

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF NOBLES

FIFTH JUDICIAL DISTRICT

FILE #53-CV-18-751

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Rodrigo Esparza, Maria de Jesus de Pineda,  
Timoteo Martin Morales, and  
Oscar Basavez Conseco,  
Plaintiffs,

-vs-

**ORDER RE:  
CLASS CERTIFICATION**

Nobles County; Nobles County Sheriff,  
Kent Wilkening, in his individual and  
official capacity,

Defendants.

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The above-entitled matter came before the Honorable Gregory J. Anderson, Judge of District Court, on January 7, 2019 for hearing on Plaintiffs' motion for class certification. Norman Pentelovich, Ian Bratlie, and Teresa Nelson appeared for Plaintiff. Stephanie Angolkar appeared for defendant.

Based on the statutes, rules, case law, file and records herein, the Court makes the following:

**ORDER**

1. The Plaintiffs' motion for class certification is GRANTED pursuant to Minn. R. Civ. P. 23.01 and 23.02(b);
2. The Class shall consist of:

All past and current detainees in the Nobles County Jail who were, are, or will be, the subjects of immigration detainers (ICE Form I-247A) and/or administrative warrants (ICE Form I-200) sent to the Nobles County Jail by officers or representatives of United States Immigration and Customs Enforcement and who, but for the I-247A and/or I-200 Forms, would otherwise be entitled to release from custody.

3. Having considered the requirements of Minn. R. Civ. P. 23.03(a), the Court appoints Rodrigo Esparza, Maria de Jesus de Pineda, Timoteo Martin Morales, and Oscar Basavez Conseco as class representatives;
4. Having considered the requirements of Minn. R. Civ. P. 23.07, the Court appoints Ian Bratlie, Teresa Nelson, Brooke Anthony and Norman Pentelovitch as class counsel; and
5. The attached memorandum describing the claims, issues and analysis is incorporated herein.

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Gregory Anderson  
Judge of District Court

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**MEMORANDUM**

*Rodrigo Esparza, Maria de Jesus de Pineda,  
Timoteo Martin Morales, and  
Oscar Basavez Conseco,*

-vs-

*Nobles County; Nobles County Sheriff  
Kent Wilkening, in his individual and  
official capacity,*

**Court File No.: 53-CV-18-751**

Where questions to be litigated are common to a large group of persons and where it is impracticable to bring in all those persons, one or more may proceed on behalf of the benefit of all by way of a class action. Plaintiffs move this Court to grant class certification pursuant to Minnesota Rules of Civil Procedure 23.01 and 23.02 as follows:

All past, current and future detainees in the Nobles County Jail who were, are, or will be, the subjects of immigration detainers (ICE Form I-247A) and/or administrative warrants (ICE Form I-200) sent to the Nobles County Jail by officers or representatives of United States Immigration and Customs Enforcement.

Defendants oppose the class certification as failing to meet the requirements under both Rules 23.01 and 23.02.

**FACTS**

The court incorporates its factual synopsis as laid out in the Order granting temporary restraining order filed October 19, 2018 (“TRO”). In addition to the facts presented in the TRO, the following facts are also relevant to the motion before the Court:

Plaintiffs allege that in 2017 NCSO received 73 ICE detainers and that from January 1, 2018 until March 31, 2018 the NCSO received 269 requests for ICE holds. It is unclear from the information presented to the Court whether these ICE holds were based solely upon I-247A detainers or I-200 administrative warrants or whether some were also based upon valid ICE arrests and/or valid warrants. Similarly, it is unclear whether any of the individuals subject to the I-247A and I-200 were also subject to State custody and, therefore, not eligible for release.

## ANALYSIS

### Burden and Standard for Class Certification

Class certification decisions by Minnesota district courts are governed by Minnesota Rule of Civil Procedure 23. “A certifiable class must meet all of the elements of Rule 23.01 - numerosity, commonality, typicality, and adequacy of representation - and one of the sections of rule 23.02.” *Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. Ct. App. 2009) *citing Lewy 1990 Trust ex rel. Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 451 (Minn. Ct. App. 2002), *rev. denied* (Minn. Nov. 19, 2002). Because of the similarity between the Federal Rule of Civil Procedure 23 and Minnesota Rule of Civil Procedure 23, federal precedent is instructive in interpreting Minnesota’s rule. *Id.* The burden to show that class certification is appropriate is on the moving party. *Glenn v. Daddy Rocks, Inc.*, 203 F.R.D. 425, 428 (D. Minn. 2001). The certification requirements of Rule 23 must be established by a preponderance of the evidence. *Whitaker*, 764 N.W.2d at 638.

### Rule 23.01

Minnesota Rule of Civil Procedure 23.01 permits certification of a class action if all four requirements of the rule have been met. These requirements are:

- (a) The class is so numerous that joinder of all members is impracticable;
- (b) There are questions of law or fact common to the class;
- (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (d) The representative parties will fairly and adequately protect the interests of the class.

