IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS E. JONES ‘EL, MICHA’EL JOHNSON, DE’ONDRE CONQUEST, LUIS NIEVES, SCOTT SEAL, ALEX FIGUEROA, ROBERT SALLIE, CHAD GOETSCH, EDWARD PISCITELLO, QUINTIN L’MINGGIO, LORENZO BALLI, DONALD BROWN, CHRISTOPHER SCARVER, BENJAMIN BIESE, LASHAWN LOGAN, JASON PAGLIARINI, and ANDREW COLLETTE, and all others similarly situated,

Plaintiffs,

v.

GERALD BERGE and JON LITSCHER,

Defendants.

ORDER

00-C-421-C

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Judgment was entered in this class action lawsuit on June 24, 2002, after a settlement agreement was recorded between the parties on March 8, 2002. On July 8, 2002, plaintiff Dennis Jones-el filed a “Motion for Relief from Judgment and to Alter/Amend Judgment.” Even assuming that plaintiff Jones-el, who is one of the named representatives of the class, has the legal status to move on his own instead of through class counsel to alter or amend a judgment affecting the class, nothing in Jones-el’s motion convinces me that I erred in entering the judgment. Jones-el signed the settlement agreement. It is

disingenuous of him to now contend that the judgment is flawed on its merits. To the extent that Jones-el contends that the agreement is being breached, his recourse is to report the breach to the monitor appointed to oversee implementation of the agreement and to class counsel for whatever action they deem appropriate. It is not to seek amendment of the judgment. Jones-el's motion to alter or amend the judgment will be denied.

Also, Jones-el moved for an "Order Requiring Counsel to Turn Over Records for Perfecting an Appeal." This request will be denied. Counsel for the class is under no obligation to provide class members with copies of all of the documents accumulated in counsel's files during the course of the litigation.

Finally, Jones-el has filed three notices of appeal. According to a letter accompanying one of the notices, Jones-el attempted to obtain the signatures of additional prisoner-appellants on a single notice but became concerned about achieving the necessary routing of the document in a timely fashion. Consequently, he sent three separate notices to the court. Unfortunately, these notices are not identical and must be treated as three separate appeals.

One notice of appeal is signed by Dennis Jones-el and Donald Lee and is dated July 23, 2002 (Dkt. #298). It contains signature lines designated for inmates Glenn T. Turner and Micha'el S. Johnson, and these lines are unsigned. This notice was received by the court on August 5, 2002. The second notice has one signature line and one signature, Dennis Jones-el's. Jones-el has placed an asterisk on the page under his signature and has printed next to it the names of Micha'el Johnson, Norman Green, Glenn Turner, Christopher Scarver, Donald Lee and Rayfus Dukes, along with the comment: "These

plaintiffs-appellant [sic] have signed one previous notice of appeal, but it has come up missing in defs. legal route; so, this is submitted new until they re-sign or it shows up." This notice is dated July 24, 2002 (Dkt. #286) and was received by the court on July 29, 2002. The third notice of appeal is signed by Dennis Jones-el, Micha'el Johnson, Norman Green, Glenn Turner, Christopher Scarver, and Rayfus U. Dukes, Jr.. It is dated July 24, 2002, and was received by the court on August 22, 2002 (Dkt. #304). There is no signature line or signature on this document for Donald Lee. In addition, although it is clear that each notice of appeal states that the respective appellants are appealing from both the June 24, 2002 judgment and from whatever decision this court would reach on Dennis Jones-el's motion to alter or amend the judgment (the motion that was discussed and denied in the first paragraph of this order), none of the notices is identical to another in its text. Because these notices of appeal are not identical, and because each has been submitted by different individuals with the exception of Dennis Jones-el, who signed them all, I am treating the notices separately.

None of the notices of appeal is accompanied by the $105 fee for filing a notice of appeal. Therefore, I presume that the appellants wish to proceed on their respective appeals in forma pauperis. These requests will be denied as to Dennis Jones-el, Micha'el Johnson and Donald Lee. A decision will be stayed with respect to Christopher Scarver, Norman Green, Glenn Turner and Rayfus Dukes, because these appellants have not submitted a statement of the issues they wish to raise on appeal or a trust fund account statement so that they can be assessed an initial partial payment of the filing fee in the event that the court finds that their appeal is taken in good faith.

Plaintiffs Dennis Jones-el and Micha'el Johnson do not qualify for indigent status under 28

U.S.C. § 1915. As part of the settlement agreement in this case, each was awarded $3500. When a prisoner seeks to utilize the initial partial payment provision in 28 U.S.C. § 1915, the court must calculate 20% of the greater of the prisoner's average monthly income or average monthly balance in his prison account for the six month period immediately preceding the filing of the notice of appeal, and require the prisoner to pay this amount at the outset of his appeal. Even if Jones-el and Johnson had no income other than a $3500 settlement in the six-month period immediately preceding the filing of their notices of appeal, their average 6-month income would amount to $583.33 and 20% of that amount is $116.66, a sum that exceeds the $105 fee for filing an appeal.

