

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**

**APPLICATION FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 406(b)**

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Dated: April 27, 2015

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Pursuant to 42 U.S.C. § 406(b), and this Court's August 8, 2014 Opinion (Dkt. 19), undersigned counsel ("Class Counsel") respectfully apply to this Court for an award of 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 class action case.

### **INTRODUCTION**

On April 8, 2015, this Court granted the Unopposed Motion for Preliminary Approval of the Parties' Settlement Agreement and for Approval of the Notice Plan ("Unopposed Motion") by Plaintiff Ephraim Greenberg, individually and on behalf of the Settlement Class ("Plaintiffs" or "Class Members"). (Dkt. 40). The Court did so after counsel for both Plaintiffs and Defendants Carolyn Colvin, in her official capacity as Acting Commissioner of the Social Security Administration, and the Social Security Administration (collectively, "Defendants" or "SSA") (Plaintiffs and Defendants collectively referred to herein as the "Parties"), appeared at a hearing before the Court on March 26, 2015, to explain the salient points contained in the Settlement Agreement and to respond to any questions the Court had.

At the March 26<sup>th</sup> hearing, the Court suggested some changes to the Settlement Agreement. The Parties made these changes and resubmitted an amended Settlement Agreement for the Court's preliminary approval. (*See* Dkt. 39). In addition, at the March 26<sup>th</sup> hearing, the Court set the Fairness Hearing date for June 30, 2015, for determining whether to grant final approval of the Settlement Agreement and to consider the attorneys' fees to be awarded to Class Counsel. Class Counsel is now submitting this Application For Attorneys' Fees Under 42 U.S.C. § 406(b) ("Fee Application") well in advance of the Fairness Hearing for the Court's consideration (subject, of course, to any objections that the Court will also take into account

from Class Members).<sup>1</sup>

Under the terms of the Settlement Agreement, Class Members will receive injunctive relief in the form of SSA's agreement to cease its application of the Windfall Elimination Provision ("WEP") to Class Members' Old Age, Survivors, and/or Disability Insurance ("OASDI") Benefits based on Class Members' receipt of Old Age Benefits from the National Insurance Institute of Israel ("NII"). Class members will also receive significant monetary relief in the form of all past-due OASDI Benefits that have been wrongfully withheld since September 3, 2004 as a result of Defendants' misapplication of the WEP based on Class Members' receipt of Old Age Benefits from the NII. *See* Settlement Agreement, Section III, Art. 4.

The Settlement Agreement thus underscores the initiative, research and diligent work of Class Counsel, and the favorable result achieved for Plaintiffs. Within four months following Plaintiffs' filing of the Complaint in November 2013, after negotiations in-person, by teleconference and by e-mail with Defendants' counsel, Class Counsel obtained Defendants' agreement on the merits of Plaintiffs' claims. The Parties reported this achievement to the Court in a filing on April 2, 2014. *See* Joint Status Report (Dkt. 11). The relatively short amount of time in which Class Counsel obtained Defendants' agreement on the merits, as well as the timing of the actual Settlement Agreement which the Parties executed within one year thereafter in March 2015, evidences Class Counsel's efficient, effective and cooperative work with the Defendants, and their in-house and Department of Justice (which was required to sign off on any

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<sup>1</sup> Both Plaintiffs and Defendants are anxious for Class Members to begin receiving their past-due benefits as soon as possible under the terms of the Settlement Agreement. Because Defendants cannot begin paying Class Members their past-due benefits until after the Court approves the Settlement Agreement at the Fairness Hearing and sets the percentage of the attorneys' fees award to be withheld from those benefits, the Parties respectfully urge the Court to grant final approval to the Settlement Agreement and rule on this Fee Application at the Fairness Hearing. *See* Settlement Agreement, Section III, ¶ 8.6.

settlement) counsel, to reach agreement, especially in light of the relatively novel nature of Plaintiffs' claims and the potential hurdles to class certification.

Defendants have estimated that there are approximately 1,100 possible Class Members who will potentially in a collective manner be entitled to reimbursements of roughly \$22 million (or approximately \$20,000 per person).<sup>2</sup> The overall estimated, potential value of this settlement evidences Class Counsel's excellent and meticulous work in advocating for Class Members, especially in a relatively untested area of the law.

In an August 8, 2014 Opinion, this Court held that Class Counsel "may seek a fee award from past-due benefits owed to class members in an amount no greater than twenty-five percent of any individual's payment." (Dkt. 19) (published as *Greenberg v. Colvin*, 2014 WL 3884181, at \*7 (D.D.C. Aug. 8, 2014)) (hereinafter cited as "*Greenberg* at \*\_\_"). Pursuant to the Court's Opinion and 42 U.S.C. § 406(b), and for all the reasons set forth herein, Class Counsel hereby apply for an award of attorneys' fees in the amount of twenty-five percent (25%) of each individual class member's payment (including to spouses, dependents, and all others receiving benefits as a result of this case)<sup>3</sup> of past-due benefits. As discussed herein, the total amount requested as attorneys' fees is reasonable in light of Class Counsel's highly capable prosecution of the Class Members' claims, the substantial relief afforded to Class Members under the terms of the Settlement Agreement and the considerable risks that Class Counsel originally undertook in deciding to file this class action lawsuit.

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<sup>2</sup> This figure is an estimate, and is subject to certain caveats. See note 6, *infra*.

<sup>3</sup> As this Court noted in its August 8, 2014 Opinion, "nothing in the legislative history of § 406(b) restricts the ability of an attorney to collect up to twenty-five percent of only benefits accrued to the claimant, as distinguished from his dependents." *Greenberg*, at \*8, n.7 (citing *Hopkins v. Cohen*, 390 U.S. 530, 534 (1968)).

As of the time of this filing, Class Counsel (including their in-house economists)<sup>4</sup> had spent over 1600 hours on this case. Moreover, under the terms of the Settlement Agreement Class Counsel will be expending a considerable additional amount of time, *inter alia*, related to notifying Class Members of the settlement and their rights, as well as following up with SSA to ensure – through a reasonable audit and/or pursuant to follow up requests by individual Class Members – that Class Members will be receiving the proper amount of money due to them under the Settlement Agreement.

Accordingly, for all the reasons set out below, Class Counsel respectfully requests this Court award fees in the amount of twenty-five percent (25%) of each individual Class Member's payment (including to spouses, dependents, and all others receiving benefits as a result of this case) of past-due benefits, a percentage amount that remains well within the parameters established by courts in this Circuit.

## **BACKGROUND**

### **The Berger Litigation**

In 2001, an SSA beneficiary, Mr. Jerome Berger, filed an administrative appeal of SSA's determination that the WEP applied to reduce his retirement benefits because of his receipt of NII Old Age benefits. Complaint (Dkt. 1) ("Compl.") ¶ 32. After SSA denied his appeal, Ira Kasdan, lead Class Counsel herein, represented Mr. Berger in seeking judicial review of SSA's decision before this court. *Id.* ¶ 33. *See generally Berger v. Barnhart*, Civ. No. 1:04-cv-0431-RMU (D.D.C. 2004). While the suit was pending, SSA agreed that the WEP should not apply to Mr. Berger's benefits, and requested a remand to the agency for a new determination of Mr. Berger's benefits. Accordingly, the Court ordered a remand. *Id.* ¶ 34. On remand to the agency,

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<sup>4</sup> Among other things, Class Counsel's in-house economists helped estimate the total size of the class for purposes of the Class Complaint.



the SSA Appeals Council determined that Mr. Berger's pension did not trigger the WEP because NII Old Age benefits are based solely on residency status and contributions into the NII system. *Id.* ¶ 35. The Council further directed SSA to recalculate Mr. Berger's retirement benefits without regard to his NII Old Age benefits. *Id.* In addition, thereafter, SSA agreed in writing to refrain from applying the WEP to recipients of NII Old Age benefits. *Id.* ¶ 36.

### **The Greenberg Complaint**

In 2013, Kelley Drye – and lead counsel Ira Kasdan in particular – became aware of a number of other persons whose SSA retirement benefits had been subjected to the WEP due to the receipt of NII Old Age benefits, despite the 2004 decision in Mr. Berger's case and SSA's written promise to rectify the situation. Declaration of Ira T. Kasdan ("Kasdan Decl.") ¶¶ 7-8, attached hereto as Exhibit A. Many of these persons had tried, on their own, to administratively appeal SSA's unlawful application of the WEP to their SSA OASDI benefits, but without success. *Id.* ¶ 7. One of these persons was named Plaintiff Ephraim Greenberg. *Id.* ¶ 9. In or about May 2013, Class Counsel began researching law and regulations relating to the WEP, the NII Old Age benefit system and SSA's historical application of the WEP to determine the feasibility of bringing a class action against SSA. *Id.* ¶ 8.

On September 30, 2013, as a result of inquiries made to SSA on his behalf by Senator Ben Cardin's office, Mr. Greenberg received an email from Jane Weisbaum, a representative of the SSA Office of International Operations. Compl. ¶ 49. In that email, Ms. Weisbaum represented that SSA had made a determination that the WEP should not apply to Mr. Greenberg's entire NII Old Age benefits, but that it would still apply to the portion of his benefits corresponding to months in which Mr. Greenberg was working. *Id.* ¶ 50. On October 3, 2013, Mr. Greenberg sent an email to Ms. Weisbaum challenging SSA's determination and explaining that *entitlement* to NII Old Age benefits, and the *amount* of those benefits, have no

relationship to the claimant's work history or prior earnings. *Id.* ¶¶ 52-53. Ms. Weisbaum responded by email that same day, again rejecting Mr. Greenberg's argument and revealing portions of a 2010 internal SSA Operations Bulletin which expressly directed SSA to treat NII Old Age benefits as a "two-tiered" pension – *i.e.*, one that is "based on work/contributions, but may also be partially based on residency." *Id.* ¶¶ 54-55. Specifically, Ms. Weisbaum stated: "It may be that you do not *agree with the law itself*, and that is certainly your right. But we are applying the law correctly." *Id.* ¶ 56. On or about October 12, 2013, SSA sent Mr. Greenberg a formal "Notice of Reconsideration," reiterating Ms. Weisbaum's arguments and concluding: "[W]e have determined that WEP offset does not apply to the part of your Israeli pension that was based only on residency. *However, it does apply to the part that was based on work.*" *Id.* ¶¶ 58, 62 (emphasis added).

