

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9 Veronica Arnold, on behalf of herself and
10 all other persons similarly situated, et al.,

No. CV-01-1463-PCT- LOA

11

Plaintiffs,

ORDER

12

vs.

13

13 Arizona Department of Public Safety, et
14 al.,

15

Defendants.

16

16 On September 15, 2005, the Court directed the parties to show cause regarding:
17 (1) whether a United States magistrate judge has jurisdiction over all members of the proposed
18 class identified in Plaintiffs' Motion for Approval of Proposed Settlement and Class
19 Certification (document # 58); and (2) assuming that the undersigned has such jurisdiction,
20 whether the Court should deny Plaintiffs' Motion for Approval of Proposed Settlement and
21 Class Certification (document # 58) as untimely.

22

22 After consideration of the relevant pleadings, as set forth below, the Court finds
23 that the undersigned Magistrate Judge has jurisdiction over the proposed class pursuant to 28
24 U.S.C. § 636(c)(1) and that the Motion for Approval of Proposed Settlement and Class
25 Certification is timely considering the unique circumstances of this case.

26

BACKGROUND

27

27 On August 6, 2001, Plaintiff commenced this suit purporting to state a class action
28 lawsuit against Defendants for civil rights violations under 42 U.S.C. § 1983 based on

1 allegations of racial profiling^{1/} in connection with traffic stops by Arizona Department of Public
2 Safety ("DPS") law enforcement personnel on Interstate 40 in and around Flagstaff, Coconino
3 County, Arizona. Plaintiffs' suit is based in large part on a statistical study performed by one
4 of Plaintiffs' expert witnesses, Dr. Fred Solop, in connection with ongoing criminal litigation
5 in Coconino County. Dr. Solop's study is predicated upon documents memorializing such
6 traffic stops during 2000 which were produced pursuant to a discovery order^{2/} by the Coconino
7 Superior Court in the aforementioned criminal litigation.

8 During 2002, however, it was discovered that certain documents regarding DPS
9 traffic stops and related vehicle searches had been lost or destroyed by DPS. Based on the
10 missing DPS stop-and-search data, which, at a minimum, rendered Dr. Solop's "conclusions
11 [subject] to challenge"^{3/} which conclusions were critical to proving Plaintiffs' case, Plaintiffs'
12 failure to conduct any discovery in this federal case, the parties' inability to meet the established
13 Rule 16 deadlines, and the uncertainty when the state court would timely order the important
14 2000 stop-data documents, the district court set an order to show cause why this action should
15 not be dismissed. (document # 42) On April 14, 2003, the assigned District Judge, finding that
16 Plaintiffs would not be prejudiced by a dismissal without prejudice under Arizona's "savings
17 statute,"^{4/} dismissed Plaintiffs' Complaint with leave to re-file if Plaintiffs discovered additional
18 evidence of racial profiling by DPS, citing Johnson v. Mammoth Recreations, Inc., 975 F.2d

19
20 ^{1/} The parties' settlement agreement defines "racial profiling" as the "reliance on race, skin
21 color, and/or ethnicity as an indication of criminality, reasonable suspicion or probable cause,
22 except when part of a description of a suspect, and said description is timely, reliable and
geographically relevant." (document # 58, p. 7) Also see, Illinois v. Wardlow, 528 U.S. 119,
120 S.Ct. 673, 681 n. 10, 145 L.E.2d 570 (2000)(discussing reports of unlawful racial profiling
by New Jersey State Police and Boston Police Department).

23 ^{2/} Plaintiffs did not request such documents in this federal civil action and did not contend
24 that the Defendants in this action committed any discovery abuses or violated any orders of this
district court. (document # 46)

25 ^{3/} Document # 46, p. 4, fn. 5.

26 ^{4/} Arizona Revised Statute ("A.R.S.") § 12-504; Janson v. Christensen, 167 Ariz. 470,
27 472, 808 P.2d 1222, 1224 (1991). Federal courts borrow the statute of limitations for § 1983
28 claims applicable to personal injury claims in the forum state and the forum state's tolling rules.
TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999). In Arizona, the courts apply a two-year
statute of limitations to personal injury claims pursuant to A.R.S. § 12-542. Id.

