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19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 KAREN CRAFT, et al.,

22 Plaintiffs,

23 vs.

24 COUNTY OF SAN
25 BERNARDINO, et al.,

26 Defendants.

Case No.: EDCV05-0359 SGL

**STIPULATED SUPPLEMENTAL
ORDER GRANTING APPROVAL
TO PROVIDE NOTICE AND
PAYMENT TO NEWLY
IDENTIFIED CLASS MEMBERS**

27 It has been called to the Court's attention that there has been an inadvertent
28 data error in identifying class members who should be mailed notice. As a result,

1 some class members were not mailed class notices, and the Court issues this
2 Supplemental Order to remedy this oversight.

3 Based on the stipulation of the parties, the Court finds as follows:

4 **I. FACTUAL FINDINGS**

5 1. The class list identified by the database consultants for both sides
6 correctly defined the relevant period for the class as beginning on May 3, 2003.
7 Accordingly, the class list agreed to by both sides began with bookings into the jail
8 as of that date.

9 2. However, the class definition itself identified five classes: Pre-
10 Arraignment, USM, Transfer, Post-Release and Group Strip Search Classes. With
11 the exception of the Pre-Arraignment class, the class definition did not require that
12 the class members have been booked on or after May 3, 2003. Instead, it required –
13 for the USM, Transfer, Post-Release and Group Strip Search Classes – that the
14 strip search or visual body cavity search occurred on or after May 3, 2003.

15 3. Thus, individuals booked before May 3, 2003 could be class
16 members, and a list beginning with those booked on or after May 3, 2003 would
17 not encompass all class members. Specifically, a class list beginning with those
18 booked on or after 5/3/03 omitted those who were arrested and booked before that
19 date but who remained in custody as of May 3, 2003, and qualified for class
20 membership, either because they were released after that date and were strip
21 searched or because they were strip searched in a group after that date.

22 4. This issue was not flagged to counsel for either party. Instead, all
23 counsel – and, for that matter all data consultants, – believed that the records
24 necessary to determine class members had been accurately and fully identified and
25 analyzed from San Bernardino County’s records, and that the class list given to the
26 Class Administrator encompassed all eligible class members.

27 5. This issue was discovered when the Class Administrator received a
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1 claim from an individual who was not on the class list. The person was ultimately
2 able to provide definitive documentation that he was in custody during the class
3 period, and would have been subjected to group strip searches when transported
4 from court to a San Bernardino County Jail.

5 6. When the Class Administrator went into the class list to try to
6 determine the nature of the problem, it was able to establish that the class list
7 began with those who were booked on 5/3/03 or later, and therefore omitted class
8 members arrested and booked before that date. This fact was subsequently verified
9 in a discussion with the Plaintiffs' data consultants.

10 7. Plaintiffs' data consultants and the Class Administrator then did an
11 analysis of what class members were in custody before May 3, 2003, as well as the
12 status of the claims to date. They determined the following:

- 13 ➤ 18,665 class members filed timely claims. Their points total
14 92,672. This is a preliminary figure as processing of deficiency
15 notices is still under way.
- 16 ➤ There are currently 685 late claims, whose points, if considered,
17 would total 3514. This number will continue to grow until a
18 definitive cut off date is established (assuming the Court decides to
19 extend the date at all. See ¶ 12, *infra*).
- 20 ➤ There are 2774 class members who had been in custody before
21 May 3, 2003, to whom notices had been sent (generally because
22 they also had bookings within the class period). This group is
23 referred to as Notified Supplemental Class Members. Of those
24 2774, 536 had filed claims. Adding their points to what they were
25 already entitled to adds a total of 827 points. There is no need to
26 re-contact these people, as they have received notice, and the
27 points to which they are entitled can be added to the total for

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purposes of calculating the points.

- There are 16 Notified Supplemental Class Members who filed late claims. If their claims were counted, it would add another 121 points.
- There are 2697 class members who had been in custody before May 3, 2003, to whom notices were **not** sent. This group is referred to as Not-Notified Supplemental Class Members. Their total possible points come to 6173 if all filed claims. Based on experience in this and other cases, class claims in cases such as this rarely exceed 20%. (Here it was closer to 15%.)

8. The issue for this Court is how to remedy this oversight in the class notice process, which remedy is set forth in the following paragraphs.

II. REMEDY

9. The Class Administrator, in conjunction with Plaintiffs' data consultant, has generated a list of Not-Notified Supplemental Class Members, who are defined as all individuals who were not on the class list to whom notice has already been sent, and either 1) were in custody at any time on or after May 3, 2003, to December 11, 2006, for the USM, Transfer, and Post-Release Strip Search Classes, or 2) were in custody at any time on or after May 3, 2003, to March 7, 2007 for the Group Strip Search Class.

10. A Supplemental Class Notice shall be mailed no later than September 8, 2008, to the Not-Notified Supplemental Class Members, in the form contained in the attached Exhibit 1.

11. Not-Notified Supplemental Class Members shall have 60 days from the date of mailing of the Supplemental Class Notice to submit claims. Any claims submitted thereafter shall not be considered. A claim shall be deemed submitted if it is either postmarked or received by November 7, 2008.

1 12. Since Not-Notified Supplemental Class Members will be filing claims
2 after the previously set deadline, it is reasonable and just to allow currently filed
3 late claims to be counted, which the Court had previously declined to do. The
4 reason for this is that the oversight addressed herein requires some additional
5 processing time to handle those claims. Therefore the Class Administrator shall
6 consider those late claims from Notified Class Members that were postmarked or
7 received on or before July 30, 2008. However, any late claims filed by Not-
8 Notified Supplemental Class Members, i.e., claims filed after November 7, 2008,
9 shall not be considered because that would further delay distribution of funds to
10 class members.

11 13. Since the settlement has already been finally approved, and the time
12 for appeal expired, there shall not be a procedure for the Supplemental Class
13 Members to object to the settlement. They must either file a claim, opt out, or
14 otherwise be bound by the settlement previously approved. This procedure is
15 appropriate because “due process does not require that every class member receive
16 actual notice so long as the court reasonably selected a means likely to apprise
17 interested parties.” *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177
18 F.R.D. 216, 230-31 (D.N.J.1997). “An elementary and fundamental requirement of
19 due process in any proceeding which is to be accorded finality is *notice reasonably*
20 *calculated, under all the circumstances*, to apprise interested parties of the
21 pendency of the action and afford them an opportunity to present their objections.”
22 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652,
23 657 (1950) (emphasis supplied). “[N]o single formula can be derived which will
24 anticipate the myriad of circumstances that may confront class action litigants
25 attempting to identify absentee class members of a 23(b)(3) action and resolve
26 whether the effort is reasonable.” *In re Nissan Motor Corp. Antitrust Litigation*,
27 552 F.2d 1088, 1097 (5th Cir.1977). “What efforts are reasonable under the
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1 circumstances of the case rests initially in the sound discretion of the judge before
2 whom the case is pending.... [T]he fact that notice to some class members must be
3 given by publication is not necessarily fatal. In all cases the Court should strike an
4 appropriate balance between protecting class members and making Rule 23
5 workable.” Manual for Complex Litigation Second § 30.211. *See also In re “Agent*
6 *Orange” Product Liability Litigation*, 818 F.2d 145, 168 (2d Cir.1987) (“Rule 23,
7 of course, accords considerable discretion to a district court in fashioning notice to
8 a class”); *Berland v. Mack*, 48 F.R.D. 121, 129 (S.D.N.Y.1969) (“Rule 23
9 contemplates cooperative ingenuity on the part of counsel and the court in
10 determining the most suitable notice in each case”).

11 14. In this case, the parties were re-constructing the identity of class
12 members from computer records not designed for that purpose. In the process, over
13 98% of class members were mailed actual notice. It must be possible to reach
14 finality, and the Court concludes that class members were provided “notice
15 reasonably calculated, under all the circumstances, to apprise interested parties of
16 the pendency of the action and afford them an opportunity to present their
17 objections, ” *Mullane, supra*, was provided before the Court approved the
18 settlement. Numerous objections were considered at that time. Since then, it has
19 been determined that a small number of class members were not individually
20 mailed class notice. The Court finds that it is reasonable, even though the time to
21 file claims has passed, to now extend the filing time and allow a mailing to such
22 members, but that it would not be reasonable to allow objections after there has
23 been an approval and thousands of class members are awaiting payment.

24 15. After responses to the Class Administrator letter to previous opt-outs,
25 there is a total of 40 opt-outs. Under the settlement agreement and Order of
26 Approval and Settlement, if the number of opt-outs exceeds 75, the County had the
27 opportunity to opt out of the settlement. There is no realistic possibility of the opt-
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1 outs exceeding 75 since mailings were sent to over 150,000 class members. If,
2 after completion of the Supplemental Class Members claim process, the number of
3 opt-outs exceeds 75, then there shall be a proportional increase in the County’s
4 Self-Insured Retention (“SIR”) funds reserve, which reserve amount is currently
5 \$648,204, to be taken from the class funds, i.e., for each opt-out above 75, the Self-
6 Insured Retention (“SIR”) funds reserve shall be increased by \$8,643 (\$648,204
7 divided by 75).

