IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EPHRAIM GREENBERG, *individually on behalf of himself, and on behalf of all others similarly situated,* **Plaintiff,** **- versus -** **CAROLYN W. COLVIN, *in her official capacity as Acting Commissioner of the Social Security Administration,* and** **THE SOCIAL SECURITY ADMINISTRATION,** **Defendants.**	**Case 1:13-cv-01837-RMC**

REPLY TO DEFENDANTS' RESPONSE TO CLASS COUNSEL'S
APPLICATION FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 406(b)

Undersigned counsel ("Class Counsel") respectfully submit this Reply to the Response of Defendants to Class Counsel's "Application for Attorneys' Fees Under 42 U.S.C. § 406(b)." (Dkt. 41) (hereinafter "Fee Application").

INTRODUCTION

Class Counsel have applied for an award of attorneys' fees under Section 406(b) in the amount of twenty-five percent (25%) of each payment of past-due benefits that SSA makes as a result of this class action case. A 25% award is warranted in light of, *inter alia*, Class Counsel's successful prosecution of this case, the substantial relief that Defendants are providing as a result of Class Counsel's efforts in this case, and the significant risk that Class Counsel undertook in bringing this class action.

Defendants contend that this Court should not grant an award of 25% of past-due benefits, but that "it is difficult to conclude precisely what the appropriate percent award should

be, other than it should be at the twenty percent or lower level." Dfts.' Resp. to Appl. for Attorney's Fees (Dkt. 42) (hereinafter "Response") at 4-5. Class Counsel respectfully disagree. As discussed in greater detail below, Defendants' position:

(i) disregards the fact that, in taking on this class action, Class Counsel shouldered a substantial risk that they would not obtain anything for their work on this case;

(ii) downplays the risk that Class Counsel still face that the attorneys' fees that they may obtain will be less than estimated by Defendants;

(iii) gives short shrift to the amount of time and resources that Class Counsel will have to expend in this case going forward to, among other things, address questions from Class Members, which is in addition to the substantial time and resources that Class Counsel have spent to date; and

(iv) ignores precedent as well as sound policy reasons for a 25% award recovery.

ARGUMENT

I. DEFENDANTS DISREGARD THE RISK BORNE BY CLASS COUNSEL THAT THEY WOULD NOT GET PAID ANYTHING IN TAKING ON THIS CASE

Defendants argue that this case's background and the amount of time that it took the parties to settle the case demonstrate that there was little risk as to the case's outcome. *See* Resp. at 3-4. Defendants are wrong.

First, the factual background leading to the filing of this case affirmatively evidences – rather than disproves – the risk that Class Counsel shouldered. Notably, Defendants mistakenly persisted in applying the WEP to NII benefits *after* the issuance of the *Berger* decision and *even after* promising to correct the error of their ways. *See* Fee Application at 2-3. The logical conclusion was, therefore, that Defendants would continue to disregard the *Berger* decision and

fight a class action challenging application of the WEP to NII benefits. Class Counsel had no way of predicting that SSA would voluntarily reverse its misguided policy.

Second, and as Class Counsel explained in their Fee Application (at 7, 24), a successful outcome in this case was far from certain because Defendants had ample exhaustion of remedies and statutes of limitation defenses that potentially could have led to dismissal of the Complaint or impeded certification of this case as a class action. Third, there was an added risk that the Department of Justice would not agree to any settlement. *Id.* at 27.

As to Defendants' argument regarding the relatively short time it took to settle the case, it would be paradoxical to lower the award percentage in a case like this where the agency's long-standing policy was conceded to be wrong. Counsel should be *incentivized* to bring cases such as this one where there is a systemic violation of the law that could be quickly remedied to bring relief to long suffering beneficiaries – not penalized as Defendants would have it.

In short, in light of all the risks, and *because* they obtained a relatively fast resolution, Class Counsel are deserving of the maximum available award under Section 406(b).

II. DEFENDANTS DOWNPLAY THE RISK THAT CLASS COUNSEL STILL FACE AS TO WHAT THEY MIGHT GET PAID FOR THEIR WORK IN THIS CASE

Defendants argue that the existence of some "unknowns" that could affect the dollar size of an attorneys' fees award, such as the final number of opt-outs and the number of persons who receive payments as a result of the Settlement Agreement, justifies an attorneys' fee award of less than 25%. *See* Resp. at 2-3. Exactly the opposite is true: Variables like these *militate in favor* of the Court granting an attorneys' fee award at the full 25% rate.

Precisely because many people may opt out and many others may never seek to obtain any relief under the Settlement Agreement, there remains a good chance that, even if the full 25% fee award allowance under the statute is granted, the total dollar amount of fees that Class

Counsel ultimately may receive will be less, and even substantially less, than the agency has (essentially) "guestimated." Additionally, SSA's estimate of people who will not qualify for relief even if they submit a request to have their records reviewed,[1] could be off as well. Finally, because under the terms of the Settlement Agreement potential Class Members have until June 2017 to seek a review of their records, Class Counsel's recovery of all their fees could occur over an extended period of time from the filing of the case in November 2013, thereby diminishing the value of the recovery over time.

