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

STEPHANIE LYNN STEIGERWALD, *Plaintiff*, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, *et al.* *Defendants.*	)	CASE NO.: 1:17-CV-1516 JUDGE JAMES S. GWIN **SUPPLEMENTAL RESPONSE TO CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 406(b)**

INTRODUCTION

In their written submissions and at this Court's April 4, 2019 hearing, class counsel vigorously opposed the routine requirement of providing contemporaneous billing records in support of their attorneys' fee request. And now we know why: Those records are so replete with errors, poor billing judgment, and improper attempts at fee recovery that they do not support an award of even $1 million in fees, much less the tens of millions that class counsel request. Among other things, class counsel seek recovery for roughly 1,300 hours of work before this lawsuit even was filed; have submitted records apparently reflecting time for work on other cases; have spent excessive time on routine legal matters; and have even attempted to recover for significant time spent on internal firm deliberations over whether to take this case and how to divvy-up any attorneys' fee award amongst the lawyers. No class members should have to pay an attorneys' fee award out of their benefits pursuant to § 406(b) (as opposed to an award through the Equal Access to Justice Act, which would not reduce those benefits); they certainly should not be liable for plainly improper billing practices charged at inflated, out-of-district billing rates. Because a lodestar analysis must guide the review of class counsel's fee request, this Court should exclude all improperly claimed hours and only award fees based on a reasonable hypothetical hourly rate.[1]

ARGUMENT

I. CALCULATION OF A HYPOTHETICAL HOURLY RATE MUST GUIDE THE COURT'S ANALYSIS

In their request for attorneys' fees, class counsel argued that, "[i]n *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002), the Supreme Court abolished the use of the 'lodestar method' in 406(b) cases."

[1] Counsel marked their records as "CONFIDENTIAL PURSUANT TO COURT ORDER," and the docket entry is automatically non-public because this is a social security case. Counsel also have not posted the records on the class-action website, and are unlikely to post this supplemental opposition either. But the protective order entered in this matter, *see* ECF No. 23, does not by its terms cover class counsel's billing records, and since counsel insist that class members should pay their fees, class members should be able to review the records themselves. The government asks the Court to require class counsel to post their billing records and this supplemental memo, to allow for class-member participation in any supplemental hearing the Court may hold.

See ECF No. 90-1, Mot. for Att.'s Fees, at 6. Similarly, at the April 4th hearing on that motion, class counsel spent considerable time arguing (1) that their contingency agreement with the named Plaintiff somehow binds absent class members, and (2) that, under *Gisbrecht*, this Court can award a reasonable fee without even referencing a hypothetical hourly rate. *See, e.g.*, Fees Hr'g at 4:12-7:1; 10:5-13:4, 16:7-25. Counsel is wrong on both counts.

First, there is no contingency fee agreement between class counsel and absent class members, which means *Gisbrecht*—which expressly addressed fee agreements—can have no relevance here. That fact alone ends any discussion about the applicability of *Gisbrecht*.

Second, even if class counsel had a fee agreement with absent class members in place, *Gisbrecht* in no way "abolished" calculation of a hypothetical hourly rate in order to gauge reasonableness. To the contrary, in holding that the lodestar is not the *primary* method of determining fees where a contingency fee agreement is present, *Gisbrecht* explicitly acknowledged that "the court may require the claimant's attorney to submit … a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases." 535 U.S. at 808. That is particularly true where, as here, "the benefits are large in comparison to the *amount of time counsel spent* on the case," thus necessitating "a downward adjustment." *Id.* (emphasis added).

Sixth Circuit precedent confirms the relevance of a hypothetical hourly rate when evaluating the reasonableness of fees under § 406(b). In *Hayes v. Secretary of Health & Human Services,* the court explained that "a windfall can never occur when, in a case where a contingent fee contract exists, the hypothetical hourly rate … is less than twice the standard rate for such work in the relevant market," and that a fee greater than twice the standard rate may be reasonable in a given case. 923 F.2d 418, 422 (6th Cir. 1990) (emphasis added). The court did not, as class counsel inaccurately insisted at the fees hearing, state that a 25% fee is presumed reasonable where, as here, no contingent agreement exists with absent class members. Nor did the court endorse the awarding of a fee that is wholly

untethered from calculation of a hypothetical hourly rate appropriate for the judicial district. And the Sixth Circuit more recently has expressly affirmed the central role of the *Hayes* test in analyzing whether a requested Section 406(b) fee would constitute a windfall. *See Lasley v. Comm'r*, 771 F.3d 308, 309-10 (6th Cir. 2014) (explaining that the *Gisbrecht* court "approved of reducing fees to avoid windfalls and expressly authorized district courts to consider the attorneys' hours and standard rates in reviewing the reasonableness of contingency fees"). Thus, this court must evaluate class counsel's billing records in order to determine whether any fee award is reasonable.[2]

Remarkably, those records indicate that class counsel would like to bill class members for their time spent researching this very issue *after* the April 4th hearing. This Court made clear at the hearing that class counsel are "wrong in the sense that the Lodestar is not a consideration in this." *See* Tr. of Mot. Hr'g at 37:18-19, 38:3-5. Notwithstanding that admonition, class counsel now seek to recover for time spent "[redacted]." *See* Billing Records of Kelley, Drye & Warren LLP ("KDW Records") at 108-09, ECF No. 111-1. Whatever else can be said about class counsel's arguments regarding the lodestar, their legal research on this issue is certainly not recoverable: That research was not conducted to benefit class members on the merits of their legal claims, but instead was undertaken to maximize the attorneys' fees that class counsel could take from the pockets of the individuals they represent.

II. THE BILLING RECORDS SUBMITTED BY CLASS COUNSEL DO NOT SUPPORT THEIR FEE REQUEST

Class counsel submitted separate billing records for the two firms: Roose & Ressler and Kelley, Drye & Warren. The Roose & Ressler records (hereinafter "RR Records") are replete with inappropriate billing entries that are not compensable whatsoever; the hours reflected in those records should be excluded entirely. And while the KDW Records reflect some compensable hours, they

[2] Counsel's interpretation of *Gisbrecht*, as well as the district court case on which counsel relies, *Sykes v. Comm'r*, 144 F. Supp. 3d 919 (E.D. Mich. 2015), were rejected as inconsistent with controlling precedent in a thorough, persuasive opinion in this circuit. *See generally Ringel v. Comm'r*, 295 F. Supp. 3d 816 (S.D. Ohio 2018).

nonetheless include numerous categories of non-recoverable time.

A. The Roose & Ressler Hours Must Be Excluded in Their Entirety

The R&R Records contain no properly recoverable time performed by that firm in this litigation. Accordingly, those records should be excluded entirely from any fee award.

First, and most notably, the RR Records attempt to bill for a stunning 1,200 hours of work performed over several years before this suit even was filed.[3] As a threshold matter, § 406(b) only applies to work performed "before the court"; it cannot provide compensation for "investigat[ion] and research[], over a period of *years*, SSA's past performance." *See* Decl. of Ira T. Kasdan ("Kasdan Decl.") at ¶ 5, ECF. No. 90-2. And decisions within this circuit make clear that pre-filing work is categorically noncompensable under § 406(b). *See, e.g.*, *Short v. Comm'r*, 1:12cv574, 2015 WL 4465189 at *7 n.5 (S.D. Ohio July 21, 2015) (excluding from compensable hours pre-complaint time reviewing claimant's record because "[n]either work performed prior to the date that the complaint was filed in this Court nor work at the administrative level is compensable under § 406(b)"); *McCastle v. Comm'r*, No. 1:16-cv-680, 2018 WL 6605529 (W.D. Mich. December 17, 2018) (denying request to include as compensable hours 36.75 hours billed before filing complaint, and awarding fees based "only [on the] 4.25 hours [] spent representing plaintiff in this Court"); *Tibbetts v. Comm'r*, No. 1:12cv894, 2015 WL 1637414 at *4 n.3 (S.D. Ohio April 13, 2015) ("Although only fees for time spent in federal court may be included in any award made pursuant to 42 U.S.C. § 406(b), the undersigned finds the .75 hours spent in pre-filing review to be so de minimis that no subtraction of the claimed hours is required"). In their supplemental fees memorandum, class counsel now claim that "attorney work performed prior to the filing of a lawsuit counts." *See* ECF No. 115 at 6. But as "support" for this contention counsel offer only three fee-shifting cases where fees were claimed *from the opposing party*, not § 406(b)

[3] At the April 4th fee hearing, the Court questioned class counsel extensively about "how could you spend 1,100 hours on a case before it's filed?" *See* Fees Hr'g at 33:14-37:19.

cases where fees came from the attorneys' *own clients*. Class counsel yet again fail to recognize that "[s]ection 406(b) is of another genre: It authorizes fees payable from the successful party's recovery," *Gisbrecht*, 535 U.S. at 802, and for that reason it does not operate like fee-shifting statutes. It is telling that counsel cannot cite a single case where pre-complaint fees were authorized under § 406(b).

And even putting aside that pre-filing hours are not compensable whatsoever under § 406(b), 1,200 hours is patently excessive: It is the equivalent of 30 forty-hour work weeks. The equivalent of more than a half a year's work (which was actually spread over several years) "investigating" this suit, *see* Kasdan Decl., ¶¶ 3, 5, is simply out-of-bounds under any analysis of attorneys' fees.

Second, Mr. Roose's records include many tasks that appear entirely unrelated to this litigation, some of which directly relate to *Greenberg*, the earlier class action brought by KDW. For example:

- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]."

Clearly, class members should not be expected to compensate class counsel for work Mr. Roose performed for other claimants, years before this litigation commenced.

Third, and contrary to Mr. Kasdan's representation at the hearing that "[i]t's not a question of Mr. Roose, as I understand it … of looking for one [plaintiff]," Hr'g Tr. 35:6-7, Mr. Roose's records reflect extensive time—close to 200 hours—performing that very task. For example:

- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]."

Also at odds with Mr. Kasdan's statement that they "chose one plaintiff lead counsel [sic] because

that's the way we wanted to conduct this case," Hr'g Tr. 35:12-13, Mr. Roose's records show that the search for plaintiffs continued even after the suit was filed:

- "[redacted]" (capitalization original)
- "[redacted]
- "[redacted]."

Mr. Roose's years-long endeavor to find plaintiffs simply is not compensable.

Fourth, Mr. Roose's hours should be rejected because they unreasonably purport to bill for at least 150 hours of general research on routine civil-litigation or social-security law issues (despite decades of experience in the area). Among these examples are:

- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"
- "[redacted]"

This general-knowledge research is not billable to the class—and Mr. Roose's records do not substantiate that this early work was tied to *Steigerwald* at all, given that, in the same time period, they reflect discussions with KDW "[redacted]."

Fifth, Mr. Roose's records frequently reflect amounts of time grossly disproportionate to the task performed. As just a few examples, Mr. Roose billed 5.25 hours to [redacted]; 3.75 hours the [redacted]; 7.5 hours [redacted]; 6.25 hours to [redacted]; 5 hours to [redacted]; 5 hours [redacted] in which Mr. Roose did not participate and [redacted]; 5.5 hours [redacted]; and 5.25 hours [redacted]

[redacted]. Further examples abound; indeed, Mr. Roose purports to bill roughly *45 hours for* [redacted].

Sixth, Mr. Roose bills a full 77 hours advocating not for class members, but instead for convincing KDW to bring this suit, including obtaining approval from that firm's contingency committee (and associated travel time), as well as negotiating the split of attorneys' fees between the firms. He also bills an additional 29.5 hours during the first two weeks [redacted]. These internal administrative matters are not billable to the class, and even if they were, the amounts claimed are facially unreasonable.

Seventh, inconsistencies between the firms' records warrant skepticism. At the April 4th hearing, Mr. Kasdan represented that KDW "were the primary drafters" of the complaint, Hr'g Tr. 34:22, and the KDW billing records reflect more than 50 hours' work to do so beginning in March of 2017. But Mr. Roose's records nonetheless bill for time "[redacted]" back in October 2014—nearly three years before the suit was filed—and include a full 63 hours of time spent on the complaint through the date of filing, in addition to the hours billed by KDW. KDW's hours also reflect that work with Mr. Roose "[redacted]" began in February 2017. But Mr. Roose's records attempt to bill class members for numerous communications with KDW (and Mr. Kasdan specifically) beginning in mid-2014—at the same time his records reference [redacted]. *See* RR Hours, 9/5/2014. This includes 20 hours over two days to travel and meet with KDW on March 26-27, 2015.

