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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARSIAL LOPEZ, SANDRA CHAVEZ
THEODORE MEDINA, each
individually, and as class
representatives,

Plaintiffs,

vs.

SHERIFF DONNY YOUNGBLOOD,
individually and in his official
capacity; FORMER SHERIFF MACK
WIMBISH, in his individual capacity;
COUNTY OF KERN, a governmental
entity; KERN COUNTY SHERIFF'S
DEPARTMENT, a California public
entity; and DOES 1 through 100,

Defendants.

CASE NO. 1:07 CV-00474 DLB

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ENTRY OF JUDGMENT
ON SPECIFIED CLAIMS AND
CERTIFICATION FOR APPEAL AND
APPLICATION FOR STAY

Fed. R. Civ. P. 54(b)

Date: May 29, 2009
Time: 9:00 a.m.
Courtroom: 9

Judge: Magistrate Judge Dennis L.
Beck

MEMORANDUM OF POINTS AND AUTHORITIES

I. Summary

The plaintiffs allege that during the period from March 27, 2005 up to October 1, 2007, they, and other inmates housed by the Kern County Sheriff's Office ("KCSO") were subjected to strip searches that were conducted unlawfully but according to official policy. Thurston Dec ¶ 2. In counter motions for summary adjudication/judgment, the parties addressed the most significant class issues raised by the complaint. *Id.* at ¶ 3.

The plaintiffs challenge two portions of the KCSO "strip search" policy and its customs in implementing it. They assert that the KCSO's policy and its custom was unconstitutional because it allowed inmates to be searched in view of other inmates who were also undergoing search. Likewise, they contend that the policy and custom was unlawful because it allowed inmates, who had been ordered "released" at their most recent court appearance, to be strip searched while awaiting confirmation of whether they were, in fact, eligible for release.

In ruling on the motions, the Court denied Eleventh Amendment immunity to Sheriff Donny Youngblood and former Sheriff Mack Wimbish as to all federal law issues. Thurston Dec ¶ 4. These defendants are filing notices of appeal as to this final judgment at the same time as the filing of this motion. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 [Denial of Eleventh Amendment immunity is immediately appealable.]. In addition, the Court determined that the County of Kern could be held liable for the strip search policy adopted by the KCSO and determined that searching inmates in groups and after they had been ordered released was unconstitutional. *Id.* at ¶ 5.

In this motion, the defendants (hereafter "County") seek entry of judgment on the claim that it may be held liable under 42 USC § 1983 for the policies or customs of the KCSO described above. Thurston Dec ¶¶ 5-6. County contends that this issue is inextricably intertwined with the individuals' entitlement to the protections of Eleventh Amendment immunity and certifying this issue for appeal serves judicial economy and

1 prevents piecemeal appeal. This issue forms the basis for the Court's determination of
2 County's liability as to all claims raised under 42 U.S.C § 1983 and, to that extent, County
3 seeks to settle this issue now.¹

4 In addition, County seeks entry of judgment on the Court's determination that
5 searching inmates in groups was unconstitutional. Thurston Dec ¶ 6. County argues here
6 that this is a central issue in the litigation and raises an important issue of law such that
7 appellate review should not be delayed. Therefore, County seeks certification of the order
8 granting plaintiffs' motion for summary adjudication related to liability under the Fourth
9 Amendment to the United States Constitution and under Article I, section 1 of the California
10 Constitution and the denial of County's motion for summary adjudication on the alleged
11 violation of California Civil Code section 52.1 as it relates to the group strip search issue.
12 *Id.* at ¶ 5.

13 Finally, County requests the Court stay the remaining and undetermined portions of
14 the matter until completion of the appellate process.

15 **II. The Court has the Authority to Certify for Appeal the Specified Claims**

16 Federal Rules of Civil Procedure rule 54, subdivision (b) vests the Court with the
17 authority to enter judgment if there is no just reason for delay. This rule provides in pertinent
18 part,

19 When an action presents more than one claim for relief . . . or when multiple
20 parties are involved, the court may direct entry of a final judgment as to one
21 or more, but fewer than all, claims or parties only if the court expressly
22 determines that there is no just reason for delay.

