

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROLAND S.,  
  
Plaintiff,  
  
v.  
  
KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,  
  
Defendant.

Case No.: 3:20-cv-01068-AHG  
**ORDER GRANTING PLAINTIFF’S  
COUNSEL’S MOTION FOR  
ATTORNEY FEES PURSUANT TO  
42 U.S.C. § 1383(d)(2)(B)**  
  
**[ECF No. 29]**

Before the Court is Counsel’s Motion for Attorney Fees Pursuant to 42 U.S.C. § 1383(d)(2)(B), filed by Plaintiff’s counsel Steven G. Rosales on September 7, 2023. ECF No. 29. For the reasons set forth below, the Court **GRANTS** the motion.

**I. BACKGROUND**

Plaintiff Roland S. (“Plaintiff”) filed this action on June 11, 2020, seeking review of the Commissioner of Social Security’s (“Commissioner”) denial of his application for supplemental security income. ECF No. 1. The parties consented to proceed before a Magistrate Judge on April 8, 2021. ECF Nos. 9, 18. After the Commissioner of Social Security (“Defendant”) filed the administrative record in lieu of an answer, the Court issued a scheduling order. ECF No. 20. Among other requirements in the scheduling order, the Court directed the parties to engage in formal settlement discussions, and set a deadline of

1 June 11, 2021 for the parties either to stipulate to a dismissal or remand of the case, or to  
2 file a Joint Status Report notifying the Court that they were unable to resolve the matter in  
3 settlement discussions. *See id.* at 2.

4 On June 10, 2021, the parties filed a joint motion for voluntary remand pursuant to  
5 sentence four of 42 U.S.C. § 405(g). ECF No. 22. On June 11, 2021, the Court granted the  
6 joint motion, remanded the case to the Commissioner of Social Security for further  
7 administrative action, and entered a final judgment reversing the final decision of the  
8 Commissioner. ECF No. 23. A Clerk’s Judgment was then entered. ECF No. 24. On  
9 September 7, 2021 pursuant to a joint motion, this Court awarded Plaintiff \$1,600.00 in  
10 attorney fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). ECF  
11 No. 28.

12 On remand, the Commissioner awarded Plaintiff \$81,075.55 in total past due  
13 benefits. ECF No. 29-1 at 2. In the instant motion, Plaintiff’s counsel Steven Rosales seeks  
14 an order awarding him attorney fees in the amount of \$12,600.00 for representing Plaintiff  
15 in this action, less the amount of \$1,600.00 for the EAJA fees previously awarded by the  
16 Court, for a net fee award of \$11,000 to be paid out of Plaintiff’s past-due benefits. ECF  
17 No. 29 at 1-2. After counsel filed the motion, the Court set a briefing schedule, directing  
18 Plaintiff to file any response in opposition to the motion by September 27, 2023. ECF No.  
19 30. The Acting Commissioner was also directed to file a response to the motion by the  
20 same deadline. *Id.* In her response, the Commissioner has taken no position on the  
21 reasonableness of counsel’s request, instead providing a neutral analysis of the fee request  
22 in her role as one “resembling that of a trustee for the claimants.” ECF No. 33 (quoting  
23 *Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n.6 (2002)). Despite being given notice of the  
24 Motion and his right to file a response by both Mr. Rosales and the Court, Plaintiff has not  
25 responded to date. Accordingly, the Court finds the motion ripe for decision.

## 26 II. LEGAL STANDARD

27 Section 1383(d)(2) is the attorney fees provision that applies where, as here, a  
28 claimant is awarded Supplemental Security Income (“SSI”) under Title XVI of the Social

1 Security Act. *See Barrera Aguilar v. Saul*, No. CV 16-7565 SS, 2019 WL 6175021, at \*1  
2 n.2 (C.D. Cal. Sept. 16, 2019). The legal standard for analyzing an attorney fee claim under  
3 § 1382(d)(2) is the same as the legal standard for analyzing a similar request under 42  
4 U.S.C. § 406(b) arising from a successful claim for Disability Insurance Benefits (“DIB”)   
5 under Title II. *Id.* Therefore, case law applicable to requests for attorney fees pursuant to  
6 § 406(b) applies with equal force to fee applications arising under § 1383(d)(2), and the  
7 Court will refer to § 1383(d)(2) and § 406(b) interchangeably herein. *See* 42 U.S.C. §  
8 1383(d)(2)(A) (“The provisions of section 406 [] shall apply to this part to the same extent  
9 as they apply in the case of subchapter II of this chapter.”); *see also Gumm v. Colvin*, 2016  
10 WL 4060303, at \*2 (C.D. Cal. July 28, 2016) (“[T]he Court analyzes the [§ 1383(d)(2)]  
11 Motion as if it were a request for Section 406(b) fees.”).

12 “Under 42 U.S.C. § 406(b), a court entering judgment in favor of [a social security]  
13 claimant who was represented by an attorney ‘may determine and allow as part of its  
14 judgment a reasonable fee for such representation, not in excess of 25 percent of the total  
15 of the past-due benefits to which the claimant is entitled by reason of such judgment.’”  
16 *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc) (quoting 42 U.S.C.  
17 § 406(b)(1)(A)). “Within the 25 percent boundary[,] the attorney for the successful  
18 claimant must show that the fee sought is reasonable for the services rendered.” *Gisbrecht*,  
19 535 U.S. at 807. In other words, although § 406(b) “does not displace contingent-fee  
20 agreements as the primary means by which fees are set for successfully representing Social  
21 Security benefits claimants in court[,]” courts must nonetheless “review for reasonableness  
22 fees yielded by those agreements.” *Id.* at 807, 809.

23 Importantly, the lodestar method of calculating reasonable attorney fees does not  
24 apply to an application for § 406(b) or § 1383(d) fees, because such fees are paid out of the  
25 claimant’s award of past-due benefits, rather than pursuant to a fee-shifting statute. *See id.*  
26 at 802 (explaining that the lodestar method is applicable to “disputes over the amount of  
27 fees properly shifted to the loser in the litigation” whereas “Section 406(b) is of another  
28 genre: [i]t authorizes fees payable from the successful party’s recovery”); *see also*

1 *Crawford*, 586 F.3d at 1148 (explaining that attorney fee awards under 42 U.S.C. § 406(b),  
2 “in contrast” to fee awards assessed against the losing party under fee-shifting statutes, “are  
3 not shifted. They are paid from the award of past-due benefits and the amount of the fee,  
4 up to 25% of past-due benefits, is based on the agreement between the attorney and the  
5 client”). Thus, “a district court charged with determining a reasonable fee award under  
6 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee agreements,’ . . .  
7 ‘looking first to the contingent-fee agreement, then testing it for reasonableness[.]’” *Id.*  
8 (quoting *Gisbrecht*, 535 U.S. at 793, 808). When determining reasonableness of the fee  
9 award, courts must consider “whether the amount need be reduced, not whether the  
10 [lodestar] amount should be enhanced.” *Crawford*, 586 F.3d at 1149. While there is not a  
11 definitive list of factors governing the reasonableness analysis, courts should consider “the  
12 character of the representation and the results the representative achieved.” *Gisbrecht*, 535  
13 U.S. at 808. The Court “may properly reduce the fee for substandard performance, delay,  
14 or benefits that are not in proportion to the time spent on the case.” *Crawford*, 586 F.3d at  
15 1151.

16 Finally, an attorney who has received both an EAJA fee award and a § 406(b) or  
17 § 1383(d) fee award for the same work must refund the smaller of the two awards to the  
18 claimant. *Id.*; Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 183 (1985) (Savings  
19 Provision of the EAJA, explaining that where an attorney “receives fees for the same work  
20 under both [42 U.S.C. § 406(b)] and [the EAJA], the claimant’s attorney refunds to the  
21 claimant the amount of the smaller fee”); *see also Gisbrecht*, 535 U.S. at 796 (“[A]n EAJA  
22 award offsets an award under Section 406(b), so that the amount of the total past-due  
23 benefits the claimant actually receives will be increased by the EAJA award up to the point  
24 the claimant receives 100 percent of the past-due benefits.”) (internal alterations omitted).