Donald Lee is not eligible for indigent status because he has struck out under 28 U.S.C. § 1915(g). See Hasham v. Berge, 01-C-314-C (W.D. Wis. Sept. 25, 2001), Lee v. Berge, 01-CV-1150 (E.D. Wis. Dec. 12, 2001) and Lee v. Copsey, 01-3724 (7th Cir. Apr. 22, 2002).

All of the remaining proposed appellants except Christopher Scarver are members of the class but are not named representatives of the class. As Glenn Turner and Norman Green are already aware, I held earlier in this case that class members who are not named representatives of the class cannot take an appeal unless they had succeeded in intervening in the action. See May 2, 2002 order, dkt. # 225; April 29, 2002 order, dkt. #220. However, the law has changed since these orders were entered. My prior decisions relied on Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998), aff'd by an equally divided court, sub. nom. California Public Employees' Retirement System v. Felzen, 525 U.S. 315 (1999), in which the Court of Appeals for the Seventh Circuit held that only named plaintiffs in a class action have standing to appeal a district court's approval of a class settlement and therefore class members who are

not named representatives must intervene in the action if they wish to appeal. See also In the Matter of: Navigant Consulting, Inc., 275 F.3d 616, 617-18 (7th Cir. 2001) ("Because members of a class (other than the named representatives) are not automatically parties, they must intervene and acquire party status if they wish to appeal.")(citing Felzen, 134 F.3d 873).

However, on June 10, 2002, the Supreme Court decided Devlin v. Scardelletti, 122 S. Ct. 2005 (2002). In Devlin, the Court of Appeals for the Fourth Circuit had reached the same conclusion as the Court of Appeals for the Seventh Circuit that only named representatives of a class action had standing to challenge the fairness of a class settlement agreement. The Supreme Court disagreed with this conclusion, explaining that the issue was not one of standing and that jurisdiction was not implicated. "What is at issue, instead," the court stated, "is whether petitioner should be considered a 'party' for the purposes of appealing the approval of the settlement." Id. at 2009. The Court concluded that because all class members are parties for the purpose of being bound by the settlement, they were also parties for the purpose of appealing. Id. at 2011. The Court then held that unnamed class members who have objected to the settlement agreement may appeal a district court's decision to disregard their objections. Id. 2010-11.

Although the Court did not discuss Felzen, I conclude that Felzen was implicitly overruled by Devlin. The conclusion in Felzen that unnamed class members must intervene if they wish to appeal cannot be reconciled with the Supreme Court's holding in Devlin that any class member who has objected to the settlement agreement may appeal the judgment approving the agreement. This conclusion is bolstered by the Supreme Court's decision to vacate Navigant Consulting, Inc. "in light

of" Devlin. Grimes v, Navigant Consulting, Inc., 122 S. Ct. 2584 (2002).

I conclude that under Devlin, all class members have standing to appeal the approval of a settlement agreement so long as those class members have filed objections to the settlement agreement and are appealing only those issues that they raised in their objections.

The record in this case already has been forwarded to the court of appeals. The record includes all of the objections the court received from class members prior to approval of the settlement. Therefore, before I can determine whether the appeals of Norman Green, Glenn Turner, and Rayfus Dukes are taken in good faith, it will be necessary for these appellants to submit to this court a copy of the objections to the settlement proposal that they submitted to the court during the objection period in this case, together with a statement of the issues they wish to raise on appeal, as required by Fed. R. App. P. 24(a)(1)(C).

Christopher Scarver's situation presents an anomaly. There was never any question about his standing to take an appeal. He is a named representative of the class and he has been allowed to intervene personally in this action for the purpose of being heard on a question decided after the settlement proposal was accepted and before judgment was entered. See May 31, 2002 order , dkt. #248. It is not likely that he wishes to challenge the settlement agreement in the present appeal, because he was allowed to proceed in forma pauperis on an appeal from the settlement agreement on May 23, 2002 (Dkt. #236 in this court and appeal no. 02-2368 filed in the court of appeals on May 28, 2002). However, he may believe that another appeal is appropriate now that the judgment has been entered. The difficulty is that Scarver has not paid the initial partial payment ordered for appeal no. 02-2368 or

two other $105 filing fees the court of appeals ordered him to pay for filing interlocutory appeals in this case on November 15, 2001 (appeal no. 01-3990) and on November 26, 2001 (appeal no. 01-4071).