### *Numerosity*

Minnesota Rule of Civil Procedure 23.01 does not contain specific guidelines indicating a maximum or minimum number of parties required to maintain a class action. The numerosity prerequisite requires that the members of a class be so numerous as to make joinder of all members impracticable. *Lewy 1990 Trust ex rel. Lewy v. Investment Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. Ct. App. 2002). The term impracticable means not impossibility, but only difficulty or inconvenience. *Id.* In determining impracticability, the court should consider factors including the size of the class, the size of the individual members’ claims, the inconvenience of trying individual suits, and the nature of the action itself. *Id.* Joinder of classes made up of

very large numbers is almost always impracticable, and classes with as few as 40 members raise a presumption that joinder is impracticable. *Id.*

Plaintiffs contend that there are over 250 individuals that have been affected by ICE detainers in the first quarter of 2018 alone. However, it is unlikely that every one of these individuals would have been held solely on the I-247A and I-200 forms without any State warrant, detainer or custody status or valid ICE arrest. Regardless, the class member number likely exceeds 40 due to the time period being litigated and the large numbers of individuals being held on behalf of ICE at the Nobles County facility. The number of potential plaintiffs in this case would make joinder impracticable, if not impossible. The court finds that the numerosity requirement has been satisfied.

### ***Commonality***

This factor requires common issues of law or fact among the proposed class. “The threshold for commonality requires that the resolution of the common questions affect all or a substantial number of class members.” *Lewy*, 650 N.W.2d at 453 (Minn. Ct. App. 2002), *citing Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986). However, it is not required that *every* issue raised in the action be common to all class members. *Like v. Carter*, 448 F.2d 798 (8<sup>th</sup> Cir. 1971). When analyzing commonality, court should make specific reference to the cause of action asserted and the nature of the evidence that would be common to all class members and that which would be specific to an individual. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 638 (Minn. Ct. App. 2009).

Plaintiffs cite nine questions of law or fact that would be common to all of the proposed class members. These questions of law or fact are:

1. Whether Sheriff Wilkening has the authority under Minnesota law to hold people suspected of civil violations of federal immigration law after Minnesota law otherwise requires their release because they have posted beyond, completed their sentence, been released on recognizance or otherwise resolved their state criminal charge;
2. Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of Form I-247A as grounds to hold people in the Nobles County jail after Minnesota law otherwise requires their release;
3. Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of Form I-200 as grounds to hold people after Minnesota law otherwise requires their release;

4. Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of Form I-203 as grounds to hold people in the Nobles County jail after Minnesota law otherwise requires their release;
5. Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of any combination of the above ICE Forms as grounds to hold people in the Nobles County jail after Minnesota law otherwise requires their release;
6. Whether Sheriff Wilkening has authority under Minnesota law to rely on the receipt of any combination of the above ICE forms as grounds to dissuade people in the Nobles County jail from posting bond, after which Minnesota law would require release;
7. Whether Plaintiffs have a clear legal right to release when Sheriff Wilkening's state-law authority to confine them has ended, and whether Sheriff Wilkening has a clear and mandatory legal duty to release the Plaintiffs when the state-law authority for their confinement has ended;
8. Whether Sheriff Wilkening's police and practice of holding people at the request of ICE after they have posted bond, completed their sentence, been released on recognizance or otherwise resolved their state criminal charge constitutes an unreasonable seizure, in violation of Article I, Section 10 of the Minnesota Constitution; and
9. Whether Sheriff Wilkening's policy and practice of holding people at the request of ICE after they have posted bond, completed their sentence, been released on recognizance or otherwise resolved their state criminal charge deprives them of procedural due process, in violation of Article I, Section 7 of the Minnesota Constitution.

Although the individual circumstances of each proposed class member's incarceration, release conditions, State criminal charge status, immigration status, and length of hold will differ, the underlying ultimate questions will be the same. The evidence and legal arguments for Sheriff Wilkening's basis to hold the individuals pursuant to ICE forms will be the same. The Court finds that the commonality requirement has been satisfied.

### *Typicality*

The typicality requirement of Rule 23.01 requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. This requirement focuses on the claims or defenses themselves and requires that the representative parties have an interest compatible with that of the class to be represented. *Ario v. Metropolitan Airport Com'n*, 367 N.W.2d 509 (Minn. 1985). This

requirement is met “when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members.” *Lewy*, 650 N.W.2d at 454. It does not require that the claims be identical, only that there be a “strong similarity of legal theories.” *Id.*, citing *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995).

If properly refined, the proposed class members would be those who have been held pursuant to ICE Forms I-247A and/or I-200 and who are not being held by any valid state or federal warrant, detainer or criminal sentence. The claims of each of the proposed class members would be the same or strongly similar as they would be based on the constitutionality of the actions of Sheriff Wilkening and the Nobles County Jail in detaining or continuing their detention. The Court finds that the typicality requirement has been satisfied.

### ***Adequacy of Representation***

The adequacy of representation prerequisite requires that the representative parties will fairly and adequately protect the interests of the class. “Representational adequacy means the representative parties’ interests must coincide with the interests of other class members and that the parties and their counsel will competently and vigorously prosecute the lawsuit.” *Lewy*, 650 N.W.2d at 455, citing *Airo*, 367 N.W.2d at 513. The factors used to determine if representivity is satisfied include:

- (1) whether the representatives’ interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf;
- (2) whether the attorneys are qualified, experienced, and capable of conducting the litigation; and
- (3) whether the representatives have any interests that conflict with the objective of the class they represent.

