IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, PAULETTE BOSCH, DENISE VOS, CRISA BROWN, LATRECE BAKER, TAMMY SPEERS, LONDORA KITCHENS, and STASHIA COLLINS, individually and on behalf of all similarly situated persons,

Plaintiffs,

Case No. 14-cv-1245

vs.

Hon.

MUSKEGON COUNTY, a municipal corporation; DEAN ROESLER, in his official capacity as Muskegon County Sheriff; LT. MARK BURNS, in his official capacity as Jail Administrator; CORRECTIONAL OFFICERS IVAN MORRIS, GRIEVES, DEYOUNG, and DAVID GUTOWSKI, in their individual capacities; and UNKNOWN CORRECTIONAL OFFICERS, in their individual capacities,

Defendants.
_____/

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs hereby move for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs request that the Court certify the following four classes:

1. pursuant to Fed. R. Civ. P. 23(b)(2), a class of all current and future inmates at the Muskegon County Jail ("MCJ"), represented by plaintiff Stashia Collins, seeking declaratory and injunctive relief from unconstitutional conditions of confinement that affect all inmates ("Overcrowding Injunctive Class");

2. pursuant to Fed. R. Civ. P. 23(b)(2), a class of all current and future female inmates at MCJ, represented by Ms. Collins, seeking declaratory and injunctive relief from unconstitutional conditions of confinement specific to female inmates ("Female Injunctive Class");

3. pursuant to Fed. R. Civ. P. 23(b)(3), a class of all inmates incarcerated at MCJ within three years prior to the filing of the complaint in this case, represented by plaintiffs Michelle Semelbauer, Paulette Bosch, Denise Vos, Crisa Brown, Latrece Baker, Tammy Speers, and Londora Kitchens, seeking damages for harm suffered as a result of unconstitutional conditions of confinement that affect all inmates ("Overcrowding Damages Class"); and

4. pursuant to Fed. R. Civ. P. 23(b)(3), a class of all female inmates incarcerated at MCJ within three years prior to the filing of the complaint in this case, represented by Semelbauer, Bosch, Vos, Brown, Baker, Speers, and Kitchens, seeking damages for harm suffered as a result of unconstitutional conditions of confinement specific to female inmates ("Female Damages Class").

In support of this motion, plaintiffs refer the Court to their accompanying brief.

As required by Local Rule 7.1, plaintiffs have sought concurrence from defendants in the relief sought. Specifically, plaintiffs' counsel attempted to reach Doug Hughes, counsel for defendants by both phone and by email, but was unsuccessful, thus necessitating the filing of this motion.

Respectfully submitted,

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Dated: December 4, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, PAULETTE BOSCH, DENISE VOS, CRISA BROWN, LATRECE BAKER, TAMMY SPEERS, LONDORA KITCHENS, and STASHIA COLLINS, individually and on behalf of all similarly situated persons,

Plaintiffs,

vs.

MUSKEGON COUNTY, a municipal corporation; DEAN ROESLER, in his official capacity as Muskegon County Sheriff; LT. MARK BURNS, in his official capacity as Jail Administrator; CORRECTIONAL OFFICERS IVAN MORRIS, GRIEVES, DEYOUNG, and DAVID GUTOWSKI, in their individual capacities; and UNKNOWN CORRECTIONAL OFFICERS, in their individual capacities,

Defendants.

Case No. 1:14-cv-01245

Hon.

ORAL ARGUMENT REQUESTED

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BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Court Rule

Other Authorities

INTRODUCTION

This is a class action lawsuit challenging unconstitutional and inhumane conditions of confinement at the Muskegon County Jail ("MCJ"). The named plaintiffs, eight current and former inmates of MCJ, bring this action to challenge their conditions of confinement, including:

- severe overcrowding;
- unsanitary and dangerous conditions of the jail facility, including infestations of vermin, insects, and mold; overflowing and backed-up sewage and plumbing; and crumbling infrastructure;
- failure to protect female inmates from being forced to routinely expose their naked bodies to male guards and male inmates when they are showering, using the toilet, getting dressed and undressed, and attending to their sanitary needs related to menstruation;
- failure to provide female inmates with reasonable access to feminine hygiene products, toilet paper, and clean under-garments; and
- failure to provide opportunities for out-of-cell exercise to female inmates.

Because these are systemic conditions that plague MCJ inmates as a group, this action is suitable for class treatment under Rule 23 of the Federal Rules of Civil Procedure. Some of these unconstitutional conditions affect all inmates, whereas others are uniquely suffered by female inmates. Additionally, it is necessary to differentiate between classes seeking damages and those seeking declaratory and injunctive relief. Consequently, plaintiffs seek certification of four overlapping classes:

1. pursuant to Fed. R. Civ. P. 23(b)(2), a class of **all current and future inmates** at the Muskegon County Jail ("MCJ"), represented by plaintiff Stashia Collins, seeking **declaratory and injunctive relief** from unconstitutional conditions of confinement that affect all inmates ("Overcrowding Injunctive Class");

2. pursuant to Fed. R. Civ. P. 23(b)(2), a class of **all current and future female inmates** at MCJ, represented by Ms. Collins, **seeking declaratory and injunctive relief** from unconstitutional conditions of confinement specific to female inmates ("Female Injunctive Class");

3. pursuant to Fed. R. Civ. P. 23(b)(3), a class of **all inmates incarcerated at MCJ within three years** prior to the filing of the complaint in this case, represented by plaintiffs Michelle Semelbauer, Paulette Bosch, Denise Vos, Crisa Brown, Latrece Baker, Tammy Speers, and Londora Kitchens, **seeking damages** for harm suffered as a result of unconstitutional conditions of confinement that affect all inmates ("Overcrowding Damages Class"); and

4. pursuant to Fed. R. Civ. P. 23(b)(3), a class of **all female inmates incarcerated at MCJ within three years** prior to the filing of the complaint in this case, represented by Semelbauer, Bosch, Vos, Brown, Baker, Speers, and Kitchens, **seeking damages** for harm suffered as a result of unconstitutional conditions of confinement specific to female inmates ("Female Damages Class").

FACTS

Stashia Collins is a woman currently incarcerated at MCJ. Collins Dec, Dkt. 3-9, at ¶ 1. Michelle Semelbauer, Paulette Bosch, Denise Vos, Crisa Brown, Latrece Baker, Tammy Speers, and Londora Kitchens are women who were incarcerated at MCJ within the last three years. Semelbauer Dec, Dkt. 3-2, at ¶ 1; Bosch Dec, Dkt. 3-3, at ¶ 1; Vos Dec, Dkt. 3-4, at ¶ 1; Brown Dec, Dkt. 3-5, at ¶ 1; Baker Dec, Dkt. 3-6, at ¶ 1; Speers Dec, Dkt. 3-7, at ¶ 1; Kitchens Dec, Dkt. 3-8, at ¶ 1.

Concurrent with this motion, plaintiffs are filing a motion for preliminary injunction. (Dkt. 2.) As demonstrated by that motion and its supporting brief, exhibits and declarations (which are hereby incorporated by reference), MCJ is plagued by the following inhumane conditions:

- severe overcrowding;
- unsanitary and dangerous conditions of the jail facility, including infestations of vermin, insects, and mold; overflowing and backed-up sewage and plumbing; and crumbling infrastructure;
- failure to protect female inmates from being forced to routinely expose their naked bodies to male guards and male inmates when they are showering, using the toilet, getting dressed and undressed, and attending to their sanitary needs related to menstruation;
- failure to provide inmates with reasonable access to feminine hygiene products, toilet paper, and clean under-garments; and
- failure to provide opportunities for out-of-cell exercise.

These conditions of confinement have existed for years, and they continue to this day. *See, e.g.*, Wilson Expert Report, Dkt. 4, at 2, 11-14; Muskegon Chronicle Article, July 8, 2009, Dkt. 4-7; Muskegon Chronicle Article (Peters), Feb. 20, 2011, Dkt. 4-8; MCJ Inspection Report 2012, Dkt. 4-3; Collins Dec, Dkt. 3-9, at ¶¶ 3, 5-8, 10-19; Baker Dec, Dkt. 3-6, at ¶ 27. Furthermore, these are not isolated incidents affecting a few inmates; they are systemic, widespread problems affecting inmates as a group. *See, e.g.*, Collins Dec, Dkt. 3-9, at ¶¶ 4-8, 10-15, 17-19; Speers Dec, Dkt. 3-7, at ¶¶ 3, 7, 13-16, 18-19, 21, 24, 26, 31; Kitchens Dec, Dkt. 3-8, at ¶¶ 2, 4, 7, 10, 15, 17, 20-21; Vos Dec, Dkt. 3-4, ¶¶ 4-6, 8-9, 11, 14, 16, 18-20.

