

**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
www.olcplc.com

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, MI 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 FOR APPOINTMENT OF INTERIM CLASS COUNSEL AND
FOR ISSUANCE OF CASE MANAGEMENT ORDER**

NOW COME Plaintiffs KEVIN LINDKE and MICHAEL SCHULTZ, by counsel, and request the appointment of attorneys Philip L. Ellison and Matthew E. Gronda as interim class co-counsel and for issuance of a case management order for class and merits-based discovery, providing deadlines for things like witnesses and exhibits lists, and other pre-trial activities. The parties held a meet-and-confer and discussed these issues (and more) with no perfect consensus reached regarding the path forward. See LR 7.1(a). The Court is holding a status conference on August 30, 2024. A proposed appointment order is attached at Exhibit B.

QUESTION(S) PRESENTED

Whether the Court should issue a case management order providing for discovery and case-related deadlines for witnesses and exhibits lists.

Whether the Court should appoint Philip L. Ellison and Matthew E. Gronda as interim class counsel to allow them to undertake activities related to class-wide pretrial activities, possible settlement discussions, and class-related discovery?

ANSWER: Yes to both.

MOST RELEVANT AUTHORITY

FRCP 23(g)

FRCP 16

BRIEF IN SUPPORT

This is an over-detention class action lawsuit regarding the no-good-time policy previously in effect at the St. Clair County Jail wherein it is alleged jailees were illegally incarcerated beyond the terms of their sentences and denied constitutionally protected liberty rights under the Fourteenth Amendment. The case has been pending for more than two years. During that time, the Court has permitted Defendants to raise each and every defense they wished with numerous motions, responses, supplemental briefs, and oral arguments while Plaintiffs were handcuffed from seeking positive relief (see *infra*). While the Court has ruled in favor of Defendants in a few respects (i.e. precluding state law claims by declining to overrule *Jones* and qualified immunity), those motions have been denied for the larger parts and case has not been death-knelled. In fact, quite the opposite has occurred.

However, Plaintiffs and this counsel are stuck. They cannot file for summary judgment because of the one-way intervention rule which “prevents plaintiffs from moving for class certification” if first “acquiring a favorable ruling on the merits of a claim.” *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1057 (7th Cir. 2016). It has been observed that even moving for class certification and summary judgment “at the same time” puts Plaintiffs

“dangerously close” to being precluded from a favorable class certification decision. *Id.* at 1058. So, the practical reality is that Plaintiffs cannot file for summary judgment until after a class is certified and notice is perfected. *Id.* (“We urge plaintiffs to exercise caution when seeking a ruling on the merits of an individual plaintiff’s claim before the district court has ruled on class certification and given notice of the ruling to absent class members”).

At the same time, this Court has suggested the mediation might be appropriate to try to resolve the lawsuit on a class wide basis – a fair idea if Defendants are interested. However, discovery, both merits and class-based, still needs to occur. A formalized identification of class members needs party and judicial attention (for notice). Formulation of a written class notice needs to be planned, perfected, and approved. And regular normal litigation steps need to happen like witnesses and exhibits lists.

As such, the Court is requested to do two things to help aid the case if the Court does not wish to address full class certification immediately. First, the Court is requested to appoint attorneys Philip L. Ellison and Matthew E. Gronda as *interim* class counsel. Rule 23 permits a court to designate interim class counsel before¹ deciding class certification. FRCP 23(g)(3). These attorneys’ qualifications are unquestionable. In fact, attorney Ellison was just

¹ Currently pending is Plaintiffs’ motion for class certification. See **ECF No. 51**.

appointed interim class counsel in another major class action case last week.

Exhibit A. Notwithstanding, this is not either attorney’s first time with class action certifications. E.g. *Taylor v. City of Saginaw*, No. 1:17-cv-11067, 2022 U.S. Dist. LEXIS 11932, at *21 (E.D. Mich. Jan. 21, 2022); *Bowles v. Sabree*, No. 20-12838, 2022 U.S. Dist. LEXIS 8172, at *45 (E.D. Mich. Jan. 14, 2022); *Arkona, LLC v. Cnty. of Cheboygan*, No. 1:19-cv-12372, 2020 U.S. Dist. LEXIS 135061, at *14 (E.D. Mich. July 30, 2020). Second, the Court is requested to issue a case management (scheduling) order.

Appointment of Interim Class Counsel

Federal district courts “may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.” FRCP 23(g)(3). “[D]esignation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement.” *Fox .v Cnty. of Saginaw*, (E.D. Mich. 2024) (**Exhibit A at 6-7** citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 and *Gamboa v. Ford Motor Co.*, 381 F. Supp. 3d 853, 867 (E.D. Mich. 2019)).

When considering whether to designate interim class counsel, district courts must consider the factors set forth in Rule 23(g)(1) – the work counsel

has done in identifying or investigating the potential claims involved in the action; counsel's experience in handling class actions, complex litigation, and the types of claims asserted in the action; counsel's knowledge of the applicable law; and the resources that counsel will devote to representing the class. FRCP 23(g)(1)(A). Courts may also consider any other factors relevant to counsel's ability to fairly and adequately represent the interests of the class. FRCP 23(g)(1)(B).

There is little doubt that attorneys Philip L. Ellison and Matthew E. Gronda are appropriate for that prestigious role. Attorney Ellison has led the way for the past two years shepherding and defending this case from the repeated and multi-faceted attacks ably raised by legally-adversarial defense counsel. Such work is hand-in-glove with confirming the seriousness of work regarding the claims involved, identified, and investigated in the action. Such largely-successful rejection of Defendants' case-killing defenses also took a substantial amount of invested time and confirms the dedication of both attorneys. While more work is required, it is clearly established that the undersigned counsel are dedicated to seeing this case through conclusion.

On the merits-based issues, attorney Ellison's extensive experience in constitutional litigation is beyond any legitimate question. See, e.g., *Kanuszewski v. Mich. Dep't. of Health & Human Services*, 927 F.3d 396 (6th

Cir. 2019); *Johnson v. City of Saginaw, Mich.*, 980 F.3d 497 (6th Cir. 2020); *Johnson v. Morales*, 946 F.3d 911 (6th Cir. 2020); *Taylor v. City of Saginaw, Mich.*, 922 F.3d 328 (6th Cir. 2019); *People v. Beck*, 939 N.W.2d 213 (Mich. 2019); *Taylor v. City of Saginaw, Mich.*, 11 F.4th 483 (6th Cir. 2021); *Benjamin v. Stemple*, 915 F.3d 1066 (6th Cir. 2019); *Safety Specialty Ins. Co. v. Genesee Cnty. Bd. of Commn'rs*, 53 F.4th 1014 (6th Cir. 2022); *Mockeridge v. Harvey*, No. 1:21-CV 12896, 2023 WL 6367687 (E.D. Mich. Sep. 29, 2023); *O'Connor v. Eubanks*, 83 F.4th 1018 (6th Cir. 2023); *Rudd v. City of Norton Shores, Mich.*, 977 F.3d 503 (6th Cir. 2020); *The Gym 24/7 Fitness, LLC v. State of Mich.*, 986 N.W.2d 150 (Mich. 2023). This case is no exception. *Lindke v. King*, 2023 U.S. Dist. LEXIS 90917 (E.D. Mich. May 24, 2023); **ECF No. 63, PageID.2813** (this case is a type of case with “hard issues” but has “really good lawyers” working on it).

Additionally, attorneys Ellison and Gronda both have extensive experience handling class action cases and their unique complexities. **ECF No. 51-3, PageID.2538-2541; ECF No. 51-4, PageID.2542-2544**. Both have experience in commencing, pursuing, prosecuting, and even resolving – by judgment or settlement – class actions in both state and federal courts with many more soon coming to legal fruition.

As such, the appointment of Attorneys Ellison and Gronda to serve as interim class counsel for all needed pre-trial activities, including class and merits discovery, class-wide mediation (if ordered), and class action litigation management (for this case), is appropriate and is asked to be granted.

Case Management Order

Relatedly, with Defendants' motions for dismissal and summary judgment resolved, the Court Rules provide that "the judge must issue the scheduling order as soon as practicable." FRCP 16(b)(2). It must provide the timelines "to join other parties, amend the pleadings, complete discovery, and file motions." FRCP 16(b)(3). It also can and does deal with discovery matters, witnesses and exhibits lists, setting dates for pretrial conferences and trial, and whatever else the Court deems relevant. FRCP 16(b)(3)(B). From such, the Court can take steps in "formulating and simplifying the issues" including classes; "determining the appropriateness and timing of summary adjudication under Rule 56" (especially with the one-way intervention rule in this case); "identifying witnesses and documents" relevant to the case; "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems" like class certification; and "facilitating in other ways the just, speedy, and inexpensive

disposition of the action” like referral to mediation at an appropriate time.
FRCP 16(c)(2).

Given the current case posture, a case management order should now issue and is formally requested.

CONCLUSION

WHEREFORE, the Court is requested to appoint attorneys Philip L. Ellison and Matthew E. Gronda as interim class co-counsel and for issuance of a case management order under Rule 16 of the Federal Rules of Civil Procedure.

RESPECTFULLY SUBMITTED:

Date: August 20, 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: August 20, 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