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United States District Court,
C.D. California.

S.A. THOMAS, Plaintiff,
v.
Leroy BACA, Michael Antonovich, Yvonne Burke, Deane Dana, Don Knabe, Gloria Molina, Zev Yaroslavsky, Defendants.

No. CV 04-08448 DDP. | Dec. 20, 2005.

Attorneys and Law Firms

Stephen Yagman, Marion R. Yagman, Joseph Reichmann, Yagman & Yagman & Reichmann, Venice Beach, CA, for plaintiffs.

Paul B. Beach, David Lawrence, Franscell, Strickland, Roberts & Lawrence, Glendale, CA, for Defendants.

Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS NOTIFICATION

PREGERSON, J.

[Motion filed on November 21, 2005]

***1** This matter comes before the Court on the plaintiffs' motion for class notification. After reviewing the arguments, the Court denies the motion and adopts the following order.

I. Background

S.A. Thomas, E.L. Gibson and Martin Quintana bring this class action suit against Sheriff Leroy Baca ("Sheriff Baca") and members of the Los Angeles County Board of Supervisors. The class alleges that they were forced to sleep on the floor of Los Angeles County jail facilities in violation of their Fourth and Fourteenth Amendment rights. (Third Amended Complaint ("TAC") ¶ 25.)

On May 17, 2005, the Court certified the class under Rule 23(b)(2) and (b)(3). Fed.R.Civ.P. 23(b)(2), (3); (*see also* Order (1) Granting Motion for Class Certification and (2) Granting Motion for an Order to Permit Identification of Class Members, May 17, 2005 "May 17, 2005 Order.") The Court defined the class as "individuals who, while in LASD custody, were required to sleep on the floor of a LASD facility with or without bedding." (May 17, 2005 Order 15.) The Court also ordered the defendants to "maintain records that identify by full name and booking number each person who was required to sleep on a floor, with or without bedding. The record for each person shall also include the date, time, and location for each such occurrence." (*Id.*)

Accordingly, on May 24, 2005, the plaintiffs filed a Third Amended Complaint in this case. The complaint contains the class allegations for both Rule 23(b)(2) and (b)(3) class action categories. (TAC ¶¶ 30-46.) With this motion, the plaintiffs seek an order for class notification and submit a draft notice to the Court.

II. Legal Standard

Rule 23(c)(2)(B) states that for a class certified under Rule 23(b)(3):
the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

• the nature of the action,

• the definition of the class certified,

• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,

• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed.R.Civ.P. 23(c)(2)(B).

Generally, the plaintiffs prepare the notice for the court's review, giving the defendants an opportunity to object or suggest changes. *Harriss v. Pan American World Airways, Inc.,* 74 F.R.D. 24, 52 (N.D.Cal.1977); *see also* Wright & Miller, *Federal Practice and Procedure,* § 1788 at 534 (2005). The court typically requires the plaintiffs to furnish the names and addresses of potential class members who are reasonably identifiable, and to bear the costs of providing notice. *Eisen v. Carlisle & Jacguelin,*

417 U.S. 156, 179 (1974); *Jones v. Diamond,* 594 F.2d 997, 1023 (5th Cir.1979).

***2** The court may, however, exercise its discretion under Rule 23(d) and order the defendants to compile the list if the Court determines that the defendants can complete the task nore efficiently. Fed.R.Civ.P. 23(d); *Oppenheimer Fund Inc v. Sanders,* 437 U.S. 340, 356 (1978). Generally, the plaintiffs must bear the defendants' costs of compiling the list. *Oppenheimer Fund,* 437 U.S. at 359. The court may, however, order the defendants to bear the costs if it determines that "the expense involved [is] so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff ... [or] the task ordered is one that the defendant must perform in any event in the ordinary course of its business ..." *Id.*

III. Discussion

A. *Plaintiffs' Draft Notice Fails to Meet Requirements of Rule 23(c)(2)(B)*

The Court agrees with the plaintiffs that it is appropriate to provide notice of this action to potential class members. The Court finds, however, that the plaintiffs' draft notice fails to meet the requirements of Rule 23(c)(2)(B).

