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

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

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I. INTRODUCTION

If nothing more, Defendants the Social Security Administration ("SSA") and Nancy A. Berryhill (together, "Defendants")' Response to Class Counsel's Motion for Fees ("Response") underscores two of the more important points that justify Class Counsel's fee request in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid. First, the tremendous difficulty presented by this case. *See* Doc. # 90.1 ("Mem.") at 11-12. Second, the huge risk that Class Counsel undertook in bringing and pursuing the litigation. *Id.*

As to the former: "The Commissioner does not dispute that the case was difficult or that attorneys performed the majority of the work." Response at 12. As to the latter, Defendants continue to assert that Class Counsel is entitled to no attorneys' fees at all. *Id.* at 14 n.11. This, despite the Court's unambiguous ruling explicitly to the contrary. Doc. 88 ("Opinion"), at 6-9.[1]

But there is more. In their Response, as they have done before in this action, Defendants again choose to distort the facts and the law.[2] As before, Class Counsel was again forced to spend time and effort ferreting out the deceptions in Defendants' Response. The Court should not be taken in by Defendants' latest misleading salvos.

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[1] Defendants have filed a Rule 59(e) Motion in which they "request clarification of the basis for" the Court's Orders, *and* threaten an appeal, Doc. 96-1 ("59(e) Memo"), at 9, which once again highlights the ongoing risk to Class Counsel in taking on this case. *See* Mem. at 13 (noting additional work that will go uncompensated and risk for Class Counsel in case of appeal). Class Counsel will dispose of the arguments in the Rule 59(e) Memo at the proper time.

[2] *See, e.g.*, the following earlier instances in which Plaintiffs pointed out Defendants' deceptions: Doc. 25 at 2 (Defendants fail to provide evidence proving Class representative Ms. Steigerwald presented her claim, and misquote *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017) to distort its holding); Doc. 54 at 2 n.2 (Defendants misstate the relief sought in Plaintiffs' Summary Judgment Motion); *id.* at 7 (Defendants cite *Dixon v. Shalala*, 54 F.3d 1019 (2d Cir. 1995) for a proposition directly contrary to its holding); *id.* at 8 (Defendants again cite *Unan v. Lyon* out of context in order to suit their needs); Doc. 59 at 1-2 (Defendants take a position in Opposition to Class Certification directly contrary to the position they took in Opposition to Summary Judgment); *id.* at 11-12 (Defendants quote from one sentence from *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) in order to "prove" that Plaintiffs needed to establish a "pattern and practice," but omit the very next sentence, which undermined their assertion).

II. ARGUMENT

A. Defendants' Response Continues to Misrepresent the Facts

Regarding the facts, Defendants again misstate their earlier positions in this case in the face of record evidence to the contrary. They state: "Defendants never disputed SSA's obligation to perform the [Subtraction R]ecalculation." Response at 9 n.6. In fact, as the Court noted in its Opinion: "Defendant vigorously denies that Plaintiffs are '*entitled* to relief whatsoever' in this case." Opinion at 7 (emphasis in Opinion) (citing Doc. 17 at 14 ("Defendants deny that Plaintiff is *entitled to any relief whatsoever* . . . ." (emphasis added)). *See also* Doc. 18 (moving to dismiss case on jurisdictional grounds); Doc. 52 (opposing Plaintiffs' motion for summary judgment).

Now that the Court has ordered Defendants to perform the Subtraction Recalculation and pay all past-due benefits owed, Defendants would like to pretend they have always intended to do so. In fact, had Defendants owned up to their mistakes at the beginning of the case in July 2017, they might actually be nearing completion of a job that they now claim will take them the next two years. *See* Rule 59(e) Memo at 6 (SSA claims it needs "no less than two years to process the class members' recalculations accurately and efficiently.").

Similarly, Defendants now criticize Class Counsel for failing to "provide proper notice under Rule 23(h) to the class members." Response at 3. This assertion reeks of hypocrisy – *especially given the fact that Defendants' Counsel explicitly told Class Counsel they did not think advance notice of a hearing was necessary*. *See* Doc. 91-1 at 2. On February 8, 2019, Class Counsel emailed Defendants' counsel, requesting that the parties call the Court to discuss setting a hearing on the Motion for Fees. *Id.* Defendants' counsel responded: "We . . . think a call is unnecessary given that your motion specifically requests that the Court schedule a hearing within 14 days of the completion of briefing." *Id.* Class Counsel responded, in part: "we have a

fiduciary duty to inform Class Members of a hearing date as soon as possible." *Id.* at 1.

At that time, Defendants' counsel did not assert their newfound Rule 23(h) position. Instead, they wrote: "We continue to assert that it is inappropriate to call chambers requesting a hearing on a motion that is not yet fully briefed . . . ." *Id.* In their February 8 email, Defendants' counsel *expressly advocated* not providing Class Members with as much advance notice of a hearing as possible. Now, two weeks later, the same attorneys claim the notice that was provided – over their strenuous objections – was insufficient.

In any case, Defendants' position as to Rule 23(h)'s notice requirement is misguided. The Committee Note to the 2003 Amendment of Rule 23(h) explains: "In adjudicated class actions, the court may calibrate the notice to avoid undue expense." Here, Class Counsel informed the Court in its Motion for Fees of its intent to "post notice of any hearing scheduled by this Court on this Motion on the website dedicated to this class action, http://www.steigerwaldclassaction.com." Doc. 90 at 2. Shortly after the Court scheduled the March 7, 2019 hearing, Class Counsel posted the notice. *See* http://www.steigerwaldclassaction.com.[3] This method of notice is completely in line with the Committee Notes to Rule 23(h), which allow "calibrat[ing] the notice to avoid undue expense." The notice requirement here is satisfied.

Indeed, courts around the country have held that providing notice in a class notice that a future motion for fees will be filed is enough to satisfy Rule 23(h)(1). In *In re Lawnmower Engine Horsepower Marketing & Sales Practices Litigation*, 733 F. Supp. 2d 997 (E.D. Wis. 2010), some class members "argued that class counsel failed to comply with Federal Rule of Civil Procedure 23(h)(1)" because "[c]lass counsel did not serve notice of its actual motion for

[3] Immediately after the Court reset the hearing, Class Counsel revised the notice on the web to reflect the new April 4 hearing date and time.

attorneys' fees on the class (other than through the court's ECF system, which makes all motions publicly available)." *Id.* at 1012 n.12. The court there found: "class counsel did give notice to the class of its intent to move for attorneys' fees in the amount of one-third of the settlement fund plus $14 million for the value of the warranty relief. Although class counsel has not served the motion itself on class members, I conclude that providing class members with notice of the amount they intended to seek in fees was sufficient." *Id. See also Williams v. SuperShuttle Int'l, Inc.*, 2015 WL 685994, at *2 (N.D. Cal. Feb. 12, 2015) ("Notice of th[e] fee-award motion was [sufficient because it was] provided in the class notice.").

As Defendants concede, notice of the fees motion was clearly provided in the Class Notice in this case. Response at 4 ("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)."). Although that earlier Notice was likely enough to satisfy Rule 23(h)(1), Class Counsel did more, providing near real-time updates to the Class on http://www.steigerwaldclassaction.com. This certainly complies with Rule 23(h)(1)'s "reasonable manner" standard. *See Dick v. Sprint Commc'ns Co. L.P.*, 2014 WL 12726552, at *2 (W.D. Ky. Jan. 30, 2014) ("Notice of this fee-award motion was [sufficient because it was] provided in the class notice and on the website.").

Defendants' position that Class Counsel presented Class Members "the mere opportunity to object at a hearing," Response at 5, is also belied by the facts. A perusal of http://www.steigerwaldclassaction.com shows that Class Counsel posted its Motion for Fees very shortly after it was filed, and apart from that also announced on the website precisely what

percentage fees was being sought, and also informed Class Members that they had the opportunity to object by writing to the Court with any objections or comments they may have. Class Counsel made this clear in the Motion for Fees. Doc. 90 at 2.

Defendants also misrepresent *Greenberg v. Colvin*, 63 F. Supp. 3d 37 (D.D.C. 2014) to which SSA was a party. In response to Class Counsel's statement in the initial Kasdan Declaration that SSA over-estimated the size of the class and the funds awarded thereto in *Greenberg*, Defendants claim that the reason for the smaller class in that case than had been represented to Judge Collyer there was because: "*Greenberg* . . . was an opt-in class, and therefore, there was substantially less certainty about the size of the class." Response at 14 n.12. In fact, as SSA *must* know, *Greenberg*, like this case, was a Rule 23(b) *opt out* class. *See Greenberg*, 63 F. Supp. 3d at 52 ("class counsel may seek fees under § 406(b) so long as notice is provided to absent class members ***and they are given an opportunity to opt out or object***.") (Emphasis added). The reason the numbers in that class were much smaller than estimated was because SSA's estimates were off-base. *See* Second Kasdan Declaration, attached hereto, ¶¶ 3-7.

In any case, SSA's argument that they must continue to rely on the unrepresentative sample of 100 Class Members – out of a Class of over 100,000 – is highly suspect. *See* Response at 11. This assertion is contrary to the attestations made in Defendants' Rule 59(e) Memo, and to the Declaration of Janet Walker supporting it.[4] Ms. Walker asserts early in her Declaration: "SSA has started performing recalculations and will continue to do so until we complete all the Class' recalculations and issue any underpayments that are due." Doc. 96-2 at 2, ¶ 4. Paragraph 72 of Ms. Walker's Declaration states: "We anticipate issuing the first

[4] Ms. Walker is the same declarant who evasively supported Defendants' Motion to Dismiss, by excluding a crucial document from Class representative Stephanie Steigerwald's file. *See* Docs. 18-2; 25-1. Given her history of withholding crucial information in this case, Class Counsel is not inclined to trust the completeness of Ms. Walker's most recent Declaration, Doc. 96-2, which may similarly exclude relevant facts unhelpful to Defendants.

underpayments to eligible Class members in February 2019." *Id.* at 20-21. Defendants similarly state: "SSA has made completion of the class-member workload a top agency priority and worked diligently during the pendency of this litigation to develop and execute a plan for expeditiously making class members whole. The agency is performing the recalculations and expects to begin issuing underpayments in February 2019." Doc. 96-1 at 5-6 (citing Walker Declaration).

Although it would otherwise be customary, Class Counsel has not received a single copied letter from SSA to any of the Class Member awarding past-due benefits. Yet, the Agency claims it has already begun performing the Subtraction Recalculation for more – assumedly many more – Class Members than the 100 originally sampled. SSA's Response fails to inform the Court the results so far or even to rely on the updated results themselves. Instead, Defendants still assert that the only information they have as to what Class Members may be owed is the initial 100 sampled. Response at 11. Defendants' reluctance to provide more information regarding how much, and how many, Class Members are owed money – information they declare they already have – should cause the Court to treat the unrepresentative sample of 100 Class Members provided earlier in this litigation as having suspect value.[5]

B. Defendants' Response Continues to Misrepresent the Law

As to the law, Defendants' citations to and reliance on cases are similarly questionable. Class Counsel has noted in the past that Defendants liberally mis-cite cases for propositions not actually found therein, or quote sparingly from cases to distort their meaning. *See, e.g.*, *supra* at 1 n.2. This trend unfortunately continues in Defendants' latest Response.

[5] It would be in the best interest of all the parties for Defendants to be ordered to provide the number of Subtraction Recalculations performed for Class Members and the average number of past-due benefits owed to those Class Members at least one week prior to the Fee Hearing, now set for April 4, 2019. Class Counsel should be given copies of letters to Class Members proving that they did or did not receive benefits as a result of the Recalculation.

First, Defendants continue to misrepresent *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002). Defendants state: "Class Counsel argue that in *Gisbrecht*, the Supreme Court eliminated the use of the lodestar in determining fees under Section 406(b) . . . This is not what *Gisbrecht* held." Response at 6. In fact, that *is* what *Gisbrecht* held. Justice Ginsburg's opinion in *Gisbrecht* was clear in explaining that the lodestar analysis simply does not apply to 406(b) attorneys' fees:

> [T]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence . . . Fees shifted to the losing party, however, are not at issue here. Unlike 42 U.S.C. § 1988 and EAJA, 42 U.S.C. § 406(b) does not authorize the prevailing party to recover fees from the losing party. Section 406(b) is of another genre . . . .

535 U.S. at 801-02 (citations omitted). *See also Ratliff v. Comm'r of Soc. Sec.*, 2013 WL 633606, at *2 (N.D. Ohio Feb. 20, 2013) ("Nor is plaintiff required to prove that the usual hourly rates of her attorneys . . . are appropriate to the market to establish that those rates are reasonable. *See Gisbrecht*, 533 U.S. at 807–08 (*rejecting lodestar approach*)" (emphasis added).[6]

The "reasonable" fee contemplated by the Sixth Circuit in the seminal case of *Hayes v. Secretary of Health & Human Services*, 923 F.2d 418, *as clarified on rehearing* (Jan. 23, 1991), made no use of a lodestar award. In fact, the term "lodestar" is not found in *Hayes*. That is

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[6] Even if a lodestar calculation is something the Court does wish to entertain (– and it respectfully should not –), "the lodestar calculation alone cannot constitute *the* basis for an 'unreasonable' [406(b)] finding." *Jeter v. Astrue*, 622 F.3d 371, 381 (5th Cir. 2010) (emphasis in original). Further, "an excessively high hourly rate alone does not render an otherwise reasonable fee unreasonable." *See id.*

Rather than a lodestar analysis, the Court should take into greater account other, much more important factors. For example, where a result is "undeniably unique" – as here, given the size of the class and the potential returns to class members – that factor alone can justify a 25% award (let alone the 20% sought here). *See, e.g.*, *In re Rite Aid Corp. Sec. Litigation*, 362 F. Supp. 2d 587, 590, 591-92 (E.D. Pa. 2005) (awarding 25% of Settlement Fund of $126,641,315.00 for a fee in the amount of $31,660,328.75).

Defendants also complain about Kelley Drye's non-local rates. Response at 7, 12 n.9. That too should be ignored. *See Bowman v. Colvin*, 2014 WL 1304914, at *6 (N.D. Ohio 2014) ("the practice of capping an hourly rate based on regional standards is precisely what the Sixth Circuit instructed against") (citing *Hayes*, 923 F.2d at 421). This is especially true given that the Class is a national one. *Cf. McHugh v. Olympia Entm't, Inc.*, 37 Fed. Appx. 730 (6th Cir. 2002) (district courts free to look to national markets and rates to fairly compensate counsel) (citation omitted).

because the Sixth Circuit has long held that a lodestar award does not apply in a Section 406(b) case. The *Hayes* court was clear on this matter, stating: "The statute, 42 U.S.C. § 406(b)(1), establishes a cap on attorney's fees of 25% of the claimant's award, *not a cap on the hourly rate*." *Id.* at 421 (emphasis added).

In fact, *Hayes*'s determination of reasonableness is largely divorced from a particular attorney's particular rates: "a hypothetical hourly rate that is less than twice the standard rate is *per se* reasonable, and a hypothetical hourly rate that is equal to or greater than twice the standard rate *may well be reasonable*." *Id.* at 422 (emphasis added). Defendants' assertion that "a requested fee that is vastly divorced from what the attorneys would regularly charge typically [cannot] be reasonable" is contradicted by the plain language of the Sixth Circuit in *Hayes*.[7]

Hayes provides two non-exclusive factors for the Court to consider in determining whether an hourly rate greater than twice the standard hourly rate is reasonable. They are "[1] a consideration of what proportion of the hours worked constituted attorney time as opposed to clerical or paralegal time and [2] the degree of difficulty of the case." *Id.* at 422. Crucially, in their Response, Defendants *concede* that Class Counsel meet their burden on *both* these counts – the only two enumerated by *Hayes*. *See* Response at 12 ("The Commissioner does not dispute that the case was difficult or that attorneys performed the majority of the work.").

Defendants also misrepresent their prior legal position as to the basis for this Court's jurisdiction. In their Response, Defendants claim that the Court's Order "direct[ing] SSA to recalculate the windfall offset within 90 days . . . is not available under 42 U.S.C. § 405(g)[.]" Response at 14 n.11. Defendants *now* claim: "the Court's sole authority to order such relief is its

[7] Despite Defendants' assertion that *Hayes* is "pre-Gisbrecht," Response at 2, *Hayes* continues to be good law. In fact, Defendants rely on *Hayes* extensively in their Response. *See, e.g.*, Response at 10, 11, 12, 13.

mandamus jurisdiction under 28 U.S.C. § 1651." *Id.* However, in their Memorandum in Support of Motion to Dismiss, *Defendants made precisely the opposite argument*. There, Defendants definitively stated their position that the Court has *no mandamus jurisdiction* to order Defendants to perform the Subtraction Recalculation *because jurisdiction was appropriate under 405(g)*: "This Court lacks mandamus jurisdiction because § 405(g) provides Plaintiff an adequate alternative remedy." Doc. 18-1 at 17 (casing fixed).

Defendants cannot credibly assert that the reason for their late-breaking position change is because the relief the Court provided is different than the relief Class Counsel requested in the Complaint. In fact, the Complaint in this case asked the Court to: "Preliminarily and permanently enjoin Defendants and order them immediately to re-calculate all Windfall Offset calculations for each class member by using the Subtraction Recalculation as required, and thereafter to make all required Retroactive Underpayments, within ninety (90) days following the date of any such order of this Court." Doc. 1 at 21, ¶ (g). This is exactly what the Court did. And Defendants have conceded in their Memorandum in Support of Motion to Dismiss that such relief is appropriate under § 405(g), foreclosing mandamus jurisdiction. *See generally* Doc. 18-1 at 17-18. Indeed, in their Rule 59(e) Memo (at 11), Defendants *still* concede that under 405(g) jurisdiction, "the Court may order other equitable relief or injunctive relief in aid of those action [sic]." On this legal issue, Defendants 180-degree shift should be seen for what it is: pure gamesmanship. Class Counsel will have more to say about this in their response to Defendants' Rule 59(e) Motion, which will be filed within the required deadline.

Finally, SSA reasserts an argument it had made and lost years ago in *Greenberg*, regarding the sufficiency of the contingency-fee agreement between Class representative Stephanie Steigerwald and Class Counsel. As SSA did in *Greenberg*, Defendants here contend

that the Court should ignore the contingency fee agreement. Response at 3.

Judge Collyer's extensive opinion rejecting SSA's parallel argument in the *Greenberg* case illustrates the weakness of Defendants' argument. *See generally* 63 F. Supp. 3d at 50-53. The court there held: "Given that class counsel represents absent class members who choose not to opt-out, allowing class counsel to seek a contingent fee without an explicit signed agreement from each absent class member is not 'unprecedented and unwarranted,' as Defendants suggest." *Id.* at 51. The court also:

> reject[ed] Defendants' related argument that § 406(b) fees are improper because the Court is unable to review individual contingent agreements for reasonableness. In this case, prior to any final approval of the settlement or award of attorney fees, the Court will hold a hearing to determine the reasonableness of the agreement and the fee award. Any concerns about the reasonableness of the fee arrangement between counsel and class members can be raised as objections and considered prior to determining a fee award.

Id. at 52. The same reasoning is true here. Any concerns about the reasonableness of the contingent fee laid out in Class representative Steigerwald's contingency-fee agreement, which she executed on behalf of the Class, may be aired by Class Members either at the hearing or through a letter to the Court. Class Counsel has provided this information to Class Members (including information regarding the time and date of the hearing, which Defendants believed "inappropriate" to request, Doc. 91-1, at 1), on http://www.steigerwaldclassaction.com/.

C. Defendants' Response Fails to Address Key Points

Apart from the misstatements of fact and law contained in Defendants' Response, it is equally (if not more) noteworthy to take into account what that Response fails to address: namely, relief for the more than 100,000 Class Members who, in many cases, have been deprived of the additional monetary benefits past-due to them since 2002, and who would never have received anything but for Class Counsel's efforts in this case.

Nowhere in their Response do Defendants disagree with the Supreme Court's dictate, as

cited by Class Counsel, that "'Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained*.' *Hensley v. Eckerhart*, 461 U.S. 424, 436, (1983) (emphasis added)." Mem. at 13. Nowhere do Defendants take issue with the unassailable fact that: "But for this lawsuit, the Retroactive Underpayments almost certainly would never have been made." *See* Mem. at 1-2 (quoting the Court's finding at Doc. 66 at 10, stating: "[T]he Court finds important that Defendant Commissioner has presented no evidence – and has not even argued – that the agency had any intention of calculating and paying these past-due benefits without litigation."). Defendants also do not quarrel with the similarly incontrovertible point that "but for Class Counsel's perseverance and thoroughness, this case might well have been dismissed early on with Class Members receiving nothing." Mem. at 3. Nowhere do Defendants deny *any* of the numerous risks undertaken by Class Counsel. *See*, *e.g.*, Mem. at 11-12. Those risks, of course, were (and until this very day remain) real.[8]

Instead, in contesting the fee sought by Class Counsel Defendants rely primarily on *ad hominem* attacks on Class Counsel. For example, Defendants assert that the "assessment that [Class Counsel] spent over 3,100 hours on this case" is "unsupported;" that "the hours worked appear to be excessive;" and that the time is not "properly document[ed]." Response at 1, 8, 13.

[8] Defendants write: "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," and claim that there have been "many" class actions brought against SSA since 1979. Response at 15 n.13. Defendants previously made this assertion – albeit citing only five cases between 1996 and 2017 in which back benefits were sought. *See* Doc. 52 at 18-19. Class Counsel has already rebutted this argument. *See* Doc. 54 at 19-20. There should be no question in the Court's mind that the reason SSA is fighting so hard in this case is because they indeed are afraid of more class actions that competent, private law firms will bring. *See* Doc. 50-1 at 17-18. Especially given the way Defendants continue to litigate this case, Defendants' contention that they somehow are acting as "trustees" for Class Members, *see* Response at 1, continues to "ring hollow." *See id.* *See also* Doc. 54 at 19; Doc. 94 at 4, ¶ 16.

The initial Kasdan Declaration attached to the Fees Motion fully supports Class Counsel's work.[9]

Moreover, despite Defendants' charge against Class Counsel of excessive time spent, Defendants do not challenge a single amount of time since the time the Complaint was filed, as detailed by category in the initial Kasdan Declaration.[10] Rather, as a basis of their "excessive" billing argument, Defendants complain that there were no depositions in the case. Response at 8. This argument ignores, at the very least, the following two facts: (1) Class Counsel deliberately chose not to take depositions of government officials when it became apparent that deposition evidence was unnecessary to prevail in this case. This choice was made precisely not to waste their time and "overbill." (2) Class Counsel was forced to seek a protective order to shield Ms. Steigerwald from an obviously unnecessary deposition noticed by Defendants.[11]

Defendants also complain that Class Counsel "have not shown any billing judgment by appearing to charge senior attorney time for all communications with class members." Response at 8 n.4. This cheap shot ignores what Defendants themselves term the "members of this class who are a uniquely vulnerable population," and the "difficult" nature of the case.

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[9] There is no legal requirement to file with the Court the time records that Class Counsel compiled contemporaneously, despite what Defendants seem to argue. In fact, the Sixth Circuit has noted that it is quite "usual" that time records need not be submitted. *See Royzer v. Sec'y of Health and Human Servs.*, 900 F. 2d 981 n.3 (6th Cir. 199) ("The district court, as is usual, never saw Benjamin's actual time records. A recapitulation of the records was attached to the petition for fee approval."). Class Counsel has nothing to hide except its work product. Accordingly, if the Court so orders, Class Counsel will submit all their electronically recorded itemized hours to the Court for *in camera* review.

[10] In his initial Declaration, lead counsel Ira T. Kasdan structured the breakdown of time Class Counsel spent on this case based on the Attorney's Fees Itemization form provided by the Court in its initial Case Management Conference Scheduling Order. *Compare* Doc. 15 at 5 *with* Doc. 90-2 ¶¶ 5-20. Defendants have previously noted this method of breaking down time. *See* Doc. 85 (Motion to Clarify) at 2 n.2. Mr. Kasdan's analysis was based on his review of the contemporaneous electronic time entries (totaling over 100 pages) made by attorneys at Kelley Drye and Roose & Ressler at their respective firms. *See* Second Kasdan Declaration, ¶ 9.

[11] *See* Doc. 68 (Notice of Discovery Dispute) seeking a protective order and noting, *inter alia*, that "Plaintiffs' counsel has repeatedly questioned what legitimate reason Defendants have to depose Ms. Steigerwald at this time. Defendants' counsel has responded with little more than the fact that Ms. Steigerwald is the named Plaintiff in this case." *Id.* at 2.

Response at 5, 12. Those factors precisely dictated the need for senior attorney time to painstakingly explain the case to Class Members who called, and to give guidance as to whether individual putative members were possibly to receive money according to Defendants (*e.g.*, as "Category 1" members) or might want to consider opting out (for whatever reasons including being listed in "Category 2" who, per Defendants would never receive anything).[12]

In the eyes of Defendants, Class Counsel evidently cannot win. Defendants admit that Class Counsel is upholding their fiduciary responsibilities to the large Class by taking time to speak to or correspond with the Class Members – Class Counsel's clients – who reach out with questions or concerns about this case. Yet, Defendants assert that Class Counsel should hand off these responsibilities to individuals who are less knowledgeable about the case. Undoubtedly, had Class Counsel done so, Defendants would criticize Class Counsel for failing to uphold their fiduciary responsibility to the Class. Defendants' criticism of Class Counsel's efforts to be available to the Class Members should be rejected.

On this topic, Defendants pointedly ignore the praise that Class Members have given – and continue to give[13] – in light of the personal attention they received and in light of the victory in this case. Finally, Defendants ignore the fact that for purposes of efficiency, there were no "junior" associates on the case virtually for any purpose at all. *See* Mem. at 8 n.4. Class Counsel take their responsibility to the Members of the Class seriously, and do not intend to "hand off" their ethical obligations to Class Members to individuals who are not intimately involved in this case, as Defendants evidently think would be appropriate.

Finally, and perhaps most egregiously, Defendants question the hours reported mostly by

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[12] All this is not to say that non-attorneys have never responded to inquiries from Class Members. In fact, they have. *See* Second Kasdan Declaration, ¶ 11.

[13] *See, e.g.*, the recent email and letter received by Class Counsel *after* the filing of the Motion for Fees, attached hereto as Exhibit 1. *See also* Doc. 94-2.

now-deceased attorney Kirk Roose leading up to and culminating with the filing of the Complaint. Response at 9. In large measure, the amount of time that Mr. Roose spent on developing the case is the reason that it has turned out to be as successful as it has. Due to that preparation by Roose & Ressler and then supplemented by Kelley Drye, Defendants were handed a well-drafted, well-sourced Complaint. Had they stopped fighting long enough to do their own preparation in litigating this case they surely would never have asserted – and have continued to assert until being proven wrong – that there were likely no more plaintiffs in this case other than Class Representative Stephanie Steigerwald. *See*, *e.g.*, Doc. 41 at 9 ("Plaintiff has identified one individual – herself – since 2002, for whom the SSA failed to perform a WO recalculation to account for representatives' fees. This one instance, which occurred in 2016, is insufficient to justify requiring the agency to produce nationwide data for sixteen years going back to 2002, in order to show that the agency has complied with its obligation to perform WO recalculations to account for representatives' fees.").

Had Defendants researched this issue earlier instead of instinctively litigating at every point, they may have rightly conceded liability and settled the case quickly. The Court should keep this in mind when reviewing Defendants' Rule 59(e) request for an additional two years to fix their wrongs they have committed over the last 17 years.[14]

[14] Despite their protestation that they have "vigorously pursued settlement," Response at 8 n.6, and despite all their losses on dismissal, class certification, summary judgment liability and Section 406(b) fees, Defendants continue to fight at every turn, question the Court's basis for summary judgment and threaten an appeal. Indeed, and especially given the purported facts alleged in the Walker Declaration in support of the Rule 59(e) Motion, Class Counsel finds strange the fact that Defendants have not seen fit to reach out to Class Counsel and make concessions in the hope of reaching finality on the fees issue that Defendants purportedly want. *See* Response at 11 n.8. A public apology to the over 100,000 Class Members who have been wronged, a heartfelt plea to Congress for emergency funding, a streamlined process to get the Subtraction Recalculation done faster than over two years, all coupled with a reasonable offer to agree – with guidance from the Court – on a percentage of 406(b) fees, could certainly expedite

III. CONCLUSION

But for Class Counsel's bringing and pursuing this case, thousands of Class Members would forever have been deprived of past-due monetary benefits they are owed since as long ago as 2002. Under this circumstance, Class Counsel's fee request is by no means a windfall. And, an award of 20% will not "unduly erode" any Class Member's benefits. *See Royzer v. Sec'y of Health & Human Servs.*, 900 F.2d 981, 982 (6th Cir. 1990).[15]

The Court should grant the Motion and award a 20% fee. At a very minimum, Defendants have set *their* baseline at 2%. *See* Response at 15 ("[A] fee award in the range of 2% . . . would appear to adequately compensate Class Counsel and would not be a 'punishment.'"). Class Counsel believes a fee of 20% more reasonably represents an appropriate fee award, given the work performed and the results achieved for the large Class. Ultimately, of course, the decision is left to the Court's discretion.

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justice being accomplished in this case, without the need for further litigation or delay.

[15] Defendants accuse Class Counsel of fostering a "novel proposition" in this regard when the words "unduly erode" are taken straight out of *Royzer*. Defendants have no response to this textual argument other than an unexplained contention that looking at each Class Member's benefits reads *Gisbrecht* out of existence. Response at 13.

Respectfully submitted,

s/Jon H. Ressler, Ohio Bar No. 0068139
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Suite A
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jressler@rooselaw.com

s/ Ira T. Kasdan, admitted *pro hac vice*
s/ Joseph D. Wilson, admitted *pro hac vice*
s/ Bezalel Stern, admitted *pro hac vice*
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
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Attorneys for Plaintiff and the Class

Dated: February 28, 2019

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

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

/s/ *Ira T. Kasdan*

Ira T. Kasdan
Attorney for Plaintiff and the class

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2019, a copy of the foregoing Reply in Support of Motion for Attorneys' 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/ Ira T. Kasdan

Ira T. Kasdan
Attorney for Plaintiff and the class

EXHIBIT 1

From: [redacted]]
Sent: Thursday, February 28, 2019 11:37 AM
To: Kasdan, Ira
Subject: Re: Retroactive social security cases

When I receive any retroactive backpay from them Social Security, I will make sure you get 20%. Its totally fair to me that you get 20% of everyones backpay. How did you all find out who Social security did this too? I'm meaning, how they didnt figure up our money until After the initial lawyer was paid? I'm thankful for lawyers like you all. I'm really struggling for money and way behind on bills. I was shot by my ex and thats why I get disability for past about 7 yrs, even though I was shot over 9 yrs ago. He pretty much blew my arm off. I was leaving due to him being so abusive. I almost died four times on the way to the hospital. I applied for disability, but I think it took close to two years to get anything. I had no income whatsoever, and was still denied medicade, of all things. My poor parents helped me pay for medication etc. It was just aweful. I didn't understand that with no income, I was denied medicade too. Shouldn't they also have to backpay me from the time I first applied? I was shot in Sept 2009? and will social security get in touch with me by mail? Just curious because I'm not sure how it works.

