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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security, in her official capacity,

Defendant.

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

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: October 8, 2015
Time: 2:00 p.m.
Dept.: Courtroom 9, 19th Floor
Judge: Hon. Jon S. Tigar

Action Filed: February 9, 2015

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NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

PLEASE TAKE NOTICE that on October 8, 2015, at 2:00p.m., or as soon thereafter as the matter may be heard, in Courtroom 9, 19th Floor of the United States District Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Jon S. Tigar, Plaintiffs Kevin Hart, Nina Silva-Collins, and Lee Harris, on behalf of themselves and all others similarly situated ("Plaintiffs"), will, and hereby do, move the Court for an Order certifying the above-captioned action to proceed as a class action and appointing Plaintiffs' counsel as class counsel.

This Motion is made pursuant to Federal Civil Procedure Rule 23 on the grounds that this matter meets all the requirements for class certification set forth in Rule 23. The Motion is based upon this Notice; the accompanying Memorandum of Points and Authorities; the Declarations of Trinh Phan, Kyle Kitson, Nyla Moujaes, Anna Rich, William Stern, and Andy Chu in Support of Plaintiffs' Motion for Class Certification, filed concurrently herewith; the pleadings and all documents on file in this action; and such other matters as may be presented at or before the hearing.

Plaintiffs request that this Court grant Plaintiffs' motion, certify this matter as a class action, and appoint Plaintiffs' counsel as class counsel.

Dated: August 6, 2015

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By: */s/ William L. Stern*
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I. INTRODUCTION

This is a class action for declaratory and injunctive relief only, in which Plaintiffs seek class certification under Rule 23(b)(2). Only three facts matter for purposes of this motion, and all are uncontested.

First, after repeated complaints, the Social Security Administration (SSA) disqualified Dr. Frank Chen in December 2013 from performing further consultative examinations ("CE") due to deficiencies in his reports and the inadequacy of his examinations. Second, before he was disqualified, Dr. Chen submitted CE reports in at least 325 cases that resulted in a denial of benefits and are now pending at the hearing level. That is only the tip of the iceberg, because it does not include cases where an applicant may have simply dropped his or her claim after it was denied, and does not include cases still at the pre-hearing stage. Altogether, the class likely consists of thousands of claimants. Third, the SSA has now admitted—through an attempted partial fix after this lawsuit was filed—that the integrity of the administrative process was compromised by Dr. Chen's CE reports. Yet, the SSA has instructed its adjudicators that these reports may be considered nonetheless.

This is bad enough for those 325 claimants, because Dr. Chen's reports could still play a role in a denial or termination of their claims. But claimants do not ordinarily get to see the CE reports, so what about the many claimants who never even saw theirs? They were never told that their denials or terminations were based on an unreliable report from Dr. Chen. They likely would not have had any reason to know they had grounds to challenge the SSA's determination, let alone possess the resources to pursue those claims even if they knew they had been wronged. For them, the SSA's attempted fix in the course of litigation is empty, and too late.

Every SSA claimant is entitled to a fair process. Whether any given claimant is ultimately found to be entitled to Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) benefits is not at issue. This Court is not being asked to decide that. Here, every class member's process was tainted by a common injury, the SSA's policy of considering CE reports prepared by Dr. Chen in resolving their disability claims.

That this was a policy cannot be disputed. In its motion to dismiss, SSA argued that there was no "policy" being challenged, hence, each aggrieved claimant must individually run the procedural gauntlet, one by one, and exhaust his or her administrative remedy. But this Court concluded that exhaustion would be futile. It found that SSA's use of reports by Dr. Chen *was* a "policy." That finding establishes the commonality element of Rule 23(a), because each class member was aggrieved by a policy this Court described as "an SSA-wide policy to consider Dr. Chen's reports in resolving disability claims, even in the wake of widespread allegations of deficiencies in the quality of his examinations."

There is nothing novel about what Plaintiffs seek. In fact, it is precisely the kind of relief ordered by the district court in *Bowen v. City of New York* upon certification of a class of individuals who had been denied disability benefits or whose benefits had been terminated pursuant to an allegedly unlawful policy: reopen decisions denying or terminating benefits, and notify class members that their claims had been reopened. 476 U.S. 467, 475-76 & n.7 (1986).

The Court should certify the proposed class, and allow Named Plaintiffs to seek relief on behalf of all those who had a CE report from Dr. Chen and were denied benefits or had their benefits terminated.

II. ISSUE TO BE DECIDED

The issue to be decided is whether Plaintiffs' claims satisfy the requirements for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

III. BACKGROUND

A. SSA Is Obliged to Provide a Fair Process for Determining Whether Claimants Are Entitled to Benefits.

To obtain benefits based on disability under the SSI or SSDI programs, a claimant must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). A claimant must provide SSA with "evidence from acceptable medical sources to establish whether [the individual has] a medically determinable impairment[]." 20 C.F.R.

§ 404.1513(a). SSA administers these benefit programs, but contracts with state agencies, such as California's Disability Determination Service Division (DDSD) of the Department of Social Services, to make the disability determinations under standards established by SSA. *Id.* § 404.1503(a).

If the DDSD finds that an applicant's own medical records are insufficient to render a decision, it can refer the applicant to a contracting doctor for a CE. *Id.* §§ 404.1519, 416.919. The doctor performing a CE must be licensed, have adequate training, experience, and equipment to perform the CE, and not otherwise be barred from participating in SSA programs. *Id.* §§ 404.1519g, 416.919g.

Federal law provides the standard for determining whether someone is disabled: "there must be medical signs and findings, *established by medically acceptable clinical or laboratory diagnostic techniques*." 42 U.S.C. § 423(d)(5)(A) (emphasis added); *see also id.* § 1382c(a)(3)(D). SSA bears the ultimate responsibility to establish "uniform standards which shall be applied at all levels of determination, review, and adjudication in determining whether individuals are under disabilities." *Id.* § 421(k)(1). SSA regulations require that the determination that an individual is disabled be based on "evidence from acceptable medical sources." 20 C.F.R. §§ 404.1513(a), 416.913(a).

Further, the Commissioner of Social Security is charged with prescribing procedures for monitoring both the CE referral processes used, and the product of doctors to whom cases are referred for CEs. 42 U.S.C. § 421(j)(3). The resulting regulations explain SSA's responsibility for monitoring and ensuring the adequacy of the CE process, including providers. *See* 20 C.F.R. § 416.919t; *see also id.* § 416.919j (SSA will review allegations that a medical source designated to perform a CE "lacks objectivity."); *id.* § 416.919s(g) ("The State agencies will cooperate with [SSA] when [it] conduct[s] monitoring activities in connection with their oversight management of their consultative examination programs.").

Upon submission of a claim for benefits, the applicant first receives an initial determination of his or her claim. *Id.* §§ 404.902, 416.1402. If the applicant is denied, he or she may seek reconsideration. *Id.* §§ 404.929, 416.1429. If the claim is once again denied, then the

applicant must, within sixty days, request a hearing before an Administrative Law Judge ("ALJ"). *Id.* §§ 404.930, 404.933, 416.1430, 416.1433. If the applicant does not pursue a hearing, the initial denial becomes binding. *Id.* §§ 404.921, 416.1421. If the claimant requests a hearing, an ALJ is assigned to the case, and required to review all evidence in the record. *Id.* §§ 404.929, 416.1429. The ALJ will then conduct a hearing and issue a written decision. *Id.* §§ 404.944, 404.953, 416.1444, 416.1453. If the applicant is denied again, he or she has sixty days to request review from the Appeals Council. *Id.* §§ 404.967-68, 416.1467-416.1468. The Appeals Council will grant review if there has been an abuse of discretion or an error of law, or if the ALJ's actions, findings, or conclusions are not supported by substantial evidence in the record. *Id.* §§ 404.970(a), 416.1470(a). The Appeals Council may decline to review the case, or remand it to an ALJ, or render a decision. *Id.* §§ 404.967, 416.1467. If the Appeals Council chooses not to review the case, then the ALJ's decision becomes binding. *Id.* §§ 404.955, 416.1455. If the Appeals Council refuses to review the case, or issues an adverse decision, the applicant must then file a complaint in federal court.

B. SSA Denied Plaintiffs and Proposed Class Members a Fair Process.

Plaintiffs and proposed class members all received a CE report from Dr. Chen, a medical doctor who was appointed by the Disability Determination Service for the State of California to be on its CE panel. Over the years, applicants and their representatives filed numerous complaints against Dr. Chen with DDSD, explaining that he had not actually conducted full physical examinations as he stated in his reports. *See, e.g.*, Declaration of Andy Chu in Supp. of Pls' Mot. for Class Certification ("Chu Decl.") ¶¶ 5-15, Exs. A-B.) Dr. Chen's reports were also internally inconsistent, and ignored diagnoses, findings, and symptoms described in the applicants' medical records, which he claimed to have reviewed. (*See, e.g., id.*) Ultimately, Dr. Chen was disqualified because of "uncorrected deficiencies regarding the quality of his examination reports and the thoroughness of his examinations, which were the subject of corrective action letters dated September 2, 2011, and October 14, 2013." (Decl. of Scott J. Borrowman in Supp. of Mot. to Dismiss ("Borrowman Decl.") Ex. B at 1, ECF No. 27-3.)

SSA, however, never provided notice to Plaintiffs or proposed class members that Dr. Chen had been disqualified. (*See* Declaration of Trinh Phan in Supp. of Pls' Mot. for Class Certification ("Phan Decl.") ¶ 17; Declaration of Nyla Moujaes in Supp. of Pls' Mot. for Class Certification ("Moujaes Decl.") ¶ 12; Declaration of Kyle Kitson in Supp. of Pls' Mot. for Class Certification ("Kitson Decl.") ¶ 14; *see also* Def.'s Answer to Class Action Compl. ("Answer") ¶ 100, ECF No. 38 ("SSA admits that there is no regulation or rule directing SSA to provide applicants whose benefits have been denied or terminated notice that the consultative examiner in their case has been removed from the applicable CE panel.").) Nor did SSA reopen the applications that were tainted by Dr. Chen's reports. Moreover, SSA did not even inform the judges and staff who adjudicate disability claims that Dr. Chen was disqualified until over a year after his disqualification—and months after this lawsuit was filed. (*See* Def.'s Reply in Supp. of Mot. to Dismiss ("Reply") at 14:11-15:6, ECF No. 27[1]; Borrowman Decl. Ex. B, *see also id.* Ex. A, ECF No. 27-2.)

C. SSA's Post-Litigation Fix Is Inadequate.

Despite the SSA's belated admission that there were "uncorrected deficiencies regarding the quality of [Dr. Chen's] examination reports" and questions about "the thoroughness of his examinations," the SSA has failed to restore the integrity of the administrative process. SSA admits that "reports from Dr. Chen generated prior to December 30, 2013 are treated as reports from acceptable medical sources under governing regulations." (Answer ¶ 6.) SSA has instructed adjudicators to "consider" Dr. Chen's removal from the panel in "determining the weight, if any, to which" Dr. Chen's CE is entitled. (Borrowman Decl. Ex. A at 2.) In a March 16, 2015 memorandum to the Acting Chief Administrative Law Judge for San Francisco, the Chief Administrative Law Judge for SSA explains that Dr. Chen "was no longer authorized to perform consultative examinations (CEs) . . . premised in part on uncorrected deficiencies

[1] SSA's own policies, which Plaintiffs claim are inadequate, place any responsibility on DDSD to inform adjudicators that a consultative examiner has been disqualified, and even then qualify that DDSD "*may* provide formal notice to the Office of Disability Adjudication and Review (ODAR) through the regional consultative examination coordinator (CEC)." Social Security Hearings, Appeals, and Litigation Law Manual ("HALLEX") Ch. I-2-1-32A, http://ssa.gov/OP_Home/hallex/hallex.html (emphasis added).

regarding the quality of his examination reports and the thoroughness of his examinations, which were the subject of corrective action letters dated September 2, 2011, and October 14, 2013." (*Id.* at 1.)

The memorandum then instructs: "When preparing the decision, the ALJ or senior attorney advisor must consider the weight to give Dr. Chen's report in accordance with the regulations at 20 C.F.R. 404.1527 and 416.927." (*Id*. at 2.) These cited regulations provide that "every medical opinion" received by an ALJ will be evaluated "[r]egardless of its source[.]" 20 C.F.R. §§ 404.1527(c), 416.927(c). The regulations restrict an ALJ's evaluation of the evidence to the face of the report, and other evidence in the record. *See id.* They do not allow an ALJ to disregard an unreliable report, or question its findings, based on the fact that the individual who prepared it has been disqualified. *See id.* §§ 404.1527(b)-(c).

One month later, on April 15, 2015, the Division Chief Administrative Appeals Judge issued a similar memorandum to all employees of the Office of Appellate Operations providing instructions regarding the cases tainted by Dr. Chen's reports that are pending appeal. (Borrowman Decl. Ex. B at 1.) The memorandum requires the Appeals Council (AC) to grant review of any case if it contains a CE report *prepared by Dr. Chen after he was disqualified*—a highly unlikely, and perhaps nonexistent, scenario. (*Id*. at 2.) But "in all other cases involving reports from Dr. Chen, the AC will rely on the record before it and adjudicate the issues in the claim on a case-by-case basis." (*Id.*) The policy provides three examples of how the AC should proceed, but in each example Dr. Chen's CE reports are still considered and weighed along with other medical evidence in the record (assuming there is any). (*Id.*)

Accordingly, SSA has continued its agency-wide policy regarding Dr. Chen's reports, and continues to violate its obligations under the Social Security Act to make disability determinations based upon medical signs and findings, established by medically acceptable clinical and laboratory diagnostic techniques. Instead, it requires adjudicators to continue to consider Dr. Chen's reports as medical evidence to resolve disability claims, even though SSA knows they are inadequate and based on incomplete examinations.

Further, SSA's memoranda only offer directives for the cases currently pending at the hearing or appellate level. They do nothing for the far larger number of cases of individuals whose claims are pending at earlier levels, or whose claims are no longer pending.[2] Claimants impacted by Dr. Chen's CE reports may not have pursued their administrative remedies after an initial denial or termination because they were never told they had grounds to reopen their case. SSA requires those injured by Dr. Chen's CE reports to both initiate and run an administrative obstacle course before they have any chance of relief. They must somehow first learn about Dr. Chen's disqualification, seek out counsel, become informed that their case can be reopened, reopen their case, and challenge Dr. Chen's CE report. This gauntlet is especially unfair given that claimants often lack the resources necessary to undertake such an ordeal. (*See* Phan Decl. ¶¶ 22-23; Kitson Decl. ¶¶ 24-25; Moujaes Decl. ¶¶ 18-20; *see also City of New York*, 476 U.S. at 483 (district court "found that class members not only were denied the benefits they were seeking, but '[the] ordeal of having to go through the administrative appeal process may trigger a severe medical setback.'") And even if a claimant could clear all of these hurdles, the unreliable evidence from Dr. Chen remains part of the record—and SSA still requires all adjudicators to consider it. SSA's partial attempt at corrective action is plainly insufficient to repair the damage it has caused. That is why Plaintiffs come to this Court for prospective relief that will provide a meaningful remedy for those whose administrative claims were tainted by Dr. Chen's reports.

D. Plaintiffs' Claims

By their complaint, Plaintiffs make four requests: First, they request a declaration that SSA's policies and practices violate the Social Security Act, its implementing regulations, and the Due Process clause of the United States Constitution. Second, they ask that SSA be enjoined from relying on the reports of Dr. Chen. Third, they request that their cases be reopened so that

[2] According to its most recent budget justification, SSA denied 68% of all initial Social Security and SSI disability determinations in fiscal year 2014, and only 40% of those denials were appealed to the first level or reconsideration stage of the appeal process in the same year. *See* SSA FY 2016 Budget Justification at 143, Table 3.27-FY 2014 Workload Data Disability Appeals, http://www.ssa.gov/budget/FY16Files/2016FCJ.pdf. Without reason to believe the population of claimants who received CE reports from Dr. Chen is significantly different than the national average, the majority of putative class members did not reach the ALJ stage.

they can receive a fair disability determination. And fourth, they ask that SSA provide notice to claimants whose cases were tainted by a Dr. Chen report. The requested relief is appropriate for the class as a whole because Plaintiffs and proposed class members suffered from the same wrong: their administrative process was tainted by consideration of a Dr. Chen report in resolving their disability claims.

E. Procedural Background

Plaintiffs filed their class action complaint ("Compl.") on February 9, 2015. (ECF No. 1.) On April 20, 2015, Defendant sought to dismiss this action under Rule 12(b)(1). (ECF No. 18.) The Court denied that motion. (ECF No. 36.) It held that jurisdiction was proper and that Section 405(g)'s exhaustion requirement was properly waived because (1) Plaintiffs alleged irreparable harm; (2) Plaintiffs' claims for relief are collateral to any claim for benefits, as they challenge the SSA's policy of considering Dr. Chen's reports in resolving disability claims; and (3) it would be futile to require Plaintiffs to exhaust their administrative remedies "[b]ecause Plaintiffs challenge an SSA-wide policy of continuing to use Dr. Chen's reports in evaluating claimants," and "Defendant has already stated the SSA's intention to continue to consider Dr. Chen's reports in appeals of disability denials or terminations." (*Id.* at 11-12.)

IV. LEGAL STANDARDS

Plaintiffs must satisfy the requirements of Federal Rule of Civil Procedure 23(a), as well as at least one of the three requirements listed in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Under Rule 23(a), the party seeking certification must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); *Dukes*, 131 S. Ct. at 2548. Here, Plaintiffs must also show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *See* Fed. R. Civ. P. 23(b)(2); *Dukes*, 131 S. Ct. at 2548-49.

V. CLASS DEFINITION

Plaintiffs seek to certify a class of: All persons whose SSI or SSDI benefits were either denied or terminated and for whom a consultative examination report was prepared by Dr. Frank Chen.

VI. ARGUMENT

A. Plaintiffs Satisfy All of Rule 23(a)'s Requirements.

1. The proposed class is sufficiently numerous.

Plaintiffs satisfy the numerosity requirement of Rule 23(a) because SSA has admitted there are at least 325 claimants in the proposed class. In its March 16, 2015 memorandum, SSA states: "We have identified 325 pending cases at the hearing level with medical evidence from Dr. Chen." (Borrowman Decl. Ex. A at 2.) In its April 15, 2015 memorandum, SSA identifies additional proposed class members: "Some cases now pending at the Appeals Council (AC) level contain reports from Dr. Chen[.]" (*Id.* Ex. B at 1.) Accordingly, the proposed class certainly contains several hundred members. By comparison, courts in the Ninth Circuit have found that classes of far fewer than 100 members are sufficiently numerous to render joinder impracticable. *See, e.g.*, *Perez-Funez v. Dist. Dir.*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) ("Classes consisting of 25 members have been held large enough to justify certification."); James M. Wagstaffe et al., *California Practice Guide: Federal Civil Procedure Before Trial* § 10:261 (2015) (citing *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998)).

Plaintiffs also have the advantage of a "relaxed" numerosity standard because they seek only injunctive and declaratory relief. *Arnott v. U.S. Citizenship & Immigration Serv.*, 290 F.R.D. 579, 586 (C.D. Cal. Oct. 22, 2012) (in an action for injunctive and declaratory relief, plaintiffs "may rely on [] reasonable inference[s] arising from plaintiffs' other evidence that the number of unknown and future members of [the] proposed []class . . . is sufficient to make joinder impracticable") (quoting *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004)); *see also Charlebois v. Angels Baseball, LP*, No. SACV 10-0853 DOC (ANx), 2011 WL 2610122, at *9 (C.D. Cal. June 30, 2011) (noting that "numerosity requirements are often 'relaxed' when only injunctive or declaratory relief is sought").

While Plaintiffs do not know precisely how many individuals are in the proposed class, common sense dictates that it is large enough to satisfy the numerosity requirement. *See Sullivan v. Kelly Servs.*, 268 F.R.D. 356, 362 (N.D. Cal. 2010) ("[W]here 'the exact size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.'" (quoting 1 Alba Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002))). The 325 claimants whose cases are *currently* pending *at the hearing level* are a small minority of putative class members, as the majority of claimants do not reach the ALJ stage and Dr. Chen has been submitting CE reports for many years. (*See* discussion *supra* Part III.C.; Second Decl. of Scott J. Borrowman in Supp. of Mot. to Dismiss, Ex. C at 12, ECF No. 28-1 (listing October 8, 2008 CE report from Dr. Chen).) It can reasonably be inferred that the proposed class contains thousands of members.

2. The SSA-wide policy raises questions of law and fact common to the class.

Plaintiffs challenge the SSA-wide policy that has applied uniformly to each proposed class member: consideration of Dr. Chen's reports in resolving disability claims. A class bringing similar challenge to an allegedly unlawful SSA policy was certified in *City of New York*, including individuals who had been denied benefits or whose benefits were terminated pursuant to that policy. 476 U.S. at 475-76. In both cases, the SSA policies provide the bases for commonality.

As the Supreme Court has explained, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" such that "all their claims can be productively litigated at once." *Dukes*, 131 S. Ct. at 2551 (citation omitted). The common questions must "generate common *answers*" that are "apt to drive the resolution of the litigation." *Id.* (citation omitted). Commonality is therefore satisfied where the claims of all class members "depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The commonality requirement has "been construed permissively," and "[a]ll questions of fact and law need not be common to

satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2009) (noting that "common" does not mean "complete congruence" (citation omitted)). In its Order denying Defendant's motion to dismiss, this Court confirmed "the existence of an SSA-wide policy regarding Dr. Chen, authorizing adjudicators to continue to 'consider' his CE reports following his removal from the CE panel." (ECF No. 36 at 9.)

This case contains numerous common issues of fact and law stemming from SSA's consideration of Dr. Chen's reports that will drive the resolution of this case. While the circumstances of individual applicants' disability claims will vary, they were all subjected to the same tainted process: unreliable reports from Dr. Chen were submitted into evidence in their cases and SSA required adjudicators to consider the reports. Additionally, SSA did not provide putative class members with a copy of their CE report prior to their hearing, or notice that Dr. Chen had been disqualified. (*See* Kitson Decl. ¶¶ 14, 25; Moujaes Decl. ¶¶ 12, 20; Phan Decl. ¶ 17.) In fact, SSA "admits that there is no regulation or rule directing SSA to provide applicants whose benefits have been denied or terminated notice that the consultative examiner in their case has been removed from the applicable CE panel." (Answer ¶ 100; *see also* Reply at 1 (explaining such policy "is its ordinary administrative process for disability determinations").) Courts have held that such processes are sufficient to show commonality under Rule 23(a). *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (common agency policies and practices can be the "glue" required to bring common constitutional claims on behalf of a class of prisoners with individualized medical needs); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (differences among class members regarding merits of individual cases were "simply insufficient to defeat the propriety of class certification"); *Doe v. Los Angeles Unified Sch. Dist.*, 48 F. Supp. 2d 1233, 1241 (C.D. Cal. 1999) ("[C]ommonality exists if plaintiffs share a common harm or violation of their rights, even if individualized facts supporting the alleged harm or violation diverge.").

Plaintiffs' challenges to the constitutionality of SSA's policies and procedures also support certification of the class. Courts have found class certification is particularly well-suited

in such cases. *See La Duke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (case challenging constitutionality of INS procedure "[p]lainly" raised common questions of law and fact). In language that applies nearly verbatim here, the Supreme Court in *Yamasaki* found class relief to be "peculiarly appropriate" because:

> The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class. . . . It is unlikely that the differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

Califano v. Yamasaki, 442 U.S. 682, 701 (1979).

Specifically, the SSA-wide policy requiring consideration of Dr. Chen's reports raises two types of common questions. First, there are common questions about the legality of admitting unreliable evidence from Dr. Chen into SSI and SSDI proceedings. Specifically, these questions include whether requiring adjudicators to consider CE reports provided by a doctor who has been disqualified because of "uncorrected deficiencies regarding the quality of his examination reports and the thoroughness of his examinations" is a violation of (1) the Social Security Act, (2) its implementing regulations, or (3) the Due Process clause of the United States Constitution.

Second, there are common questions regarding SSA's legal obligations, including (1) whether the Due Process clause requires SSA to provide applicants with a copy of their CE report; (2) whether SSA had an obligation to monitor Dr. Chen; and (3) whether SSA failed to adequately monitor Dr. Chen.

None of these questions turn on the facts of any individual's case. The first set of common questions requires the Court to determine whether this unreliable evidence from Dr. Chen can legally be considered in a particular administrative proceeding. In short, is the SSA-wide policy authorizing adjudicators to consider Dr. Chen's CE reports legal? All proposed class members were, or are, subject to this policy. The second set of questions require the Court to determine SSA's legal obligations, and also to consider SSA's conduct in relation to Dr. Chen—not individual class members.

In addition to being common, the bulk of these questions are case-dispositive. For example, if SSA's policy of requiring adjudicators to consider unreliable CE reports as medical evidence is illegal, then Plaintiffs are entitled to declaratory relief. Likewise, if SSA is not required to provide applicants with a copy of their CE report, or did not have an obligation to monitor Dr. Chen, then Plaintiffs will lose those claims.

3. Plaintiffs' claims are typical of the class.

Plaintiffs' claims are typical of the class because Plaintiffs have been subjected to the same SSA-wide policy and have lost or been denied benefits as a result. Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "'The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.'" *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). The typicality requirement is "'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Rodriguez*, 591 F.3d at 1124 (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez*, 591 F.3d at 1124 (quoting *Hanlon*, 150 F.3d at 1020).

In this case, Plaintiffs' experiences exemplify the problem faced by all members of the proposed class: each received a CE report from Dr. Chen and had their claim for benefits denied or terminated. In August 2013, Dr. Chen examined Named Plaintiff Kevin Hart when he was scheduled for a continuing disability review (CDR) to determine if he continued to meet the disability standard.[3] (Phan Decl. ¶¶ 9-10; Ex. B.)

[3] The CDR differs from the initial disability determination in that the first step is to determine if there has been any medical improvement since the date the applicant was first determined to be disabled. If medical improvement related to ability to do work cannot be established, and no exceptions apply, benefits will continue. 20 C.F.R. § 404.1594.

SSA relied on Dr. Chen's evaluation in terminating Mr. Hart's benefits on September 11, 2013. (*Id.* ¶ 11.) Following a subsequent hearing, a Disability Hearing Officer concluded in a March 17, 2014 order that Mr. Hart's physical impairments had "medically improved" and that he was "able to do medium work activities" based upon Dr. Chen's report. (*Id.* ¶¶ 14-15, Ex. E at 6.) The Officer found Dr. Chen's report "more reasonable as consistent and supported by medical evidence" than another doctor's report that had been submitted by Mr. Hart. (*Id.* Ex. E at 9.)

Mr. Hart promptly filed a Request for Hearing by an ALJ, which occurred in March 2015. Thanks to his counsel's complaints about the existing Dr. Chen report, Mr. Hart received a new CE on May 6, 2015. (*See id.* ¶ 18.) The prior CE report by Dr. Chen, however, still remains in the administrative record of his claim and, in accordance with SSA regulations, it must be considered by the fact-finder. *See* 20 C.F.R §§ 404.1527(c), 416.927(c) ("Regardless of its source, we will evaluate every medical opinion we receive.").

Like Mr. Hart, Named Plaintiffs Nina Silva-Collins and Lee Harris also received CEs from Dr. Chen and their claims for benefits were denied. The cases of Ms. Silva-Collins and Mr. Harris also demonstrate how Dr. Chen's CE reports have continued to be used in the adjudication of individual disability claims well after his disqualification. Ms. Silva-Collins was examined by Dr. Chen on August 10, 2013, after the ALJ determined that a CE was necessary to evaluate her claims. (Moujaes Decl. ¶ 10.) Nevertheless, the ALJ who denied her claim for benefits following a supplemental hearing on January 8, 2014, "gave great weight to the opinion of consultative examiner Dr. Chen." (*Id.* ¶ 13, Ex. E at 12.) Ms. Silva-Collins filed an appeal to SSA's Appeals Council, which was recently granted. (*Id.* ¶¶ 15-16.) Her case was remanded to an ALJ for further proceedings; however, the Order requires the ALJ to consider all medical evidence in the record, and does not exclude the Dr. Chen CE. (*Id.* ¶ 16, Ex. G.)

Mr. Harris has been unfairly haunted by a similarly inadequate examination following his application for SSI. He previously applied for benefits in 2011, and that application was denied by an ALJ on June 4, 2013, based on Dr. Chen's CE report, which was assigned the "greatest weight" in the ALJ's decision. (Kitson Decl. ¶ 11, Ex. D at 10.) Mr. Harris applied for SSI benefits again on November 14, 2013. (*Id.* ¶ 12.) Mr. Harris subsequently obtained not one but

two subsequent examinations, one arranged by his counsel and another by a different SSA consultative examiner, both of which found Mr. Harris' limitations to be much greater than those described by Dr. Chen. (*Id.* ¶¶ 13, 15, Exs. E-F.) Yet once again, Dr. Chen's CE report was considered in the initial denial of Mr. Harris' 2013 application. The denial stated that Mr. Harris's CE was "reviewed and compared with CE by Dr. Chen in prior file." (*Id.* ¶ 16, Ex. G at 7.) Mr. Harris's written request for a hearing was submitted on February 4, 2015, and is still pending.[4] (*Id.* ¶ 20, Ex. J.)

In this case, Plaintiffs and all members of the proposed class received a CE report from Dr. Chen, and have had benefits terminated or denied. Plaintiffs' claims for declaratory and injunctive relief are identical to that of the class, and their interest in enforcing their statutory and constitutional rights is identical to that of the class. *See Parsons*, 754 F.3d at 686 (Rule 23(a)(3) requires only that the named plaintiffs' "claims be 'typical' of the class, not that they be identically positioned to each other or to every class member."). In short, "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected." *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. at 2551. Differences in the underlying facts concerning class members' disability status are not relevant because this lawsuit challenges only SSA-wide policies and practices in resolving disability claims. It does not seek to adjudicate individual benefit amounts. *See, e.g., Rodriguez*, 591 F.3d at 1124 (holding that variations in named plaintiff and class members' entitlements to relief did not defeat typicality because such "particular characteristics . . . will not impact the resolution of this general statutory question"). Thus, Rule 23's typicality requirement is met.

[4] In her Answer to the Complaint, Defendant cites a 60-day statute of limitations defense against Mr. Harris's claims. (Answer at 20.) That statute of limitations is inapplicable because Plaintiffs have alleged "good cause," as well as "fraud or similar fault." (*See* Compl. ¶ 111; *see also, e.g.*, Chu Decl. ¶¶ 5-15, Exs. A-B.) An SSDI or SSI disability determination may be reopened at any time in the case of fraud of similar fault. (20 C.F.R. §§ 404.988, 416.1488.) This issue is one that must be resolved after a full consideration of the merits.

4. Plaintiffs will fairly and adequately protect the interests of the proposed class.

Plaintiffs are adequate class representatives as their claims are typical of the class, and therefore they have no conflicts with class members. Rule 23(a)(4) is satisfied when the class representatives will "fairly and adequately protect the interests of the class." In order to make this determination, courts must resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. In considering the adequacy of plaintiffs' counsel, the court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Plaintiffs and proposed class members share the same interest: to remedy the systemic consideration of Dr. Chen's reports in resolving their disability claims. Because SSA has instructed adjudicators to continue using reports by Dr. Chen, and those reports remain in the record for each claimant's file, Plaintiffs and proposed class members are all interested in the relief requested by this action, including a declaration that SSA's policies and practices violate the law, and that SSA be stopped from relying on the reports of Dr. Chen.

Plaintiffs are also adequate class representatives as they have retained experienced and committed counsel, namely Justice in Aging (formerly known as the National Senior Citizens Law Center), the Legal Aid Society of San Mateo County, and the law firm of Morrison & Foerster LLP, working *pro bono*. Collectively, the two nonprofit organizations and the law firm, as well as the particular attorneys involved in the case, have extensive experience in public benefits law, the Social Security Act, and class-action litigation, as well as the necessary resources and commitment to pursue the interests of the class vigorously. (Declaration of William Stern in Supp. of Pls' Mot. for Class Certification ¶¶ 4-15; Declaration of Anna Rich in

Supp. of Pls' Mot. for Class Certification ¶¶ 2-7; Second Declaration of Trinh Phan in Supp. of Pls' Mot. for Class Certification ¶¶ 2-7.)

5. The proposed class is ascertainable.

"[C]ourts have implied an additional requirement under Rule 23(a): that the class to be certified be ascertainable." *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 1102660, at *10 (N.D. Cal. Mar. 18, 2014). "'A class definition should be precise, objective, and presently ascertainable,' though 'the class need not be so ascertainable that every potential member can be identified at the commencement of the action.'" *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 508 (N.D. Cal. 2011) (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)). In the Ninth Circuit, some courts have held that there is no ascertainability requirement in class actions brought under Rule 23(b)(2)[5]; while others have merely relaxed the requirement. *Compare In re Yahoo Mail Litig.*, No. 13-CV-04980, 2015 WL 3523908, at *16 (N.D. Cal. May 26, 2015) (holding that there is no ascertainability requirement in 23(b)(2) cases), *with Berndt v. Cal. Dept. of Corrections*, No. C. 03-3174 PJH, 2012 WL 950625, at *9 (N.D. Cal. Mar. 20, 2012) (finding the ascertainability requirement satisfied for a proposed (b)(2) class where the "class definition satisfactorily describes and reaches members of the class who *may* experience harm" as a result of the defendant's conduct "at some point in the future"). In any event, Plaintiffs' proposed class is ascertainable because they have precisely defined the class based on objective criteria. *See In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1182 (N.D. Cal. 2013) (explaining it must be possible to determine whether a class member is included "by reference to objective criteria") (quoting 5 James W. Moore, *Moore's Federal Practice*, § 23.21[3] (Matthew Bender 3d ed.)). Here, an individual is a member of the class if (1) they received a CE report from Dr. Chen, and (2) their benefits were denied or terminated.

[5] The First, Third, and Tenth Circuits have all concluded that the ascertainability requirement is inappropriate for (b)(2) classes. *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015); *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004).

Moreover, SSA has implicitly conceded the ascertainability of the class proposed here: it was able to identify 325 cases pending at the hearing level with medical evidence from Dr. Chen (Borrowman Decl. Ex. A at 2), and it must maintain records of those applicants who have been granted benefits, denied benefits, or had their benefits terminated, in order to administer the SSI and SSDI programs. *See* 20 C.F.R. § 401 app. A(b)(2)(c). Therefore, the class meets the ascertainability requirement, to the extent there is one.

B. Plaintiffs Satisfy Federal Rule of Civil Procedure 23(b)(2).

This case meets the requirements for certification under Rule 23(b)(2) because SSA "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Plaintiffs present a prototypical Rule 23(b)(2) class. Rule 23(b)(2) "has been used extensively to challenge the enforcement and application of complex statutory schemes, such as suits involving the award or termination of benefits under the Social Security Act." 7AA Charles Alan Wright, et al., *Federal Practice and Procedure* § 1775, at 73 (3d ed. 2005).

SSA has acted on grounds that apply generally to the class proposed here: it has acted based on an SSA-wide policy to consider CE reports from Dr. Chen to deny or terminate disability benefits. And, as the Court explained in its denial of Defendant's motion to dismiss, the memorandum issued by the SSA "only underscores the existence of an SSA-wide policy regarding Dr. Chen, authorizing adjudicators to continue to 'consider' his CE reports following his removal from the CE panel." (ECF No. 36 at 9.) In this way, SSA has confirmed that adjudicators must continue to consider these unreliable reports in determining the disability claims of class members.

Further, the relief requested by Plaintiffs is appropriate for the class as a whole. In *City of New York*, the district court certified a strikingly similar class of individuals who had applied for or received Title II and/or Title XVI benefits, were found to have "a functional psychotic or functional nonpsychotic mental impairment which is severe (*i.e.*, determined under 20 CFR § 404.1520(c) or § 416.930(c) to require evaluation under Appendix I of that Regulation), and

whose applications for benefits have been denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity." 476 U.S. at 475-76 n.6 (1986). "As a remedy, the District Court ordered the Secretary to reopen the decisions denying or terminating benefits, and to redetermine eligibility. . . . The District Court also ordered SSA to notify class members that their claims had been reopened, and to inform class members with an appeal pending before an ALJ that such claimants had the option of proceeding with their appeals upon the existing record rather than with the administrative reopening of their case." *Id.* at 476 & n.7. Here, if Plaintiffs succeed on the merits, SSA will similarly be required to provide all class members with notice that their cases are being reopened. SSA will now have to give claimants what they were previously denied—the determination of their disability claim through a fair process.

SSA may argue that some class members are not entitled to this relief because the outcome of their benefits determination was not entirely dependent on a CE report from Dr. Chen. But "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez*, 591 F.3d at 1125.

Indeed, this case is quite similar to *Rodriguez*, where plaintiffs sought injunctive and declaratory relief providing individual bond hearings to all members of the class. *Id.* at 1111. The defendants in *Rodriguez* argued that Rule 23(b)(2) certification was inappropriate because some class members may not be entitled to a bond hearing since they were properly subject to mandatory detention. *Id.* at 1125. The Ninth Circuit acknowledged that some of the class members may not have viable individual claims for relief, but that did "not alter the fact that relief from a single practice is requested by all class members." *Id.* at 1126. It was sufficient that "all class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right." *Id.*

As in *Rodriguez*, the possibility that some class members may not have a viable claim for benefits does not preclude Rule 23(b)(2) certification. Members of the class may differ in terms of the exact deficiencies of the exam that they received, or the degree of weight given to the CE

report in the course of SSA's denial or termination of their benefits, and the details of Plaintiffs' financial or medical eligibility for benefits are, of course, highly individualized. None of those differences matters for purposes of Rule 23, however, because Plaintiffs do not ask the Court to adjudicate the disability status of the entire class. Rather, Plaintiffs challenge SSA-wide policies, which apply to Plaintiffs and all class members.

VII. CONCLUSION

For the foregoing reasons, the Court should grant the Plaintiffs' motion, certify this matter as a class action as defined above, and appoint Plaintiffs' counsel as class counsel.

Dated: August 6, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2015, I electronically transmitted the foregoing document to the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

/s/ William L. Stern
WILLIAM L. STERN