United States Court Of Appeals
For The Ninth Circuit

CLARA CRAWFORD, *Plaintiff,* vs. MICHAEL J. ASTRUE, Commissioner of Social Security, *Defendant-Appellee.* BRIAN C. SHAPIRO, *Real Party in Interest-Appellant.*	Case No.: 06-55822 D.C. No. CV-00-011884 (AN) Appeal from the United States District Court for the Central District of California Arthur Nakazato, Magistrate Judge, Presiding
RUBY WASHINGTON, *Plaintiff,* vs. MICHAEL J. ASTRUE, Commissioner of Social Security, *Defendant-Appellee.* YOUNG CHO, *Real Party in Interest-Appellant.*	Case No.: 06-55954 D.C. No. CV-03-06884 (AN) Appeal from the United States District Court for the Central District of California Arthur Nakazato, Magistrate Judge, Presiding
DAPHNE M. TREJO, *Plaintiff,* vs. MICHAEL J. ASTRUE, Commissioner of Social Security, *Defendant-Appellee.* DENISE BOURGEOIS HALEY, *Real Party in Interest-Appellant.*	Case No.: 06-56284 D.C. No. CV-98-5662 (RNB) Appeal from the United States District Court for the Central District of California Robert N. Block, Magistrate Judge, Presiding

PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. STATEMENT OF NEED FOR EN BANC HEARING

The decision of the majority in *Crawford v. Astrue*, ___ F.3d ___ (9th Cir. September 25, 2008) conflicts with the decision of the panel in *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) (Kozinski, C.J.). The court and thus the law of this circuit demands:

> Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected. *See Bogan* v. *City of Boston*, 489 F.3d 417, 430 (1st Cir. 2007).

The majority opinion did not have the benefit of the insight and description of the need for articulation by the district court. *Moreno* precedes the majority opinion at issue herein by 1 month. Therefore, to the extent that the majority opinion diverges from *Moreno*, the earlier decision controls. The court should grant rehearing to resolve the discrepancy between the majority opinion and *Moreno*. *See also Crawford*, ___ F.2d at ___ (Fletcher, J. dissenting) *citing Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1151 (9th Cir. 2001); *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992). *Moreno* also relies upon *Ferland* for the same proposition. *Moreno*, 534 F.3d at 1112.

The majority opinion in *Crawford* conflicts with the Supreme Court decision in *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002). In *Gisbrecht*, the Supreme Court reversed this court's longstanding use of a lodestar approach with permissible enhancement for contingency, finding that the contingent fee agreement is entitled to a mild

presumption. *Gisbrecht*, 535 U.S. at 792 holds at the outset of the decision that:

> Because the decision before us for review rests on lodestar calculations and rejects the primacy of lawful attorney-client fee agreements, we reverse the judgment below and remand for recalculation of counsel fees payable from the claimants' past-due benefits.

The majority opinion in this case did not give primacy to the lawful attorney-client fee agreement and used a hybrid lodestar to calculate the attorney fees.

The court should grant rehearing or rehearing en banc to resolve the intra-circuit split and to bring the law of the circuit into square conformity with the instructions from the Supreme Court.

II. A HYBRID LODESTAR IS NOT A CONTINGENCY FEE

The majority opinion holds that:

> We read *Gisbrecht* not to prohibit a district court from making lodestar-type calculations, but only from relying exclusively on such calculations and refusing to consider the contingent-fee agreement. Here, the district court noted that *Gisbrecht* controls, and considered the contingent-fee agreements. The district court, however, concluded that substantial reductions in the fees under those agreements were necessary for the fees to meet the statutory standard of reasonableness. Those rulings complied with the requirements of *Gisbrecht*.

Crawford v. Astrue, ___ F.3d ___ (9th Cir. September 25, 2008). In an imperceptible difference, this court previously held that:

> Rather, a district court must set a reasonable lodestar rate for counsels' services. To the extent that Plaintiffs are arguing that 25 percent is the appropriate lodestar rate, and thereby are attempting to blur the distinction between the lodestar and contingency methods, their argument is unavailing. A lodestar rate is "a reasonable *hourly* rate." *Widrig* [*v. Apfel*, 140 F.3d 1207 (9th Cir. 1998)], (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). But 25 percent is not an "hourly rate."

