**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

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| L.N.P., *on his own behalf and on behalf of his dependent children P.D.P. and L.D.P. and on behalf of all others similarly situated*, | ) | |
| Plaintiff, | ) | Case No. 1:24cv1196 (MSN/IDD) |
| v. | ) | |
| FRANK BISIGNANO, Commissioner of Social Security Administration, *et al.*, | ) | |
| Defendants. | ) | |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES**

Pursuant to Local Rule 7, Defendants hereby respond to Plaintiff's Motion for Attorneys' Fees (Dkt. 185). Plaintiff seeks a fee award pursuant to 42 U.S.C. § 406(b) of 10% or 20% of past due benefits paid to class members "and other auxiliary beneficiaries"[1] as a result of this Court's judgment. For the reasons set forth below, Defendants respectfully request that the Court deny the motion or, in the alternative, hold the motion in abeyance until all appeals are exhausted.

**PROCEDURAL BACKGROUND**

On April 27, 2026, the Court issued its Final Judgment Order in favor of Plaintiff (Dkt. 176-77). In addition to holding that the Social Security Administration had misapplied the Social Security Act when determining reductions of child auxiliary benefits, the Court determined that "Plaintiffs' counsel are eligible for an attorneys' fee award under 42 U.S.C. § 406(b) based on a percentage of past-due benefits paid to the class," and that "the matter shall be stayed pending

[1] The reference to other auxiliaries is improper as these individuals are not party to this matter and are not represented by Plaintiffs' counsel. *See* Argument Section III(A), *infra*.

appeal to the Fourth Circuit Court of Appeals" (Dkt. 176 ¶¶ 4, 7). Paragraph 4 of the Final Judgment further provided that Plaintiffs' fee application "shall be submitted within fourteen (14) days of entry of this Judgment" (Dkt. 176 at 4). On April 29, 2026, with the consent of both parties, the Court amended the Clerk's judgment to correct a typographical error (Dkt. 180). On May 8, 2026, Plaintiffs filed a motion seeking clarification of the Final Judgment Order with respect to the intended scope of the class entitled to relief (Dkt. 182). Defendants opposed this motion (Dkt. 190). On May 11, 2026, Plaintiffs filed the instant motion for attorneys' fees pursuant to 42 U.S.C. § 406(b) (Dkt. 184). The Court issued its Amended Final Judgment Order on May 22, 2026; the Amended Judgment was entered by the Clerk the same day (Dkt. 192-93). While the Amended Final Judgment Order contained substantive changes from the original Final Judgment Order, Paragraphs 4 and 7, concerning the stay and attorneys' fees, remained the same (Dkt. 192). Both parties are considering appealing portions of the Amended Final Judgment Order (hereinafter referred to as the Final Judgment Order).

## ARGUMENT

### I. PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES IS PREMATURE.

#### A. The Court Should Not Grant Plantiff's Motion Because the Matter is Stayed Pending Appeal.

Plaintiff's request for attorneys' fees is premature. The Final Judgment Order requires the agency to recalculate class members' benefits. However, mindful that the agency may appeal the Court's determination that it misapplied the Social Security Act when it originally calculated these benefits, the Court stayed enforcement of its order. This stay applies not just to recalculation of benefits but to the entire matter: "This matter shall be stayed pending appeal to the Fourth Circuit of Appeals" (Dkt. 192 at 3 ¶ 7). Given that the Court stayed the entire matter, the portions of the judgment and order that address attorneys' fees are stayed as well. After all, the determination of

eligibility and the proper amount of attorneys' fees is just as much a part of "this matter" as the determination that the agency misapplied the Social Security Act and must recalculate benefits for class members. Nothing in the text of the Final Judgment Order indicates otherwise.

