UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

WILLIAM DILLON, SCOTT GRAUE, DAVID HODGES, and ALBERT LOVE individually, and on behalf of a class of others similarly situated,

Plaintiffs,

v.

CLACKAMAS COUNTY, and CRAIG ROBERTS, both individually and in his official capacity as Sheriff,

Defendants.

Case No. 3:14-cv-00820-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

Plaintiffs are former inmates of the Clackamas County Jail ("CCJ"). In this class action, plaintiffs allege that their federal constitutional and state statutory rights were violated by visual strip searches they endured during incarceration. This case was originally filed on May 18, 2014, and included as named plaintiffs William Dillon, Scott Graue, and David Hodges. On May 4, 2015, plaintiffs filed a Second Amended Complaint adding two additional named

plaintiffs, Albert Love and Jayson Saylor.[1] Second Am. Compl. , ECF #31. Defendants include Clackamas County and the County Sheriff, Craig Roberts.

On July 23, 2018, the court granted plaintiffs' motion to certify the class "as to the Fourth Amendment claims by male inmates at the CCJ who underwent return-from-court visual strip searches between September 25, 2012, and the date in May 2013 on which the County installed privacy panels in CCJ's hallway." Order 8, ECF #160. The court also appointed Leonard Berman as class counsel. *Id.*

Defendants move the court for an order decertifying the class on the basis that plaintiffs' counsel Leonard Berman cannot adequately represent the class. ECF #177. For the reasons discussed below, defendants' motion should be GRANTED.

FINDINGS

A district court's order granting class certification is subject to later modification, including class decertification. *See* FRCP 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *see also Sali v. Corona Regional Medical Center*, 909 F.3d 996, 1004 (9th Cir. 2018) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)) (describing a court's class certification order as "inherently tentative"). A district court's decision to decertify a class is committed to its sound discretion. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F. 3d 807, 816 (9th Cir. 1997). Plaintiffs, as the party seeking class certification, bear the burden of demonstrating that the requirements of Federal Rule of Civil Procedure 23 are met. *See United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010) ("The party seeking class certification bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met.").

[1] Plaintiffs voluntarily dismissed Saylor as a named plaintiff on January 9, 2017. ECF #65.

Rule 23(a)(4) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class." "To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citation omitted).

Determining the adequacy of representation requires consideration of 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?" *Id* (citation omitted). The latter factor is at issue in this case.

Rule 23(g)(1)(A) directs courts to consider several factors when appointing class counsel:

> (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.

FRCP 23(g)(1)(A). Courts also may consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." FRCP 23(g)(1)(B).

Mr. Berman appears to have sufficient knowledge regarding the applicable law, as evidenced by the fact he has brought other prisoner civil rights actions in this district. However, Mr. Berman's repeated failure to meet court deadlines in this case and others, the multitude of mistakes that he made in providing class notice in this case, and his history in this district demonstrate his inability to adequately represent the class in this case.

I. Deficiencies in Class Notice

Defendants contend that Mr. Berman failed to properly effectuate notice of class certification pursuant to Rule 23(c)(2)(B). Def. Reply 3, ECF #182. As the class was certified under Rule 23(b)(3), pursuant to Rule 23(c)(2)(B), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." "Both the form and content of the notice must be adequate to be approved by the courts." *Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-cv-00520-TLN-DB, 2016 WL 6208367, at *6 (E.D. Cal. Oct. 24, 2016) (citing *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 452 (E.D. Cal. 2013)). Moreover, "[u]nder Rule 23(c)(2)(B), courts must scrutinize the form and content of the proposed notice, as well as the manner in which it is to be disseminated." *Lauber v. Belford High School*, No. 09-CV-14345, 2012 WL 12994873, at *1 (E.D. Mich. Apr. 6, 2012). "Typically, the plaintiff prepares the notice for the Court's review and approval, giving the defendant the opportunity to object or suggest changes. However, the Court is ultimately responsible for directing notice to the class members and protecting their due process rights to remain in the class or be excluded." *Patton v. Dollar Tree Stores, Inc.*, No. CV-15-03813-MWF, 2017 WL 8233883, at *2 (C.D. Cal. Apr. 5, 2017) (citation omitted).

Here, the notice that was effectuated on February 16, 2019, was not approved by the court. The court did not have the opportunity to scrutinize the form and content of the proposed notice, and defendants had no opportunity to object or suggest changes. The court cannot fulfill its duty under FRCP 23(c)(2)(B) to direct the "best notice that is practicable," if it has no opportunity to review the notice before it is sent to class members.