On or about October 28, 2013, Class Counsel entered into a contingency fee agreement with Mr. Greenberg, in which Class Counsel agreed to represent Mr. Greenberg in an administrative appeal of SSA's determination, as well as in the present class action suit before this Court. *See* Kasdan Decl. ¶ 10; Attachment A to Plaintiffs' Motion for Determination of Attorneys' Fees, re-attached here as Exhibit B. As part of that fee agreement, Class Counsel and Mr. Greenberg agreed that Class Counsel would attempt to receive, as a contingency fee for Class Counsel's representation of Mr. Greenberg and the Class, "25% (twenty-five percent)" of Mr. Greenberg's and the Class' past-due benefits obtained as part of this case.

Up to point of the filing of the Complaint, Class Counsel spent over a total of 260 hours in researching NII Old Age benefits, examining the possibility of bringing the class action, researching Mr. Greenberg's claims, researching the possible defenses and procedural bars that SSA could raise against Mr. Greenberg, preparing an administrative appeal of SSA's reduction

of Mr. Greenberg's benefits and communicating with SSA on behalf of Mr. Greenberg in an attempt to resolve his claims administratively. Kasdan Decl. ¶ 12. Although there were no legal decisions directly on point (other than the SSA Appeals Council decision in the *Berger* case), Class Counsel believed they had strong arguments as to why the WEP should not apply to Old Age benefits from NII. *Id.* ¶ 11. Nonetheless, Class Counsel felt that SSA had legitimate, potential defenses against a lawsuit, including arguments based on statutes of limitation and exhaustion of remedies. Consequently, Class Counsel drafted the Complaint akin (in part) to a motion for summary judgment by including legal arguments and citations to convince Defendants, *on the face of the Complaint*, that a motion to dismiss would be fruitless. *Id.* ¶ 12. *See* page 24 and note 13, *infra*.

On November 21, 2013, named Plaintiff Ephraim Greenberg, on behalf of himself and all others similarly situated, and through Class Counsel, filed this class action lawsuit against Defendants. Shortly thereafter, lead counsel Mr. Kasdan traveled to Israel to meet with a group of potential class members. Kasdan Decl. ¶ 13. At that meeting, Mr. Kasdan briefed the potential Class members on the case, and received and reviewed documentation from many of them regarding the status of their administrative claims with SSA. *Id.*

#### **Settlement Negotiations with Defendants**

Over the next several months, Class Counsel obtained informal discovery from SSA and other sources, and participated in negotiations with Defendants regarding the merits of the case. Class Counsel also met with Defendants' counsel to persuade SSA not to seek dismissal of the case on procedural grounds and to consent to Plaintiffs proceeding as a class. *Id.* ¶ 15. On April 2, 2014, Plaintiffs filed a joint status report on behalf of the Parties notifying the Court that Defendants had agreed with Plaintiffs' position as set out in the Complaint that SSA should not

apply the WEP to a beneficiary who receives NII Old Age benefits, and that the Parties were prepared to enter into a settlement agreement. Joint Status Report (Dkt. 11) at 2. At the same time, however, the Parties notified the Court that they could not agree on whether Class Counsel should be entitled to attorneys' fees under 42 U.S.C. § 406(b), and requested a briefing schedule on this issue. *Id.* at 2-3.

After briefing by the parties on the matter, this Court ultimately ruled on August 8, 2014 that Class Counsel "may seek a fee award from past-due benefits owed to class members in an amount no greater than twenty-five percent of any individual's payment." *Greenberg* at \*7. The Court also certified the class for settlement purposes at that time, appointed the law firm of Kelley Drye & Warren as Class Counsel, *id.*, at \*6, and ordered the Parties to file their proposed settlement within a month. *See* Aug. 8, 2014 Minute Order.

Class Counsel continued to negotiate with Defendants in working through all the details necessary to finalize a settlement agreement. Despite the diligence of both sides, the arms-length negotiations did not result in a settlement as fast as had been hoped.

Accordingly, on September 8, 2015, the Parties filed a "Consent Motion for Extension of Time to File The Parties' Settlement Agreement," followed on October 8, 2014, by the filing of a "Motion on Partial Consent to Extend Time for the Parties to File the Settlement Agreement," (Dkt. 26). In the October 8<sup>th</sup> filing, counsel for SSA represented that "[t]he attorneys for the [SSA] continue to coordinate with several components of the agency on finalizing the terms of the settlement, which takes time," and that "the 'Notice' to the class members has to be approved by the Office of Management and Budget, which may take several weeks on an expedited basis." Class Counsel represented that "Defendants' counsel have been working diligently and in good faith throughout the settlement process," and that "any delay in reaching a final settlement

agreement is not their fault; neither do we attribute any bad faith whatsoever on the part of their clients”; however, Class Counsel sought “the Court’s guidance to ensure that submission of all the documents necessary for the Court to preliminarily approve the settlement be completed as expeditiously as reasonably possible.”

On October 9, 2014, the Court granted the Parties’ Motion on Partial Consent, ordered the Parties to file their settlement agreement no later than October 31, 2014, and further ordered Defendants submit a status report by the same date regarding (1) the OMB clearance process for the Notice [of Proposed Class Action Settlement] and (2) the progress of finalizing the Instructions to the Class” by that same date. *See* Oct. 9, 2014 Minute Order.

On October 31, 2014, the Parties filed a Joint Status Report, in which they apprised the Court that, *inter alia*, the Parties were still addressing several open issues with regard to the Settlement Agreement, including the finalization of the internal agency “Instructions”<sup>5</sup> to the Class; SSA had obtained OMB approval of Notice of Proposed Class Action Settlement; and DOJ had not yet approved the preliminary Settlement Agreement, but that it “hope[d] to complete its review by November 21, 2014.”

On November 22, 2014, SSA filed a Status Report informing the Court that DOJ had not yet approved the preliminary Settlement Agreement, but that DOJ “hope[d] to complete its review by December 1, 2014.” (Dkt. 32).

On December 1, 2014, Plaintiffs filed a joint Status Report stating that “Defendants’ counsel advised Class Counsel this afternoon of Monday, December 1st that an issue has come up as to the Department of Justice’s approval of the Settlement Agreement. Defendant’s counsel

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<sup>5</sup> The “Instructions” are internal directives to agency personnel as to how the Settlement Agreement should be implemented. The Instructions that were finally negotiated between the Parties is an attachment to the Settlement Agreement.

has told Class Counsel that the issue should take less than a week to be resolved for the Department of Justice to grant approval.” (Dkt. 33).

On December 15, 2014, Plaintiffs filed a Status Report with the Court that noted, *inter alia*: “DOJ has still not approved the Settlement Agreement, notwithstanding Defendants’ prior representation that such approval was coming shortly.” (Dkt. 34). Plaintiffs concluded:

Class Counsel has been working diligently in an effort to resolve all outstanding items with the draft Settlement Agreement. Class Counsel presumes that Defendants and their counsel are doing so as well. At the same time, Class Counsel wishes that Defendants were able to speed up addressing the open issues – particularly, obtaining DOJ’s approval for the draft Settlement Agreement – though Class Counsel recognizes that whatever “fault” is involved is not attributable to Defendants’ counsel.

*Id.*

On December 17, 2014, Defendants filed a Status Report, informing the Court that “the Department of Justice completed its review and approved the settlement of this case.” (Dkt. 35).

On December 31, 2014, the Parties filed a Joint Status Report to the Court reporting that “Class Counsel still awaits either Defendants’ response to Class Counsel’s comments on the Instructions or a final version of the Instructions from Defendants’ counsel incorporating Class Counsel’s comments”; “open issues surrounding Article 8.1 in the Settlement Agreement” still remained; and that “[o]n the morning of December 31st, Defendants’ counsel provided Class Counsel with Defendants’ estimate regarding the amount of past due benefits due to the Class.” (Dkt. 36). SSA had estimated that there are “somewhat more than” 1,000 individuals in the Class, and “the total potential reimbursements would be roughly \$22 million,” or “roughly \$20,000 [per person] prior to deduction of attorneys’ fees.” *See* December 30, 2014 Memorandum (Exhibit C, hereto) at 1.<sup>6</sup> In other words, SSA has estimated that there are

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<sup>6</sup> SSA has noted several caveats to this estimation. For instance: “Actual reimbursements will fall short of potential reimbursements to the extent that (a) individuals do not avail

approximately 1,100 Class Members (*i.e.*, \$22 million/1,100 Class Members = \$20,000 per Class Member).

On January 15, 2015, Defendants filed a Status Report informing the Court that “Defendants have continued their review of Class Counsel’s comments on the Instructions,” and that Defendants “completed their review of the open issues regarding Article 8.1.” (Dkt. 37). Defendants also reported that they provided new draft documentation to Class Counsel relating to Article 8.1 on January 14, 2015, and that Class Counsel had “commenced a dialogue with SSA’s Counsel and gave preliminary comments on the new documentation.” *Id.* Defendants further stated: “The Parties’ respective counsel expect to continue their discussion and negotiation over the new documentation in the coming days to resolve issues surrounding those documents. The Parties continue to work diligently in an effort to resolve all outstanding items with the draft Settlement Agreement.” *Id.*

Rather than burden the Court with further updates, the Parties continued their negotiations and worked towards a final resolution of all the issues which culminated with the execution of the Settlement Agreement in March of 2015.

#### **Some Pertinent Terms of the Settlement Agreement**

On March 18, 2015, the Parties finalized and filed their Settlement Agreement for the Court’s preliminary approval. (Dkt. 38). Thereafter, counsel for the Parties sought and received a hearing before the Court in order to obtain the Court’s thoughts on the contents of the

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themselves of the settlement or (b) publicity efforts fail to reach those class members who cannot readily be identified as such from SSA’s records.” *Id.* at 1, n. 2. SSA also stated that it arrived at the estimated number of Class Members by a series of “extrapolations and calculations [which] relied on several simplifying assumptions,” and that “the assumptions underlying [its] adjustment for additional pensions subject to WEP were, in particular, subject to considerable uncertainty.” SSA concluded that “[t]he estimate of \$22 million reflects [SSA’s] analysis of the available data, supplemented by [its] best judgment,” but that “[t]he liability could be more or less by a few million dollars.” *Id.* at 2.

Settlement Agreement and to have the Court set a date for a Fairness Hearing. The Court meticulously reviewed the Settlement Agreement and at a March 26<sup>th</sup> hearing offered its comments; the Court also set the Fairness Hearing for June 30, 2015. The Parties incorporated the Court's suggestions into an amended Settlement Agreement which they then filed on March 30, 2015. On April 8, 2015, the Court issued an Order preliminarily approving the revised Settlement Agreement.

In some of its most relevant parts, the Settlement Agreement provides the following:

- “Effective on the date of the Final Order or on an earlier date to be agreed upon by accordingly cease all collection efforts on Overpayments, and no longer reduce Social Security Retirement or Disability Benefits on account of a person’s receipt of NII Old Age Benefits.” Settlement Agreement, Section III, ¶ 3.1. Class Counsel is pleased to report that, with Class Counsel’s consent, SSA has already issued an internal “Emergency Message” fulfilling this provision of the Settlement Agreement.

- With respect to each Class Member:

SSA shall calculate and issue a payment to each Class Member for:

(a) the full amount of all reductions, if any, that SSA made to the Class Member’s OASDI Benefits payment(s) since September 3, 2004, through application of the WEP based on his or her receipt of NII Old Age Benefits,

(b) and, the full amount of any collections, if any, that SSA has made for any Overpayment(s) that have been assessed since September 3, 2004, against the Class Member through application of the WEP based on his or her receipt of NII Old Age Benefits,

(c) less, the percentage, if any, of the amounts described in (a) and (b) that the Court awards to Class Counsel as attorney fees.

*Id.* ¶ 4.2.



- SSA will also “rescind all Overpayments that have been assessed since September 3, 2004, against the Class Member through application of the WEP based on his or her receipt of NII Old Age Benefits, and SSA shall cease all collection efforts on those Overpayments.” *Id.* ¶ 4.3.
- The Settlement Agreement requires Class Counsel and Defendants’ counsel to work together to identify all potential Class members, in order to ensure comprehensive notice to the Class. *See generally id.* Art. 2. Specifically, SSA must “send a copy of the Notice of Proposed Class Action Settlement” to each potential Class member identified by Class Counsel and Defendants, “dedicate and maintain webpage(s) on its official website . . . for the purpose of hosting information pertaining to the Lawsuit and the Settlement Agreement,” and “establish and operate, at its own expense, toll-free numbers (access charges may apply to calls made from outside the United States) to which Class Members and other persons (including persons who believe they might be Class Members) can call to ask questions about the Action and Settlement Agreement and to request a Settlement Claim Review.” *Id.* ¶¶ 2.4-2.5, 2.7. In fact, SSA has already mailed the Notices to the list of potential Class Members that it timely provided Class Counsel and it also has established the website, *see generally* [www.ssa.gov/greenberg](http://www.ssa.gov/greenberg), and set up the toll free numbers.
- Class Counsel will “contact Agudath Israel of America and the Association of Americans and Canadians in Israel and request that each entity . . . notify its membership who may be Class Members to visit Greenberg Lawsuit Website or to call the Greenberg Lawsuit Toll-free Numbers about the Lawsuit and the

Settlement Agreement.” *Id.*, ¶ 2.8. Class Counsel has already fulfilled the terms of this provision.<sup>7</sup>

- Class Counsel will also monitor SSA’s claims review process, including SSA’s benefits re-calculations. *See generally id.*, Art. 8. For example, Class Counsel successfully negotiated Defendants’ agreement to include the following provision in the Settlement Agreement: “Upon request by Class Counsel, SSA shall provide the summary earnings information from SSA’s Master Earnings File, and information submitted by the Class Member, used to determine the Class Member’s payment under Section III, Article 4 of this Settlement Agreement, to Class Counsel. Any such documents provided under Section III, Article 8 of this Settlement Agreement, irrespective of a specific designation marking such document as private or confidential, shall remain subject to the September 2, 2014, Protective Order filed in this case. The Parties will act in good faith in ensuring that the number of requests is reasonable, and that the responses to those requests are provided in a reasonable time and manner. Any disagreement concerning the reasonableness of the number of requests is subject to the dispute resolution process in Section III, Article 13 of this Settlement Agreement.” *Id.*, ¶ 8.1.

Throughout this process, Class Counsel has fielded – and going forward, will continue to field – inquiries from Class Members and potential Class Members regarding the Settlement Agreement. Since the Complaint was filed – and even before that time – Class Members and

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<sup>7</sup> Even though not required by the Settlement Agreement, Class Counsel have also drafted an advertisement to be placed in several English-language Israeli newspapers, and have shared this draft with Defendants’ counsel, who have agreed with its contents. Kasdan Decl. ¶ 23.

potential Class Members have contacted Class Counsel to seek advice, discuss the status of the case and inquire as to the terms of the Settlement Agreement. Kasdan Decl. ¶ 14. In turn, Class Counsel have received, answered and researched these inquiries, which has taken additional time and resources apart from the time spent on the lawsuit and Settlement Agreement negotiations themselves. *Id.*

Moreover, the Notice mailed to potential Class Members, and the Notice posted on SSA's website, includes Class Counsel's contact information and will notify potential Class members that they may contact Class Counsel to initiate the "Settlement Claim Review Process" under the Settlement Agreement.<sup>8</sup> Thus, Class Counsel anticipate that they will spend a considerable amount time and resources going forward as they field further inquiries from a number of the approximately 1,100 potential Class Members and oversee the execution of the Settlement Agreement.

### **ARGUMENT**

Class Counsel's requested attorneys' fee award is reasonable and warranted under the facts of this case. Class Counsel's prosecution of this case and negotiation of the Settlement Agreement will result in a substantial sum of money for the Class – both in total and for each Class Member individually. Over the past eighteen months, Class Counsel expended significant time and effort in pursuing Plaintiffs' claims – investigating the relevant facts and law prior to filing the Complaint in November 2013; engaging in a year's worth of arms-length settlement negotiations with Defendants; and handling incoming inquiries from potential Class Members regarding their individual cases. Class Counsel undertook a significant risk in bringing this case

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<sup>8</sup> See, e.g., [http://www.ssa.gov/greenberg/Greenberg\\_Final\\_Detailed%20Notice%20of%20Proposed%20Class%20Action%20Settlement.pdf](http://www.ssa.gov/greenberg/Greenberg_Final_Detailed%20Notice%20of%20Proposed%20Class%20Action%20Settlement.pdf), at 5.

on a contingency fee basis, especially considering the real possibility that Defendants would move to dismiss the Complaint on various potential grounds,<sup>9</sup> the relatively untested nature of the claims herein, and SSA's unfortunate failure to fulfill its earlier promise not to apply the WEP to NII Old Age benefits – which, but for this lawsuit, it may well have continued to do. Moreover, Class Counsel have litigated this case efficiently, working prudently to manage time and expenses. Accordingly, an attorneys' fee award of the full amount permitted under statute – *i.e.*, 25% of each past-due benefit that is paid out by SSA – is reasonable and warranted.

### **I. LEGAL STANDARDS**

In its August 8, 2014 Opinion, the Court held that with respect to the attorneys' fees requested by Class Counsel, "the Court will 'look[] first to the contingent-fee agreement, ... test[] it for reasonableness,' and may 'appropriately reduce[] the attorney's recovery based on the character of the representation and the results the representative achieved.'" *Greenberg* at \*11 (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002)). The Court's Opinion noted: "Gisbrecht is clear that when a contingency fee agreement does exist, relying on the lodestar approach [to determine the reasonableness of attorneys' fees] is inappropriate." *Id.* at \*9, n.9 (citing *Gisbrecht*, 535 U.S. at 806).<sup>10</sup>

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<sup>9</sup> See pp. 23-24, *infra*.

<sup>10</sup> For this reason, Class Counsel's argument herein is not based on a lodestar calculation, and the Court may make its reasonableness determination without any reference to the lodestar in this case. See *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 205 (D.D.C. 2011) ("As an initial matter, the Court rejects Rosen's objection to class counsel's calculation of attorneys' fees without reference to a lodestar. In cases involving common funds (such as this case), the D.C. Circuit has indicated a preference for applying a 'percentage of the fund' method for awarding attorneys' fees."); see also *Buljina v. Astrue*, 828 F. Supp. 2d 109, 112 (D.D.C. 2011) ("*Gisbrecht* concluded that the 'lodestar' analysis is not the primary method of calculating awards of attorney's fees under the Social Security Act"); *Kifafi v. Hilton Hotels Retirement Plan*, 2013 WL 6053754, at \*10 (D.D.C. Nov. 18, 2013) ("The D.C. Circuit does not require district courts to conduct a lodestar cross-check" against attorneys' fees requested as a percentage of the common fund).

Under the reasonableness test, “[i]f the attorney is responsible for delay,” or if the contingency fee would result in a “windfall[]” for counsel, then a reduction in the contingency fee may be appropriate. *Gisbrecht*, 535 U.S. at 808. Though there is no “one composite or comprehensive list of factors” for determining the reasonableness of a contingency fee, there are two general propositions courts follow in Social Security cases: “(1) the authority to determine which contingency fees are ‘reasonable’ is vested in the discretion of the district court; and (2) the district court’s discretion is to be guided by the facts of each particular case.” *Buljina v. Astrue*, 828 F. Supp. 2d 109, 114 (D.D.C. 2011). Outside of the Social Security benefits context, this Court has identified seven factors for evaluating the reasonableness of requested attorneys’ fees:

(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by class members to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by class counsel; and (7) the award in similar cases.