LEGAL STANDARD FOR CLASS CERTIFICATION

"At an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). The class-certification inquiry begins with the four prerequisites under Rule 23(a): numerosity, commonality, typicality, and adequacy.

> In other words, the plaintiff must show that (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 class representative are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a).

Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 617 (6th Cir. 2007). Next, "the plaintiff must satisfy one of the subsections of Rule 23(b)." *Id*. Rule 23 allows for certification of more than one class when necessary to adjudicate multiple issues in an action or under different subsections of Rule 23(b). *See* Fed. R. Civ. P. 23(c)(4)-(5); *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000).

ARGUMENT

In this case, the Court should certify four classes.

Current inmate Stashia Collins brings claims for declaratory and injunctive relief on behalf of two of these classes, defined as (1) all current and future inmates (the Overcrowding Injunctive Class), and (2) current and future female inmates (the Female Injunctive Class). Ms. Collins satisfies the four prerequisites of Rule 23(a), and her two classes of claims should be certified under Rule 23(b)(2).

Former inmates Michelle Semelbauer, Paulette Bosch, Denise Vos, Crisa Brown, Latrece Baker, Tammy Speers, and Londora Kitchens bring claims for damages on behalf of the other two classes, defined as (3) all inmates incarcerated at MCJ in the last three years (the Overcrowding Damages Class), and (4) female inmates incarcerated at MCJ in the last three years (the Female Damages Class). These plaintiffs also satisfy the four prerequisites of Rule 23(a), and their two classes of claims should be certified under Rule 23(b)(3).

I. The Court should certify two classes of current and future inmates who seek declaratory and injunctive relief from unconstitutional conditions of confinement at the Muskegon County Jail.

Plaintiffs' claims regarding severe overcrowding and the jail facility's unsanitary and unsafe conditions (plumbing, mold, vermin and crumbling infrastructure) pertain to all inmates, whereas plaintiffs' claims regarding cross-gender viewing, access to hygiene products and lack of out-of-cell exercise pertain to female inmates. Accordingly, there should be a class of all inmates for the first set of claims and a class of female inmates for the second set of claims.

A. The proposed classes meet the four prerequisites of Rule 23(a).

1. Numerosity

The first prerequisite to class certification is that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although there is no strict numerical test, "substantial" numbers alone usually satisfy the numerosity requirement. *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Where plaintiffs 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 the requirement." *Peters v. Cars To Go, Inc.*, 184 F.R.D. 270, 276 (W.D. Mich. 1998) (citation omitted).

Furthermore, numbers alone are not dispositive when "the plaintiff seeking class certification has demonstrated impracticability of joinder." *Turnage v. Norfolk Southern Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) (citing *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996)). "Joinder of future class members is inherently impracticable." *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285, 290 (S.D. Ohio 2006). Due to the fluid nature of a jail population, actions seeking prospective relief at such facilities are inherently suited to class action status. *See*

Hiatt v. Adams County, 155 F.R.D. 605, 608 (S.D. Ohio 1994); *Dean v. Coughlin*, 107 F.R.D. 331, 332-33 (S.D.N.Y. 1985); *Glover v. Johnson*, 85 F.R.D. 1, 3-5 (E.D. Mich. 1977).

MCJ is designed to house 370 inmates, and count data provided by MCJ shows that its actual population routinely exceeds its rated design capacity and routinely reaches more than 400 inmates per day. MCJ Inspection Report 2012, Dkt. 4-3, at 1, 6; Wilson Expert Report, Dkt. 4, at 11; MCJ Population Chart, Dkt. 4-1. Count data provided by MCJ shows that the daily population of female inmates is typically between 40 and 90, and occasionally exceeds 100. MCJ Population Chart, Dkt. 4-1. Furthermore, because Ms. Collins brings claims for declaratory and injunctive relief on behalf of fluid classes of current and future inmates, joinder is impracticable. Therefore, the numerosity requirement is satisfied.

