UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF MICHIGAN

KEVIN LINDKE; MICHAEL SCHULTZ; and all those similarly situated,
Plaintiffs,

v.

MAT KING, in his official and personal capacities; TIMOTHY DONNELLON, in his official and personal capacities; COUNTY OF ST. CLAIR; TRACY DECAUSSIN, in her official and personal capacities; and THOMAS BLISS, in his official and personal capacities,
Defendants

Case No.: 22-cv-11767
Honorable Matthew Leitman

MOTION

**** CLASS ACTION ****

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Attorney for Plaintiffs
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

GRONDA PLC
MATTHEW E. GRONDA (P73693)
Attorney for Plaintiffs
4800 Fashion Sq Blvd, Ste 200
Saginaw, Michigan 48604
(989) 233-1639
matt@matthewgronda.com

FLETCHER FEALKO SHOUDY & FRANCIS, PC
TODD J. SHOUDY (P41895)
VICTORIA R. FERRES (P78788)
Attorneys for Defendants
1411 Third Street, Suite F
Port Huron, Michigan 48060
(810) 987-8444
tshoudy@fletcherfealko.com
vferres@fletcherfealko.com

MOTION TO CERTIFY CLASS AND
FOR APPOINTMENT OF CLASS COUNSEL

NOW COME Plaintiffs MICHAEL SCHULTZ and KEVIN LINDKE, by counsel, and move for class certification pursuant to FRCP 23 and for appointment of attorneys Philip L. Ellison and Matthew E. Gronda as class counsel pursuant to FRCP 23(g). Defendants' counsel was apprised of the relief sought and affirmatively confirmed Defendants would not consent to the same. See E.D. Mich. LR 7.1.

QUESTION(S) PRESENTED

Should this matter be certified as a class and the undersigned attorneys be appointed as class counsel pursuant to FRCP 23?

Answer:
Yes

MOST RELEVANT AUTHORITY

FRCP 23

In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,
722 F.3d 838 (6th Cir. 2013)

In re Am. Med. Sys.,
75 F.3d 1069 (6th Cir. 1996)

M.C.L. § 51.282(1)

People v. Cannon,
522 N.W.2d 716 (Mich. App. 1994).

BRIEF IN SUPPORT

On behalf of himself and a class of all other similarly situated individuals, Plaintiffs MICHAEL SCHULTZ and KEVIN LINDKE hereby seek to certify this class. This is a class action lawsuit seeking damages related to the denial of liberty and freedom of individuals, by unlawful over-detainment, when Defendants failed to respect "good time" credits of those serving sentences of criminal contempt – including things like missing court dates or failing to timely pay court costs – within the St. Clair County Jail. Those convicted for criminal contempt are required to serve their confinement in the local jail. M.C.L. § 769.28. Michigan's "Good-Time-Credit" statute unambiguously reduces the length of confinement time by "1 day for each 6 days of the sentence" for a prisoner when his or her "record shows that there are no violations of the rules and regulations" while confined. M.C.L. § 51.282(1); see also *People v. Cannon*, 522 N.W.2d 716 (Mich. App. 1994). Defendants denied hundreds of class members their timely freedom from confinement as required by state law. Yet after this injustice was called out by Plaintiff Lindke when he was confined to the St Clair County Jail during the second confinement period, Defendants' refusal to apply good-time credit to criminal contemnors was fully abandoned as of January 11, 2022 (despite their incongruous arguments in this case that they "had or have to"

deny the credits under a separation-of-powers argument). See **Exhibits D and E**.

This motion seeks to certify the class and also appoint class counsel to preserve and represent the rights of the class members. Rule 23 directs that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." FRCP 23(c)(1)(A). This case is over a year and a half old and now is a reasonable time to review class certification.