1 604 (9th Cir. 1992)(district courts have substantial interest in being able to control their dockets
2 and providing timely adjudication of filed cases). (document # 46) At the time of dismissal,
3 over 2 1/2 years after the commencement of this lawsuit, Plaintiffs had not moved the district
4 court for class certification as required under Rule 23, FED.R.CIV.P.

5 Plaintiffs timely appealed the dismissal. While on appeal, the parties agreed to
6 participate in mediation conducted by Stephen Liacouris of the Ninth Circuit Court of Appeals
7 Mediation Program. Mediation began on September 24, 2003 and continued until the parties
8 reached a settlement in January of 2005 on all issues raised in Plaintiffs' complaint After
9 reaching their settlement agreement, the parties filed a stipulation with the Ninth Circuit to
10 dismiss the pending appeal, without prejudice to its reinstatement, so that jurisdiction could be
11 re-vested in the district court and the matter remanded for possible approval of the settlement.
12 On February 10, 2005, the Ninth Circuit dismissed the appeal without prejudice and remanded
13 this matter for review and approval of the settlement agreement. (document # 57) With the
14 consent to assignment by the assigned District Judge, the parties consented to the undersigned
15 Magistrate Judge. (documents # 61 and # 62)

16 The parties now seek several orders: (1) an order suspending the judgment of
17 dismissal entered on April 14, 2003; (2) an order certifying a Plaintiffs' Class; and (3) an order
18 approving the parties' settlement agreement. (documents # 58 and # 59)

19 Before proceeding to the merits of any of the pending motions, the Court must
20 determine whether a United States magistrate judge has jurisdiction over the proposed class and
21 whether Plaintiffs' Motion for Approval of Class and Approval of the Settlement Agreement is
22 timely. Briefing by the parties was requested. On October 7, 2005, the parties filed their Joint
23 Response To Order To Show Cause. (document # 66)

24 **I. Jurisdiction over Proposed Class**

25 Title 28 U.S.C. § 636(c)(1) provides that "[u]pon consent of the parties, a full time
26 United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil
27 matter and order the entry of judgment in the case, when specifically designated to exercise such
28 jurisdiction by the district court or courts he serves." Id. The parties' consent must be explicit

1 and unambiguous. Hajek v. Burlington Northern R.R. Co., 186 F.3d 1105, 1108 (9th Cir. 1999).
2 In a class action suit, the named parties may voluntarily consent to magistrate judge jurisdiction
3 on behalf of the entire class. Williams v. General Electric Capital Auto Lease, Inc., 159 F.3d
4 266, 269 (7th Cir. 1998)(noting that where the named parties consented to proceed before a
5 magistrate judge under 28 U.S.C. § 636(c)(1) prior to the certification of the class, the unnamed
6 class members were bound by the consent.) In Williams, all of the named parties consented to
7 magistrate judge jurisdiction and the plaintiffs decided, on behalf of the entire Class, to consent
8 to magistrate judge jurisdiction. Id.; Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001)(magistrate
9 judge had jurisdiction by consent under 28 U.S.C. § 636(c)(1) over a class action in a civil rights
10 suit brought by six Idaho prisoners against the State Department of Corrections where all named
11 parties consented.); Crawford v. Equifax Payment Services, Inc., 201 F.3d 877 (7th Cir.
12 2000)(magistrate judge had jurisdiction under § 636(c)(1) to certify class and rule on approval
13 of class settlement); In re U.S. Bancorp Litigation, 291 F.3d 1035 (8th Cir. 2002)(magistrate
14 judge approved settlement of class action litigation by bank customers seeking punitive relief
15 and damages arising from bank's alleged disclosure of private information to third parties.)
16 Thus, the named parties' voluntary consent is the linchpin to magistrate judge jurisdiction under
17 the Constitution. Jaliwala v. United States, 945 F.2d 221, 224 (7th Cir.1991).

18 The consent of the unnamed class members is not necessary under 28 U.S.C. §
19 636(c)(1) because "[g]enerally speaking, absent class members are not 'parties' before the court
20 in the sense of being able to direct the litigation." Williams, 159 F.3d at 269 (citing In re Brand
21 Name Prescription Drug Antitrust Litigation, 115 F.3d 456, 458 (7th Cir. 1997)); United States
22 v. Real Property, 135 F.3d 1312, 1316 (9th Cir.1998)(in an in rem civil forfeiture action wherein
23 the plaintiff consented, magistrate judge had jurisdiction to enter a final judgment over
24 defaulted-person who was technically not a "party" to the litigation); Giove v. Stanko, 882 F.2d
25 1316, 1318 (8th Cir.1989)(determining that judgment debtor who failed to intervene in
26 garnishment action was not automatically a party to that action and need not have consented to
27 magistrate judge's jurisdiction). Rather, the named plaintiff is the party to the lawsuit who acts
28 on behalf of the entire class including whether to consent to magistrate judge jurisdiction.

1 Williams, 159 F.3d at 269. If any unnamed class members prefer an Article III district judge,
2 he or she may move to intervene in the suit under Fed.R.Civ.P. 24(a). Williams, 159 F.3d at
3 269. If permitted to intervene, the unnamed class member becomes a party who may refuse to
4 consent to proceed before a magistrate judge and the proceedings will be reassigned to a district
5 judge. Id. Alternatively, after entry of final judgment unnamed class members may collaterally
6 attack on due process grounds the class representative's decision to consent. Id. However, in
7 either case, unless it is shown that by deciding to consent to magistrate judge jurisdiction the
8 class representative failed to adequately represent the interests of the unnamed class members,
9 the representative's consent binds the entire class. Id.

10 In view of the full consent of all Plaintiffs and all Defendants to magistrate judge
11 jurisdiction and the caselaw on the issue, the undersigned finds that he has jurisdiction over the
12 members of the proposed class pursuant to 28 U.S.C. § 636(c)(1).

13 **II. Timeliness of Motion for Approval of Proposed Settlement and Class Certification**

14 The Court must next determine whether that part of Plaintiffs' Motion seeking
15 class certification should be denied as untimely filed. Plaintiffs commenced this action over
16 four years ago and delayed in seeking class certification. Plaintiffs explain that such delay was
17 the result of the complexity of the issues, the volume of discovery, the loss or destruction of
18 critical evidence which prevented Plaintiffs from establishing the factors which Fed.R.Civ.P.
19 23 requires for class certification, the intervening appeal, and the parties' decision to participate
20 in mediation. (document # 66 at 8) Defendants do not oppose class certification despite the
21 significant delay in moving the Court to do so.

22 When Plaintiffs filed suit in 2001, Fed.R.Civ.P. 23 required a court to determine
23 whether to certify a class "*as soon as practicable after commencement of an action.*" Id.
24 (Emphasis added). In 2003, while this case was pending in district court, Congress amended
25 Federal Rule of Civil Procedure 23(c)(1)(A) to give federal courts more flexibility by permitting
26 the court to consider class certification "*at an early practicable time.*" Fed.R.Civ.P. 23 (2003).
27 The amendment to Rule 23 accounts for the judicial practice of ruling on pretrial motions,
28 including motions for summary judgment, before determining whether to certify a class.

1 Managing Class Action Litigation: A Pocket Guide for Judges, Barbara J. Rothstein & Thomas
2 E. Willging, FJC (2005). The advisory notes to Rule 23 provide that the more relaxed standard
3 provides the parties and the court with the time necessary to gather information relevant to the
4 certification decision. Advisory Committee Notes to Rule 23, Federal Rules of Civil Procedure,
5 Rev. Ed., p. 129, Thompson/West (2004). In addition, the court may need to determine how the
6 case will be tried, consider pretrial motions, and explore the designation of counsel before
7 deciding whether to certify a class. Id. The Advisory Committee Notes, however, warn that
8 the court should ensure that the certification decision is not "unjustifiably delayed." Id. Unlike
9 some districts, the District of Arizona has no Local Rule on timeliness for seeking class action
10 certification.^{5/}