8 16. The distribution of class funds shall now be handled as follows:

- 9 ➤ Based on the maximum number of possible points, including the
10 late claims, and all possible supplemental claims, there are 106,235
11 possible points.
- 12 ➤ There are 96,246 points for timely filed claims, including the
13 counting of the points for Notified Supplemental Class Members.
- 14 ➤ There is \$18,609,364.07 in the class account currently. This is after
15 payment of fees and expenses to date.
- 16 ➤ There is another \$600,000 authorized for class administration
17 costs, as needed.
- 18 ➤ There is \$648,204 in the County SIR Reserve, available for use if
19 opt-outs file claims.
- 20 ➤ There is a \$60,000 IRS reserve for deposit for fines on those for
21 whom the Class Administrator may need to withhold because the
22 social security number provided by the class member is an invalid
23 match according to the Internal Revenue Service.
- 24 ➤ An additional \$60,000 – which is likely on the high end – will be
25 added to authorized class administration costs to cover possible
26 additional costs for Supplemental Class members.
- 27 ➤ That leaves \$17,241,160.07 for distribution to class members at

1 present, which equates to \$162.29 per point (based on including all
2 timely and late claims to date, and all possible supplemental claims
3 by Non-Notified Class Members).

4 ➤ To account for some possible changes in the numbers, a point
5 value of \$160 shall be used to pay

6 17. At the Final Approval Hearing, the Court inquired what class
7 counsel's estimate of the average payment to class members would be, and class
8 counsel estimated that it would be in the neighborhood of \$750 per class member.
9 Based on scoring to date, the average points per class member is 4.8. Thus, even
10 with the conservative \$160 per point for the initial distribution, the average
11 payment will be \$768, which is \$18 higher than the estimate provided the Court.

12 18. Claims shall be paid forthwith to class members who filed timely
13 claims. There were 18,665 timely claims filed, for a total to date of 96,427 points
14 (including the points allocated to Notified Supplemental Class Members who filed
15 timely claims). There may be some additional points assigned when processing of
16 deficiency notices is completed. It is estimated that the total distribution to timely
17 filed Notified Class Members shall be approximately \$15,650,000. That leaves
18 \$1,590,000 (or more) to cover claimants who filed late claims and claimants who
19 file claims sent to Not-Notified Supplemental Class Members.

20 19. The Class Administrator shall process late claims of Notified Class
21 Members postmarked or received through July 30, 2008, expeditiously. As
22 indicated in ¶ 12, no late claims from Notified Class Members after that date shall
23 be considered.

24 20. The Class Administrator shall send out the Supplemental Class Notice
25 attached hereto as Exhibit 1 to all Not-Notified Supplemental Class Members by
26 September 8, 2008. The final date for Not-Notified Supplemental Class Members
27 to file claims shall be November 7, 2008. Determination of timely filing of Not-

1 Notified Supplemental Class Members claims shall be based on a postmark, or
2 receipt by the Class Administrator, of November 7 or earlier. No late claims for
3 Not-Notified Supplemental Class Members shall be accepted.

4 21. The Class Administrator shall distribute at the same time funds to late
5 claimants and Not-Notified Supplemental Class Members who file claims. A point
6 value of \$160 shall be used for this distribution, as it was for the timely claims.
7 Based on the schedule set forth herein, it is anticipated that this distribution shall
8 occur by March 2009.

9 22. It is anticipated that this procedure will result in greater funds being
10 reserved than necessary to cover claims because the system adopted herein
11 reserves points for all Not-Notified Supplemental Class Members when
12 substantially fewer will file claims. This is not a concern because a Second
13 Distribution was established in the original Final Order of Approval and
14 Settlement. The rationale for the Second Distribution was that experience indicates
15 that a significant number of individuals to whom checks are sent do not cash them.
16 See Final Order ¶ 37. Thus, the slight increase in the Reserve by holding more
17 funds than will likely be claimed by Not-Notified Supplemental Class Members
18 will not affect the Class Members' overall receipt of class funds, except that a
19 somewhat greater proportion of the distribution shall occur in the second round
20 rather than the first.

21 23. The Class Administrator estimates that the Second Distribution will
22 occur by August 2009.

23 24. Except as indicated in this Supplemental Order, the Final Order of
24 Approval and Settlement remains in full force and effect.

25 IT IS SO STIPULATED.

26 DATED: August 11, 2008

LITT, ESTUAR, HARRISON & KITSON,

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DATED: August 12, 2008

By _____/s/_____

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Barbara S. Huff

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ORDER

IT IS SO ORDERED.

August 14, 2008



STEPHEN G. LARSON

UNITED STATES DISTRICT JUDGE