UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LORRAINE PADRO, DHANASAR RAMAN, TOBY MARLOW, as court-appointed guardian for JUDITH BLUMENSOHN, CARMEN DURAN, JOHN EDWARDS, ERNESTA GUTIERREZ, JULIA JUAN, and JANE DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL J. ASTRUE,
AS COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CV 11 - 1788

CLASS ACTION COMPLAINT

__-CV-____ (___)

AMON, J.

MANN, M.J.

PRELIMINARY STATEMENT

1. Plaintiffs, on behalf of themselves and all others similarly situated (together "Class Plaintiffs"), bring this action against the Commissioner of the Social Security Administration Michael J. Astrue ("the Commissioner"), for bias against Social Security disability claimants by the Queens Office of Disability Adjudication and Review ("QODAR"), resulting in a systematic failure to provide full and fair Social Security benefit hearings.

2. Class Plaintiffs comprise a vulnerable group of disabled individuals with extremely limited means of subsistence. Many have profound disabilities—the kind of disabilities, as one court put it, that "dominate life." Notwithstanding clearly documented and disabling medical conditions, Class Plaintiffs, and thousands like them, have diligently pressed their rights for years—cataloging their conditions, meeting with doctors, being subjected to innumerable tests and procedures—only to run headlong into the QODAR brick wall of bias.

3. Prior court judgments have found routine derelictions of duty, and commission of the same legal errors, in case after case after case. Courts have used various phrases to describe the problem, highlighted more fully below, with Administrative Law Judges ("ALJs") from QODAR, including:

a. Proceedings that were "**a far cry**" from the required standards;

b. Rationale that was "**plucked from thin air**";

c. Conduct that "**trivializes plaintiff's impairments**" and "**raises the possibility that the ALJ was not seeking to neutrally develop the record, but rather to find support for the conclusions he had already formed**";

d. Analysis that was "**deficient**" and "**incoherent**";

e. Decisions that were "**at odds with established precedent**," "**replete with conclusory statements**," "**arbitrary**," "**illogical**," and "**not supported by substantial evidence**";

f. Delay that was "**particularly egregious**";

g. Witness examinations that were "**a study in combative questioning**"; and

h. Overall conduct that demonstrates "**serious negligence and could possibly even suggest bias.**"

4. Many similar criticisms can be found on hundreds of pages of judicial ink devoted to reviewing and remanding the decisions of the ALJs discussed below. Again and again and again, claimants, their advocates, and, finally, judges, must wade through thousands

of pages of testimony and records only to find the same errors—a monumental waste of judicial and legal time and resources.

5. In each case, the victim of the error was not the Commissioner—it was the claimant. Viewed in proper context, these errors are routine, clearly intentional, and an obvious manifestation of general bias against claimants.

6. Indeed, QODAR has the *third highest benefits-denial rate in the entire country*, the highest benefits-denial rate in the New York region, and *almost all of the ALJs below rank high on the national list of top claims deniers*. On appeal, the QODAR suffers one of the highest remand rates in the country.

7. These statistics are all the more deplorable in light of the Second Circuit's pronouncement in *Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir. 1975), that the Social Security Act (the "Act") must be liberally applied. The Act's intent is inclusion, not exclusion, except in QODAR.

8. In particular, five members of QODAR have demonstrated persistent and flagrant bias against benefits claimants as demonstrated conclusively by their persistent and intentional legal and procedural errors, as well as unprofessional behavior and disregard of court-imposed rules.

9. Accordingly, Class Plaintiffs seek a declaratory judgment that the ALJs in question—Michael D. "Manuel" Cofresi, Seymour Fier, Marilyn P. Hoppenfeld, David Z. Nisnewitz, and Hazel C. Strauss, (together, the "Named ALJs"):

a. Routinely fail to develop administrative records in dereliction of their duties;

b. Routinely refuse to apply correct legal standards even when instructed by federal court to do so;

c. Routinely make erroneous credibility determinations against claimants, including by failing to consider claimants' work histories;

d. Routinely engage in unprofessional and unfair behavior to the detriment of claimants; and

e. Taken together, these consistent actions deprive Class Plaintiffs and other claimants of their rights to fair hearings before an impartial adjudicator, in violation of the Social Security Act, the Administrative Procedure Act, and the due process guarantee of the Fifth Amendment to the United States Constitution.