There is no other logical way to interpret Paragraph 7. There is no indication that the Court intended the stay to apply to one instruction given in the Final Judgment Order (Defendants' obligation to recalculate benefits and issue back payments) but not another (Plaintiff's obligation to move for attorneys' fees within 14 days of the judgment). The Court found "that the factors weigh in favor of permitting the government to appeal this matter to the Fourth Circuit and that it would be irreparable harm and tremendously difficult if the government were to start to disburse this money before the Fourth Circuit had weighed in" (Dkt. 162 at 4:5-10). These concerns apply with equal force to the disbursement of attorneys' fees. The stay of "the matter" defers the parties' obligations to perform the actions mandated by the final judgment order, until such time – if it ever were to come to pass – that the Court of Appeals confirms that the order was appropriate. Interpreting the Final Judgment otherwise would lead to two odd results. First, because attorneys' fees under Section 406(b) are calculated as a percentage of back benefits paid, Plaintiffs' attorneys would receive fees based on a hypothetical amount not yet paid to each class member. Plaintiffs' attorneys would receive this money while payment of the benefit on which that fee is predicated is stayed pending conclusion of the parties' appeals. Second, because the agency would have to disburse attorneys' fees while appeals are pending, should the agency prevail on appeal, the agency would have to claw those fees back from Plaintiff's counsel. Staying any determination of attorneys' fees until conclusion of the parties' appeals avoids both problematic results.

**B. Given the Potential Appeal, Plaintiffs Are Not Prevailing Parties From Whose Payments Attorneys' Fees Could be Allocated**

Under the Social Security Act, the court may allow a "reasonable fee" for attorneys or other representatives who have obtained a "judgment favorable to" the claimant after representing the claimant in federal court. 42 U.S.C. § 406(b)(1)(a). At the heart of the Court's stay is its recognition that its Final Judgment Order requiring the recalculation of class members' benefits could potentially be modified or reversed by the Fourth Circuit:

> I don't find that there's a strong likelihood of [the Government] prevailing [on appeal], but this is an issue of first impression; it's a legal issue; and I'm not so confident of my own abilities as to conclude that it's impossible to imagine the Fourth Circuit may disagree. So it's not a reflection of any doubt in my mind, but it's a recognition that reasonable minds can differ, and the Fourth Circuit should have an opportunity to weigh in on whether to affirm that decision or not.

Dkt. 162 at 4:10-17. Even Plaintiff has acknowledged that they "still fac[e] risk in ultimately prevailing and obtaining fees given SSA's apparent insistence on appealing to the Fourth Circuit" (Dkt. 185 at 31). Given these circumstances, awarding attorneys' fees to Plaintiff's counsel at this time would place an unnecessary burden on the agency, as well as on claimants, in the event that the Final Judgment is not affirmed by the Fourth Circuit and the recovery of overpayments were to become necessary.

**C. A Decision on Plaintiff's Application for Section 406(b) Fees Would Be Premature**

Even without consideration of the Court's stay, governing law as well as Plaintiff's filing itself require that a *decision* on that fee petition should await the conclusion of the litigation. An attorney who successfully represents a claimant by obtaining a favorable judgment may be awarded fees in an amount "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. § 406(b)(1)(A). The statute

is thus tied to both a court's "judgment" and the subsequent administrative determination that past benefits are due. It "conditions the right to fees on the award of benefits and caps those fees at twenty-five percent of the awarded benefits." *Walker v. Astrue,* 593 F.3d 274, 278 (3d Cir. 2010). And thus, a court "cannot determine whether a right to a fee award exists and what the value of that fee award should be until the administrative remand proceeding is complete[.]" *Id.*

Here, the Court has entered a judgment that, should it stand following appeal, would result in payment of past-due benefits—but the amount of such past-due benefits is far from certain. It is Defendants' understanding that Plaintiff himself is considering an appeal of the definition and size of the certified class. Plaintiff estimates past-due benefits in the range of $62.7 million (a number derived from his interpretation of the class certified by the district court) to $420 million (a number derived from the larger class he may seek on appeal). This is a wide gulf based on mere estimates. As the Court has recognized, confirming or disputing the premise of Plaintiff's estimates would consume agency resources that would be better directed toward other workloads, including evaluating applications for benefits and making payments, until the outcome of an appeal is known. *See* Dkt. 162 at 4 (in granting the stay, the Court acknowledged that "it would be irreparable harm and tremendously difficult if the government were to start to disburse this money before the Fourth Circuit had weighed in"). And of course, assuming the Court's judgment stands, any benefit awards would themselves change once the appeal has concluded based simply on the passage of time. Disposition of the fee petition should be denied or, in the alternative, held in abeyance pending conclusion of any appeal and any further administrative proceedings that may be appropriate in light of the Court of Appeals' decision.

