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

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

Defendant, Nancy A. Berryhill, Acting Commissioner of Social Security, hereby responds to Class Counsel's request for twenty percent of the additional past-due benefits of 129,695 class members who are receiving those benefits under Title II and Tile XVI of the Social Security Act. Class Counsel cannot even reduce to writing the amount they seek. By Class Counsel's own math, such an award would likely amount to nearly *30 million dollars* from the class members they have represented over approximately 18 months. Even taking as a given Class Counsel's unsupported assessment that they spent over 3,100 hours on this case, the fee award sought would likely translate to a rate of over $9,000 an hour. Moreover, Class Counsel have not provided the Court with sufficient documentation to assess the reasonableness of any fee award, let alone to support their request, which, under any standard, would result in an impermissible windfall at the expense of the class members.

LEGAL STANDARD

Unlike applications under the Equal Access to Justice Act, the Commissioner "has no direct financial stake in the answer to the § 406(b) question; instead, she plays a part in the fee determination resembling that of a trustee for the claimants." *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002). In that role, the Commissioner files responses to attorney requests under Section 406(b), advising the Court of the applicable law regarding Class Counsel's request.

Under Section 406(b), an attorney who successfully represents a Social Security claimant may seek a "reasonable fee" for such representation, not in excess of twenty-five percent of the total of the past-due benefits to which the claimant is entitled. 42 U.S.C. § 406(b)(1)(A). The court must determine the reasonableness of the award but cannot exceed the twenty-five percent cap. *See Rodriquez v. Bowen*, 865 F.2d 739, 746 (6th Cir. 1989). "Within the 25 percent boundary . . . the attorney for the successful claimant must show that the fee sought is reasonable

for the services rendered." *Gisbrecht*, 535 U.S. at 807. The Court must always serve as "an independent check" that a fee request should "yield reasonable results in particular cases." *Id.*

The Court first "look[s] to whether a fee agreement has been executed by the claimant and the claimant's attorney." *Rodriquez*, 865 F.2d at 746. While "§ 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court," "the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered." *Gisbrecht*, 535 U.S. at 807.

If a contingent-fee agreement exists, "[c]ourts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have appropriately reduced the attorney's recovery based on the character of the representation and the results the representative achieved." *Gisbrecht*, 535 U.S. at 808. Furthermore, "[i]f the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order" to "disallow 'windfalls for lawyers," and the court may consider " a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases." *Id.* The Sixth Circuit has similarly indicated that reductions are appropriate: (1) for improper conduct or ineffectiveness of counsel; and (2) where counsel would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended. *Rodriquez*, 865 F.2d at 746. In *Hayes v. Sec'y of Health & Human Servs.*, decided pre-*Gisbrecht*, the Sixth Circuit stated:

> under *Rodriquez*, 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. We believe that a multiplier of 2 is appropriate as a floor in light of indications that social security attorneys

> are successful in approximately 50% of the cases they file in the courts. Without a multiplier, a strict hourly rate limitation would insure that social security attorneys would not, averaged over many cases, be compensated adequately. . . . Such a result would thwart Congress's intention to assure social security claimants of good representation. . . .

923 F.2d 418, 422 (6th Cir. 1990), *as clarified on reh'g* (Jan. 23, 1991). If the fee requested is more than twice the standard hourly rate, however,

> then the court may consider arguments designed to rebut the presumed reasonableness of the attorney's fee. Such arguments may include, *without limitation*, a consideration of what proportion of the hours worked constituted attorney time as opposed to clerical or paralegal time and the degree of difficulty of the case.

Id. (emphasis added). "Whether an amount above a multiplier of 2 represents a windfall is also a matter for the district court's discretion." *Id.* at 423, n. 6.

In the absence of a contingent-fee agreement, courts do not "test[] [the agreement] for reasonableness," *Gisbrecht*, 535 U.S. at 808, but rather independently consider the amount of the "reasonable fees." In doing so, courts look to the lodestar. *Bentley v. Comm'r of Soc. Sec.*, 524 F. Supp. 2d 921, 925 (W.D. Mich. 2007) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

ARGUMENT

1. Class Counsel Do Not Have A Contingent-Fee Agreement with the Absent Class Members And Have Not Complied With Rule 23(h)'s Basic Notice Requirements.

Class Counsel argue, without any legal support, that by entering into a contingent-fee agreement with the lead Plaintiff, Stephanie Steigerwald, they are entitled to a presumption that a twenty-five percent fee is reasonable as to the entire class of 129,695 individuals. (ECF No. 90-1, PageID # 1086.) The Supreme Court in *Gisbrecht* never endorsed an atextual "presumption" of reasonableness whenever a fee agreement exists—even though that approach was raised, *see* 535 U.S. at 792—but rather reiterated that Section 406(b)'s text permitting "reasonable" fees requires "*the attorney* [to] show that the fee sought is reasonable" and the court to "review . . .such

arrangements as an independent check, to assure that they yield reasonable results in particular cases." *Gisbrecht*, 535 U.S. at 807. In any event, the argument that a class-wide contingent-fee agreement exists is unsupportable and should be rejected.

Class Counsel do not have a contingent-fee agreement with any class member other than Ms. Steigerwald. [1] Contingent fee agreements are contracts between an individual and his or her attorney, s*ee In re Sulzer Hip Prosthesis & Knee Prosthesis Liability Litig.*, 290 F. Supp. 2d 840, 848 (N.D. Ohio 2003), and are given deference under Section 406(b) precisely because they represent "an arm's length agreement" between the parties, *Rodriquez*, 865 F.2d at 746. The absent class members have no such arm's length agreement with Class Counsel. Rather, Class Counsel's fee agreements with Ms. Steigerwald inform *Ms. Steigerwald* that Class Counsel "intend to charge 25% (twenty five percent) of your and the class's past due benefits" if any. (ECF No. 90-3, PageID # 1109-1121.)

Nor could the Class Notice and right to opt-out create such an agreement. Indeed, class members have never been even advised they are somehow legally bound to a presumption of a twenty-five percent fee award, and their silence on such a matter, if they were so informed, would not evidence consent. The Class Notice states: "You do not have to pay Class Counsel now to participate as a Class member. Instead if the Class obtains past-due money from SSA, Class Counsel *intend to ask* the Court for an order to deduct attorneys' fees from Class members' past-due money benefits of not more than 25% of each individual award to a Class member." (ECF No. 80-1, PageID # 1025 (emphasis added).) The Notice communicates only the possibility that Class Counsel may seek attorney's fees, but neither seeks class members' agreement to a fee motion nor forms the basis for an implied contract. The Notice instead simply sets forth the legal

[1] A fact they concede in their Motion for Summary Judgment. (ECF No. 50, PageID # 658.)

requirements of Section 406(b), which are applicable with or without a contingent fee agreement.

This highlights a more fundamental problem. Rule 23(h) provides that "[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner" so that "[a] class member, or a party from whom payment is sought, may object to the motion" with the right to a hearing. Fed. R. Civ. P. 23(h)(1)-(2). Such notice is required here, where "the real parties in interest are [the class members'] attorneys, who seek to obtain higher fee awards under § 406(b)" and thereby seek to reduce the benefits of the class members. *Gisbrecht*, 535 U.S. at 798 n.6.[2] Merely posting the motion on the class website without notice of when the announcement might appear, thus requiring continual checks for updates and therefore no fair notice of when they can object, is not reasonable, particularly for members of this class who are a uniquely vulnerable population. In addition, the mere opportunity to object at a hearing under Rule 23(h) does not create "an arm's length agreement" between the parties and, therefore, does not fulfill the basis for the deference awarded to a contingent fee agreement under Section 406(b). *See Rodriquez*, 865 F.2d at 746.

[2] Relatedly, Class Counsel assail the Commissioner's assertion that she serves in role resembling that of a trustee in the 406(b) context. (ECF No. 94, PageID # 1156.) Class Counsel's contention is irreconcilable with *Gisbrecht*, 535 U.S. at 798 n.6. As the Sixth Circuit has explained, "[i]n view of the humanitarian policy of the Social Security program to benefit the disabled," the Commissioner "retains an interest in the fair distribution of monies withheld for attorney's fees." *Lewis v. Sec'y of Health & Human Servs.*, 707 F.2d 246, 248 (6th Cir. 1983) (internal quotation marks omitted). The filing of a motion for fees out of the plaintiff's past-due benefit automatically terminates the attorney-client relationship because of the inherent conflict of interest. *See id.* at 251 (adopting *Moore v. Califano*, 471 F. Supp. 146 (S.D. W. Va.1979), *appeal dismissed*, 622 F.3d 585 (4th Cir. 1980) (unpublished table opinion)). Thus, the Commissioner's participation "is beneficial, indeed often necessary, to a fair evaluation of the petition by the court."*Moore*, 471 F. Supp. at 149.

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Although the class certification creates an attorney-client relationship between Class Counsel and the absent class members, it does not create a fee contract entered into freely by the parties and certainly cannot circumvent the notice obligations to the class members. Before this Court grants any fee motion by Class Counsel, it must require Class Counsel to first provide proper notice under Rule 23(h) to the class members.[3]

2. The Court Should Look to the Lodestar Method to Determine the Reasonableness of Class Counsel's Requested Fee.

Without a contingent-fee agreement, the reasonableness of Class Counsel's fee request under Section 406(b) should be determined by the lodestar method. *See Bentley*, 524 F. Supp. 2d at 925; *see also Artrip*, 2013 WL 1399046, at *2. Class Counsel argue that in *Gisbrecht*, the Supreme Court eliminated the use of the lodestar in determining fees under Section 406(b), and therefore, they do not need to substantiate their hours worked. (ECF No. 90-1, PageID # 1083 n. 6.) This is not what *Gisbrecht* held. In *Gisbrecht*, the Court determined that even where there is a contingent-fee agreement, "the court may require the claimant's attorney to submit, not as a basis for satellite litigation, but as an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, 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. 808 (citing *Rodriquez*, 865 F.2d, at 741). Nor could a requested fee that is vastly divorced from what the attorneys would regularly charge typically be reasonable.

[3] Because the payments awarded to class members are the result of injunctive relief leading to the individual windfall-offset recalculation, not a lump-sum judgment, this is not a common fund case. *See Geier v. Sundquist*, 372 F.3d 784, 790 (6th Cir. 2004). However, even in common fund cases, courts consider the existence of a contingent-fee agreement with the lead plaintiff as one factor in its analysis, particularly if notice of the agreement has been given to the class. *See, e.g.*, *Bowling v. Pfizer, Inc*., 102 F.3d 777, 780 (6th Cir. 1996); *Dillworth v. Case Farms Processing, Inc.*, No. 5:08-CV-1694, 2010 WL 776933, at *8 (N.D. Ohio Mar. 8, 2010). It does not create a rebuttable presumption in favor of a particular fee request.

Under the lodestar method, the starting point is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. The party seeking fees bears the "burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Id.* at 437. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.* When a plaintiff's counsel obtains excellent results, the attorney "should recover a fully compensatory fee," which normally "will encompass all hours reasonably expended on the litigation." *Id.* at 435. In exceptional circumstances, "an enhanced award may be justified." *Id.* However, the attorney bears the burden of proving an enhancement is warranted, and no enhancement may be awarded on the basis of a factor that is "subsumed in the lodestar calculation," such as the novelty and complexity of the case or the quality of the representation. *Perdue v. Kenny A.*, 559 U.S 542, 553 (2010). To determine a reasonable hourly rate, courts look to "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier*, 372 F.3d at 791. "The documentation offered in support of the hours charged 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 in the prosecution of the litigation." *Imwalle v. Reliance Med. Products, Inc.*, 515 F.3d 531, 553 (6th Cir. 2008). Reductions in attorneys' fees are appropriate to account for duplicative or excessive billing. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 702 (6th Cir. 2016).

Here, Class Counsel have failed to properly support their fee award request with rates appropriate to the Northern District of Ohio or with billing records that would enable the Court to review the reasonableness of the hours expended and, therefore, the fee request. *Geier*, 372 F.3d at 791; *Imwalle*, 515 F.3d at 553. Class Counsel provide no particularized billing record in this

case, let alone a contemporaneous and itemized record. *See Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir.1991) (party seeking fees has "the burden of providing for the court's perusal a particularized billing record."). Nor have they shown an entitlement to any enhancement. *See Perdue*, 559 U.S at 554-560. Class Counsel submitted only the affidavit of Ira Kasdan, which provides estimates of the total hours worked "by the various categories of litigation activities." (ECF No. 90-2, PageID # 1095-1107.) He also attempts to attest to rates and lump-sum hours spent by attorneys in a separate firm, Roose & Ressler. (*Id.*) The affidavit makes no effort to tie hours worked to a particular attorney or to the rates billed in any particular year, exclude excessive or redundant hours, or exercise billing judgment. *See Ne. Ohio Coal. for the Homeless*, 831 F.3d at 702. The generalized categories, with no particularized billing records, provide no way for the Court to determine which attorneys performed which tasks and whether such tasks were overstaffed or excessively billed.[4] And, with the exception of the rates provided for Roose & Ressler, they provide billing rates for attorneys practicing in Washington, D.C., not the rates reasonable in the Northern District of Ohio, nor have they shown that competent class action counsel could not be found at a lower rate within the District.[5] *See id.* at 716.

Moreover, the hours worked appear to be excessive, particularly given the fact that the case was filed in July 2017, no depositions were conducted in this case, and the vast majority of the discovery was borne by Defendants.[6] Thus, Class Counsel are essentially seeking, by their

[4] In particular, Class Counsel have not shown any billing judgment by appearing to charge senior attorney time for all communications with class members.

[5] To determine a reasonable hourly rate, "A district court may look to 'a party's submissions, awards in analogous cases, state bar association guidelines, and its own knowledge and experience in handling similar fee requests.'" *The Ne. Ohio Coal. for the Homeless*, 831 F.3d at 716, *quoting Van Horn v. Nationwide Pro. & Cas. Ins.*, 436 Fed. Appx. 496, 499 (6th Cir. 2011).

[6] Defendants do not agree with Class Counsel's characterization of Defendants litigation position in this lawsuit, particularly to the extent it characterizes Defendants as "recalcitrant" or

own math, nearly 30 million dollars for a complaint, three motions, settlement negotiations, written discovery, and a discovery dispute. Particularly troubling is Class Counsel's request for 1170 hours spent in the "years leading up to and culminating with the actual filing of the Complaint." (ECF No. 90-2, PageID # 1098 ¶ 9; *see also* PageID # 1096 ¶ 5.) Such extensive pre-complaint compensation is in tension with the text of Section 406(b), which permits only fees for "such representation" "before the court" and not *non*-representation activities completed *prior to* any court proceedings. As a factual matter, too, the likelihood of such an extensive pre-complaint investigation is undercut by Class Counsel's responses to Defendants' discovery requests, in which Plaintiff produced only Ms. Steigerwald's disability file and a one-page "Letter to the Editor" published in a legal periodical from 1989.[7] (Pl.'s Obj. & Resp. to Defs' First Set of RPD and Doc. No. Steig1040, attached as Ex. A.) And when asked in an interrogatory about the basis for the belief that the class contained several thousand members, Plaintiff responded with a series of conclusory allegations and assertions:

> By way of response, Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint. By way of further response: (l) SSA's own reports show that, in a given year, the number of persons who receive both OASDI and SSI benefits ("Concurrent Beneficiaries") is approximately 2.5 million. *See, e.g.*, SSA Office of Research, Statistics, and Policy Analysis, "Fast Facts & Figures About Social Security," for 2012-17, respectively, at p. 32 for each document. Available at https://www.ssa.gov/oolicv/docs/chartb ks/fast facts/; (2) A significant percentage of Concurrent Beneficiaries used attorney or non-attorney representatives; (3) The OIG Reports indicate that SSA makes a significant volume of

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inappropriately delaying the litigation. Defendants raised jurisdictional and procedural objections in this litigation, but Defendants never disputed SSA's obligation to perform the recalculation, expended vast resources to develop code to identify class members, (*see* ECF No. 72-1 & 72-2, PageID # 901-929), and vigorously pursued settlement.

[7] The requests asked, *inter alia*, for "Any and all documents that support your contention in Paragraph 93 of the Complaint that the SSA has "systematic[ally]" and "erroneous[ly] deni[ed] ... benefits to the proposed class over an extended period of time." Plaintiff objected to producing documents in Defendants' custody and control, those more burdensome for Plaintiff to produce, and those, like reported cases, matters of public record. (Ex. A, RPD # 12.)

> errors with respect to addressing the Windfall Offset with concurrent beneficiaries; (4) SSA did not account for the attorney fee award in Ms. Steigerwald's case in calculating her Windfall Offset, and, as a result, provided her with an amount of benefits that less than the amount to which she was legally entitled. Based on the foregoing, it is reasonable to infer that Ms. Steigerwald is not the only concurrent beneficiary who has suffered this plight and that the number of concurrent beneficiaries who have suffered this plight since 2002 contains at least several thousand members.

(Pl.'s Obj. & Resp. to Defs' First Set of Interrog., # 6, attached as Ex. B.) Whatever else can be said about this response, it does not reflect an extensive pre-Complaint investigation. Nor should class members be required to compensate Class Counsel for their unsuccessful attempts to find a named plaintiff prior to Ms. Steigerwald. (ECF No. 90-2, PageID # 1097, ¶ 5 (seeking compensation for reviewing files of individuals who "*potentially could* have been negatively impacted…") (emphasis added). Thus, Class Counsel's hours, including 1170 hours billed for work up to and including drafting the Complaint (over one third of the entire number of hours billed), are unsupported and excessive.

Class Counsel have not met their burden under Section 406(b), let alone for an award of twenty-percent of all payments due to the Class.

3. Even Presuming a Valid Contingent-Fee Agreement, Class Counsel's Request Would Generate an Impermissible Windfall.

Regardless whether Class Counsel have a valid class-wide fee agreement, an award of twenty percent of all payments to the Class, potentially amounting to tens of millions of dollars, would constitute an inordinately large benefit and, therefore, an impermissible windfall. *Rodriquez*, 865 F.2d at 746; *Hayes*, 923 F.2d at 422.

Under *Hayes*, when determining whether counsel "would enjoy a windfall because of either an inordinately large benefit or from minimal effort expended," a windfall can never occur where "the hypothetical rate determined by diving 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.

Here, because Class Counsel moved for fees before the amount of the payments to the absent class members are known, the *Hayes* analysis cannot be performed without reference to a non-representative sample of the payments that may be due in this case.[8] Defendants calculated the payment due for 100 individuals in Category 1, resulting in an average of $1,426.08 per individual. (ECF No. 90-1, PageID # 1091.) Assuming that no individuals in Category 2 are owed payments (and the sample is representative), the amount of class payments would total $143,184,136.00 (assuming 100,404 members of Category 1). If Class Counsel received twenty percent, they would take $28,636,827.30 out of the pockets of the class members they represent.

Even if this request were not extraordinarily large, the Court's analysis would again be hampered by the vagueness of Class Counsel's affidavit, which is insufficiently detailed to allow the Court to assess the fee's reasonableness. Class Counsel provide only block estimates for their work on pieces of this litigation and do not tie any particular hours to any particular attorney or his or her billing rate during any given year. This is not sufficient to allow the Court to fulfill its duty under *Gisbrecht*. 535 U.S. at 808; *see also e.g.*, *Hayes*, 923 F.2d at 420 (noting the attorney "documented his legal services"); *Woodruff v. Colvin*, No. 1:12CV1752, 2016 WL 6605132, at *2 (N.D. Ohio Oct. 19, 2016) (noting counsel's submission of time records).

However, assuming Class Counsel worked the 3,172 hours claimed, which the Commissioner disputes is an appropriate and supportable calculation, this would result in an

[8] In a typical case under Section 406(b), the plaintiff's counsel seeks a fee award from the district court after the total amount of past-due benefits have been awarded. *See e.g.*, *Hayes*, 923 F.2d at 420. Doing so here, however, particularly with a class of 129,695 members, would create an enormous administrative burden for SSA.

hourly rate of $9,028. An hourly rate of $9,028 is well above twice any reasonable rate, let alone the standard hourly rate for class action work in the Northern District of Ohio, which is the relevant market. *Hayes*, 923 F.2d at 422; *see also Scappino v. SSA*, 2015 WL 7756155, at * 2 -3 (N.D. Ohio. 2015). In fact, it is *more than 25 times* higher than the highest billing rate for an attorney practicing in the District put forth by Class Counsel,[9] $350 per hour charged by Mr. Roose.[10] Thus, the *Hayes* floor in the case is a maximum of $2,220,400 (3,172 hours x 350 x 2).

Class Counsel argue that they are entitled to more than the *Hayes* floor – 13 times more – because the case was difficult and the majority of the work in this case was performed by attorneys. (ECF No. 90-1, PageID # 1089.) The Commissioner does not dispute that the case was difficult or that attorneys performed the majority of the work. Rather, these are not the only factors that should be considered to rebut any presumption of reasonableness that may have survived *Gisbrecht*. *Hayes*, 923 F.2d at 422. *In Gisbrecht*, the Supreme Court held that counsel bears the burden to demonstrate the reasonableness of the fee and that a downward adjustment may be warranted "if the recovered benefits are large in comparison to the time the claimant's attorney invested in the case." 535 U.S. at 808; *see also Lasley v. Comm'r of Soc. Sec.,* 771 F.3d 308, 309 (6th Cir. 2014). That standard is more than satisfied here.

Even if this Court were to credit their insufficiently supported hours and rates, class

[9] Even this rate is unsupported, as Class Counsel do not even claim that Mr. Roose has ever actually been compensated at $350 per hour. (ECF No. 90-2, PageID # 1104 ¶ 29.) Class Counsel list significantly higher rates for the attorneys at Kelley, Drye, and Warren. These rates, however, are billed by attorneys located and practicing in Washington, D.C., which is not the relevant market for a case brought and litigated in the Northern District of Ohio. *See Hayes*, 923 F.2d at 422.

[10] Even using the highest billing rates put forth by counsel for 2018 (the year in which the majority of the work was performed on this case) would be appropriate and Class Counsel's expenditure of 3,024.7 hours of senior attorney time were properly supported, which they are not, a fee of $3,202,360 would be the maximum fee that would not be considered a windfall.

Counsel's request for twenty percent of the payments due to a class of 129,695 is plainly disproportionate to the time spent on this case. On that basis, this Court should apply a substantially smaller percentage. *See Gisbrecht*, 535 U.S. at 808. But this Court cannot simply credit Class Counsel's insufficiently supported hours and rates: Where Class Counsel has failed to properly document those hours and rates, no adjustment above the *Hayes* floor is reasonable. *See e.g.*, *Koprowski v. Comm'r of Soc. Sec.*, 2013 WL 29804 at * 2 (N.D. Ohio Jan. 2, 2013) (limiting counsel to double court determined market rate where counsel failed to properly document hourly rate). Therefore, applying the *Hayes* analysis, the Commissioner notes that a fee award in the range of 2% appears reasonable, which would result in an estimated award of $2,863,682.72.

Class Counsel argue that the Court should not focus on the entire fee award but rather the "benefit award" per individual. (ECF No. 90-1, PageID # 1091.) To support this novel proposition, they contend that when the Sixth Circuit stated in *Royzer* 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," it "implicitly recognize[ed] that if a claimant's benefits are not 'unduly eroded' by the fee award, the 406(b) fees awarded are not a 'windfall.'" (ECF No. 90-1, PageID # 1085) (citing *Royzer v. Sec'y of Health & Human Servs.*, 900 F.2d 981, 982 (6th Cir. 1990)). The Sixth Circuit did no such thing. Class Counsel's strained interpretation reads the Supreme Court's instruction to ensure the reasonableness of the fee out of existence. *See also Gisbrecht*, 535 U.S. at 807. It would also defeat a primary purpose of class actions- to pass on to class members the benefit of economies of scale. *See Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (discussing common fund cases); *see also Thatch v. Comm'r of Soc. Sec.*, No. 1:09–CV–454, 2012 WL 2885432, *2-*3 (N.D. Ohio July 13, 2012) (in individual

case, noting lack of contingent-fee agreement when denying fees for auxiliary benefit award, where attorney did little to no extra work for that beneficiary).

The only other decision to discuss the application of Section 406(b) to a class action is a district court decision that approved the settlement of a much smaller class action for a much smaller fee award. *Greenberg*, 2015 WL 4078042, at *8. Indeed, no court of appeals has ever endorsed application of Section 406(b) in the class action context.[11] Instead, courts typically award attorney's fees in class actions against SSA under EAJA. *See e.g., Hart v. Colvin*, ECF No. 88, No. 15-cv-00623-JST (N.D. Cal. Apr. 17, 2017); *Padro v. Astrue*, No. 11-CV-1788, 2013 WL 5719076, at *8, No. 11-cv-1788 (CBA) (E.D.N.Y. Oct. 18, 2013); *Hyatt v. Barnhart*, 315 F.3d 239, 243-256 (4th Cir. 2002); *Sorenson v. Mink*, 239 F.3d 1140, 1143 (9th Cir. 2001). As for *Greenberg*, although the court awarded twenty percent, it did so on a class of 1,666 individuals due an estimated $22,000,000. *Id.* This in no way supports a twenty percent award in a case with 129,695 class members due an estimated $143,184,136.00 in payments.[12] And Class Counsel, thus, provide no support for the extraordinary proposition that up to twenty-five percent may be taken from each and every unnamed plaintiff's benefits award (no matter how large the total amount) without any assessment of the amount of benefit conferred on the class as a whole. A

[11] Although this Court has held that Class Counsel are eligible for attorneys' fees under § 406(b), Defendants respectfully urge the Court to reconsider. Now that the Court has directed SSA to recalculate the windfall offset within 90 days, relief that is not available under 42 U.S.C. § 405(g), there is no statutory basis for a fee award under § 406(b), as the Court's sole authority to order such relief is its mandamus jurisdiction under 28 U.S.C. § 1651.

[12] Class Counsel complains that the award in *Greenberg* was not what they expected, in part because estimates of the size of the class were mistaken. (ECF No. 90-2, PageID # 1105 n.8.) *Greenberg*, however, was an opt-in class, and therefore, there was substantially less certainty about the size of the class. *Greenberg v. Colvin*, 63 F. Supp. 3d 37, 46 (D.D.C. 2014). Nonetheless, Class Counsel received between 1.4 and 1.6 million dollars, which was sufficient to incentivize them to undertake this class action. (ECF No. 90-2, PageID # 1105 n.8.)

holding along these lines would undermine the Supreme Court's admonition that court review of a fee arrangement should serve as "an independent check" that a fee request should "yield reasonable results in particular cases." *Gisbrecht*, 535 U.S. at 807; *see also Drake v. Comm'r of Soc. Sec.*, No. 14-12662, 2016 WL 492704, at *4 (E.D. Mich. Feb. 9, 2016) ("The Court is also aware, however, that every dollar awarded to counsel is one dollar less received by a deserving disability applicant . . . .")

Furthermore, in no case is Class Counsel entitled to an award of more than twice the rate for such work in the relevant market merely because of the contingent nature of the fee agreement with Ms. Steigerwald. The contingent nature of the work, and the associated risks, are adequately accounted for using the multiplier of twice the standard hourly rate in the relevant market. *Hayes*, 923 F.2d at 422). Again, a fee award in the range of 2%, or of an estimated $2,863,682.72, would appear to adequately compensate Class Counsel and would not be a "punishment." (ECF No. 90-1, PageID # 1087, n. 8); *see also Greenberg*, 2015 WL 4078042, at * 10 (rejecting counsel's argument that they would be "penalized" by a reduced fee award.)[13]

CONCLUSION

In sum, the Commissioner respectfully requests that this Court should first direct Class Counsel to provide sufficient notice to the class members as required under Rule 23(h), permitting any member to object, and then conduct an independent review of the reasonableness of the fee sought by Plaintiff's counsel and award a fee accordingly.

[13] Class Counsel also provide no support for their assertion that a large award under Section 406(b) is necessary to incentivize class actions against SSA. While it may have been Class Counsel's incentive, (ECF No. 90-2, ¶ 10, PageID # 1099), there have been many class actions against SSA since *Califano v.Yamasaki*, 442 U.S. 682 (1979) and class counsel in such cases (with the exception of the attorneys at Kelley, Drye, and Warren) have routinely negotiated or litigated attorneys' fees under EAJA. (*See* ECF No. 52, PageID # 698.)

Respectfully submitted,

JUSTIN E. HERDMAN
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF OHIO

s/ Erin E. Brizius
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned counsel certifies that the foregoing Response is fifteen (15) pages in length and within the page limitations of a standard track matter.

s/ *Erin E. Brizius*
Erin E. Brizius
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2019 a copy of the foregoing 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/Erin E. Brizius
Erin E. Brizius
Assistant U.S. Attorney

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

STEPHANIE LYNN STEIGERWALD, individually on behalf of herself, and on behalf of all others similarly situated Plaintiff, - versus - NANCY A. BERRYHILL, in her official capacity as Acting Commissioner of Social Security, and THE SOCIAL SECURITY ADMINISTRATION, Defendants.	Case No. 1:17-cv-1516-JG JUDGE JAMES GWIN MAGISTRATE JUDGE RUIZ Plaintiff's Objections and Responses to Defendants' First Set of Requests for Production of Documents

Plaintiff Stephanie Lynn Steigerwald ("Plaintiff" or "Ms. Steigerwald"), by undersigned counsel and pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, hereby provides the following Objections and Responses to the First Set of Requests for Production of Documents (the "Document Requests") propounded by Defendants Nancy A. Berryhill, in her official capacity as Acting Commissioner of Social Security, and the United States Social Security Administration (collectively, "Defendants" or "SSA").

I. OBJECTIONS TO INSTRUCTIONS AND PREFATORY LANGUAGE

Plaintiff Objects to the following Instructions of Defendants and prefatory language found in the Document Requests:

Plaintiff objects to the Instructions to the extent they request material in the possession, custody or control of Defendants, material that is reasonably available to the Defendants, and/or material that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means.

GOVERNMENT EXHIBIT A

II. OBJECTIONS TO DEFINITIONS

Plaintiff Objects to the following Definitions provided by Defendants, as found in the Document Requests:

Plaintiff objects to the term "Plaintiff," "you," or "yourself" as including Plaintiff's "counsel." Plaintiff's counsel represents Plaintiff in this action. Plaintiff's counsel is not a party to this action. In this regard, and as further objection to this wrongfully expansive definition, Plaintiff notes that Defendants' definition of "Defendants" pointedly does *not* include Defendants' counsel.

III. RESERVATION OF OBJECTIONS

The foregoing Objections to Definitions and Instructions and the following specific Objections are based upon (a) Plaintiff's interpretation of the specific requests posed by Defendants and (b) information available to Plaintiff as of the date of this document. Plaintiff reserves the right to supplement these objections based upon the discovery of new information supporting additional and/or amended objections. A statement that Plaintiff will produce documents in response to any of the Document Requests is not meant to imply that such documents exist, but only that Plaintiff will produce them if they do exist, they are located, and their production is reasonable and proportionate to the needs of this case, subject to any of the specific objections to the Document Requests.

IV. RESPONSES TO DOCUMENT REQUESTS

1. Any and all documents cited, referenced, or quoted in the Complaint.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more

burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request in so far as documents, such as reported cases, are matters of public record.

Subject to these Objections, Plaintiff will produce non-privileged documents that are responsive to this request.

2. Any and all documents described, identified, relied upon, or referred to in your responses to Defendants' First Set of Interrogatories or in your initial disclosures.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request in so far as documents, such as reported cases, are matters of public record.

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

3. Any and all documents you have received from any person not a party to this action concerning this action.

RESPONSE:

Plaintiff objects to this request to the extent it seeks "[a]ny and all" documents received by Plaintiff from her attorneys, as non-parties to this action, "concerning this action." This request,

if so construed, attempts to collect attorney-client privileged, work product documents received to, from, or on behalf of Plaintiff's attorneys. Plaintiff will produce no such documents, nor will Plaintiff provide a privilege log for such documents.

Other than such documents, Plaintiff has no documents to produce in response to this request.

4. All documents you have received from Defendants concerning this action.

RESPONSE:

Plaintiff objects to this request as it is, on its face, wasteful, duplicative and unnecessarily burdensome to Plaintiff. Plaintiff further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means.

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

5. Any and all documents concerning any communications you have had with any current or former employee of the Social Security Administration concerning this action.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request to the extent that it calls for production of documents

protected by the work product doctrine (*e.g.*, notes taken by Plaintiff's counsel on conversations with current or former employees of SSA in preparation of this case).

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

6. Any and all documents concerning any communications you have had with any current or former employee of the Social Security Administration concerning any of the allegations made in the Complaint.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request to the extent that it calls for production of documents protected by the work product doctrine (*e.g.*, notes taken by Plaintiff's counsel on conversations with current or former employees of SSA in preparation of this case).

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

7. Any and all documents concerning any communications you have had with any current or former employee of the Social Security Administration regarding the attorneys' fees authorized in connection with your Social Security Benefits.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request to the extent that it calls for production of documents protected by the work product doctrine (*e.g.*, notes taken by Plaintiff's counsel on conversations with current or former employees of SSA in preparation of this case).

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

8. Any and all documents concerning your notes or any memorialization of the facts and circumstances alleged in the Complaint including but not limited to diaries, calendars, day planners, etc., electronic or otherwise.

RESPONSE:

Plaintiff objects to this request to the extent Defendants seek attorney-client privileged material or work product documents received to, from, or on behalf of Plaintiff's attorneys. Plaintiff further objects to this request to the extent it purports to require Plaintiff to produce documents that no longer exist.

Other than such documents, Plaintiff has no documents to produce in response to this request.

9. Any and all documents you may use to support any and all claims in this action, including, but not limited to, all documents identified in your response to Defendants' First Set of Interrogatories to Plaintiff Stephanie L. Steigerwald.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request in so far as documents, such as reported cases, are matters of public record.

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

10. Any and all documents, including communications that you reviewed, consulted, read, or referred to in formulating your responses to Interrogatories 3 through 13 of Defendants' First Set of Interrogatories to Plaintiff Stephanie L. Steigerwald.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request in so far as documents, such as reported cases, are matters of public record. Plaintiff further objects to this Document Request because production in response

thereto would violate the work product doctrine insofar as production could reflect the mental processes of Plaintiff's attorneys (*e.g.*, by effectively asking for disclosure of documents that Plaintiff's attorneys that were important to be reviewed in addressing the referenced interrogatories).

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

11. Any and all documents that alerted you and/or led you to understand that the SSA had not performed the Subtraction Recalculation that you alleged you were due in your Complaint.

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request in so far as documents, such as reported cases, are matters of public record.

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

12. Any and all documents that support your contention in Paragraph 93 of the Complaint that the SSA has "systematic[ally]" and "erroneous[ly] deni[ed] ... benefits to the proposed class over an extended period of time."

RESPONSE:

Plaintiff objects to this Document Request insofar as it asks for documents in Defendants' custody or control, and further objects to this Documents Request insofar as it asks for documents that are reasonably available to the Defendants, and/or for documents that would be more burdensome for Plaintiff to produce than for Defendants to obtain through other means. Plaintiff further objects to this Document Request in so far as documents, such as reported cases, are matters of public record.

Subject to these Objections, Plaintiff will produce non-privileged documents, if any, that are responsive to this request.

Date: February 20, 2018

Respectfully submitted,

s/Kirk B. Roose, Ohio Bar No. 0018922
s/Jon H. Ressler, Ohio Bar No. 0068139
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s/ Ira T. Kasdan, admitted *pro hac vice*
s/ Joseph D. Wilson, admitted *pro hac vice*
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Attorneys for Plaintiff and the putative class

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, a copy of the foregoing PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANTS' FIRST SET OF REQUESTS FOR PRODUCTION was served by Federal Express, with a courtesy copy by electronic mail, upon the following:

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Attorney for Plaintiff and the putative class

Volume 11, Nos. 11/12 — November/December, 1989

LETTERS TO THE EDITOR continued from page 2

tion of the medical improvements standard, when she failed to perfect her direct challenge to that termination? I will appreciate any helpful suggestion.

Thank you.

Very truly yours,
William R. Beu, Attorney at Law
Rockford, Illinois

RE: Concurrent Cases' Recalculation of Amount Offset After Attorney's Fee Paid

Dear Editor:

Did you know that claimants who are approved for both SSI and Title II benefits are entitled to an automatic recalculation of the Title II/SSI offset amount after an attorney fee has been approved and that the average claimant will be due an additional benefit equal to 70% of the approved fee? Your answer probably depends upon where you live and the priorities and competence of the District Office serving your clients. SSA agrees and POMS instructions require that the amount of the approved fee and any necessary litigation expenses be deducted from Title II benefits in calculating the Title II/SSI offset amount. Since the fee is not approved until after the past due benefits have been paid, POMS requires the District Offices to automatically recalculate the offset amount after the fee is approved and to notify both the claimant and the attorney of the amount of additional benefits due. In the age of down sizing, whether and when this difficult manual computation is made depends on the practices in particular District Offices. It is universally true that the recalculation is more likely to occur and will certainly occur faster if the claimant's attorney notifies the District Office of the approved fee and requests a recalculation.

I have recently settled a Tennessee class action on this issue. Pursuant to the settlement, SSA will identify and pay additional benefits due to Tennessee residents approved for concurrent benefits who had an attorney fee approved on or after February 1, 1985. The settlement will result in payment of approximately $3,000,000.00 in past due benefits.

I would strongly encourage attorneys to send copies of their fee approvals for concurrent claimants and a statement of any litigation expenses to the appropriate District Office and to request a recomputation of the offset amount. If you do not receive notice of the recalculation within 90 days, I believe that follow up would be appropriate. If a District Office is generally failing to perform the recalculations, your client may want to consider a class action lawsuit.

I have provided NOSSCR with a short memo I prepared for Tennessee attorneys with form letters requesting benefit recalculations. I have also provided NOSSCR with copies of the relevant POMS instructions.

Very truly yours,
David A. Ettinger, Staff Attorney
Legal Services of Middle Tennessee
Nashville, Tennessee

RE: Lupus Foundation

Dear Editor:

Recently, the Missouri Chapter of the Lupus Foundation sponsored a seminar for the benefit of the staff of the Disability Determination Service of our state. It was our hope that the information we presented about Lupus would help future claimants for Social Security disability benefits. We felt that if those examining the claims for SSA at the initial and reconsideration levels were educated about the disease, fewer denials would result. While this goal was not fully realized, the seminar was judged to be successful by everyone involved.

The program was divided into three segments. First, Terry Moore, M.D., rheumatologist, and long-time researcher in the field of Lupus, spoke about the disease and the latest medical advances in diagnosis and treatment. Second, Dennis Fox, Attorney at Law, discussed the representatives' point of view, and what problems a lawyer experiences when representing claimants with this disease. Lastly, Dr. Moore and Mr. Fox were joined by three Lupus sufferers for a panel discussion with the audience. There was much audience participation throughout the seminar.

The Lupus Foundation decided the videotape the seminar and offer it to other state disability determination agencies. We would also like to make it available to any other interested parties. There are three videotapes, one for each segment. The tapes can be purchased individually for $40.00, or all three tapes for $110.00. An additional charge for postage and handling is $2.00 per tape. If you would like to purchase one or all of these tapes, please send your check

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

STEPHANIE LYNN STEIGERWALD, individually on behalf of herself, and on behalf of all others similarly situated Plaintiff, - versus - NANCY A. BERRYHILL, in her official capacity as Acting Commissioner of Social Security, and THE SOCIAL SECURITY ADMINISTRATION, Defendants.	Case No. 1:17-cv-1516-JG JUDGE JAMES GWIN MAGISTRATE JUDGE RUIZ Plaintiff's Objections and Responses to Defendants' First Set of Interrogatories

Plaintiff Stephanie Lynn Steigerwald ("Plaintiff" or "Ms. Steigerwald"), by undersigned counsel and pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, hereby provides the following Objections and Responses to the First Set of Interrogatories (the "Interrogatories") propounded by Defendants Nancy A. Berryhill, in her official capacity as Acting Commissioner of Social Security, and the United States Social Security Administration (collectively, "Defendants" or "SSA").

I. OBJECTIONS TO INSTRUCTIONS

Plaintiff Objects to the following Instructions of Defendants, as found in the Interrogatories:

Plaintiff objects to Instruction Number 1 if and to the extent it purports to require Plaintiff to sign her name after each interrogatory response. Plaintiff has signed a Certification Statement attesting to the truth, to the best of her knowledge, of these responses. Further signatures following each interrogatory are duplicative and unnecessarily cumbersome.

GOVERNMENT EXHIBIT
B

II. OBJECTIONS TO DEFINITIONS

Plaintiff Objects to the following Definitions provided by Defendants, as found in the Interrogatories:

Plaintiff objects to the term "Plaintiff," "you," or "yourself" as including Plaintiff's "counsel." Plaintiff's counsel represents Plaintiff in this action. Plaintiff's counsel is not a party to this action. In this regard, Plaintiff notes that Defendants' definition of "Defendants" pointedly does *not* include Defendants' counsel. Plaintiff further objects to this definition as it implicates the attorney-client privilege, the work product doctrine, or both.

III. RESERVATION OF OBJECTIONS AND RIGHT TO AMEND OR SUPPLEMENT TO RESPONSES

The foregoing Objections to Definitions and Instructions and the following specific Objections are based upon (a) Plaintiff's interpretation of the specific requests posed by Defendants and (b) information available to Plaintiff as of the date of this document. Plaintiff reserves the right to supplement these objections, and/or amend or supplement any Responses below based upon the discovery of new information supporting additional and/or amended objections or responses.

IV. RESPONSES TO INTERROGATORIES

1. Describe in detail the questions of fact common to the class you purport to represent in this matter.

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraph 28 of the Complaint.

2. Describe in detail the questions of law common to the class you purport to represent in this matter.

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraph 28 of the Complaint.

Further, another common question of law is whether the members of the class are entitled to an injunction ordering Defendants to recalculate all Windfall Offset calculations for each member, as defined in the Complaint, by properly performing the Subtraction Recalculation, as defined in the Complaint.

3. Aside from your allegations based on the *Guadamuz* and *Willis* class actions referenced in Paragraph 15 of the Complaint, state all facts that support the allegation in Paragraph 15 of the Complaint that "SSA has been on notice for at least thirty (30) years that it fails to apply the regulations and POMS correctly, thereby wrongly withholding the Retroactive Underpayment for Plaintiff and the other putative class members.

RESPONSE:

Aside from Plaintiff's allegations in the Complaint, *see also* Steig001040.

4. State all facts that support your allegation in Paragraph 16 of the Complaint that "SSA continues to fail to regularly perform the Subtraction Recalculation and pay the Retroactive Underpayment."

RESPONSE:

Plaintiff objects to Interrogatory Number 4 to the extent the information requested is in the possession of Defendants, or would be in the possession of Defendants should Defendants properly

review their records and adequately respond to Plaintiff's First Set of Interrogatories Numbers 1 through 4.

Notwithstanding these objections, by way of response Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint.

5. Identify the "other putative class members" you refer to in Paragraph 17 of the Complaint.

RESPONSE:

Plaintiff objects to Interrogatory Number 5. The information requested in Interrogatory Number 5 is in the possession of Defendants, or would be in the possession of Defendants should Defendants properly review their records and adequately respond to Plaintiff's First Set of Interrogatories Numbers 1 through 4.

Therefore, Plaintiff will not provide a substantive response to Interrogatory Number 5.

6. Describe in detail the basis for your assertion in Paragraph 27 of the Complaint that "on information and belief, the class contains at least several thousand members."

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint.

By way of further response: (1) SSA's own reports show that, in a given year, the number of persons who receive both OASDI and SSI benefits ("Concurrent Beneficiaries") is approximately 2.5 million. *See, e.g.*, SSA Office of Research, Statistics, and Policy Analysis, "Fast Facts & Figures About Social Security," for 2012-17, respectively, at p. 32 for each document. Available at https://www.ssa.gov/policy/docs/chartbooks/fast_facts/; (2) A significant percentage Concurrent Beneficiaries used attorney or non-attorney representatives; (3) The OIG Reports

indicate that SSA makes a significant volume of errors with respect to addressing the Windfall Offset with concurrent beneficiaries; (4) SSA did not account for the attorney fee award in Ms. Steigerwald's case in calculating her Windfall Offset, and, as a result, provided her with an amount of benefits that less than the amount to which she was legally entitled.

Based on the foregoing, it is reasonable to infer that Ms. Steigerwald is not the only concurrent beneficiary who has suffered this plight and that the number of concurrent beneficiaries who have suffered this plight since 2002 contains at least several thousand members.

7. Describe in detail the basis for your assertion in Paragraph 38 of the Complaint that "Defendants have systematically denied benefits to class members based on a consistent, longstanding practice of failing to give sufficient and proper notice of SSA's failure to pay claimants the Retroactive Underpayments."

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint, as well as Steig001040.

8. Describe in detail the basis for your assertions in Paragraph 56 of the Complaint that "Even after repeatedly being found in violation of the POMS, Defendant SSA continued to not make the Subtraction Recalculation consistently, as would have been appropriate and required."

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint.

9. Describe in detail the basis for your statement in Paragraph 61 of the Complaint, that "a large percentage of these cases were unprocessed or incorrectly processed actions were similar in nature to that of Plaintiff and the other members of the purported class [...]."

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint.

10. Describe in detail the basis for your statement in Paragraph 72 of the Complaint, that "a significant percentage of these cases were unprocessed or incorrectly processed actions were similar in nature to that of Plaintiff and the other members of the purported class [...]."

RESPONSE:

By way of response, Plaintiff refers Defendants to Paragraphs 39-82 of the Complaint.

11. Describe in detail all notices that you contend in Paragraph 87 of the Complaint are "required" and should have been provided regarding the Subtraction Recalculation, as defined in the Complaint.

RESPONSE:

Plaintiff objects to Interrogatory Number 11, because it misconstrues the meaning of Paragraph 87 of the Complaint. Defendants assert, in Interrogatory Number 11, that Defendant SSA was "required" to provide notice(s) to Plaintiff and the other members of the class following Defendants' failure to perform the Subtraction Recalculation, as defined in the Complaint. In fact, the word "required" in Paragraph 87 refers to the requirement of Defendants to perform the Subtraction Recalculation. Defendants are and were required by the POMS to perform the

Subtraction Recalculation for Plaintiff and the other members of the class, whether or not Defendants provided Plaintiff and the other members of the class with notice of such performance.

12. Aside from your reliance on the *Guadamuz* and *Willis* cases and the 2011 and 2016 OIG Reports referenced in the Complaint, describe in detail the basis for your statement in Paragraph 44 of the Complaint that "Defendants have actively and continually disregarded" their obligation "to perform the Subtraction Recalculation."

RESPONSE:

Plaintiff objects to Defendants' Interrogatory Number 12 because and to the extent that a more complete response is in the possession of Defendants, or would be in the possession of Defendants should Defendants properly review their records and adequately respond to Plaintiff's First Set of Interrogatories Numbers 1 through 4.

Without waiving this objection, by way of response Plaintiff refers to Steig001040.

13. Describe in detail the basis for your allegation in Paragraph 93 of the Complaint that "SSA's notices about the Subtraction Recalculation have been absent, inaccurate, or misleading."

RESPONSE:

By way of response, Plaintiff states:

Defendants have admitted in this action that they failed to perform the Subtraction Recalculation for me until after the Complaint was filed. ECF 18-1, p. 18 ("Once Plaintiff raised her claim by filing this case, the SSA performed a recalculation of the windfall offset to account for representative's fees."). Defendants attached a Declaration of Janet Walker to their Motion to

Dismiss, in which Ms. Walker provided various (although incomplete) correspondence between my attorney and Defendants. ECF 18-2. Not one of the attachments to Ms. Walker's Declaration contains a notice that SSA had not performed the Subtraction Recalculation. No such notice was referenced in or attached to Ms. Walker's Declaration. Indeed, the Court found that no such notice was provided to me. ECF 32, pp. 9-11.

Additionally, the November 7, 2017 letter referred to in Paragraph 27 of Ms. Walker's Declaration stating that SSA was now releasing money previously withheld to me, still did not state whether or not the Subtraction Recalculation had in fact been performed. *See* ECF 18-2, pp. 136-38.

14. Identify each and every individual other than Plaintiff whom you contend is owed a "subtraction recalculation," [sic] as defined in your Complaint, and what efforts were made to determine that a "subtraction recalculation" was owed.

RESPONSE:

Plaintiff objects to Defendants' Interrogatory Number 14 because and to the extent that a complete response is in the possession of Defendants, or would be in the possession of Defendants should Defendants properly review their records and adequately respond to Plaintiff's First Set of Interrogatories and Request for Production of Documents.

Therefore, Plaintiff will not provide a substantive response to Interrogatory Number 14, at this time, until Defendants comply with their discovery obligations.

15. Identify each and every individual other than Plaintiff whom you contend is owed a recalculation of his/her windfall offset, following the authorization of a representative's fees, and

describe what efforts were made to determine that a windfall offset recalculation following the authorization of a representative's fees was owed.

RESPONSE:

Plaintiff objects to Defendants' Interrogatory Number 15 because and to the extent that a complete response is in the possession of Defendants, or would be in the possession of Defendants should Defendants properly review their records and adequately respond to Plaintiff's First Set of Interrogatories and Request for Production of Documents.

Therefore, Plaintiff will not provide a substantive response to Interrogatory Number 15, at this time until Defendants comply with their discovery obligations.

16. Identify each member of the alleged class with whom you have communicated regarding this action.

RESPONSE:

By way of response, Plaintiff states:

As of the date of these responses, I have not knowingly communicated with any other member of the class.

Date: February 20, 2018

Respectfully submitted,

s/Kirk B. Roose, Ohio Bar No. 0018922
s/Jon H. Ressler, Ohio Bar No. 0068139
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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 putative class

CERTIFICATION STATEMENT

I, Stephanie Lynn Steigerwald, believe, based on reasonable inquiry, that the foregoing answers are true and correct to the best of my knowledge, information and belief.

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

Dated: February 20, 2018

By:/s/ Stephanie Lynn Steigerwald

Stephanie Lynn Steigerwald

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, a copy of the foregoing PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES was served by Federal Express, with a courtesy copy by electronic mail, upon the following:

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