10. Plaintiffs also seek an injunction barring the Commissioner from allowing the Named ALJs to preside over any claims for Social Security disability benefits ("SSD") under Title II of the Act, 42 U.S.C. §§ 401 *et seq.*, and Supplemental Security Income benefits ("SSI") under Title XVI of the Act, 42 U.S.C. §§ 1381 *et seq.*

JURISDICTION

11. This Court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c), and 28 U.S.C. §§ 1331 and 1361. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, and injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

12. Venue lies within this district pursuant to 28 U.S.C. § 1391(b)(1) and (2).

PARTIES

13. Plaintiff Lorraine Padro is a resident of Ozone Park, New York, and a claimant for SSI. Ms. Padro's case is assigned to the Honorable Nicholas G. Garaufis, District Judge, U.S. District Court for the Eastern District of New York 10-CV-3387.

14. Plaintiff Toby Marlow is a party to this lawsuit as the court-appointed guardian for Judith Blumensohn. Both Ms. Marlow and Ms. Blumensohn are residents of Queens, New York, and Ms. Blumensohn is a claimant for SSD. Ms. Blumensohn's case is assigned to the Honorable Sandra L. Townes, District Judge, U.S. District Court for the Eastern District of New York, 11-CV-00860.

15. Plaintiff John Edwards is a resident of Brooklyn, New York, and a claimant for SSI. Mr. Edwards' case is assigned to the Honorable Kiyo A. Matsumoto, District Judge, U.S. District Court for the Eastern District of New York, 11-CV-00971.

16. Plaintiff Jane Doe is a resident of Far Rockaway, New York, and a claimant for SSI. Jane Doe's case is pending before the Appeals Council.

17. Plaintiff Carmen Duran is a resident of Richmond Hill, New York, and a claimant for SSI. Ms. Duran's case is pending before the Appeals Council.

18. Plaintiff Ernesta Gutierrez is a resident of Sunnyside, New York, and a claimant for SSI. Ms. Gutierrez is preparing to file her case in the U.S. District Court for the Eastern District of New York.

19. Plaintiff Julia Juan is a resident of Elmhurst, New York, and a claimant for SSD and SSI. Ms. Juan's case is pending before the Appeals Council.

20. Plaintiff Dhanasar Raman is a resident of South Ozone Park, New York, and a claimant for SSD and SSI. Mr. Raman's case is pending before the Appeals Council.

21. Defendant Michael J. Astrue is the Commissioner of the Social Security Administration ("SSA") and is statutorily responsible for the administration of the Act. SSA employs a corps of ALJs to adjudicate claims under the Act by claimants who request hearings. The SSA established the Office of the Chief Administrative Law Judge which oversees the hearing process conducted by SSA's ALJs; formulates and develops broad policies and objectives and establishes program goals for the ALJs; engages in continuous examination of all aspects of the Office of Disability Adjudication and Review ("ODAR") operations and implements improvements where needed; is responsible for developing and maintaining procedures for effective operations of the hearings; provides management oversight for all managerial activities in ODAR field offices; and coordinates regional and hearing office activities.

CLASS ACTION ALLEGATIONS

22. The named plaintiffs bring their claims on behalf of themselves and other similarly situated persons, pursuant to Federal Rules of Civil Procedure ("FRCP") 23(a) and (b)(2).

23. The class consists of all claimants whose claims will be assigned to the Named ALJs for a hearing and/or decision and all SSI and SSD claimants who, since January 1, 2005, have received an unfavorable or partially favorable decision, not reversed on any subsequent appeal, from the Named ALJs.

24. The class action requirements of FRCP 23(a) and (b)(2) are met in that:

a. The class is so numerous that joinder of all members is impracticable. Upon information and belief, the Named ALJs each conduct over 150 hearings a year and deny benefits to up to 80% of claimants who appear

before them. Every individual eligible for a hearing before the Named ALJs is a potential class member.

b. There are questions of law and fact common to the class, including whether the Named ALJs are generally biased against claimants for SSI and SSD and whether this bias deprives Class Plaintiffs of their right to a full and fair hearing before an impartial adjudicator, in violation of the Act, the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment.

c. The named plaintiffs' claims are typical of the claims of the class, and the named plaintiffs have no conflict of interest with other members of the class, all of whom would benefit from the relief sought in this case.

d. The named plaintiffs will fairly and adequately represent the interests of the class. Plaintiffs are represented by counsel experienced in class action litigation, and in litigating cases involving the SSA as well as other public benefit programs. Counsel has previously litigated numerous class action suits in federal court and has sufficient resources to prosecute the present case.

e. The Commissioner has acted on grounds generally applicable to the class by allowing plaintiffs' claims to be assigned to the Named ALJs despite their bias and inability or unwillingness to provide fair hearings. If class certification is not granted, individuals would be forced to bring separate actions, thereby wasting judicial resources, as well as the time of attorneys from government agencies and free legal services programs.

FACTUAL ALLEGATIONS COMMON TO THE CLASS

A. Applying for Social Security Benefits

25. The Commissioner administers several types of benefits under the Act, including benefits based on disability or old age. A disabled person can apply for two distinct forms of disability benefits administered by SSA: SSD, which is based on work history, and SSI, which is based on limited income and resources. Some individuals are eligible for both SSI and SSD.

26. A disabled individual may be eligible for SSD based on his or her work history, or the work history of a parent or spouse. A claimant for SSD must prove disability as of the date the worker was last insured.

27. An individual may be eligible for SSD as a disabled adult child ("DAC") if he or she became disabled prior to age 22 and has an insured parent who is receiving Social Security benefits or is deceased.

28. An adult individual can be found to be "disabled" for purposes of SSI and SSD if he or she is 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 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).

29. An adult individual is found to be disabled if "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

30. The evaluation of medical disability for both SSI and SSD is the same and consists of a "five-step sequential evaluation" codified by SSA. 20 C.F.R. §§ 416.920, 404.1520.

31. The first step of the sequential evaluation determines whether the claimant is engaged in "substantial gainful activity."

32. If the claimant is not engaged in such activity, the severity of the claimant's impairment is evaluated in the second step. An impairment is defined as "severe" if it interferes with basic work-related activities and is expected to result in death or last more than twelve months.

33. If the impairment is found to be severe, the claimant's impairments are evaluated against the Listing of Impairments ("Listing") contained in SSA's regulations. 20 C.F.R. Pt. 404 Subpt. P. App. 1; 20 C.F.R. §§ 416.920(d), 404.1520(d). The Listing sets forth a set of symptoms and other criteria specific to several medical conditions. A claimant can "meet" the Listing and be found disabled with medical evidence that supports the exact requirements of the Listing or "equals" a Listing.

34. If the claimant's impairment does not meet or equal a Listing, the process moves to the fourth step, with a determination of the claimant's "residual functional capacity." This finding assesses the claimant's capacity to engage in basic work activities, including prior relevant work.

35. If the claimant does not retain the residual functional capacity to return to prior relevant work, the process moves to the fifth step, where a determination is made regarding whether the claimant has the capacity to perform other work in the national economy in light of the claimant's residual functional capacity assessment, age, education, and work experience. If

the claimant cannot perform other work, benefits are awarded. The burden of proof at this step is on the Commissioner.

36. Applications for SSI and SSD are initially processed through a network of SSA field offices and state disability determination services. A claimant begins the process by completing an application and an adult disability report, and submitting the documents to one of SSA's field offices. In New York, the initial determination of whether a claimant is disabled is made by New York State's Office of Temporary and Disability Assistance ("OTDA"), pursuant to a contract with SSA. At this stage, OTDA may order a consultative examination of the claimant.

37. If the claim is denied, that claimant is entitled to a hearing before an ALJ in SSA's ODAR. The ALJ reviews the claim *de novo*.

38. ALJ hearings are informal and non-adversarial proceedings. The claimant may have an attorney or non-attorney act as his or her representative at the hearing.

39. If the ALJ's decision is adverse to the claimant, he or she may seek review by the Appeals Council, a component of SSA's ODAR. The Appeals Council has the power to deny the request for review, accept the case for review and deny or grant benefits, or accept the case for review and remand it to an ALJ for further review. The Appeals Council has the power to review an ALJ's decision *sua sponte* within 60 days of the decision.

40. On information and belief, the average processing time for the Appeals Council to review a case and issue a decision is fourteen months.

41. If the claimant disagrees with the Appeals Council's decision or the Appeals Council declines to review the claim, the claimant may seek judicial review in a federal district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). If a federal court remands the claim, it goes to

the Appeals Council, which may grant benefits or remand the case to an ALJ with instructions. If a denial from the same ALJ is remanded more than twice, it is the policy and practice of the Appeals Council to remand to a different ALJ. A federal court and the Appeals Council can remand to a different ALJ at any time.

42. SSI and SSD claimants are often unrepresented by counsel due to a lack of financial means and/or sufficient information to understand the importance of retaining an attorney. In addition, SSI and SSD claimants often have mild or severe mental disabilities. Many also have limited means of transportation to disability interviews, meetings, and hearings. Denial of claims can and do have severe consequences for claimants and their families.

B. Seminal Principles of Social Security Law

43. The chronic failure of the Named ALJs to correctly apply the law is all the more alarming given the well-settled principles that govern the components of an SSA benefits determination. Indeed, as evidenced below, the Second Circuit has clearly opined on many of the standards to be applied and provided the Named ALJs with a roadmap for the correct adjudication of benefits applications.

1. Liberal Construction of the Act

44. As explained by the Second Circuit in *Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir. 1975), the Act is "a remedial statute which must be 'liberally applied'; its intent is inclusion rather than exclusion."

2. Evidentiary Standard

45. It is the longstanding policy of the Commissioner to apply the preponderance of evidence standard, the traditional evidentiary standard in civil or administrative adjudicatory proceedings. This standard of proof applies at all levels of administrative review, but the Named ALJs effectively, and wrongfully, have held Class Plaintiffs to a much higher standard.

3. Treating Physician Rule

46. In determining the nature, scope and effect of a disability, an ALJ is required to follow the "Treating Physician Rule." Originally articulated by Courts of Appeals, and later codified by SSA, 20 C.F.R. §§ 416.927(d)(2), 404.1527(d)(2), the Treating Physician Rule was intended as a means to control rampant denials of SSI and SSD claims.

47. Based on the notion that the claimant's treating physician (as opposed to non-treating physicians, typically retained by OTDA and SSA for one-time consultative examinations, and non-examining physicians used to review claims files without ever meeting the claimant) are in a better position to render a reliable diagnosis and prognosis based on the deeper knowledge and insight gained from the physician's longitudinal treatment of the claimant, the Treating Physician Rule requires the decision-maker to give special deference to the treating physician in cases where the medical evidence is in conflict. The application of the Treating Physician Rule is the single-most important determinant in weighing SSI and SSD claims.

48. For example, in *Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir. 1986), the seminal case on the interpretation of the Treating Physician Rule, the Second Circuit held:

> The treating-physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant . . . relative to other medical evidence before the fact-finder, including opinions of other physicians. The rule, which has been the law of this circuit for at least five years, provides that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment, is: (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder.

49. The Second Circuit further honed this directive in *Rosa v. Callahan*, 168 F.3d 72, 78-79 (2d Cir. 1999), where it held that the opinion of a treating physician must in fact be given

controlling weight if it is well supported by medical finding and not inconsistent with other substantial evidence. The Court held further that ALJs "cannot arbitrarily substitute [their] own judgment for competent medical opinion" and that it is improper for an ALJ to "'set [her] own expertise against that of' the treating physician."

50. Yet despite this bright-line test, and as evidenced in detail below, the Named ALJs routinely misapply the Treating Physician Rule—a critical component of the eligibility analysis. Their misconduct ranges from entirely ignoring the treating physician to finding obvious pretexts for marginalizing his or her medical opinion. Often, the Named ALJs engage in this illegal behavior because the treating physician's evidence contradicts a conclusion the Named ALJ has already reached.

4. Analysis of Subjective Symptoms

51. Equally critical to the adjudication of a benefits claim under the Act is the proper analysis of subjective symptoms, including pain. The Second Circuit instructs that claims of pain and functional limitation need not be supported by objective medical evidence. *See Green-Younger v. Barnhart*, 335 F.3d 99, 107 (2d Cir. 2003). Indeed, the Second Circuit cites favorably to the Eighth Circuit's pronouncement that "[a] patient's reports of complaints, or history, is an essential diagnostic tool." *Id.* (citing *Flanery v. Chater*, 112 F.3d 346, 350 (8th Cir. 1997)). Moreover, "[a]s a general matter, 'objective' findings are not required in order to find that an applicant is disabled." *Green-Younger*, 335 F.3d at 108. Sadly, the record demonstrates that the Named ALJs do not properly assess subjective symptoms. Instead, they readily ignore directives to consider these important components of a claimant's disability, and routinely marginalize any such testimony or evidence if it is not consistent with the ruling, that in many cases, the Named ALJs have pre-ordained.

52. Moreover, in assessing the degree to which a claimant's pain interferes with his or her ability to work, an ALJ's ability to disregard the claimant's testimony about such pain is strictly limited. Once a claimant is determined to have a pain-producing disability, the ALJ may not disregard her testimony about the scope of, and limitations created by, such pain. 20 C.F.R. § 404.1529(c)(2)-(3). Rather, the ALJ must consider seven factors in evaluating a claimant's testimony concerning pain: (1) the claimant's daily activities; (2) the location, duration, frequency, and intensity of the claimant's pain and other symptoms; (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness, and side effects of any medication the claimant takes to alleviate pain or other symptoms; (5) any treatment, other than medication that the claimant received; (6) any measures the claimant uses to relieve pain or other symptoms; and (7) other factors concerning the claimant's functional limitations and restrictions due to pain or other symptoms. 20 C.F.R. §§ 404.1529(c)(3)(i)-(vii), 416.929(c)(3)(i).

5. Claimant Credibility

53. The ALJs' failure to correctly consider subjective complaints is often manifest in improper credibility determinations.

54. The proper assessment of a claimant's credibility is of vital importance in determining whether an individual qualifies for benefits. Accordingly, the Commissioner and the Second Circuit have both issued explicit guidance that an ALJ must adhere to in their adjudication of benefits claims. In guidance to all ALJs, the Commissioner specifically instructed:

> It is not sufficient for the adjudicator to make a single, conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible.' It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the

> weight the adjudicator gave to the individual's statements and the reasons for that weight.

SSR 96-7p, 1996 WL 374186, at *2 (S.S.A.).

55. The Second Circuit has additionally clarified that in assessing credibility, "[a] claimant with a good work record is entitled to substantial credibility when claiming an inability to work because of a disability." *Rivera v. Schweiker*, 717 F.2d 719, 725 (2d Cir. 1983).

56. Once again, despite having been provided with a clear set of guidelines for assessing credibility, the record demonstrates that the Named ALJs operate as if there are no guidelines at all. Routinely, the Named ALJs disregard the factual evidence in the record and substitute their own opinions in place of a claimant's testimony. Additionally, in multiple instances, the Named ALJs failed to accord the appropriate weight to a claimant's previous work experience.

6. Duty to Develop the Record

57. Whether or not a claimant has counsel, and often they do not, an ALJ is required to develop the evidentiary record pursuant to 20 C.F.R. §§ 416.912, 404.944, and 404.1512, and seek additional information from the treating physician. The Court of Appeals for the Second Circuit has held that an ALJ has an affirmative duty to develop the administrative record and that it is the duty of an ALJ to seek additional information from the treating physician *sua sponte* where clinical findings are inadequate. *Clark v. Comm'r of Soc. Sec.*, 143 F.3d 115, 118 (2d Cir. 1998). This duty includes the responsibility to investigate and develop evidence and arguments in favor of and against awarding benefits.

58. As demonstrated below, the Named ALJs consistently and chronically fail to satisfy their obligation to create the proper record.

7. **Use of a Vocational Expert**

59. The Second Circuit has also provided instructions governing the proper implementation of a vocational expert to supplement the use of medical-vocational guidelines in assessing a claimant's ability to perform work. In *Bapp v. Bowen*, 802 F.2d 601, 605 (2d Cir. 1986), the Second Circuit held:

> [A]pplication of the grid guidelines and the necessity for expert testimony must be determined on a case-by-case basis. If the guidelines adequately reflect a claimant's condition, then their use to determine disability status is appropriate. But if a claimant's nonexertional impairments "significantly limit the range of work permitted by his exertional limitations" then the grids obviously will not accurately determine disability status because they fail to take into account claimant's nonexertional impairments.

60. The Second Circuit, through its decision in *Bapp*, established a test that hinges the need for a vocational expert upon the non-exertional impairments of the claimant. Yet despite this clear directive, and as evidenced repeatedly below, the Named ALJs fail time and time again to properly utilize vocational experts, and instead thrust their own biased opinions into the evaluation of non-exertional impairments to the great detriment of the claimants.

* * *

61. The practical effect of the Named ALJs' failure to follow these long-standing and clear principles is a tremendous waste of judicial resources. The manifest errors cause claimants to spend years, and sometimes more than a decade, being shuttled back and forth between the multi-layered bureaucracy. Tellingly, several of the rulings made by this Court and discussed herein, reflect the district court judges' frustration with the Named ALJs for repeating the exact same mistakes in the exact same manner over and over again. Based on their complete lack of faith in the Named ALJs' ability to carry out their mandate, in many instances the cases at issue are either remanded to different ALJs or remanded solely for a benefits calculation.

C. The Queens Office Of Disability Adjudication & Review

62. According to the hiring standards set forth by the U.S. Office of Personnel Management, "ALJs serve as independent impartial triers of fact in formal proceedings requiring a decision on the record after the opportunity for a hearing." The Association of Administrative Law Judges, representing ALJs employed by the Commissioner, has noted that "the administrative law judges in [SSA] have the responsibilities of developing a complete record for both parties; to protect the trust fund as well as the due process rights of the claimant; and render a legally defensible decision based on the evidence in the hearing record."

63. The Commissioner employs ALJs, pursuant to 5 U.S.C. § 3105, to adjudicate claims for benefits under the Act in Queens, New York, and assigns them to various hearing offices. There are currently eight ALJs assigned to QODAR, including QODAR's Chief ALJ Nisnewitz, and ALJs Cofresi, Fier, Hoppenfeld, and Strauss.

64. The Named ALJs are not fair adjudicators; they each have a general bias against SSA claimants and use any means available, legal or not, to prevent claimants from having fair hearings before an impartial decision maker, and to deny valid claims.

65. The bias of the Named ALJs is described in four sections below:

a. **Section 1** reviews the history of bias of each Named ALJ based on published and unpublished judicial decisions.

b. **Section 2** discusses the Commissioner's indifference, and failure to act, in response to this pattern and practice of gross misconduct, which made this lawsuit (and the relief sought by plaintiffs) the last resort.

c. **Section 3** addresses the lack of public accountability for ALJs.

d. **Section 4** addresses the specific mistreatment of plaintiffs and class members by the Named ALJs.

1. History of Bias

66. The Named ALJs each have a clear and unambiguous history of bias against SSI and SSD claimants. Their disturbing pattern of conduct, which the Commissioner has failed to address or remediate, is demonstrated conclusively by their: (1) routine failure to develop the administrative record; (2) routine failure to follow the law; (3) erroneous and faulty credibility determinations; and (4) aberrantly high denial rates. Each category of misconduct is described below for each ALJ.

a) Chief ALJ David Z. Nisnewitz

67. Since January 1, 2008, thirteen district court cases identified ALJ Nisnewitz as the author of the decision under review. In these federal court opinions he was found to have committed error in ten cases. There is little doubt, when the overall record is considered, that Chief ALJ Nisnewitz's consistent errors are highly probative of his anti-claimant bias.

(1) Failure to Develop the Record

68. In a vast majority of ALJ Nisnewitz's cases, this Court found him in error for failing to discharge his duty to "affirmatively develop the record." The Courts' factual findings are wholly consistent with a clear pattern of denial of meritorious claims based on pre-existing bias against claimants. Below are several notable examples, demonstrating this clear pattern between 2008 and the present:

69. In *Ginsberg v. Astrue*, 2008 WL 3876067 (E.D.N.Y. Aug. 18, 2008), ALJ Nisnewitz denied benefits to a 55-year-old *pro se* claimant who experienced extended periods of being completely bedridden and multiple chronic conditions. This Court found that ALJ Nisnewitz made numerous errors and was unfair. Noting that "the ALJ is under a heightened duty to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts," the Court found him in dereliction of his duty. For example:

a. Rather than calling witnesses to develop the record, ALJ Nisnewitz callously stated, "I don't make calls."

b. ALJ Nisnewitz's response to a *pro se* claimant's request for guidance on how to establish a doctor's expertise were "intemperate, brusque, and unhelpful."

c. ALJ Nisnewitz's questioning of another medical expert was, according to the Court, "a study in combative questioning, which hampered the truth seeking process."

d. ALJ Nisnewitz constantly interrupted a treating physician's testimony with leading questions designed "to elicit the responses he apparently wanted or expected to hear."

e. His manner of conduct chilled the *pro se* claimant during the Commissioner's case, resulting in "virtually no cross-examination at all."

f. Based on these errors, the Court found ALJ Nisnewitz was "a far cry" away from satisfying his duty to develop the record. Thus, the Court vacated and remanded.

70. In *Rudt-Pohl v. Astrue*, 2009 WL 2611320 (E.D.N.Y. Aug. 25, 2009), ALJ Nisnewitz denied benefits to claimant twice and was found both times to have failed to properly develop the record. This Court found that "[claimant] has a very serious medical condition [an allergy] that clearly dominates her life." In fact, claimant's allergy was so severe that she had an acute allergic reaction in front of ALJ Nisnewitz, forcing her to attend the adjourned hearing telephonically. Ignoring the evidence, ALJ Nisnewitz found that claimant could hold a job and denied her benefits claim, a decision this Court held was based on no proof at all. For these

reasons, the Court found that the "ALJ's conclusion cannot be sustained on the record before this Court," vacated his decision, and remanded the matter solely for the calculation of benefits.

71. In *Larkins v. Astrue*, 2009 WL 3148763 (E.D.N.Y. Sept. 29, 2009), ALJ Nisnewitz had denied benefits to a multiple sclerosis victim, who had an impressive 30-year work history. ALJ Nisnewitz had been remanded earlier in this case by the Second Circuit Court of Appeals for his failure to develop the record, including a failure to resolve inconsistencies in the medical testimony. In addition to legal errors (discussed below), this Court found that ALJ Nisnewitz failed again to develop the record. "Here," the Court explained, "over the course of twelve years, the record has been developed and reviewed by the ALJ, twice." Nevertheless, the Court found that ALJ Nisnewitz's determination was "not supported by substantial evidence." The Court further found that, "[a]lthough the Court of Appeals for the Second Circuit instructed the ALJ to resolve the apparent tension [between two physicians], the ALJ failed to do so." Rather than acceding to the Commissioner's request for further remand for additional proceedings, the Court made a finding of disability and remanded solely for the calculation of benefits.

72. In *Baldwin v. Astrue*, 2009 WL 4931363 (S.D.N.Y. Dec. 21, 2009), this Court again found that ALJ Nisnewitz "neglected his duty to properly develop the record," stating that he failed to consider "the incompleteness of the record before him" in making his adverse benefits decision, and that he "failed to meet his responsibility to resolve ambiguities or evidentiary gaps in the record." The Court remanded, further finding that ALJ Nisnewitz's "failure to acknowledge relevant evidence or to explain its implicit rejection is plain error."

73. In *Gross v. Astrue*, 2010 WL 301945 (E.D.N.Y. Jan. 15, 2010), this Court went even farther, finding that ALJ Nisnewitz's behavior "raises the possibility that the ALJ was not

seeking neutrally to develop the record, but rather to find support for the conclusions he had already formed in his first decision." ALJ Nisnewitz had denied benefits, twice, to a claimant suffering from severe conditions, including congenital hip dysplasia and associated osteoarthritis. Among other errors, ALJ Nisnewitz again "failed to develop the medical record, failed to consider the proper factors in evaluating [claimant's] claims of subjective pain, and failed to provide a function-by-function assessment of [claimant's] ability to do work-related activities." Using an unusual remedy, but one used all too often for the Named ALJs, the Court ordered the Commissioner to assign the case to a new ALJ on remand. In doing so, the Court concluded that ALJ Nisnewitz's conduct suggested a lack of impartiality and a dereliction of his duties.

74. In *Aas v. Astrue*, 2010 WL 3924687 (E.D.N.Y. Sept. 29, 2010), ALJ Nisnewitz denied benefits to a former New York City firefighter with severe medical conditions, including spinal disk degeneration, depression, and associated alcoholism. This Court found that ALJ Nisnewitz had denied benefits without developing and evaluating all available evidence. Indeed, ALJ Nisnewitz erred, according to the Court, in rejecting claimant's benefits without even mentioning the limits of claimant's ability to move. ALJ Nisnewitz failed to seek any evidence on this important issue.

75. In *Legare v. Astrue*, 2010 WL 5390958 (E.D.N.Y. Dec. 22, 2010), this Court excoriated ALJ Nisnewitz, stating that his determination of claimant's income eligibility and his analysis "were so deficient and so incoherent as to prevent meaningful review of his decision." The Court called ALJ Nisnewitz's analysis "opaque and nonspecific," and found his decision "so palpably deficient" that it ordered a remand. Convinced that ALJ Nisnewitz could not fairly develop the record, the Court ordered the Commissioner to assign the matter to a different ALJ.