2. Commonality

The second prerequisite is that "there are questions of law **or** fact common to the class." Fed. R. Civ. P. 23(a)(2) (emphasis added). Commonality is satisfied "if there is a single factual or legal question common to the entire class." *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (finding commonality requirement satisfied, and granting class certification, where criminal defendants alleged that the Public Defender regularly failed to seek indigency hearings). The Supreme Court has clarified that "what matters" in the commonality inquiry is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

It is well established that when all members of the class are subject to the conditions, practices and policies being challenged, the commonality requirement is satisfied. "When the party opposing the class has engaged in some course of conduct that affects a group of persons

and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected." *Newberg on Class Actions* § 3:20 (5th ed.). "Thus, where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (certifying class of prisoners challenging conditions of confinement).

Many courts within the Sixth Circuit have certified classes of inmates where those inmates raised common questions of law or fact. In *Glover*, 85 F.R.D. at 5-6, the district court found the commonality requirement satisfied and certified a class of female prisoners who challenged the Michigan Department of Corrections' unconstitutional policies in providing women with inferior educational and vocational programs. In *Hiatt*, 155 F.R.D. at 609, the district court certified a class of inmates challenging jail conditions, finding commonality satisfied where "[t]he conditions, policies and practices challenged" impacted all inmates. More recently, in *Brown v. City of Detroit*, No. 10–12162, 2012 WL 4470433 (E.D. Mich. Sept. 27, 2012), the district court certified two classes of pretrial detainees (one class challenging jail conditions and a second challenging detention for more than 48 hours without probable cause), finding that for each class seeking certification, the alleged constitutional injuries were the same for every putative class member. *See also Gorton v. Johnson*, 100 F.R.D. 801 (E.D. Mich. 1984) (commonality met where persons incarcerated under Michigan's "guilty but mentally ill" statute challenged whether Defendants' policies, practices or procedures could provide class members with adequate mental health treatment); *Allen v. Leis*, 204 F.R.D. 401, 406-07 (S.D. Ohio 2001) (commonality requirement satisfied for class of pretrial detainees where named plaintiff challenged defendants' "pay for stay" policy, which applied to all pre-trial detainees); *Smith v. Ohio Dep't of Rehab. and Corr.*, No. 2:08–CV–15, 2012 WL 1440254 (S.D. Ohio April 26,

2012) (commonality requirement satisfied for class of prisoners because all putative class members shared common questions of fact and law, namely whether the facility had exposed prisoners to dangerously high levels of asbestos).

Here, plaintiffs challenge conditions of confinement that are systemic and pervasive throughout MCJ. Because all inmates at MCJ are subject to the jail's unsanitary and unsafe conditions (plumbing, mold, vermin and crumbling infrastructure), the question of whether those conditions are unconstitutional is common to the class of all inmates. Because all female inmates at MCJ are subject to cross-gender viewing, a lack of access to hygiene products, and a lack of out-of-cell exercise opportunities, the question of whether those conditions are unconstitutional is common to the class of female inmates. Furthermore, "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation" is manifest. *Wal-Mart*, 131 S. Ct. at 2551. This is not a case where individual inmates are being targeted for poor treatment by individual jail guards; it is a case where inmates as a group are subject to—and seek declaratory and injunctive relief from—unconstitutional conditions of confinement that plague MCJ as an institution.

3. Typicality

The third prerequisite for class certification necessitates that the claims of the representative plaintiffs be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality and commonality "tend to merge," *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 158 n. 13 (1982), and as with commonality, the typicality requirement is not onerous. *Rockey v. Courtesy Motors, Inc*., 199 F.R.D. 578, 584 (W.D. Mich. 2001). "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 [the] claims are based on the same legal theory." *Beattie v. CenturyTel, Inc*., 511

F.3d 554, 561 (6th Cir. 2007). The typicality prerequisite "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

> [C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims. Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold.

Baby Neal v. Casey, 43 F.3d 48, 55, 58 (3d Cir. 1994) (citation omitted). 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).

Courts have consistently found prisoners' claims to be "typical" of the class they propose to represent where the claims arise from policies or conditions at an institution affecting all members of the proposed class. In *Glover*, 85 F.R.D. at 5-6, the court held that plaintiffs' claims regarding the Department of Corrections' policies were typical of those of the class, regardless of whether each class member was "identically situated." In *Smith v. Ohio Dep't of Rehabilitation and Correction*, 2012 WL 1440254, the court found that a prisoner's claims regarding asbestos at the prison were typical of those of the class of prisoners he sought to represent because they arose "from the same events, practice or course of conduct." And in *Brown v. City of Detroit*, 2012 WL 4470433, the court held that named plaintiff raised claims that were typical of those of the proposed class of pretrial detainees, i.e., that he was detained for a substantial amount of time without bedding and for more than 48 hours without a probable cause hearing. *See also Eddleman v. Jefferson County*, 96 F.3d 1448, 1996 WL 495013 at *4 (6th Cir. 1996)

(unpublished) (typicality requirement met where plaintiffs challenged county jail's blanket strip-search policy even though individual searches varied in scope).

In this case, Ms. Collins' claims are typical of those for each class she seeks to represent. Collins is a current inmate who seeks declaratory and injunctive relief from the conditions of the confinement described above. With respect to the overcrowding and facility conditions to which all inmates are subjected, her claims are typical of the claims of the Overcrowding Injunctive Class. With respect to the claims that uniquely affect women, her claims are typical of the claims of the Female Injunctive Class. Although the individuals within these classes might have varying fact patterns regarding how the conditions personally affect them, the typicality requirement is satisfied because they share a common claim that these conditions are unconstitutional. *See Parsons*, 754 F.3d at 685-86.

4. Adequacy of Representation

The fourth prerequisite to class certification is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has held that the typicality and adequacy of representation elements "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Rutherford v. City of Cleveland,* 137 F.3d 905, 909 (6th Cir.1998).

To determine the issue of adequacy of representation, the Sixth Circuit has articulated two criteria: "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.*, 75 F.3d at 1083. "The adequate representation

requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Id.*

In this case, the first adequacy criterion is met for reasons set forth in the commonality and typicality discussions above. Ms. Collins does not have interests antagonistic to those of the classes she would represent. The relief she seeks—declaratory and injunctive relief from unconstitutional conditions of confinement—would benefit all class members and would not benefit the class representatives at the expense of any other class member. There are no conflicts of interest between the named plaintiffs and the other class members; Collins is committed to obtaining declaratory and injunctive relief to benefit all inmates.

The second adequacy criterion, 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." *Beattie*, 511 F.3d at 562-63. In this case, Plaintiffs' counsel are highly qualified and experienced civil rights attorneys who are able and willing to conduct this litigation on behalf of the class. Attorneys of record in this case have successfully handled class action litigation on numerous occasions. Several are employed by the American Civil Liberties Union Fund of Michigan ("ACLU"), the Michigan affiliate of a national organization that routinely brings class actions for relief from unconstitutional policies and practices. The law firm Pitt, McGehee, Palmer & Rivers, P.C., which is serving as cooperating counsel in this case, has served as class counsel in many cases, including class action prisoners' rights cases and in other ACLU cases. Thus, the requirement that class representatives and their counsel provide adequate representation to the class is met.

B. The Injunctive Classes are maintainable under Rule 23(b)(2) because plaintiffs seek declaratory and injunctive relief that will benefit the class as a whole.

In addition to meeting the four prerequisites of Rule 23(a), Plaintiffs must show that this action fits into one of the categories defined in Rule 23(b). *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). Under subdivision (b)(2), a class action is maintainable if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, plaintiffs' counsel have been in contact with defendants over the last year and half in hopes of resolving these issues short of litigation. Wilson Expert Report, Dkt. 4; Letter to Williams Hughes, Dkt. 4-11; Letter From Douglas Hughes to Kevin Carlson, Dkt. 4-12. These efforts have failed so plaintiffs are now forced to seek declaratory and injunctive relief.

As the Supreme Court has recognized, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *see also* 8 *Newberg on Class Actions* § 25:20 (4th ed. 2002) ("Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits."). In actions primarily seeking injunctive relief, the (b)(2) requirement is "almost automatically satisfied." *Baby Neal*, 43 F.3d at 58. "What is important is that the relief sought by the named plaintiffs should benefit the entire class." *Id*. at 59.

"Numerous courts have held that Rule 23(b)(2) is an appropriate vehicle in actions challenging prison conditions." *Williams v. City of Philadelphia*, 270 F.R.D. 208, 222 (E.D. Pa. 2010). Within the Sixth Circuit, many courts have certified prisoner class actions under Rule 23(b)(2) where the claims challenged ongoing conditions of confinement affecting the larger inmate population. *See, e.g., Glover v. Johnson*, 85 F.R.D. 1 (E.D. Mich. 1977) (certifying class

of female prisoners for injunctive and declaratory relief from unequal and discriminatory provision of services); *Gorton v. Johnson*, 100 F.R.D. 801 (E.D. Mich. 1984) (certifying under Rule 23(b)(2) a class of inmates as to whether the defendants were capable of providing adequate mental health treatment and whether they failed to do so); *Hiatt v. Adams County*, 155 F.R.D. 605, 610 (S.D. Ohio 1994) (Rule 23(b)(2) certification appropriate where Plaintiffs alleged "a continuous course of conduct by the Defendants which impacts on all inmates," sought injunctive and declaratory relief, and where "the remedy sought, to be effective, must be system wide rather than individually oriented"); *Allen v. Leis*, 204 F.R.D. 401, 406-07 (S.D. Ohio 2001) (certification of class of pretrial detainees appropriate under 23(b)(2) where defendants acted in same way to all class members in seizing their funds and a common remedy would benefit all); *Smith v. Ohio Dep't of Rehab. & Corr.*, 2012 WL 1440254 at *15 (S.D. Ohio April 26, 2012) ("[C]ertification under Rule 23(b)(2) is appropriate because plaintiffs' claims are based on conduct (or inaction) by defendants that is generally applicable to the Class.").

With regard to class certification under Rule 23(b)(2), the Supreme Court has stated:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

Wal-Mart, 131 S. Ct. at 2557 (citation omitted). That standard is met in the present case, where plaintiffs seek injunctive and declaratory relief from defendants' generally applicable policies, practices, or customs of housing all inmates in an overcrowded jail; maintaining abysmal, dangerous, and unsanitary jail conditions; degrading female inmates by allowing male guards to see them naked on a routine basis; denying female inmates adequate feminine hygiene products, toilet paper, and undergarments; and denying regular out-of-cell exercise to female inmates

throughout their detention. The named plaintiffs do not contend that they are singled out for unlawful treatment; rather, their shared claim is that collectively class members' constitutional rights are violated by the dangerous and inhumane conditions of confinement at MCJ. The remedy they seek—declaratory and injunctive relief—would apply to and benefit all members of the proposed classes.

II. The Court should also certify two classes of inmates who seek damages for harm suffered within the last three years as a result of unconstitutional conditions of confinement at the Muskegon County Jail.

In addition to two classes of inmates seeking declaratory and injunctive relief, two classes of inmates seek damages for the harm they suffered as a result of the unconstitutional conditions of confinement discussed above. The class representatives for these claims are recent inmates who are no longer incarcerated. Again, because some of the challenged jail conditions applied to all inmates and some applied uniquely to women, there are two classes seeking damages. And because common questions of liability predominate, certification is appropriate under Rule 23(b)(3).

A. The proposed classes meet the four prerequisites of Rule 23(a).

1. Numerosity

For the classes seeking damages, numerosity is satisfied because the classes consist of (a) all inmates incarcerated at MCJ within the past three years, and (b) all women incarcerated at MCJ within the past three years. MCJ is designed to house 370 inmates, and count data provided by MCJ shows that the actual population routinely exceeds its rated design capacity, routinely reaching more than 400 inmates per day. MCJ Inspection Report 2012, Dkt. 4-3, at 1, 6; Wilson Expert Report, Dkt. 4, at 11; MCJ Population Chart, Dkt. 4-1. The count data also shows that the daily population of female inmates is typically between 40 and 90, and occasionally exceeds 100. MCJ Population Chart, Dkt. 4-1. Although the exact size of the classes is unknown, jails contain

a fluid population so the number of inmates detained anytime within the past three years is undeniably substantial. *See Davidson v. Henkel Corp.*, __ F.R.D. __, 2014 WL 4851759, *8 (E.D. Mich. 2014) ("[I]t generally is accepted that a class of 40 or more members is sufficient for satisfying the numerosity requirement."). These facts show that the total number on inmates, as well as the total number of women incarcerated at MCJ over a three-year period certainly exceeds 40, likely reaches the hundreds or even thousands.[1] Accordingly, both classes satisfy the numerosity requirement.