## II. THE LEGAL STANDARD FOR SECTION 406(b) AWARDS: PLAINTIFF'S INCOMPLETE AND SPECULATIVE REQUEST FOR ATTORNEYS' FEES DOES NOT ALLOW FOR ADEQUATE EVALUATION BY THE COURT

Section 206(b) of the Social Security Act (Act), 42 U.S.C. § 406(b), allows for recovery of attorneys' fees for representing individuals claiming entitlement to Social Security benefits. 42 U.S.C. § 406. The provision states the following, in relevant part:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). Thus, a district court may award section 406(b) attorneys' fees when the claimant is awarded past-due benefits.

It is for the Court to decide if the request for attorneys' fees for services provided before the court under 42 U.S.C. § 406(b) is reasonable under the law. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 809 (2002). The Commissioner has no direct financial stake in the outcome but instead "plays a part in the fee determination resembling that of a trustee for the claimants." *Gisbrecht*, 535 U.S. at 798 n.6. Consistent with that duty, the Commissioner identifies the following issues for the Court to consider in determining the reasonableness of any fees awarded.

### A. Types of Services for Which Section 406(b) Fees May Be Awarded

The statute is clear: federal courts may award attorneys' fees only for time spent representing clients before the court, not for time spent at the administrative level. *See* 42 U.S.C. § 406(b)(1)(A); *Gisbrecht*, 535 U.S. at 794. Further, fees are awarded when "a court renders a judgment favorable to a claimant under this title." *See* 42 U.S.C. § 406(b)(1)(A).

Here, counsel represented having spent over five years and 4,800 hours on this matter, including time and expenses from either May 2019 or May 2021 (before Plaintiff filed the

complaint in the instant matter) to May 2026[2] (Dkt. 185 at 5, 24; Dkt. 185-2 ¶ 8). However, section 406(b) does not permit fees for time spent on the prior case that resulted in a dismissal due to L.N.P.'s failure to exhaust his administrative remedies, nor does it permit fees for time spent at the administrative level. *See Lane v. Comm'r of Soc. Sec.*, 646 F. App'x 392, 394 (6th Cir. 2016) (refusing to award section 406(b) fees for time spent on a court case that did not result in a favorable judgment and was "unrelated to the merits or ultimate outcome of the claims"); *Mudd v. Barnhart*, 418 F.3d 424, 428-29 (4th Cir. 2005) (section 406(b) fee compensation is limited to court-related work; the time spent and work performed by counsel when the case was pending at the agency level was proper for the court to consider only to the extent relevant to the reasonableness inquiry).

Additionally, the Commissioner questions whether Plaintiff's counsel seek fees from past-due benefits beyond those awarded to class members in the current action. Counsel request "10% or 20% of the past-due benefits to be awarded to class members *and other auxiliaries* by the Social Security Administration" (Dkt. 184 at 1 (emphasis added)); *see also* Dkt. 185-1 at 6). This request extends beyond the class members directly represented in this action and is not permitted. Indeed, class counsel's motion acknowledges that the engagement letter with the named plaintiffs and the

[2] Plaintiff's counsel did not begin representing L.N.P. and his children until May 2021 and filed the complaint in district court in the first case on July 12, 2021. Dkt. 185-4; *L.N.P. v. Kijakazi*, No. 1:21-cv-00820 (E.D. Va.). On November 24, 2021, the district court granted SSA's motion to dismiss based on Plaintiff's failure to exhaust the administrative review process, dismissed Plaintiff's complaint without prejudice to the ability to re-file after exhausting the administrative processes, and denied Plaintiff's motion for class certification as moot. *L.N.P. v. Kijakazi*, No. 1:21-cv-00820, 2021 WL 7185231 (E.D. Va. Nov. 24, 2021). Following Plaintiff's appeal, on April 7, 2023, the Fourth Circuit Court of Appeals affirmed the district court's order dismissing the case. *L.N.P. v. Kijakazi*, 64 F.4th 577 (4th Cir. 2023). The claim then proceeded through the administrative appeals process before Plaintiff filed a new complaint in this Court on July 9, 2024. Dkt. 185 at 6-7.

class notice approved by the Court reflect only that class counsel will seek a fee from "past-due benefits paid *to class members*." *See* Dkt. 185-2 ¶¶ 6, 7 (emphasis added).