Eighth, Mr. Roose's records frequently fail to provide sufficient detail to allow this Court to [redacted]" on March 7, 2017 (emphasis added) and 7.5 hours over two consecutive days to "[redacted]" Steigerwald as "[redacted]," ending on February 1, 2017. It is unclear what any of these entries even mean; they certainly fail to comport with the principle that "supporting documentation must be

of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended." *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) (internal quotation marks omitted). "[G]eneric" time records – *e.g.*, "'[r]eview[ing] case materials,' and '[r]eview of key strategy issues . . .' 'are inadequate to meet a fee applicant's heavy obligation to present well-documented claims.'" *New Jersey v. EPA*, 703 F.3d 110, 114 (D.C. Cir. 2012).

Additionally, this Court can take judicial notice of the fact that at least two courts within this district have chastised Mr. Roose for inappropriate billing practices. *See Jones v. Comm'r*, No. 1:10 CV 2568 (N.D. Ohio Sept. 11, 2012), ECF No. 30 at 8 (calling Mr. Roose's "conduct [] indefensible" in claiming a high number of hours for duplicative work performed in other matters), *citing English v. Comm'r*, No. 1:11 CV 2794, at *7-8 (N.D. Ohio) (cataloguing "a staggering number of hours devoted solely to the issue of counsel's hourly rate" with duplicative billing for that same work in eleven separate cases). Indeed, in response to this Court's questions at the fees hearing about Mr. Roose's pre-complaint hours, Mr. Kasdan declined to defend the records: "I can't defend Mr. Roose, other than say that he had recorded these hours." *See* Fee Hr'g at 34:9-10. The implication that, because Mr. Roose has unfortunately passed away, his hours should be accepted at face value is of no moment: To recover attorneys' fees, Mr. Roose was required to maintain accurate records reflecting work that he performed on this case. His firm did not do so. Instead, his firm has submitted records for uncompensable time generally; for work performed on other cases; or for work that was grossly disproportionate to the task at hand. The records submitted simply do not support a recovery of a fee award on behalf of the time purportedly expended by Mr. Roose at all, and the fact that those hours make up more than *one third* of class counsel's total claimed work on this case makes it especially important that this Court, at minimum, review those records with a careful eye.

Moreover, it is not only Mr. Roose's hours that must be excluded. Mr. Ressler, his partner, bills for 44 hours beginning in early 2018. But those hours reflect unnecessary duplication and

oversight of work performed by KDW, not actual work performed on behalf of the class. Mr. Ressler has never actively participated in a hearing before this Court, or a conference with the assigned magistrate, or the mediation session completed last summer, or on any phone conference with government counsel—yet he bills 4.5 hours for [redacted]; 3 hours for [redacted]; 10 hours to [redacted]; 5 hours for t[redacted], and so forth. That duplicative billing is inappropriate. *See, e.g.*, *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004) ("[C]ourts ought to examine with skepticism claims that several lawyers were needed to perform a task, and should deny compensation for such needless duplication as when three lawyers appear for a hearing when one would do."); *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) ("[w]e remand with instructions that the district court (1) make a finding concerning the number of hours that 'are documented inadequately and reflect duplicative efforts and excessive staffing,' (2) make a finding as to which lawyers billed those hours, and (3) deduct those hours from its calculation of the hours that Plaintiffs' counsel 'reasonably expended' on this action"). Mr. Ressler's other hours reflect non-substantive and non-billable tasks such as [redacted].