BACKGROUND

The facts of this case are not overly complicated. Plaintiff MICHAEL SCHULTZ was issued a 25-day sentence for criminal contempt on August 11, 2021. **Exhibit D, ¶3.** With the required good-time-credit he was entitled under Michigan law (which he never had taken from him, ***Id.*, ¶5**), it was mandated that the actual time of confinement was actually to be only 20 days. This is because for every six days, he received a one-day credit off his sentence. M.C.L. § 51.282(1).[1] He should have been released on August 30, 2021. Yet by Defendants' policies and actions (**Exhibit I**), he was confined

[1] Michigan's case law has been clear for decades that trial courts imposing a criminal sentence lack jurisdiction to take away good-time credits. E.g. *People v. Cannon*, 522 N.W.2d 716 (Mich. App. 1994).

and detained in the St. Clair County jail for the full 25 days or until September 4, 2021. **Exhibit D, ¶4.**

Plaintiff Kevin Lindle was issued a 10-day sentence for criminal contempt on July 26, 2019. **Exhibit E, ¶3.** With the required good-time-credit he was entitled under Michigan law (which he never had taken from him, ***Id.*****, ¶5**), it was mandated that the actual time of confinement was actually to be only, at most, 9 days. He should have been released on August 3, 2022. Yet by Defendants' policies and actions (**Exhibit I**), he was confined and detained in the St. Clair County jail until August 4, 2022. **Exhibit E, ¶4.**[2]

This has happened hundreds of times over across many years with hundreds of others similarly situated. See **Exhibit A**.

CLASS CERTIFICATION

Class Definition

The following class definition is proposed—

> All individuals confined to the St Clair County jail for criminal contempt for a period in excess of what is permitted by Michigan law due the failure to respect "good time" credit pursuant to M.C.L. § 51.282(1) from April 22, 2019[3] to January 10, 2022.

[2] Additional good-time credit was refused Plaintiff Lindke in 2021 and 2022 under Sheriff King as outlined in the response in opposition to Defendants' motion for summary judgment.

[3] This date consists of the applicable three-year statute of limitations period for Section 1983 claims plus additional period during the COVID-19 suspension of the statute of limitations through the date of abandonment of the policy on January 10, 2022. *Bowles v. Sabree*, 2022 U.S. Dist. LEXIS 8172, at *23-24 (E.D. Mich. Jan. 14, 2022) (finding

The obligation to define the class falls to the judge (who may ask for assistance). *Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015).

Class Certification Requirements

Under Rule 23 of the Federal Rules of Civil Procedure, class certification is warranted when:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;
3. the claims or defenses of the named parties are typical of the claims or defenses of the class; and
4. the named parties will fairly and adequately protect the interest of the class.

FRCP 23(a)(1)-(4). The class must also satisfy one portion of Rule 23(b) or be bifurcated as a Rule 23(c)(4) class.[4]

similar expanded SOL and collecting cases); **Exhibit J** (changing policy effective January 11, 2022).

[4] In the alternative, the Court can operate under a "(c)(4)" class. See FRCP 23(c)(4) ("[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."). A common discretionary use of this rule is to segregate liability issues from damages issues. E.g. *Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 800 (7th Cir. 2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogenous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.").

While the Court must perform a "rigorous analysis" to determine whether to certify a class, *Wal-Mart v. Dukes*, 564 U.S. 338, 351 (2011), the Court may not require Plaintiffs *to prove* their claims at this pre-answer class certification stage. See *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered… only to the extent… that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). At the certification stage, the movant need only provide evidence to demonstrate that Rule 23 itself is satisfied as certification is not a "dress rehearsal for the trial on the merits." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851-852 (6th Cir. 2013). Moreover, "it is not always necessary… to probe behind the pleadings before coming to rest on the certification question, because sometimes there may be no disputed factual and legal issues that strongly influence the wisdom of class treatment." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012). This is such a case of no heady factual disputes, only stark legal ones.

Numerosity

The proposed class is sufficiently numerous to warrant class certification. See FRCP 23(a)(1). Although there is no strict numerical test, "substantial" numbers usually satisfy the numerosity requirement. *In*

re Am. Med. Sys., 75 F.3d 1069, 1079 (6th Cir. 1996); see also *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Where plaintiff can show that the number of potential class members is large, the numerosity requirement is met "even if plaintiffs do not know the exact figure." *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 601 (E.D. Mich. 1985). "[A] class numbering more than 40 members usually satisfies the impracticability requirement, and classes containing 100 or more members routinely satisfy the numerosity requirement." *Peters v. Cars To Go, Inc.*, 184 F.R.D. 270, 276 (W.D. Mich. 1998) (citation omitted); see *Calloway v. Caraco Pharm. Labs, Ltd.*, 287 F.R.D. 402, 406 (E.D. Mich. 2012); *Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n,* 192 F.R.D. 568, 571 (W.D. Mich. 1999) ("Numbers alone…will dictate impracticability when the numbers are large.").

While the exact number of class members from the Jail's non-produced database is not yet secured, records received as part of a *Freedom of Information Act* request and by limited initial discovery reveals the number to be in in excess of 200 individuals during the relevant statute-of-limitations period. **Exhibit A.** This list is not a final list as the undersigned knows – firsthand – that there are missing names from the Jail's provided list. See **Exhibit K** (eight of many known examples of contempt sentences missing from the jail's originally-produced list (**Exhibit A**)). However, this original list

is more than sufficient to establish the numbers needed for class certification. Numerosity is easily met.

Commonality

The claims asserted on behalf of the proposed class include common questions of law and fact that satisfy Rule 23(a)(2). A court looks for "a common issue the resolution of which will advance the litigation." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). "Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class." *Am. Med. Sys.*, 75 F.3d at 1080. Courts must "start from the premise that there need be only <u>one</u> common question to certify a class." *Whirlpool*, 722 F.3d at 853. Commonality directs these common questions are "to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 349. These "common answers" must "relate[] to the actual theory of liability in the case." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015); see also *Cmtys. for Equity*, 192 F.R.D. at 572. However, the commonality requirement "has been characterized as a 'low hurdle' easily surmounted." *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 297 (N.D. Ohio 2007). This is because when the legality of the defendant's standardized conduct is at issue, the

commonality factor is normally easily met. *Gilkey v. Central Clearing Co.*, 202 F.R.D. 515, 521 (E.D. Mich. 2001).

Here, commonality is easily met. Potential class members share common issues of both law and fact. Each class member's claim is exactly the same with only the number of days over-detained varying (given the inherent differences in original length of sentence). Each class member was detained longer than Michigan law permitted. The undertaken policies and practices (over-detainment) and resulting wrong (denying liberty to those over-detained) are identical; the common questions are whether it is lawful and constitutional. Commonality is easily met on the pleadings.

Typicality

To meet the typicality requirement, Plaintiff's claims must be "typical of the claims or defenses of the class." FRCP 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 564 U.S. at 349 fn.5. "Like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Reese v. CNH Am., LLC*, 227 F.R.D. 483, 487 (E.D. Mich. 2005). Typicality is satisfied if the representative's claims arise "from the same… practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Beattie v.*

CenturyTel, Inc., 511 F.3d 554, 561 (6th Cir. 2007). So long as the class and its representatives have similar legal theories arising from the same practice or course of conduct, the requirement is met "even if substantial factual distinctions exist between the named and unnamed class members." *Rankin v. Rots*, 220 F.R.D. 511, 518 (E.D. Mich. 2004).

Based on the First Amended Complaint and materials presented by this motion, common questions of liability are so identical such that the typicality requirement has been easily met. This case involves the constitutionality of Defendants' actions and Contempt Over-Detention Policy in not applying the "Good-Time-Credit" statute to those confined to the St Clair County jail for criminal contempt. The same legal theories are being pled on behalf of all proposed class members. **First Am. Compl., ECF No. 13.** In short, the class members all raise common and typical questions of law with few or nay questions of fact that will determine liability in this case, and the determination of liability will turn on the same legal questions and on the same simple and generalized proofs for each member.