**B. The Reasonableness Determination Regarding Section 406(b) Fees**

The statute permits an attorney to receive a "reasonable fee" not exceeding 25% of past-due benefits. 42 U.S.C. § 406(b)(1)(A). Plaintiff's counsel seek an award of 10% or 20% of past-due benefits, referencing an engagement letter with the named plaintiffs and class notices indicating an intent to seek a fee of up to 25% of past-due benefits (*See* Dkt. 184 at 1; Dkt. 185-2 at ¶¶ 4, 6, 7). The Supreme Court has made clear that section 406(b) does not guarantee the maximum fee; rather, it sets a ceiling and courts must independently review fee requests and any contingency fee agreements to determine reasonableness. *Gisbrecht*, 535 U.S. at 793, 807-09.

In conducting the reasonableness inquiry, the Supreme Court identified the following relevant factors: the character of the representation and results achieved, whether counsel was responsible for delay, and whether the benefits were large in comparison to the time expended by counsel (the windfall factor). *Id.* at 807-08. Noting there is no "definitive list of factors," the Fourth Circuit identified additional factors relevant to the reasonableness inquiry: "the overall complexity of the case, the lawyering skills necessary to handle it effectively, the risks involved, and the significance of the result achieved in district court." *Mudd v. Barnhart*, 418 F.3d 424, 428 (4th Cir. 2005). "In examining a fee request, judges should constantly remind themselves that, while the lawyer is entitled to reasonable compensation for services rendered in the judicial proceeding, these benefits are provided for the support and maintenance of the claimant and not for the enrichment of members of the bar." *Glen A. v. Bisignano*, 2026 WL 753526, at *1 (S.D.W. Va. Mar. 17, 2026) (citing *Redden v. Celebrezze*, 370 F.2d 373, 376 (4th Cir. 1966)).

In evaluating the reasonableness of the fee requested under section 406(b), the Commissioner respectfully highlights the following issues.

***1. Section 406(b) Fees in the Class Action Context Are Rare and Still Must Meet* Gisbrecht*'s Reasonableness Standard***

As Plaintiff's counsel note, section 406(b) fees have been awarded in the class action context on only two occasions. *See* Dkt. 185 at 17 (citing *Steigerwald v. Comm'r of Soc. Sec.*, 48 F.4th 632 (6th Cir. 2022); *Greenberg v. Colvin,* 63 F. Supp. 3d 37 (D.D.C. 2014)). Plaintiff's counsel argue that this case should be treated like a common fund class action (Dkt. 185 at 19-21). However, the rationale behind awarding fees and the court's reasonableness analysis differs in section 406(b) cases. "The legislative history of § 406(b) indicates that the provision was motivated by two main concerns: first, that attorneys were collecting 'inordinately large fees' in social security cases; and second, that attorneys should be able to collect reasonable fees." *Greenberg*, 63 F. Supp. 3d at 49 (citing *Gisbrecht*, 535 U.S. at 805). *Gisbrecht*'s reasonableness standard remains the guiding decision on section 406(b) fees in Social Security appeals. *See Steigerwald v. Saul*, 2020 WL 6485107, at *5-6 (N.D. Ohio Nov. 4, 2020), *aff'd*, 48 F.4th 632 (6th Cir. 2022); *Greenberg v. Colvin*, 2015 WL 4078042, at *6-10 (D.D.C. July 1, 2015).

***2. The Effective Hourly Rate Remains Relevant to the Reasonableness of the Fee***

Although courts may not rely exclusively on the lodestar method (awarding fees based on the reasonable hours spent on a case and a reasonable hourly rate) to determine reasonableness of a section 406(b) fee request, the Supreme Court instructed in *Gisbrecht* that "[i]f the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is … in order" to disallow windfalls. *Gisbrecht*, 535 U.S. at 792-93, 802, 808; *see also Jeter v. Astrue*, 622 F.3d 371, 381 (5th Cir. 2010) ("district court may consider the lodestar method in determining the reasonableness of a § 406(b) fee, but the lodestar calculation alone cannot constitute *the* basis

for an 'unreasonable' finding"). Thus, "the court may require the claimant's attorney to submit…as an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases." *Gisbrecht*, 535 U.S. at 808. In the *Greenberg* and *Steigerwald* class actions, the courts considered the effective hourly rate as a part of the reasonableness determination. *See Steigerwald*, 2020 WL 6485107, at *5-6; *Greenberg*, 2015 WL 4078042, at *7-8.

Courts in the Fourth Circuit routinely consider the effective hourly rate as a factor in the section 406(b) fee reasonableness determination. *See, e.g.*, *Glen v. Bisignano*, 2026 WL 753526, at *2 (S.D.W. Va. Mar. 17, 2026) (determining that "an effective rate of $1,180.82 falls within the range that courts have found reasonable in Social Security contingency matters"); *Paul N. v. Bisignano*, 2025 WL 2627423, at *2 (S.D.W. Va. Sept. 11, 2025) (finding that an effective hourly rate of $908.62 fell within the reasonable range for the Fourth Circuit); *Robert C. v. Comm'r of Soc. Sec.*, 2025 WL 1262930, at *2-3 (D. Md. May 1, 2025) (finding that an effective hourly rate of $1,625.99 would constitute a windfall and reducing the fee to $1,050 per hour); *Connie S. v. Comm'r of Soc. Sec. Admin.*, 2025 WL 1150722, at *2 (W.D. Va. Apr. 17, 2025) (finding that an effective hourly rate of $652.17 fell within the reasonable range for the Fourth Circuit).

Presently, there are several issues that make it difficult for the Court to consider the effective hourly rate in a reasonableness analysis. First, Plaintiff's percentage request and argument on reasonableness are based on estimates of calculations that have yet to be performed for a class whose size, time period, and even existence is still subject to further litigation. Second, Plaintiff's counsel have not provided a record of the hours spent representing the Plaintiff and the class in the ***present*** court action (as opposed to the ***prior unsuccessful*** court action) or a statement

of the normal hourly billable rate for noncontingent-fee cases. Further, Plaintiff's counsel have not provided documentation to support the attorney time spent on this case, such as contemporaneous and itemized billing records. Courts often require and review itemized time records in determining the reasonableness of section 406(b) fee requests. *See e.g., Paul N.*, 2025 WL 2627423, at *2; *Connie S.,* 2025 WL 1150722, at *2.

Plaintiff's counsel assert that they have provided $4,184,597.00 in "billable value" to the class. Assuming, for illustrative purposes only, the accuracy of counsel's assertion of 4,800 hours of work over five years, this suggests that counsel would have billed at the rate of $871.79 per hour if the case were a non-contingency case (Dkt. 185-2 ¶ 8). But this does not line up with the payout that Counsel's fee request actually seeks. For the "smaller class" as defined in Plaintiff's motion (25,000), counsel seek 20% of the estimated $62.7 million in past due benefits, or $12.54 million in fees, resulting in an effective hourly rate of $2,612.50 – nearly 3 times the $871.79 hourly rate counsel claim to have provided. After subtracting the hours spent on administrative proceedings and the dismissed court case, that effective hourly rate will only increase. This very well may result in a windfall to counsel; it will be the Court's task to determine whether this is the case. In the event the Court finds a windfall, the Court should deny the requested fee award as unreasonable.

In summary, Courts must ensure that any fee awarded under section 406(b) is reasonable and proportionate to the work performed and the results achieved. Plaintiff's counsel's request is based on uncertain estimates, lacks a clear breakdown of compensable hours, and is not supported by itemized billing records. For these reasons, the Court should defer ruling on Plaintiff's motion until the uncertainties are resolved. The Court may then carefully scrutinize the requested fee and,

if necessary, reduce the fee award to align with the statutory requirement of reasonableness and the interests of the class members.

**CONCLUSION**

For all the foregoing reasons, Defendants respectfully request that Plaintiff's request for attorneys' fees be denied or, in the alternative, held in abeyance pending resolution of any appeal.

Dated: June 2, 2026

Respectfully submitted,

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