
To: 'Brizius, Erin E. (USAOHN)'
Cc: Asher, Ruchi (USAOHN); Sandberg, Justin (CIV); Bailey, Kate (CIV); Kasdan, Ira; Wilson, Joseph D.; 'Jon Ressler'
Subject: Steigerwald v. Berryhill - Opt outs and withholding
Attachments: SSA 1694.pdf; SSA 1699.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Counsel,

As a follow-up to my below email, I am attaching copies of Forms SSA-1694 and SSA-1699 that Ira Kasdan already has on file with the Social Security Administration. These Forms should satisfy any prerequisites necessary for the Agency to withhold 25% of any Retroactive Underpayment for each claimant until the Court rules on the percentage of the benefits to which we are entitled as fees. [Please note that the Forms contain a social security number, and should be treated with confidentiality.]

It is our understanding that Form SSA-1695 does not have to be filed in cases where the attorney representative did not represent a claimant before SSA. *See* GN 03920.017, which states: "The representative is also required to submit Form SSA-1695 (Identifying Information for Possible Direct Payment of Authorized Fees) for each claimant ***that he represents before SSA***." (Emphasis added). If your understanding is different, please provide us with a citation with the basis of your understanding. If required pursuant to regulations, we will fill out Forms SSA-1695 for all of the Class Members, and will send the completed Forms to you. Of course, since we do not have social security numbers for the individual Class Members, you will need to fill out that section of the Forms.

Please let us know immediately if the Agency will need anything else in order for Class Counsel to be paid directly from the Agency out of the Retroactive Underpayments that will be due. If you have any questions or comments or if you want to discuss anything, let us know.

Bez

BEZALEL STERN
Senior Associate
Kelley Drye & Warren LLP
Office: (202) 342-8422
Cell: (301) 922-5039
bstern@kelleydrye.com

From: Stern, Bezalel
Sent: Monday, January 28, 2019 9:50 AM
To: 'Brizius, Erin E. (USAOHN)'
Cc: Asher, Ruchi (USAOHN) ; Sandberg, Justin (CIV) ; Bailey, Kate (CIV) ; Kasdan, Ira ; Wilson, Joseph D. ; 'Jon Ressler'
Subject: CONFIDENTIAL LITIGATION INFORMATION: Steigerwald v. Berryhill - Opt outs and withholding

Erin,

Congratulations on the end of the shutdown! I have attached to this email a complete list of opt outs for the Agency's use in performing the Subtraction Recalculation. The password to access the document will come in the next email.

We expect that, following performance of the Subtraction Recalculation over the next 90 days, the Agency will withhold 25% of any Retroactive Underpayments due pending the Court's ruling on the amount of fees appropriate. If the Agency does not intend to do so let us know as soon as possible so we may inform the Court.

Sincerely,

Bez

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

STEPHANIE LYNN STEIGERWALD on behalf of herself and the class,	)	
Plaintiffs,	)	**CASE NO.: 1:17-CV-1516**
v.	)	**JUDGE JAMES S. GWIN**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	**[PROPOSED] ORDER ON MOTION FOR ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 406(b)**
Defendants.	)	

Having reviewed Plaintiffs' Motion for Attorneys' Fees Pursuant to 42 U.S.C. § 406(b), any Opposition thereto, any comments or objections received from Class Members, and other relevant portions of the record, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Motion is **GRANTED**.

Class Counsel is hereby awarded attorneys' fees pursuant 42 U.S.C. § 406(b) in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid to each Class Member as a result of this case (including but not limited to heirs, and all others receiving benefits as a result of this case).

Defendants are **ORDERED** to withhold from payment to Class Members the percentage of past-due benefits awarded to Class Counsel, and to remit such percentage directly to Class Counsel within the ninety (90) days of performance of the Subtraction Recalculation for each Class Member.

IT IS SO ORDERED.

Dated: _____, 2019

_____
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE