

1 Miguel Márquez, Acting County Counsel (SBN 184621)
2 Tamara Lange, Lead Deputy County Counsel (SBN 177949)
3 OFFICE OF THE COUNTY COUNSEL
4 70 West Hedding St., Ninth Fl., East Wing
5 San Jose, CA 95110-1770
6 Tel.: (408) 299-5900

7 S. Chandler Visher, Esq. (SBN 52957)
8 LAW OFFICES OF S. CHANDLER VISHER
9 44 Montgomery Street, Suite 3830
10 San Francisco, CA 94104
11 Tel.: (415) 901-0500
12 Fax: (415) 901-0504

13 Matthew J. Witteman (SBN 142472)
14 LAW OFFICES OF MATTHEW J. WITTEMAN
15 582 Market Street, Suite 1007
16 San Francisco, CA 94104

17 Marie Noel Appel, Esq. (SBN 187483)
18 CONSUMER LAW OFFICE OF MARIE NOEL APPEL
19 44 Montgomery Street, Suite 3830
20 San Francisco, CA 94104
21 Tel.: (415) 901-0508
22 Fax: (415) 901-0504

23 **Attorneys for County of Santa Clara**

24 **UNITED STATES DISTRICT COURT**
25 **NORTHERN DISTRICT OF CALIFORNIA**
26 **OAKLAND DIVISION**

27 ROSA MARTINEZ, ET AL., on behalf of
28 themselves and all others similarly
situated,
Plaintiffs,
v.

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

No. 08-CV-4735 CW

**FINAL OBJECTIONS OF COUNTY OF
SANTA CLARA TO STIPULATION OF
SETTLEMENT**

Date: September 24, 2009
Time: 2:00 p.m.
Dept: Courtroom 2, 4th Floor

The Hon. Claudia Wilken

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I. INTRODUCTION

The Stipulation of Settlement in this action (“Settlement”), which appears to have been reached after arms-length and good-faith negotiations, provides significant relief for an estimated 200,000 low-income disabled individuals whose federal Supplemental Security Income (“SSI”) payments were wrongfully suspended or denied due to an outstanding felony warrant. The Social Security Administration’s (“SSA”) commitment to changing its former policy of denying benefits to all individuals with outstanding felony warrants is particularly important.

For one class of approximately 80,000 individuals (called the “Post-2006 Class” in the Settlement), the Settlement provides for retroactive payments from the date when their federal benefits are restored back to January 2007; the Settlement also requires that SSA reinstate their federal benefits going into the future. The Settlement provides more limited relief to a separate class of approximately 120,000 individuals denied benefits before January 2007 (the “Pre-2007 Class”); they will be able to receive partial retroactive benefits for the period from April 2009 until their benefits are restored, but only if they contact the SSA to schedule an appointment or file a new application.

The County, for itself and for its residents who are members of the Settlement class, seeks to intervene in this action to object only to limited aspects of the Settlement. The County believes that the parties can agree to make these changes within the current approval schedule set by the Court. The County’s primary interests in intervening, which Part II explains in detail, are maintaining the federal safety net for County residents, placing fewer burdens on overextended County resources, securing for County residents the federal benefits in the future for which they are eligible, and recovering federal reimbursements due to the County. The County hopes to ensure through its intervention that all eligible County residents receive their retroactive payments under this Settlement; that federal benefits are restored for all eligible County residents whose benefits were suspended; and that all eligible County residents receive federal benefits if those benefits were denied on the initial application. The County also seeks to ensure that the Pre-2007 Class is treated equitably.

1 The County believes that the Settlement, at least on its face, has *five major flaws*. These
2 defects, discussed at greater length in Part IV, follow:

- 3 1. Inadequate provisions for verifying Class Members’ addresses to ensure that they will
4 receive notice;
- 5 2. The lack of any procedure by which plaintiffs’ counsel or state and local governmental
6 entities can obtain class information to ensure that recipients are notified of their rights
7 under the Settlement;
- 8 3. Inadequate language in the actual notice to be sent to the pre-2007 Class members to
9 describe the Settlement and steps Class members must take to reestablish benefits and to
10 obtain retroactive relief;
- 11 4. Differential treatment of the Pre-2007 Class and the Post-2006 Class with respect to
12 restoration of benefits and scope of retroactive payments despite the absence of any
13 obvious distinctions between the two groups; and
- 14 5. The absence of a recitation that SSA will reimburse local governmental entities pursuant
15 to 42 U.S.C. § 1383(g) and associated agreements with the State of California.

16
17 The County has identified *solutions* for these defects that the parties could implement in
18 an amended Settlement within the existing time frame for approval and implementation of the
19 Settlement. Because these solutions are the most important part of this filing, we address them
20 here instead of in conclusion:

- 21 **1. To address the inadequate provisions for verifying Class members’ addresses to**
22 **ensure that they will receive notice, the Settlement should be amended to provide**
23 **that:**
 - 24 • Before the initial mailing, instead of relying on the last address the agency has on
25 file, the SSA will utilize available services such as the National Change of
26 Address (“NCOA”) system to check addresses for all individuals in both the Pre-
27 2007 and the Post-2006 Classes.

