

1 GERALD A. McINTYRE (SBN 181746)  
2 gmcintyre@justiceinaging.org  
3 JUSTICE IN AGING  
4 3660 Wilshire Blvd., Suite 718  
5 Los Angeles, CA 90010  
6 T: (213) 674-2900 / F: (213) 550-0501

7 ANNA RICH (SBN 230195)  
8 arich@justiceinaging.org  
9 TRINH PHAN (SBN 267288)  
10 tphanh@justiceinaging.org  
11 JUSTICE IN AGING  
12 1330 Broadway, Suite 525  
13 Oakland, CA 94612  
14 T: (510) 663-1055 / F: (213) 550-0501

15 Attorneys for Plaintiffs  
16 *(Additional Counsel listed on next page)*

17 CHAD A. READLER  
18 Acting Assistant Attorney General  
19 JUDRY L. SUBAR  
20 Assistant Director  
21 Federal Programs Branch  
22 M. ANDREW ZEE (CA Bar No. 272510)  
23 United States Department of Justice  
24 Civil Division, Federal Programs Branch  
25 450 Golden Gate Avenue, Room 7-5395  
26 San Francisco, CA 94102  
27 T: (415) 436-6646 / F: (415) 436-6632  
28 Email: m.andrew.zee@usdoj.gov

Attorneys for Defendant

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

14 KEVIN HART, NINA SILVA-COLLINS, )  
15 and LEE HARRIS, on behalf of themselves )  
16 and all others similarly situated, )

17 Plaintiffs, )

18 v. )

19 NANCY A. BERRYHILL, Acting )  
20 Commissioner of Social Security, in her )  
21 official capacity, )

22 Defendant. )

Case No. 3:15-cv-00623-JST

**STIPULATED REQUEST TO AMEND**  
**ORDER GRANTING FINAL APPROVAL**  
**OF CLASS ACTION SETTLEMENT AND**  
**~~PROPOSED~~ ORDER**

Hon. Jon S. Tigar

1 WILLIAM L. STERN (SBN 96105)  
2 WStern@mofo.com  
3 CLAUDIA M. VETESI (SBN 233485)  
4 CVetesi@mofo.com  
5 ROBERT T. PETRAGLIA (SBN 264849)  
6 RPetraglia@mofo.com  
7 ELIZABETH BALASSONE (SBN 280563)  
8 EBalassone@mofo.com  
9 MORRISON & FOERSTER LLP  
10 425 Market Street  
11 San Francisco, California 94105-2482  
12 T: (415) 268-7000 / F: (415) 268-7522

9 HOPE NAKAMURA (SBN 126901)  
10 hnakamura@legalaidsmc.org  
11 LEGAL AID SOCIETY OF SAN MATEO COUNTY  
12 330 Twin Dolphin Drive, Suite 123  
13 Redwood City, CA 94065  
14 T: (650) 558-0915 / F: (650) 517-8973  
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1 Plaintiffs, Kevin Hart, Nina Silva-Collins, and Lee Harris, on behalf of themselves and all  
2 others similarly situated, and Defendant, Nancy A. Berryhill, Acting Commissioner of Social  
3 Security, sued solely in her official capacity (“SSA”), submit this Stipulated Request to Amend  
4 the Court’s April 17, 2017 Order Granting Final Approval of Class Action Settlement (“Order”)  
5 [ECF No. 88] to comport with the terms of the parties’ Amended Settlement Agreement  
6 (“Agreement”) [ECF No. 79-1]. The April 17, 2017 Order differs from the Agreement in the  
7 following four material respects. First, on page 1, line 19, the Order recites that the case involves  
8 “evidence used by Administrative Law Judges (‘ALJs’),” but the case involved adjudications at  
9 all levels, not just at the ALJ stage, so Plaintiff would request that “Administrative Law Judges  
10 (‘ALJs’)” be replaced with “Social Security Administration (‘SSA’)”; and at page 1, line 20-21,  
11 instead of saying “The evidence ALJs consider when making a disability benefits determination  
12 includes consultative evaluations,” this should be replaced with “The evidence the agency  
13 considers when making a disability benefits determination often includes consultative evaluations  
14 . . . .” Second, the Order sets the date for mailing Request Forms as May 19, 2017, but under the  
15 Agreement that the Court was approving, the deadline for mailing the Request Forms is later,  
16 namely, ninety days (for most forms) and twenty days (for another form) after the time for any  
17 appeals from the approval order has elapsed. Third, the Order contains language that might create  
18 confusion concerning the enforcement mechanism negotiated and agreed upon by the parties.  
19 Fourth, the parties had requested that the Court grant final approval to the amended class  
20 definition, which was omitted from the Court’s Order Granting Final Approval. Respectfully,  
21 therefore, the parties request that the Court amend its April 17, 2017 Order in the manner  
22 described below. Alternatively, the parties request that the Court withdraw the Order and enter  
23 the Amended Proposed Order [ECF No. 85-1] that the parties submitted on March 1, 2017 in  
24 connection with Plaintiffs’ Motion for Final Approval.

25 **Request for Amendment of the Order**

26 The Conclusion of the Order provides as follows:

27 **CONCLUSION**

1 The Court finds the settlement agreement fair, adequate, and  
2 reasonable and GRANTS Plaintiffs motion for final approval of the  
3 settlement.

4 The parties shall distribute the Request Forms by May 19,  
5 2017.

6 Defendant will pay \$490,000 in attorneys' fees and costs to  
7 Plaintiffs' counsel Justice in Aging and Legal Aid Society of San  
8 Mateo County. The Court finds that this award is fair and reasonable  
9 in light of the nature of this Action, counsel's experience and efforts  
10 in prosecuting and resolving this action, and the benefits obtained  
11 for the Class. Plaintiffs' co-counsel, Morrison & Foerster, has  
12 agreed to waive its fees and costs.

13 The Court reserves exclusive and continuing jurisdiction  
14 over the Action, the Class Representatives, the Class members, and  
15 Defendants for the purposes of supervising the implementation,  
16 enforcement, and construction of the Settlement and this Judgment.

17 Order 5. The parties request that the Order be amended to remove the second and fourth  
18 paragraphs of this Conclusion, and to include a term that the parties had requested that the Court  
19 include.

20 *Second Paragraph:* In the Agreement, the parties did not establish a date certain (such as  
21 May 19, 2017) by which SSA would send claimants the agreed-upon notices and claim forms  
22 (referred to by the Court as "Request Forms" in the Order). Instead, the deadline to send such  
23 forms is to be established in relation to the "date on which the Settlement becomes effective."  
24 *See* Agreement 18, 20, 27, 28, 31 (providing that SSA will send Notices A, A2, B, and B2 within  
25 ninety days after the effective date and Notice C within twenty days after the effective date).  
26 Pursuant to the agreed definition, the "date on which the Settlement becomes effective" will not  
27 be known until either (1) any timely appeal of the approval order is resolved; or (2) no timely  
28 appeal is filed. Agreement 4 (defining "date on which the Settlement becomes effective"). A  
May 19, 2017 deadline to distribute the Request Forms is therefore at odds with the terms of the  
Agreement. Further, counsel have been informed that SSA is not in a position to meet a May 19,  
2017 deadline (which would in any event come before the deadline for an appeal from the April  
17, 2017 Order). Therefore, the parties respectfully request that the second paragraph of the  
Conclusion be stricken. Otherwise, the parties will be in the difficult position of having an Order

1 granting final approval of a Settlement Agreement that deviates from the negotiated terms of the  
2 Settlement Agreement (and which, as a practical matter, cannot be performed).

3 *Fourth Paragraph:* In the Agreement, the parties identified specific pre-dispute resolution  
4 procedures in an Enforcement provision. Agreement 33-35. Without noting the Enforcement  
5 provision, the April 17, 2017 Order states that the Court “reserves exclusive and continuing  
6 jurisdiction over the Action, the Class Representatives, the Class members, and Defendants for  
7 the purposes of supervising the implementation, enforcement, and construction of the Settlement  
8 and this Judgment.” Order 5. In the Agreement, however, the parties agreed to an “exclusive  
9 process for remedying alleged violations of this Agreement.” Agreement 33. The parties “further  
10 agree[d] that no other litigation action in the Case, including but not limited to the filing of any  
11 motions or pleadings, may be taken except as set forth in this Section VI [concerning  
12 Enforcement].” *Id.* In order to avoid potential confusion from the language in the Order (which  
13 does not expressly reference the Enforcement provision), the parties respectfully request that the  
14 fourth paragraph of the Conclusion be stricken.<sup>1</sup>

15 *Final Approval of Amended Class Definition:* In the Agreement, the parties agreed, for  
16 settlement purposes, to amend the definition of the class and to request that the Court amend the  
17 certified class so that the plaintiff class is defined as consisting of “all persons whose SSI or SSDI  
18 benefits were either denied or terminated and for whom a consultative examination was prepared  
19 by Dr. Frank Chen, and all persons who received a partially favorable decision or determination  
20 on their claim for SSI or SSDI benefits and for whom a consultative examination was prepared  
21 by Dr. Chen.” Agreement 6-7. Although the Court preliminarily approved this modification of  
22 the class definition, *see* Order Granting Mot. for Prelim. Approval, ECF No. 81, at 6-7, it did not  
23 expressly grant final approval to this modification. To ensure that proper notice is given of the

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24  
25 <sup>1</sup> It appears that the fourth paragraph of the Conclusion may have been drawn from the  
26 original proposed order submitted by Plaintiffs in connection with their Motion for Final  
27 Approval. *See* Proposed Order, ECF No. 82-3, at 5, ¶ 10 (using same language as fourth  
28 paragraph of the Conclusion). Following submission of this proposed order, SSA registered its  
objections to this language with Plaintiffs’ counsel, and the parties then agreed to submit an  
Amended Proposed Order, in which this language does not appear. *See* Notice of Am. Proposed  
Order, ECF No. 85-1; *see also* Def.’s Mem. Supp. Final Approval, ECF No. 83, at 1 n.2.

1 amended class definition, and out of an abundance of caution, the parties respectfully request that  
2 the Court add a new paragraph to the Conclusion granting final approval to the amended class  
3 definition. *See also* Notice of Am. Proposed Order, ECF No. 85-1, at 1-2, ¶ 5.

4 \* \* \*

5 In summary, the parties respectfully request that the Court amend page 1, line 19 to replace  
6 “Administrative Law Judges (‘ALJs’)” with “Social Security Administration (‘SSA’)”; and at  
7 page 1, line 20-21, instead of saying “The evidence ALJs consider when making a disability  
8 benefits determination includes consultative evaluations,” this should be replaced with “The  
9 evidence the agency considers when making a disability benefits determination often includes  
10 consultative evaluations . . . .” The Conclusion of the Order should be amended so that it provides  
11 as follows:

#### 12 **CONCLUSION**

13 The Court finds the settlement agreement fair, adequate, and  
14 reasonable and GRANTS Plaintiffs motion for final approval of the  
15 settlement.

16 This Court gives its final approval of the Settlement to the  
17 amended class definition as approved in its Order Granting Motion  
18 for Preliminary Approval of Class Action Settlement:

19 [A]ll persons whose SSI or SSDI benefits  
20 were either denied or terminated and for whom a  
21 consultative examination was prepared by Dr. Frank  
22 Chen, and all persons who received a partially  
23 favorable decision or determination on their claim  
24 for SSI or SSDI benefits and for whom a consultative  
25 examination was prepared by Dr. Chen.

(ECF No. 81 at 6-7.)

26 Defendant will pay \$490,000 in attorneys’ fees and costs to  
27 Plaintiffs’ counsel Justice in Aging and Legal Aid Society of San  
28 Mateo County. The Court finds that this award is fair and reasonable  
in light of the nature of this Action, counsel’s experience and efforts  
in prosecuting and resolving this action, and the benefits obtained  
for the Class. Plaintiffs’ co-counsel, Morrison & Foerster, has  
agreed to waive its fees and costs.

Alternatively, the parties request that the Court withdraw the Order in its entirety and enter the  
Amended Proposed Order [ECF No. 85-1] that the parties submitted on March 1, 2017 in  
connection with Plaintiffs’ Motion for Final Approval. A proposed order is attached.

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Dated: April 21, 2017

WILLIAM L. STERN  
CLAUDIA M. VETESI  
ROBERT T. PETRAGLIA  
ELIZABETH BALASSONE  
MORRISON & FOERSTER LLP

By: /s/ William L. Stern  
WILLIAM L. STERN

Attorney for Plaintiffs

Dated: April 21, 2017

U.S. DEPARTMENT OF JUSTICE  
CIVIL DIVISION

CHAD A. READLER  
Acting Assistant Attorney General  
JUDRY L. SUBAR  
Assistant Director  
M. ANDREW ZEE (CA Bar # 272510)  
Attorney

By: /s/ Andrew Zee  
M. ANDREW ZEE

Attorneys for Defendant

~~PROPOSED~~ ORDER

Upon stipulation of the parties, and good cause appearing, the Court hereby orders that:

The Court's April 17, 2017 Order Granting Final Approval of Class Action Settlement is amended by

Replacing, at page 1, line 19, "Administrative Law Judges ('ALJs')" with "Social Security Administration ('SSA')";

Replacing, at page 1, line 20-21, "The evidence ALJs consider when making a disability benefits determination includes consultative evaluations," with "The evidence the agency considers when making a disability benefits determination often includes consultative evaluations,"; and

Striking the Conclusion section appearing at lines 2 through 12 of page 5, and replacing it with the following text:

**CONCLUSION**

The Court finds the settlement agreement fair, adequate, and reasonable and GRANTS Plaintiffs motion for final approval of the settlement.

This Court gives its final approval of the Settlement to the amended class definition as approved in its Order Granting Motion for Preliminary Approval of Class Action Settlement:

[A]ll persons whose SSI or SSDI benefits were either denied or terminated and for whom a consultative examination was prepared by Dr. Frank Chen, and all persons who received a partially favorable decision or determination on their claim for SSI or SSDI benefits and for whom a consultative examination was prepared by Dr. Chen.

(ECF No. 81 at 6-7.)

Defendant will pay \$490,000 in attorneys' fees and costs to Plaintiffs' counsel Justice in Aging and Legal Aid Society of San Mateo County. The Court finds that this award is fair and reasonable in light of the nature of this Action, counsel's experience and efforts in prosecuting and resolving this action, and the benefits obtained for the Class. Plaintiffs' co-counsel, Morrison & Foerster, has agreed to waive its fees and costs.



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PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: April 25, 2017

  
\_\_\_\_\_  
HON. JON S. TIGAR  
United States District Court Judge

**ATTESTATION**

Pursuant to Local Rule 5-1(i)(3), I attest that I am the ECF user whose user ID and password are being used in the electronic filing of this document, and further attest that I have obtained the concurrence in the filing of the document from the other signatory.

/s/ Andrew Zee

M. ANDREW ZEE

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of April, 2017, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Andrew Zee

M. ANDREW ZEE