Gisbrecht v. Barnhart, 258 F.3d 1156, 1158 (9th Cir. 2001) *reversed* 535 U.S. 789, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002). The substantive law on the subject of fees under 42 U.S.C. § 406(b)(1) reviewed and reversed by the Supreme Court now finds revival by the majority opinion in this case.

Guam Soc. of Obstetricians & Gyn. v. Ada, 100 F.3d 691, 697-699 (9th Cir. 1996) held that a multiplier on top of a lodestar calculation remains a well accepted part and parcel of the lodestar process that survives the invalidation of enhancement of a lodestar for contingency. *Id.* citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Fadhl v. City and County of San Francisco*,859 F.2d 649, 651 (9th Cir. 1988); *Gomez v. Gates*, 804 F. Supp. 69, 75 (C.D. Cal. 1992). *Allen v. Shalala*, 48 F.3d 456, 458 (9th Cir. 1995) in rejecting the contingency approach adopted by the Supreme Court canvassed the then-law of the circuit:

> We first applied the lodestar method in a § 406(b)(1) case in *Starr* [*v. Bowen*, 831 F.2d 872 (9th Cir. 1987)]. In that case, we vacated a fee award where the district court gave "great weight" to a 25% contingent fee agreement between the plaintiff and his attorney. We rejected arguments that the district court should treat a contingent fee arrangement as presumptively fair and reasonable, noting that "[t]he district court does not sit to approve routinely a contingent fee contract between social security claimants and their counsel." 831 F.2d at 874. Instead, we instructed the district court to begin its inquiry "with the

> Supreme Court's directive that `[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" 831 F.2d at 874, *citing Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1988). This lodestar amount may then be adjusted by considering the *Kerr* factors.

The majority opinion returns the court full circle back to *Allen*, *Starr*, and *Widrig v. Apfel*, 140 F.3d 1207 (9th Cir. 1998) . Judge Fletcher writes, with respect to the view set out by the majority opinion, that:

> This approach was flatly rejected by the Supreme Court. It held a district court charged with making a fee award under § 406(b)(1) (A) must respect "the primacy of lawful attorney-client fee agreements," *Gisbrecht*, 535 U.S. at 793, "looking first to the contingent-fee agreement, then testing it for reasonableness," *id.* at 808. The resulting award is unreasonable, and thus subject to reduction by the court, if the attorney provided substandard representation or engaged in dilatory conduct, or if the "benefits are large in comparison to the amount of time spent on the case." *Id.* The attorney bears the burden of establishing that the fee sought is reasonable. *Id.* at 807. "[A]s an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement," the attorney may provide the court with a record of the hours worked and its regular fee. *Id.* at 808.

Crawford v. Astrue, ___ F.3d at ___ (Fletcher, J. *dissenting*). The court should grant rehearing or rehearing en banc to facially address the conflict between *Gisbrecht* and the majority opinion described by Judge Fletcher.

III. FAILURE TO PROVIDE A CLEAR STATEMENT

Hensley v. Eckerhart, 461 U.S. 424, 437, 103 U.S. 1933, 76 L. Ed. 2d 40 (1983) requires a clear and concise statement of the reasons for the court's fee awards. *Moreno* holds that the law of the circuit demands:

> Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected. *See Bogan* v. *City of Boston*, 489 F.3d 417, 430 (1st Cir. 2007).

Moreno, 534 F.3d at 1111.

Moreno furthers the law on fees holding that the objective of fee awards in civil rights cases is to attract qualified counsel to that field of law by paying "the prevailing rate in the community for similar work; no more, no less." *Moreno*, 534 F.3d at 1.

The district court in each of the three cases used the hybrid lodestar method to enhance a hypothetical hourly rate by 40% (*Crawford* and *Washington*) or 100% (*Trejo*). None of the fees approached the level of fees called for in the retainer agreement between the claimants for benefits and their respective attorneys. None of the fees approached the fees that the three attorneys sought after the exercise of billing judgment, the proverbial "haircut."

Judge Fletcher in her dissent capsulizes the tension between the former law of the circuit, the correct statement of law articulated by the Supreme Court, and the apparent return to the pre-*Gisbrecht* standard evidenced here. Judge Fletcher observes that:

> Had the district court awarded the full contractual fee, the attorneys in these cases would have received fees ranging from $19,010 to $43,000. Instead, they received amounts ranging from $8,825.53 to $12,650.40. These fee awards represented 6.68% to 11.6% of the benefit awards. Put another way, the attorneys received 53.57% to 73.3% less than the contingency contracts provided.

Crawford v. Astrue, ___ F.3d at ___ (Fletcher, J. *dissenting*). Judge Fletcher goes on to note that:

> The attorneys in these cases recognized that a full 25% fee would be unreasonable. They therefore sought fees ranging from $11,500 to $24,000, which represented 13.95% to 16.95% of the benefits awarded, a substantial reduction from the amount contracted for. Although I do not hold the view that where, as here, an attorney seeks less than 25% of the back-benefits awarded, the fee request is presumptively reasonable, I believe that the attorney's request should be entitled to some deference in such cases. I find it particularly problematic that the district court in *Crawford* reduced the fee sought by 60%. The attorney in that case requested less than 17% of the back-benefits awarded—a substantial reduction from what the contract provided for—and ultimately received less than 7% of the claimant's award. Although that figure represented a premium over the lodestar, the fact that it was so much lower than the contracted-for amount strongly suggests that the district court gave insufficient deference to the fee agreement.

Crawford v. Astrue, ___ F.3d at ___ fn. 1 (Fletcher, J. *dissenting*). Because the two Magistrate Judges in these three cases did not give an adequate explanation under *Gisbrecht*, *Hensley*, or *Moreno* for the departure from the exercise of billing judgment juxtaposed against the lawful fee agreement between the real parties and their clients, the court should grant rehearing.

IV. MISCHARACTERIZATION OF BURDEN OF RISK

In each of the cases, the court either placed the burden on counsel to establish personal or firm risk or downplayed the presence of risk in the particular case. In none of the cases did the district court make a finding that there existed an adequate supply of good lawyers making a good living representing Social Security disability cases in federal court. *See Dukes v.*

Wal-Mart, 509 F.3d 1168, 1200 (9th Cir. 2007) ("Plenty of lawyers make good livings litigating sex discrimination cases for contingent fees.") *Fadhl v. City & County of San Francisco,* 859 F.2d 649, 650 (9th Cir. 1988) (per curiam) set forth the two-pronged standard for enhancing a fee award to account for risk:

> First, the fee applicant must establish that "without an adjustment for risk the prevailing party `would have faced substantial difficulties in finding a counsel in the local or other relevant market.'" *Id.* 107 S.Ct. at 3091 (O'Connor, J., concurring). Second, any enhancement for contingency must reflect "the difference in market treatment of contingent fee cases *as a class,* rather than . . . the `riskiness' of any particular case."

Citing Pennsylvania v. Del. Valley Citizens' Council, 483 U.S. 711, 107 S.Ct. 3078, 3081 and 3089, 97 L.Ed.2d 585 (1987) (*Delaware II*) (O'Connor, J. concurring).

In each of the three cases, counsel demonstrated that claimants for Social Security disability have no trouble getting representation before the Social Security Administration but that the amount and quality of representation drops off dramatically once a claimant exhausts administrative review. Counsel in each of the three cases demonstrated that even after experiencing the vagaries of contingency fee litigation with risks of loss and the delays in payment, contingency fee lawyers gross more money than their hourly counterparts. Therefore, the district court had an obligation to address the application of the contingency fee agreement in light of the *ex ante* risk of loss and the delays in payment at the outset. If

some fees are not permitted to reach "above average," the average will simply go down in a spiral.

Judge Fletcher sets out counsels' position: "The firm should not be penalized for providing high-quality representation that frequently results in success for its clients." *Crawford*, ___ F.2d at ___ (Fletcher, J. dissenting). If a firm suffers penalization for providing high-quality representation that results in the payment of benefits to its clients, then the entire fee structure violates the admonition in *Moreno*, "the district court must strike a balance between granting sufficient fees to attract qualified counsel [...]and avoiding a windfall to counsel." Because the majority opinion contravenes the law of this circuit set forth in *Moreno*, the court should grant rehearing.

V. GUIDANCE VS. DISCRETION

Perhaps the greatest weakness of the majority opinion is that it engenders satellite litigation. Fees will vary from courtroom to courtroom without predictability. In *Ellick v. Barnhart*, 445 F.Supp.2d 1166, 1173 (C.D. Cal. 2006), the district court lamented:

> After Gisbrecht, counsel and their clients cannot predict with any degree of certainty what courts will award as "reasonable" fees under section 406(b), particularly where the benefits are large in comparison to the amount of time spent by counsel. And, absent further guidance from Congress or from the appellate courts, district courts cannot have any degree of confidence that their section 406(b) awards will be consistent with what the law intends.

The Ninth Circuit should take *Ellick* up on the challenge and give the district courts guidance. A lack of guidance simply fosters ever expanding factual inquiries into the methodology to obtaining fees years after service began.

VI. CONCLUSION

The majority decision in *Crawford v. Astrue* conflicts with the well-established law of the circuit and the very recent decision of the court in *Moreno v. City of Sacramento*. A hybrid lodestar cannot establish a contingency fee entitled to primacy under Supreme Court precedent. The district court decisions under review fail to provide a clear statement of reasons for a dramatic reduction in fees awarded. The majority decision mischaracterizes the risk associated with litigation contrary to the law of the circuit. The Ninth Circuit should provide the guidance for fees under 42 U.S.C. § 406(b)(1) as requested in published decisions of the district court.

DATE: November 5, 2008

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARA CRAWFORD,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of Social Security Administration,
Defendant-Appellee,

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Arthur Nakazato, Magistrate Judge, Presiding

Nos. 06-55822, 06-55954, 06-56284

UNITED STATES COURT OF APPEALS

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CLARA CRAWFORD, RUBY WASHINGTON, and DAPHNE M. TREJO,

Plaintiffs,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant-Appellee,

BRIAN C. SHAPIRO, YOUNG CHO, and DENISE BOURGEOIS HALEY,

Real-parties-in-interest-Appellants.

Appeal from the
United States District Court for the
Central District of California

OPPOSITION TO APPELLANT'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

I. STATEMENT

The Social Security Act ("Act") provides for the payment of fees to attorneys, who successfully represent Social Security claimants in court, from the claimants' past due benefits. See Gisbrecht v. Barnhart, 535 U.S. 789, 792 (2002); see also 42 U.S.C. §§ 406(b), 1383(d)(2)(A).[1] The Act provides that

> [w]henever a court renders a judgment favorable to a claimant . . . 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); see 20 C.F.R. §§ 404.1703, 416.903 (2008) (defining "past-due benefits"). The courts do so "as an independent check" to ensure that any contingency fee agreements between Social Security claimants and their attorneys will "yield reasonable results in particular cases." Gisbrecht, 535 U.S. at 807.

According to the Supreme Court,

> Courts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have appropriately reduced the attorney's recovery based on the character of the representation and the results the representative achieved.

Id. at 808. For example, courts may consider factors such as

[1] 42 U.S.C. § 406(b) applies to Title II of the Social Security Act. 42 U.S.C. § 1383(d)(2)(A) adopts the provisions of § 406(b), with some minor modifications, for the purposes of Title XVI of the Act.

substandard representation, delay by the attorney, and benefits that are large in comparison to the amount of time the attorney spent on the case. Id. As noted by the Supreme Court, "district courts are accustomed to making reasonableness determinations in a wide variety of contexts, and their assessments in such matters, in the event of an appeal, ordinarily qualify for highly respectful review." Id. at 808.

In the instant case, Crawford v. Astrue, 545 F.3d 854 (9th Cir. 2008), a panel of this Court affirmed three District Court decisions which assessed the reasonableness of § 406(b) attorney fees and which reduced the § 406(b) fee awards accordingly. This Court held that the District Court had not deviated from the standards elucidated in Gisbrecht and that the District Court had not abused its discretion. Crawford, 545 F.3d at 856.

Petitioners[2] now assert that Crawford conflicts with Gisbrecht and also creates an intra-circuit split concerning the method of assessing the reasonableness of attorney fees under 42 U.S.C. § 406(b). The Commissioner disagrees. This Court should deny the Petitions.

[2] The Real-parties-in-interest-Appellants are attorneys affiliated with the Lawrence D. Rohlfing law firm. See Crawford, 545 F.3d at 857. For convenience, the Commissioner refers to the Real-parties-in-interest-Appellants as "Petitioners."

II. ARGUMENT

A. CRAWFORD DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN GISBRECHT.

Petitioners assert that Crawford "did not give primacy to the lawful attorney-client fee agreement and used a hybrid lodestar to calculate the attorney fees" (Petition at 2). In this regard, Petitioners argue that Crawford conflicts with Gisbrecht (Petition at 2-4). The Commissioner disagrees. For each of the three District Court cases that were consolidated in Crawford, this Court noted the amount of § 406(b) attorney fees requested by Petitioners, discussed the various factors considered by the District Court in assessing the reasonableness of the fee, and noted that the District Court "recognized the primacy of the contingent-fee agreements by first determining that they met the § 406(b)(1) guidelines, and then testing them for reasonableness." Id. at 861. This Court also analyzed Gisbrecht at length, id. at 857-59, and stated,

> the district court noted that Gisbrecht controls, and considered the contingent-fee agreements. The district court, however, concluded that substantial reductions in the fees under those agreements were necessary for the fees to meet the statutory standard of reasonableness. Those rulings complied with the requirements of Gisbrecht.

Id. at 862. This Court correctly observed that Gisbrecht did not preclude a district court from considering a lodestar-type calculation as one factor when assessing the reasonableness of a

§ 406(b) fee.[3] Id.

1. Crawford properly held that the type of fee calculation used by the District Court was appropriate and was not barred by Gisbrecht.

Crawford held that Gisbrecht did not mandate "any particular procedure or format that the district courts must follow in determining a reasonable attorney fee in social security cases." Crawford, 545 F.3d at 862. Crawford held that Gisbrecht did not absolutely preclude a lodestar-type calculation:

> We read Gisbrecht not to prohibit a district court from making lodestar-type calculations, but only from relying exclusively on such calculations and refusing to consider the contingent-fee agreement.

Id.

Crawford is correct. Gisbrecht gave several examples of factors for a court to consider when assessing the reasonableness of a § 406(b) attorney fee. See Gisbrecht, 535 U.S. at 808. One of those factors is whether the requested fee would be a windfall for the attorney: "If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order." Id. Gisbrecht stated that a lodestar-type calculation could aid in determining whether a requested fee was a windfall:

[3] In a lodestar calculation of an attorney fee, the number of hours reasonably devoted to a case is multiplied by a reasonable hourly fee. See Gisbrecht, 535 U.S. at 798-99.

> In this regard, the court may require the claimant's attorney to submit, not as a basis for satellite litigation, but 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.

Id. Thus, Gisbrecht approved the use of a lodestar-type calculation as one factor to determine whether the amount of fees was reasonable in relation to the amount of time the attorney expended on the case.

2. The dissenting opinion did not establish any conflict between Crawford and Gisbrecht.

Petitioners argue that the dissenting opinion identified a conflict between Crawford and Gisbrecht (Petition at 4). The Commissioner disagrees.

The dissent asserted that "the district courts did not respect the primacy of the attorney-client fee agreements," as required by Gisbrecht, because the attorneys received "53.7% to 73.7% less than the contingency contracts provided," Crawford, 545 F.3d at 864-65 (Fletcher, J., dissenting). However, the fact that the attorneys received less than provided by the contingency contracts does not establish that the attorney-client fee agreements were not given primary consideration. Indeed, Gisbrecht expressly contemplated that district courts could reduce § 406(b) fees in their sound discretion, based on consideration of a number of factors. See Gisbrecht, 535 U.S. at 808. The reasonable reduction of the requested § 406(b) fees is consistent with Gisbrecht and does not

violate Gisbrecht's principles.

The dissent also asserted that the "language in each of the district court orders also makes clear that the district court failed to appreciate the reasonableness test mandated by Gisbrecht." Crawford, 545 F.3d at 865 (Fletcher, J., dissenting). The dissent conceded that the District Court quoted "extensively from Gisbrecht," "discuss[ed] the character of the representation," and concluded "that the requested fee would represent a windfall to the attorneys." Id. Although the dissent acknowledges that the District Court considered these Gisbrecht principles, the dissent faults the District Court because it supposedly did not "first look to the fee agreement and then adjust downward." Id. at 866. This assertion fails for three reasons.

First, as stated in the majority opinion in Crawford, Gisbrecht did not "prescribe that in every case the district court mechanically must begin its analysis with the twenty-five percent contingent fee and then make any reduction in that amount that appears appropriate in the particular case." Id. at 862. That is, the 25% limitation is not prima facie reasonable. See Gisbrecht, 535 U.S. at 807 ("Within the 25 percent boundary, as petitioners in this case acknowledge, the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered"). Rather, Gisbrecht concluded that courts must review contingent-fee agreements to ensure that they yield reasonable

results, stated that "the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered," and gave examples of factors that warranted reducing fees. Id. at 807-08. Those examples included a lodestar-type calculation to ascertain whether a fee constituted a windfall to the attorney.

Second, to the extent that Petitioners object to Crawford's approval of lodestar-type calculations as one factor in considering the reasonableness of the fee request, the Commissioner again notes that Gisbrecht expressly approved of such calculations and that Crawford properly acknowledged that those calculations were but one of several factors considered:

> the lodestar calculation was but one of several factors the district court considered when testing the contingent-fee agreement for reasonableness after "looking first to the contingent-fee agreement." Gisbrecht, 535 U.S. at 808, 122 S.Ct. at 1817.

Crawford, 545 F.3d at 862. As Petitioners acknowledge (Petition at 4), the dissent agreed that an attorney's hours and regular fee could be relevant to ascertaining the reasonableness of the claimed § 406(b) attorney fee. See id. at 865 (Fletcher, J., dissenting). Thus, in each of the three District Court cases, the Court noted the amount Petitioner sought under each contingency fee agreement, discussed the factors that the District Court considered in assessing the reasonableness of the fee under § 406(b), and affirmed the resulting fee reduction. Each case properly included a lodestar-type calculation as a factor. The District Court's

analysis was therefore fully consistent with Gisbrecht.

Third, to the extent that Petitioners object to the District Court's discussion of the lodestar-type calculation and any upward "enhancement," the Commissioner notes that such comparisons -- between the requested fee and the lodestar-type calculation -- are appropriate reasonableness considerations under Gisbrecht. In considering the lodestar-type calculation as a reasonableness factor in each case, the District Court properly compared that calculation to the fee that Petitioners requested under the contingent-fee agreement. See id. at 859-60 (comparing the lodestar-type calculation of $5,907.14 to the requested $21,000.00 under the contingent-fee agreement for Crawford), 861 (comparing $6,303.95 to the requested $11,500.00 for Washington and $6,325.20 to the requested $24,000.00 for Trejo). Since Gisbrecht expressly approved lodestar-type calculations as one factor in determining the reasonableness of a fee request, such comparisons are a valid consideration in assessing whether the contingent fee requested meets the statutory test for reasonableness.

In sum, Crawford is consistent with Gisbrecht's holding that contingent-fee agreements must be tested under § 406(b) must be tested for reasonableness. As noted in Crawford, Gisbrecht did not mandate a mechanical procedure that a district court must use in testing for reasonableness. Rather, Gisbrecht gave examples of appropriate factors to consider in ascertaining the reasonableness

of a § 406(b) fee and reiterated that District Court's assessment in such matters is entitled to highly respectful review. Gisbrecht expressly approved of a lodestar-type calculation as a tool to ascertain reasonableness. Thus, Crawford correctly concluded that a lodestar-type calculation was not precluded when ascertaining the reasonableness of a § 406(b) fee. Crawford properly affirmed the three underlying § 406(b) District Court decisions, noting that the District Court had considered multiple factors in assessing a reasonable fee in each case. Crawford properly applied the "highly respectful review" contemplated in Gisbrecht, and concluded that the District Court had not abused its discretion in assessing reasonable § 406(b) fees. There was no conflict with Gisbrecht.

B. CRAWFORD DOES NOT CONFLICT WITH MORENO V. CITY OF SACRAMENTO.

Petitioners also claim that Crawford did not provide "a clear and concise statement of the reasons for the court's fee awards" (Petition at 4-6). In this regard, Petitioners argue that Crawford creates an intra-circuit conflict with Moreno v. City of Sacramento, 534 F.3d 1106, 1111 (9th Cir. 2008) (Petition at 1). The Commissioner disagrees. Petitioners' argument fails for two reasons. First, Moreno is inapposite. Second, Crawford adequately explained the reasons for the § 406(b) attorney fees awarded.

1. Moreno involves attorney fees under 42 U.S.C. § 1988 and is inapplicable to attorney fees under 42 U.S.C. § 406(b).

Contrary to Petitioners' assertions, Moreno is inapposite to

Crawford. As Petitioner concedes (Petition at 5), Moreno involved attorney fees under 42 U.S.C. § 1988 in connection with a civil rights complaint under 42 U.S.C. § 1983. Moreno, 534 F.3d at 1110. In Moreno, the district court had applied a lodestar analysis to assess the reasonableness of those attorney fees. Id. at 1111.

Here, in contrast, the Act, 42 U.S.C. § 406(b), controls the assessment of the reasonableness of the attorney fees at issue. In interpreting the Act, Gisbrecht expressly distinguished fees under 42 U.S.C. § 1988 from contingent fees under 42 U.S.C. § 406(b):

> Fees shifted to the losing party, however, are not at issue here. Unlike 42 U.S.C. § 1988 (1994 ed. and Supp. V) and EAJA, 42 U.S.C. § 406(b) (1994 ed., Supp. V) does not authorize the prevailing party to recover fees from the losing party. Section 406(b) is of another genre: It authorizes fees payable from the successful party's recovery.

Gisbrecht, 535 U.S. at 802. Gisbrecht expressly rejected a lodestar analysis as the sole method for ascertaining the reasonableness of contingent fees under § 406(b) because, in part, "the lodestar method was designed to govern imposition of fees on the losing party." Id. at 806.

The only material similarity between Crawford and Moreno is that both cases concern attorney fees. These two cases are based on different laws. Therefore, to the extent that they may conflict, Crawford does not create an intra-circuit conflict with Moreno.

2. Crawford explained the reasons for the § 406(b) fee awards.

In Moreno, the court noted that,

> "When the district court makes its award, it must explain how it came up with the amount. The explanation need not be elaborate, but it must be comprehensible. As Hensley [v. Eckerhart, 461 U.S. 424, 437 (1983)] described it, the explanation must be 'concise but clear.'"

(emphasis in original). Crawford does not conflict with that holding. The District Court's decision affirmed by the Court adequately summarized and explained the District Court's reasoning for the § 406(b) fee awards. Although Petitioners and the dissent fault Crawford and the District Court for lack of explanation, the sufficiency of the explanation provided by the District Court, and affirmed by this Court, was consistent with the rationale requirements of circuit law. Petitioners' factual disagreement with that conclusion does not create an issue that justifies rehearing. To conclude otherwise would lead to the anomalous result that whenever this Court found that the District Court adequately explained its conclusion for a fee award, the losing party in the appeal could seek rehearing on the basis of a perceived conflict with Moreno.

As to each of the three cases, Crawford recounted the District Court's rationale for the reduced fee. In brief, as to Crawford, Petitioners requested $21,000.00, and this Court listed six factors that the District Court considered which warranted the reduction of the fee to $8,270.00. Id. at 859-60. As to Washington,

Petitioners requested $11,500.000, and this Court summarized the District Court's factors which warranted a reduction to $8,825.53. Id. at 860-61. Those factors included the complexity of the case, the amount of work that the attorney actually performed, and the rejection of Petitioners' argument that the case could be compared to class action securities litigation. As to Trejo, Petitioners requested $24,000.00, and the Court summarized the factors which warranted a reduction to $6,325.20. Id. This Court noted the District Court's conclusion that the requested fee, based on 12 years of past-due benefits, was excessive and constituted a windfall. Thus, Crawford reviewed and summarized the District Court's explanations of the reasonableness determination and the fee reductions in each case. Crawford properly concluded that the District Court had adequately explained the reduced fees.

Petitioners complain that the fees that the District Court awarded were less than the fees allowed in the contingent-fee agreement (Petition at 5). Petitioners ignore Gisbrecht's mandate that, in light of § 406(b), such contingent-fee agreements must be reviewed for reasonableness and may be reduced accordingly. Petitioners' reliance on the dissent (Petition at 5-6) fails for the same reason: Gisbrecht anticipated and approved such fee reductions.