*Radosti v. Envision Emi, LLC*, 760 F. Supp. 2d 73, 78 (D.D.C. 2011) (citing *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 122 (D.D.C. 2007) (in turn citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at \*8 (D.D.C. June 16, 2003))); *Trombley v. Nat’l City Bank*, 826 F. Supp. 2d 179, 204 (D.D.C. 2011) (citing *In re Lorazepam*, 2003 WL 22037741, at \*8). Under all of these factors, Class Counsel’s requested attorneys’ fee is reasonable.

## **II. THE COURT SHOULD AWARD CLASS COUNSEL’S REQUEST FOR A TWENTY-FIVE PERCENT CONTINGENCY FEE**

As noted above, the Court will “look[] first to the contingent-fee agreement” between Plaintiff and Class Counsel before proceeding with the reasonableness inquiry. *Greenberg* at \*11. In this case, Class Counsel entered into a contingency fee agreement with the named Plaintiff, Ephraim Greenberg, which provided, in relevant part:

In the event of a favorable determination, Kelley Drye will attempt to receive the greater of the following from the Government:

1. 25% (twenty-five percent) of your and/or the class' past-due benefits resulting from the Matter, or
2. Such amount as Kelley Drye is able to obtain pursuant to the Equal Access to Justice Act (EAJA)...

Exhibit B at 5.<sup>11</sup> Thus, the Court begins with the 25% attorneys' fee provision in the retainer agreement, and tests it for reasonableness. As discussed below, a 25% fee award is reasonable here.

**A. The Size of the Fund Created and Number of Persons Benefitted Weigh In Favor of A 25% Attorneys' Fee Award**

The result achieved by counsel is an important factor to consider when determining the reasonableness of a fee award. *See Hensley v. Eckhart*, 461 U.S. 424, 436 (1983) (“the most critical factor is the degree of success obtained”). Here, the size of the “fund” created (*i.e.*, as much as approximately \$22 million in past-due benefits) and the number of persons benefitted (*i.e.*, approximately 1,100 Class Members, if not more) by the Settlement Agreement weighs in favor of awarding Class Counsel a 25% attorneys' fee award.

Under this factor, “[c]ourts have regarded exceptional benefits to a large class as grounds for a higher fee award.” *In re Baan Co. Securities Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (finding that a “\$32.5 million settlement fund represents a substantial recovery for [the approximately 17,500] Class members”) (quoting *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at \*11 (D.D.C. July 16, 2001)). In *Radosti*, for instance, the Court approved an attorneys' fee award of approximately 33% where a class of 3446 benefitted from a settlement fund with a total value of \$4,307,500 in vouchers (*i.e.*, resulting in an award of vouchers worth approximately \$1,250 per class member), finding that “the agreement reached by the parties

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<sup>11</sup> Although the contingency agreement contemplated the possibility of EAJA fees, EAJA fees are not part of the Parties' Settlement Agreement. *See* further discussion at note 16, *infra*.

provides substantial benefits to the members of the class due to the amount of funds made available for the vouchers.” 760 F. Supp. 2d at 78. In *Trombley*, the Court approved an attorneys’ fee award of 25% of a settlement fund worth \$12 million, approximately \$8,407,000 of which would be divided up among 187,679 class members. 826 F. Supp. 2d at 204. That is, the *Trombley* settlement resulted in approximately \$44.79 per class member. In *Kifafi v. Hilton Hotels Retirement Plan*, the Court found that the substantial size of the fund (approximately \$140 million) and the number of persons benefitted (approximately 23,000) – *i.e.*, approximately \$6,087 per class member – “weigh[ed] in favor of the requested fee” of 15% of the common fund, or approximately \$21 million. 2013 WL 6053754, at \*7 (D.D.C. 2013).<sup>12</sup>

Here, although the Parties do not know either the final size of the Class, nor the total amount of past-due benefits to be recovered as a result of the settlement of this case, SSA has estimated that there are approximately 1,100 people in the Class, and that there is approximately \$22 million potentially to be recovered by the Class. *See* Exhibit C. Thus, assuming SSA’s estimates are correct, Class Counsel will recover roughly \$20,000 in past-due benefits for each Class member – a per-person sum significantly higher than those obtained by class counsel in *In re Baan Co. Securities Litig.*, *Radosti*, *Trombley*, or *Kifafi*.

Finally, a 25% fee award is especially appropriate in this case because Class Counsel has obtained equitable relief for the Class Members outside of their past-due benefits. Specifically, according to the terms of the Settlement Agreement, Defendants “shall rescind the practice of applying WEP to NII Old Age Benefits, and accordingly cease all collection efforts on

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<sup>12</sup> As the *Kifafi* court noted, an attorneys’ fee award of less than 20% is more common in “mega-fund” cases, 2013 WL 6053754, at \*4 – *i.e.*, those involving a common fund over \$100 million. *Id.*, at \*9 (citing *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at \*6 (D.D.C. July 16, 2001)). When the total award is smaller – as it is here – “[a]wards of between twenty and thirty percent of the common fund have been deemed reasonable in this Circuit.” *Id.* at \*4.

Overpayments, and no longer reduce Social Security Retirement or Disability Benefits on account of a person's receipt of NII Old Age Benefits." Settlement Agreement, Section III, ¶ 3.1. That is, in addition to re-calculating the amount of past-due benefits as a result of SSA's misapplication of the WEP, SSA will also cease application of the WEP to any of the Class' OASDI retirement benefits on a *going forward* basis. This prospective relief will result in a substantial monetary gain for the Class Members (including dependents and others who will receive relief as a result of this case), from which no attorneys' fees will be deducted. Such additional equitable relief weighs in favor of the reasonableness of the requested fees. *See Radosti*, 760 F. Supp. 2d at 78 (reasonableness of 33% fee award was "bolstered by the fact that Class Counsel also obtained equitable relief in the form of the *cy pres* fund.").

**B. Class Counsel's Skill and Efficiency In Litigating this Case Weigh In Favor of A 25% Attorneys' Fee Award**

Class Counsel's skill and efficiency in bringing this case to settlement also weigh in favor of granting the attorneys' fees requested herein. First, Class Counsel have extensive experience handling complex civil actions such as this. As discussed in the Declaration of Ira T. Kasdan submitted in support of Plaintiffs' motion for class certification (Dkt. 13-4) ("First Kasdan Decl."):

Mr. Wilson, Ms. Johnson, and I have focused our respective practices of law in the area of civil litigation. Furthermore, the bulk of the litigations that we have handled have been complex. Put another way, the three of us, combined, have over fifty years of civil litigation experience, including substantial experience in handling complex civil litigations.

First Kasdan Decl. ¶ 40. Furthermore, both lead counsel Mr. Kasdan and co-counsel Joseph Wilson have meaningful experience litigating class actions. *Id.* ¶ 41. In its August 8, 2014 Opinion, the Court noted that Kelley Drye could "fairly and adequately represent the class"



based on the firm's "ample experience" in this area when it appointed Kelley Drye as Class Counsel. *See Greenberg* at \*5.

Under similar circumstances, courts have found in favor of the requested attorneys' fees. *See, e.g., Radosti*, 760 F. Supp. 2d at 78 ("Class Counsel have significant experience in consumer class action litigation, and the Court finds that they performed their duties ably and efficiently"); *Cohen*, 522 F. Supp. 2d at 122 ("Class Counsel are experienced litigators who have served as lead or co-counsel in numerous complex antitrust class actions and other actions benefitting consumers"); *Trombley*, 826 F. Supp. 2d at 204-05 ("As to the skill and efficiency of the attorneys involved and the complexity and duration of litigation, the Court has previously noted that class counsel is experienced in litigating and resolving complex cases, including other class actions against banks involving their overdraft fee policies . . . Hence, this factor weighs in support of an attorneys' fee award of \$3 million.").

Second, Class Counsel have experience handling the specific subject matter in this case, as Kelley Drye – and Mr. Kasdan specifically, as lead counsel – represented the plaintiff in *Berger v. Barnhart*, 1:04-cv-00431-RMU (D.D.C. 2004), successfully challenging the same SSA policy as is at issue in this case. First Kasdan Decl. ¶ 36. *See also Greenberg* at \*6. ("Kelley Drye has a significant history of investigating the claims in this action and handling similar matters. Indeed, Ira Kasdan of Kelley Drye represented the plaintiff in the *Berger* litigation, where he challenged the same SSA policy at issue here."). Payment of attorneys' fees in the requested amount fairly compensates Class Counsel for their initiative in challenging the SSA policy at issue and in developing the expertise to represent affected Class Members. Simply put, Class Counsel's prior work more than a decade ago in successfully resolving the same claim for an individual plaintiff served as the impetus behind this class action lawsuit, and Class Counsel

have been able to achieve significant benefits for the Class based on their knowledge and expertise with the applicable law. Without this effort by Class Counsel, Class Members who will benefit from the Settlement Agreement may otherwise never have seen any recovery.

Third, Class Counsel efficiently brought this matter to a favorable settlement for Class Members, obtaining Defendants' agreement to settle the case in a little over four months after filing the Complaint. (*See* Dkt. 11 at 2) ("Defendants now agree with Plaintiffs' position as set out in the Complaint that SSA should not apply the WEP to a beneficiary who receives a NII Old Age pension. Consequently . . . the parties will now work toward drafting and filing a stipulated class settlement agreement."). Class Counsel also have worked efficiently with Defendants' counsel to agree on various components of the Settlement Agreement, and consistently have pushed for an efficient resolution of outstanding issues between the Parties. *See, e.g.*, Dkt. 26 (Class Counsel sought "the Court's guidance to ensure that submission of all the documents necessary for the Court to preliminarily approve the settlement be completed as expeditiously as reasonably possible"); Dkt. 34 ("Class Counsel wishes that Defendants were able to speed up addressing the open issues – particularly, obtaining DOJ's approval for the draft Settlement Agreement – though Class Counsel recognizes that whatever 'fault' is involved is not attributable to Defendants' counsel."). Within a relatively short twelve-month period since the Parties notified the Court of their agreement to settle this case (*i.e.*, since April 2014), the Parties negotiated, drafted, revised and finalized their written Settlement Agreement, including all the necessary components thereof (*e.g.*, the Instructions regarding how SSA will process Class members' claims; long-form and short-form Notices to Class members; opt-out forms; and settlement claim review request forms). Thus, Class Counsel's skill and efficiency weighs in favor of awarding the fee requested. *See Trombley*, 826 F. Supp. 2d at 204-05.

**C. The Complexity and Duration of this Action  
Weigh In Favor of the Requested Attorneys' Fee Award**

The complexity and duration of this case also weigh in favor of a 25% attorneys' fee award in this case. In *Trombley*, this Court approved an attorneys' fee award of \$3 million (or 25% of the overall settlement fund) where, "[a]lthough the duration of litigation was relatively short (there were no dispositive motions filed), the issues to be resolved in this case were complex" because "the settlement was obtained 'in the face of substantial defenses.'" 826 F. Supp. 2d at 205 (citation omitted). In *Radosti*, the court held: "Class Counsel was able to negotiate the settlement in a relatively short amount of time. 'While there was no lengthy litigation, counsel should not be penalized for achieving an effective and efficient settlement.'" 760 F. Supp. 2d at 78 (quoting *In re Vitamins*, 2001 WL 34312839, at \*11).

"Many social security cases present difficult, complex issues . . ." *Johnson v. Astrue*, 2013 WL 1302243, at \*2 (D.S.C. Mar. 29, 2013). The present case is no exception. First, the case involved an analysis of a foreign benefit system (*i.e.*, Israel's NII Old Age benefits system) and its application to the WEP law and regulations, and a direct challenge to SSA's internal policies; thus, this is not, for example, a "straight-forward social security disability case that did not involve particularly difficult or complex issues." *Hyatt v. Barnhart*, 315 F. 3d 239, 251 (4th Cir. 2002) (citation omitted). Class Counsel navigated these issues to arrive at a Settlement Agreement that establishes binding precedent precluding SSA from applying the WEP to NII Old Age benefits going forward. Second, the class action nature of this case renders it even more complex than a typical individual Social Security case, because Class Members consist of individuals at various stages of administrative appeals (or lack thereof), who have had the WEP applied to their OASDI benefits for varying amounts of time and who are due various sums of past-due benefits. *Cf. Radosti*, 760 F. Supp. 2d at 78 ("The Court also notes that this case has

been fairly complex since its inception, involving multiple actions with a variety of differently-situated plaintiffs, raising difficult choice-of-law questions and threatening the viability of class certification.”).

Indeed, Class Counsel achieved an extremely favorable settlement for Class Members in the face of substantial potential defenses from Defendants. In particular, Defendants had two strong defenses that potentially could have led to dismissal of the Complaint, let alone weighed against the certification of a class action here: First, there was an exhaustion of remedies issue with regard to those claimants (including Mr. Greenberg) who had not pursued their full administrative remedies at the agency level (*i.e.*, a request for reconsideration of their benefits determination, and an appeal to the SSA Appeals Council from a denial of their request for reconsideration). Second, there was a statute of limitations issue with respect to those potential class claimants who failed to challenge the application of WEP within sixty (60) days. Class Counsel’s ability to obtain agreement from SSA on not moving for a dismissal,<sup>13</sup> and then on certifying this case as a class action despite SSA’s potential defenses, resulted in a much more effective and efficient outcome for individual class members, who otherwise would have had to each pursue past-due benefits on their own (with potentially varying outcomes). Accordingly, this factor weighs in favor of the attorneys’ fee award requested.

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<sup>13</sup> Class Counsel drafted the Complaint in anticipation of Defendants’ potential dismissal arguments, and included legal arguments and citations, as though the pleading was a motion for summary judgment, as to why the case should not be dismissed. *See, e.g.*, Compl. ¶¶ 83-91 (discussing why the Court should waive the exhaustion of administrative remedies requirement, and the requirement that an SSA claimant must appeal within 60 days of a final determination by the agency).

**D. Class Counsel’s Considerable Risk of Nonpayment in This Case Weighs In Favor of A 25% Attorneys’ Fee Award**

Class Counsel’s risk of nonpayment in this case was significant, and weighs in favor of a 25% attorneys’ fee award. Class Counsel undertook this action on a wholly contingent basis, assuming significant risk with the possibility of no recovery whatsoever.

This Court consistently has relied on the existence of a contingency fee agreement to establish that class counsel risked nonpayment in a given case. In *Trombley*, for instance, the Court found that the risk of non-payment weighed in favor of a 25% attorneys’ fee where “Class counsel have been litigating this case on a contingency fee basis, and have not yet received any fees or payment for litigating this action . . . [M]oreover, the chance of recovery was by no means assured given the risks . . . including the likelihood of appeal, the difficulty in ascertaining and quantifying damages, and the substantive defenses possessed by the defendants to the charges lodged against them.” 826 F. Supp. 2d at 205. *See also Radosti*, 760 F. Supp. 2d at 78 (“The Court also finds that Class Counsel faced a significant risk of nonpayment, having taken the case on a contingency basis and expending significant resources on investigation before negotiating the settlement.”); *Cohen*, 522 F. Supp. 2d at 123 (“As to the risk of non-payment, Class Counsel handled this case on a purely contingent basis . . . Moreover, in light of the substantial defenses raised by Defendants, ‘[t]he risk of nonpayment through either an award of summary judgment or loss at trial was significant and real in this case’”) (citation omitted); *Kifafi*, 2013 WL 6053754, at \*9 (“The risk of nonpayment in this litigation was high. Class Counsel agreed to represent Mr. Kifafi and the class on a contingency fee basis.”).

Just as in the cases cited above, Class Counsel took this class action case on a contingency fee basis, risking the chance that – in the event of an unfavorable decision from this Court – Class Counsel would receive no compensation for their work at all. Moreover, the

chance of receiving no payment at all was very real at the time Class Counsel agreed to represent Mr. Greenberg and the Class in this action.

First, as discussed above, *see pp. 23-24, supra*, there was no guarantee that Class Counsel would succeed in certifying the Settlement Class. *See Radosti*, 760 F. Supp. 2d at 78 (finding that this factor weighed in favor of attorneys' fee requested in the amount of approximately 33% of common fund where "Class Counsel's recovery was threatened by significant obstacles to class certification.").

Second, Class Counsel had no guarantee of success on the merits at the time the Complaint was filed. Although Class Counsel had a ten-year-old decision from the SSA Appeals Council holding that the WEP should not apply to NII Old Age benefits, *see Compl. ¶ 35* (citing Sep. 3, 2004 SSA Appeals Council Decision, Attachment 3 to Complaint), Class Counsel had no other federal court decision supporting their interpretation of the WEP's application to NII Old Age benefits. Indeed, there is scant – if any – case law interpreting the WEP regulation's applicable language (*i.e.*, "monthly pension(s) . . . based in whole or part on your earnings in employment"). *See* 20 C.F.R. § 404.213(a)(3). Nor were Class Counsel aware of any other class action successfully challenging application of the WEP. *Cf. Kifafi*, 2013 WL 6053754, at \*9 ("When Class Counsel took the case, no other successful class actions had been brought over vesting and backloading violations . . ."). Thus, Class Counsel were left to challenge SSA's interpretation of its own regulation without any controlling federal court authority on which to rely. Additionally, there certainly was no guarantee that the government would, or was even required to, fulfill its written promise to rectify the situation after the *Berger* case.

The Court recognized Class Counsel's significant risk in its August 8, 2014 Opinion: "[W]hen Plaintiff filed suit, it was not a foregone conclusion that SSA would agree to a

settlement. Indeed, SSA previously stated that it had acted erroneously and would recalculate the amount of any past-due benefits accordingly, but did not change its policy, thereby requiring the instant lawsuit.” *Greenberg* at \*11. Moreover, even after SSA agreed to a settlement, Class Counsel’s risk remained as approval from the Department of Justice was uncertain. *See id.* (acknowledging that “there are various potential issues ‘that may prevent a settlement, including the Justice Department’s failure to approve the settlement terms, or even a change in the law’”) (quoting Plaintiffs’ Reply in Support of Plaintiff’s Motion for Determination of Attorneys’ Fees [Dkt. 18] at 4). The Court further stated that “[i]f the Court is ultimately persuaded that the risk of loss to Plaintiff’s counsel was not substantial, it may reduce the fee award accordingly,” citing a string of cases in which courts decreased the requested attorneys’ fee because the contingency fee agreement was not signed until after a favorable result was evident. *Greenberg* at \*12.

Here, by contrast, Class Counsel signed the contingency fee agreement with Mr. Greenberg *after* SSA, through Ms. Weisbaum: (a) repeatedly rejected Mr. Greenberg’s arguments against applying the WEP to NII Old Age benefits (*i.e.*, the same arguments Class Counsel set forth in the Complaint), *see* Compl. ¶¶ 50, 54-56; asserted that Mr. Greenberg was entitled to disagree with the law, but that SSA was “applying the law correctly,” *id.* ¶ 56; and (c) disclosed a written, internal SSA policy that specifically instructed SSA to apply the WEP to NII Old Age benefits. *Id.* ¶¶ 54-55. Moreover, Class Counsel was aware, at the time the contingency agreement was executed, that numerous Class Members had attempted unsuccessfully to challenge SSA’s policy at the administrative level. *See* Kasdan Decl. ¶¶ 7-9. Even after the Complaint was filed, it took about four months before Defendants agreed that their policy of applying the WEP to NII Old Age benefits was incorrect. *See* Apr. 2, 2014 Joint Status Report (Dkt. 11) (“The parties are now pleased to report a partial resolution of the merits as

Defendants now agree with Plaintiffs' position as set out in the Complaint that SSA should not apply the WEP to a beneficiary who receives a NII Old Age pension.”).

Absent class certification or success on the merits, Class Counsel stood a significant risk of nonpayment. This risk existed at the time Class Counsel entered into a contingency fee agreement with Mr. Greenberg, at the time Class Counsel filed the Complaint and even after Defendants initially agreed to a settlement. *See Greenberg* at \*11 (“The Court disagrees that ‘[t]he settlement of this action removes any litigation risk.’”) (quotation omitted). Accordingly, this factor weighs in favor of the attorneys’ fees requested herein.

