UNITED STATES DISTRICT COURT
District of Maine

DALE DARE, on behalf of himself and on behalf of others similarly situated, Plaintiffs	)	
vs.	)	Docket No. 02-251-P-C
KNOX COUNTY, DANIEL DAVEY, In his individual capacity and in his official Capacity as Knox County Sheriff, Defenda nts	)	

PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL

I. SUMMARY

The parties agreed to settle this case on Friday, September 29, 2006 at the Judicial Settlement conference with Chief Judge Singal (Docket item No. 328), the general terms of which are set forth in a written settlement agreement signed by all parties on September 29, 2006. Under the summary agreements, the parties were required to submit, using the Second Amended Settlement Agreement approved in *Nilsen v. York County*, (02 -CV-212-P-H.) their final written agreement, along with a Motion to Recertify the Class.(Docket item No. 368, supra).

On December 18, 2006 the Court entered It's Order approving Plaintiff's Motion For Approval Of Third Final Settlement Agreement, thus giving preliminary approval to the agreement between the parties and authorizing the issuance of a class wide notice "in a reasonable manner" as required by Rule 23 (e) (1) (B). The court also set a hearing

under Rule 23 (e) (1) (c) to determine whether the settlement is fair, reasonable and adequate; whether any request for attorneys fees and non-taxable cost should be allowed and, if so, the extent of such allowance; and resolution of any other issues then properly before the Court. The hearing under Rule 23 (e) (1) (c) is scheduled to take place on April 23, 2007 at 10:00 a.m.(Docket item No. 378). Additionally, the Court issued an injunctive Order designed to prevent unconstitutional strip searches in the future (Docket item No. 379).

II. Procedural History

Plaintiffs filed this action on or about November 19, 2002. On November 5, 2003, Judge Gene Carter of the United States District Court for the District of Maine granted plaintiff's motion for class certification and certified this case as a class action under Fed.R. Civ. P 23 (b) (3). The class was defined as follows:

All people who after November 19, 1996, were subjected to a strip search and/or visual body cavity search without evaluation for individualized reasonable suspicion while being held at the Knox County Jail:

(1) After having been arrested on charges that did not involve a weapon, drugs, or a violent felony; or

(2) While waiting for bail to be set up on charges that did not involve a weapon, drugs, or a violent felony; or

(3) While waiting for an initial court appearance on charges that did not involve a weapon, drugs, or a violent felony; or

(4) After having been arrested on a warrant that did not involve a weapon, drugs, or a violent felony. (See Docket Item No. 21)

The decision to certify the class was affirmed on appeal by the United States Court of Appeals for the First Circuit, *Tardiff vs. Knox County*, 365 F.3d 1 (1st Cir. 2004).

Plaintiffs alleged that all arrestees or pretrial detainees at the Knox County Jail were subjected to a strip search, sometimes to include a visual body cavity search, as part of a booking procedure. The defendants have denied those allegations and have asserted that both their officially promulgated policies and their actual practices and procedures were at all times consistent with constitutional requirements.

This case has been in litigation since November, 2002. Partial Summary Judgment was granted to the Plaintiffs on November 2, 2005. The Court ordered on a small rollback of the Partial Summary Judgment in April of 2006 requiring Plaintiffs to prove an unconstitutional custom and practice for class members strip-searched between September 2002 and December 2004. A trial, originally scheduled to begin April 1, 2006, was postponed until May 1, 2006 and then to October 3, 2006. The parties, like the famed the light brigade, charged into summer with no thought to what September would bring. The parties interviewed, deposed, motioned and strategized fiercely aiming for the killer strike that would put them a leg up and demoralize the other side. On September 5, 2006 court decertified the class with respect to damages, disqualified all witnesses, shredded all exhibits and denied all motions. The parties retreated, seeking shelter in the chambers of Chief Judge Singal. On September 29 Chief Judge Singal brought the battle

to a close through an all day Judicial Settlement Conference.[1] Following instructions of Chief Judge Singal to prepare a final written agreement using the Second Amended Agreement approved in *Nilsen v. York County*, (02-CV-212-P.-H.), the parties began the process while hammering out that final agreement. On December 18, 2006 the Court rewarded the parties' efforts by approving preliminarily the Third Final Settlement Agreement. (Docket Item No.: 378).