Crawford summarized the District Court's rationale in each case and properly concluded that the District Court had

sufficiently explained the reasons for its decisions. See Crawford, 545 F.3d at 863 ("Unlike the dissent, we conclude that the opinions of the magistrate judges who decided these cases adequately explained the basis and reasons for their decisions"). Ultimately, Petitioners' disagreement with the fee reductions does not render those explanations inadequate or insufficient.

C. CRAWFORD APPROPRIATELY PLACED THE BURDEN ON THE ATTORNEYS TO PRODUCE EVIDENCE OF THE REASONABLENESS OF THE FEE REQUEST.

Apart from Petitioners' stated reasons in support of the petition for rehearing en banc (Petition at 1-2), Petitioners additionally argue that Crawford mischaracterized the burden of risk (Petition at 6-8). The Commissioner disagrees.

To the extent that Petitioners object that Crawford and the District Court "placed the burden on counsel to establish personal or firm risk" (Petition at 6), Petitioners' argument fails. Under Gisbrecht, it is the attorney's burden to establish the reasonableness of the fee. See Gisbrecht, 535 U.S. at 807 ("the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered").

To the extent that Petitioners generally object to Crawford's and the District Court's consideration of the risk of contingency, Petitioners have not shown that this factor was improperly considered for the purposes of § 406(b). Petitioners cite Fadhl v. City & County of San Francisco, 859 F.2d 649, 650 (9th Cir. 1988), as setting the appropriate standard for enhancing a fee award to

account for risk of contingency (Petition at 7). However, Fadhl is inapposite. In Fadhl, the Court used a lodestar-method to calculate the attorney fees. Fadhl, 859 F.2d at 650. As discussed supra, Gisbrecht and Crawford agree that § 406(b) fee cases are not lodestar cases, so Fadhl is inapplicable here. Moreover, Gisbrecht should be the controlling authority on this point. As discussed supra, Gisbrecht expressly distinguished § 406(b) fee cases from fee-shifting cases such as Fadhl. Gisbrecht addressed the relevance of contingent-fee agreements to § 406(b) fees. Gisbrecht acknowledged the expertise of district courts in making reasonableness determinations, Gisbrecht, 535 U.S. at 808, and Crawford observed that "[t]he selection of the appropriate factors, both pro and con, for determining a reasonable attorney fee in a particular case involves the essence of discretionary action," Crawford, 545 F.3d at 863. Thus, Petitioners have not established that this Court improperly considered the risk of contingency. In any event, such a fact-bound determination does not justify rehearing.

To the extent that Petitioners rely on the dissent (Petition at 8), the dissent stated, "[a] district court cannot reduce the amount of a fee simply because a firm is generally successful." Id. at 867 (Fletcher, J., dissenting). There is no indication that the District Court did so here. Under Gisbrecht, a district court may consider multiple factors in assessing the reasonableness of a

§ 406(b) fee. An attorney's success rate may evidence the risk of contingency for the purposes of § 406(b). In any event, Petitioners did not provide evidence of success rate, so Petitioners made no attempt to persuade the District Court of the reasonableness of the fees in that regard. See Gisbrecht, 535 U.S. at 807 fn. 17 (an attorney bears the "burden of persuasion that the statutory requirement has been satisfied").

D. CRAWFORD PROVIDES SUFFICIENT GUIDANCE TO DISTRICT COURTS; CRAWFORD CLARIFIES GISBRECHT AND DEMONSTRATES THE REVIEW OF THE DISTRICT COURT'S ASSESSMENT OF REASONABLE ATTORNEY FEES UNDER § 406(b).

Apart from Petitioners' stated reasons in support of his petition for rehearing en banc (Petition at 1-2), Petitioner additionally asserts that Crawford "engenders satellite litigation" (Petition at 8-9). Petitioners' assertion is unfounded. Petitioners' dissatisfaction with this Court's interpretation and/or application of the law does not render Crawford defective and does not warrant rehearing.

III. CONCLUSION

Petitioners have not established any valid reason for rehearing. The Petition for Rehearing and Petition for Rehearing En Banc should be denied.

Respectfully submitted,

_/s/_____
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Special Assistant U.S. Attorney
Attorney for Appellee

Dated: February 27, 2009

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

__X_ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

_/s/_____
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