Finally, the 98 hours billed for paralegal Ms. Shriver must be excluded in their entirety. Although Ms. Shriver is *not* an attorney, her hours reflect items such as a full hour on July 19, 2017 for "[redacted]." Indeed, Ms. Shriver bills for "[redacted]" of *every docket entry entered in this action*, including the many non-substantive entries, such as "[redacted]" on July 19, 2017 and [redacted] on September 13, 2017. Aside from docket entries, class counsel copy Ms. Shriver on *every* email with government counsel (and, it appears, many or all internal emails), and she bills time to read each and every one of these emails. "Purely clerical or secretarial tasks, [that is, non-legal work,] should not be billed—[even] at a paralegal rate—regardless of who performs the work." *Missouri v. Jenkins by Agyei*, 491 U.S. 274,

288 n. 10 (1989). And Roose & Ressler surely is on notice that the items billed by Ms. Shriver are non-compensable, given that judges within this district have explicitly rejected the firm's attempts to include Ms. Shriver's reading of emails and ECF notices in other cases. *See, e.g.*, *De Nunez v. Comm'r*, 2013 WL 60429, at *3 (N.D. Ohio Jan. 3, 2013) (excluding "Shriver's activities … for review[ing] Court emails"); *accord Teeter v. Comm'r*, 2013 WL 5279102, at *5-7 (N.D. Ohio Sept. 18, 2013). The only potentially compensable entry on Ms. Shriver's records is for [redacted], but even that entry claims an unreasonable 1.5 hours to do so.

For the reasons stated above, the more than 1,300 hours claimed by Roose & Ressler are not billable to the class and must be excluded from this Court's hourly rate calculation because *none* of those hours reflect reasonable and substantive work performed before the Court.

B. The KDW Records Are Inflated and Duplicative

Unlike the RR Records, the timesheets submitted by KDW reflect substantive, compensable work performed before this Court. But those records still contain several categories of non-compensable hours, a lack of billing judgment, and unreasonably duplicative work, all of which should be excluded by the Court.

First, as discussed extensively above, case law makes clear that § 406(b) does not permit the recovery of pre-complaint work. The 186 hours of time billed by KDW (reflecting roughly 8% of the total time expended on the case) before this suit even was filed must therefore be excluded.

Aside from the impropriety of including any pre-suit hours, the KDW Records include significant time for non-compensable, internal administrative matters. For example, between April 14 and June 27, 2017, KDW attorneys billed 68.8 hours for [redacted]. None of these hours are chargeable to the class.

The KDW Records also fail to demonstrate billing judgment by including substantial

duplication. As discussed above with regard to the RR Records, it is not reasonable to bill class members for multiple attorneys to travel significant distances to attend hearings and other events at which only one attorney participates. *Democratic Party of Wash. State*, 388 F.3d at 1286. Excessive hours should be excluded where, for example, KDW bills 51 hours for three attorneys to travel and attend the Court's January 3, 2018 status conference and where 46.6 hours are billed for three attorneys to travel and attend the July 16, 2018 mediation with Magistrate Judge Ruiz.

Similarly, a fundamental lack of billing judgment is evidenced by the fact that KDW repeatedly bills substantial quantities of partner time for routine or administrative tasks such as eight hours to [redacted]; eight hours for senior counsel to [redacted] numerous hours spent [redacted] (*e.g.*, 2/28/18, 3/5/2018, 2/13/2019); thirteen hours for Mr. Kasdan to work on the [redacted](10/26-11/2/2018); and more than seven hours for two attorneys to [redacted].[4]

The KDW Records also include at least 284 hours devoted to class counsel's quest to maximize attorneys' fees. This represents more than 12% of counsel's total time on the litigation; such a disproportionate amount of time is not reasonable, *especially* after class counsel admitted in their motion for attorneys' fees that the government's attempts to settle the case last year were forestalled by counsel's insistence regarding attorneys' fees. *See* Kasdan Decl. ¶¶ 13-17. This Court should limit counsel's ability to profit from their attempt to increase their own fees.

Moreover, a reduction is appropriate due to KDW's frequent use of block billing, often for large amounts of time on entirely unrelated tasks. For example:

[4] This list, as with others in this brief, is not exhaustive. KDW did not submit their billing records in a text-searchable format, making it virtually impossible to categorize and sort all of the firm's hours. In order to perform a straightforward windfall analysis and award a reasonable fee, the government respectfully contends that the Court should remove from its calculation all similar instances of unreasonable billing, especially where attorneys perform clerical tasks. This task would be aided by submission of text-searchable records.

- 10.5 hours were billed on November 19, 2018 for "[redacted]"
- 9.4 hours were billed on June 5, 2018 for "[redacted]"
- 7.2 hours were billed on February 15, 2018 for "[redacted]."

Although block billing is not *per se* unreasonable, KDW's aggregated billing entries lump together so many unrelated tasks as to render a reasonableness determination impossible. The Court should therefore reduce all of the firm's hours by an appropriate margin. *See Gratz v. Bollinger*, 353 F. Supp.2d 929, 939 (E.D. Mich. 2005) (reducing claimed hours on basis that "block billing" made court unable to determine the number of hours expended on each discrete task [and] … cannot determine whether the number of hours billed are reasonable").

Finally, the KDW Records bill facially unreasonable amounts of time for various aspects of this litigation. The firm spent 129 hours opposing the government's motion to dismiss; 196 hours briefing class certification; 128 hours on class notice; and 180 hours on their motion for summary judgment. *See* Kasdan Decl., ¶¶ 12, 16, 18-20. These hours also should be reduced.

III. THE COURT MUST USE PREVAILING RATES WITHIN THIS JUDICIAL DISTRICT

Class counsel's argument that this Court can look to KDW's billing rate for private clients in the District of Columbia to assess the reasonableness of the requested fee here is wrong. Class counsel argued in their reply in support of their request for fees, *see* ECF No. 97 at 7 n.6, that *Hayes*, 923 F.2d at 422, permits courts to use non-local rates in performing a windfall analysis. This contention fundamentally misconstrues the case law. The Sixth Circuit did not endorse the use of inflated, out-

of-district rates, but simply held that an attorneys' hypothetical hourly rate should not be *capped* at the prevailing regional rate due to the risk undertaken in social security representation. *See id.* (explaining that a multiplier of 2 is an appropriate floor to compensate attorneys adequately over time). Contrary to counsel's reading, the *Hayes* court expressly instructed courts to assess whether, "in a case where a contingent fee contract exists, the hypothetical hourly rate … is less than twice *the standard rate for such work in the relevant market*" (emphasis added). In no way did the court endorse looking to rates for wholly different types of representation in a different legal market. And as discussed above, the Sixth Circuit re-affirmed the continuing central role of the *Hayes* test in *Lasley*, 771 F.3d at 308. There is no basis for this Court to use an out-of-market rate in assessing the reasonableness of class counsel's fee.[5]

Substantial authority supports a maximum hypothetical hourly rate at or near $350 per hour for awards under § 406(b). Indeed, the most recent decision available from this Court used precisely that rate. *See Daniels v. Colvin*, 2017 WL 35697, 1:11-cv-806, at *1 (N.D. Ohio Jan. 4, 2017) (Gwin, James S.) (rejecting counsel's request for $797 per hour as impermissible windfall, recounting standard Ohio billing rate for social security work as $250, and awarding rate of $350 per hour). Other recent decisions within this district have reached similar conclusions. *See, e.g.*, *Hayhurst v. Berryhill*, 2018 WL 1122135, No. 5:16-cv-576, at *2 (N.D. Ohio March 1, 2018) ("Courts in the Northern District of Ohio have determined that an hourly rate of $350.00 is an appropriate upper limit in awarding attorney fees pursuant to § 406(b)."); *Pierce v. Berryhill*, 2018 WL 5016604, No. 16-CV-12, at *1 (N.D. Ohio Oct. 16, 2018) (citing "appropriate upper limit" of $350, and reducing requested rate to $400 hourly); *Hayes v. Colvin*, 2015 WL 4275506, No. 1:13CV2812, at *3 (N.D. Ohio July 14, 2015) (collecting cases where courts in Northern District have determined "an hourly rate of up to $350 is an appropriate upper limit"). Class counsel chose to bring this suit in the Northern District of Ohio—a venue where

[5] In their supplemental response class counsel claim the Sixth Circuit has endorsed reference to national markets. *See* ECF No. 115, at 8. Counsel once again rely on cases applying general fee-shifting principles, which have no applicability when applying § 406(b).

competent class-action attorneys regularly practice—and cannot now complain that prevailing market rates here differ from what is available in Washington, DC. This Court should therefore analyze the reasonableness of any fee awarded using rates payable under § 406(b) within this district.