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- After the first mailing, the SSA will utilize services such as Accurint to follow up on any addresses shown to be unusable—again, for both classes.
- The SSA will provide notice to the State of California and other similarly situated entities of those individuals for whom notice is returned because of undeliverable addresses; such notice can be provided through the use of California’s existing and efficient Income and Eligibility Verification System (“IEVS”), a federally mandated program designed to help the government determine the eligibility of applicants for and recipients of federal assistance. California uses IEVS to verify information received from applicants and recipients in the CalWORKs, Food Stamps, Medi-Cal, and General Assistance (“GA”) programs.
- The SSA will provide notice through IEVS to the State of California, and to other states and territories with similar systems, of all individuals who are *eligible* for the restoration of their benefits and for retroactive payments under the terms of this Settlement. As explained below, the Pre-2007 Class members have a particular need for this amendment because the current Settlement does not restore their benefits automatically (while the Settlement seems to require automatic restoration for the Post-2006 Class). Instead, the Pre-2007 Class must affirmatively apply for benefits—but if they do not receive notice, due to the inadequate notice provisions discussed above or other failings in the system, they will not know that they can and should reapply. The SSA already provides notice to states and counties through IEVS when individuals’ SSI benefits are *restored*; the difference in our proposal is that it would require the SSA to provide information about individuals’ *eligibility* to pursue benefits pursuant to this Settlement, an earlier step in the process.

2. To address the lack of any procedure by which plaintiffs’ counsel or state and local governmental entities can review class information to ensure that certain groups of

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recipients are notified of their rights, the Settlement should be amended to provide that:

- In addition to providing notice through IEVS to the State of California, and to other states and territories with similar systems, of all individuals who are *eligible* for the restoration of their benefits and for retroactive payments under the terms of this Settlement, the SSA will cross check, or allow plaintiffs’ counsel and/or state and local government entities to cross-check, General Assistance and other government records against the names of the Class members.
- If any confidentiality requirements bar the release of such a list, the County would appreciate the opportunity to develop an alternative approach for conducting such a cross-check.

3. To make the notice provided to the Pre-2006 Class meaningful, the Settlement should be amended to require that:

- The notice explains in simple terms the meaning of the relevant codes cited;
- The notice tells Pre-2007 Class members, like the Post-2006 Class members, that they “may be entitled to or eligible” for benefits, *not* merely that an individual should apply “if the individual thinks he/she may be eligible”; and
- The SSA tells Pre-2007 Class members that they must reapply for benefits within six months.

4. To address the inequitable treatment of the Pre-2007 Class in the Settlement:

- Benefits for both groups, not just the Post-2006 Class, should be *automatically* restored pursuant to the Settlement.
- Both groups, not just the Post-2006 Class, should receive retroactive benefits back to January 1, 2007.

- Alternatively, the Class definition could exclude this group for purposes of precluding its earlier claims while preserving the benefits for the group in the current settlement.

5. **To address the absence of a recitation that SSA will reimburse local governmental entities pursuant to the mandates of 42 U.S.C. § 1383(g) and related agreements with the State of California,** the Settlement should be amended to provide this simple recitation.

II. THE COUNTY’S INTERESTS IN THIS CASE

The County has not yet been able to obtain firm numbers on how many residents would be affected by the Settlement in its current form. However, two approaches both result in an approximation of more than 1,100 County residents benefitting directly from the Settlement.¹ The County’s interests arise out of the significant size of this population.

A. Maintaining the Federal Safety Net for County Residents

The County has a direct interest in maintaining the federal safety net for its residents. A disabled individual in the County can receive up to \$850 in combined federal SSI/State Supplementary Program (“SSP”) benefits each month, because disabled individuals who qualify for SSI can receive \$674 a month in SSI benefits plus \$176 a month through California’s SSP. In contrast, the amount of GA that the County provides to those residents not receiving SSI is far lower. “The GA Program provides monthly payments (considered a loan) to eligible persons

¹ Santa Clara County had 47,774 SSI recipients in December 2008. *See* SSA, “Number of Recipients in State . . .” at 10, http://www.socialsecurity.gov/policy/docs/statcomps/ssi_sc/2008/ca.pdf. The population of SSI recipients nationwide was about 7.52 million. *Id.* at 9. That means that the County has 0.64% of the nation’s population. Applying that percentage to the Class size here of 200,000 individuals results in an estimate of 1,270 individuals in the County who could benefit from the Settlement.

Under the second, rougher approach, we note that there are 305 million individuals in the United States, and 1.7 million Santa Clara County residents as of 2008. Therefore, the County has .0056 of the U.S. population, or 0.56%. The class in the proposed settlement has 200,000 members. When 0.0056 is multiplied by 200,000, the result is 1,115 County residents who could benefit from the Settlement.

1 legally residing in the County who have no other means of support.”² These payments are made
 2 entirely through County general funds, pursuant to California’s Welfare and Institutions Code,
 3 which requires that:

4
 5 Every county and every city and county shall relieve and support all incompetent, poor,
 6 indigent persons, and those incapacitated by age, disease, or accident, lawfully resident
 7 therein, when such persons are not supported and relieved by their relatives or friends, by
 8 their own means, or by state hospitals or other state or private institutions.

9 Cal. Welf. & Inst. Code § 17000. The average County GA payment is \$136;³ a homeless
 10 individual meeting all conditions receives \$147 a month; and a maximum of \$337 a month is
 11 provided to an individual renting a residence alone.⁴

12 In a process described more thoroughly in Section II.D below, the County is reimbursed
 13 for such payments when made during a period in which residents instead were eligible for SSI.
 14 Therefore, the GA payments are considered “interim” payments. Residents keep the surplus
 15 benefits that remain from the federal government, which can be typically is far more substantial
 16 than the amount of the GA payments: for some recipients, the surplus is SSI benefits are more
 17 than \$400 a month, adding up to thousands a year. While GA assists County residents most in
 18 need of help, such as homeless adults, the restoration or initial provision of SSI through this
 19 Settlement will be even more meaningful to them.

20
 21 _____
 22 ² Santa Clara County, Social Services Agency, Department of Employment and Benefits Services, “Financial
 23 Assistance for Adults, General Assistance (‘GA’) Program,”
 24 [http://www.sccgov.org/portal/site/debs/agencychp?path=%2Fv7%2FEmployment%20%26%20Benefit%20Services%2C%20Department%20of%20\(DEP\)%2FFinancial%20Assistance%20\(CalWORKS%2C%20Gen.%20Assist.%20%26%20more...\)%2FAdults](http://www.sccgov.org/portal/site/debs/agencychp?path=%2Fv7%2FEmployment%20%26%20Benefit%20Services%2C%20Department%20of%20(DEP)%2FFinancial%20Assistance%20(CalWORKS%2C%20Gen.%20Assist.%20%26%20more...)%2FAdults).

25 ³ See Report to Will Lightbourne, Social Services Agency, County of Santa Clara, Prepared by CalWIN Division,
 26 Decision Support & Research Section, “Quarterly Statistical Data of Public Assistance Families in the County of
 27 Santa Clara” at 6 (July 1, 2009),
 28 http://www.sccgov.org/portal/site/debs/agencyarticle?path=%2Fv7%2FEmployment%20%26%20Benefit%20Services%2C%20Department%20of%20%28DEP%29%2Fattachments&contentId=1754198f9ca4d110VgnVCM1000048dc4a92_____.

⁴ Nearly 4,000 County residents were receiving GA in the month of July 2009. *Id.*

1 Other County residents covered by this Settlement did not receive any County financial
 2 assistance for which the County can be reimbursed while their federal benefits were suspended
 3 or denied. Fewer County residents are eligible for GA assistance than are eligible for SSI
 4 because a) the GA program requires that participants have lower income and resource limits, and
 5 b) only individuals *without* children under their care and control can receive GA.⁵ Therefore,
 6 some Class members may have received assistance other than GA, such as that available through
 7 CalWORKs, Cash Assistance for Immigrants, Food Stamps, and/or Medi-Cal. These Class
 8 members will keep the entire amount of any retroactive SSI payments provided under this
 9 Settlement.

10 Payments under this Settlement will directly improve County residents' standard of
 11 living. In a time of sharply reduced state and local funding, ensuring that residents eligible for
 12 SSI receive their benefits is critical both to the individual residents and to the community as a
 13 whole.

14 ***B. Placing Fewer Burdens on Overextended County Resources***

15 Second, low-income persons often use County hospital and other services to an extent
 16 that increases with their degree of poverty. Whenever they obtain financial support through
 17 federal benefits, such support translates into fewer burdens on other County resources, such as its
 18 Health and Hospital system.⁶

19 The County's programs for low-income residents are under a great deal of pressure. The
 20 Fiscal Year 2010 Recommended Budget, prepared by the County Executive's Office of Budget
 21 and Analysis, discusses the cumulative \$1.5 billion deficit that the County has suffered since the
 22 fiscal year 2003.⁷ The State's recent budget reductions have only made matters worse. A
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24
 25 ⁵ Individuals with children become eligible for CalWORKs, which has a higher benefit level.

26 ⁶ The County is the provider of last resort for its residents. *See also, e.g.,* Ken Yeager and Kim Roberts, "Opinion:
 27 Health care reform must support public hospitals," *Mercury News* (Sept. 5, 2009),
http://www.mercurynews.com/opinion/ci_13278298.

28 ⁷ County of Santa Clara, Office of the County Executive, Office of Budget and Analysis, "Fiscal Year 2010
 Recommended Budget," at 4, http://www.sccgov.org/SCC/docs%2FSCC%20Public%20Portal%20Attachments%2FIntro_RecommendedBudget_2010.pdf.

1 September 2009 report to the Santa Clara County Board of Supervisors from the County
 2 Executive concluded that the most recent reductions to the County budget through the
 3 Governor's blue pencil actions and the Legislature's decisions will deprive the County of an
 4 additional \$60 million in the fiscal year 2010.⁸ These massive cuts harm programs such as In-
 5 Home Supportive Services and assistance to individuals with HIV/AIDS on which
 6 disadvantaged populations in the County rely.

7
 8 ***C. Avoiding the Unnecessary Subsidization of County Residents Eligible
 9 for Federal Benefits in the Future***

10 Third, the County has a duty under state law to "secure for every person the amount of
 11 aid to which he is entitled." Cal. Welf. & Inst. Code § 10500. This duty includes ensuring that
 12 those individuals eligible for SSI receive their benefits—making sure that individuals have
 13 access to the right program and the maximum benefits they are entitled to receive.

14 ***D. Recovering Reimbursements Due to the County***

15 Finally, as indicated above, the County has a financial interest in recovering the requisite
 16 reimbursements from the federal government.

17 Federal law, 42 U.S.C. § 1383(g), and associated agreements permit reimbursement to
 18 counties for GA payments made to persons during the interim period when they should have
 19 been receiving SSI.⁹ These interim payments by the counties must be cash or vendor payments
 20 made to meet recipients' basic needs, defined as those "essential items for everyday living which
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 23
 24 ⁸ County of Santa Clara, Office of the County Executive, Office of Budget and Analysis, Transmittal to the Board of Supervisors, "Update on FY 2010 Budget Re-balancing Options" (Sept. 15, 2009), at 4.

25 ⁹ The federal SSA provides Interim Assistance Reimbursement by withholding all or part of a recipient's retroactive SSI/SSP payment(s) in order to repay states or counties for any interim assistance—such as GA payments—provided while the individual's SSI/SSP application was pending, or while the SSI/SSP benefits were suspended if the person is subsequently found to be eligible, if certain conditions are met. *See, e.g.*, "Social Security Handbook: 2186. Interim Assistance Reimbursement," http://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2186.html; State of California & SSA Commissioner, "Agreement for Reimbursement to California's Interim Assistance Agencies."

1 cannot be put off until an SSI determination is made.”¹⁰ Pursuant to the State’s agreement with
2 the Commissioner of the SSA, the State, through its Department of Social Services, makes these
3 federal funds available to reimburse participating counties, such as Santa Clara County.

4 During the period of suspension or denial of SSI, County staff state that a majority of
5 Class members living in the County will have pursued GA funds that would now be subject to
6 reimbursement. Members of the Post-2006 Class may have been on GA for as many as four
7 years by the time of the back payments provided by this Settlement in 2010. Individuals in the
8 Pre-2007 Class will be eligible to receive retroactive benefits for the period from April 2009
9 until their benefits are restored in 2010 or later, provided that they make a timely application.
10 Although the potential recovery under the current Settlement terms for this second class might be
11 smaller, there are about 50 percent more individuals in this class, and each member of this class
12 may have been on County assistance for more than a year when payments under the Settlement
13 are made.

14 As noted above, the surplus available to individual Class members could far outweigh the
15 amount available to the County as reimbursement; however, even \$136 a month over a period of
16 years for hundreds of individuals adds up potentially hundreds of thousands of dollars, or
17 millions of dollars, that the County can recover. Therefore, the County has a clear interest in
18 ensuring that members of both the Pre-2007 and the Post-2006 Classes are identified.

19 20 **III. THE RELEVANT PROVISIONS OF THE SETTLEMENT**

21 **A. *The Settlement Classes***

22 The Settlement is on behalf of a:

23
24 [C]lass pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, comprising:
25 All persons [or representative payees] whose SSI, SVB, or OASDI benefits have been
26 suspended or denied, or who have been notified of a proposed suspension or denial of
27 such benefits, for “fleeing to avoid prosecution or custody or confinement after
conviction” for a felony.

28 ¹⁰ U.S. Social Security Administration, “SI 02003.001 Interim Assistance,”
<https://secure.ssa.gov/apps10/poms.nsf/lnx/0502003001>.

1 Settlement, 2:15–20. Within this broad class, two groups have rights under the Settlement to
2 recover benefits that were wrongfully suspended: (1) Post-2006 Class members, for whom SSA
3 made an initial suspension, initial denial, or administrative appeal denial on or after January 1,
4 2007 (Settlement, 3:24–28) and (2) Pre-2007 Class members, for whom SSA made an initial
5 suspension or initial denial on or after January 1, 2000, but before January 1, 2007. (Settlement,
6 4:1–6.) Although the Pre-2007 and Post-2006 members of the Class are treated very differently,
7 the Settlement and certification papers do not discuss potential conflicts, any need for subclasses,
8 which class representatives would represent the interest of each group, or any other reasons why
9 these groups should be distinguished.

10 We also note that, prior to final approval of this Settlement, no Class members have been
11 given individual notice of either the pending litigation or the potential settlement. Further, notice
12 through other means has consisted of a posting on the SSA website and notification to a limited
13 number of organizations that advance the interests of the Class.

14 ***B. The Claims Available to the Class Members***

15 After final approval, all members of the Class will have given up all claims asserted on
16 their behalf in the suit. (Settlement, ¶ 13.1.) It is important to know what benefits might have
17 been available if the case went to trial so that the benefits achieved in the Settlement can be
18 compared to possible trial results.

19 The plaintiffs conducted no discovery but did obtain some informal information from the
20 defendant. (Declaration of S. Chandler Visher in Support of Objections of County of Santa Clara
21 to Proposed Settlement (“Visher Declaration”), ¶ 10.) The whole class consists of about 200,000
22 persons, of whom 80,000 are in the Post-2006 Class. This Post-2006 Class is said to have a total
23 claim for suspended benefits of \$500 million. These facts permit some estimate of the value of
24 the claims of the Pre-2007 and Post-2006 classes. (Visher Declaration, ¶ 12 and Exhibit A
25 thereto.)
26
27
28

1 **1. Pre-2007 Claims**

2 Persons whose benefits were suspended prior to 2007 have the right under the Settlement
3 to reapply for benefits, which may be awarded retroactive to April of 2009. (Settlement, ¶ 3.5)
4 However, in the Complaint, these Class members also have a claim for benefits from the time of
5 suspension until April 2009. For purposes of clarity in discussing what this Pre-2007 Class is
6 getting and giving up, “Retroactive to 2009 Benefits” refers to those benefits for which they are
7 eligible under the Settlement for the period starting in April 2009 and going into the future,
8 while “Back Benefits” refers to the benefits claim for the period before April 2009, a claim that
9 is waived for all Pre-2007 class members.

10 Extrapolating from the acknowledged financial impact of the Post-2006 class members’
11 termination, the total Back Benefits claim of the Pre-2007 group (which the Settlement
12 precludes) is approximately \$2.6 billion. (Visher Declaration, Exhibit A.) Assuming that most of
13 the suspensions in this subgroup occurred from 2005 to 2007, the Back Benefit claim per Class
14 member generally would be in the \$12,000 to \$25,000 range. The Retroactive to 2009 Benefit
15 claim for the period starting in April 2009 until benefits were restored, expected to be in late
16 2010 or later, would be in the \$5,000 to \$10,000 range per Pre-2007 Class member. (Visher
17 Declaration, ¶ 10.)

18 **2. Post-2006 Claims**

19 Because the Post-2006 Class is eligible under the Settlement to recover all benefits lost
20 during periods of suspension, it is not necessary to segregate their claims into Back Benefits and
21 Retroactive to 2009 Benefits, as was done with the Pre-2007 Class. Based on 80,000 Post-2006
22 Class members with an aggregate claim of \$500 million, the average Post-2006 Class member
23 claim is \$6,250 ($\$500,000,000/80,000 = \$6,250$).
24

25 **IV. SETTLEMENT DEFECTS**

26 Next we turn to the main defects in the Settlement that the parties can fix without
27 delaying the implementation of the SSA’s rollout plan.
28

1 **A. Insufficient Procedures for Verifying Addresses**

2
3 **1. Current Notice Provisions**

4 A major defect in the Settlement is the absence of any requirement that Class member
5 addresses be updated. The agreement affirmatively states that the federal government only will
6 use “the last known address on SSA records” (for the Post-2006 Class) and, similarly, the “most
7 recent address in SSA’s records” (for the Pre-2007 Class), and also states that the federal
8 government “will not conduct any follow-up address search or mailing” for the Pre-2007 Class.
9 See Stipulation of Settlement at page 6. These provisions are inadequate, given that a substantial
10 percentage of members of a class this large will have moved after their benefits were suspended
11 and that the population here may be particularly transient.

12 In terms of notice to the Post-2006 Class, the Settlement provides that the:

13 SSA shall contact the Post-2006 Class members through individual notices mailed to the
14 last known address on SSA records. SSA shall bear the cost of this notice. The notices
15 generally shall advise that SSA’s policy regarding outstanding felony arrest warrants has
16 changed and that the individuals may be entitled to or eligible for benefits or payments
17 for applicable periods of suspension or non-payment.

18 (Settlement, ¶ 2.6.) Unlike its provisions for the Pre-2007 Class discussed below, the Settlement
19 is silent on what efforts will be made, if any, to find correct addresses when notice is returned as
20 undeliverable.

21 As for the Pre-2007 Class members, they likely will be mailed notice of the Settlement
22 starting in the middle of 2010. (McIntyre Decl., ¶ 7.) The Settlement provides that the SSA will
23 “send individual notices, mailed to the most recent address in SSA’s records” and that the “SSA
24 shall bear the cost of this one-time notice and will not conduct any follow-up address search or
25 mailing.” (Settlement, ¶ 3.4.) If the Class member contacts SSA “to make an appointment within
26 six months of the date on the notice mailed pursuant to the preceding paragraph, that individual
27 shall receive a ‘protective filing date’ of April 1, 2009.” (Settlement, ¶ 3.5.) If the Class member
28

1 does not contact SSA within the six-month window, the member receives no Retroactive to 2009
2 Benefits under the Settlement.¹¹

3 These inadequate notice provisions have particularly serious repercussions for the Pre-
4 2007 Class members, whose relief is already limited under the Settlement and who must
5 *affirmatively apply* for the restoration of their SSI benefits. The County receives notice through
6 the IEVS (the State's eligibility verification system) when residents' SSI benefits are *restored*,
7 but it does not receive notice of residents' eligibility. Thus, this existing system does not help
8 members of the Pre-2007 Class. In other words, by failing to provide for the automatic
9 restoration of Class members' benefits, the Settlement closes off the only avenue by which states
10 and localities will receive information about residents' benefits. Therefore, it is unclear how Pre-
11 2007 Class members who do not receive proper notice of the Settlement due to the inadequate
12 notice provisions in the Settlement will obtain the restoration of their benefits or be able to
13 pursue the limited retroactive recovery provided under the Settlement.

14 **2. Standard Mechanisms That Instead Can Be Used Here**

15 There are at least two mechanisms that the SSA could use to verify addresses and track
16 down Class members.

17 **a) National Change of Address (“NCOA”) Update Prior to Mailing**

18 The Settlement fails to update Class members' addresses before the initial mailing to
19 make sure that they receive notice of their benefits under the Settlement. Both the Pre-2007 and
20 Post-2006 Class members are to be sent notice at the last address on the SSA books without any
21 requirement that pre-mailing updating be done and without any requirement to find correct
22 addresses for notices that are returned as undeliverable.
23
24
25
26

27 ¹¹ Although this language in the Settlement appears to be intended to ensure that a Class member has six months to
28 contact SSA to schedule an appointment, the phrasing should be clarified to avoid future disputes over whether a
Class member must contact SSA within six months or must “make an appointment within six months.” This is
particularly important because SSA controls whether or not an appointment is made and there may be substantial
barriers to scheduling an appointment “within six months of the date on the notice.”

1 As Daniel Rosenthal, owner of the class action administration company Rosenthal & Co.,
2 states in his declaration outlining standard practices in class action administration: “Before
3 notices are mailed the mailing list is updated using the National Change of Address (NCOA)
4 database, which is compiled from change of address notices submitted to the Post Office over the
5 previous four years. The cost to update 200,000 addresses [through] the NCOA database is about
6 \$450.” (Declaration of Daniel Rosenthal, ¶ 3.)

7 The cost of using the NCOA database is less than a penny per Class member. Class
8 members have claims in the \$5,000 to \$25,000 range each. There is simply no excuse for not
9 using the NCOA to update the addresses. One of the County’s attorneys, S. Chandler Visher, is
10 class counsel for a class of military veterans whose class addresses for notices sent earlier this
11 year came from a government database derived from the Social Security system updated through
12 the NCOA. If the percentage of addresses in that class that required updating through NCOA
13 applied to the Class here (and this Class likely is more transient than a veteran class), Class
14 members with an estimated \$10 million in claims under the Settlement would be mailed notice
15 that would be returned undelivered unless they were first updated by through the NCOA.

16 Even in a case with modest class benefits, the failure to use the NCOA update database is
17 grounds for finding that notice was not the “best notice practicable” if using it would result in
18 updated addresses. *Parker v. Time Warner Entertainment Company*, 239 F.R.D. 318, 336
19 (E.D.N.Y. 2007). Here, each class member has a substantial interest in receiving notice worth
20 thousands of dollars. We see no justification for allowing SSA to avoid spending less than a
21 penny per member to update the addresses.

22 The kind of notice that the Class could expect the Court to impose if the case were to be
23 tried was provided in *Hyatt v. Bowen*, 118 F.R.D. 572, 574 (W.D.N.C. 1988), a case involving
24 improper denial of Social Security disability benefits. The Court required that:

25 The First Notice packages shall be mailed by certified mail, return receipt requested, to
26 the potential class members’ last known address. If returned to the Secretary undelivered,
27 or if lost, another identical notice shall be mailed by regular, first-class mail to the last
28 known address with the words “Please Forward” clearly printed on the face of the
envelope. If again returned undeliverable, the Secretary shall request from the North
Carolina Department of Human Resources a last known address of the potential class

1 member. If a different address is obtained the Secretary shall repeat the first mailing and
(if necessary) the second mailing described above.

2 Technology has changed sufficiently since 1988 that the procedures discussed above should be
3 required in lieu of repeat mailings, but *Hyatt* provides a baseline of the sort of effort and expense
4 the SSA should be expected to make to locate class members here – including an effort to
5 coordinate with state and local entities to obtain current address information or other means of
6 providing notice to Class members.

7
8 ***b) Accurint Update for Returned Notices***

9 The Settlement also fails to update the address for notices that are returned without a
10 forwarding address, even though this is a typical procedure in class notices handled by class
11 action administration firms. (Rosenthal Declaration, ¶ 2.) The Social Security numbers for the
12 Class members are known. Rosenthal states that “[o]ur experience is that when we search for
13 new addresses among class members whose mail is returned undeliverable and we have the
14 SSNs of the class members, we will find new addresses for between 65% and 95% of those
15 searched.” (Rosenthal Declaration, ¶ 5.) The cost of the updates for the SSA class would be
16 about \$.50 for each returned notice. (Rosenthal Declaration, ¶ 5.)

17 **3. The Costs of Not Fixing the Notice Procedure**

18 As noted, the experience of class counsel for a class of veterans recovering Social
19 Security benefits is that at least 10% of the class who would not receive the notice if the last
20 known SSA address were used instead would receive notice if the NCOA and Accurint address
21 updates were used. (Visher Declaration, ¶ 8.)

22 The Post-2006 Class members are entitled to full Back Benefits and Retroactive to 2009
23 Benefits under the Settlement in the amount that the settling parties claim is \$500 million. If the
24 failure to update the addresses as described above results in 10% of persons in this portion of the
25 Class not receiving notice and thus not receiving benefits available to them under the Settlement,
26 the loss to the Class will be about \$50 million. (Visher Declaration, ¶ 10.)

27 The Pre-2007 Class members lost their Back Benefits under the Settlement but are
28 entitled to the Retroactive to 2009 Benefits starting in April of 2009. These benefits are worth at

1 least \$5,000 each for the period between April of 2009 and when benefits will be paid in late
2 2010 or 2011. If 10% of the 120,000 persons in this portion of the Class do not receive notice
3 due to the failure to use the NCOA and Accurint update services, then about 12,000 Class
4 members will lose Retroactive to 2009 Benefits of about \$60 million simply because they never
5 got the notice. (Visher Declaration, ¶ 9.)

6 The cost of updating the approximately 20,000 bad addresses that one could expect to be
7 found through the NCOA and Accurint updates is, comparatively, nominal. Even if 40,000
8 addresses had to be run through Accurint to find the 20,000 good addresses (using a modest 50%
9 find rate), the cost of using the databases would be less than \$21,000. (See Visher Declaration, ¶
10 10; Rosenthal Declaration, ¶ 5.)

11 **4. Supportive Case Law**

12 The Settlement proposes a Class certified pursuant to Fed. R. Civ. P. Rule 23(b)(2), and
13 the Preliminary Approval Order certifies the Class under that section. Rule 23(c)(2)(A) defines
14 the notice requirements for Rule 23(b)(1) and 23(b)(2) classes, stating that “the court may direct
15 appropriate notice to the class.” The Preliminary Approval Order does not require any individual
16 notice before final settlement approval; the only notice provided is on the SSA website and to a
17 list of organizations who might be interested in the suit. *See* Proposed Order Granting Plaintiffs’
18 Motion for Preliminary Approval of Class Settlement, at 3.

19 Therefore, the only effective notice that members of the Class will receive about the
20 benefits they may have available under the Settlement comes in the notice that is to be mailed
21 after the Settlement is finally approved. This post-approval notice is provided pursuant to Rule
22 23(e)(1), which states that the “court must direct notice in a reasonable manner to all class
23 members who would be bound by the proposal.” Where the post-approval notice is the first the
24 Class will get, the question is what constitutes “notice in a reasonable manner to all class
25 members” under the facts of this case. What is reasonable here should be considered in light of
26 what benefit they may receive from notice and who is in the class.
27
28

1 Pre-certification notice requirements under Rule 23 and what other courts have found to
2 be reasonable notice after trial help shed light on what is considered reasonable.

3
4 **a) The Large Class Claims Support Stringent Notice Requirements**

5 As noted, for classes certified under Rule 23(b)(2), the Court is not required to provide
6 any notice but “may direct appropriate notice to the class.” Fed. R. Civ. P. Rule 23(c)(2)(A).
7 Where money damages are involved and the class is certified under Rule 23(b)(3), “the court
8 must direct to class members the best notice practicable under the circumstances, including
9 individual notice to all members who can be identified through reasonable effort.” *Parker*, 239
10 F.R.D. at 333-34. Here, each class member has a claim for Back Benefits or Retroactive to 2009
11 Benefits, or both, totaling in the range of \$5,000 to \$25,000 per person. In such a case, even if it
12 is not necessary to give the Class the opportunity to opt out by providing pre-certification notice,
13 the individual interest in the case that favors identifying class members in a 23(b)(3) case are
14 equally applicable to the Class here with respect to their notice of this Settlement.

15 The court in *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987), squarely states that
16 “when monetary damages are sought in a b(2) class action, ‘due process does require notice
17 before the individual monetary claims of absent class members may be barred’” (citing *Johnson*
18 *v. General Motors Corp.*, 598 F.2d 432, 433 (5th Cir. 1979)). A treatise similarly notes that
19 “[t]he trend . . . , and the weight of authority, is to require some kind of notice to absent members
20 when monetary damages are sought under 23(b)(2).” William B. Rubinstein, Alba Conte and
21 Herbert B. Newberg, [3 Newberg on Class Actions § 8:5n n.9 \(4th Ed.2002\)](#) (and collected
22 cases). *See also Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 163 (2d Cir.
23 2001) (“Where non-incident monetary relief such as compensatory damages are involved, due
24 process may require the enhanced procedural protections of notice and opt out for absent class
25 members.”).

26 **b) Nature of the Class Militates for Clear and Actual Notice**

27 It is reasonable to assume that many members of the Class here share the mental
28 disabilities described for the Class representatives in the Complaint. Even a letter delivered to

1 members of this Class may not put them on actual notice unless it is worded clearly enough for
2 them to understand that they have a right to benefits, that the right requires them to take action
3 and that there is a deadline with which they must act.

4 What courts have required after trial helps give an idea of what type of notice is needed
5 to actually ensure that the Class receives the benefits available to it under the Settlement. In
6 *Schisler v. Heckler*, 787 F.2d 76, 85-86 (2d Cir. 1986), a successful action by disability
7 claimants who challenged the use of a “‘current disability’ standard by the SSA,” the court
8 granted the plaintiffs’ request for a variety of measures “calculated to assure . . . timely and
9 comprehensible notice to class members of their right to readjudication.” The SSA had sent out
10 notices of the right to readjudication without prior review by the district court. The appellate
11 court noted that “[s]pecial consideration” may be required in light of the fact that some class
12 “members also belong to the subclass of mentally disabled claimants.” *Id.* at 86. The district
13 court was ordered to review the SSA notice and to “fashion its own more effective notice, if
14 necessary” in light of the plaintiff class members’ disability. *Id.* See also *Newberg on Class*
15 *Actions*, *supra*, § 8:22, n.8. ; *Cho v. Seagate Technology Holdings, Inc.*, 2009 WL 2940181
16 (Cal.App. 1 Dist., Sept. 15, 2009)

17 **B. The Lack of Any Procedure by which Plaintiffs’ Counsel or State and**
18 **Local Governmental Entities Can Review Class Information To**
19 **Ensure That Certain Groups of Recipients Are Notified of Their**
20 **Rights**

21 Second, although the SSA should bear the primary responsibility for contacting class
22 recipients, we note that the Settlement does not provide any mechanism for plaintiffs’ counsel or
23 state and local government entities such as the County to cross-check General Assistance records
24 against the names of the Class members to maximize the possibility that the County’s eligible
25 Class members receive notice of their rights. As noted, the County receives information from a
26 third party (through the State IEVS) when the SSA approves the grant of SSI benefits to an
27 individual who is a client of the County. However, even this process allows individuals who are
28

1 eligible for federal benefits to slip through cracks, falling outside State and County oversight. As
2 discussed above, Pre-2007 Class members will not have their benefits automatically renewed
3 pursuant to the Settlement; therefore, because the SSA apparently only provides notice as a
4 matter of general practice for those individuals whose benefits are actually restored, not for those
5 who are merely eligible, the County will receive no notice of their change in eligibility and
6 therefore will not be able to assist them in obtaining retroactive or future benefits.

7
8 **C. The Inadequate Substance of the Notice To Be Provided to the Pre-
9 2007 Class**

10 The substance of the notice that the SSA plans to provide to the Pre-2006 Class is also
11 inadequate. Under the Settlement, this notice will “inform the individual that SSA suspends or
12 denies benefits/payments using the current policy and procedure only for three categories of
13 NCIC codes 4901, 4902 and/or 4999” and “will state that, if the individual thinks he/she may be
14 eligible for benefits/payments, he/she may contact SSA through the 1-800 telephone number to
15 schedule an appointment for prospective reinstatement of” benefits. (Settlement, ¶ 3.4.) Neither
16 plaintiffs’ counsel nor the Court must approve the language of this Class notice. Lead Class
17 Counsel will be given two business days to review the proposed form of notice, but the “SSA is
18 not obligated to respond to Lead Class Counsel’s comments or to incorporate those comments
19 into any . . . notice that it issues.” (Settlement, ¶ 6.2.)