III. SUMMARY OF SETTLEMENT TERMS

The Settlement reached by the parties secures a remarkable recovery for class members. Under the settlement, the Defendants have created a settlement fund of $3 million dollars from which payments to class members, class representatives, class counsel, and the Claims Administrator will be made. This is an extraordinary outcome for the Class because approximately 366 class members will share in a fund which will pay them significantly more than they might have received had they gone individually to trial.

Under the terms of the settlement agreement, each class member who timely submits a completed and signed claim form postmarked no later than February 12, 2007, will, if his claim is approved, receive a payment from the common fund (after deducting attorneys fees, costs, expenses of administration, and bonuses to the class representative and those class members who were deposed by the Defendants) calculated on the basis of one share for every class member with an approved claim. Class members wishing to opt

[1] The parties had previously attempted to mediate the dispute with the assistance of former Maine Supreme Judicial Court Chief Justice Daniel Wathen. The two days spent with the Chief Justice Wathen brought focus to the parties' perceptions but did not resolve the case.

out of the settlement are required to file a properly executed to opt-out form on or before February 12, 2007.

In the terms of the settlement agreement, a portion of the settlement fund shall be used, subject to Court approval, to pay the cost of administering the settlement as well as a plaintiffs attorneys fees and expenses. Class counsel have separately applied to the Court for an award of attorney's fees in the amount of $900,000.00 (which represents 30% of the settlement fund of 3 million), for reimbursement of $178,561.41 in expenses, and for $35,000[2] to cover the estimated Cost of Administering the Settlement.

The Settlement Agreement also provides for an incentive award in the amount of $5,000 for the class representative of record as of the date of the Final Approval of the settlement and a $500 bonus for each of the 20 class members who were deposed by the defendants.

The Settlement Agreement will completely settle and resolve this class action. Unless a class member opted out by the timely submission of a valid opt-out form, the settlement will fully bind all members of the class. As the settlement agreement provides: "in consideration of the settlement amount, all defendants,... will be released from all liability for the class members' claims for unlawful strip searches that were part of this lawsuit, including class members who do not file claims, except for any class members who requested exclusion, opted out, and filed an individual lawsuit within the

[2] Analytics initial estimate of claims administrative expenses was $35,000.00 (see Exhibit B, Motion for Attorney's Fees **,** Cost Of Litigation And Expenses Of Settlement Administration), class counsel had paid Analytics $8,684.33 and have another invoice in transit in the amount of $21,933.37, for a total to date of $30,617.70 in claims administration expenses. Analytics will provide an updated estimate of the expenses expected to be necessary to close out the claims administration phase of this case.

applicable statute of limitations. The parties have expressly agreed that the release of claims arising from the settlement includes all visual inspections, including without limitation visual body cavity inspections, that otherwise fall within the scope of the claims certified as a class action by the Court in this case. The parties further agree that this release of claims applies to any claims that the strip searches were conducted in a manner that was unlawful, including without limitation, claims of physical touching, cross- gender searches, or searches which were observed by persons other than the correctional officer performing the search. The parties further agree that their settlement does not release any other claims, such as wrongful arrest, excessive force, or searches that were not part of the admissions process (such as strip searches after a lockdown)."

Class members have been notified of the settlement pursuant to the Notice Plan approved by the Court in its Order granting preliminary approval of the settlement (Docket item No. 376-2). First, a Notice Package consisting of a Notice of Class Action Settlement and of the Hearing to Approve the Settlement ("Notice of Settlement"), a Settlement Claim Form, a Frequently Asked Questions sheet and an Opt-Out Form, by first-class mail postage prepaid to all potential class members, whose addresses are known to Class Counsel at their last known address within three weeks after the Court Order granting preliminary approval. Second, creation of a website, www knoxcountyjailclass.com, where Notice of Settlement and the Settlement Claim Form and the Opt-Out Form are available for downloading from the website or on request to the Claims Administrator including through a toll-free number. Third, publication of the Notice of Settlement twice in the Portland Press Herald, Rockland Courier Gazette and

the Bangor Daily News. Fourth, posting the Notice of Settlement in the Knox County Jail. Fifth, the issuance of a press release detailing preliminary approval of the settlement, how to obtain the appropriate Claims and Opt-Out Forms, the dead-line for filing and Notice of the date and time of the Final Fairness Hearing.