The Court of Appeals for the Seventh Circuit has directed district courts to consider a prisoner's failure to submit a fee required to be paid under the 1996 Prison Litigation Reform Act for any reason other than destitution as a decision by the prisoner to give up the right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996). Because Christopher Scarver has not submitted a trust fund account statement with this recent notice of appeal and did not made a showing in connection with his earlier appeals that he has no means of paying the fee related to that appeal, I cannot determine whether his failure to pay is because he does not have the funds to do so or because he has chosen to relinquish his right to proceed in future proceedings in forma pauperis. Therefore, I will stay a decision on Christopher Scarver's request for leave to proceed in forma pauperis on appeal to allow him to submit a trust fund account statement for the past six-month period. If I find that Scarver has had money deposited to his prison account but that he is not making payments toward the $105 fee he owes for his first appeal in this case, I will deny his request for leave to proceed in forma pauperis with respect to the appeal docketed in this court as #304. Even if Scarver does make a showing that his failure to pay the fees he has been ordered to pay in this case is the result of his inability to do so, Scarver will have to submit a statement of the issues he intends to raise on appeal so that I can determine whether this additional appeal is taken in good faith.

Finally, because there is the possibility that proposed appellants Dukes, Turner and Green will satisfy this court that their appeal is taken in good faith, they will have to submit trust fund account

statements for the period beginning approximately February 1, 2002 and ending approximately July 1, 2002, so that I can determine whether they are financially eligible to proceed under § 1915 and, if so, what amount should be assessed to each of them as an initial partial payment of the fee for filing their appeal.

I note that as a practical matter, the fee for filing each of the three appeals discussed in this order may be paid by the time Scarver, Dukes, Turner and Green submit trust fund account statements and statements of the issues they intend to raise on appeal. This is because under the Prison Litigation Reform Act, each person filing a notice of appeal is responsible jointly and severally for paying the fee for filing the appeal. This means that Dennis Jones-el is responsible not only for paying the $105 fee for the notice of appeal he signed alone that is docketed #286, but is responsible as well for paying the $105 fee for each of the other two notices of appeal on which he signed his name, dkt. #s 298 and 304. Micha'el Johnson is jointly and severally liable for the $105 fee for filing the appeal docketed #304 and Donald Lee is jointly and severally liable for the $105 fee for filing the appeal docketed #298. Between Jones-el and Johnson, the fee for the appeal docketed #304 should be paid in full immediately, which would obviate the need for the remaining proposed appellants on that particular appeal to seek pauper status or obtain a good faith determination from this court under § 1915. Nevertheless, in the event that Jones-el and Johnson do not pay the fee for the appeal docketed #304 promptly, it will be necessary to request the statutorily required trust fund account statements and statements of the issues each appellant intends to raise on appeal from Scarver, Dukes, Turner and Green, and to require Dukes, Turner and Green to provide the court with a copy of the objections they filed in response to the proposed settlement

in this case.

ORDER

IT IS ORDERED that

1) Plaintiff Dennis Jones-el's motion to alter or amend the judgment in this case is DENIED;

2) Plaintiff Dennis Jones-el's motion for an order requiring counsel to turn over records is DENIED;

3) The motions for leave to proceed in forma pauperis on appeal of Dennis Jones-el and Micha'el Johnson are DENIED on the ground that these individuals are not indigent;

4) The motion for leave to proceed in forma pauperis on appeal of Donald Lee is DENIED on the ground that Lee is ineligible for indigent status under 28 U.S.C. § 1915 because he has struck out under § 1915(g);

5) A decision on the motion of Christopher Scarver to proceed in forma pauperis on appeal is STAYED until October 7, 2002, so that Scarver can submit a trust fund account statement for the period beginning approximately March 1, 2002 and ending September 1, 2002, as well as a statement of issues Scarver intends to raise on appeal;

6) A decision on the motion of Glenn Turner, Norman Green, and Rayfus Dukes to proceed in forma pauperis on appeal is STAYED until October 7, 2002, so that these inmates may submit a trust fund account statement for the six-month period immediately preceding the filing of their notice of appeal (the period beginning approximately February 22, 2002 and ending approximately August 22,

2002), a statement of the issues each wishes to raise on appeal and a copy of the objection each submitted in response to the proposed settlement in this case;

7) Dennis Jones-el owes $105 for filing the appeal docketed no. 286. This amount is to be paid promptly.

8) Dennis Jones-el, Micha'el Johnson, Glenn Turner, Christopher Scarver, Norman Green and Rayfus Dukes are liable jointly and severally for the $105 fee for filing the appeal docketed no. 304. However, because Jones-el and Johnson are not entitled to indigent status with respect to this appeal, they will have to pay the full amount of the fee promptly; and

9) Dennis Jones-el and Donald Lee are liable jointly and severally to pay the $105 fee for filing the appeal docketed no. 298. This fee is due immediately.

Further, IT IS ORDERED that if any one of inmates Dennis Jones-el, Micha'el Johnson and Donald Lee fails to pay the full amount of the fees they owe in this case promptly or make a credible showing that they have no means to do so, then as to any one of them who fails to pay or make the required showing an order will be entered under Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), requiring the clerks of the courts within the circuit to return unfiled any civil complaints that inmate might submit until his debt to the judicial system has been paid.

Entered this 18th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge