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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ANTONIA M.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI,<sup>2</sup>

Defendant.

Case No.: 20cv75-MSB

**ORDER GRANTING MOTION FOR  
ATTORNEYS' FEES PURSUANT TO  
42 U.S.C. § 406(b) [ECF NO. 23]**

On November 10, 2021, Plaintiff's counsel filed a "Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b)." (ECF No. 23.) For the reasons stated below, the Court **GRANTS** the motion.

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<sup>1</sup> Pursuant to Civil Local Rule 7.1(e)(6)(b), "[o]pinions by the Court in [Social Security cases under 42 U.S.C. § 405(g)] will refer to any non-government parties by using only their first name and last initial."

<sup>2</sup> On July 9, 2021, Kilolo Kijakazi became the Commissioner of the Social Security Administration. See <https://www.ssa.gov/agency/commissioner.html> (last visited on December 6, 2021). The Court substitutes Kilolo Kijakazi for her predecessor, Andrew Saul, as the defendant in this action. See Fed. R. Civ. P. 25(d); 42 U.S.C. § 405(g) (providing that "[a]ny action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office."); 20 C.F.R. § 422.210(d) ("the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant.").

## I. PROCEDURAL BACKGROUND

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2 On January 10, 2020, Plaintiff Antonia M. filed a civil Complaint against Defendant  
3 Acting Commissioner of Social Security seeking judicial review of the denial of her  
4 application for disability insurance and supplemental security income benefits. (ECF No.  
5 1.) On March 4, 2020, District Judge Cathy A. Bencivengo reassigned this case to this  
6 Court “for all proceedings and purposes pursuant to Civ.L.R. 73.1.” (ECF No. 15; see also  
7 ECF No. 16.) On April 10, 2020, Defendant filed the Administrative Record, and the  
8 Court issued a “Scheduling Order for Joint Motion for Judicial Review of Final Decision of  
9 the Commissioner of Social Security.” (ECF Nos. 17 & 18.)

10 On May 4, 2020, the parties jointly moved to remand the action to the Social  
11 Security Administration for further proceedings pursuant to sentence four of 42 U.S.C.  
12 § 405(g). (ECF No. 19.) The Court granted the joint motion on May 15, 2020, and  
13 remanded the action to the Social Security Administration for further proceedings. (ECF  
14 No. 20.) On remand, the Commissioner granted Plaintiff’s application, entitling her to  
15 receive \$70,704.50 in retroactive Title II and XVI benefits. (ECF No. 23 at 6, 8.)

16 On July 13, 2021, the parties filed a “Joint Motion for the Award and Payment of  
17 Attorney Fees and Expenses Pursuant to the Equal Access to Justice Act, 28 U.S.C.  
18 § 2412(d) and Costs Pursuant to 28 U.S.C. § 1920.” (ECF No. 21.) The Court granted the  
19 joint motion on July 21, 2021, and awarded fees and expenses in the amount of  
20 \$1,891.25, consisting of \$1,875.00 in fees and \$16.25 in expenses under the Equal  
21 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), and zero costs under 28 U.S.C.  
22 § 1920. (ECF No. 22.)

23 In the instant motion, Plaintiff’s counsel, Marc V. Kalagian, seeks an attorneys’ fee  
24 award of \$10,000 under 42 U.S.C. § 406(b), arguing that the fee is reasonable  
25 considering the services he has rendered and the results he has achieved. (ECF No. 23  
26 at 8; see also id. at 1, 6.) Plaintiff’s counsel further seeks an order directing him to  
27 reimburse Plaintiff \$1,891.25 for the EAJA fees previously awarded by the Court. (Id. at  
28 1, 6, 21–22.)

1 On November 19, 2021, Defendant filed a response to Plaintiff’s counsel’s motion.  
 2 (ECF No. 24.) Defendant states that the Commissioner of Social Security was not a party  
 3 to the contingent fee agreement between Plaintiff and Plaintiff’s counsel, and therefore  
 4 the Commissioner “is not in a position to either assent or object to the § 406(b) fees”  
 5 sought by Plaintiff’s counsel. (Id. at 2.)