IV. ANY REASONABLE FEE WOULD CONSTITUTE SUCH A MINISCULE PERCENTAGE OF CLASS MEMBER'S BENEFITS THAT THIS COURT SHOULD INSTEAD AWARD A REASONABLE FEE UNDER EAJA

Any fee that could be found reasonable under controlling Sixth Circuit precedent, taking counsel's actual expenditure of hours into account, would be so small relative to class member's total unpaid benefits that the Court could, as a prudential matter, award a reasonable fee under EAJA instead of § 406(b). Such a ruling would preserve class members' benefits, compensate counsel adequately for their actual representation and the risk incurred in bringing suit, and substantially lessen the administrative difficulty for the agency to complete the necessary recalculations.

As demonstrated above, *none* of the hours submitted by Roose & Ressler reflect compensable work performed "before the court."[6] And the KDW Records contain significant categories of both categorically non-compensable items and compensable items for which excessive and duplicative hours have been claimed. Once these items are removed from the 2,360 hours claimed by KDW, the actual number of compensable hours should be significantly below 2,000 hours. It is striking that, even accepting KDW's District of Columbia rates (which do not apply here) and even including all of the firm's improperly billed hours, the records still show a total billing amount of less than $1.5 million—an amount dwarfed by the tens of millions of dollars counsel continue to seek.

As of the date of filing, 618 recalculations have been completed. Of those, the underpayments paid averaged $755.[7] Assuming that no individuals in Category 2 are owed underpayments (which may

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[6] That does not necessarily mean that Roose & Ressler will not receive any compensation for time spent investigating the case before it came to fruition. That firm may receive a referral or other agreed-upon fee for bringing the case to KDW. Although government counsel is not privy to the details of any side agreements between the firms, such agreements presumably exist given the large number of hours billed by the firms to negotiate the terms of their retainer agreements.

[7] *See* ECF No. 114, Def.'s Status Report. This average underpayment is smaller than the amount found in the

not be the case), the 100,404 members of Category 1 can be estimated to receive $75,709,165. Counsel's request to receive 20% of those benefits would likely exceed $15 million—representing a hypothetical hourly rate above $7,570 per hour, even using a total of 2,000 hours (which, to be clear, is substantially higher than this Court should credit). Even reducing counsel's award down to just 2% of the total estimated benefits would yield an attorneys' fee of roughly $1.5 million—and a hypothetical hourly rate of $757 (again, using the inflated 2,000 hours). For comparison, using the "appropriate upper limit" in this district of $350, counsel's award should be capped below $700,000.

Although hourly rates in the $600-700 range have been held reasonable in certain circumstances (typically where the representation spans far longer than the 22 months here), that rate would represent the top of any conceivable reasonable fee. It simply makes no sense for class members to disgorge a portion of benefits, and for the agency to face the administrative hurdle[8] of withholding benefits and paying class counsel from each individual award, when counsel cannot possibly substantiate the receipt of an award above 2% of class members' benefits. The government recognizes that this Court already has held that § 406(b) applies in this case, but at that stage the Court did not have the benefit of comparing counsel's low hourly expenditure with the high amount due class members. Due to these factors, the Court could as a prudential matter award reasonable fees under EAJA instead of Section 406(b), thus maximizing the preservation of class members' benefits.

CONCLUSION

For the foregoing reasons, this Court should exclude from its calculation hours not reasonably expended on this litigation, perform a windfall analysis using an appropriate hypothetical hourly rate, and award only reasonable fees to class counsel under EAJA.

100-person sample that the agency completed at class counsel's request last summer. *See* ECF No. 95, at 11. Neither the sample nor the 618 completed to-date provide a statistically significant sample from nearly 130,000 class members. The uncertainty regarding the total amount of underpayments, and the consequent uncertainty regarding the potential recovery by counsel, provide an additional reason for the Court to consider awarding a sum certain under EAJA.

[8] *See* ECF No. 99-1, Walker Reply Decl., at ¶ 21.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned declares under penalty of perjury that this *Supplemental Opposition on Fees* is 15 pages in length and is within the page limitation for standard track cases.

s/ Kate Bailey
Kate Bailey
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2019, the ***Supplemental Opposition on Fees*** 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/ Kate Bailey
Kate Bailey
Trial Attorney