Ty so much for all you've done,
[redacted]

On Sat, Feb 23, 2019, 3:00 AM [redacted]> wrote:

> Wow, thats awesome! I feel like they didnt figure mine right for sure because I was making 19.00 an hour at one time. So they have 90 to days to pay people? Ty lots!
>
> On Fri, Feb 22, 2019, 12:42 AM Kasdan, Ira <IKasdan@kelleydrye.com> wrote:
>
> > Dear [redacted] –
> >
> > I am not sure that I understand your question fully. However, I am attaching the court's January 25, 2019 Opinion. At page 9 the Judge wrote:
> >
> > Thus, the Court joins the Greenberg court in holding that Plaintiffs' counsel are eligible § 406(b) fees, in an amount to be decided at a later date. Plaintiffs' counsel may also be simultaneously eligible for fees under the Equal Access to Justice Act, 42 U.S.C. § 2412(d).[21] The Court does not decide their eligibility under this act at this time. Plaintiffs' counsel may move for fees under this Act later. [fn 21]

III. Conclusion

For the foregoing reasons, the Court GRANTS Plaintiffs' motion for summary judgment. The Court ORDERS Defendant to perform the Subtraction Recalculation for Plaintiffs and pay any past-due benefits to Plaintiffs within ninety days.

Dated: January 25, 2019 s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

[21] See Gisbrecht v. Barnhart, 535 U.S. 789, 795-6 (2002) (explaining that counsel may receive § 406(b) fees and EAJA fees for the same representation).

In addition, we have filed a motion for attorneys' fees with the court and SSA just today opposed that. A copy of our motion is posted at www.steigertwaldclassaction.com and SSA's opposition will be posted there tomorrow.

The website currently also explains generally –

Update – On February 12, 2019, the Court set a Hearing on Class Counsel's Motion for Fees. The Hearing is scheduled for March 7, 2019, at 8:00am, in Courtroom 18A, at the United States District Court for the Northern District of Ohio Carl B. Stokes United States Court House, 801 West Superior Avenue, Cleveland, Ohio 44113-1838. To read the Motion for Fees and supporting documents, please click here.

Update - Class Counsel has filed a Motion requesting an award of attorneys' fees in the amount of twenty percent (20%) of each individual Class Member's past-due benefits paid or due to be paid to each Class Member as a result of this case (including but not limited to heirs, and all others receiving benefits as a result of this case). If you have any comment or objection to Class Counsel's Motion for Fees, please send it, by letter, to:

United States District Court

For the Northern District of Ohio

Clerk of the Court

Re: *Steigerwald v. Berryhill*, Case No. 17-cv-01516-JG

Carl B. Stokes United States Court House

801 West Superior Avenue

Cleveland, Ohio 44113-1838

With a copy to:

Ira T. Kasdan, Class Counsel

Kelley Drye & Warren LLP

3050 K Street NW, Suite 400

Washington, DC 20007

To read the Motion, please click here.

Feel free to call me if you have any further questions.

Thank you.

Ira Kasdan

Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW, Washington, DC 20007
o: (202) 342-8864 | fax: (202) 342-8451
ikasdan@kelleydrye.com
Website – www.kelleydrye.com

From: [redacted]
Sent: Thursday, February 21, 2019 10:57 PM
To: Kasdan, Ira <IKasdan@KelleyDrye.com>
Subject: Retroactive social security cases

CAUTION External Email

I was wondering if the case was won in Jan 2019 on the retroactive lawyer fees. Where they were paid and then our money was calculated. Please let me know. Ty lots, [redacted]

Feb. 13, 2019

Dear Ms. Steigerwald,

Congratulations on a Job well done. I am [redacted] - a member of this class And I appreciate all of the Long, hard, arduous hours it took for you and your Associates to overcome And prevail to get to this Point, Thank you for taking the grand stand. Thank You for Allowing us to Follow the case with you to the end,

Be blessed And Prosperous in all that You do!

[redacted]
Baton Rouge, LA. 70811
Case No. 17-cv-01516-JG
cc: Ira T. Kasdan, Class Counsel

[redacted]
Rouge, LA. 70811

BATON ROUGE LA 707
14 FEB 2019 PM 3 L

Ira T. Kasdan, Class Counsel
Kelley Drye + Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007

FEB 19 2019

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

STEPHANIE LYNN STEIGERWALD, on behalf of herself and the class,	)	
	)	**CASE NO.: 1:17-CV-1516**
Plaintiffs,	)	
	)	**JUDGE JAMES S. GWIN**
v.	)	
	)	**SECOND DECLARATION OF IRA T. KASDAN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 406(b)**
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL.	)	
	)	
Defendants.	)	

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

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

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

3. In my initial Declaration in Support of Class Counsel's Motion for Fees, Doc. 90-2 (the "Initial Declaration"), I stated that, from my personal experience in *Greenberg v.*

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

Colvin, 63 F. Supp. 3d 37 (D.D.C. 2014), a case for which I was the lead class counsel, preliminary data provided by SSA is not always entirely accurate. *See* Initial Declaration, ¶ 32. *See also id.* n.8.

4. In *Greenberg*, SSA had projected that approximately 1,000 class members would be entitled to reimbursements of roughly a little more than $20,000 per person. In fact, only between 400-500 class members were entitled to reimbursements

5. In fact, between 400-500 class members in *Greenberg* were found to be entitled to reimbursements approximating $14,000 per person.

6. My law firm, Kelley Drye, was the class counsel in the *Greenberg* case. Kelley Drye did not earn a premium in the *Greenberg* case. In other words, the amount of time recorded on the case was greater than the amount of fees recovered. In part, this was due to SSA's incorrect estimates in that case, which Judge Collyer relied upon in awarding a 20% 406(b) fee (as opposed to a 25% fee that had been requested). *See generally Greenberg v. Colvin*, 2015 WL 4078042 (D.D.C. 2015).

7. In that case, SSA caveated its estimate of a $22,000,000 payment of past-due benefits to the class by stating that "the estimate of $22 million 'could be more or less off by a few million dollars." *Greenberg*, 2015 WL 4078042, at *8 n.8 (quoting SSA's briefing). In fact, SSA's estimate in that case was over-inflated by between $14,000,000 and $15,000,000.

8. Especially because SSA is currently privy to information about the past-due benefits due to the Class in this case, which they are choosing not to share with Class Counsel or the Court, *see* Reply at 5-6, I am skeptical that the initial sample size of 100 Class Members provided by Defendants earlier in this case (out of a total of over 129,000 Class Members), can necessarily be relied on.

9. In providing the time worked by Class Counsel on this case in my Initial Declaration, I personally reviewed and reasonably categorized the information compiled from the electronic time records retained by Kelley Drye and co-Class Counsel Roose & Ressler totaling over 100 printed pages. Although at the time of my compiling these time-entries for the Initial Declaration Mr. Roose had passed away, his electronic time records were still available. Additionally, I consulted with my co-counsel Mr. Ressler and his paralegal, Diane Shriver, regarding Mr. Roose's electronic time records.[2] Finally, I used my discretion to subtract time from Mr. Roose's time entries for purposes of the time provided to the Court. I did so where in reviewing his time records the entries were questionable in my mind as to whether they related to the litigation and Complaint filed in this instance. As a result I reduced the time recorded by Mr. Roose from the records I received from Roose & Ressler by approximately 181 hours.

10. Should the Court request it, I will provide all relevant Kelley Drye and Roose & Ressler electronic time records to the Court for the Court's *in camera* review.

11. The overwhelming majority of communications with Class Members in this case is by Class Counsel at Kelley Drye: myself, Joseph Wilson and Bezalel Stern. However, my non-attorney assistant at Kelley Drye has also responded to Class Members who have called my office directly. When the Class Member simply asks for an update or has non-substantive questions, my assistant responds by imparting information, including as to the availability of information on www.steigerwaldclassaction.com. If the person calling has a substantive

[2] Defendants question my Initial Declaration as to the time Roose & Ressler spent on this case. *See* Doc. 95 at 9 (stating that I "attempt[] to attest to rates and lump-sum hours spent by attorneys in a separate firm, Roose & Ressler."). In fact, Class Counsel Kelley Drye and Roose & Ressler have developed an intimate working relationship. Moreover, Defendants statement seems not to understand the fact that private attorneys regularly account for their time by way of electronic time records. In preparing for my Initial Declaration, co-counsel provided me with relevant Roose & Ressler electronic time records.

question or asks to speak to a lawyer, then my assistant refers the call to me. My assistant has not recorded any billable time for her efforts described above.

12. From calls, emails and letters that I receive and personally review and/or respond to Class Members, I know that they are very pleased with the outcome of this case so far. *See, e.g.*, Exhibit 1 to the Reply. I also know that they are eager for Defendants to perform all Subtraction Recalculations and pay all past-due benefits owed as quickly as possible. *See id.*

13. To cite one poignant latter example, on January 17, 2019, I spoke to a Class Member who has late-stage cancer. He asked me when he would receive any past-due benefits due. After I explained the nature of the action as of that time, he asked me what his surviving beneficiaries should do to obtain the past-due benefits owed him should any such benefits not be paid before his death. He has since called again after Judgment was rendered in the case and he remains anxious to know when he may receive any money that may be owed to him.

14. I strongly believe it is in the best interest of the Class for Defendants to perform the Subtraction Recalculation and pay all past-due benefits owed in as expeditious a manner as possible.

15. In the month since the Court issued its Opinion and Order granting summary judgment, through February 25, 2019, I and Bezalel Stern at Kelley Drye have spent an additional 157 hours on this case, including in preparing the Motion for Fees, preparing the Reply to Defendants' Opposition thereto, reviewing the Rule 59(e) Motion that Defendants have filed and in communicating directly with Class Members.[3]

[3] This number does not include the time spent by other attorneys and staff on this case, or the time spent by Jon Ressler or Diane Shriver at Roose & Ressler.

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

Executed February 28, 2019 at Washington, District of Columbia.

/s/ Ira T. Kasdan
Ira T. Kasdan