## 6 **II. LEGAL STANDARD**

7 A court that has rendered a judgment in favor of a Social Security disability  
 8 insurance claimant who was represented by an attorney, may award attorneys’ fees in a  
 9 “reasonable” amount, not to exceed 25 percent of the total past-due benefits awarded  
 10 to the claimant. 42 U.S.C. § 406(b)(1)(A); Crawford v. Astrue, 586 F.3d 1142 (9th Cir.  
 11 2009). The court has an independent duty to ensure that § 406(b) contingency fee is  
 12 “reasonable.” 42 U.S.C. §406(b); Gisbrecht v. Barnhart, 535 U.S. 789 (2002). The United  
 13 States Supreme Court has explained:

14 [Section] 406(b) does not displace contingent-fee agreements as the  
 15 primary means by which fees are set for successfully representing Social  
 16 Security benefits claimants in court. Rather, § 406(b) calls for court review  
 17 of such arrangements as an independent check, to assure that they yield  
 18 reasonable results in particular cases. Congress has provided one boundary  
 19 line: Agreements are unenforceable to the extent that they provide for  
 20 fees exceeding 25 percent of the past-due benefits. Within the 25 percent  
 boundary . . . the attorney for the successful claimant must show that the  
 fee sought is reasonable for the services rendered.

21 Gisbrecht, 535 U.S. at 807 (internal citation and footnote omitted, emphasis added). In  
 22 evaluating the reasonableness of a fee request under § 406(b), the court should  
 23 consider the character of the representation and the results achieved. Id.; see also  
 24 Crawford, 586 F.3d at 1151.

25 District courts should examine the following factors in assessing whether, under  
 26 Gisbrecht, a fee is reasonable: (1) whether counsel’s performance was substandard;  
 27 (2) whether counsel had engaged in dilatory conduct; and (3) whether the requested  
 28 fees were excessively large in relation to the benefits achieved, *i.e.*, whether the

1 attorney enjoyed a “windfall.” Crawford, 586 F.3d at 1151–52. With respect to the last  
2 factor, the Ninth Circuit noted that counsel assumed significant risk in accepting the  
3 case, including the risk that no benefits would be awarded, or that there would be a  
4 long court or administrative delay in resolving the case. Id. at 1152.

5 The attorneys’ fee award is paid by the claimant out of the past-due benefits  
6 awarded; the losing party is not responsible for payment. Gisbrecht, 535 U.S. at 802.  
7 Attorneys are permitted to seek recovery under both EAJA and § 406(b), and to keep  
8 the larger fee, but they must refund the smaller fee to the claimant. Id. at 796; Parrish  
9 v. Comm’r Soc. Sec. Admin., 698 F.3d 1215, 1218 (9th Cir. 2012).

### 10 III. DISCUSSION

11 The contingency fee agreement between Plaintiff and her counsel, Law Offices of  
12 Rohlifing & Kalagian, LLP, provides that Plaintiff’s counsel would be paid a maximum of  
13 25 percent<sup>3</sup> of past-due benefits awarded to Plaintiff. (ECF No. 23-1 at 1.) As such, the  
14 contingency fee agreement is within the statutory ceiling. See 42 U.S.C. § 406(b)(1)(A).  
15 On remand, the Commissioner awarded Plaintiff \$70,704.50 in past-due benefits. (ECF  
16 No. 23 at 6, 8.) Twenty-five percent of that amount is \$17,676.13. Plaintiff’s counsel  
17 seeks an attorneys’ fee award of \$10,000, which represents 14.14 percent of the past-  
18 due benefits awarded to Plaintiff. (See id. at 8).

19 Further, nothing in this case suggests that Plaintiff’s counsel rendered  
20 substandard representation or delayed this litigation. See Crawford, 586 F.3d at 1151–  
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23 <sup>3</sup> The Court notes that the 25 percent cap set forth in § 406(b)(1)(A) limiting attorneys’ fees to 25  
24 percent of past-due benefits applies only to fees for representation before federal court, and not to  
25 aggregate fees awarded for representation before both the court and the agency. Culbertson v.  
26 Berryhill, —U.S.—, 139 S. Ct. 517, 519 (2019); see also Ricardo A. v. Saul, Case No.: 3:19-cv-00846-AHG,  
2021 WL 718605, at \*2 n.3 (S.D. Cal. Feb. 24, 2021) (“[T]he 25% cap set forth in Section 406(b)(1)(A)  
27 applies solely to attorney fees for representation in federal court.”).

