

1 DAVID H. FRY (SBN 189276)

David.Fry@mto.com

2 MARK R. CONRAD (SBN 255667)

Mark.Conrad@mto.com

3 JEREMY S. KROGER (SBN 258956)

Jeremy.Kroger@mto.com

4 MUNGER, TOLLES & OLSON LLP

560 Mission Street, 27th Floor

5 San Francisco, CA 94105-2907

T: (415) 512-4000 / F: (415) 512-4077

6 GERALD A. McINTYRE (SBN 181746)

gmcintyre@nslc.org

7 NATIONAL SENIOR CITIZENS LAW CENTER

8 3435 Wilshire Blvd., Suite 2860

Los Angeles, CA 90010-1938

9 T: (213) 674-2900 / F: (213) 639-0934

10 ANNA RICH (SBN 230195)

arich@nslc.org

11 KEVIN PRINDIVILLE (SBN 235835)

kprindiville@nslc.org

12 NATIONAL SENIOR CITIZENS LAW CENTER

1330 Broadway, Suite 525

13 Oakland, CA 94612

T: (510) 663-1055 / F: (510) 663-1051

14 Attorneys for Plaintiffs

15 ADDITIONAL COUNSEL LISTED ON NEXT PAGE

17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 OAKLAND DIVISION

20 ROSA MARTINEZ, JIMMY HOWARD,
21 ROBERTA DOBBS, BRENT
22 RODERICK, SHARON ROZIER, and
JOSEPH SUTRYNOWICZ, on behalf of
themselves and all others similarly situated,

23 Plaintiffs,

24 vs.

25 MICHAEL J. ASTRUE, Commissioner of
26 Social Security, in his official capacity,

27 Defendant.

CASE NO. 08-CV-4735 CW

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT, CLASS
CERTIFICATION, AND APPOINTMENT
OF CLASS COUNSEL, AND DIRECTING
CLASS NOTICE AND SETTING FINAL
FAIRNESS HEARING**

Date: August 11, 2009

Time: 2:00 p.m.

Dept: Courtroom 2

The Honorable Claudia Wilken

1 EMILIA SICILIA
esicilia@urbanjustice.org
2 JENNIFER PARISH
jparish@urbanjustice.org
3 URBAN JUSTICE CENTER
123 William Street, 16th Fl.
4 New York, NY 10038
T: (646) 602-5668 / F: (212) 533-4598

5 CHRISTOPHER A. DOUGLAS (SBN 239556)
cdouglas@legalaidsmc.org
6 M. STACEY HAWVER (SBN 146012)
mshawver@legalaidsmc.org
7 LEGAL AID SOCIETY OF SAN MATEO COUNTY
521 East 5th Avenue
8 San Mateo, CA 94402
9 T: (650) 558-0915 / F: (650) 558-0673

10 MARILYN HOLLE (SBN 61530)
marilyn.holle@disabilityrightsca.org
11 DISABILITY RIGHTS CALIFORNIA
3580 Wilshire Blvd. Suite 902
12 Los Angeles, CA 90010-2522
T: (213) 427-8747 / F: (213) 427-8767

13 Of Counsel for Plaintiffs ROSA MARTINEZ, JIMMY
14 HOWARD, ROBERTA DOBBS, BRENT RODERICK,
SHARON ROZIER, JOSEPH SUTRYNOWICZ, and all
15 others similarly situated

NOTICE OF MOTION

TO THE COURT, ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Tuesday, August 11, 2009, at 2:00 p.m., before the Honorable Claudia Wilken, at the United States Courthouse at 1301 Clay Street, Oakland, CA 94612, Plaintiffs will and hereby do move the Court for an order that:

- (1) certifies this action as a class action and certifies the following class of plaintiffs (“Settlement Class”), pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(c)(1), who have been affected by the operation and application of a policy of the Social Security Administration with respect to statutes and regulations governing the Old Age, Survivors, and Disability Insurance (“OASDI”), Supplemental Security Income (“SSI”), and Special Veterans Benefits (“SVB”) programs, *see* 42 U.S.C. §§ 402(x)(1)(A)(iv) (OASDI), 1004(a)(2) (SVB), 1382(e)(4)(A) (SSI); *see also* 20 C.F.R. § 416.1339(b); *id* § 408.810(b):

All persons whose SSI, SVB, or OASDI benefits have been suspended or denied, or who have been notified of a proposed suspension or denial of such benefits, for “fleeing to avoid prosecution or custody or confinement after conviction” for a felony or who are not permitted to serve as Representative Payees for SSI, SVB or OASDI benefits for “fleeing to avoid prosecution or custody or confinement after conviction” for a felony. The class shall not include, and this settlement shall not apply to, any individual who has received a final federal court disposition regarding payment or nonpayment of benefits due to fugitive felon status.