11 Courts applying Rule 23, as amended, do not deny class certification based on
12 timeliness unless the delay has prejudiced a defendant. In re Spring Ford Indus., 2004 WL
13 231010 (Bankr.E.D.Pa. 2004). In addition, courts, including the Ninth Circuit, have held that
14 so long as no prejudice results, it is permissible to proceed on the merits before class
15 certification. Wright v. Schock, 742 F.2d 541, 543 (9th Cir. 1984); Evans v. Taco Bell Corp.,
16 2005 WL 233384, * 3 n. 6 (D.N.H. 2005)(stating that "[i]t is well settled that, absent prejudice
17 to the plaintiff, a court may decide a defendant's motion for summary judgment in a putative
18 class action before taking up the issue of class certification.").

19 In view of the flexibility now permitted in amended Rule 23, the unusual
20 procedural posture of this case which contributed to the delay in seeking class certification, the
21 Defendants' concurrence in the request for class certification, the apparent absence of any
22 prejudice to any of the parties, and class certification would protect a larger group of people and
23 enhance the public policy against the unlawful discriminatory practice of racial profiling, the
24

25
26 ^{5/} Rules of Practice of the United States District Court for the District of Arizona, as
27 amended on December 1, 2004; Joseph N. Main P.C. v. Electronic Data Sys. Corp., 168 F.R.D.
28 573 (N.D.Tex.1996)(district court denied class certification as untimely under Local Rule's 90
day time period); Umbricac v. American Snacks, Inc., 388 F.Supp. 265 (E.D.Pa.1975) (failure
to file class motion within time limits of Local Rule was a "de minimis lapse").

1 Court finds that the motion for class certification is timely and should be considered on the
2 merits. The Court, however, declines to rule on the merits of that motion at this time.

3 The Court will set this matter for a mandatory scheduling conference to be held
4 on Monday, November 21, 2005 at 2:00 p.m. At that time, counsel and the Court will discuss
5 the following: (1) whether this matter complies with the jurisdictional rules of the Class Action
6 Fairness Act of 2005^{6/} ("CAFA"); (2) the appointment of appropriate class counsel under Rule
7 23(g); (3) the definition of the class; (4) whether the court should certify a "settlement class"
8 or a "litigation class," Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997); Manual
9 for Complex Litigation (MCL 4th) § 21.612, 21.632; Fed.R.Civ.P. 23(a) and (b); (5) review
10 notice plan(s) and notice to the class members to ensure the best notice practicable, and (6) any
11 other matter relevant to the proposed settlement or case. In preparation for the conference, on
12 or before November 15, 2005, the parties shall submit briefing on these issues and a proposed
13 joint order Certifying the Class which complies with Fed.R.Civ.P. 23.

14 Accordingly,

15 **IT IS ORDERED** setting this matter for a mandatory Rule 16 scheduling
16 conference for counsel of record on **Monday, November 21, 2005 at 2:00 p.m.** at which time
17 counsel for the parties will discuss the issues identified in this Order. The named parties may,
18 but are not required to, physically attend the scheduling conference.

19 **IT IS FURTHER ORDERED** that on or before **November 15, 2005**, the parties
20 shall file, either jointly or separately, briefing on the aforementioned issues and lodge a
21 proposed Order Certifying the Class, or separate proposed Orders if the parties disagree, which
22 complies with Fed.R.Civ.P. 23, as amended, to the undersigned's chambers email box in
23 Wordperfect format.

24 ///

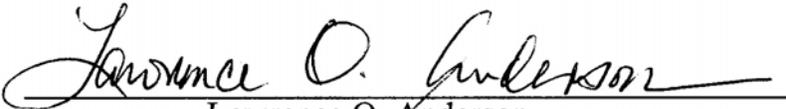
25
26
27
28

^{6/} Pub. L. No. 109-2, 119 Stat. 4 (2005).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that Plaintiffs' Motion for Approval of Settlement Agreement and Class Certification (document # 58) is held in abeyance until further order of this Court.

DATED this 18th day of October, 2005.



Lawrence O. Anderson
United States Magistrate Judge