1. *Nature of the Action*

The draft notice states that individuals required to sleep on the floors without a bunk in the Los Angeles County jails may be entitled to damages as a member of the class. (Mot.6.) The notice to potential class members "should include some description of the nature of the suit and the issues being litigated so that each class member can make a rational judgment on whether to request exclusion from the action." Wright & Miller, *Federal Practice and Procedure,* § 1787 at 512. The description in the draft notice fails to explain the class claims or why the individuals may be entitled to damages. Therefore, the Court finds that the notice does not adequately state the nature of the action. *See* Fed.R.Civ.P. 23(c)(2)(B).

2. *Definition of Class*

The plaintiffs argue that the Court has defined the class as "all those Los Angeles County jail detainees who were caused to sleep on the jails' floors without bunks for the period December 11, 2000 to date." (Mot.3.) The defendants estimate that the five-year range proposed by the plaintiffs would require sending of the notice to over ten million people. (Defs' Opp'n 4.) The defendants argue that it is premature to send out notice of the action because the Court and the parties have not addressed the issue of how to try the case. (*Id.* 5.) The defendants also argue that providing notice would be prohibitively expensive and wasteful. (*Id.* 4-5.)

The order certifying this class did not include the beginning and ending dates of class membership. The Court notes that the limitations period for actions brought under § 1983 is calculated by applying the period used by the forum state for personal injury actions. *Wilson v. Garcia,* 471 U.S. 261, 273-75 (1985). The limitations period for personal injury actions in California is two years. Cal. C. Civ. P. § 335.1. On December 17, 2004, the plaintiffs filed the original motion for class certification. The Court finds that the filing put the defendants on notice of the class action, and that the limitations period should date back from the date of the filing. Therefore, absent tolling, the limitations period began on December 18, 2002.

***3** Section 352.1 of the California Code of Civil Procedure tolls the two-year statute of limitations period for bringing a personal injury suit in actions for damages brought under § 1983. Specifically, the tolling provision applies to individuals who were imprisoned on a criminal charge at the time the cause of action accrued. Cal. C. Civ. P. § 352.1. Although state law determines the length of the limitations period, "federal law determines when a civil rights claim accrues." *Morales v. City of Los Angeles,* 214 F.3d 1151, 1153-54 (9th Cir.2000). Under federal law "a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* at 1154. Under § 352.1, the applicable limitations period does not commence until the prisoner is released from prison, but in no event is the statute tolled for more than two years. *See* Flahavan, Rea & Kelly, *Cal. Prac. Guide: Personal Injury* ¶ 5:142 (The Rutter Group 2005).

The plaintiffs argue that, under § 352.1, the class includes inmates who were required to sleep on the floor for periods prior to December 18, 2002. (Mot. 3, n. 1, Pls' Reply 8.) The Court finds that some individuals who were required to sleep on the floor prior to December 18, 2002 have timely claims under § 352.1. Specifically, the class includes prisoners who were required to sleep on the floor at any point between December 18, 2000 and December 17, 2002 and who remained in prison after the cause of action accrued until at least December 18, 2002.[1]

1 Prisoners who were required to sleep on the floor on December 17, 2000 or earlier are time-barred from the tolling provision of § 352.1.
The class only consists of those individuals who had live claims as of December 18, 2004. Therefore, the prisoners who were required to sleep on the floor during December 18, 2000 and December 17, 2002 but who were released prior to December 18, 2002 did not have live claims as of December 18, 2004.

The class closed in this case on the date of the certification order. The Court notes that closing the class on May 17, 2005 promotes an efficient resolution of the case and ensures that as many class members as possible are given adequate, timely notice of the action.

The class is defined as "individuals who, while in LASD custody, were required to sleep on the floor of a LASD facility with or without bedding." (May 17, 2005 Order 15.) The dates of class membership are from December 18, 2002 to May 17, 2005. Floor sleepers between December 18, 2000 and December 17, 2002 who remained in prison until at least December 18, 2002 are also included in the class pursuant to the tolling provision of § 352.1. The notice should be provided to individuals who meet the class definition and fall within the dates of class membership.

3. *Class Claims, Issues or Defenses*
The draft notice does not explain to potential class members that they may make an appearance through counsel. (Mot.6-7.)

4. *Opt-Out Clause*
The draft notice asks potential class members whether they wish to be members of the class. (*Id.*) This is an inadequate opt-out clause. The notice "should inform the recipient exactly how to express the desire to opt out, to whom it should be directed, and the date by which it must be received." Wright & Miller, *Federal Practice and Procedure,* § 1787 at 521.

5. *Binding Effect of Judgment*
***4** Finally, the draft notice fails to explain the binding effect of a judgment on class members. (Mot.7.)

B. *The Defendants Must Compile the List of Potential Class Members and the Plaintiffs Must Bear Costs of Providing Notice*
The plaintiffs argue that Sheriff Baca should provide notice to potential class members because he has the relevant data on those persons required to sleep on the floor. (Mot.4.) After the Court issued the May 17, 2005 Order, the Sheriff's Department began maintaining a list of individuals who were required to sleep on the floor of a LASD facility with or without bedding. (*See* May 17, 2005 Order 15.) The Court finds that some of these individuals may meet the class definition and class membership dates in this case. Further, the Court finds that the Sheriff's Department has the ability to compile a list of potential class members who may not have been individually identified. Therefore, the Court finds that it is more efficient for the defendants to compile the list of potential class members. *See* Fed.R.Civ.P. 23(d); *Oppenheimer Fund,* 437 U.S. at 356.

The plaintiffs also maintain that Sheriff Baca should bear the costs of providing notice because "the costs of making the notifications easily will not exceed the contempt fines that could have been imposed on, but were not requested against, Baca for his disobedience of the *Rutherford* injunction." (Mot.8.) Following the plaintiffs' logic, defendants in any class action would have to bear the costs of providing notice. The Court may only shift the costs of providing notice to the defendants in exceptional circumstances. *See Eisen,* 417 U.S. at 179; Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide, Fed. Ciy. Pro. Before Trial* 10:673 (The Rutter Group, 2005). The plaintiffs argue that demonstrating some success on the merits is an exceptional circumstance that warrants a shifting of costs to the defendants. (Pls' Reply 6.) The plaintiffs argue that they have succeeded on the merits in light of their contribution to the modification of the *Rutherford* injunction. (*Id.*) The parties' modification of the *Rutherford* injunction does not resolve the constitutional issues in this case. Therefore, the plaintiffs' contributions to that process does not constitute a success on the merits. The plaintiffs offer no evidence that there are any other exceptional circumstances in this case.

The Court also finds that the plaintiffs must bear the defendants' costs for compiling the list of potential class members. There is no evidence that the cost of performing the task is unsubstantial or that the task is part of the defendants' ordinary course of business. *See Oppenheimer Fund,* 437 U.S. at 359.

C. *The Parties Must Meet and Confer Regarding Notice*
Since the May 17, 2005 Order, the Sheriff's Department has maintained a list of individuals required to sleep on the floor. The Court orders the Sheriff's Department to provide the plaintiffs with the list and include the individuals' addresses. The Court orders the parties to meet and confer for the purposes of: (1) preparing the jointly proposed notice, and (2) agreeing on and proposing the appropriate method by which notice to the class should be given, including potential class members who may not have been individually identified. The Court is not suggesting that the notice be individual notice to each inmate of the entire inmate population. Further, the Court orders the Sheriff's Department to provide the plaintiffs with a statement of the expenses of compiling the list of potential class members with a breakdown

thereof.

III. Conclusion

***5** Based on the foregoing reasons, the Court denies the motion.

IT IS SO ORDERED.