**E. The Amount of Time Devoted to the Case by Class Counsel Weighs in Favor of a 25% Attorneys’ Fee Award**

The amount of time spent by Class Counsel on this case weighs in favor of granting a 25% attorneys’ fee award. In *Trombley*, this Court found that plaintiff’s counsel’s expenditure of over 1,000 hours on the case, which included “research into [the defendant] and its practices; analyses of potential damages; engaging in formal and informal discovery; the filing of the class action complaint; settlement negotiations; the process of obtaining preliminary approval of the proposed settlement, including responding to objections and revising the settlement agreement,” weighed in favor of the requested 25% attorneys’ fee award. 826 F. Supp. 2d at 206. The *Trombley* Court so held even though “the duration of litigation was relatively short (there were no dispositive motions filed),” *id.* at 205, because – as noted in *Radosti*, “counsel should not be penalized for achieving an effective and efficient settlement.”” *See Radosti*, 760 F. Supp. 2d at 78.

Here, Class Counsel, as of April 27, 2015, have spent over 1600 hours on this matter, time which includes, but is not limited to, researching and investigating Plaintiff’s claims; drafting and filing the Complaint; negotiating with Defendants’ counsel (in person, by



teleconference, and by email); drafting the Motion to Certify the Class; drafting Plaintiff's Motion for Attorneys' Fees and the Reply in support thereof; negotiating and preparing numerous drafts of the Settlement Agreement; editing and reviewing comments by Defendants' counsel on the Settlement Agreement; and drafting/editing exhibits to the Settlement Agreement such as the short and long-form Notices to the Class Members, Opt-Out forms, etc. Kasdan Decl. ¶ 22. Class Counsel have expended significant time and resources investigating, litigating and negotiating the claims in this case, but more importantly, Class Counsel have obtained an extremely favorable settlement in a relatively short amount of time. Both the amount of time spent by Class Counsel on this case, as well as their ability to efficiently resolve the claims herein, weigh in favor of the requested fee.

**F. A 25% Attorneys' Fee Award Is In Line With Fee Awards in Similar Cases**

“In ‘a majority of common fund class action[s],’ [in this Circuit,] attorneys’ fee ‘awards fall between twenty and thirty percent’ of the fund.” *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 39 (D.D.C. 2011) (quoting *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993)). As noted above, *see* note 12, there is an exception for so-called “mega-fund cases” – *i.e.*, those involving a common fund over \$100 million, *see Kifafi*, 2013 WL 6053754, at \*9 – but that exception is inapplicable here, where the total amount of funds to be distributed to the Class Members is estimated to be approximately \$22 million.<sup>14</sup> An award of 25% (and even higher, outside of the Social Security context<sup>15</sup>), is common in cases involving

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<sup>14</sup> Although attorneys’ fees in this case are being awarded pursuant to Section 406(b) rather than the “common fund” theory, common fund cases still are instructive here because, as the Court noted in its August 8 Opinion: “In [common fund] cases, counsel’s fees were not awarded under a fee-shifting regime, but rather out of plaintiffs’ recovery, like § 406(b).” *Greenberg* at \*10, n.10.

<sup>15</sup> Of course, in the Social Security context, attorneys’ fees are capped at 25% by statute. *See* 42 U.S.C. § 406(b).

multi-million dollar funds, both in this Circuit and elsewhere. *See, e.g., Radosti*, 760 F. Supp. 2d at 78 (approving attorneys' fee award of approximately 33% from a settlement fund valued at \$4,307,500); *Trombley*, 826 F. Supp. 2d at 204 (approving attorneys' fee award of 25% of a settlement fund worth \$12 million); *In re Baan Co. Securities Litig.*, 288 F. Supp. 2d at 22 (approving attorneys' fee award of 28% of a settlement fund worth approximately \$32.5 million); *Sullivan v. DB Investments, Inc.*, 667 F. 3d 273, 329 (3d Cir 2011) (approving attorneys' fee award of 25% of \$293 million principal settlement fund); *McDonough v. Toys" R" Us, Inc.*, 834 F. Supp. 2d 329, 340-41 (E.D. Pa. 2011) (approving attorneys' fee award of 33.3% of \$35 million settlement fund). *See also Faught v. American Home Shield Corp.*, 668 F. 3d 1233, 1243 (11th Cir. 2011) (approving award of \$1.5 million fixed fee to plaintiffs' counsel from defendants, plus an award of 25% of the common fund, even where value of common fund was not yet known).

Moreover, outside of the class action context, courts routinely award attorneys' fees of 25% under 42 U.S.C. § 406(b) for representation of individuals in Social Security actions. *See, e.g., Buljina*, 828 F. Supp. 2d at 114-15 (approving 25% fee award of past-due benefit amount, or \$21,609.25 in fees); *Smith v. Colvin*, 2014 WL 1413630, at \*1 (N.D.N.Y. Apr. 11, 2014) (approving 25% attorneys' fee award of past-due benefit amount, or \$19,865.25 in fees); *Gordon v. Astrue*, 2012 WL 3308891, at \*1-2 (E.D. Cal. Aug. 13, 2012) (approving 25% total attorneys' fee award of past-due benefit amount, or \$15,525.76 in fees); *Kazanjian v. Astrue*, 2011 WL 2847439, at \*1, 3 (E.D.N.Y. July 15, 2011) (approving 25% fee award of past-due benefit amount, or \$48,064.00 [less \$3456.25 previously received under the EAJA, for a total of \$44,607.75]).<sup>16</sup> In this case, where SSA estimates that there are approximately 1,100 class

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<sup>16</sup> Plaintiffs have not applied for EAJA fees in this case, namely in part because the Parties

members, each due approximately \$20,000 in past due benefits,<sup>17</sup> a 25% attorneys' fee award to Class Counsel representing approximately \$5,000 of each Class Member's benefits falls well within Section 406(b) precedent.<sup>18</sup>

Accordingly, this factor also weighs in favor of Class Counsel's fee request.

**G. Public Policy Considerations Weigh In Favor of the Attorneys' Fee Award Requested Here**

Finally, public policy reasons support a 25% attorneys' fee award in this case. Encouraging skilled and capable counsel to bring risky but advantageous class actions, such as this one, benefits society in general. *See In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at \*10 (S.D. Cal. Aug. 30, 1999) (“[W]ithout able lawyers handling these matters not only do some of them go unprosecuted, but . . . you don't get the highest recovery.”).

Here, Class Counsel brought this case on behalf of a class of retired, older individuals, most of whom live abroad and have limited capacity to challenge SSA's policies. Some of these individuals tried, on their own and without any success, to challenge SSA's application of the WEP to their OASDI benefits based solely on their receipt of NII Old Age benefits; other Class Members likely are unaware that SSA has wrongfully withheld their OASDI benefits at all. Through their efforts, Class Counsel obtained SSA's agreement to pay back OASDI benefits

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could not agree upon the amount of time that would be compensable under EAJA. Class Counsel believe that a 25% attorneys' fee award is appropriate and reasonable here, even without EAJA fees that may be remitted to the Settlement Class, for the reasons discussed herein.

<sup>17</sup> Of course, the amount of past-due benefits owed by SSA to any particular class member will vary. But because SSA is unable to verify precisely how many Class members there are, or how much each of those individuals is due, until SSA actually begins processing claims, Class Counsel must rely on these estimates for purposes of the present Application.

<sup>18</sup> Accordingly, because a 25% attorneys' fee award to Class Counsel would result in a relatively modest award from each *individual* Class member's past-due benefits, there would not be a “windfall” to Class Counsel. *See Buljina*, 828 F. Supp. 2d at 113 (quoting *Gisbrecht*, 553 U.S. at 807).

wrongfully withheld to all Class Members. Perhaps more importantly, Class Counsel have secured an agency-wide policy change that will bring SSA's WEP policy, as it applies to NII Old Age benefits, in line with federal statute and regulations – to the benefit of not only Class Members (including their dependents, spouses, etc.), but also to *future* generations of retirees. Not only does this result serve an important public policy of ensuring that federal agencies' practices and procedures comply with the law, but it also ensures that future retirees – many of whom are on a limited income and depend heavily on their OASDI benefits – will receive the *full* amount of OASDI benefits to which they are entitled. Thus, the public policy considerations served by this lawsuit weigh in favor of awarding Class Counsel the attorneys' fees requested herein.

### **CONCLUSION**

For all the reasons set forth above, undersigned counsel respectfully request that the Court grant this Motion and award twenty five percent (25%) of each payment of past-due benefits made by SSA as a result of this case as attorneys' fees.

### **RESERVATION OF RIGHTS**

Class Members have until June 22, 2015 to file objections to the fees applied for by Class Counsel. *See* Settlement Agreement at Section III, ¶ 7.4 and the Detailed Notice of Proposed Class Action Settlement, located at [http://www.ssa.gov/greenberg/Greenberg\\_Final\\_Detailed%20Notice%20of%20Proposed%20Class%20Action%20Settlement.pdf](http://www.ssa.gov/greenberg/Greenberg_Final_Detailed%20Notice%20of%20Proposed%20Class%20Action%20Settlement.pdf), at 6. They also have the right to appear at the Fairness Hearing for that purpose. To the extent there are any objections to this Fee Application by Class members or Defendants, and/or to the extent that Court has questions or concerns about this Fee Application in advance of the Fairness Hearing, Class Counsel reserve the right to respond in writing as appropriate and/or to present argument at the Fairness Hearing.

Respectfully submitted,

/s/ Ira. T. Kasdan

Ira T. Kasdan, Esq. (D.C. Bar # 292474)  
Joseph D. Wilson, Esq. (D.C. Bar # 466652)  
Elizabeth C. Johnson (D.C. Bar # 987429)  
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[ejohnson@kelleydrye.com](mailto:ejohnson@kelleydrye.com)

*Counsel for Plaintiff*

Dated: April 27, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 27th day of April, 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:

FRED E. HAYNES (DC Bar #165654)  
Assistant United States Attorney  
555 Fourth Street, N.W., Room E-4110  
Washington, D.C. 20530  
(202) 252.2550

*Counsel for Defendants*

/s/ Ira T. Kasdan

Ira T. Kasdan, Esq. (D.C. Bar # 292474)  
KELLEY DRYE & WARREN LLP  
3050 K Street, N.W., Suite 400  
Washington, D.C. 20007  
(202) 342-8400 (phone)  
(202) 342-8451 (facsimile)  
Email: [ikasdan@kelleydrye.com](mailto:ikasdan@kelleydrye.com)

*Counsel for Plaintiff*

EXHIBIT A

**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**

**DECLARATION OF IRA T. KASDAN IN SUPPORT  
OF PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 406(b)**

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 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.

2. I make this declaration based on my personal knowledge. I submit this declaration in support of Class Counsel’s Application for Attorneys’ Fees under 42 U.S.C. § 406(b) (the “Application”).

3. The Application seeks compensation for Class Counsel in the amount twenty-five percent (25%) of each payment of past-due benefits made by the Social Security Administration as a result of this class action case and arising out of the settlement between Plaintiffs and

Defendants Carolyn Colvin, in her official capacity as Acting Commissioner of the Social Security Administration, and the Social Security Administration (collectively, “Defendants” or “SSA”). Through the Application, Class Counsel seek reasonable attorneys’ fees for the time expended investigating and prosecuting the claims in this action, as well as for the favorable result achieved.

4. In short, Class Counsel have demonstrated a strong commitment and devoted the necessary resources to effectively litigate this case. Class Counsel remain committed to doing what is necessary to implement the Settlement Agreement reached with SSA and expect to commit additional time and resources as the matter proceeds to final approval.

**Class Counsel’s Investigation and Prosecution of this Case.**

5. The law firm of Kelley Drye – and I, specifically – previously served as counsel to Jerome Berger, who brought suit in this Court in a case captioned *Berger v. Barnhart*, Civ No. 04-0431 (D.D.C. 2004). In the *Berger* matter, the Plaintiff claimed that SSA improperly applied the Windfall Elimination Provision (“WEP”) to his Old Age, Survivors, and/or Disability Insurance (“OASDI”) benefits payments based on his receipt of Old Age benefits from the National Insurance Institute of Israel (“NII”). After SSA requested – and the Court agreed to – a remand to the agency, the SSA Appeals Council determined that NII Old Age benefits did not trigger the WEP.

6. I am aware that in 2005, Martin H. Gerry, Deputy Commissioner for Disability and Income Stability Programs for SSA, wrote a letter to Mr. Mordechai Biser, Associate General Counsel for Agudath Israel of America, in which Mr. Gerry re-affirmed that the WEP should not apply to NII Old Age benefits, adding: “We agree that other beneficiaries who are also receiving the NII pension may have had the WEP erroneously applied and that we should



recalculate the current benefit amounts of all such beneficiaries and pay any back benefits due. We have begun the process of identifying such persons in our files, and we will take appropriate actions to correct any misapplication of the WEP.”

7. Throughout the past few years however, and through 2013, I was contacted by a number of SSA beneficiaries who informed me that SSA was continuing to apply the WEP to their OASDI benefits because of their receipt of NII Old Age benefits. Many of these individuals had tried to administratively appeal SSA’s application of the WEP to their OASDI benefits, but were not successful in doing so.

8. In or about May 2013, I received an inquiry from a family member of an SSA beneficiary regarding SSA’s continued practice of applying the WEP to OASDI benefits due to the beneficiary’s receipt of NII Old Age benefits. As a consequence, my colleagues and I began anew to research the law and regulations relating to the WEP; the NII Old Age benefit system; and SSA’s historical application of the WEP.

9. One of the individuals who contacted me was Mr. Ephraim Greenberg, the named plaintiff in this class action. Through Mr. Greenberg’s correspondence with SSA, I learned that SSA had implemented a written, internal policy of treating NII Old Age benefits as a “two-tiered pension” that were (at least partially) subject to the WEP.

10. On or about October 28, 2013, Kelley Drye signed a contingency fee agreement with Mr. Greenberg in which Kelley Drye agreed to represent Mr. Greenberg in an administrative appeal of SSA’s determination that the WEP applied to his OASDI benefits (to preserve his individual rights), as well as in the present class action suit before this Court.

11. Beginning in October 2013, Class Counsel researched Mr. Greenberg’s claims, prepared an administrative appeal of SSA’s reduction of Mr. Greenberg’s benefits, and

communicated with SSA on behalf of Mr. Greenberg in an attempt to resolve his claim. Although there were no legal decisions directly on point (other than the SSA Appeals Council decision in the *Berger* case), we believed we had strong arguments as to why the WEP should not apply to Old Age benefits from NII.

12. Leading up to Class Counsel's filing of the Complaint, Class Counsel, including in-house economists, spent over 260 hours in researching NII Old Age benefits, examining the possibility of bringing the class action, researching Mr. Greenberg's claims, researching the possible defenses and procedural bars that SSA could raise against Mr. Greenberg, preparing an administrative appeal of SSA's reduction of Mr. Greenberg's benefits and communicating with SSA on behalf of Mr. Greenberg in an attempt to resolve his claims administratively. Consequently, Class Counsel prepared the Class Action Complaint filed in this case, which included researching and projecting the total number of affected Class Members, examining the complex provisions relating to the payment of benefits under the Social Security Act, and developing legal arguments and citations to convince Defendants (as in a motion for summary judgment), on the face of the Complaint, that a motion to dismiss would be fruitless.

13. As part of Class Counsel's due diligence in investigating the possibility of bringing this matter as a class action, I traveled to Israel in November 2013 and met with other potential Class Members. I met personally with approximately one dozen persons in Israel who have claims against SSA similar to Mr. Greenberg's claims. During this meeting, I heard about Defendants' practice of misapplying the WEP to reduce the individuals' OASDI benefits based on their receipt of NII Old Age benefits, and briefed the individuals on the class action case. I also collected and reviewed documentation from many of these individuals regarding their individual claims against SSA.

14. In addition to the in-person meetings in Israel, my colleagues and I have communicated by telephone and email – both prior to the filing of the Complaint and since that time – with numerous potential Class Members who also received a reduction in their NII Old Age Benefits based on SSA’s misapplication of WEP. These persons have contacted us to seek advice regarding their individual claims, discuss the status of this case, and inquire as to the terms of the Settlement Agreement. We have researched and answered these inquiries as we have received them, which has taken additional time and resources apart from the time spent on the lawsuit and Settlement Agreement negotiations themselves.

15. Shortly after filing the Class Action Complaint, and based on the information received from Class Members relating to the alleged misapplication of the WEP, Class Counsel entered into settlement negotiations with Defendants. These negotiations included the merits of the case and whether SSA would consent to Plaintiffs proceeding as a class action or would move to dismiss the action. Class Counsel also engaged in informal discovery with SSA and others, with which SSA cooperated.

16. The negotiations surrounding the ultimate Settlement Agreement took several months, and the parties requested several extensions for filing the Settlement Agreement in order to resolve various outstanding issues.

17. In negotiating these final outstanding issues in the draft Settlement Agreement, Class Counsel engaged in numerous communications with Defendants, including by written letters, e-mail, telephone conversations, and meet-and-confers. Throughout these arms-length negotiations, Defendants’ counsel worked professionally and cooperatively with Class Counsel, while zealously advocating for SSA’s position.

**The Settlement Agreement**

18. Class Counsel's extensive negotiations with Defendants culminated in the execution of a Settlement Agreement on March 30, 2015 which was preliminarily approved by the Court on April 8, 2015.

19. The Settlement Agreement provides the following significant benefits to Class Members: (1) a substantial monetary benefit of approximately \$22 million (or, about \$20,000 each for an estimated 1,100 Class Members) based on SSA's good faith estimate, as represented to Class Counsel and to the Court, for the total of reimbursements of all overpayments assessed since September 3, 2004 through application of the WEP and (2) a commitment by the agency to rescind the practice of applying WEP to NII Old Age Benefits in the future – a practice that will enhance Class Members' future OASDI benefits payments.

20. The Settlement Agreement mandates that Class Counsel and Defendants shall work together to identify all potential Class Members, and that Class Counsel specifically will contact organizations such as Agudath Israel of America and the Association of Americans and Canadians in Israel to request that each entity notify its membership of the lawsuit, the relevant website, and the toll-free phone number. We anticipate that these efforts will require Class Counsel to expend significant additional time and resources on this case.

21. In addition to the notice program established by SSA, Class Counsel will continue to field inquiries from Class Members and potential Class Members regarding the settlement.

22. As of April 27, 2015 Class Counsel have spent over 1600 hours on this matter, time which includes, but is not limited to, researching and investigating Plaintiff's claims; drafting and filing the Complaint; negotiating with Defendants' counsel (in person, by teleconference, and by email); drafting the Motion to Certify the Class; drafting Plaintiff's Motion for Attorneys' Fees and the Reply in support thereof; negotiating and preparing

numerous drafts of the Settlement Agreement; editing and reviewing comments by Defendants’ counsel on the Settlement Agreement; and drafting/editing exhibits to the Settlement Agreement such as the short and long-form Notices to the Class Members, Opt-Out forms, etc.

23. Class Counsel do not seek an expenses award at this time, although Class Counsel have incurred a number of expenses in pursuing this litigation. These expenses have included costs for, among other things: travel, electronic research and long-distance telephone calls. In addition, and even though not required by the Settlement Agreement, Class Counsel will be placing an ad in several English-language Israeli newspapers to publicize the Settlement Agreement. Class Counsel have shared the draft of the ad with Defendants’ counsel, who have agreed with its contents. Class Counsel reserves its right to request expenses at a later time.

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

Executed April 27, 2015 at Washington, District of Columbia.