52. Plaintiff's counsel prepared a settlement letter outlining the legal basis for a remand, which led to the parties' agreement to remand the matter for further proceedings. (See ECF No. 23 at 7.) Plaintiff's counsel's representation therefore resulted in the expeditious resolution of this case, as well as the sizeable award of past-due benefits to Plaintiff.

Additionally, the time Plaintiff's counsel spent on this case is not out of proportion to the fee award. See Crawford, 586 F.3d at 1151–52. Plaintiff's counsel's firm expended 10.35 hours of attorney and paralegal time<sup>4</sup> while representing Plaintiff through the entry of the order of remand. (ECF No. 23 at 23, Decl. of Marc V. Kalagian.) Courts "recognize that basing a reasonableness determination on a simple hourly rate basis is inappropriate when an attorney is working pursuant to a reasonable contingency contract for which there runs a substantial risk of loss." Ayersman v. Berryhill, Case No.: 17-cv-1121-WQH-JMA, 2021 WL 37717, at \*2 (S.D. Cal. Jan. 5, 2021) (quotation omitted); see also Moreno v. Berryhill, No. CV 13-8492-PLA, 2018 WL 3490777, at \*3 (C.D. Cal. July 19, 2018) ("Counsel assumed the risk of nonpayment inherent in a contingency agreement, [and] the fee does not exceed . . . the 25 percent statutory cap[.]"). In this case, Plaintiff's counsel assumed a substantial risk of non-payment by agreeing to be paid on a contingency basis, and counsel's work ultimately resulted in a highly favorable result for Plaintiff. The Court therefore concludes that Plaintiff's counsel's attorneys' fee request of \$10,000 is reasonable. See Gisbrecht, 535 U.S. at 807–09; see also Elsa M. P. v. Kijakazi, Case No. 5:19-cv-01698-JC, 2021 WL 4497930, at \*3 (C.D. Cal. July 14, 2021) (finding that a fee award of \$12,000 for 14.65 hours counsel and paralegal spent representing plaintiff before the court was reasonable); Reddick v. Berryhill, Case No.: 16-cv-29-BTM-BLM, 2019 WL 2330895, at \*2 (S.D. Cal. May 30, 2019) (finding, on reconsideration, that a fee award of \$43,000 for

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<sup>4</sup> Specifically, Plaintiff's counsel expended 7.25 hours of attorney time and 3.1 hours of paralegal time in the representation of Plaintiff. (See ECF No. 23-4 at 1.)

21.6 hours of work by counsel on the case was reasonable); Thomas v. Colvin, No. 1:11-cv-01291-SKO, 2015 WL 1529331, at \*2-3 (E.D. Cal. Apr. 3, 2015) (finding that a fee award of \$44,603.50 for 40.8 hours of attorney and paralegal time expended on the case was reasonable).

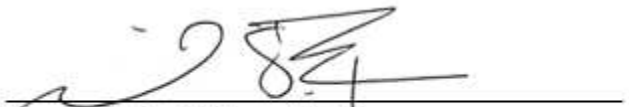
An award of § 406(b) fees, however, must be offset by any prior award of attorneys’ fees granted under the EAJA. Gisbrecht, 535 U.S. at 796. Plaintiff was awarded \$1,891.25 in fees pursuant to the EAJA, and the award of § 406(b) fees must therefore be offset in that amount.

**IV. CONCLUSION**

For the reasons set forth above, the Court **GRANTS** Plaintiff’s counsel’s “Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b)” [ECF No. 23]. The Court awards Law Offices of Rohlfing & Kalagian, LLP attorneys’ fees in the amount of \$10,000.00. The Court further orders Law Offices of Rohlfing & Kalagian, LLP to reimburse Antonia M. the amount of \$1,891.25 for EAJA fees previously awarded by this Court.

**IT IS SO ORDERED.**

Dated: December 20, 2021

  
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Honorable Michael S. Berg  
United States Magistrate Judge

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