### 25 **III. DISCUSSION**

26 On April 10, 2019, Plaintiff and the Law Offices of Lawrence D. Rohlffing entered  
27 into a Social Security Representation Agreement (“Agreement”). ECF No. 29-2. Pursuant  
28 to the Agreement, Plaintiff agreed to pay counsel a contingency fee of 25% of past-due

1 benefits awarded by the Commissioner upon reversal of any unfavorable ALJ decision for  
2 work before the Court. *Id.* ¶ 4. Following remand, the Commissioner issued a fully  
3 favorable decision on October 31, 2022. ECF No. 29-3. The Commissioner then issued a  
4 Notice of Award on June 23, 2023, approving Plaintiff’s claim for past-due benefits dating  
5 back to June 2016 in the total amount of \$81,075.55. ECF No. 29-4.

6 Pursuant to Social Security agency regulations, when past-due benefits are awarded  
7 to a claimant, the agency will withhold a certain portion of those benefits for payment of  
8 court-authorized § 406(b) fee awards, which the agency pays directly to counsel, if  
9 possible. ECF No. 33 at 3; *see also* 20 C.F.R. §§ 404.1728(b) (“If a Federal court . . . makes  
10 a judgment in favor of a claimant who was represented before the court by an attorney, and  
11 the court [] allows the attorney as part of its judgment a fee not in excess of 25 percent of  
12 the total of past-due benefits to which the claimant is entitled by reason of the judgment,  
13 we may pay the attorney the amount of the fee out of [] the amount of the past-due benefits  
14 payable”), 404.1730(a) (“We will pay an attorney representative out of your past-due  
15 benefits the amount of the fee allowed by a Federal court”). The Commissioner withholds,  
16 at most, 25 percent of a claimant’s past-due benefits for possible payment of authorized fee  
17 awards. ECF No. 33 at 3.

18 In the instant motion, Plaintiff’s counsel seeks a total award of \$12,600.00 in  
19 attorney fees under the contingency fee contract with Plaintiff, compared to the total  
20 withholding of \$20,268.75. ECF No. 29-1 at 2. Counsel asks the Court to consider factors  
21 including “the nature of the representation and the results achieved, . . . the time expended,  
22 consideration of hourly rates, market treatment of contingency, and the relative dearth of  
23 qualified counsel for court review of agency determinations” to find the requested fee  
24 reasonable. *Id.* Counsel argues that the requested fee amount “would not constitute a  
25 windfall and counsel is not responsible for any delay.” *Id.* Additionally, because counsel  
26 is required to reimburse the \$1,600.00 EAJA fee to Plaintiff, counsel requests that the Court  
27 order the payment of attorney fees in the amount of only \$11,000.00 out of the past-due  
28 benefits withheld by the agency, representing the award of \$12,600.00 less the EAJA fee

1 previously awarded. *Id.* at 2.

2       Upon careful review of the documents submitted, and the applicable law, the Court  
3 finds that counsel’s fee request is reasonable. Counsel’s firm expended 8.76 hours of  
4 attorney and paralegal time in representing Plaintiff before the Court—3.4 hours of  
5 paralegal time and 5.36 hours of attorney time. ECF No. 29-5 at 1. The *de facto* hourly rate  
6 is thus \$1,438.35, which—although high, as discussed in further detail below—is in line  
7 with hourly rates approved by courts in similar cases, including in this district. *See, e.g.,*  
8 *Desiree D. v. Saul*, No. 3:19-CV-01522-RBM, 2021 WL 1564331, at \*3 (S.D. Cal. Apr.  
9 20, 2021) (approving a *de facto* hourly rate of \$1,494.34); *Martinez v. Saul*, No. 15-CV-  
10 1994-BTM-BGS, 2019 WL 3322481, at \*2 (S.D. Cal. July 24, 2019) (approving a *de facto*  
11 hourly rate of \$1,488.83); *Reddick v. Berryhill*, No. 16-CV-29-BTM-BLM, 2019 WL  
12 2330895, at \*2 (S.D. Cal. May 30, 2019) (approving a *de facto* hourly rate of \$1,990 upon  
13 reconsideration after previously reducing the fee award to an effective hourly rate of  
14 \$1,080.26); *Todd v. Saul*, No. EDCV 18-01384-JEM, 2020 WL 8413517, at \*2 (C.D. Cal.  
15 Dec. 9, 2020) (approving a *de facto* hourly rate of \$1,047.62, and collecting Central District  
16 of California cases approving *de facto* hourly rates of \$1,483.25, \$1,435, \$1,418,  
17 \$1,505.26, \$1,485.71, and \$1,472.86, respectively) (citations omitted).