Adequacy

Plaintiffs Schultz and Lindke lastly fulfill the final requirement under Rule 23(a) in that both "will fairly and adequately protect the interests of the class." FRCP 23(a)(4). To determine the issue of adequacy of

representation, there are two part: 1) the representative must have common interests with unnamed members of the class and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Am. Med. Sys.*, 75 F.3d at 1083. The Sixth Circuit presumes that, absent evidence to the contrary, representatives and counsel meet the adequacy standard. See *UAW v. GMC*, 497 F.3d 615, 628 (6th Cir. 2007).

Both parts are easily met. First, Plaintiffs Schultz and Lindke stand ready to serve the class and support the collective's best interest. **Exhibits D and E**. Neither have interests that are in any way known to be contrary to the rest of the class. The relief sought in the form of damages for all members of the class are the same base theory and would benefit the entire class collectively and generally.

Secondly, adequacy of counsel is also clearly satisfied here. Adequacy of counsel is met where "class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Stout v. JD Byrider*, 228 F.3d 709, 717 (6th Cir. 2000). This Court knows well the qualifications and expertise of the undersigned in first impression litigation

under the federal civil rights cases. The declarations of both attorneys are attached as **Exhibits B and C**.

Rule 23(g) requires that the court appoint class counsel for any class that is certified. FRCP 23(g)(1). Class counsel must "fairly and adequately represent the interests of the class." FRCP 23(g)(1)(B). A court must consider factors including: (1) "the work counsel has done in identifying or investigating potential claims in this action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources that counsel will commit to representing the class." FRCP 23(g)(1)(A).

As the Declarations attached substantiate, the undersigned counsel easily satisfies these requirements. Both counsels have prior experience serving as appointed class counsel. *Taylor v. City of Saginaw*, 2022 U.S. Dist. LEXIS 11932 (E.D. Mich. Jan. 21, 2022); *Arkona, LLC v Cnty of Cheboygan*, 2020 U.S. Dist. LEXIS 135061 (E.D. Mich. July 30, 2020); *Fox v. Cnty. of Saginaw*, 2020 U.S. Dist. LEXIS 191922 (E.D. Mich. Oct. 16, 2020); *Bowles v Wayne Cnty.*, 2:20-cv-12838, ECF No. 47, PageID.727; *Hathon v State of Michigan*, Michigan Court of Claims Case No. 19-023-MZ. So far, the undersigned counsel have fully prosecuted two class actions with

thousands of class members to final judgment or settlement. See **Exhibit B.** Plaintiff's counsels specialize in bringing claims on novel constitutional issues before the courts. Plaintiff's counsel is prepared to contribute and has already contributed significant pre-suit resources and time to the representation of this class. Both counsels have a history of zealous and cutting-edge advocacy on behalf of their clients, as evidenced by the filings in cases before this Court. Accordingly, Plaintiffs meet Rule 23(a)(4)'s adequacy requirement.

DAMAGES CLASS

Once a plaintiff satisfies the requirements of FRCP 23(a), class certification is appropriate under Rule 23(b)(3) where (1) common questions of law or fact predominate over individual questions; and where (2) a class action represents a superior method for the fair and efficient adjudication of the controversy. FRCP 23(b)(3); *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 535 (6th Cir. 2008).

Both of these requirements are, again, easily satisfied in this straightforward case. The common questions are apparent from the definition of the proposed class, the identical legal issues across class members, and the essentially undisputed factual issues of actions and policies that Plaintiff argues to be unlawful and unconstitutional.

Rule 23(b)(3) provides that a class action can be maintained when the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. In considering a potential certification under Rule 23(b)(3), applicable factors can include the class members' interests in individually controlling the prosecution of different actions; the extent and nature of any litigation already concerning the controversy initiated by the class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action.

Predominance

Rule 23(b)(3) is met when "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FRCP 23(b)(3). The Sixth Circuit has confirmed—

> No matter how individualized the issue of damages may be, the determination of damages may be reserved for individual treatment with the question of liability tried as a class action.
>
> ***
>
> [W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.
>
> ***

> A class may be divided into subclasses, FRCP 23(c)(4)–(5), or, as happened in this case, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.

Whirlpool, 722 F.3d at 854, 860-861. By the proposed class definition and claims asserted, questions of law (and essentially no real substantial questions of fact) regarding lawfulness and constitutionality are common to the putative class members predominate over any questions affecting any individual proposed member. Predominance is clearly met.

Superiority

Class actions are designed to "achieve economies of time, effort, and expense, and promote... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). The four specific factors listed in Rule 23(b)(3) require the conclusion that a class action is superior to resolve these claims.

First, the class members' concerns in individually controlling the prosecution or defense of separate actions are small by federal standards. The amount of damages of each individual class member is, for the most part, small relative to the per-hour costs associated with litigating a complex case. With smaller-claims putative class actions, "courts should be liberal in granting class certification." *Gasperoni v. Metabolife, Int'l Inc.*, 2000 WL

33365948 at *8 (E.D. Mich. 2000). This is particularly true in this unique case. Absent class-based relief, the likelihood of relief by individual class members is small when available resources of each class member to individually pursue these claims are likely low. However, "the interests of justice require that in a doubtful case… any error, if there is to be one, should be committed in favor of *allowing* the class action." *Esplin v. Hirschi*, 402 F.2d 94, 101 (2d Cir. 1968) (emphasis added).

Next is the extent and nature of any litigation concerning the controversy already commenced by members of the Class. This also supports proceeding with this action in class form. FRCP 23(b)(3)(B). No other known similar class actions have been certified. Resolving these claims *en masse* will reduce strain on the courts, the defendants, and the class members. At least with respect to these Defendants, a single, manageable case is preferable to a horde of hundreds of individualized cases to be filed in this District.

The third factor is the desirability "of concentrating the litigation of the claims in the particular forum." FRCP 23(b)(3)(C). Having a single forum resolve all claims maximizes judicial efficiency and conserves judicial resources and the resources of the parties.

Finally, there are little, if any, "difficulties likely to be encountered in the management of a class action." FRCP 23(b)(3)(D). The claims are identical, the theories of relief are the same, and the only difference is the relatively simple damage calculation deriving from the illegal length of time each class member was over-detained. On the other hand, it is a "well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663 (7th Cir. 2015). There are numerous management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) later altering or amending the class. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001); see also *In re Master Key Antitrust Litig.,* 528 F.2d 5, 12 fn.11, 14 (2d Cir. 1975) (discussing use of a separate liability and damages trial in an antitrust case and, if appropriate, use of subclasses to facilitate damages determination).

CONCLUSION

For the reasons set forth, Plaintiffs MICHAEL SCHULTZ and KEVIN LINDKE respectfully request that this Court certify the class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. They also request that undersigned counsel be appointed class counsel under Rule 23(a)(4) and (g).

RESPECTFULLY SUBMITTED: Date: February 8, 2024

/s/ Philip L. Ellison
OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Counsel for Plaintiff(s)
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

/s/ Matthew E. Gronda
GRONDA PLC
MATTHEW E. GRONDA (P73693)
Counsel for Plaintiff(s)
4800 Fashion Sq Blvd, Ste 200
Saginaw, Michigan 48604
(989) 233-1639
matt@matthewgronda.com

CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

Date: February 8, 2024

RESPECTFULLY SUBMITTED:

/s/ Philip L. Ellison
OUTSIDE LEGAL COUNSEL PLC
by PHILIP L. ELLISON (P74117)
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com