In sum, Defendants' "unknowns" argument amounts to an illogical request that the Court punish, rather than reward, Class Counsel for bearing the risk created by these unknowns.

III. CLASS COUNSEL EXPECT TO HAVE TO EXPEND A MEANINGFUL AMOUNT OF TIME AND RESOURCES GOING FORWARD IN THIS CASE

Defendants contend that a downward adjustment on Class Counsel's requested fee is appropriate as "it is unlikely that a substantial amount of attorney's time will need to be expended in the future" because the case has settled. *See* Response at 3. Once again Defendants are misguided: Notwithstanding the settlement, Class Counsel's work remains ongoing.

In the weeks since the Notice of the proposed Settlement Agreement was sent to potential Class Members, Class Counsel have received e-mail inquiries from approximately fifty (50) individuals and phone calls from about twenty (20) others with questions about the Settlement Agreement and the claims process. *See* Ex. 1 hereto (Kasdan Decl.) ¶ 5. Class Counsel have responded to each inquiry personally and have not relied on paralegals, secretaries or an automatic call center to streamline the intake of questions. *Id.* Class Counsel have replied to questions expeditiously after receiving an email or phone call, and this commitment has garnered

[1] For example, persons who receive foreign or other pensions for which the WEP should be appropriately applied by law may be larger than SSA believes, thus decreasing the number of ultimate beneficiaries below the 1,000 estimated by SSA.

statements of appreciation from potential Class Members. *See id.* ¶ 6 (listing some of those statements of appreciation). Class Counsel is committed to continuing to answer questions in this manner prospectively.

The questions posed to Class Counsel have taken more than an insignificant amount of time to address because (especially due to nature of the Class Members) it routinely takes several emails or phone calls to answer them. In addition, Class Counsel have received and submitted to SSA numerous claim review request forms forwarded by claimants, and Class Counsel have followed-up with SSA to confirm receipt of each such forms. That, too, has taken time.

Despite Defendants' assertion that Class Counsel's work on the case is ending, the communications with claimants and the dealings with SSA on various matters related to the Settlement Agreement have taken a meaningful amount of time – and are expected to continue to take a meaningful amount of Class Counsel's time going forward.

Most importantly, even after the Settlement Agreement is finalized, Class Counsel will be auditing SSA's calculations and payment of awards under the Settlement Agreement. *See* Settlement Agreement, Art. 8 (setting out the audit procedures). That audit assuredly will require Class Counsel to expend their own time, and, in addition, may necessitate that Class Counsel engage – at their own expense – a third-party, such as an accounting firm, to help with the audit. In sum, Class Counsel will continue to monitor SSA's claims review process on behalf of Class Members, including SSA's benefits re-calculations, in the months and years ahead.

The foregoing demonstrates that the time and resources that Class Counsel have spent on this case will continue going forward, and this weighs in favoring of granting Class Counsel the attorneys' fees award that they have requested.

IV. PRECEDENT AND SOUND POLICY REASONS SUPPORT CLASS COUNSEL'S REQUEST FOR AN AWARD OF 25%

Defendants do not contend that a 25% award would be unreasonable. Instead, Defendants arbitrarily argue that the appropriate percentage fee award should be "at the twenty percent or lower level." Response at 4-5. By contrast, Class Counsel's position is supported by precedent, in the context of both social security cases and class actions. *See* Fee Application at 29-31. With no authority or case support, Defendants' position must be rejected.

More importantly, Defendants in their Response fail to recognize or address the important policy reasons cited by Class Counsel in the Fees Application. *See* Fees Application at 31-32. As a result of this this lawsuit, SSA will now comply with federal law regarding the WEP and henceforth will properly calculate Class Members' rightful benefits. *Id.* By granting Class Counsel an attorneys' fees award in the maximum percentage allowed under 42 U.S.C. § 406(b), the Court will endorse the importance of holding SSA accountable under the law. Conversely, were it to grant a fees award of less than the 25% authorized by 42 U.S.C. § 406(b), the Court would be sending the wrong message, and could disincentivize other counsel to take on other risky, albeit righteous, cases against SSA

CONCLUSION

For all of the foregoing reasons and those set forth in Class Counsel's Fee Application, that Application should be granted in full and Class Counsel should be awarded attorneys' fees in the amount of twenty five percent (25%) of each payment of past-due benefits made by the Social Security Administration as a result of this case.

Respectfully submitted,

/s/ Ira. T. Kasdan

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Dated: May 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on the 26th day of May, 2015, I caused the foregoing, and all attachments thereto, to be electronically filed using the Court's CM/ECF system, which will then send a notification of such filing (NEF), to the following counsel for Defendants:

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