18       The Court is mindful that the *de facto* hourly rate requested here is much higher than  
19 what would be approved if the Court were to apply the lodestar method to calculate  
20 “reasonable” attorney fees. *See, e.g.,* Ronald L. Burdge, Esq., United States Consumer Law  
21 Attorney Fee Survey Report 2017-2018, ECF No. 29-6 at 28-29 (reflecting a 95% median  
22 attorney rate of \$787 per hour for consumer law attorneys in the Los Angeles area,<sup>1</sup> an  
23 average hourly rate of \$120 for paralegals in the Los Angeles area, and an average hourly  
24 rate of \$534 for Los Angeles attorneys who, like Mr. Rosales, have been practicing law for  
25 21-25 years); USAO Attorney’s Fees Matrix—2015-2021, ECF No. 29-6 at 43 (reflecting  
26  
27

---

28 <sup>1</sup> Counsel’s firm is in the Los Angeles area.

1 an average hourly rate of \$621 for attorneys with 21-30 years of experience and an average  
2 hourly rate of \$180 for paralegals in 2020-21, in a matrix designed for use in statutory fee-  
3 shifting cases in District of Columbia courts); Laffey Matrix, ECF No. 29-6 at 46  
4 (reflecting average hourly rates in 2021-22 of \$208 for paralegals \$919 for attorneys with  
5 more than 20 years of experience, in a matrix designed for use in statutory fee-shifting  
6 cases and reflecting rates for lawyers in the D.C. area). However, the directives from the  
7 Supreme Court and the Ninth Circuit in *Gisbrecht* and *Crawford* are clear that “a district  
8 court charged with determining a reasonable fee award under § 406(b)(1)(A) must respect  
9 ‘the primacy of lawful attorney-client fee agreements, looking first to the contingent fee  
10 agreement, then testing it for reasonableness[.]’” *Crawford*, 586 F.3d at 1148 (quoting  
11 *Gisbrecht*, 535 U.S. at 793, 808). “Lodestar fees will generally be much less than  
12 contingent fees because the lodestar method tends to under-compensate attorneys for the  
13 risk they undertook in representing their clients and does not account for the fact that the  
14 statute limits attorneys’ fees to a percentage of past-due benefits[.]” *Crawford*, 586 F.3d at  
15 1150. Although the Court may consider the lodestar calculation, it should do so “*only as*  
16 *an aid* in assessing the reasonableness of the fee.” *Id.* at 1151. Indeed, as mentioned above,  
17 the *Reddick* court in this district granted a motion for reconsideration and approved a *de*  
18 *facto* hourly rate of \$1,990, after previously reducing the fee award to an hourly rate of  
19 \$1,080.26, explaining in part that “this approach was erroneous under *Crawford*” because  
20 the court had impermissibly adjusted upward from a lodestar, and “perhaps most  
21 significantly, the Court erred by failing to consider the full extent of risk borne by  
22 contingency fee attorneys in social security cases. . . . Given the deferential standard of  
23 review, these cases are hard to win. Counsel bore that risk, and has waited years for  
24 payment.” 2019 WL 2330895, at \*2. Thus, the court determined that the “the requested fee  
25 was not a windfall and that the Court’s decision to reduce the requested attorney’s fee  
26 award by 43% failed to respect the primacy of the lawful contingent fee agreement and was  
27 made in error.” *Id.*

28 For the same reasons outlined in the reconsideration order in *Reddick*, the Court will

1 approve the requested fee award here. As counsel discusses in his motion, there is a “dearth  
2 of qualified counsel for court review of agency determinations,” and “SSI cases are  
3 particularly problematic” because “[t]he past due amounts are typically very low because  
4 of a lack of retroactivity, offsets for in kind support, and the likely presence of a grant of  
5 benefits on a subsequent claim. . . . The only feasible way to encourage competent counsel  
6 to bring select SSI cases to federal court is to award the contingent fee in those appropriate  
7 cases.” ECF No. 29-1 at 2, 5. The Court agrees. Mr. Rosales is an experienced Social  
8 Security law attorney who has been practicing in this area since 2002. ECF No. 29-1 at 9,  
9 Rosales Decl. ¶ 7. By taking Plaintiff’s case, counsel “assumed a substantial risk of not  
10 recovering attorney[] fees. At the time that Plaintiff and his counsel signed the contingency  
11 fee agreement, Plaintiff had an unfavorable ruling from the ALJ and had just filed this  
12 action for judicial review.” *Shultz v. Comm’r of Soc. Sec.*, No. 17cv1823-CAB-MDD, 2020  
13 U.S. Dist. LEXIS 147006, at \*5–6 (S.D. Cal. Aug. 14, 2020). Moreover, although the  
14 contingent-fee agreement in this case provides that counsel is entitled to 25% of the past-  
15 due benefits awarded, Mr. Rosales is seeking \$12,600.00 in attorney fees, which amounts  
16 to only 15.5% of the \$81,075.55 in past-due benefits. Therefore, counsel has already  
17 reduced the fee request to well below the statutory cap of 25%, further bolstering a finding  
18 that the requested fee is reasonable. *See Moreno v. Berryhill*, No. 13-cv-8492-PLA, 2018  
19 WL 3490777, at \*3 (C.D. Cal. July 19, 2018) (“Counsel assumed the risk of nonpayment  
20 inherent in a contingency agreement, [and] the fee does not exceed . . . the 25 percent  
21 statutory cap[.]”).

22 Plaintiff’s counsel has also submitted a billing statement detailing the work  
23 performed to litigate this case in federal court. ECF No. 29-5. There is nothing in the record  
24 to suggest substandard performance by counsel, or that counsel delayed this litigation in  
25 order to amass more in potential fees. As a result of counsel’s work, Plaintiff received a  
26 favorable decision and a significant award of past-due benefits. Thus, none of the factors  
27 outlined in *Gisbrecht* favor reducing the fee award justified by the contingency fee  
28 agreement between Plaintiff and his counsel, and the Court concludes that counsel’s



1 request for attorney fees is reasonable. *See Gisbrecht*, 535 U.S. at 808.

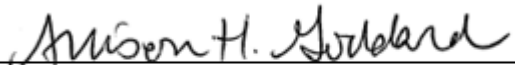
2 **IV. CONCLUSION**

3 For the reasons set forth above, the Court **GRANTS** Plaintiff’s counsel’s motion for  
4 attorney fees pursuant to 42 U.S.C. § 1383(d)(2)(B) (ECF No. 29). The Court **AWARDS**  
5 Steven G. Rosales, Esq. § 1383(d)(2)(B) attorney fees in the amount of \$12,600.00.

6 As discussed above, Mr. Rosales previously received an EAJA fee award of  
7 \$1,600.00, and “an EAJA award offsets an award under Section 406(b), so that the amount  
8 of the total past-due benefits the claimant actually receives will be increased by the EAJA  
9 award up to the point the claimant receives 100 percent of the past-due benefits.”  
10 *Gisbrecht*, 535 U.S. at 796 (internal alterations omitted). Accordingly, counsel requests  
11 that the Court authorize a payment of \$11,000.00 to Mr. Rosales out of Plaintiff’s past-due  
12 benefits, which, when coupled with the \$1,600.00 EAJA fee previously awarded to Mr.  
13 Rosales, would amount to the total authorized § 1383(d)(2)(B) attorney fee award of  
14 \$12,600.00. In other words, Plaintiff’s past-due benefits will be “increased by the EAJA  
15 award” of \$1,600.00. *Id.* The Court finds this request is consistent with offset process  
16 described by the Supreme Court in *Gisbrecht* and will thus grant it. The Commissioner is  
17 **DIRECTED** to certify payment of a fee award of \$11,000, made payable to Law Offices  
18 of Lawrence D. Rohlfing, Inc., CPC, out of Plaintiff’s past-due benefits in accordance with  
19 agency policy.

20 **IT IS SO ORDERED.**

21 Dated: October 20, 2023

22   
23 \_\_\_\_\_  
24 Honorable Allison H. Goddard  
25 United States Magistrate Judge  
26  
27  
28