UNITED STATES DISTRICT COURT
District of Maine

DALE DARE, Plaintiff	)	Docket No. 02-251-PC
v.	)	
KNOX COUNTY, DANIEL DAVEY, JANE DOE and JOHN DOE, Defendants	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL

NOW COME Defendants, through counsel, and hereby respond to Plaintiffs' Motion for Final Settlement Approval.

The Defendants join with Plaintiffs in seeking approval of the settlement on the terms set forth in the agreement reached between the parties on September 29, 2006. The Defendants submit this filing for two principal reasons: (1) to alert the Court to the fact that the Defendants have brought claims against Laurie Tardiff seeking to enforce the settlement as to her and to therefore request that the Court take account of the possibility of such enforcement and reserve funds sufficient to pay Tardiff one share of the settlement fund, plus an appropriate bonus, and (2) to address certain statements made by Plaintiff in the Motion for Final Settlement Approval.

A. THE DEFENDANTS HAVE FILED CLAIMS AGAINST LAURIE TARDIFF ARISING OUT OF HER ATTEMPT TO OPT OUT OF THIS SETTLEMENT.

The Court is well aware of the Defendants' contention that Laurie Tardiff is bound to the settlement agreement and does not have the right to opt out of the agreement. The Defendants have repeatedly reserved their right to enforce the settlement as to Tardiff. *Transcript of 10/11/06 Hearing, pp. 47-49; Transcript of 10/24/06 Hearing, pp. 5-6; Transcript of 11/27/06 Hearing, pp.*

6-9, 11-12, 15-17; Transcript of 12/18/06 Hearing, p. 11. The Court has acknowledged that the Defendants may challenge Tardiff's attempt to opt out of the settlement. *Transcript of 11/27/06 Hearing, p. 8.*

Ms. Tardiff has attempted to opt out by filing an Opt Out/Exclusion Form with the Dare Claims Administrator. Tardiff subsequently filed a civil action against Knox County and Jane Doe (*Laurie Tardiff v. Knox County and Jane Doe*, Docket No. 07-cv-10). The Defendants have filed a counterclaim against Ms. Tardiff alleging breach of contract and equitable estoppel. (*Tardiff v. Knox County, et al, Docket No. 07-cv-10, Docket Item No. 7).* In the event that the Defendants are successful on either count of their counterclaim, Ms. Tardiff will be bound to the settlement agreement in the instant action and will only be entitled to recover from the settlement fund.

The Defendants are amenable to the Court reserving a portion of the settlement fund to compensate Ms. Tardiff for her share in the litigation, plus an appropriate bonus for her efforts as the class representative. In the event that Tardiff is ultimately found to be bound to the settlement, she would be able to recover from the reserved portion of the fund. In the event that she is not bound to the settlement, then the reserve proceeds could be distributed by the *cy pres* doctrine.[1] Of course, the Defendants urge the Court to approve the settlement even if it declines to set aside funds specifically for Ms. Tardiff.

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[1]Reservation of a small portion of the total settlement fund would only marginally reduce the amount being paid to the other approved claimants. Class counsel has repeatedly referred to the total settlement as "extraordinary", *Plaintiff's Motion for Approval of Settlement, p. 4; Plaintiff's Motion for Attorney's Fees, pp. 3-4, 12*, and have observed that individual class members will receive a cash payment "in the neighborhood of $5,000". *Motion for Approval of Settlement, p. 10*. Class counsel has also observed that this payment far exceeds the payments to individual class members in the matter of *Nilsen v. York County*, Docket No. 02-212. *Plaintiff's Motion for Attorney's Fees, p. 13.*

B. CORRECTIONS TO PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL

Plaintiffs' Motion for Final Settlement Approval contain a number of inaccuracies, including attributions of motive to the Defendants, which require correction, as they are now a matter of public record.

1. The Defendants dispute class counsel's description of the course of litigation.

Page 3 of class counsel's memorandum contains a description of the course of litigation in this case from April 1, 2006, to the settlement conference of September 29, 2006, which can best be described as an exercise in rhetorical excess. Defendants do not agree with many of the characterizations in that part of the memorandum but believe that this Court is sufficiently familiar with this litigation to separate the wheat from the chaff.

2. Discovery and Electronic Data

Plaintiffs assert that "comprehensive interrogatories and document request(sic) were made . . .". *Plaintiff's Motion for Final Settlement Approval, p. 8*. In point of fact, neither side served interrogatories on the other.

Plaintiffs also assert that "extensive information was obtained electronically by on-site inspection of the jails(sic) electronic records, and that thousands of lines of electronic data were analyzed by experts on both sides". *Plaintiff's Motion for Final Settlement Approval, pp. 8, 13.* These statements are factually inaccurate. Although Plaintiffs engaged experts in an attempt to extract electronic information from the jail's computers, the Defendants informed Plaintiffs' counsel – before, during and after this exercise – that the jail did *not* maintain inmate information electronically and that any electronic information which existed was entered after the fact as a training exercise on computer software that was never used as it had been intended when it was

purchased. Indeed, after spending many tens of thousands of dollars, Plaintiffs reported to the Court exactly what the Defendants had been representing all along: the information on the computers was of no use, and the only source of the information which Plaintiffs desired was contained in paper records. *Plaintiff's Motion for Aid in Identification of Class Members, Sept. 15, 2004, Docket Item No. 49.*

3. The paper records maintained by the Jail were of sufficient quality for the Plaintiffs to recommend that the Court allow the claims administrator to use those records for purposes of acting upon claims by class members.

In Plaintiffs' motion, Plaintiffs refer to "the poor quality of the records". *Plaintiff's Motion for Final Settlement Approval, p. 9.* The records maintained by the jail were presented chronologically for an eight-year period (four months, believed to be contained in a single banker's box, were missing). These records were organized shift-by-shift, day-by-day, week-by-week, month-by-month, and year-by-year. The records identified all of the activity in the intake/release area of the jail, which is the area where the strip searches that are the subject of this action were alleged to have occurred. The records documented the activity of each inmate and the correctional officers, including when the inmates came into the jail, what crimes they were charged with, whether or not they were strip searched, and if so, by whom.

While perhaps not ideally suited as a source of data for a § 1983 class action lawsuit, the records allowed counsel to identify all possible class members.

Indeed, in the settlement agreement, Plaintiffs recommend that the administrator review claim forms submitted by class members and compare the claims with "available booking data previously provided by the Defendants", and use that data to act on the individual claims. *Third Final Settlement Agreement, § VII(1) and (3), Docket Item No. 376.* The "booking data" is

information obtained exclusively from the records. Plaintiffs' recommendation that the claims administrator use data from the Defendant's records as the exclusive source of accepting or rejecting a class member's claim demonstrate that the records were sufficient.

4. Defendants deny that it was their practice to strip search all inmates.

In their motion, Plaintiffs state that "Defendants have not denied that the challenged strip search practice occurred . . .". *Plaintiff's Motion for Final Settlement Approval, p. 11*. In fact, to the contrary, the Defendants have always denied that such a practice existed. In addition to the denials contained in the answers to Plaintiffs' complaint and amended complaint, the Defendants vigorously opposed Plaintiffs' Motion for Summary Judgment, arguing, in part, that there was no custom or practice sufficient to impose liability on Knox County. To this day, the Defendants deny that there was a custom or practice of strip searching all detainees at the Knox County Jail. The jail records conclusively demonstrate that there was no such custom or practice.

5. The Court's order on Plaintiffs' Motion for Summary Judgment was and is interlocutory in nature and does not contain findings that may be used by class members who have opted out in subsequent litigation.

Plaintiffs argue that class members who have opted out of the settlement may use "the Partial Summary Judgment and the Injunctive Order to their advantage". *Plaintiff's Motion for Final Settlement Approval, p. 12.* The summary judgment order was and is interlocutory in nature. A final judgment never ensued. The order cannot be used against the Defendants in subsequent litigation brought by class members who have opted out.

CONCLUSION

The Defendants join Plaintiffs in requesting that the settlement be approved. Defendants reiterate their position that Laurie Tardiff is bound to the settlement. Defendants also correct the record with respect to inaccuracies contained in Plaintiffs' Motion for Final Settlement Approval as set forth hereinbove.

Dated: April 20, 2007

/s/ Peter T. Marchesi

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2007, I electronically filed with the Clerk of Court using the CM/ECF system Defendants' Response to Plaintiff's Motion for Final Settlement Approval. The Court will send notification of such filing(s) to the following:

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