2. Commonality

As with the classes of current inmates seeking injunctive and declaratory relief, the classes of inmates seeking damages satisfy the commonality requirement because they are all challenging the same policies, practices and customs that are responsible for the abysmal conditions of confinement at MCJ. Although not all members of the class suffered the same amount of damages as a result of the conditions, the question of defendants' liability under the Fourth, Eighth and Fourteenth Amendments for subjecting all inmates to such conditions is common to the classes.

Regardless of the relief sought, the proper inquiry "focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013) (finding commonality requirement satisfied where class of consumers sought damages for moldy washing machines), *cert. denied*, 134 S. Ct. 1277 (2014). In this case, the answer to the question of whether conditions of confinement at MCJ are unconstitutional is common to all members of the classes of inmates who were confined under such conditions. *See also Powers v. Hamilton*

[1] The total number of individuals incarcerated at MCJ over a three-year period far exceeds the total number of women.

County Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007) (finding commonality requirement satisfied, and granting class certification, where former criminal defendants sought damages based on Public Defender's "well-settled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine"); *Brown v. City of Detroit*, No. 10–12162, 2012 WL 4470433 (E.D. Mich. Sept. 27, 2012) (certifying multiple classes seeking damages based on common claims of conditions and duration of confinement); *Flood v. Dominguez*, 270 F.R.D. 413, 418 (N.D. Ind. 2010) (certifying class seeking damages for jail's policies and widespread practices of overcrowding, poor sanitation, and other unconstitutional conditions of confinement). Therefore, the commonality requirement is satisfied.

3. Typicality

The class representatives' claims are typical of the claims of the classes. Plaintiffs Semelbauer, Bosch, Vos, Brown, Baker, Speers, and Kitchens are former inmates who were recently incarcerated at MCJ and seek damages for being subjected to the unconstitutional conditions of confinement described above. These plaintiffs' claims are typical of the claims of (a) all inmates incarcerated at MCJ within the past three years (the Overcrowding Damages Class), and (b) all women incarcerated at MCJ within the past three years (the Female Damages Class). Although the individuals within these classes might have varying fact patterns affecting the monetary value of their claims, the named plaintiffs' claims are typical because they "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory." *Beattie*, 511 F.3d at 561 (finding typicality in damages case for deceptive billing practice).

4. Adequacy of Representation

The adequacy prerequisite is satisfied for the classes seeking damages for the same reasons it is satisfied for the classes seeking declaratory and injunctive relief. The class representatives do not have interests antagonistic to the class members, and class counsel are fully capable of, and committed to, pursuing classwide relief.

B. The Damages Classes are maintainable under Rule 23(b)(3) because common questions predominate and a class action is superior.

Generally, classes seeking individualized damages must proceed under Rule 23(b)(3). *Wal-Mart*, 131 S. Ct. at 2557-58. Under subdivision (b)(3), a class action is maintainable if "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." Fed. R. Civ. P. 23(b)(3). Thus, there two components to class certification under Rule 23(b)(3): predominance and superiority. *See Beattie*, 511 F.3d at 564-67; *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529, 543 (S.D. Ohio 2013).

1. Predominance

"To satisfy the predominance requirement in Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *Beattie*, 511 F.3d at 564. Following the Supreme Court's decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), some defendants argue that Rule 23(b)(3) certification is improper whenever damages cannot be calculated on a classwide basis. However, the Sixth Circuit has explicitly rejected that argument, concluding that even after *Comcast*, (b)(3) certification remains the norm

when common questions related to *liability* predominate over the individualized issues. *See In re Whirlpool*, 722 F.3d at 858-61.

> When 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, or a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. Because recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal, in the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.

Id. at 860-61 (citations and alterations omitted).

Here, even though the (b)(3) class members' damages may be individualized, it is undeniable that "adjudication of questions of liability common to the class will achieve economies of time and expense," and "liability questions common to the class predominate over damages questions unique to class members." *Id.* The central issues in this case are whether the conditions of confinement at MCJ, to which all class members were subject, were unconstitutional. Defendants' liability for subjecting entire groups of people to inhumane conditions presents common questions that predominate over individualized differences in the degree to which each class member suffered harm.

2. Superiority

With regard to Rule 23(b)(3)'s superiority requirement, Rule 23 identifies the following factors as pertinent to this determination:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b); *see also Newberg on Class Actions* § 4:68 (4th ed.) (stating that the four factors are generally used to decide whether Rule 23(b)(3)'s superiority requirement is satisfied). In this case, all four superiority factors weigh in plaintiffs' favor.

a. Individual Interests

In weighing the first factor, courts consider whether the "interest in individual law suits is minimal in that the class mechanism allows class members for a more effective and far reaching remedy than would be available to them on an individual basis." *Trollinger v. Tyson Foods, Inc.,* No. 4:02-CV-23, 2006 WL 2924938 (E.D. Tenn. Oct. 10, 2006) (quoting *Saur v. Snappy Apple Farms, Inc.,* 203 F.R.D. 281, 289 (W.D. Mich. 2001)). In this matter, much like in *Trollinger*, "the individual amounts of damages involved, while not insubstantial, are generally not large enough to justify individual actions" and the "costs of the individual actions would unreasonably consume the individual amounts that would be recovered." *Id*. (internal quotations omitted). Consequently, the first factor weighs heavily in the plaintiffs' favor.

b. Other Litigation

The second factor courts must consider is any litigation already brought by class members involving the same controversy. Plaintiffs are presently unaware of any litigation brought by any class members regarding this controversy. The second factor therefore weighs in favor of class certification.

c. The Forum

The third factor directs courts to consider the desirability of concentrating the action in this forum. Because MCJ is located in the Western District of Michigan and plaintiffs are bringing federal claims, this is the appropriate forum. Additionally, "the desirability of concentrating claims in a particular forum is relevant only when other class litigation has already been commenced elsewhere," 2 *Newberg on Class Actions* § 4.31 (4th ed.), and as noted,

plaintiffs are unaware of any other litigation concerning these claims, in this jurisdiction let alone elsewhere. Accordingly, the third factor weighs in favor of class certification.

d. Manageability

For the fourth factor, courts must consider likely difficulties in managing the class action. In doing so, courts are not to consider "whether [a] class action will create significant management problems, but instead determin[e] whether it will create relatively more management problems than any of the alternatives." *Williams v. Mohawk Indus., Inc.,* 568 F.3d 1350, 1358 (11th Cir. 2009). And "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative . . . to no litigation at all." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Furthermore, the manageability determination is largely dependent on the outcome of the predominance inquiry:

> Where a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions. If a district court determines that issues common to all class members predominate over individual issues, then a class action will likely be more manageable than and superior to individual action.

Williams, 568 F.3d at 1358 (citation omitted). Consequently, "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001).

In this case, there is no reason to think that class treatment of plaintiffs' claims will cause significant manageability problems, particularly as compared to individualized treatment of each class member's claim. Additionally, common issues of liability predominate. Therefore, certification under Rule 23(b)(3) is proper.

CONCLUSION

For the reasons set forth above, plaintiffs request that the court certify four classes as follows:

1. pursuant to Fed. R. Civ. P. 23(b)(2), a class of all current and future inmates at the Muskegon County Jail ("MCJ"), represented by plaintiff Stashia Collins, seeking declaratory and injunctive relief from unconstitutional conditions of confinement that affect all inmates (the Overcrowding Injunctive Class);

2. pursuant to Fed. R. Civ. P. 23(b)(2), a class of all current and future female inmates at MCJ, represented by Ms. Collins, seeking declaratory and injunctive relief from unconstitutional conditions of confinement specific to female inmates (the Female Injunctive Class);

3. pursuant to Fed. R. Civ. P. 23(b)(3), a class of all inmates incarcerated at MCJ within three years prior to the filing of the complaint in this case, represented by plaintiffs Michelle Semelbauer, Paulette Bosch, Denise Vos, Crisa Brown, Latrece Baker, Tammy Speers, and Londora Kitchens, seeking damages for harm suffered as a result of unconstitutional conditions of confinement that affect all inmates (the Overcrowding Damages Class); and

4. pursuant to Fed. R. Civ. P. 23(b)(3), a class of all female inmates incarcerated at MCJ within three years prior to the filing of the complaint in this case, represented by Semelbauer, Bosch, Vos, Brown, Baker, Speers, and Kitchens, seeking damages for harm suffered as a result of unconstitutional conditions of confinement specific to female inmates (the Female Damages Class).

Respectfully submitted,

By: /s/ Miriam J. Aukerman

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