*Lewy*, 650 N.W.2d at 455, citing *Smith v. B&O R.R.*, 473 F. Supp. 572, 581 (D. Md. 1979).

The first factor of the adequacy of representation requirement is very similar to that of the typicality requirement. As the Court has previously addressed, the claims and interests of the representative plaintiffs in this matter are very similar or identical to those of the proposed class members. The Court has no doubt that the representatives will continue to vigorously prosecute the suit on behalf of themselves and those similarly situated.

The second factor addresses the experience and capabilities of the attorneys representing the representatives. The representative plaintiffs in this matter are represented by experienced attorneys from the ACLU and the Anthony Ostlund Baer & Louwagie law firm who are all qualified and capable of conducting this litigation.

Finally, the Court is not aware of any interests of the representatives that would conflict with those in the proposed class. Based upon a review of both the typicality and the factors of the adequacy of representation requirements, the Court finds that the adequacy of representation requirement has been satisfied.

For the reasons cited above, this Court finds that the Plaintiffs have satisfied the requirements of Minn. R. Civ. P. 23.01.

## **Rule 23.02**

In addition to meeting the requirements of Rule 23.01, the Plaintiffs must also satisfy one of provisions of Rule 23.02. Plaintiffs allege that the proposed class action satisfies both paragraphs (b) and (c) of Rule 23.02. Rule 23.02 states, in relevant part:

An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

...

- (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
  - (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
  - (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
  - (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  - (4) the difficulties likely to be encountered in the management of a class action.



Plaintiffs argue that the class should be certified under 23.02(b) because an injunction is the relief they are seeking. Defendants argue that this is not accurate because Plaintiffs plead one count of false imprisonment, which may have monetary damages. Plaintiffs' complaint brings six claims for relief:

1. Ultra vires actions - Minn. R. Civ. P. 57 and 65
2. Mandamus - Minn. Stat. § 586 and 484.03
3. Unreasonable seizure - Minn. Constitution Art. I, Section 10
4. Due Process - Minn. Constitution Art. I, Section 7
5. Right to Bail - Minn. Constitution Art. I, Section 5 and 7
6. False Imprisonment

The relief sought in the first five claims is declaratory or injunctive relief, not monetary relief. Monetary damages may be awarded in a false imprisonment claim. A class should not be certified under Rule 23.02(b) where the predominant relief sought is damages. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9<sup>th</sup> Cir. 1982). However, the mere fact that money damages are sought does not bar treatment of a class action so long as the injunctive or declaratory relief is the predominant relief sought. *Stewart v. Winter*, 669 F.2d 328, 334-35 (5<sup>th</sup> Cir. 1982).

The Court finds that the predominant relief sought by Plaintiffs in this matter is injunctive or declaratory relief, not monetary damages. The fact that monetary damages may be possible under one of the six claims is not sufficient to bar class action certification. The Plaintiffs have satisfied Minn. R. Civ. P. 23.02(b) and, as such, it is appropriate to certify a class.

## CONCLUSION

### Class Certification and Definition

Based upon a review of the relevant case law and facts of this case, the court finds that it is appropriate to certify a class of plaintiffs in this matter. However, it is appropriate to narrow the class definition to ensure that all potential class members would be properly entitled to relief. As such, the Court finds that the following class definition is appropriate and sufficiently narrow to encompass only those who would have been subject to any alleged unconstitutional hold or detainer:

All past and current detainees in the Nobles County Jail who were, are, or will be, the subjects of immigration detainers (ICE Form I-247A) and/or administrative warrants (ICE Form I-200)

sent to the Nobles County Jail by officers or representatives of United States Immigration and Customs Enforcement and who, but for the I-247A and/or I-200 Forms, would otherwise be entitled to release from custody.

### **Appointment of Class Counsel**

Pursuant to Minnesota Rule of Civil Procedure 23.07, the Court that certifies a class must appoint class counsel. In appointing counsel, the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action, (ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (iii) counsel's knowledge of the applicable law, and (iv) the resources counsel will commit to representing the class.

The proposed counsel for the class include counsel from the ACLU and the law firm Anthony Ostlund Baer & Louwagie. Both the ACLU and The Anthony Ostlund law firm have experience in bringing class actions and asserting claims involving issues of unconstitutional treatment. The Court has no reason to doubt the proposed counsels' knowledge of the applicable law or the resources that will be available to counsel to pursue the class action. Counsel has, thus far, actively and articulately argued on behalf of the Plaintiffs and the purported class for the TRO and the Court has no reason to doubt that this strong advocacy will continue in the future. There being no reason to conclude otherwise, the Court finds it is appropriate to appoint Ian Bratlie, Teresa Nelson, Brooke Anthony, and Norman Pentelovitch as counsel for the class.

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G.J.A.