23 *Id.* In *Continental Airlines, Inc., v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th
24 Cir. 1987) the Court held,

25 Distinguishing "claims" from theories of recovery for purposes of Rule 54(b)
26 has occasioned a good deal of subtle jurisprudence. A claim, it is true, is less

27 ¹At this time, County *does not* challenge the substance of the Court's determination
28 that strip searching court "releasees" is unconstitutional. Thurston Dec ¶ 5. *It does* seek to
challenge whether the County of Kern can be held liable for this KCSO policy/custom. *Id.*
at ¶ 5.

1 than the central object of a lawsuit and surely more than merely one element
2 of proof offered in support of a complaint seeking money damages. But the
3 essence eludes the grasp like quicksilver. We agree with Judge Wisdom that
the solution for Rule 54(b) purposes lies in a more pragmatic approach
focusing on severability and efficient judicial administration.

4 The Court decided that even though the final rulings below “eliminated none of the parties
5 and left open potentially full recovery in both of Continental's ultimate areas of loss,”
6 certifying the issues for appeal was proper given that it streamlined the action and narrowed
7 the issues. *Id.*

8 For the reasons set forth below, County contends that there is no just reason to delay
9 entry of judgment on the issues identified which will allow immediate appellate review at the
10 same time as the individuals’ appeal related to denial of Eleventh Amendment immunity.

11 **A. A “final” judgment has been issued regarding County’s liability under 42**
12 **USC § 1983 and as to the lawfulness of searching inmates in groups.**

13 In determining a Rule 54 certification motion, the Court must determine first whether
14 a “final” judgment exists. In *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980)
15 the court held that for a judgment to be considered “final” for Rule 54 certification purposes,
16 “It must be a “judgment” in the sense that it is a decision upon a cognizable claim for relief,
17 and it must be “final” in the sense that it is “an ultimate disposition of an individual claim
18 entered in the course of a multiple claims action.”

19 **i. Whether the Sheriff is a policymaker for the County of Kern is a**
20 **“claim” upon which the Court has made a final determination.**

21 Whether County is liable for the policies of the KCSO involves analysis of the
22 relationship between the Kern County Board of Supervisors and the Sheriff and the
23 relationship between the Attorney General and the Sheriff as well as other relationships. It
24 requires evaluation of a discrete set of state law and other legal authorities and appears to
25 be a pure question of law. Thurston Dec ¶ 9. Thus, this issue is a “claim” for purposes of
26 Rule 54 certification.

27 Moreover, the Court has determined that County is liable for the policies of the KCSO
28

related to strip searches of inmates. Thurston Dec ¶ 5. Likewise, it has determined that these KCSO policies were unconstitutional. *Id.* at ¶¶ 5-6. There are no remaining questions related to liability on this topic. Thus, the Court's ruling is a final disposition of the issue of County's responsibility for the KCSO policies and is appropriate for Rule 54 certification.

This issue is intertwined with the Court's denial of Eleventh Amendment immunity about which Youngblood and Wimbish are seeking appellate review. Thurston Dec ¶ 7. Judicial economy dictates that the entirety of the issue be decided on appeal now rather than in a piecemeal fashion. For example, County's intention is to appeal the issue of its liability for the KCSO policies when operating the jail at the entry of judgment, whether this occurs now or in the future. *Id.* at ¶ 7. On the other hand, addressing this issue on appeal now would assist in the possibility of settlement because, no matter how County's appeal is decided, it would assist in clarifying the availability of insurance coverage. *Id.* at ¶ 8.

ii. Whether the policy of strip searching inmates in groups was unconstitutional is a "claim" upon which the Court has made a final determination.

The set of facts regarding strip searches of inmates in groups is discrete from the issues remaining in the case that have not yet been determined. Thurston Dec ¶ 9. It is discrete also from the determination that strip searching court "releasees" is unconstitutional both legally and factually. *Id.* Instead, appellate review of the lawfulness of strip searching inmates in groups involves a pure question of law.² *Id.* Thus, this issue is a "claim" for purposes of Rule 54 certification.

The fact that the plaintiffs relied upon this manner of searching as support for several different causes of action does not militate against finding that the issue is a claim for purposes of Rule 54 certification. Instead, a "claim" "refers to a set of facts giving rise to legal rights in the claimant, not to legal theories of recovery based upon those facts." *CMAX*,

²This is true because the defendants do not deny the content of the policy, how it was implemented or how and when strip searches were conducted as this relates to this issue.

1 *Inc. v. Drewry Photocolor Corp.*, 295 F.2d 695, 697 (9th Cir. 1961) The Court in *CMAX Inc.*
 2 warned, "It does not seem to us to be good judicial administration, or a reasonable
 3 construction of Rule 54(b), to have both this court and the district court simultaneously
 4 passing upon what is in substance the identical claim, we dealing with one theory, but
 5 basically the same facts, under the second count, and the district court dealing with another
 6 other theory, but basically the same facts, under the first count." *Id.* Thus only where
 7 factual questions overlap with issues not on appeal are courts reluctant to grant certification.

8 The Court's ruling determining that the defendants' action in strip searching inmates
 9 in groups was unlawful, is a final determination which makes the entity liable in this case.³
 10 Thurston Dec ¶¶ 5-6. Therefore, this determination is of a "claim" in the lawsuit. As a result,
 11 the entity seeks certification of the "group strip search claim" that includes the Court's ruling
 12 that strip searching in groups violated the Fourth Amendment to the United States
 13 Constitution. *Id.* at ¶ 6. As to the individual defendants and the entity, the defendants seek
 14 certification of the Court's ruling that strip searching in groups violated Article I, Section 1 of
 15 the California Constitution and that it forms an underlying basis for liability under California
 16 Civil Code section 52.1. *Id.*

17 **B. There is no just reason to delay appeal of the identified issues.**

18 The second step in determining the Rule 54 certification motion requires the Court
 19 to evaluate whether there are just reasons to delay the appeal. *Curtiss-Wright Corp. v.*
 20 *General Elec. Co.*, *supra*, 446 U.S. at 8. The Court is required to "take into account judicial
 21 administrative interests as well as the equities involved" and, in doing so, consider such
 22 factors as whether "the claims under review were separable from the others remaining to be
 23 adjudicated and whether the nature of the claims already determined was such that no
 24 appellate court would have to decide the same issues more than once even if there were
 25 subsequent appeals." *Id.* One of the most important factors the Court is required to evaluate
 26 is the "interrelationship of the claims so as to prevent piecemeal appeals." *Id.* at 10.

27 ³Youngblood and Wimbish were granted qualified immunity on this topic.
 28

1 However, if the Court finds “a sufficiently important reason for nonetheless granting
2 certification,” that one of the factors mitigates against granting the certification motion is not
3 determinative. *Id.* at n. 2.

4 In *General Acquisition, Inc. v. Gencorp, Inc.*, 23 F.3d 1022, 1030 (9th Cir. 1994), the
5 Court held that there is no “precise test” for determining if just cause exists to delay the
6 appeal. However, the Court articulated a “nonexhaustive list of factors which a district court
7 should consider when making a Rule 54(b) determination.” *Id.* The Court identified the
8 suggested factors to consider as,

9 (1) the relationship between the adjudicated and unadjudicated claims; (2) the
10 possibility that the need for review might or might not be mooted by future
11 developments in the district court; (3) the possibility that the reviewing court
12 might be obliged to consider the same issue a second time; (4) the presence
13 or absence of a claim or counterclaim which could result in set-off against the
judgment sought to be made final; (5) miscellaneous factors such as delay,
economic and solvency considerations, shortening the time of trial, frivolity of
competing claims, expense and the like.

14 *Id.* “Rule 54(b) certification is proper if it will aid ‘expeditious decision’ of the case. [Citation]
15 ‘The Rule 54(b) claims do not have to be separate from and independent of the remaining
16 claims.’ [Citation] However, Rule 54(b) certification is scrutinized to ‘prevent piecemeal
17 appeals in cases which should be reviewed only as single units.’” *Texaco, Inc. v. Ponsoldt*,
18 939 F.2d 794, 797 (9th Cir. 1991).

19 As noted above, there is no factual or legal relationship between the matters not
20 decided by the Court or the issue of strip searching court “releasees” and those issues
21 sought to be appealed. Thurston Dec ¶ 10. Likewise, no development in the trial court,
22 outside of sua sponte reversal of the orders by the Court, will moot the need for appellate
23 review of the identified issues. *Id.* at ¶ 10. However, decisions on the appealed issues could
24 streamline the trial on the remaining issues. *Id.* For example, each plaintiff alleges claims
25 against the entity and the individuals. *Id.* Thus, a determination that the Sheriff acted for the
26 state, rather than the County, would preclude further litigation. *Id.* Likewise, a determination
27 that strip searching inmates in groups was lawful would effectively cut the lawsuit in half but,
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in terms of prospective class members, it would reduce the size to a mere fraction of those that would otherwise be class members. *Id.* at ¶¶ 10-11.

The trial, when held, could be greatly shortened by the appeal because if County is successful, the number of plaintiffs would be significantly reduced and there would be fewer issues to determine. Thurston Dec ¶¶ 10-11. This, in turn, would reduce the amount of time the Court would require to spend and the amount of time the parties would spend in discovery and would preserve the economic resources of the Court and the parties. *Id.* Resources would be preserved also because the need for notifying prospective members of the group strip search class could be rendered unnecessary depending upon the results on appeal. *Id.*

Finally, because the matter is being appealed by Youngblood and Wimbish as of right, there seems little justification for failing to obtain an appellate determination as to all ripe issues at this time. Thurston Dec ¶ 4. Because the issues are distinct from those not appealed or determined, the Court of Appeals would not decide the same issue more than once. *Id.* at ¶¶ 4, 7-8. Therefore, based upon the factors announced in *General Acquisition, Inc. v. Gencorp*, County requests the Court certify the following claims:

1. The claim that the County of Kern may be held liable under 42 U.S.C. § 1983 for the policies of the Sheriff as they relate to operation of the jail;
2. The claim that strip searching inmates in groups is unlawful which includes the Court's ruling that strip searching in groups violated the Fourth Amendment to the United States Constitution and Article I, Section 1 of the California Constitution and that it forms an underlying basis for liability under California Civil Code section 52.1.

III. The Claims at Issue are Justiciable

A. The Defendants Have Standing to Appeal

The defendants here have standing to appeal because they were parties who participated in the proceedings below. Thurston Dec ¶¶ 3-6. They are aggrieved by the

1 decision of the Court which determined that they are liable for conducting strip searches in
 2 groups and, in the case of the entity, that it is liable for the policies of the Sheriff when
 3 operating the jail. *Id.*; *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981)
 4 [Determination of an issue of liability unfavorably to the defendant/appellant is sufficient to
 5 demonstrate standing to appeal.].

6 **B. The Issues Have Not Become Moot**

7 County knows of no facts that have made moot the issues sought to be raised on
 8 appeal. Thurston Dec ¶ 10.

9 **C. The Controversy is Ripe for Appeal**

10 The Court has made a final determination that the defendants are liable to classes
 11 of plaintiffs. Thurston Dec ¶¶ 5-6. Thus, any opinion issued by the Court of Appeal would
 12 not be advisory but would determine an actual case and controversy. (*Vieux v. E. Bay Reg'l*
 13 *Park Dist.*, 906 F.2d 1330, 1344 (9th Cir. 2003) ["The ripeness doctrine prevents courts from
 14 deciding abstract issues that have not yet had a concrete impact on the parties."].

15 **IV. Good Cause Exists to Stay the Non-Appealed Portions of the Case**

16 The Court has the inherent power to stay the case to allow the appeal to proceed. In
 17 *CMAX, Inc. v. Drewry Photocolor Corp.*, *supra*, 295 F.2d at 268, the Court held,

18 A district court has inherent power to control the disposition of the causes on
 19 its docket in a manner which will promote economy of time and effort for itself,
 20 for counsel, and for litigants. The exertion of this power calls for the exercise
 21 of a sound discretion. Where it is proposed that a pending proceeding be
 22 stayed, the competing interests which will be affected by the granting or
 23 refusal to grant a stay must be weighed. Among these competing interests are
 the possible damage which may result from the granting of a stay, the
 hardship or inequity which a party may suffer in being required to go forward,
 and the orderly course of justice measured in terms of the simplifying or
 complicating of issues, proof, and questions of law which could be expected
 to result from a stay.

24 County contends that good cause exists to stay the proceedings as to those issues
 25 not subject to appellate review. Thurston Dec ¶¶ 10-12. First, proceeding with the remainder
 26 of the case will be extremely costly and these costs could be determined to be unnecessary
 27 depending upon the outcome of the appeal. *Id.* For example, notification of potential class
 28

1 members will be very costly in terms of resources, time and money. *Id.* However, should
2 County succeed on appeal and it is determined that these defendants cannot be held liable,
3 notification to the group strip search class will be unnecessary. *Id.*

4 Second, if County does not succeed on appeal but notification to the “Post Release
5 Class” has occurred, re-notice to this class will be necessary because of their potential
6 inclusion in the “Group Strip Search” class also. Thurston Dec ¶¶ 10-12. Not only is this a
7 duplication of cost of resources, it is prejudicial in that it gives these prospective class
8 members more than the one opportunity to join in or opt out of the class although
9 prospective members of the other class will have only one opportunity. *Id.* Moreover, it will
10 require moving forward on a damage determination either through “mini-trials” of
11 representative plaintiffs’ cases and/or through negotiation without regard for the need for the
12 same effort as to the other defined class. *Id.*

13 Third, proceeding with the determination of the named plaintiffs’ claims is potentially
14 wasteful of the Court’s time because County’s appeal will challenge the primary bases upon
15 which the plaintiffs rely for their assertions of liability. Thurston Dec ¶¶ 10-12. In the event
16 of success of the appeal, there is a significant probability of inconsistent determinations. *Id.*
17 Fourth, a stay will allow for the orderly administration of this case, is not sought for any
18 improper purpose and the defendants know of no prejudice that will result thereby. Thurston
19 Dec ¶ 12.

20 **V. Conclusion**

21 For the reasons set forth, certification of the identified issues for purposes of appeal
22 will serve the interests of judicial economy and will not pose the risk of piecemeal appeals
23 and, in fact, will avoid the probability of piecemeal appeals. Therefore, County requests the
24 Court grant the motion and certify the issues identified above for immediate appeal.

25 ///

26 ///

27 ///

1 Likewise, ordering a stay of the action would avoid waste of resources and duplication
2 of efforts and would allow for the orderly administration of the balance of the case. Thus,
3 County urges the Court to stay the proceedings to allow completion of the appeals.
4

5 Dated: April 28, 2009

OFFICE OF THE COUNTY COUNSEL

6
7 By /s/ Jennifer L. Thurston
Jennifer L. Thurston, Deputy
8 Attorneys for Donny Youngblood, Mack
9 Wimbish, the County of Kern and its agency the
Kern County Sheriff's Department
10

11 Dated: April 27, 2009

PORTER SCOTT
A PROFESSIONAL CORPORATION

12 By /s/ Michael W. Pott
13 Michael W. Pott
14 Terence J. Cassidy
15 Kristina M. Hall
Attorney for Defendant
COUNTY OF KERN

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PROOF OF SERVICE

Lopez, et al. v. County of Kern, et al.
 USDC(E) Case No. 07-CV-00474-LJO-DLB
 Page 1 of 1

I am over the age of eighteen years and not a party to the within action; my business address is 1115 Truxtun Avenue, Fourth Floor, Bakersfield, CA 93301.

On the date last written below, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT ON SPECIFIED CLAIMS AND CERTIFICATION FOR APPEAL AND APPLICATION FOR STAY** on the party(ies) listed below, through their attorneys of record, if any, by facsimile transmission, by personal delivery or by placing true copies/originals thereof in sealed envelope(s) addressed/designated as shown below:

- A. BY MAIL** - I enclosed such document in sealed envelope(s) with the name(s) and address(es) of the person(s) served as shown on the envelope(s) and caused such envelope(s) to be deposited in the mail at Bakersfield, California. The envelope(s) was/were mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- B. BY OVERNIGHT SERVICE** - I caused each such envelope to be delivered by overnight service to the addressee(s) noted below.
- C. BY FACSIMILE SERVICE** - I placed such document in a facsimile machine (pursuant to *California Rules of Court*, Rule 2003(3)) with the fax number of (661) 868-3805. Upon facsimile transmission of the document, I obtained a report from the transmitting facsimile machine stating that the facsimile transmission was complete and without error. A copy of the transmission report is attached to this Proof of Service pursuant to *California Rules of Court*, Rule 2008(e).
- D. BY PERSONAL SERVICE** - I caused such envelope(s) to be delivered by hand to the addressee(s) listed below.

<u>TYPE OF SERVICE</u>	<u>ADDRESSEE</u>	<u>FAX NO.</u>
A	DONALD W COOK ESQ MANN & COOK 3435 WILSHIRE BLVD #2900 LOS ANGELES CA 90010	

____ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

 X (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on **April 28, 2009**, at Bakersfield, California.

 /s/ Dania Moser
 Dania Moser