20 First, most recipients of such a notice would not know what those codes meant and might
21 just throw away the notice.

22 Second, these Class members are told only that they should apply “if the individual
23 thinks he/she may be eligible” (see below). In contrast, the Post-2006 Class members are told
24 that they “may be entitled to or eligible” for benefits. Telling a person that benefits may only be
25 suspended based on three NCIC codes, which the class member might not recognize, does not
26 tell the Class member that her benefits were wrongfully suspended based on another code and
27 that she is likely to be reinstated if she applies for benefits now.
28

1 Third, although pursuant to the Settlement, members of the Pre-2007 Class must contact
2 SSA within six months in order to secure the April 1, 2009 filing date, the Settlement does not
3 require that the SSA tell the Pre-2007 Class that it has a six-month deadline. (Compare
4 Settlement, ¶3.4 with ¶ 3.5.)

5
6 **D. Unequal Treatment of the Claims of the Pre-2007 Class**

7 So-called distributional fairness examines “whether similarly situated class members are
8 treated the same by the settlement.” *Parker*, 239 F.R.D. at 338. The Settlement describes no
9 clear basis for distinguishing between the Pre-2007 and the Post-2006 Class members, such as a
10 distinction in applicability of tolling or administrative exhaustion. The groups appear to be
11 similarly situated; in the absence of a meaningful distinction between the subclasses, there is no
12 justification for discriminating between them in the terms of the Settlement. To treat all class
13 members equally, the Settlement should instead provide to Pre-2007 Class members 1) the same
14 automatic restoration of benefits provided to Post-2006 Class members and 2) the same
15 provision of retroactive benefits going back to January 1, 2007.

16 The Motion for Preliminary Approval provides the only indication for why the Pre-2007
17 Class might be treated in a discriminatory manner:

18 Claims under the Social Security Act are subject to a 60-day statute of limitations. 42
19 U.S.C. § 405(g). While Plaintiffs believe that the statute would be tolled under the
20 circumstances of this case, litigating the issue of retrospective relief would subject the
21 Settlement Class to the delay and risk of additional and complex litigation. In the views
22 of the experienced attorneys who represent the Plaintiffs, the terms of the Stipulation of
23 Settlement—which provide full retroactive relief for persons whose benefits were denied
24 or suspended during a period of more than 20 months prior to the filing of this action
25 (and partial retroactive relief for persons denied or suspended during a period of more
26 than eight years prior to the filing of the action)—represent a fair and reasonable
27 settlement.

28 (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, p. 14:7–15.)

The Settlement terms, then, assume there has been tolling and waiver for 20 months, back
to January 1, 2007. While it is reasonable to go back at least that far, a court might well find that

1 at least some of the Pre-2007 Class could show tolling as well. *See, e.g., Dixon v. Shalala*, 54
2 F.3d 1019, 1021, 1033 (2d Cir. 1995). It is possible that the SSA here agreed to treat the statute
3 as tolled for the Post-2006 Class if the plaintiffs agreed to give up the Back Benefits claim of the
4 Pre-2007 Class. In money terms, if true, this would mean that the federal government agreed to
5 provide the Post-2006 Class with a potential \$500 million recovery in exchange for an agreement
6 foreclosing the right of the Pre-2007 Class to recover its Back Benefits claim of \$2.6 billion and
7 imposing other barriers – including weaker notice provisions - that are likely to prevent many
8 Pre-2007 Class members from obtaining benefits even under the current terms of the Settlement.

9 The problem of discrimination against the Pre-2007 Class can be resolved by excluding
10 this group from the Class definition. There is no need to litigate or to resolve disputed issues
11 concerning exhaustion and tolling to do so. If they are excluded from the Class definition, the
12 due process problem of denying them the right to claim benefits without the right to opt out of
13 the Settlement disappears. And it is perfectly permissible to provide benefits to non-Class
14 members, so the benefits provided by the Settlement to the Pre-2007 Class would be proper even
15 if they are not treated as Class members. In contrast, exchanging the Back Benefit claims of the
16 Pre-2007 Class to secure better benefits for the Post-2006 Class is an inequitable option.

17 Alternatively, the Settlement could be amended to provide equal treatment of the classes,
18 in particular by providing for 1) the automatic reinstatement of the Pre-2007 Class members’
19 claims and 2) retroactive benefits back to January 1, 2007.

20 Either proposal protects the substantial relief provided for the Post-2006 Class members,
21 as to which the parties already have agreed, and resolves concerns regarding the waiver of the
22 Pre-2007 Class members’ claims without notice or an opportunity to opt out.

23 ***E. The Absence of a Recitation that SSA Will Reimburse Local***
24 ***Governmental Entities Pursuant to 42 U.S.C. § 1383(g) and Related***
25 ***Agreements***

26 The Settlement does not explicitly state that the SSA will reimburse local governments
27 pursuant to its responsibilities under 42 U.S. § 1383(g) and contracts with the State of California.
28

1 While the SSA likely intends to do so, the Settlement should explicitly state that the agency will
2 be providing these reimbursements.

3
4 **V. CORRECTIONS FOR THESE DEFECTS**

5 The Introduction provides a bullet-point list of the various ways in which these defects in
6 the Settlement can be resolved easily and quickly within the timeframe established by the Court
7 and the parties to permit speedy implementation.

8 Dated: September 17, 2009

Respectfully submitted,

9
10 Miguel Márquez, Acting County Counsel
11 Tamara Lange, Lead Deputy County Counsel
12 S. Chandler Visher
13 Matthew J. Witteman
14 Marie Noel Appel

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/s/ S. Chandler Visher
Attorneys for County of Santa Clara