IV. The proposed settlement is fair, reasonable and adequate

A class-action settlement that "...is fair, adequate and reasonable" may be approved by the Court. Fed.R. Civ. P 23 (e)(1)(C), and *City Partnership Co. v. Atlantic Acquisition Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir.1996). The criteria relevant to determination of whether a settlements is fair, reasonable, and adequate are: (1) comparison of the proposed the settlement with the likely results of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and(6) prospects of the case, including risk, complexity, expense and duration. *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R D. 197, 206-07 (D. Me.2003) and Alba Conte & Herbert Newberg, Newberg on Class Actions (4th ed. 2002), section 11.43. In In re Compact Disc, the Court indicated that "a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair. *In re Compact Disc*, supra at 207.

A. A Comparison of Settlement Terms with Litigation Prospects.

The first and six factors-comparison of proposed settlement with likely results of litigation, and prospects of the case, including risk, complexity, expense, duration-

overlap, and may be analyzed together. "In evaluating the substantive fairness of a class-action settlement, the Court cannot and should not, use as a benchmark the highest award that could be made to the plaintiff after full and successful litigation of the claim." *Duhaime v. John Hancock Mutual Life Insurance Co*., 177 F.R.D.54,68 (D. Mass. 1997). Rather, the question is "whether the plaintiffs' likelihood of success on the merits balances appropriately against the amount and form of the relief offered in settlement." Id.. ("quoting *Santana v. Collazo*, 714 F.2d 1172, 1175 (1st Cir. 1983); see also *Ramirez v. DeCoster*, 203 F.R.D.30, 33 (D. Me. 2001) (deferring to "the parties ... assessment of their respective risks ....").

The parties litigated this case completely through discovery. The case was hard fought with no stone left unturned. Comprehensive interrogatories and document request were made, 25 depositions were taken, a physical inspection of the Knox County Jail booking area and process was conducted and extensive information was obtained electronically by on-site inspection of the jails electronic records. Class counsel contacted numerous potential claimants and the parties interviewed more than a hundred absent class members. The Defendants also produced 25 bankers boxes of intake and release records. From the production of the paper and electronic records, the depositions, interviews and contacts with class members, both parties were able to assemble databases permitting them to narrow the field of eligible class members. While the parties' estimations of the number of eligible class members narrowed the field to about 7,000 claimants, the parties estimations of how many of those 7,000 were strip searched varied

by a wide margin. Because of the poor quality of the records, it was not possible to narrow the gap. Plaintiffs' included in their count all eligible class members held at the jail without bail as well as those whose intake records clearly indicated the class member were strip searched. The Jail's estimate included only those individuals which the records identify explicitly as having been strip searched.

The depositions taken by the Plaintiffs of the jail administrator and the State's Chief Jail Inspector established that Jail policy was to strip search everyone held at the jail. While this threshold issue of liability was strongly defended, Plaintiffs' won Summary Judgment on the issue both with respect to Knox County's "policy" and "custom and practice". The Court later rolled back Summary Judgment on the "custom and practice' count, granting summary judgment to the Plaintiffs for the period November 19, 1996 through August 31, 2002 and leaving open for trial "custom and practice" liability for those people detained between September 1, 2002 and December 31, 2004.

The parties made two efforts at settlement, both in 2006. First in April of 2006, the parties spent 2 days trying to hammer out a settlement with former Maine Supreme Judicial Court Chief Justice Daniel Wathen as mediator. The parties were unsuccessful in achieving a settlement at that time, but were able to achieve a sharper focus of the strengths and weaknesses of their respective claims and the complexities facing them in trial of the case.