/s/ Ira T. Kasdan  
Ira T. Kasdan

October 28, 2013

**Via Email (PDF)**

Rabbi Ephraim Greenberg  
12 Arielli St., Apt. 2  
Beitar Illit, Israel 90500

**Re: Engagement Letter Agreement**

Dear Rabbi Greenberg:

We are very pleased that you have agreed to have Kelley Drye & Warren LLP ("Kelley Drye"; "we"; "our"; etc.) serve as your legal counsel to represent you as a named plaintiff in a class action lawsuit against the Social Security Administration ("SSA") in federal district court. Consistent with the rules of professional responsibility that govern all attorneys, it is our firm's practice to advise clients in writing of the terms and conditions under which we undertake a representation.

**Scope of Representation.** You have engaged us to represent you in connection with a class action lawsuit against the SSA on behalf of U.S. citizens Israeli residents who have had the Windfall Elimination Provision improperly applied to reduce their SSA retirement benefits (the "Matter").<sup>1</sup> This letter and the enclosed Terms and Conditions apply to our representation of you in the Matter, and will also apply to any additional legal services that we agree to provide in the future for which a separate written agreement is not executed.

<sup>1</sup> Included in the "Matter" is our assistance to you in drafting/editing for you an administrative appeal to an Administrative Law Judge within SSA regarding the adverse WEP decision that you recently received from SSA. At this time, the "Matter" does not include any obligation for us to appear as your formal counsel of record in this administrative appeal, though we may do so in the future, with your consent, depending upon the posture of the lawsuit in court that we will be filing on your and the class' behalf.



KELLEY DRYE & WARREN LLP

Rabbi Ephraim Greenberg  
October 28, 2013  
Page Two

After completion of this engagement, changes may occur in the applicable laws or regulations that may have an impact upon your future rights and liabilities. Unless you specifically engage us to provide additional services after the completion of this engagement, Kelley Drye does not undertake to advise you with respect to future legal developments relating to the subject matter of this engagement.

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

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

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

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

*EB*

**Cooperation of Client.** For us to provide these services effectively, you agree to disclose fully and accurately all pertinent facts and keep us apprised of all developments relating to the issues involved in this Matter. You further agree otherwise to cooperate fully with us and to be available to attend such meetings, conferences, hearings, and other proceedings as is appropriate.

Please review this agreement carefully, and if you have any questions concerning the foregoing or our Terms and Conditions, do not hesitate to contact me. You also should, of course, feel free to obtain independent legal advice about any of the provisions of this agreement about which you have questions. If this agreement is acceptable to you, please acknowledge that you have reviewed it, understand it, and desire to retain us on the basis of the terms of this letter and the attached Terms and Conditions by signing and delivering to us the enclosed copy, at which point we shall commence our representation of you. We recommend that you keep a copy of this letter and our Terms and Conditions in your file.

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

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

Very truly yours,



Ira T. Kasdan

THE ABOVE AGREEMENT IS  
ACCEPTED AND AGREED TO:

  
\_\_\_\_\_  
Ephraim Greenberg

10/30/13  
\_\_\_\_\_  
Date



KELLEY DRYE & WARREN LLP

**TERMS AND CONDITIONS OF ENGAGEMENT**

1. **Termination:** You have the right to terminate our representation by written notice at any time, subject to court approval if required in a pending proceeding. We have the same right to terminate our engagement for any reason, consistent with the applicable rules of professional responsibility, if you insist upon taking action that we consider repugnant or with which we have a fundamental disagreement, or any other conduct that we deem to be inconsistent with the rules of professional conduct or any other law. If required, we will provide notice to or obtain permission from a court or other tribunal prior to terminating our representation. Unless previously terminated, Kelley Drye's representation of you will terminate upon delivery of our final statement (so marked) for services rendered on the engagement, notwithstanding that we may be listed as your agent to receive any kind of notice or that we may retain possession of certain of your files relating to this engagement.

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

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

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

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

6. **Attorney-Client Privilege for Internal Communications.** We believe that it is in our clients' interest that Kelley Drye have the protection of the attorney-client privilege (which restricts disclosure of confidential communications between attorney and client in connection with internal reviews of our work for you. You agree that (a) any communication between any of our lawyers or staff and a lawyer at Kelley Drye who may be reviewing their work for compliance with professional conduct rules will be protected by the Firm's own



KELLEY DRYE & WARREN LLP

attorney-client privilege, and (b) any such review will not constitute a conflict between our interests and your interests.

7. **Scope of Representation.** We will be representing you as the sole named plaintiff in a class action lawsuit. You understand and agree that this action will be brought on behalf of you, individually, and also as a representative of a proposed class of similarly situated claimants, against the SSA. That means that if the class is certified, you will be required to act in the best interests of the class as a whole. You recognize that even though you are acting as a class representative, you are not entitled to, and will not receive, any separate payment for acting in this capacity.

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

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

8. **Costs.** You will not be responsible for advancing any costs, nor be responsible to pay any expenses or fees in connection with the Matter, provided that if it becomes necessary for you to travel to the United States in connection with this Matter, you shall be responsible for all costs associated with that travel.

9. **Attorneys' Fees: Contingency Fee Agreement.** Kelley Drye will represent you in the Matter on a contingency fee basis. In this case, you will have no obligation to pay Kelley Drye for its professional legal services in its representation of you in the Matter. Our fees (including any premium) would be recovered only from the Government and only if you and/or the class (if one is certified) receive a favorable determination from the court and/or the SSA, by settlement or by judgment. A "favorable determination" means a determination that WEP should not have been applied to your (and/or the class') SSA benefits because of the receipt of an NII pension. In the event of a favorable determination, Kelley Drye will attempt to receive the greater of the following from the Government:

1. 25% (twenty-five percent) of your and/or the class' past-due benefits resulting from the Matter, or
2. Such amount as Kelley Drye is able to obtain pursuant to the Equal Access to Justice Act (EAJA). Fees paid pursuant to the EAJA are paid by the U.S. government or agency thereof



**KELLEY DRYE & WARREN LLP**

— not out of the claimant's past-due benefits. You agree that any fees recovered under this agreement will be payable to Kelley Drye.

In the event the lawsuit is not successful, neither you nor any member of a class, individually or collectively, will have any obligation of any nature to reimburse any costs or fees.





EXHIBIT C

## SOCIAL SECURITY

### MEMORANDUM

**Date:** December 30, 2014

**Refer To:** TCB

**To:** Aparna Srinivasan  
Etzion Brand  
Office of the General Counsel

**From:** Bert Kestenbaum  
Mary Kemp  
Jacqueline Walsh  
Office of the Chief Actuary

**Subject:** Rough Estimate of Underpayments Due the Class Described in *Greenberg v. Colvin*—  
**INFORMATION**

Under the proposed settlement in *Greenberg v. Colvin*, the Social Security Administration (SSA) would reimburse benefit reductions made since September 3, 2004, under the Windfall Elimination Provision (WEP), due to the receipt of “old-age” pension payments from the National Insurance Institute (NII) of Israel. The Court has asked SSA for a rough estimate of the total potential reimbursements.

We estimate that somewhat more than one thousand beneficiaries would be due a reimbursement under the proposed settlement and that the average reimbursement, for beneficiaries having no additional pension<sup>1</sup> subject to WEP, would be roughly \$20,000 prior to deduction of attorneys’ fees. We estimate that the total potential reimbursements would be roughly \$22 million.<sup>2</sup> Further details and caveats follow.

SSA’s Office of Retirement and Survivors Insurance Systems produced two lists of social security numbers for beneficiaries who were subject to WEP with pension type “other”, i.e., neither Federal government nor State government but rather local government or foreign. One is a comprehensive list of such persons who were beneficiaries at any time since September 2004 and have ever had an Israeli address on file in SSA’s beneficiary records. The other is a *partial*

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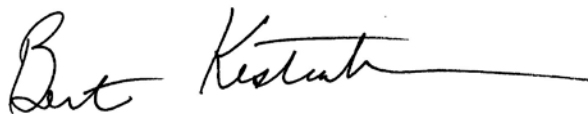
<sup>1</sup> For months in which a beneficiary had, in addition to the NII pension, another pension subject to WEP, the amount of the reduction under WEP would typically not depend on whether the NII pension was treated as being subject to WEP or not.

<sup>2</sup> Actual reimbursements will fall short of potential reimbursements to the extent that (a) individuals do not avail themselves of the settlement or (b) publicity efforts fail to reach those class members who cannot readily be identified as such from SSA’s records.

list of the names of the pension payer(s) for beneficiaries subject to WEP type “other”—*partial* because SSA does not always capture these pension-payer names.

We linked the two lists together to determine, for beneficiaries appearing on both lists, the number who could be identified as having received an “old-age” pension from NII. Then we extrapolated to beneficiaries not appearing on the first list (due to their having no Israeli address on file with SSA) and/or not appearing on the second list (due to its incompleteness). We also calculated an average-per-family WEP reduction from September 2004 to the present.

These extrapolations and calculations relied on several simplifying assumptions; the assumptions underlying our adjustment for additional pensions subject to WEP were, in particular, subject to considerable uncertainty. The estimate of \$22 million reflects our analysis of the available data, supplemented by our best judgment. The liability could be more or less by a few million dollars.

A handwritten signature in black ink that reads "Bert Kestenbaum". The signature is fluid and cursive, with a long horizontal line extending to the right.

Bert Kestenbaum, A.S.A.  
Supervisory Actuary

A handwritten signature in black ink that reads "Mary Kemp". The signature is cursive and somewhat compact.

Mary Kemp  
Mathematical Statistician

A handwritten signature in black ink that reads "Jacqueline Walsh". The signature is cursive and elegant.

Jacqueline Walsh  
Actuary

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

**[PROPOSED] ORDER**  
**GRANTING PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES**

Upon consideration of Plaintiffs' Application for Attorneys' Fees under 42 U.S.C. § 406(b) ("Application"), any response thereto, and after a Fairness Hearing, and having found cause to grant the same, it is hereby **ORDERED**:

Plaintiffs' Application is **GRANTED**; and

Class Counsel are entitled to 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 class action case.

**SO ORDERED.**

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Hon. Rosemary M. Collyer  
Judge, U.S. District Court for the  
District of Columbia