After defendants filed their motion to decertify the class, the court instructed Mr. Berman to file a copy of the class notice by Friday, May 17, 2019, for the court's review. Order, ECF #184. On May 15, 2019, plaintiffs filed a copy of a class notice; however, it was a notice of a proposed settlement from a different class action. *See* Proposed Class Notice, ECF #185. The next day Mr. Berman emailed a copy of the class notice—for this case—to the court, but was unable to upload the notice into ECF. In his email, Mr. Berman claimed to be having "unprecedented computer problems."

On May 20, 2019, plaintiffs filed a copy of the class notice in the docket; however, there is at least one difference between the class notice that was emailed to the court on May 16, 2019, and the class notice that was filed in ECF four days later.[2] *Compare* Corrected Proposed Notice, ECF #186, with Emailed Class Notice, ECF #197. It is not clear whether Mr. Berman made updates to the class notice in the interim, or whether he had two versions of the class notice, and emailed one and filed the other. In any event, it is unclear which version was mailed to the class members. Indeed, given the fact that Mr. Berman initially provided the court with an incorrect document from a completely different case, and then provided two different versions of the class notice, it is conceivable that an entirely different version—one that the court has not seen—was mailed to the class members. These doubts certainly raise concerns as to the adequacy of representation.

The two notices provided by Mr. Berman also contain typographical and grammatical errors. Moreover, the definition of the class is not "clearly and concisely state[d] in plain, easily

[2] The word "FROM" was included in the definition of the class in the version that was emailed to the court on May 16, 2019; however, it was deleted in the version that was filed on May 20, 2019.

understood language" as required by FRCP 23(c)(2)(B). The class is defined verbatim as follows:

> The class includes all male inmates were booked into the Clackamas County Jail and strip-searched in a group, UPON RETURN FROM COURT, OUTSIDE OF PRIVACY PANELS but only as to the Fourth Amendment claims of male inmates at the CCJ who underwent return-from-court group visual strip searches between September 25, 2012, and a date in May 2013 when privacy panels were installed.

Corrected Proposed Notice, ECF #186.[3] Adding to the confusion is an incomplete sentence that references a "proposed Settlement," despite the fact that there is no proposed settlement in this case: "If the proposed Settlement receives final approval, people who were subjected to a strip search in the Clackamas County Jail." Corrected Proposed Notice, ECF #186. In sum, not only was the notice mailed after the deadline and without court approval, but the notice itself fails to meet the requirements of FRCP 23(c)(2)(B).

II. Missed Deadlines

After the court had already ordered that, due to the age of the case, no further extensions would be granted, Mr. Berman requested a 90-day extension of time to effectuate notice. *See* Am. Order, ECF #170; Mot. Exten., ECF #172. The motion was filed January 31, 2019, the day

[3] Compare the class notice in this case to the clear and concise language approved by a court in another class action in this district:

> The Court has certified this case as a class action consisting of all current and former employees of Butler Investments, Inc. and/or Canby Pub & Grill from October 9, 2007, to the present, including a first subclass of all front-of-the-house employees during this time period and a second subclass of all back-of-the-house employees during this time period. This notice constitutes notice to the class members that the above class has been certified, and of their right to opt-out, and the required procedures for doing so.

Chastain v. Cam, No. 3:13-cv-1802-SI, ECF #142, at 3; *id.*, ECF #143 (order approving proposed notice).

before the deadline for completing notice was to expire. *Id.* Plaintiffs eventually completed notice on February 15, 2019, two weeks after the deadline had passed. Cert. Compl., ECF #175.

Additionally, Mr. Berman failed to meet the deadline for delivering his expert report. On April 23, 2019, the court granted a stipulated motion for extension of discovery, and ordered plaintiffs to provide their expert disclosures to defendants by May 1, 2019. Order, ECF #181. The next day, Mr. Berman emailed defendants informing them that he had to replace his expert and said he expected "to get [them] a report by early to mid-May." Lillegren Decl. ¶ 5, ECF #190. Mr. Berman delivered the expert report on May 16, 2019, two weeks after the May 1, 2016 deadline. *Id.* ¶8. However, Mr. Berman failed to obtain permission to extend this deadline, and this failure to comply with the court's deadline is the subject of a pending motion for sanctions filed by the defense. Mot. Imp. Sanctions, ECF # 189; *see* Lilligren Decl. ¶¶ 6-7 (contending that by informing defense counsel on April 24, 2019, that he had replaced his expert, Mr. Berman had "no intention of complying with the Court's" May 1, 2019 deadline).