If the parties did not have sufficient information to make a reasonable assessment of their risk at trial, the Court made those risks crystal clear on September 5, 2006 when it decertified the class for damages, disqualified all witnesses and shredded all exhibits. See *Luevano v. Campbell*, 93 Frd 68, 86 (D.D.C. 1981); *Ressler v. Jacobson*, 822 Fed. Supp 1551, 1554-55 (N.D. FLA 1992) and *In Re: Marine Midland Motor Vehicle Leasing Litigation,* 155 Frd 416, 420 (W.D.N.Y. 1994). Further aided by Chief Judge Singal's telescopic vision and a full day of discussion, the parties were able to settle the case for Three Million Dollars ($3,000,000.00).

Under the terms of the settlement each class member who timely submits a valid claim should receive from the net settlement fund a cash payment in the neighborhood of $5,000.00. This approximated share of the settlement is calculated by dividing One Million Nine Hundred Eighty-Five Thousand Dollars ($1,985,000.00), [$2,000,000.00 minus $15,000.00 in incentive and bonus awards by 366 (approximate number of claims expected to be approved)]. Each approved class member will receive and equal share of this fund. Class Counsel proposes that the remaining One Million Dollars ($1,000,000.00) of the gross settlement fund, plus accrued interest, be used to pay awarded attorneys' fees, litigation expenses and the cost of settlement administration with any excess remaining to be *cy pres'd*.

Plaintiffs ask the Court to order, as part of the requested final approval order, that the payment to each claimant be calculated such that $2,000,000.00 of the settlement fund (net of attorney's fees and costs, settlement expenses and incentive awards) be

divided by all class members submitting valid claims. The language of the settlement agreement permits the Court to Order that the actual payment to claimants be calculated to consume the entire residual corpus of the net settlement amount. Plaintiffs fully expect this number to final out at $2,000,000.00 dollars. Should there be some residual amount left in the fund after all expenses are paid, Plaintiffs respectfully request that the Court apply *cy pres* rules to that excess.

The $3,000,000.00 settlement was achieved not withstanding Defendants steadfast denial of any liability to the class. Defendants have not denied that the challenged strip search practice occurred but have vigorously asserted that it was neither unlawful nor harmful to the claimants. While the Plaintiffs believe that they were able to prove their claims and defend their verdict and summary judgment on appeal, the Defendants interposed numerous legal and constitutional defenses which they said they would continue to exert vigorously at trial and on appeal. Continuing litigation of these defenses notwithstanding, trial on the remaining issues of liability and then individual trials on issues of damages would have been extraordinarily expensive for both sides exhausting them physically and financially and also exhausting the limited resources of the Court. See *Murillo v. Texas A & M University System*, 921 F.Supp 443, 447 (S.D. Tex. 1996).

The substantial benefits of the proposed settlement compared to the nightmare ahead would the case were tried is, in and of itself, evidence that the settlement is fair reasonable and adequate. It brings closure to the issues and lays to rest all planned

appeals. The Court has issued an Injunctive Order prohibiting future strip searches of the caliber challenged by the Plaintiffs and qualified class members who have filed claims will receive a substantial monetary payment under the settlement. There have been a few opt outs. While one or more of those who chose to opt out and who move forward to litigate their individual claims to conclusion may prevail at trial and may end up with a more substantial recovery than what the settlement agreement provides, that recovery would come at a cost so prohibitive as to dwarf any additional amount recovered by them even though some may be able to use the work of Class Counsel, the Partial Summary Judgment and the Injunctive Order to their advantage.

The Settlement Agreement also provides for an incentive award in the amount of $5,000.00 to the named class representative. The proposed incentive award is fair and reasonable given the substantial benefit the Plaintiffs have secured for the class. See *In Re: Mego Financial Corp. Securities Litigation*, 213 F3rd 454, 457, 463 (9th Cir. 2000). The bonus of $500.00 to each of the class members who were deposed by the Defendants is also fair and reasonable given the substantial benefit the named Plaintiffs have secured for the class and the singling out that these courageous individuals endured in order to advance the cause of the entire class.

B. Reaction of the Class

The second factor, reaction of the class to the proposed settlement, also weighs in favor of final approval. Four Hundred Twenty-Three (423) people submitted claims

forms. Eight (8) people opted out. Fifty-Seven (57) claims were denied. Three Hundred Sixty-Six (366) claims were approved. The deadline for filing a claim form or opting out was February 12, 2007. No one asked for an extension of the filing deadlines and no objections to the settlement have been filed.

C. Stage of Litigation

The third factor, the stage of litigation and extent of discovery completed, further supports approval of the proposed settlement. The discovery has been ongoing for four years. It was extended several times. The Plaintiffs deposed the Knox County Jail Administrator and the Chief Jail Inspector of the State of Maine. Defendants deposed 19 named class members and interviewed more than 100 absent class members. Defendants produced thousands of pages of jail records and thousands of lines of electronic data. Experts on both sides reviewed the data extracted electronically and from the paper documents to build and analyze data files. Experts on both sides also were deposed and listed for trial as damage experts. The extensive discovery in this case, extensive settlement discussions and legal challenges to the class certification and the legalities of Plaintiffs theories have given class counsel and counsel for the defense a clear understanding of the scope and strengths of the Plaintiffs claims and the Defendants' defenses and a firm conviction that the settlement constitutes a fair, reasonable and adequate resolution of those claims.

D. Quality of Class Counsel

The fourth factor, quality of Class Counsel, also supports final approval. Class counsel had extensive experience in local and national class action litigation as documented in class counsel's application for award of attorney's fees and award of litigation expenses and claims administration fees.

E. Conduct of Negotiations

The fifth factor, conduct of negotiations, further buttresses the case for final approval. Hard fought, arms length negotiations extended over a period of about one-year, during which time the parties were far apart on their positions and ultimately needed the assistance of Magistrate Judge Cohen to pick a mediator. Numerous in person and telephonic conferences were conducted between counsel and among counsel to get settlement discussions going and then to consummate those discussions with the assistance of Chief Judge Singal. The parties were scrupulous in using independent mediators who could diffuse the contentious nature of the negotiations and keep the parties focused on the object of the mediation. Although a two day long session with former Maine Supreme Judicial Court Chief Justice Daniel Wathen proved fruitless, a day long session with Chief Judge Singal on the eve of trial brought the parties to terms.

Settlement negotiations were arms length, hard fought and ultimately successful. Because of those struggles, the proposed settlement is fair and reasonable. It is an excellent recovery for the Class and Plaintiffs respectfully submit that final approval should be granted.

IV. The notice plan is fair, adequate and reasonable.

Rule 23 requires class members to receive notice of a proposed class action settlement. The notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 173 (1974) quoting Fed. R.C.P. 23(c)(2)(B). The notice must indicate the nature of the class and its claims, and explain that class members have the option of entertaining an appearance through counsel or opting out of the settlement, and make clear the binding effect of a judgment on class members. *Id*.

The parties, with the persistent assistance of the Court, crafted an efficient and effective plan for notifying class members of the proposed settlement and getting settlement funds into the hands of class members. The notice and claims administration plan (Docket Item No. 382-1, sets out in detail the method by which class members have been notified of their rights. Notice has been sent to each class member at his last known address where the parties had such an address. Notice of the proposed settlement was published pursuant to the Court's Order, twice in the Portland Press Herald, Rockland Courier Gazette and the Bangor Daily News. Posters were posted in the Knox County Jail throughout the period where claims could be filed and the Claims Administrator established a website: www.knoxcountyjailclass.com enabling potential class members to obtain the notice information and download claims and opt out forms.

The notice was designed to make clear to class members the existence and nature of the lawsuit, the terms of the proposed settlement and their options with respect to settlement both in filing a claim or opting out. Plaintiffs therefore believe it is fair, adequate and reasonable and should be approved.

CONCLUSION

For the above reasons, Plaintiffs respectfully request the Court grant final approval of the settlement and the notice plan in this action.

Dated: March 30, 2007

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