- (2) appoints Plaintiffs’ counsel as Class Counsel for the Settlement Class pursuant to Rules 23(g) and 23(c)(1);
- (3) preliminarily approves the Stipulation of Settlement and the compromise of class claims described therein, pursuant to Rule 23(e);
- (4) approves the proposed form of notice to the Settlement Class; and
- (5) schedules a fairness hearing for Thursday, September 24, 2009, at 2:00 p.m. for final approval of the Stipulation of Settlement, with any objections to the Stipulation of Settlement to be filed not later than September 10, 2009.

1 This Motion is made pursuant to the Federal Rules of Civil Procedure 23 and 54. The
2 Motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities,
3 the Declaration of Gerald A. McIntyre filed concurrently herewith, and such additional argument
4 as the parties may present at the hearing on this Motion.

5
6 DATED: July 21, 2009

MUNGER, TOLLES & OLSON LLP
Attorneys for Plaintiffs

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8 By: /s/ Mark R. Conrad
9 MARK R. CONRAD
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7AA Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, <i>Federal Practice and Procedure</i> § 1775, at 73 (3d ed. 2005)	11, 15
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Social Security Administration, *SSI Federally Administered Payments*,
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Social Security Administration, *2009 Social Security Changes*,
available at <http://www.ssa.gov/pressoffice/factsheets/colafacts2009.pdf> (last visited July 21, 2009)..... 5

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit was filed to challenge the Social Security Administration's ("SSA") policy, in connection with its administration of the Old Age, Survivors, and Disability Insurance ("OASDI"), Supplemental Security Income ("SSI"), and Special Veterans Benefits ("SVB") programs (collectively, the "Federal Benefits Programs"), of denying and suspending benefits, and of denying certification to and decertifying representative payees, whenever a beneficiary or representative payee is the subject of an outstanding felony warrant.

After extensive arm's-length negotiations, the parties have reached agreement on the terms of a settlement which, if approved by the Court, would resolve the case. *See* Declaration of Gerald A. McIntyre ("McIntyre Decl."), Exh. 1 ("Stipulation of Settlement"). As part of the proposed settlement, SSA has changed its policy, effective April 1, 2009, in all pending and future determinations. SSA has replaced the challenged policy with a new directive, pursuant to which the agency has agreed hereafter to deny applications or suspend benefits—or deny certification or decertify representative payees—only in cases where those applicants, beneficiaries, or representative payees are subject to a warrant that bears a code specifically identifying the relevant felony as involving "flight" or "escape," *i.e.* National Crime Information Center Uniform Offense Classification Codes of 4901 (escape), 4902 (flight to avoid) and 4999 (flight-escape).

The Stipulation of Settlement further provides for payment of full retroactive benefits to otherwise eligible members of the proposed Settlement Class whose benefits were denied or suspended under the policy on or after January 1, 2007. Further, members of the Settlement Class whose benefits were suspended or denied between January 1, 2000 and December 31, 2006, will have a notice sent to them advising them of SSA's revised policy so that these class members can pursue prospective relief as if they had filed on April 1, 2009. Moreover, except for those with warrants issued under one of the three NCIC codes referred to above, SSA will no longer seek to collect overpayments from any members of the class, if their benefits were suspended or denied

1 on or after January 1, 2000. That is, pursuant to the implementation plan described below, and in
 2 a revision of its former practice, SSA will no longer seek to recoup benefits that were previously
 3 paid during periods when a beneficiary's warrant was outstanding.

4 The proposed Stipulation of Settlement represents a fair, adequate, and reasonable
 5 compromise of claims. Plaintiffs request that the Court: (1) certify a Settlement Class pursuant
 6 to Rules 23(a), 23(b)(2), and 23(c)(1); (2) appoint Plaintiffs' counsel as Class Counsel for the
 7 Settlement Class pursuant to Rules 23(g) and 23(c)(1); (3) preliminarily approve the Stipulation
 8 of Settlement pursuant to Rule 23(e); (4) approve the proposed notice to the class; and (5) in
 9 accord with the Court's order at the case management conference held July 7, 2009, set a final
 10 approval hearing for Thursday, September 24, 2009, at 2:00 p.m. to consider the fairness of the
 11 proposed Stipulation of Settlement, with any objections filed not later than September 10, 2009.

12 **II. BACKGROUND**

13 **A. Nature of the Claims**

14 Federal law makes ineligible for OASDI, SVB, or SSI benefits (or for service as
 15 representative payees under these programs) all persons who are "fleeing to avoid prosecution, or
 16 custody or confinement after conviction," for a felony. 42 U.S.C. §§ 402(x)(1)(A)(iv) (OASDI),
 17 1004(a)(2) (SVB), 1382(e)(4)(A) (SSI). Pursuant to these statutes, SSA has implemented
 18 regulations which state that SSA will deny or suspend benefits only where there is an order or
 19 warrant that is issued "on the basis of an appropriate finding" that the individual in question "[i]s
 20 fleeing, or has fled, to avoid prosecution" or "is fleeing, or has fled to avoid, custody or
 21 confinement after conviction" for a felony. 20 C.F.R. § 416.1339(b); *id.* § 408.810(b).

22 In its administration of these Federal Benefits Programs, SSA established a policy, set
 23 forth in the agency's Program Operations Manual System ("POMS"), under which the agency
 24 instructed its personnel to deny and suspend benefits, and to deny certification or decertify
 25 representative payees, on the ground that an applicant, beneficiary, or representative payee was
 26 the subject of an outstanding felony warrant—even if the applicant, beneficiary, or representative
 27 payee did not know of the warrant or the charges from which the agency deemed the individual to
 28 be fleeing.

1 Prior to the filing of this action, numerous federal courts had previously addressed the
 2 policy in the context of individual appeals and had consistently ruled against the agency. *See*,
 3 *e.g.*, *Fowlkes v. Adamec*, 432 F.3d 90, 96-97 (2d Cir. 2005); *Reff v. Astrue*, 2008 WL 4277713
 4 (D. Minn. Sept. 15, 2008); *Caldwell v. Astrue*, 2008 WL 2713714 (E.D. Tenn. July 10, 2008);
 5 *Blakely v. Comm'r Soc. Sec.*, 330 F. Supp. 2d 910 (W.D. Mich. 2004); *Hull v. Barnhart*, 336 F.
 6 Supp. 2d 1113 (D. Or. 2004); *Thomas v. Barnhart*, 2004 WL 1529280 (D. Me. June 24, 2004);
 7 *Garnes v. Barnhart*, 352 F. Supp. 2d 1059 (N.D. Cal. 2004).

8 **B. Procedural Background**

9 On behalf of themselves and all other similarly situated individuals, Plaintiffs Rosa
 10 Martinez and Jimmy Howard filed this action on October 15, 2008, alleging that SSA's policy
 11 violated the Social Security Act and the agency's implementing regulations. Two days later,
 12 Plaintiff Rosa Martinez filed a motion for a temporary restraining order, which Defendant
 13 opposed. That motion was withdrawn a few days later, after SSA agreed to resume paying
 14 benefits to Ms. Martinez.

15 Plaintiffs filed a First Amended Class Action Complaint on December 12, 2008, adding
 16 four additional named plaintiffs. On January 12 and January 15, 2009, the parties filed a series of
 17 substantive motions. Plaintiffs moved for class certification, for a preliminary injunction, and for
 18 summary adjudication on the question of the legality of SSA's challenged policy. Defendant filed
 19 two motions to dismiss, contending that Plaintiffs were required to exhaust their administrative
 20 remedies and making various other jurisdictional arguments. Defendant also opposed the motion
 21 for class certification, preliminary injunction, and summary adjudication on the primary ground
 22 that SSA's policy was consistent with legislative history. While these motions were pending,
 23 SSA returned some of the named Plaintiffs to pay status.

24 Prior to the completion of briefing on these motions, the parties entered into settlement
 25 negotiations. After briefing was completed but prior to the scheduled hearing on the pending
 26 motions, the parties participated in two lengthy settlement conferences before the Honorable
 27 Magistrate Judge Edward M. Chen. Although these two sessions did not produce a complete
 28 agreement, the parties made substantial progress toward a mutually acceptable resolution of the

lawsuit and thereafter continued to engage in settlement talks. On March 12, 2009, the day of the scheduled hearing on the pending motions, the parties reached agreement in principle on the terms of a settlement, with the exception of the amount of fees to be paid to Plaintiffs' counsel. Having agreed upon the elements of the substantive relief to be provided to the Settlement Class, the parties requested, and the Court approved, a continuation of the hearing on the motions to allow further negotiations. After agreeing on a fee amount, the essential elements of the parties' agreement were included in a Memorandum of Understanding which was entered on the record before Magistrate Judge Chen on March 30, 2009, and the parties withdrew their respective motions. Subsequently, the parties resolved all remaining issues and memorialized their agreement in the proposed Stipulation of Settlement, attached as Exhibit A to the Declaration of Gerald A. McIntyre filed herewith.

C. The Stipulation of Settlement

The key features of the proposed Stipulation of Settlement are as follows. *First*, the Stipulation of Settlement fundamentally changes the challenged SSA policy. Under the terms of the Stipulation, effective April 1, 2009, SSA no longer suspends or denies OASDI, SSI, and SVB benefits merely on the basis of an outstanding felony warrant and no longer refuses to certify an individual as a representative payee solely on the basis of an outstanding felony warrant, although it may use warrant information in determining an individual's suitability to serve as a representative payee.¹ Instead, SSA has agreed that it will deny or suspend benefits, or deny or suspend status as a representative payee, only when the applicant, beneficiary, or representative payee has been charged with an offense that falls under one of three designated NCIC Codes: "escape" (4901); "flight to avoid" (prosecution, confinement, etc.) (4902); and "flight-escape" (4999). *See* Stipulation of Settlement, art. I. Out of more than 424 types of warrants listed by the NCIC, the parties specifically negotiated these codes, which constitute a small fraction of all

¹ *See also* Social Security Administration, EM-09025, *available at* <https://secure.ssa.gov/apps10/public/reference.nsf/8b709aba3e20a0dd852574da00547b45/24d88ce410138ee38525758a003ed321!OpenDocument> (April 1, 2009) (beneficiaries); Social Security Administration, EM-09024, *available at* <https://secure.ssa.gov/apps10/public/reference.nsf/8b709aba3e20a0dd852574da00547b45/b3d2f7c0a1a2ae2b8525758b0069c1ec!OpenDocument> (April 1, 2009) (representative payees).

1 warrants issued. Further, the nature of the offenses captured by these three codes suggests that an
 2 individual subject to a warrant bearing one of these codes has been the subject of a probable cause
 3 finding that the person is “fleeing” to avoid prosecution, custody or confinement.

4 *Second*, with the exception of persons whose warrants fell within one of the three NCIC
 5 classifications noted above, all otherwise eligible persons whose applications were denied or
 6 whose benefits were suspended or who had an administrative appeal decision on the basis of an
 7 outstanding felony arrest warrant on or after January 1, 2007, as well as all persons with pending
 8 administrative claims challenging any such suspension or denial as of August 11, 2008 (the
 9 “Post-2006 Class Members”), are entitled under the Stipulation of Settlement to have their
 10 benefits reinstated and to receive full retroactive award of benefits for the period during which
 11 SSA had denied or withheld benefits pursuant to the challenged policy. *See* Stipulation of
 12 Settlement, art. II. SSA will provide individual notices to these persons advising them of their
 13 eligibility for this relief. At this time, SSA’s preliminary estimate is that the group of Post-2006
 14 Class Members includes approximately 80,000 individuals. McIntyre Decl. ¶¶ 13-14. Further,
 15 according to SSA, in January 2009 the average benefits payment received by retired workers
 16 under Social Security was \$1,153 per month; the average payment received by disabled workers
 17 under Social Security was \$1,064 per month; and the average Supplemental Security Income
 18 payment received was \$504.10 per month. *See* Social Security Administration, 2009 Social
 19 Security Changes, available at <http://www.ssa.gov/pressoffice/factsheets/colafacts2009.pdf> (last
 20 visited July 21, 2009); Social Security Administration, SSI Federally Administered Payments,
 21 available at http://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2009-05/table07.pdf (last
 22 visited July 21, 2009).

23 *Third*, again with the exception of persons whose warrants fell within one of the three
 24 NCIC classifications noted above, individuals whose benefits were denied or suspended between
 25 January 1, 2000 and December 31, 2006, and who are not members of the Post-2006 class (the
 26 “Pre-2007 Class Members”) will be sent individualized notices, mailed to the individuals’ last
 27 known address, advising of the changes made to SSA’s policy and apprising these individuals of
 28 their potential eligibility for prospective benefits. While Pre-2007 Class Members will not be

1 entitled to an award of full retroactive benefits, those who are not already receiving benefits or
 2 payments and who contact SSA within six months of the mailing of these notices will be assigned
 3 a “protective filing date” of April 1, 2009, entitling these individuals to benefits based on that
 4 filing date, provided they establish their present eligibility for benefits. *See* Stipulation of
 5 Settlement, art. III.

6 *Fourth*, with the exception of persons whose warrants fell within one of the three NCIC
 7 classifications noted above, under the implementation plan SSA will not seek to collect
 8 overpayments from anyone whose benefits were denied or suspended after January 1, 2000, if
 9 such overpayments were based on SSA’s implementation of the challenged policy. Previously,
 10 when SSA determined that a beneficiary had received payments under the Federal Benefits
 11 Programs at a time when a felony warrant was outstanding for that person’s arrest, SSA
 12 considered those payments to be “overpayments” and billed the individual for the amount of
 13 those benefits. If the warrant was cleared and the agency again deemed the person to be eligible,
 14 the agency would withhold some or all of the person’s ongoing benefits until it recovered the
 15 “overpayment” of any benefits paid while a warrant was in existence. Under the terms of the
 16 Stipulation of Settlement, SSA will cease to collect these overpayments altogether, providing a
 17 large number of Settlement Class members with relief from a debt SSA has told them they owe.
 18 *See* Stipulation of Settlement, §§ 2.2 & 3.2. At this time, SSA is unable to estimate how many
 19 individuals in the Pre-2007 group are entitled to this relief.

20 In addition to these key terms, the Stipulation of Settlement also provides for publication
 21 of its terms on the website of the Social Security Administration and in the Federal Register. *See*
 22 Stipulation of Settlement, art. IV. Further, SSA has developed an implementation plan setting
 23 forth anticipated timeframes for providing agreed-upon relief to the Settlement Class and will
 24 notify Class Counsel of the dates that it begins and substantially completes each phase. *See*
 25 Stipulation of Settlement, art. V. Any significant adjustments to this implementation plan will
 26 require SSA to notify Class Counsel and will be subject to dispute resolution procedures if
 27 needed. Moreover, to protect the interests of the class, the Stipulation of Settlement contemplates
 28 collaboration by Plaintiffs’ Counsel in the implementation of the settlement, including the right to

1 review and comment within two days on notices and transmissions from SSA to agency
 2 employees regarding the revised policy and the implementation of the settlement and on notices
 3 to class members. It also provides for the continuing jurisdiction of this Court to enforce the
 4 terms of the Stipulation of Settlement, modify it if jointly requested by the parties, and enter any
 5 order authorized by it. *See* Stipulation of Settlement, arts. IX & X. Finally, the Stipulation
 6 provides for an award of attorneys' fees and costs in the amount of \$483,000 to Class Counsel.
 7 This amount reflects the substantial amount of work Class Counsel has already performed in
 8 briefing the case and reaching out to prospective members of the Settlement Class, and is
 9 considerably less than the reasonable fees and costs that Plaintiffs would otherwise be entitled to
 10 seek from the Court. *See* McIntyre Decl. ¶¶ 9, 11.

11 **D. SSA's Implementation and Expected Timeframes**

12 Immediately upon the parties' tentative settlement, SSA issued instructions revising its
 13 policy and procedures on paying beneficiaries with outstanding felony warrant records and
 14 selecting representative payees with such records, as described in greater detail below. SSA also
 15 began comprehensive efforts preparing for implementation of the settlement by developing
 16 business plans, writing and testing systems codes and protocols, and drafting various materials for
 17 providing notice to class members. On June 12, 2009, SSA provided plaintiffs its implementation
 18 plan as required by Article V of the settlement, and plaintiffs have accepted the plan after
 19 discussing it with SSA. The significant efforts on implementation, the salient terms of which are
 20 described below, will continue until the SSA fulfills its obligations under the settlement.

21 **1. Policy Change**

22 On April 1, 2009, SSA announced the new fugitive felon policy resulting from this
 23 settlement in Emergency Message (EM) 09025, attached as Exhibit C to the Settlement
 24 Agreement. *See* McIntyre Decl. Exh. 1. Prior to its public release, Plaintiffs' counsel reviewed
 25 EM 09025, as provided in the March 30, 2009 terms of settlement. The policy became effective
 26 the same day and is publicly available on SSA's website, www.socialsecurity.gov.

27 The EM 09025 provides that only three National Crime Information Center (NCIC) felony
 28 offense codes will be used to prohibit payment and not to select representative payees under the

1 felony non-payment and non-selection provisions of Titles II, VIII, and XVI of the Social
 2 Security Act. SSA may continue to consider all warrant information in determining an
 3 individual's suitability to serve as a representative payee.

4 SSA used the emergency message format as an immediate means to disseminate and make
 5 public the new policy. Upon finalization of the settlement, the agency anticipates incorporating
 6 the policy in EM 09025 in a section of its Program Operations Manual System ("POMS").
 7 POMS provides the operational and policy guidance for agency field personnel, and portions of
 8 the POMS are available on SSA's website and published on Westlaw.

9 **2. Provision of Retroactive Relief**

10 Pursuant to the settlement terms, on June 12, 2009, SSA provided Plaintiffs with an
 11 Implementation Plan for the elements of the settlement, including the provisions for retroactive
 12 relief to the Post-2006 Class Members and Pre-2007 Class Members. McIntyre Decl. ¶ 5. The
 13 agency has already begun preparatory work on effectuating this relief. *Id.* ¶ 6. The
 14 implementation plan included the agency's current assessment of the anticipated timeframes for
 15 the public aspects of implementation. *Id.* ¶ 5. To make this assessment, SSA's systems,
 16 operations, and policy components had to carefully sequence and stage the relief provided to the
 17 Post-2006 Class Members, further sequence this relief with respect to the Title II, Title VIII and
 18 Title XVI programs, and plan the relief for the Pre-2007 Class Members. *Id.* ¶ 6. SSA and
 19 Plaintiffs' counsel discussed the sequencing of relief in detail. *Id.* Following systems validation
 20 procedures, SSA plans to identify class members and then:

- 21 (a) begin notifying post-2006 Title II class members and reinstating their benefits in
 22 the fourth quarter of 2009;
- 23 (b) begin notifying post-2006 Title XVI and Title VIII class members and begin
 24 redetermining their non-medical eligibility and, as appropriate, reinstating their
 25 payments in the second quarter of 2010;
- 26 (c) begin reopening Title XVI claims denied after 2006 and reassessing non-medical
 27 eligibility and, in cases where a determination has not already been made,
 28 determining medical eligibility, in the second quarter of 2010;

(d) begin notifying pre-2007 class members, providing overpayment relief, and affording protective filing dates to timely responders in the second quarter of 2010. *Id.* ¶ 7. The Implementation Plan advises that the timeframes are contingent on several factors, including, but not limited to, successful systems design, development, testing, and validation activities, as well as the anticipated availability of resources planned for the Martinez Settlement initiative. *Id.* ¶ 8. The timeframes also depend on the number of cases in which SSA determines that relief cannot be automated and must be manually handled. *Id.* In addition, the currently articulated timeframes are contingent on currently known facts and anticipated circumstances. *Id.* Therefore, changes in facts or circumstances, including changes in the preliminary or final approval hearing date or the effective date of the settlement, could affect the phases of the settlement and the final effectuation. *Id.*

III. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE UNDER RULE 23(A) AND RULE 23(B)(2).

A. The Settlement Class Meets the Numerosity, Commonality, Typicality, and Adequacy Requirements Set Forth in Rule 23(a).

Federal Rule of Civil Procedure 23(a) mandates that, as to any class that would be certified, (1) the number of persons must be so numerous that joinder of all individual class members as parties would be impracticable; (2) there must be questions of law or fact common to the class members; (3) the claims of the proposed named plaintiffs must be typical of those of the class; and (4) the named plaintiffs and their counsel must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). The proposed Settlement Class meets all of these requirements.

1. Numerosity. The vast number of beneficiaries and representative payees affected by SSA's policy makes joinder of all Settlement Class members' individual claims impracticable. SSA estimates that the proposed class would encompass tens of thousands of people. Although the exact number of Settlement Class members has not been calculated, class treatment is appropriate given the vast number of plaintiffs in the proposed class. *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980); *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 608 (N.D. Cal. 2004) (citing 1

1 Newberg on Class Actions § 3:6 (4th ed. 2002)).

2 **2. Commonality.** Common questions of both law and fact are presented by the claims of
 3 members of the proposed class. The commonality requirement of Rule 23(a) has been “construed
 4 permissively” in analogous contexts, *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003), and
 5 is satisfied here. The common questions relate to, among other issues: the operation and legality
 6 of SSA’s challenged policy; the reasonableness of SSA’s interpretations of governing federal
 7 statutes; and the ability of class members to obtain a retroactive award of benefits previously
 8 denied or suspended. Because the relief obtained by the Settlement Class does not depend on the
 9 facts of any individual case or the propriety of any plaintiff-specific factual determinations (such
 10 as the individual’s disability status), the questions posed by the claims of the proposed class
 11 representatives are common to those of other members of the Settlement Class.

12 The eligibility of individual members of the proposed class for benefits under the Federal
 13 Benefits Programs depends on their unique circumstances, but those individual questions do not
 14 prevent certification of a class in this case because this case challenges a policy that has been
 15 applied uniformly to all members of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019
 16 (9th Cir. 1998); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998); *Celano v. Marriott Int’l,*
 17 *Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007); *see also Forbush v. J.C. Penney Co., Inc.*, 994 F.2d
 18 1101, 1106 (5th Cir. 1993) (existence of subsequent individual administrative proceedings “does
 19 not supply a basis for concluding that [a proposed class] has not met the commonality
 20 requirement”).

21 **3. Typicality.** The claims of Plaintiffs Rosa Martinez, Jimmy Howard, Roberta Dobbs,
 22 Brent Roderick, Sharon Rozier, and Joseph Sutrynowicz are typical of the claims of the proposed
 23 Settlement Class. “Under the rule’s permissive standards, representative claims are ‘typical’ if
 24 they are reasonably co-extensive with those of absent class members; they need not be
 25 substantially identical.” *Hanlon*, 150 F.3d at 1020. In this case, the named plaintiffs and all
 26 members of the proposed Settlement Class have had (or face the threat of having) their benefits
 27 denied or suspended based on the same unlawful policy. They have identical claims for
 28 declaratory and injunctive relief and an identical interest in enforcing the plain language of the

1 statutes and implementing regulations. For these reasons, the claims of the named plaintiffs
2 should be considered typical of those of the members of the proposed Settlement Class.

3 **4. Adequacy.** The representative plaintiffs are adequate to protect the interests of the
4 proposed Settlement Class. In particular, the interests of the named plaintiffs are consonant with,
5 and not antagonistic to, the interests of the Settlement Class. The procurement of relief for the
6 named plaintiffs in no way undermines or jeopardizes the availability of relief to others who have
7 been affected by SSA's policy. Under such circumstances, the individual plaintiffs are capable of
8 adequately protecting the interests of the class. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177
9 (9th Cir. 2007); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238-39 (9th Cir. 1998);
10 *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

11 **B. The Settlement Class Should Be Certified Pursuant to Rule 23(b)(2) Because**
12 **SSA's Challenged Policy Applies Generally to the Class.**

13 Certification of a class is appropriate where a defendant "has acted or refused to act on
14 grounds that apply generally to the class, so that final injunctive relief or corresponding
15 declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Here,
16 Plaintiffs have complained of conduct that generally affects and is applicable to the class as a
17 whole—namely, SSA's policy of denying or suspending benefits, or decertifying or denying
18 certification for representative payees, under the same challenged policy. Indeed, this case is
19 similar to, and for purposes of Rule 23(b)(2) indistinguishable from, numerous other cases in
20 which aggrieved claimants have challenged generally the application of a particular government
21 policy. *See, e.g., Walters*, 145 F.3d at 1047 *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *see*
22 *also* 7AA Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and*
23 *Procedure* § 1775, at 73 (3d ed. 2005) (noting that Rule 23(b)(2) "has been used extensively to
24 challenge the enforcement and application of complex statutory schemes, *such as suits involving*
25 *the award or termination of benefits under the Social Security Act.*" (emphasis added)).

26 **IV. APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL IS**
27 **APPROPRIATE UNDER RULE 23(g).**

28 Plaintiffs counsel, a group of experienced and capable attorneys, include attorneys at four
non-profit organizations—the National Senior Citizens Law Center ("NSCLC"), the Urban

Justice Center, Disability Rights California, and the Legal Aid Society of San Mateo County—whose missions each and collectively include the representation and advancement of the interests of individuals within the proposed Settlement Class.² Further, Plaintiffs’ counsel Gerald McIntyre, of NSCLC, has previously and successfully argued a case before the Second Circuit Court of Appeal presenting many of the issues raised in this litigation. *See Fowlkes v. Adamec*, 432 F.3d 90, 91 (2d Cir. 2005) (listing Mr. McIntyre as plaintiff’s lead counsel). Finally, Plaintiffs’ counsel include attorneys from the nationally recognized law firm, Munger, Tolles & Olson LLP, which has demonstrated its commitment in this case to provide the resources necessary to litigate the issues presented in this matter and whose attorneys have extensive litigation experience. *See Drew Combs, A Firm of Equals*, *The American Lawyer*, July 2008 (ranking MTO first in the 2008 version of its “annual A-List of the nation’s elite firms”); Andrea Chang, *L.A. Law Firm Judged No. 1*, *L.A. Times*, July 8, 2008. The attorneys representing the proposed Settlement Class have expertise in disability rights, public-benefits law, senior-citizen law and class-action litigation, and they have demonstrated that they possess the necessary resources and commitment to pursue vigorously the interests of the proposed Settlement Class. For these reasons, they should be appointed as Class Counsel to the Settlement Class.

V. APPROVAL OF THE PARTIES’ PROPOSED SETTLEMENT AGREEMENT IS APPROPRIATE UNDER RULE 23(e).

Federal Rule of Civil Procedure 23(e) requires this Court to determine whether a proposed class settlement is fundamentally fair, adequate, and reasonable to the plaintiff beneficiaries. “Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class

² *See, e.g.*, National Senior Citizens Law Center <http://www.nslc.org/NSCLC/about-us/whowere>; Urban Justice Center, <http://www.urbanjustice.org/ujc/about/hub.html?id=cZtvmZBP>; Disability Rights California, <http://www.disabilityrightsca.org/about/index.htm>; Legal Aid Society of San Mateo County, <http://www.legalaidsmc.org/about.htm>; Munger Tolles & Olson, <http://www.mto.com/about/>.

1 members to the proposed settlement.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
2 1998). Such a comprehensive assessment of the fairness and adequacy of a proposed settlement
3 is “committed to the sound discretion of the trial judge.” *Id.* In reviewing a proposed resolution,
4 the court also considers “the strong judicial policy that favors settlements, particularly where
5 complex class action litigation is concerned.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,
6 1276 (9th Cir. 1992).

7 Here, the parties’ proposed Stipulation of Settlement should be preliminarily approved.
8 As described above, the Stipulation of Settlement effects a major change in SSA policy. The
9 agreement assures that SSA will no longer deny or suspend benefits unless the warrant in
10 question falls into one of three categories, such that the nature of the offense for which the
11 warrant has been issued suggests that a probable cause finding has been made that the individual
12 is “fleeing” to avoid prosecution, custody or confinement. This is a narrow subset of warrants,
13 specifically negotiated by the parties, covering only 3 of 424 types of warrants categorized by the
14 NCIC. Furthermore, the Stipulation of Settlement provides substantial economic benefits to the
15 Settlement Class. Those members of the proposed Settlement Class whose benefits have been
16 denied or suspended since January 1, 2007 are eligible for retroactive benefits that may, in some
17 instances, amount to tens of thousands of dollars. Any member whose benefits were denied or
18 suspended between January 1, 2000 and December 31, 2006 will have any “overpayments”
19 attributable to the policy eliminated under the implementation plan—a benefit that may be worth
20 thousands or tens of thousands of dollars to some members of the proposed Settlement Class.
21 Perhaps most significantly, all members of the proposed class (except those with an unsatisfied
22 “flight” or “escape” warrant) will have the opportunity to obtain benefits going forward without
23 the impediment of the challenged policy.

24 Although the action has not proceeded to an advanced stage, settlement at this juncture is
25 in the interests of class members. Given that the Federal Benefits Programs provide the primary
26 or sole source of income for the overwhelming majority of the class, the prompt resolution of this
27 action and renewed access to program benefits is of vital importance. Because this action
28 challenges a publicly-disclosed policy, discovery is not relevant to many of the key issues in the

1 case. Moreover, a resolution at this early stage provides much-needed relief to members of the
 2 proposed Settlement Class, some of which has already been preliminarily provided by SSA. The
 3 policy changes encompassed in the proposed settlement are very similar to, if not precisely the
 4 same as, the prospective relief that Plaintiffs could have obtained if they had prevailed outright in
 5 further litigation.

6 The Stipulation of Settlement also provides meaningful retroactive relief, including full
 7 reinstatement of retroactive benefits for some. Claims under the Social Security Act are subject
 8 to a 60-day statute of limitations. 42 U.S.C. § 405(g). While Plaintiffs believe that the statute
 9 would be tolled under the circumstances of this case, litigating the issue of retrospective relief
 10 would subject the Settlement Class to the delay and risk of additional and complex litigation. In
 11 the views of the experienced attorneys who represent the Plaintiffs, the terms of the Stipulation of
 12 Settlement—which provide full retroactive relief for persons whose benefits were denied or
 13 suspended during a period of more than 20 months prior to the filing of this action (and partial
 14 retroactive relief for persons denied or suspended during a period of more than eight years prior
 15 to the filing of the action)—represent a fair and reasonable settlement.

16 Finally, it is noteworthy that the central terms of the Stipulation of Settlement are the
 17 result of arm's-length negotiations mediated by a magistrate judge. The fact that a federal agency
 18 has participated and agreed upon the terms of this Stipulation of Settlement provides another
 19 reason to conclude that it constitutes an adequate settlement for the class, rather than the sort of
 20 collusive class settlement that Rule 23(e) is designed to prevent. *Churchill Village, LLC v. Gen.*
 21 *Elec. Co.*, 361 F.3d 566, 577 (9th Cir. 2004); *City of Seattle*, 955 F.2d at 1276.

22 VI. NOTICE TO SETTLEMENT CLASS

23 If the Court preliminarily approves the Stipulation of Settlement, Rule 23(e) of the Federal
 24 Rules of Civil Procedure requires that “practicable” notice of any proposed class action settlement
 25 be provided in a manner that is “reasonably calculated, under all the circumstances, to apprise
 26 interested parties of the pendency of the action and afford them an opportunity to present their
 27 objections.” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (quoting *Mullane v. Cent.*
 28 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Court has wide discretion to

determine the particular form of notice to be provided, but generally such notice should set forth:

- (1) a summary of the proposed settlement agreement or a copy of the agreement; (2) the time, date and place of the fairness hearing; and (3) the procedure by which objections to the settlement may be made. *See* Manual for Complex Litigation, Third, § 30.41 at 236-38 (1997). Actual individualized notice is not required, especially where, as here, the Court's approval of the settlement under Rule 23(e) ensures the adequacy of representation, and the class is certified under Rule 23(b)(2). *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987) (quoting 7B Charles Wright et al., Federal Practice and Procedure § 1789, at 253 (2d ed. 1986)); *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).

Here, SSA would post a notice on its website. *See* McIntyre Decl. Exh. 2. Class Counsel would post the notice on their respective websites and would provide the notice to national organizations that represent members of the Settlement Class, including the ABA Commission on Law and Aging; AARP; Bazelon Center for Mental Health Law; Brennan Center for Justice; Center on HIV Law and Policy; Legal Action Center; Consortium for Citizens with Disabilities; National Academy of Elder Law Attorneys; National Alliance on Mental Illness; National Disability Rights Network; National Coalition for the Homeless; National Law Center on Homelessness and Poverty; National Organization of Social Security Claimants' Representatives; National Policy and Advocacy Council on Homelessness; Philippine Veterans Affairs Office (Quezon City); and Sargent Shriver National Center on Poverty Law. Class counsel would also request each of these national organizations to distribute the notice to any constituent organizations or affiliates. *See* [PROPOSED] Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Class Certification, and Appointment of Class Counsel, and Directing Class Notice and Setting Final Fairness Hearing. Such notice is reasonably calculated, in light of the characteristics of the Settlement Class, to provide notice and effective explanation to parties affected by the proposed settlement, regarding their rights and benefits under the proposed settlement agreement.

Pursuant to the Court's order at the case management conference held on July 7, 2009, a final approval hearing set for Thursday, September 24, 2009, at 2:00 p.m. will provide the Court

1 with additional opportunity to review the merits of the settlement agreement and to consider any
2 objections or other comments received from members of the Settlement Class, which will be filed
3 not later than Thursday, September 10, 2009.

4 **VII. CONCLUSION**

5 For the reasons set forth above, therefore, Plaintiffs request that the Court issue the
6 proposed order, filed herewith, which shall:

- 7 (1) certify the Settlement Class, defined above, pursuant to Rules 23(b)(2) and 23(c)(1);
8 (2) appoint Plaintiffs' counsel as counsel for the Settlement Class pursuant to Rules 23(g)
9 and 23(c)(1);
10 (3) preliminarily approve the Stipulation of Settlement pursuant to Rule 23(e);
11 (4) approve and direct notice to the class; and
12 (5) schedule a fairness hearing on Thursday, September 24, 2009, at 2:00 p.m. for final
13 approval of the Stipulation of Settlement.

14
15 DATED: July 21, 2009

MUNGER, TOLLES & OLSON LLP
Attorneys for Plaintiffs

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18 By: /s/ Mark R. Conrad
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