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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

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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.¹

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

24
25 ¹ 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

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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

1
2 Upon stipulation of the parties, and good cause appearing, the Court hereby orders that:

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

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

7
8 Replacing, at page 1, line 20-21, "The evidence ALJs consider when making a disability
9 benefits determination includes consultative evaluations," with "The evidence the agency
10 considers when making a disability benefits determination often includes consultative
11 evaluations,"; and

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

15 **CONCLUSION**

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

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

22 [A]ll persons whose SSI or SSDI benefits
23 were either denied or terminated and for whom a
24 consultative examination was prepared by Dr. Frank
25 Chen, and all persons who received a partially
26 favorable decision or determination on their claim
27 for SSI or SSDI benefits and for whom a consultative
28 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