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

REPLY

**** CLASS ACTION ****

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

GRONDA PLC
MATTHEW E. GRONDA (P73693)
Attorney for Plaintiff(s)
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

REPLY IN SUPPORT OF MOTION FOR CLASS CERITIFICATION AND APPOINTMENT OF CLASS COUNSEL

REPLY

Defendants' response violates the first rule of class certification motions—it is not a "dress rehearsal" for the merits. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). District courts have been "admonishe[d]" by the Supreme Court "to consider at the class certification stage *only* those matters relevant to deciding if the prerequisites of Rule 23 are satisfied." *Id.* Plaintiffs have already prevailed against Defendants' demand for full dismissal under Rule 12(b) (**ECF No. 32**) and Plaintiffs have fully briefed why summary judgment is inappropriate (**ECF No. 50**).[1] So the time for class certification is now ripe in this now year-and-half old case. FRCP 23(c)(1)(A) (directing class certification to be dealt with at "an *early* practicable time"). Yes, this Court has discretion to address the sequence of a summary judgment motion versus determining class certification. That said, undertaking only the former structurally prejudices Plaintiffs given the one-way intervention rule provides that a class plaintiff

[1] Defendants continue to argue that the "contempt sentencing orders specifically directed the jail that the inmate was not to be provided with good time credit." **ECF No. 53, PageID.2602**. Yet, Defendants are never able to explain away two contrary notions that undercuts that assertion. First, *regardless* if there was such a "no good time" statement or not in a criminal contempt order, they never recognized any good time either way. Second, the judges that put those statements therein have been clear that any such states were nothing more that *notifications* to aid the Sheriff in apply *his own policy*. Defendants never deal with these two massive issues—they completely ignore them with the hope this Court overlooks them.

cannot demand summary judgment in his or her favor until after class certification and notice issues. *Costello v. BeavEx, Inc*., 810 F.3d 1045, 1057-1058 (7th Cir. 2016). Class certification is now sought so this Court can address Defendants' summary judgment motion (which only Defendants could file) and the class certification at the same time.

Standing. Next, Defendants try to suggest a lack of standing for claims against Defendants Bliss and Sheriff Donnellon because, in their view, neither Plaintiff suffered any denial of good time when these two individuals were in office. Untrue. As outlined extensively in the motion to dismiss, Plaintiff Lindke was denied at least one day of good time credit during his "first confinement period," i.e., when he was sentenced for 10 days on criminal contempt commencing July 26, 2019. He was not released until August 4, 2019 when he should have been released on August 2 or 3, 2019 because of the Sheriffs' illegal Contempt Over-Detention Policy. **Lindke Decl., ECF No. 50-15, PageID.2450 (¶¶3-6)**; see also **Table, ECF No. 50-26, PageID.2467**. Thus, Plaintiff Lindke was injured because of a policy that "subjects" or "causes [Lindke] to be subjected… to the deprivation of [his] rights… secured by the Constitution." 42 U.S.C. § 1983. During this period, Defendants Bliss and Donnellon were the jail administrator and sheriff,

respectively. **ECF No. 53, PageID.2617** ("both retired in 2020").[2] Thus, standing by Plaintiff Lindke exists.

Commonality & Typicality. Defendants also suggest that there is no commonality or typicality—issues which the case law explains as "tend[ing] to merge." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011). Here, the claim is identical—each class member was injured by the existence and enforcement of the Sheriffs' Contempt Over-Detention Policy. Every person confined to jail for criminal contempt had this same illegal policy directly enforced upon them. The only difference is the length of over-detainment solely based on the length of the original sentence. Thus, the only difference is amount of the damages based on a per-day over-detainer. The jury can and should determine what damages should be awarded for over-detainment.[3]

[2] Defendant Timothy Donnellon actually took a new job. Liz Shepard, *Donnellon Retiring Early to Take Job with the State*, THE TIMES HERALD, Oct. 21, 2020, *available at* http://olcplc.com/s/t1FG (**Exhibit D**). Defendant Tracy DeCaussin claims to have replaced Defendant Tom Bliss as Jail Administrator on January 1, 2020 and cites to a prior brief (at **ECF No. 45, PageID.2027**). However, no such corroborating evidence has been submitted to verify the same. This is becoming a common theme—making factual assertions *without* supporting evidence. E.g. **ECF No. 50, PageID.2354-2356** (explaining no evidence was submitted to support Defendants' assertions of the jail maintaining a *judge-approved* policy); see also **ECF No. 52** (reply later filed that declines to address this raised shortcoming).

[3] Notwithstanding, "no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 854 (6th Cir. 2013).

Defendants argue that "the proposed class cannot prove through common proof that they were entitled to receive good time credit." **ECF No. 53, PageID.2610**. That is incorrect. *Every* class member is *automatically* entitled to good time credit. *People v. Cannon*, 522 N.W.2d 716, 718 (Mich. Ct. App. 1994).[4] It can only be taken away by the Sheriff (never the courts) via the General Rule Method or the Special Order Method. *Id.*; M.C.L. § 51.282(1). If the Sheriff previously did so, a "written statement… as to the evidence relied on and reasons" for the revocation of good time credit needed had to have issued before any deprivation. *Wolff v. McDonnell*, 418 U.S. 539, 564-565 (1974). Such a document would be a known record within the jail's operations and would result in the exclusion of the person from the class by definition.[5] Thus, the supposed issue is nothing but a red herring; there is such proof that the class would ever need to offer.[6] The argument fails.

Predominance and Superiority. Defendants again seek to merits-type arguments suggesting that predominance and superiority cannot be

[4] "[E]very county prisoner *shall* be entitled to a reduction of sentence of one day for every six days served where there are no violations of the rules and regulations." (italics in original; underlining added).

[5] There are no such revocations for Plaintiffs (and, as far as the undersigned knows, none exist for any other contemnor).

[6] What Defendants' counsel seems to be suggesting that he can now back-door the *taking away* of good-time credit today. That is impermissible. See **ECF No. 50, PageID.2345-2346** (fn.2).

met. Defendants are again wrong. The common and key question predominating this entire case is whether Defendants, via the Contempt Over-Detention Policy, caused Plaintiffs and the other class members to be subjected to the deprivation of rights secured by the Constitution and thus liable pursuant to 42 U.S.C. § 1983. The policy itself, when pressed against authority like *Cannon*, provide the generalized proof applicable to the class as a whole. And given that the same illegal policy is being applied to all members of the class the same way, a class wide method of resolution is superior to individual standalone federal cases. **ECF No. 51, PageID.2527-2529**. Thus, predominance and superiority are easily satisfied.

Defendants again try to suggest that they can now try to ask this Court to impose revocation of good-time credit after-the-fact. But it is too late for that. If the Sheriffs were ever going to revoke good time credits, it was required to be done *then* and only with the required *Wolff* due process procedures. Attempting to suggest that revocation can be artificially-papered over *today* violates due process and becomes an unconstitutional *ex post facto* punishment, which is also contrary to federal law. See **ECF No. 50, PageID.2345-2346** (fn.2). This entire line of argument is without merit, is illegal in its suggestion, and thus not relevant.

Adequacy. Finally, Defendants challenge the adequacy of Plaintiffs

Lindke and Schultz to be class representatives. Of course, to be a class representative in an over-detention case means one had to have spent time in the St. Clair County jail for criminal contempt—an irony given that jailees are suing their jailors for the latter's failure to obey the law themselves.

For Plaintiff Schultz, Defendants claims that his verbal apraxia makes him "mental[ly] disab[led]" and thus cannot adequately serve. But verbal apraxia is generally a *communicative* challenge, not a mental capacity disability. See *Apraxia of Speech in Adults*, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION, *available at* https://www.asha.org/public/speech/disorders/apraxia-of-speech-in-adults/ ("Apraxia is a motor *speech* disorder that *makes it hard to speak*."). Here, Defendants' counsel was easily able to conduct the entire deposition of Plaintiff Schultz to the former's apparent satisfaction.[7] **ECF No. 45-29**. If any duties are imposed upon Plaintiff Schultz that are made difficult by his disability – and to be clear none have occurred – federal law (the ADA) requires an accommodation, not disqualification. Plaintiff Schultz has previously provided full disclosure of his medical condition to this Court and has explained that it will not "prevent [him] from

[7] The difficulty that Attorney Shoudy references as Plaintiff Schultz needing "need[ing] assistance at his deposition in this case" was because of the mode by which the deposition was taken—over the Zoom meeting platform rather than in-person. Nevertheless, the entire approximately 30-minute deposition was fully completed with only minimal of help from Mr. Schultz's wife whose assistance was limited to occasionally repeating questions Mr. Shoudy asked of Plaintiff Schultz.

using [his] best judgment to cause the best possible result for all Class Members as a class representative." **ECF No. 50-3, PageID.2403.** On the other hand, Defendants have provided no *evidence* (only innuendo) to the contrary. Mr. Schultz is not under any guardianship today and frankly never should have been previously. **ECF No. 45-29, PageID.2205**. Most importantly, he has the undersigned and experienced class co-counsel to serve as legal advisors. Plaintiff Schultz is a married man and proud father of a son who suffered a serious legal harm he never should have. He is precisely the right class representative.

As for Plaintiff Lindke, the eye is in beholder. To folks within the inner-circle of political power in St. Clair County, Plaintiff Lindke is no doubt a detestable delinquent and malefactor. Yet, to others in the very same community, he is a hero and avenging angel standing up to a heavily corrupted system riddled with "abuse and favoritism" that has long infected the community. Francis X. Donnelly, *Michigan Renegade Unnerves the Powerful, Becomes Focus of Supreme Court Case*, THE DETROIT NEWS, Aug. 16, 2023, *available at* http://olcplc.com/s/mZVw (**Exhibit B**); see also Devin Dwyer and Patty See, *Can Politicians Block Their Constituents Online? Michigan Provocateur Appeals to Supreme Court*, ABC NEWS (Nat'l), Oct 31, 2023, *available at* http://olcplc.com/s/gCTB (**Exhibit C**; but online version

contains approximate seven-minute video story as well). No doubt that Plaintiff Lindke has convictions on his record but a conviction alone should not be enough to be precluded from being a class representative on a case that specifically targets the Sheriffs' jail policies that resulted in illegal over-detention. The only reason this case is here today is because of Plaintiff Lindke. Compare **ECF No. 45-30, PageID.2211** (Lindke: "Refusal to credit me with good time violates both state law and my civil rights") with **Exhibit A** (Jail Administrator: "When someone is sentenced on contempt charges *historically **we** have never granted good time*. We are being challenged on those orders *by inmate, who I will leave unnamed*, that the Sheriff must grant good time."). And if there is any question about Plaintiff Lindke's resolve, this Court need only look to the *Lindke v. Lane* case long pending in this Court to confirm that both he and his attorney(s) are firmly committed to finding final justice in the long haul. Again, Defendants provide no *evidence* to the contrary. Instead, similar to an innuendo, Defendants decry that "dishonesty and lack of trustworthiness" makes Plaintiff Lindke "not an appropriate fiduciary for the absent class members." **ECF No. 53, PageID.2619**. The undersigned personally disagrees Plaintiff Lindke is at all dishonest or lacks trust. Unorthodox, yes. Inappropriate to serve on behalf of the wrong disadvantaged underdogs just as he has long treated? Absolutely no.

Fugitive Disentitlement Doctrine. Lastly, Defendants suggest that Plaintiff Lindke cannot serve because he forfeited his right to any federal civil damages remedy under the fugitive disentitlement doctrine. Defendants spend two whopping sentences on it. "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Nationwide Property & Cas. Ins. Co. v. Brown*, 260 F. Supp. 3d 864, 879 (E.D. Mich. 2017); see also *Meridia Prod. Liab. Litig. v. Abbott Laboratories*, 447 F.3d 861, 868 (6th Cir. 2006) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones."). As presented, it is inadequately briefed by Defendants and thus the issue is forfeited.

But the undersigned believes that such brevity was a strategy in the briefing because the case law on the doctrine rejects its application here. The best case about the background of the doctrine and its inapplicability to these circumstances is outlined in *Magluta v. Samples*, 162 F.3d 662 (11th Cir. 1998). There, the Eleventh Circuit explained—

> The fugitive disentitlement doctrine limits access to courts by a fugitive who has fled a criminal conviction in a court in the United States. Although traditionally applied by the courts of appeal to dismiss the appeals of fugitives, the district courts may sanction or enter judgment against parties on the basis of their fugitive status. See generally *Prevot v. Prevot*, 59 F.3d 556, 564-565 (6th Cir. 1995) (citing cases involving the dismissal of civil actions on fugitive disentitlement grounds). The rationales for this doctrine include the difficulty of

> enforcement against one not willing to subject himself to the court's authority; the inequity of allowing a fugitive to use court resources only if the outcome is an aid to him; and the need to avoid prejudice to the nonfugitive party. See *Degen v. United States*, 517 U.S. 820, 824-825, 828 (1996); *United States v. Barnette*, 129 F.3d 1179, 1183 (11th Cir. 1997). In accordance with these rationales, the dismissal of a civil action on fugitive disentitlement grounds requires that (1) the plaintiff is a fugitive; (2) his fugitive status has a connection to his civil action; and (3) the sanction employed by the district court, dismissal, is necessary to effectuate the concerns underlying the fugitive disentitlement doctrine. See *Degen*, 517 U.S. at 829; *Ortega-Rodriguez v. United States*, 507 U.S. 234, 242-249 (1993).

Id. at 664 (cleaned up).[8] The circumstances in *Magluta* are nearly identical to what is happening here. While being held pending trial after being arrested for drug charges, Magluta filed a federal civil rights action against various prison officials challenging the conditions of his confinement. He was acquitted. Magluta was then promptly arrested for passport fraud but this time was released on bail. As his trial was nearing an end, Magluta failed to appear in passport-related court. The criminal trial continued in his absence, and he was convicted. On February 27, 1997, the prison officials (defendants in the civil rights action) sought to dismiss the case based on the fugitive disentitlement doctrine. The trial court granted the motion. The Eleventh Circuit reversed explaining broadly that any dismissal is often an "excessive

[8] Defendants do not even cite to the two most important and recent Supreme Court statements on the doctrine in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) and *Degen v. United States*, 517 U.S. 820 (1996). That "inadvertence" (with holdings that do not support their position) should be telling to this Court.

response" to the concerns underlying the fugitive disentitlement doctrine (citing *Degen*, 517 U.S. at 829) and specifically held that "a district court may not dismiss a civil complaint under the fugitive disentitlement doctrine unless there exists a nexus between the plaintiff's fugitive status and his civil lawsuit and dismissal is necessary to effectuate the concerns underlying the doctrine." *Id.* at 665. Magluta's lawsuit challenged the conditions of his previous confinement. He became a fugitive only after the confinement related to that case ended. Because there was no connection, it was an abuse of discretion to dismiss.

The same rationale applies here. Plaintiff Lindke is challenging the illegal Contempt Over-Detention Policy and is seeking damages (retroactive relief) for having kept him and his fellow class members needlessly and illegally confined beyond the scope of the lawful confinement period. He is not seeking prospective relief. Defense counsel has repeated confirmed the policy has been changed since January 2022. **ECF No. 18, PageID.1328**. Thus, this class lawsuit has no connection or nexus with Plaintiff Lindke's fugitive status in his current state court case (see **Exhibit E**), whatever the status is formally labelled (fugitive versus contemnor).

Expansion of the doctrine as Defendants suggest also fails. In *Ortega-Rodriguez*, the Supreme Court explained that it would not "accept an

expansion" of the fugitive disentitlement doctrine to permit one court to defend the "dignity" of another court through a "sanction by dismissal [for] any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of [that court's] proceedings." 507 U.S. at 256. If a defendant flees while his case is before one particular court, that particular court is well situated to impose an appropriate punishment at the appropriate time. *Id.* at 247. The Supreme Court further warned against the use of this doctrine as being "too rough." *Degen,* 517 U.S. at 829. Applying that analysis here, Plaintiff Lindke has never insulted the "dignity" of this Court when seeking relief from an unconstitutional policy. Forfeiture is inappropriate and, even if possible, is simply "too rough" in its application. *Id*.; see also *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) ("[t]he power of an American court to disentitle a fugitive from access to its power and authority is not jurisdictional in nature").

CONCLUSION

WHEREFORE, Plaintiffs request that this Court certify this matter as a class action, appoint class counsel, and allow Plaintiffs' counsel to begin the work for approval of class notice.

RESPECTFULLY SUBMITTED:

Date: March 7, 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: March 7, 2024

RESPECTFULLY SUBMITTED:

/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