Mr. Berman's failure to meet deadlines appears to be in keeping with a pattern. In another case, *Lyons v. Peters*, Judge Simon recently found that Mr. Berman could not adequately represent a class, relying in part on the fact that Mr. Berman had "repeatedly missed briefing and discovery deadlines. . . ." *See* Order 3, ECF #67, No. 3:17-cv-720.

III. Resources

In *Lyons*, Judge Simon also expressed concern that Mr. Berman is a solo practitioner, noting that he might not have had the "available resources" to commit to a class action case. *Id.* at 6. Judge Simon explained that those concerns were "compounded by the fact that [Mr. Berman had] approximately 20 active cases in this district." *Id.* Currently, including this case, Mr. Berman has 14 active cases in this district.

Mr. Berman argues that *Lyons* would have involved more work than this case because it had 14,000 potential class members whereas this case has only 1,500 class members. Pl. Resp. 3, ECF #180. Whether or not this case will require less work than *Lyons*, there nevertheless has been a failure to meet deadlines in this case. Moreover, the class notice contained typographical and grammatical errors, was poorly formatted, and included confusing language, which indicates that Mr. Berman does not have the resources to carefully proofread a one-page class notice, despite the importance of the document.

IV. Conduct in Other Cases

Additionally, as Judge Simon noted in *Lyons*, Mr. Berman has demonstrated an "apparent aversion to trial," calling into question whether he will see this case through to final disposition. Order 6, ECF #67, No. 3:17-cv-730-SI. For example, Mr. Berman has, on multiple occasions, sought to withdraw as counsel shortly before trial. *Id.*

> In one such instance, after his motion to withdraw was denied two weeks before trial, Mr. Berman simply failed to appear in court on the day of trial. *See Radilla v. Newberg et al*, Case No. 3:15-cv-1019-MO, ECF 66 (D. Or. Sept. 13, 2016) (denying motion to withdraw); *Id.* ECF 73 (D. Or. Sept. 27, 2016) (granting Mr. Berman's motion to withdraw on reconsideration after he failed to appear in court on the day of trial).

Id.

Recently, Mr. Berman completed a jury trial to verdict in this district. *Torres v. Snider*, No. 3:17-cv-00624-SI. However, given the age of this case and the amount of work remaining for the parties and the court leading up to a potential trial, it remains of concern that Mr. Berman may move to withdraw at the eleventh hour or fail to appear in court on the day of trial.

V. Withdrawal of Co-Counsel

Mr. Berman was the original counsel of record in this case but was subsequently joined by Tonna Farrar as co-counsel. *See* Compl., ECF #1; Notice of Appearance, ECF #13. Prior to

class certification, Ms. Farrar withdrew from the case. *See* Notice of Attorney Withdrawal, ECF #55; ECF #56. In plaintiffs' Motion for Class Certification, Mr. Berman alleged that "if granted class certification, former counsel Tonna Farrar will likely rejoin the case." Mot. Class Cert. 10, ECF #79. Class certification was granted; nevertheless, former counsel Ms. Farrar has not rejoined the case. Indeed, based on the reasons given for her withdrawal, it does not appear that there was ever any realistic possibility that she would return to the case. *See* Notice of Attorney Withdrawal ¶¶ 2, 4, ECF #55 (explaining that "irreconcilable differences" between Ms. Farrar and Mr. Berman would "render it impossible" for her to provide effective counsel and required her to withdraw under RPC 5.1).

VI. Work Completed in the Case

In *Sali v. Corona Regional Medical Center*, 909 F.3d 996, 1007-08 (9th Cir. 2018), the Ninth Circuit held that a district court abused its discretion in concluding that proposed class counsel was inadequate. The court found that the district court had focused only on the errors made by counsel, but ignored the "evidence in the record demonstrating class counsel's substantial and competent work on the case." *Id.* at 1008. Specifically, the Ninth Circuit relied on the fact that class counsel had:

> incurred thousands of dollars in costs and invested significant time in this matter, including preparing dozens of interrogatories and requests for production, taking numerous depositions, retaining experts, defending the named plaintiffs' depositions and the deposition of the plaintiffs' expert economist, reviewing and analyzing thousands of documents, interviewing hundreds of class members, obtaining signed declarations, and preparing and filing a motion for class certification.

Id.

In *Lyons*, the court distinguished *Sali*, noting that "Mr. Berman's investments in this case do not appear to be nearly as significant as those of the proposed class counsel in *Sali*." Order 6, ECF #67, No. 3:17-cv-730-SI. Likewise, in this case, while Mr. Berman has certainly made

investments in the case, they do not rise to the level in *Sali*. Mr. Berman has taken and defended depositions, filed and responded to a number of motions, retained an expert, and issued a class notice; however, there is no indication that he has interviewed hundreds of class members, reviewed and analyzed thousands of documents, or prepared dozens of interrogatories.

Furthermore, in *Sali*, there was no evidence that class counsel had a history or pattern of failing to meet deadlines or comply with court orders. There also was no risk that class counsel would withdraw on the eve of trial or fail to show up for trial. Additionally, as noted by Judge Simon in *Lyons*, "class counsel in *Sali* consisted of an entire law firm," whereas Mr. Berman's "available resources to commit to this case as a solo practitioner are far more modest." Order 6, ECF #67, No. 3:17-cv-730-SI.

While the Ninth Circuit held in *Sali* that it was "premature" at such an "early stage of the litigation" to determine that class counsel was inadequate, here the litigation has progressed further. 909 F.3d at 1008. At this point in the case, the court has a good idea of whether Mr. Berman has the ability to handle a class action. Importantly, as detailed above, Mr. Berman failed to meet the court's deadline for effectuating class notice and the notice itself was deficient. Mr. Berman's failure to communicate effectively with absent class members cuts to the heart of his adequacy as class counsel.

Finally, plaintiffs have fallen short of meeting their burden of demonstrating that the requirements of Rule 23 are met. *United Steel Workers*, 593 F.3d at 807. In his four-page response, Mr. Berman did not discuss or cite to Rule or any relevant caselaw. Pl. Resp., ECF #180. Despite asserting that significant effort and expense has been incurred, Mr. Berman provide no evidence documenting the amount of work he has completed or the actual amount of expenses incurred. Indeed, the effectuation of notice to 1,500 potential class members was the

only example Mr. Berman gave regarding the work he has completed in this case. *See* Pl. Resp. 1-2, ECF #180. The court must consider counsel's "competent work on the case," but Mr. Berman's improperly effectuated class notice does not qualify as competent work. *Sali*, 909 F.3d at 1008.

Plaintiffs argue that nearly 1,500 class members have been notified and significant effort and expense would be required to notify the pending class of decertification. Pl. Resp. 1-2, ECF #180. However, the class notice was deficient; therefore, similar effort and expense would be required to cure the deficient notice even if the court denied the motion to decertify. *See Day v. Whirlpool Corporation*, No. 2:13-CV-02164, 2014 WL 12461378, at *8 (W.D. Ark. Dec. 3, 2014) (holding that the proposed notice did not "clearly and concisely define the class in plain language as required by Rule 23(c)(2)(B)(ii)" and explaining that where the court is viewing a notice "retrospectively" it would have the discretion to determine whether the failure to comply with FRCP 23(c)(2)(B) was harmless).[4]

Plaintiffs also argue that the court was aware of Mr. Berman's solo practitioner status, health challenges, and litigation lapses when it initially appointed him as counsel in this case. Pl. Resp. 2, ECF #180. Whether or not the court was aware of those issues, at that point, there were no objections to the adequacy of Mr. Berman as class counsel and the court declined to raise the matter *sua sponte*. Moreover, subsequent to his appointment, Mr. Berman has missed deadlines and committed a number of missteps in effectuating notice, with the result being that a deficient class notice was mailed to 1,500 potential class members.

[4] Because the court is recommending that defendants' motion to decertify the class be granted, it is not necessary to reach the question of whether or not the deficiency was harmful and corrective notice would have been required. Nevertheless, it appears that the confusing language included in the class definition, taken together with the false assertion that there was a proposed settlement, would not be harmless.

RECOMMENDATION

For the reasons stated above, defendants' motion to decertify the class (ECF #177) should be GRANTED. If these findings and recommendations are adopted, the court should direct plaintiffs to immediately prepare and provide notice of decertification to all members of the class to whom notice has previously been sent. This notice of decertification should be submitted to the court for approval before it is sent.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Tuesday, August 20, 2019. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED August 6, 2019.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge