

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LINDA ROSE, *et al.*,

Plaintiffs,

Case No. 01-10337

v.

SAGINAW COUNTY, *et al.*,

Hon. David Lawson

Defendants.

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION
OR, IN THE ALTERNATIVE, FOR JOINDER AND CONTINUED TOLLING**

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INTRODUCTION

Time and publicity after this Court's summary judgment opinion (issued on January 25, 2005) have demonstrated that Defendants' brutal, unconstitutional practices are far more pervasive, have existed far longer and have affected far more people than Defendants have represented to the Court.¹ While Defendants have continuously insisted that only a small number — some 30 — have been victimized by the County's unconstitutional practices, there can now be little doubt that the victims exceed a hundred and may number as many as two hundred to three hundred.

The full extent of the practice remains to be determined. Plaintiffs are informed that the FBI and the Department of Justice are conducting their own investigation, and Plaintiffs also are advised that the County's own counsel decried Defendants' practices.² Publicity has generated communications from numerous persons, and there is substantial likelihood that the County's own records will reveal others who have been victimized by the County's practices.³

Under the circumstances, only class certification can provide substantial justice and complete relief to all of Defendants' victims and ensure that Defendants' unconstitutional

¹ A summary of the County's representations to Plaintiffs and this Court is contained in the Affidavit of Christopher Pianto, which is being filed in support of this motion ("Pianto Affidavit").

² In a March 30, 2005 article in the Saginaw News, reporter Joe Snapper wrote: "Saginaw County leaders had ample warning their jail policy of stripping unruly detainees was fertile ground for a major lawsuit, former Sheriff Tom McIntyre says." Mr. Snapper also wrote: "But, McIntyre added, lawyer Peter C. Jensen's 11-page opinion also advised the county to admit mistakes and settle before the number of plaintiffs — and damages — mushroomed. Officials didn't listen." (A copy of Mr. Snapper's article is attached as Exhibit A to the Pianto Affidavit.) Plaintiffs' counsel has made repeated attempts to obtain the Jensen memorandum through FOIA requests. Those requests have been ignored by Defendants — further demonstrating their callous refusal to provide pertinent evidence which would allow Plaintiffs to establish the full extent of Defendants' unconstitutional practices. Plaintiffs will now proceed through more formal discovery to obtain this memorandum and other evidence showing the County willfully ignored its responsibilities to the victims of its unconstitutional policies. Pianto Affidavit, ¶ 1.

³ Plaintiffs' counsel continues to investigate the extent of Defendants' unconstitutional practices. The investigation to date, however, establishes that Defendants have seriously misrepresented the number of victims and the time frame of the unconstitutional practices. *See* Pianto Affidavit and the attached summary of evidence which is attached as Exhibit B to the Pianto Affidavit.

practices will finally end. Class certification is necessary and appropriate because only class certification can overcome the effects of the Defendants' prior misrepresentations to the Court and ensure that all victims will have adequate time and resources to pursue their remedies:

- A. Because there is strong evidence that the conditions are on-going, the Court should certify a class under Rule 23(b)(2), F.R.Civ.P., so that it enter permanent classwide injunctive relief to ensure that the County's unconstitutional practices in fact end.
- B. Because the number of persons who have been affected by the County's unconstitutional practices are far greater than originally suspected, the Court should certify a class under Rule 23(b)(3), so that the individuals who have been victimized can only adequate monetary relief.
- C. Class certification will promote judicial economy and avoid the need for numerous individual actions;
- D. Class certification will ensure that all victims receive adequate representation because it will protect not only currently identified victims but will allow additional time to identify and give notice to remaining class members.
- E. Denying class certification will not, as may sometimes be true, limit additional litigation. Plaintiffs now have evidence from more than 80 persons who could, if necessary, file individual claims;⁴ and, if they did so, judicial economy would dictate that those individual claims be consolidated with the current claims.
- F. None of these individual claims are barred by the statute of limitations:
 - a) the commencement of this lawsuit tolled the statute of limitations for all persons who were within the original class definition on all claims which were or could have been brought under the original claim until an order denying class certification has been entered. *Crown, Cork, & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-354 (1983) (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 544 (1974)).
 - b) Even if the limitations period had not been tolled because it was filed as a class action, the limitations period would still be tolled because Defendants fraudulently concealed facts which would have caused Plaintiffs to move for class certification and Defendants' conduct estops them from asserting the limitations period as a defense to the claims of absent class members. *Jarrett v. Kassel*, 972 F.2d 1415, 1427-1428 (6th Cir. 1992); *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996);

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A summary of these claims is attached as Exhibit B to the Pianto affidavit.

Lothian v. Detroit, 414 Mich. 160, 176-177, 324 N.W.2d 9 (1982); MCLA 600.5855.

The County's unconstitutional actions are not isolated. They are part of a long-standing pattern and practice which has victimized more than 100 persons – persons who are least able to take care of themselves. This case cries out for classwide relief, both equitable and monetary.

Because at least the currently identified persons could pursue individual claims, judicial economy mandates class certification as the most superior way to adjudicate the classwide issues and ensure that there is a classwide remedy. Problems of individualized proof of damages has rarely been a bar to class certification, and it is not a bar in this case. *See Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), *affirming* 203 F.R.D. 254 (E.D.Mich. 2001) (Lawson, J) (in affirming this Court's decision to certify a class under Rule 23(b)(2) and Rule 23(b)(3) and finding that individual damage determinations did not prevent certification). If further discovery demonstrates that there may be manageability problems, then Court can modify its rulings and, if necessary, decertify the class. *See* Rule 23(c)(1), F.R.Civ.P., and *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997) (as long as the court retains jurisdiction over the case it must continue carefully to scrutinize whether the requirements of Rule 23 are satisfied and withdraw or amend certification if such representation is not furnished").

Denying class certification at this point would create the serious risk that currently unidentified victims might lose their right to sue because an order denying class certification terminates the tolling of the limitations period. Thus, at a minimum, if the Court should decide to deny class certification, it should enter an order tolling the limitations period until after Plaintiffs have had an adequate opportunity to review all relevant records to identify those persons who have been victimized and give them an adequate opportunity to retain counsel and pursue individual actions.

I. FACTS SUPPORTING CLASS CERTIFICATION

A. The Conditions At The Jail Are Far Worse Than Those That The Court Addressed In Its Summary Judgment Opinion; And They Continue To This Day

From the earliest stages of this litigation, the defendants have asserted that the practice of forcibly removing inmates' clothing, placing them naked in an isolation cell where they can be observed by members of the opposite sex was curtailed by jail directive in December of 2001. As the summary of evidence supporting the pattern of pervasive constitutional violations clearly demonstrates, the jail has continued the practice through the present time.

Plaintiffs have assembled a summary of evidence which demonstrates that Defendants' practices were far more pervasive than Defendants have represented and, worse, that they continue to this time. A summary of the evidence is attached as Exhibit B to the Pianto affidavit.⁵

The policy of providing isolation cell detainees with paper gowns is, by no means, uniformly followed. Indeed, the evidence indicates that since December of 2001, inmates have been routinely stripped of their clothing by force and placed in segregation cells in a naked condition. Moreover, the paper gowns, when provided, are inadequate to cover private body

⁵ The *Summary of Evidence Supporting Pervasive Pattern of Constitutional Violations* documents the reports of 91 victims of this policy. 72 of the individuals reporting violations were male, 19 were female. The average age of the detainee is 31.5 years. The average length of stay in the isolation cell is 22.5 hours. Of those filing reports with plaintiffs' counsel, 38 are currently incarcerated in the Saginaw County Jail or elsewhere. 65 of the victims or 71% allege that they were observed by members of the opposite sex. The presence of cameras in the cells make it likely that others were as well. The reports span eight years from 1998 to 2005. These include one case in 1998; fourteen cases in 1999; eighteen cases in 2000; fourteen cases in 2001; fourteen cases in 2002; twelve cases in 2003; fifteen cases in 2004; and, three cases in 2005. There were 44 reports of violations occurring after January, 2002. Of the 44 reports, 23 alleged that they were placed in the isolation cell without a gown or any other type of covering. The twenty three individuals making these allegations are (3) Ball, (15) Cage, (16) Carson, (18) Castillo, (27) Eudis, (36) Hasse, (42) Jakes, (43) Jekel, (45) Johnson, (50) Kennelly, (54) Labelle, (55) Lamphere, (56) Larkin, (62) Mayfield, (63) Merrow, (67) Newman, (69) O'Connor, (71) Peoples, (75) Quinnan, (77) Riggins, (78) Riggins, W, (85) Semple, and (88) Wicker. Of the 91 reported violations, 71 individuals asserted that they were in the segregation cell totally naked. Only 19 said that they were provided with a paper gown. On this see the affidavit of Peggy Goldberg Pitt which is filed in support of this motion which explains the methodology used in compiling this information.

parts. The paper gowns are of such poor quality that they usually tear. In addition, the gowns are often used by the prisoners to remove mace sprayed on them during the clothes stripping process or utilized as toilet paper, leaving them naked.

These unconstitutional isolation cells are monitored 24 hours a day by cameras from several locations. The cameras can viewed by a wide variety of personnel within the jail. See <http://www.delta.edu/corrprog/scsdjailtour.html> (which proudly shows the holding cells and the monitors which allow observation of the holding cells which the constitutional violations occurred.)

The jail has used, and currently uses, three areas in the jail as isolation cells. One cell appears to be standard size with a commode and sink but which is often inoperable or kept in an unsanitary condition. There is a concrete slab about a foot off the ground for sitting or sleeping. The other two segregation cells are barred rooms approximately eight feet-by ten feet which have neither a commode, nor a sink, nor a slab upon which the inmate can sit. There is a hole in the floor where inmates can relieve themselves. It is unclear whether the hole is attached to a sanitary drain.

The overwhelming majority of those reporting conditions in the isolation cell indicate that they were subjected to extremely cold temperatures. Reports indicate that the temperature may not be habitable for individuals who stay in the cells for more than a short time.

More than a third of those reporting described the conditions in the isolation cells as unsanitary with offensive odors. Hygiene items such as toilet paper and tampons were denied to approximately 31% of those reporting.

It is also universally reported that there are unsanitary conditions in both cells. In the one cell where a commode is available, it is often plugged up with human feces and other waste material. The water often does not run. Fecal matter, urine, blood, pus and other human bodily fluids cover the walls, floor and the seating slab in the one cell where it is provided.

Many of the inmates report that sanitary supplies, such as toilet paper and tampons, are not available. Class counsel has received many reports that, when toilet paper is provided, naked inmates wrap themselves in the toilet paper in order to keep warm and are unable to secure additional paper products when the time comes to clean themselves after defecation.

These statistics prove that the defendants continue to misrepresent the conditions at the jail. The defendants' insistence that the unconstitutional conditions addressed in the court's January 25, 2005 opinion have been cured is simply not true.

B. Defendants Have Engaged In A Fraudulent Course Of Conduct Designed To Conceal The Full Extent Of Their Pervasive Patter Of Unconstitutional Conduct

Plaintiffs suspected that Defendants' unlawful conduct was pervasive and victimized far more persons than the originally named plaintiffs. The Defendants have not only denied this — in communications to Plaintiffs' counsel and in written and oral representations to the Court — but they stonewalled Plaintiffs' efforts to discover the true facts. These misrepresentations have prejudiced Plaintiffs because they did not move early on for class certification, and they affected the Court's own analysis of the class. These misrepresentations, whether intentional or negligent at the time, include the following:

On March 14, 2002, Mr. Jensen filed "Defendants' Status and Scheduling Conference Statement", wherein he stated, among other things:

"[with] regard to whether this is a 'class action', the jail records of Saginaw County reflect for the past three years there have been 11 females (including the plaintiffs in this case) and 19 males who have been placed in the holding tank . . . assuming that the class of plaintiffs is simply women who have been strip-searched by male guards, the number of plaintiffs is very slight, and there are limited fact questions to be resolved." [Pianto Affidavit, ¶ 4]

As the case continued, the misrepresentations continued; and, upon reflection, it is difficult to view the misrepresentations as mere negligence. As the facts established in the Pianto affidavit demonstrate, Defendants (perhaps not their counsel) were engaged in a clear pattern and practice of misrepresenting to Plaintiffs and the Court what happened in the Saginaw County Jail.

C. Notwithstanding Defendants' Obstruction, Plaintiffs Have Discovered That The Pattern Was Far More Pervasive And Affected Far More Persons Than Defendants Have Acknowledged

In early 2003, Plaintiffs' began receiving information which strongly suggested that Defendants had misrepresented the extent of unconstitutional practices. On February 14, 2003, a local television station aired a story on the jail's use of segregation cells. Plaintiffs' counsel began receiving calls from former inmates at the Saginaw County Jail claiming to have been placed in the segregation cell naked or in a partially-naked condition. Pianto Affidavit, ¶ 15.

On March 10, 2003, Plaintiffs' counsel notified the court by letter of his concerns that the number of persons who were adversely affected by the jail's policies exceeded the 30 or so plaintiffs who had been identified by the defendants from their records, and requested an in-person pretrial conference. The court conducted the status conference on March 18, 2003. At the status conference, Plaintiffs' counsel described to the court the phone calls received from the newly-discovered victims, and he reiterated his concerns regarding the representations made by defense counsel that the number of victims did not exceed 30 individuals. At the conclusion of the conference, the court informed counsel that because dispositive motions were forthcoming, the court would revisit the issues of joinder and/or class-action after it decided the dispositive motions. Pianto Affidavit, ¶¶ 16-18.

Since that early 2003 status conference, more information has emerged. Indeed, after the Court issued its summary judgment opinion on January 25, 2005, publicity about the Saginaw County Jail has increased; and this increased publicity has caused Plaintiffs' counsel to conclude that more than 200 persons have been victims of Defendants' unconstitutional conduct. *See* Pianto Affidavit, ¶¶ 26-28.

ARGUMENT

I. STANDARD OF REVIEW

It is well-established that "any doubts concerning the propriety of class certification should be resolved in favor of upholding the class." *Gasperoni v. Metabolife International, Inc.*, 2000 WL 33365948 at *8 (E.D. Mich. 2000) (Cohn, J.). *See also Eisenberg v. Gagnon*, 766 F.2d

770, 785 (3d Cir. 1985); *Little Caesar Enterprises, Inc. v. Smith*, 172 F.R.D. 236, 241 (E.D.Mich. 1997) (Gadola, J.).

When considering a class certification motion, the court may not inquire into the merits of the case, and may look beyond the pleadings solely to determine whether the plaintiff's claims, if proven, would present principally individual or common issues. *Little Caesar*, 172 F.R.D. at 241; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974).

II. Because The Statutes Of Limitations Have Been Tolloed, Denying Class Certification Will Not Promote Judicial Economy Or Substantial Justice; Instead, It Will Require The Filing Of Individual Actions Which Will Only Increase The Cost And Burdens Of Litigation For All Parties And The Court

The Supreme Court has held that the filing of a class action tolls “ ‘the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.’ ” *Crown, Cork, & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-354 (1983) (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 544 (1974)). Once the statute has been tolled by the filing of the class action, “it remains tolled for all members of the putative class until class certification is denied.” *Crown Cork*, 462 U.S. at 354. *See also see Weston v. AmeriBank*, 265 F.3d 366 (6th Cir. 2001) (the statute of limitations for putative class members of the original class is tolled for substantive claims that were raised, or could have been raised, in the initial complaint).⁶

⁶ The same tolling principles apply under Michigan law. As *Warren Consol. Schools. v. W. R. Grace & Co.*, 205 Mich. App. 508, 518 N.W.2d 508, 511 (1994). observed: “Where class certification is later denied, the commencement of a class action suspends the applicable period of limitation with respect to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353, 103 S.Ct. 2392, 2397, 76 L.Ed.2d 628 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 766, 38 L.Ed.2d 713 (1974); *Lee v. Grand Rapids Bd. of Ed.*, 148 Mich.App. 364, 369, 384 N.W.2d 165 (1986). To hold otherwise would frustrate the function of a class action, which is to avoid multiplicity of activity. *American Pipe*, *supra* 414 U.S. at 551, 94 S.Ct. at 765. These principles are embodied in MCR 3.501(F)(1), which states: “The statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action.”

And, even if the class action tolling principles did not extend the limitations period, Defendants' conduct estops them from invoking the statute of limitations. When they filed this action as a class action, Plaintiffs represented the putative class members. Thus, Defendants' misrepresentations affected not only Plaintiffs but the other class members as well. *Jarrett v. Kassel*, 972 F.2d 1415, 1427-1428 (6th Cir. 1992). Had Plaintiffs not been deceived, they would have moved for class certification earlier, and the Court would likely have granted class certification if it was aware of all the facts. And, even if the Court had denied class certification, the Court would certainly have made provision for all persons victimized by Defendants' unconstitutional conduct to be identified and either join this action or pursue separate actions. Solely because of Defendants' misconduct, that early hearing did not occur. Thus, Defendants' misconduct bars them from invoking the statute of limitations as a defense to any newly identified victims, under principles of equitable tolling and equitable estoppel.

Wolin, 83 F.3d at 852 (7th Cir. 1996), explains the difference between equitable tolling and equitable estoppel:

Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit. * * * Equitable estoppel, as we have seen, is invoked when the prospective defendant does make such a special effort to cover up the fraud or does something else to prevent the prospective plaintiff from suing in time, such as promising not to plead the statute of limitations as a defense. * * *

This is the domain of equitable tolling and equitable estoppel. They differ critically in scope in the following respect: when the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay (though not of course of the original wrong), so the plaintiff must use due diligence to be allowed to toll the statute of limitations; if he does not, he has no equitable claim to avoid the time bar. In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent. The disagreement, however, may be apparent rather than real, because the cases often run equitable tolling and equitable estoppel together. [Citations omitted.]

The same principles apply under Michigan law. *Lothian*, 414 Mich. at 176-177.

Thus, whether the Court applies federal law or state law to determine the appropriate limitations periods, the Court should conclude that the running of the statute of limitations has been tolled since this lawsuit was commenced and that Defendants are estopped to rely on the limitations period in defense of victims who have been newly identified or who will be identified when Defendants cease their stonewalling and provide accurate information to Plaintiffs' counsel and the Court about what really happened at the Saginaw County Jail.

III. Given The Choice Between Joinder, Filing Independent Actions, Or Class Certification At This Time, The Court Should Choose Certification

Doing justice demands that all victims of Defendants' unconstitutional conduct should have a remedy; and, now that it is clear that the victims exceed the County's earlier representations of 30 or so, the only question is how procedurally to manage the numerous individual claims. On first glance, the easiest solution might be to deny class certification, but any serious reflection will soon demonstrate that that solution will not only clog the Court's docket but impose huge costs on the all parties and the courts.

Individual actions would mandate individual discovery and individual trials. Joinder would mandate individual discovery and perhaps individual trials. Both individual actions and joinder would also create the risk that newly identified persons might not be protected by the tolling principles **after** the court enters an order denying class certification.

Rule 23 exists to prevent the precise problems that would be presented by individual actions or joinder. And, in this case at this time, there is little doubt that Plaintiffs can satisfy the requirements of Rule 23 and that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy."

IV. This Case Satisfies The Requirements Of Rule 23(A)

A. The Class Is So Numerous That Joinder Is Impracticable

The numerosity requirement requires that joinder be impracticable, but this does not mean "impossible." The requirement is satisfied by showing that joinder would be difficult or inconvenient. *Little Caesar*, 172 F.R.D. at 241.

As this court observed in *Olden*, 203 F.R.D. at 268:

There is no strict numerical test to determine when the class is large enough or too numerous to join under Federal Rules of Civil Procedure. *Bremiller v. Cleveland Psychiatric Inst.*, 195 F.R.D. 1, 19 (N.D. Ohio 2000). The Court may consider many factors, including “class size, ease of identification of members of the proposed class, geographic distribution of class members, and the ability of the class members to pursue individual actions.” *Krieger v. Gast*, 197 F.R.D. 310, 314 (W.D. Mich. 2000).

See also *Little Caesar*, 172 F.R.D. at 241. Federal courts have routinely found that groups of 25 to 40 individuals are sufficient to meet the numerosity requirements. See 5 *Moore’s Federal Practice* (3d ed. 1997), § 23.23 at 23-63 ; *Harris v. General Development Corp.*, 127 F.R.D. 655, 660 (N.D. Ill. 1989).

While Plaintiffs meet the numerosity test on numbers alone, the limited time the detainees and prisoners spend in jail makes class certification especially appropriate when the claims could become moot as the case progresses and the Plaintiffs are released from the jail. *Penland v. Warner County Jail*, 797 F.2d 332 (6th Cir. 1986) (reversing District Court’s denial of class certification of case challenging various conditions of confinement at a small county jail); *Johnson v. City of Operowsa*, 658 F.2d 1065, 1069-1070 (5th Cir. 1981). In *Penland*, the Sixth Circuit emphasized that potential mootness concerns mandated certification of a 23(b)(2) class seeking declaratory and injunctive relief because, without certification, the short duration of confinement would render it unlikely that any representative could prove his claim while still incarcerated in the county jail. The same factor is obviously true here.

B. There Are Questions Of Law And Fact Common To The Class

Commonality exists when there is a common issue among the plaintiffs and the resolution of that issue would advance the litigation. See *Olden*, 203 F.R.D. at 269; *Garrish v. UAW*, 149 F. Supp. 2d 326 (E.D. Mich. 2001), citing *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998); This is not a demanding requirement. *Anderson v. Cornejo*, 199 F.R.D. 228, 239 (N.D. Ill. 2000).

A common question is one which “arises from ‘a common nucleus of operative facts’ regardless of whether the underlying facts change over the class period and vary as to individual claimants.” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citations omitted). As this Court explained in *Klender v. U.S.*, 218 F.R.D. 161, 164-165 (E.D.Mich. 2001) (Lawson, J.):

A variance in damages does not destroy commonality or typicality provided that “the same event or practice or course of conduct [] gives rise to the claims of other class members,” and if the named representatives’ claims “are based on the same legal theory.” *Id.* (citing *Amer. Med. Sys.*, 75 F.3d at 1082). Although the named plaintiffs’ claims must fairly encompass the class members’ claims, they need not always involve the same facts or law provided there is a common element of fact or law. *Senter v. General Motors Corp.* 532 F.2d 511, 525 n. 31 (6th Cir.1976). In addition, the resolution of the common issue should advance the litigation. *Sprague*, 133 F.3d at 398.

Governmental action in particular may present a “common course of conduct” which makes class certification appropriate, especially where Plaintiffs seek declaratory and injunctive relief. *Kanter v. Casey*, 43 F.3d 48 (3rd Cir. 1994) (commonality found in claims of systematic deficiencies in operation of child welfare system although Plaintiffs may have received different individual damages, as differences would not affect the outcome of the central legal issue in the case and Defendant’s common course of conduct toward Plaintiffs eliminated a need for individualized determination of propriety of injunctive relief.)

In this case, the common question of law has already been established by the court in its January 25, 2005 Summary Judgment Order which found unconstitutional the Saginaw County Jail’s policy of placing inmates in isolation cells in a naked or partially-naked condition where they can be viewed by members of the opposite sex.

Plaintiffs seek injunctive relief and damages as a result of this unconstitutional practice. While the particular factual circumstances and impact of the policies as applied to each individual detainee and prisoner may be different, the legal issues concerning the constitutionality of Defendants’ policies, customs, and practices are the same. *VanVels v. Previer Athletic Center of Plainfield*, 182 F.R.D. 500, 507 (W.D. Mich. 1998) (cases involving

challenges to a policy or procedure readily meet the commonality requirement as the common question becomes whether the Defendants acted through an illegal policy or procedure).

C. The Claims Of The Representative Parties Are Typical

In *Olden*, 203 F.R.D. at 268, this court observed:

A claim is typical if “it arises from the same event or 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.” In re Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir.1996). In addition, the resolution of the common issue should advance the resolution of the litigation. *Sprague*, 133 F.3d at 397.

The typicality requirement is not overly demanding and does not require identity. See *Bittinger v. Tecumseh Products Company*, 123 F.3d 877 (6th Cir. 1997). (typicality existed even though some class members had signed releases and would be subject to defenses not faced by other class members); *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir.1993); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174-1175 (8th Cir. 1995); *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993); *Rosario v. Livaditis*, 963 F.2d at 1018 (citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)); *Paper Systems, Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 605 (E.D. Wis. 2000)

Where the focus is upon the Defendants’ conduct and the Plaintiffs’ legal theories, it is not necessary that all class members suffer the same injury as the named class representative or that the representative and the class have suffered to the same degree. *Kanter v. Casey*, 43 F.3d 48 (3rd Cir. 1994); *Robidoux v. Celani*, 987 F.2d 931, 936-937 (32d Cir. 1993); *Forbush*, 994 F.2d at 1106.

Even a cursory comparison of the claims of class representatives Rose and Fuller with those of the individuals identified in the summary reveals that their claims arise from the same conditions, policies, and practices imposed on the class and are based on the same legal theories. Plaintiffs easily satisfy the typicality requirement of Rule 23(a)(3).

D. The Representative Parties Will Fairly And Adequately Protect The Interests of The Class

“Adequate representation” requires two inquiries: (1) whether the class counsel are “qualified, experienced and generally able to conduct the litigation” and (2) whether the class members have interests that are antagonistic to the other class members. *Olden*, 203 F.R.D. at 270, citing *Stout v. Byrider*, 228 F.3d 709, 717 (6th Cir.2000).

The requirement that the named plaintiffs be adequate representatives does not require that they be the best possible representative for the class, nor must they occupy a position identical to other members of the class. *In re Playmobil Antitrust Litigation*, 35 F.Supp.2d 231, 242 (E.D.N.Y. 1998); 7A Wright & Miller, *Federal Practice and Procedure* (2d ed.), § 1765. The test, ultimately, is whether the class representatives will promote the interests of the class as they protect their own. It is generally recognized that this test is met upon a showing that there are no conflicts of interest between the representative plaintiffs and there is a likelihood of vigorous prosecution of the case by competent counsel. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *In re The Prudential Ins Co of America Sales Practices Litigation*, 148 F.3d 283, 311 (3d Cir. 1998) ; *Garrish v. UAW*, 149 F. Supp. 2d 326 (E.D. Mich. 2001).

Absent a showing to the contrary, adequacy will be assumed.

Plaintiffs’ counsel, Michael L. Pitt, Stephen Wasinger and Christopher Pianto, are filing affidavits in support of this motion which establish a solid team of experienced trial attorneys skilled in class-action litigation and fully capable of prosecuting the case through settlement, trial and appeal. The firms involved in this matter and the ACLU of Michigan are fully capable of providing the finances necessary for successful prosecution.

Similarly, Plaintiffs are filing the affidavits of class representatives Rose and Fuller which demonstrate that they will adequately represent the class. Class representative Rose has been involved in the prosecution of this matter since its inception in October of 2001. Class representative Fuller has participated in this matter since September, 2002. Both have

demonstrated a willingness and commitment to prosecute this case through settlement, trial and, if necessary, appeal.

Plaintiffs amply meet the criteria of Rule 23(a)(4).

V. The Court Should Certify A Class Under Rule 23(b)(1) and (2) To Order Final Injunctive Relief

Rule 23(b) sets out the three types of class-action suits that may be certified, if the requirements of subdivision (a) have been met. *See Olden*, 383 F.3d at 507 (affirming this Court's certification under Rule 23(b)(2) for injunctive relief and a Rule 23(b)(3) for monetary relief).

Class actions under Rule 23(b)(2) are often brought in civil-rights cases in which similar legal wrongs against each of the class members are alleged. *See Molski v. Gleich*, 318 F.3d 937, 949-950 (9th Cir. 2003) (class properly certified under Rule 23(b)(2) in federal and state civil-rights action in which injunction was predominant form of relief sought); *Stewart v. Abraham*, 275 F.3d 220, 228 (3rd Cir. 2001) (class action properly certified under Rule 23(b)(2) based on alleged civil-rights violations of persons released and then rearrested in exercise of prosecutorial discretion).

The fact that Plaintiffs also seek monetary relief does not mean that the Court should refuse to certify a case under Rule 23(b)(2). Indeed, in *Olden*, the Sixth Circuit affirmed this Court's certification of a class under both Rule 23(b)(2) and Rule 23(b)(3), and specifically rejected Defendants' argument that "Rule 23(b)(2) certification is inappropriate because individualized money damages overwhelm the plaintiffs' request for injunctive relief." 383 F.3d at 510.

Because Plaintiffs seek injunctive relief and compensation for injuries stemming from Defendants' unconstitutional conduct which arise out of policies and practices which impact as a whole and which will continue to do so unless an injunction is issued, they meet the conditions for certification of a Rule 23(b)(2) class. *Olden*, 383 F.3d at 510-511. In addition, Plaintiffs satisfy the requirements for a Rule 23(b)(1) class because individual adjudication would run the

risk of establishing inconsistent standards of conduct or would “as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . .” In contrast, class certification will conserve judicial resources and promote substantial justice in a manner which is fair to all parties, including the absent class members who have not yet been identified.

Based on these reports and the defendants’ efforts to cover-up the actual conditions in the jail, permanent injunctive relief is required in order to prevent a continuation of the pervasive pattern of constitutional violations. The court should enjoin the defendants as follows:

- A. The isolation cell, if utilized, must comply with all state and industry regulations as to size, accessibility of water and appropriate sanitation equipment.
- B. The court should permanently enjoin the defendants from utilizing the segregation cell which does not comply with state or industry standards regarding size and accessibility of water and sanitation equipment.
- C. The court must require the defendants to regularly maintain the habitability of the segregation cell through regular monitoring, inspection and cleaning.
- D. The court should require the defendants to maintain the temperature in the segregation cell at standards established by the State of Michigan or by the industry.
- E. The court should order the defendant to establish an appropriate suicide prevention protocol for inmates confined to the isolation cell. The protocol shall provide, at a minimum, that for inmates placed in the isolation cell determined to be low risk, that the inmate be permitted to wear standard jail uniforms. In situations where there is a moderate or substantial risk of suicide, the inmate may be issued suicide-proof gowns of such size and quality as to provide full and complete privacy for the inmate held in the isolation cell and provide some warmth.
- F. The court should order that each inmate confined to the isolation cell shall be provided a suicide-proof blanket which must be made available throughout the individual’s stay in the isolation cell.
- G. The court should order that forcible stripping of clothing should occur only when absolutely necessary. Whenever there is a forcible removal of clothing, the officers or jail personnel performing this task must be the same gender as the inmate. In every case where the removal of clothing is deemed to be necessary, the inmate must be provided a clear and unequivocal opportunity to remove his or her own clothing in a non-public location. Under no circumstances, should other

inmates, including trustees, be able to observe an inmate removing his or her clothing voluntarily or involuntarily or during the time that the inmate is in the isolation cell.

- H. The court should order that appropriate sanitary items, such as toilet paper and tampons, be provided in such quantities as necessary.
- I. Under no circumstances shall there be more than one person detained in the isolation cell at the same time.
- J. The court shall order that the jail should adopt policies which will eliminate or substantially restrict jail personnel viewing inmates of the opposite sex in a nude or partially nude condition.
- K. The court should order that the use of mace, physical force or other restraints shall be used only in strict accordance with State of Michigan guidelines or industry standards.
- L. The court should order the defendants to adopt a strictly-enforced policy of prohibiting jail personnel from using derogatory language, verbal harassment or taunting in connection with the utilization of the isolation cell.
- M. The court should order that inmates confined to the isolation cell shall have access to the necessary and approved medication and/or medical attention as required by state regulation or industry standard.
- N. The court should order that the defendants adopt a comprehensive set of policies necessary to comply with the court's order and to provide the necessary training to all personnel who are currently employed in the jail. The training program shall be a regular part of the defendants' orientation for new jail personnel.
- O. The court should appoint an expert in the field of jail administration to serve as a monitor to assist the defendants in developing and implementing the necessary injunctive relief. The court should appoint a monitor for a term no less than two years. The monitor shall provide quarterly reports to the court and class counsel. The defendants shall bear all reasonable costs associated with the retention of the monitor during the two-year monitoring period.
- P. The Court should order that a procedure for reporting violations without fear of retaliation be put in place.

VI. The Court Should Also Certify A Class Under Rule 23(b)(3) To Remedy Past Discrimination Through Awards Of Damages

Rule 23(b)(3) permits a class action to be brought if the court finds "that the questions of law or fact common to the members of the class predominate over any questions effecting only

individual members, and that a class action is superior to other available methods for the fair and efficient administration of the controversy.” *Olden*, 383 F.3d at 508-509; *Klender v. U.S.*, 218 F.R.D. 161 (E.D.Mich. 2003). In doing so, the court should consider the four non-exclusive factors listed in Rule 23(b)(3): (1) any interest of the class members in pursuing individual action; (2) the existence and nature of any litigation concerning the class claims already underway; (3) whether pursuing the claims in the particular forum would be desirable; and, (4) any difficulty in administration or management of a potential class action.

The complete identity of proof is not required. Accordingly, if the court can identify some significant advantages to the class-action device, some factual differentiation in the class claims will not preclude certification. *See Olden*, 383 F.3d at 507-508; *Little Caesar*, 172 F.R.D. at 265 (the critical question for Rule 23(b)(3) is whether the method of proving [the claim] involves facts – even if complex and external to the contract – that are predominately common to the class and not individual).

Since “[n]o two claims are likely to be exactly similar [and] [a]most all claims will involve disparate issues of fact and law to some degree,” the question is whether there is “more commonality . . . than there is disparity.” If so, the predominance test is met. 429 Mich. at 415-416. Similarly, 7A Wright & Miller, *Federal Practice and Procedure* (2d ed. 1986), § 1778 at pp. 528-529, explain that under Rule 23:

[t]he common questions need not be dispositive of the entire action. In other words, “predominate” should not be automatically equated with “determinative” or “significant.” Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the action will be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.

Here, the predominance requirement is amply satisfied because proof relating to the common question of Defendants’ unlawful practices will dominate any trial, whether on an individual or a classwide basis. Proofs of individual damages do not destroy predominance. *Olden*, 383 F.3d at 508-509; *see also Delgozzo v. Kenny*, 628 A.2d 1080 (N.J. 1993) (“[T]he overwhelming weight of authority holds that the need for individual damages calculations does

not diminish the appropriateness of class action certification where common questions as to liability predominate.”); 4 H. Newberg, *Newberg On Class Actions* (3d ed.), § 3.16 at pp 173-74.

As the Sixth Circuit observed in *Olden*, if individualized damage determinations become necessary, this Court has many choices:

As the district court properly noted, it can bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can be decided by a special master or by another method. Fed.R.Civ.P. 23(c)(4)(A); *see also Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 30 (S.D.N.Y. 2001) (“By bifurcating issues like general liability or general causation and damages, a court can await the outcome of a prior liability trial before deciding how to provide relief to the individual class members.”). [383 F.3d at 509]

Indeed, if the court does not find a superior method of determining individual issues after the trial of the common liability issues, then the Court could exercise its right under Rule 23(c)(1) to decertify the class. In this situation, at least the common liability determinations would be the law of the case and operate as a bar on further, time-consuming relitigation of the common issues. This additional trial time on individualized issues, if necessary, is far preferable to individual trials on all aspects of the case.

A class action is also the superior method of dealing with the claims in this case. First, this case has been pending since October of 2001. In the three-and-a-half years that have elapsed, the only cases that have been brought are those originally pursued by attorneys Christopher Pianto and Loyst Fletcher. Even with the most recent barrage of publicity, it is unlikely that any of the individuals who have been subjected to the unconstitutional jail policies will pursue individual cases. The reason for this should be obvious: many of the claims involve isolation-cell incidents lasting only a few hours and, for the most part, do not involve any allegations of physical harm or residual impairments or losses. In today’s legal environment, pursuing an individual case of this type would be cost-prohibitive.

Second, the only other litigation concerning the class claims which is already underway is the *Brabant* case which counsel in the *Rose* case is also pursuing on behalf of eight plaintiffs.⁷

The third factor evaluates whether pursuing the claims in the particular forum would be desirable. Here there can be no doubt that this forum is most appropriate.

Finally, the court must consider any difficulty in administration or management of the potential class action. As to this factor, the court is requested to examine its own decisions in *Klender* and *Olden*, as well as the Sixth Circuit's *Olden* decision. In *Olden*, 203 F.R.D. at 270-271, this Court addressed the "manageability" factor

This "manageability" factor "encompass[es] the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir.1996)(internal quotations omitted). The problems may include cases which "break[] down into an unmanageable variety of individual legal and factual issues." *Id.* The defendant argues that is the case here. However, it appears the legal issues are common to all defendants. The individual factual questions are how much money, if any, is each plaintiff entitled to assuming liability is established; this will change with the length of time they lived in Alpena and the damages they suffered during that time. The Court can bifurcate the issue of liability from the issue of damages. *See Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 267 (E.D.Mich.1997). Once liability is found, the issue of damages can be decided by a special master or by another method. *Id.*

In *Klender*, retired public school teachers sued the United States alleging that payments they received pursuant to early retirement incentive plans in exchange for their property rights of tenure and contractual rights of just-cause employment did not constitute income and, accordingly, sought return of taxes which were withheld under the Federal Insurance Contributions Act. This court held that the proposed class satisfied requirements for certification under Rule 23(b)(3) and, in addressing manageability, stated:

⁷ The *Brabant* case was filed earlier this year on behalf of the eight-named plaintiffs after the court issued its ruling granting plaintiffs' motion for summary judgment as to the unconstitutional nature of the Saginaw Jail policy in question but denied leave to amend the complaint to add additional parties. If class certification is granted in *Rose*, the *Brabant* case will be dismissed and the *Brabant* plaintiffs will become either party plaintiffs in *Rose* or class members.

once the common legal issue is decided, individual assessments can be determined by a special master or by other methods. This case does not present an unmanageable variety of individual legal and factual issues. [218 F.R.D. at 268]

Thus the Court's own prior decisions make clear that problems of individualized proof can be dealt with in a variety of ways either at one trial or after a bifurcated trial of liability. The effect of the unconstitutional practices on individual class members can be the subject of summary testimony or the court can use a master to take the individual testimony. Defendants can offer no rationale for compelling a multiplicity of trials addressing both liability and damages.

The trial of the damage claims will be easily managed, either by this court or a special master. As the *Summary of Evidence Supporting Pervasive Pattern of Constitutional Violations* (Pianto Exhibit B) demonstrates, the presentation of evidence for each claimant would follow a definite repetitive pattern. If necessary, the court can create a subclass for those claims which allege serious physical harm or serious physical consequences. For all other cases, the factors which must be considered by the jury in determining the appropriate level of compensation are simple and straightforward. These factors would include such things as duration in the isolation cell, the condition of the isolation cell at the time in question, whether the individual was placed in the cell completely naked or was given an inadequate paper gown, whether the individual was viewed by members of the opposite sex, whether the individual had his or her clothing forcibly removed and whether there were some aggravating factors such as verbal taunting, harassment, macing, or other physical contact which did not result in injury or other physical consequences.

VII. If The Court Does Not Certify, It Should Permit Joinder Of The Additional Persons Who Plaintiffs Have Thus Far Identified And Continue To Toll The Limitations Period Under Plaintiffs Can Obtain Complete Access To Defendants' Records So That They Can Identify Additional Parties Who Have Suffered From Defendants' Unconstitutional Practices

Rule 20, F.R.Civ.P., provides that all persons may join in one action as plaintiffs "if they assert any right or relief jointly, severally or, in the alternative, in respect of or arising out of the

same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action”.

Courts have regularly approved joinder of plaintiffs in civil-rights cases. In *Alexander v. Fulton County*, 207 F.3d 1303, 1324 (11th Cir. 2000), 18 plaintiffs alleged that they were subject to systemic employment discrimination which arose from the same transaction or occurrence and raised common questions of law and fact, making joinder the plaintiffs proper under Rule 20. Likewise, in *Puricelli v. CNA Ins. Co.*, 185 F.R.D. 139, 142-143 (N.D.N.Y. 1999), the fact that plaintiffs were terminated at different times, under different circumstances, and by different supervisors do not compel conclusion that the claims arose from a different transaction or occurrence.

As explained above, “a class action is superior to other available methods for the fair and efficient adjudication” of this case. *See* Rule 23(b)(3). The individual victims of Defendants’ unconstitutional conduct deserve their day in court. If the Court concludes that there are obstacles to class certification, then to do substantial justice and preserve the rights of the individuals who have been recently discovered or will be discovered, the Court should permit joinder and continue to toll the limitations period until the conclusion of all discovery in this case.

CONCLUSION

The Court should grant class certification under both Rule 23(b)(2) and Rule 23(b)(3).

Respectfully submitted,

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Dated: April 29, 2005
KH073535

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2005, I electronically filed the foregoing **Defendants' Motion for Class Certification Brief in Support of Motion** with the Clerk of the Court for the Eastern District of Michigan using ECF system which will send notification of such filing to the following registered participants of the ECF system as listed on the Court's Notice of Electronic Filing:

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