IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FAVIAN BUSBY, ET AL.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No.: 2:20-CV-02359-SHL**
	)	
FLOYD BONNER, JR., ET AL.,	)	
	)	
Defendants.	)	

RESPONDENTS-DEFENDANTS' RESPONSE IN OPPOSITION TO PETITIONERS-PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Respondents-Defendants, Floyd Bonner, Jr., Shelby County Sheriff and the Shelby County Sheriff's Office ("Respondents"), by and through their undersigned counsel, respond in opposition to Petitioners-Plaintiffs' ("Petitioners") Motion for Class Certification (ECF No. 3).[1]

STANDARD

To be certified, the class must first meet the four "threshold requirements" of Federal Rule of Civil Procedure 23(a): (1) numerosity (a class so large that joinder of all members is impracticable); (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims or defenses are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class). *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1089-90 (6th Cir. 2016). In addition to satisfying the requirements of Rule 23(a), the class must fit under one of the three subdivisions of Rule 23(b). *Coleman v. GMAC*, 296 F.3d 443, 446 (6th Cir. 2002). "The United States Court of Appeals for the Sixth Circuit has

[1] Respondents-Defendants additionally rely upon and incorporate the arguments contained within their Motion to Dismiss and their Response in Opposition to Petitioners-Plaintiffs' Motion for a Temporary Restraining Order filed in this cause.

recognized that the 'class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Cole v. City of Memphis*, 2014 U.S. Dist. LEXIS 183492, *11 (W.D. Tenn. Sept. 29, 2014) (citing *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig*., 722 F.3d 838, 850 (6th Cir. 2013)). Accordingly, this Court has provided, "A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Id*. at *11 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (explaining that plaintiffs bear the burden of establishing the propriety of class certification by a preponderance of the evidence)).

LAW & ARGUMENT

A. FAILURE TO PRESENT ACTUAL EVIDENCE

As a threshold matter, Petitioners have presented no actual evidence about the proposed class. Instead, Petitioners rely upon the allegations of their Petition and multiple exhibits and/or declarations containing hearsay, which is simply insufficient. *See Rega v. Nationwide Mut. Ins. Co*., 2012 U.S. Dist. LEXIS 151336, *10 (N.D. Ohio Oct. 22, 2012) ("[S]ome circuits expressly bar district courts from presuming that the plaintiffs' allegations in the complaint are 'true for purposes of the class motion…without resolving factual and legal issues that strongly influence the wisdom of class treatment.'"); *see also Gooch v. Life Investors Ins. Co. of Am*., 672 F.3d 402, 417 (6th Cir. 2012) (endorsing the view that a district court may probe behind the pleadings to decide the certification question when it is necessary to resolve disputed factual and legal issues that impact the wisdom of class treatment)). Thus, this Court should deny certification.[2]

[2] Due to the lack of evidence offered by Petitioners, Petitioners have failed to establish the numerosity element necessary for class certification.

B. FAILURE TO ESTABLISH COMMONALITY AND/OR TYPICALITY

Under Rule 23(a)(2), a plaintiff must show that "there are questions of law or fact common to the class." *Davis v. Cintas Corp*., 717 F.3d 476, 487 (6th Cir. 2013); Fed. R. Civ. P. 23(a)(2). A question of law or fact is common to the class if it is "capable of classwide resolution—which means that its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2545. As the Supreme Court explained in *Dukes*:

> What matters to class certification…is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id.

Likewise, Petitioners' claims must also be typical of the class members' claims:

> Typicality is met if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Sprague v. Gen. Motors Corp*., 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (quoting [*In re Am. Med. Sys., Inc*., 75 F.3d 1069, 1082 (6th Cir. 1996)]). This requirement insures that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members. *Id*.
>
> These two concepts of commonality and typicality "tend to merge" in practice because both of them "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." *Dukes*, 131 S. Ct. at 2551 n.5.

In re Whirlpool Corp., 722 F.3d at 852-53 (considering commonality, typicality, and adequate representation together due to their "intertwined nature").

Moreover, in *Money v. Pritzker*, the United States District Court for the Northern District of Illinois recently denied a similar request for class certification involving inmates seeking relief in response to the COVID-19 pandemic. *Money v. Pritzker*, 2020 U.S. Dist. LEXIS 63599 (N.D.

Ill. April 10, 2020). In *Money*, the Court provided, "The imperative of individualized determinations, recognized by both sides in this case, makes this case inappropriate for class treatment." *Id*. *50-51. The Court explained:

> Each putative class member comes with a unique situation—different crimes, sentences, outdates, disciplinary histories, age, medical history, places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism, and danger to the community.

Id. at *51. While acknowledging that perfect uniformity is not required, the Court reiterated, "But it does require more uniformity that these Plaintiffs would have on the only matter 'apt to drive the resolution of the litigation'—namely, which class members should actually be given a furlough?" *Id*. (citing *Dukes*, 131 S. Ct. at 2541).

Similar to the Court in *Money*, this Court should deny Petitioners' request for class certification. Here, Petitioners are requesting this Court to certify a class, as well as a subclass, consisting of "[a]ll persons currently or in the future held at the Jail in pretrial custody during the COVID-19 pandemic who are 55 and older, as well as all persons currently or in the future held at the Jail of any age" who suffer from an array of medical conditions. (ECF No. 3, PageID 214). In support of their request, Petitioners have included the following questions: (1) Does COVID-19 present a risk of harm so severe to Class members detained at Shelby County Jail that the only constitutionally permissible way to protect them is to release them? (2) Have Defendants failed to provide Subclass members reasonable modifications to protect against COVID-19 in violation of disability rights laws? (3) Is release of Class and Subclass members from custody in light of the COVID-19 pandemic the only way the Jail can adequately protect vulnerable people from injury or death?" (ECF No. 3, PageID 222).

While each of these proposed class members would ultimately seek the similar relief of

release from incarceration, the dissimilarities of said individuals – loosely defined by Petitioners as "hundreds of people," some of which are *future* inmates/detainees – would undoubtedly "impede the generation of common answers" to the questions posed. Said differences would necessarily include, but are not limited to, whether each detainee/inmate can obtain necessary medical treatment within the Jail; whether the detainee/inmate can be safely released, especially considering the specific safety risks that each detainee/inmate would pose to his/her immediate family, prior victims, and the public at large[3]; whether the detainee/inmate has a safe host site; whether that host site poses less risk of infection than the Jail; and whether the detainee/inmate might potentially put a vulnerable family member and/or the public at large at risk of infection. Each of these issues would mandate an individualized assessment before determining whether the release of each specific detainee/inmate would be practicable, beneficial, and safe.

To that extent, the Tennessee Constitution provides certain basic constitutional rights to the victims of crimes. *See* Tenn. Const. art. I § 35. The applicable constitutional provision sets out eight specific rights for victims, including the right to "[t]he right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly," "the right to be informed of all proceedings, and of the release, transfer or escape of the accused or convicted person," and "[t]he right to be present at all proceedings where the defendant has the right to be present." *Id.*; *see also* Tenn. Code Ann. §§ 40-38-101 to 40-38-117; *State v. Mutory*, 581 S.W.3d 741, 749 (Tenn. 2019). Moreover, Tennessee law provides that Tennessee courts must consider numerous factors in determining whether a pretrial detainee should be released and whether and for what amount bond should be set, including: (1) The defendant's length of residence in the community; (2) The defendant's employment status and history, and financial condition; (3) The

[3] Both of the named Petitioners are each currently being detained on multiple felony charges. *See* Respondents' Response in Opposition to Petitioners-Plaintiffs' Motion for a Temporary Restraining Order.

defendant's family ties and relationships; (4) The defendant's reputation, character and mental condition; (5) The defendant's prior criminal record, including prior releases on recognizance or bail; (6) The identity of responsible members of the community who will vouch for defendant's reliability; (7) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and (8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear. Tenn. Code Ann. § 40-11-115(b). Said provisions further highlight the specific and individualized nature of the assessment necessary to determine each detainee/inmate's eligibility and need for release.

Ultimately, because the lack of commonality and typicality would impede any single remedy in this cause, the resolution of Petitioners' asserted common questions would not resolve this case. Thus, the request for class certification should be denied.

CONCLUSION

Based upon the above and upon the record as a whole, Respondents respectfully request that the Court enter an order denying Petitioners' Motion for Class Certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via ECF filing system, upon the following:

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