UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PERRY HILL, both individually and on behalf of a class of others similarly situated,

Plaintiff,

v. **9:14-CV-933 (BKS/DJS)**

COUNTY OF MONTGOMERY, MICHAEL AMATO and MICHAEL FRANKO,[1]

Defendants.

Appearances:

For Plaintiff:
Law Offices of Elmer Robert Keach, III, P.C.
Elmer Robert Keach, III
Maria K. Dyson
One Pine West Plaza
Suite 109
Albany, NY 12205

Migliaccio & Rathod LLP
Nicholas A. Migliaccio
Jason S. Rathod
412 H Street N.E.
Suite 302
Washington, D.C. 20002

For Defendants:
Goldberg Segalla LLP
Jonathan M. Bernstein
8 Southwoods Boulevard, Suite 300
Albany, NY 12211

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[1] Defendants note that Defendant Michael Franko has retired. (Dkt. No. 88-18, at 29). To the extent he is sued in his official capacity, his "successor is automatically substituted as a party." Fed. R. Civ. P. 25(c). Claims against Defendant Franko in his individual capacity remain.

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Perry Hill brings this proposed class action under 42 U.S.C. § 1983 against Defendants County of Montgomery, Michael Amato, and Michael Franko. (Dkt. No. 1). Plaintiff advances a conditions of confinement claim, alleging that Defendants failed to provide adequate food and nutrition while he was detained at the Montgomery County Jail ("MCJ") in Fultonville, New York, in violation of the Eighth Amendment. (Dkt. No. 1). Presently before the Court is Plaintiff's motion for class certification under Rule 23 of the Federal Rules of Civil Procedure. (Dkt. No. 73). Plaintiff asks the Court to certify as a class "[a]ll detainees who have been or will be placed into the custody of the Montgomery County Jail and were detained for at least two consecutive weeks" from July 25, 2011 to the present. (*Id.*). Defendants oppose the motion. (Dkt. No. 88). For the following reasons, Plaintiff's motion for class certification is denied without prejudice to renewal with further briefing.

II. BACKGROUND

In support of his motion for class certification, Plaintiff relies on the Complaint, his deposition, the depositions of five other MCJ inmates, the depositions of Defendants Amato and Franko, as well as the depositions of a number of MCJ staff who work in the kitchen and medical department, MCJ meal plans, a sample of inmate surveys, and the opinion of Heidi Jay Silver, an expert in the area of nutrition.[2] Defendants have submitted expert reports by Katherine Streeter,

[2] In his reply, Plaintiff indicated that he intended to submit for in camera review inmate grievances and additional surveys from inmates at MCJ. (Dkt. No. 95-3, at 8–9). In a letter motion following Plaintiff's reply, Defendants objected to Plaintiff's "attempt[] to submit evidence to the Court . . . that was not included in his initial motion papers for class certification." (Dkt. No. 97). Defendants' letter motion is denied as moot as Plaintiff did not submit this evidence or file a request for in camera review. (*See* Dkt. No. 99 (offering "to provide additional evidence to the Court.")). In the event the parties wish to file additional evidence in support of any further briefing, they are free to do so.

a registered dietitian, Martin Horn, an expert in the area of correctional facilities policies and procedures, and William Graber, M.D., who reviewed, *inter alia*, Plaintiff's medical records. The Court has carefully considered all the evidence and outlines the evidence relevant to the disposition of the present motion.

A. Plaintiff Perry Hill

According to the Complaint, Plaintiff was detained at MCJ from October 2013 to March 2014 for a "parole violation." (Dkt. No. 1, ¶ 3). Plaintiff seeks to represent the following class:

> All detainees who have been or will be placed into the custody of the Montgomery County Jail and were detained for at least two consecutive weeks. The class period commences on July 25, 2011, and extends to the date on which Montgomery County is enjoined from, or otherwise ceases, enforcing its policy, practice and custom of refusing to provide an appropriate amount of nutritional sustenance to all detainees admitted to the Montgomery County Jail. Specifically excluded from the class are Defendant and any and all of its respective affiliates, legal representatives, heirs, successors, employees or assignees.

(*Id.* ¶ 8). Plaintiff asserts that "hundreds of citizens . . . are placed into the custody of Montgomery County every month" and that he believes "the size of the Proposed Class totals at least thousands of individuals." (*Id.* ¶ 10). Plaintiff claims there are common questions of law and fact, including (1) "whether the Defendant's written and/or de facto policy of providing inadequate [sustenance] to all [MCJ] detainees is a violation" of the Eighth Amendment; and (2) whether such a written and/or de facto policy existed during the Class Period." (*Id.* ¶ 18).

Plaintiff alleges that MCJ "instituted a written and/or de facto policy, custom or practice of refusing to provide detainees adequate food in that they provide not more than 1,700 calories per day to all detainees" and that the food provided "is substantially devoid of the protein, minerals, and vitamins necessary to human survival." (Dkt. No. 1, ¶ 23). Consequently, the "vast majority of detainees" have lost "substantial percentages of body weight" or have developed symptoms of malnutrition. (*Id.* ¶ 23). Plaintiff stated that his meals at MCJ typically

consisted of: oatmeal, a breakfast cake, or cereal for breakfast; a sandwich and vegetable, and maybe fruit for lunch; and a chicken patty or beef stroganoff and a vegetable for dinner. (Dkt. No. 75-6, at 36–37). He was "always" hungry. (*Id*. at 38). "On several occasions, Plaintiff was so hungry he consumed . . . toothpaste and coco-butter lotion" and observed "numerous other detainees eating the same or similar substances." (*Id*. at 37).

Plaintiff suffered from constant hunger pains, skin rashes, depression, and exhaustion, and felt "dizzy and faint" as a result of the inadequate food at MCJ. (*Id*. ¶ 33). Plaintiff also lost "a significant amount of hair, experienced loosening of his teeth, pain and bleeding in his gums, and his gum line began to recede." (*Id*. ¶ 33; Dkt. No. 75-6, at 55). Plaintiff witnessed a fight over a sandwich. (*Id*. at 58-59). Plaintiff weighed approximately 160 pounds upon admission to MCJ and lost twenty-four pounds during the five months of his incarceration there. (Dkt. No. 1, ¶ 31).

Plaintiff complained to corrections officers "[a]ll the time" and asked "why there was so little food" but received no response. (Dkt. No. 75-6, at 39). Plaintiff, and other detainees, filed grievances "regarding the lack of adequate food;" these grievances "were categorically denied and/or ignored" and Plaintiff never received a response. (Dkt. No. 1, ¶ 34).

B. Other Individuals Housed at MCJ

In support of his motion, Plaintiff submitted the deposition testimony of two individuals who had been pretrial detainees at MCJ for more than two weeks during the proposed class period. (Dkt. No. 75-4 (Engle); Dkt. No. 75-10 (Pettit)). Eric Engle testified that the portions were "incredibly small and he was . . . extremely hungry." (Dkt. No. 75-4, at 14). Engle testified that he complained but that "the only answers I was getting from the kitchen staff, most of the guards didn't know that is what was decided by the jail administrator, it was enough

calorie intake and you are not going to get any more." (Dkt. No. 75-4, at 69). Robert Pettit testified that when he was in MCJ in 2012 and 2013,[3] he lost hair due to "[l]ack of food," he was hungry all day every day, and the meals did not fill him up. (Dkt. No. 75-10, at 46, 63). Plaintiff also submitted the testimony of Bruce O'Shaughnessy, Kenneth Crouse, and Robert Washington (Dkt. No. 95-1), who seem to have been convicted prisoners serving a sentence at MCJ, and who claim to have suffered as a result of the inadequate food. (Dkt. Nos. 75-9, at 5–6, 11; 75-22, at 6–7, 16; Dkt. No. 95-1, at 7, 17–18).

C. Montgomery County Jail

Approximately 1,000 individuals enter MCJ every year and it has 177 beds. (Dkt. No. 75-5, at 45; Dkt. No. 75-2, at 36). Since 2010, Trinity Services Group has been MCJ's food provider. (Dkt. No. 88-3, ¶ 2). The dietician provided by Trinity sets the menu at MCJ and serving size.[4] (Dkt. No. 75-3, at 10, 58). Inmates at MCJ are supposed to receive, on average, 2,900 calories per day. (Dkt. No. 75-2, at 8). Trinity requires the jail to make a substitution if an item specified on the menu is unavailable—if milk has spoiled, for instance. (*Id*. at 56-57). The MCJ cook makes the decision to substitute an item on a menu. (Dkt. No. 75-2, at 144). Lynn Dunmar, who is employed as a cook at MCJ, explained that an item might be substituted if they were out of stock or it was winter and the food delivery truck did not arrive on time. (Dkt. No. 75-3, at 27). A vegetable is replaced with another type of vegetable and a starch is replaced with another starch. (Dkt. No. 75-3, at 27). Dunmar testified that a production sheet must be filled out for every meal and if there is a substitution it is usually noted on that sheet. (Dkt. No. 75-3, at 92).

[3] Pettit appears to have been a pretrial detainee during some of the time he was at MCJ in 2012 and 2013. (Dkt. No. 75-10, at 8–9).

[4] Amato testified that the MCJ kitchen staff and Trinity "put together" the diet. (Dkt. No. 75-2, at 56).

Dunmar stated that she instructs the inmates to use specific utensils when working in the kitchen, explaining that if they are supposed to serve one cup of mashed potatoes, they use a one-cup utensil to scoop the potatoes and level it off before placing it on the tray. (Dkt. No. 75-3, at 50). Crouse, an inmate who worked in the kitchen, testified that three or four times each week he was instructed to ladle out less than the prescribed amount of food because they were running low. (Dkt. No. 95-2, at 13). Inmates receive an extra meal as payment for working in the kitchen. (Dkt. No. 75-2, at 25).

D. Plaintiff's Nutrition Expert – Heidi Jay Silver

Heidi Jay Silver is a Research Associate Professor of Medicine in the Division of Gastroenterology, Hepatology, and Nutrition in the School of Medicine, Department of Medicine, at Vanderbilt University Medical Center, Nashville, Tennessee. (Dkt. No. 75-1, at 1). Plaintiff's counsel asked Silver to analyze a number of documents, including among others, spreadsheets of Trinity Services Group's menus and nutrient analysis of menus, Dunmar's deposition, the Commission of Corrections' investigatory materials about food substitutions, meal records from January to February 2013 and January to February 2014, and photographs of Plaintiff and R. Reece, who was housed at MCJ. (Dkt. No. 75-1, at 2).

Silver opined that the inmates of MCJ "experienced clinically significant weight loss during the period of time in which they were incarcerated" because the calories they consumed at MCJ were "less than the energy requirements for maintaining their initial admission body weight." (*Id*. at 3). After reviewing Trinity's menus, Silver stated that she agrees "that the daily menus as planned are designed to provide" "a range of 2350-3065 calories per day." (*Id*. at 3).

After reviewing MCJ incident reports as well as the weight loss of fifteen inmates, Silver stated that in her opinion, it "is apparent that there are frequent occasions when substitutions are

being made for food items that provide fewer calories and other nutrients than what was planned in the written cycle menus." (*Id*. at 4–5). These substitutions created caloric and protein deficits as well as deficits in, among other nutrients, fiber, iron, calcium, potassium, Vitamin A, and Vitamin D. (*Id*. at 6).

Silver viewed facial photographs of Plaintiff and R. Reese, "for whom the reduction in body mass (loss of fat and muscle mass) is physically apparent" and opined that the weight loss is "clinically significant." (Dkt. No. 75-1, at 7). Silver defined "clinically significant" as the loss of ten percent or more body weight in a six month period or five percent of body weight in a period of three months." (Dkt. No. 75-1, at 3). According to Silver, hair loss may be caused by the inadequate intake of protein, Vitamin E, zinc, selenium, and biotin; bleeding gums may be caused by a Vitamin C deficiency; skin changes may be caused by a deficiency in Vitamin E, Vitamin A, and fatty acids; and a loss of menses may be caused by inadequate caloric intake and weight loss. (Dkt. No. 75-1, at 7). Additionally, Silver stated that "[w]ith hunger, there is an increased focus on finding other items to substitute for the inadequate food intake – the effect of hunger is consistent with the aberrant eating behaviors reported by counsel of inmates consuming toothpaste, cocoa butter and toilet paper to assuage their hunger." (*Id*. at 8).

III. MOTION FOR CLASS CERTIFICATION

For a matter to proceed as a class action, a plaintiff must first satisfy four requirements: 1) numerosity ("the class is so numerous that joinder of all members is impracticable"); 2) commonality ("there are questions of law or fact common to the class"); 3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"); and 4) adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class"). Fed. R. Civ. P. 23(a). In addition, the Second Circuit has

"'recognized an implied requirement of ascertainability in Rule 23,' which demands that a class be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017) (quoting *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015)).

Assuming the requirements of Rule 23(a) are met, a class action may only be maintained if the Plaintiff also qualifies the proposed class under one of the categories in Rule 23(b). Fed. R. Civ. P. 23(b). Here, Plaintiff seeks to certify the class for purposes of injunctive relief under Rule 23(b)(2) and compensatory relief under Rule 23(b)(3), though limited to the issue of liability under Rule 23(c)(4), as damages will require an individualized inquiry. (Dkt. No. 69-1, pp. 19-29). Certification of a class under Rule 23(b)(2) is appropriate in cases where the defendant "has acted or refused to act on grounds generally applicable to the class," thus entitling class members to "final injunctive relief." Fed. R. Civ. P. 23(b)(2). The court may certify a Rule 23(b)(3) class if it "finds that 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).

The party seeking class certification bears the burden of satisfying Rule 23's requirements by a preponderance of the evidence. *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 317 F.R.D. 374, 384 (S.D.N.Y. 2016). Thus, "a court must 'probe behind the pleadings before coming to rest on the certification question,' satisfying itself that Rule 23 compliance may be demonstrated through 'evidentiary proof.'" *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). "[T]his inquiry may sometimes overlap with merits issues, though the determination as

to a Rule 23 requirement is not binding on the trier of fact in its determination of the merits." *Id.* "Furthermore, in order to certify a class, the proponent of class certification need not show that the common questions 'will be answered, on the merits, in favor of the class.'" *Id.* (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013)). While the requirements "are to be applied liberally," the court must still "conduct a rigorous analysis of the criteria set forth in Rule 23." *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 153-54 (S.D.N.Y. 2010). "A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

A. Section 1983 – Conditions of Confinement

In this case, Plaintiff's claim appears incongruous: he seeks to represent a class of "detainees" in connection with a conditions of confinement claim, but alleges a violation of the Eighth Amendment. (Dkt. No. 1, ¶¶ 8, 40). "A pretrial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eight[h] Amendment." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017); *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 582 (N.D.N.Y. 2017) ("As a general matter, a convicted prisoner is obligated to pursue relief for allegedly unconstitutional conditions under the Cruel and Unusual Punishment Clause of the Eighth Amendment while a pre-trial detainee's claim is properly brought under the Due Process Clause of the Fourteenth Amendment.").

Plaintiff testified that he was held at MCJ from October 2013 to March 2014 for a probation violation, but that there was no sentence because "they came to a determination that

they were in the wrong." (Dkt. No. 75-6, at 17). Although the parties appear to assume that Plaintiff is properly characterized as a pretrial detainee, rather than a convicted prisoner, the Complaint alleges a violation of the Eighth Amendment, which applies to convicted prisoners, and the parties have not briefed this issue.[5] *See, e.g.*, *Weishaar v. County of Napa*, No. 1:14-cv-1352-LB, 2016 WL 7242122 at *6 (N.D. Cal. Dec. 15, 2016) (ruling that arrested probation violator was a pretrial detainee, whose claim for deliberate indifference to medical needs rests upon the Fourteenth Amendment, not a convicted prisoner whose claim rests upon the Eighth Amendment); *Hamilton v. Lyons*, 74 F.3d 99, 104–06 (5th Cir. 1996) (ruling that parolee arrested for subsequent crime "may establish a claim for unconstitutional conditions of confinement through direct evidence of an expressed intent by detention facility officers to punish him for the crime for which he has been charged but not convicted," but may not prevail "merely because the government fails to come forward with evidence that the challenged condition is reasonably related to a legitimate government interest").

Under both the Eighth and Fourteenth Amendments, a plaintiff must establish an objective element and a subjective element for a § 1983 conditions of confinement claim. Under both amendments, "to establish an objective deprivation, 'the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health.'" *Darnell*, 849 F.3d at 30 (quoting *Walker v. Schult*, 717 F.3d 119, 126 (2d Cir. 2013)). The Constitution requires "that prisoners be served 'nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it' [and] under certain circumstances a substantial deprivation of food may well be recognized as being of constitutional dimension." *Robles v. Coughlin*, 725

[5]The Court recognizes that *Darnell*, which distinguishes the mens rea element necessary for convicted prisoners, as opposed to pretrial detainees, in an unconstitutional conditions of confinement case was issued just days before Plaintiff's motion for class certification.

F.2d 12, 15 (2d Cir. 1983). "[C]onditions of confinement may be aggregated to rise to the level of a constitutional violation, but 'only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise.'" *Walker*, 717 F.3d at 125 (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

The subjective element requirement, however, differs between the two amendments. Under the Eighth Amendment, a defendant "'cannot be found liable . . . for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Darnell*, 849 F.3d at 32 (quoting *Farmer v. Brennan*, 511 U.S. 825 (1994)). The mens rea requirement for pretrial detainees under the Fourteenth Amendment, on the other hand, is defined objectively. *Darnell*, 849 F.3d at 35. A pretrial detainee must prove "that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 29, 35.

B. Rule 23(a) Requirements

1. Numerosity

Rule 23(a)(1) first requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiff's proposed class includes "[a]ll detainees who have been or will be placed into the custody of the Montgomery County Jail and were detained for at least two consecutive weeks." (Dkt. No. 74, at 14). In general, "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Hyde Park*, 47 F.3d 473, 483 (2d

Cir. 1995). Here, Plaintiff claims that (1) "thousands of detainees were held within the MCJ during the class period;" and (2) more than a hundred individuals have contacted him indicating that they wish to be part of this lawsuit. (Dkt. No. 74, at 16). Additionally, Plaintiff has submitted the deposition testimony of at least two MCJ inmates who claim weight loss or malnutrition and hunger, ten surveys of MCJ inmates suffering malnutrition, hunger, or weight loss, a letter by an inmate, and a grievance. Plaintiff's expert's report contains a table of fourteen individuals, all of whom were at MCJ for longer than two weeks and lost weight. (Dkt. No. 75-1, at 4). Defendants contend that Plaintiff has failed to show numerosity because there is no evidence that "these thousands or even hundreds of people lost weight to an unhealthy point while at the jail." (Dkt. No. 88-18, at 13).

Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement. *See, e.g.*, *Barlow v. Marion Cty. Hosp. Dist*., 88 F.R.D. 619, 625 (M.D. Fla. 1980) (as the bearers of the burden to show joinder is impracticable, "[p]laintiffs must show some evidence of or reasonably estimate the number of class members" but "need not show the exact number"); *see also* 1 Herbert B. Newberg, Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels § 3.05, at 139 (2d ed. 1985). Further, the numerosity inquiry is not "strictly mathematical." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014). Rather, it

> must take into account the context of the particular case, in particular whether a class is superior to joinder based on other relevant factors including: (i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members.

Id.

In this case, in view of the evidence that more than one thousand inmates pass through MCJ annually, the Court finds it is reasonable to conclude that there is a sufficient number of present and former MCJ detainees to satisfy the numerosity requirement. Further, as there may be well in excess of forty class members who are unlikely to have the financial resources to sue separately, judicial economy favors certification over joinder.

Defendants contend that a class cannot be certified because the individuals who are currently incarcerated must exhaust their administrative remedies first. (Dkt. No. 88-18, at 15). The exhaustion requirement under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), is inapplicable to Plaintiff because he was not incarcerated at the time this action was filed. *See Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) ("[L]itigants . . . who file prison condition actions after release from confinement are no longer 'prisoners' for purposes of § 1997e(a) and, therefore, need not satisfy the exhaustion requirements."). Moreover, "although a defense may arise and may affect different class members differently, this occurrence does not compel a finding that individual issues predominate over common ones." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) (internal quotation marks and brackets omitted). "So long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification." *Id.* (quotation marks omitted and alterations incorporated). Thus, this defense is best considered in the context of predominance.

2. Commonality[6]

Next, a plaintiff seeking class certification must show "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The critical inquiry is whether the common questions

[6] The Second Circuit has observed that "[t]he commonality and typicality requirements tend to merge into one another, so that similar considerations animate analysis of Rules 23(a)(2) and (3)." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

are at the core of the cause of action alleged." *Friedman-Katz*, 270 F.R.D. at 155 (quoting *Labbate–D'Alauro v. GC Servs. Ltd. P'shp*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996)). "Commonality does not mandate that all class members make identical claims and arguments, only that common issues of fact or law affect all class members." *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992) (citing *Port Auth. Police Benevolent Ass'n v. Port Auth.*, 698 F.2d 150, 153–54 (2d Cir. 1983)).

Even a single common question may suffice, but it "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The common question(s) must generate "common answers apt to drive the resolution of the litigation." *Id.* (citation omitted).

Plaintiff asserts that common questions in this case include: (1) "do County employees make changes to the menus that were approved by a qualified dietician, such that those changes provide . . . inadequate nutrition": (2) "[a]re these menu changes made pursuant to a policy or practice implemented by Montgomery County"; and (3) "[h]ave detainees suffered injuries as a result of this practice." (Dkt. No. 74, at 18). Defendants argue that "there are too many variables and factual scenarios to support commonality" and that Plaintiff cannot show "that the alleged malnutrition occurred on a class wide basis when there are inmates that gained weight or had their weight remain the same." (Dkt. No. 88-18, at 16). Defendants further argue that Plaintiff "fails to account for those inmates that worked in the kitchen that obtained double portions," (*Id*. at 17), and note that MCJ's medical unit has the ability to order more food for a pregnant inmate, and that changes are made to meals to accommodate diabetics. (Dkt. No. 75-2, at 81).

Plaintiff alleges that Defendants intentionally or recklessly employed a policy or practice of making changes to the menu designed by a Trinity dietitian to provide adequate calories and nutrition to inmates by substituting foods of insufficient caloric and nutritional value on a continual basis and at least twice weekly reducing portion sizes. The Second Circuit "has been reluctant to impose bright-line durational or severity limits in conditions of confinement cases, and has never imposed a requirement that pretrial detainees show that they actually suffered from serious injuries." *Darnell*, 849 F.3d at 31 (citing *Walker*, 717 F.3d at 129); *see also Willey*, 801 F.3d at 68 ("[S]erious injury is unequivocally not a necessary element of an Eighth Amendment claim."). Thus, the answers to the above questions go to the heart of this case—whether Defendants, through policy or practice of allowing calorically and nutritionally inadequate food to be served to inmates on a continuous basis, subjected Plaintiff and others to conditions that posed "an unreasonable risk or serious damage to [their] future health." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012). Accordingly, commonality is satisfied. *See, e.g.*, *Butler v. Suffolk Cty.*, 289 F.R.D. 80, 98 (E.D.N.Y. 2013) ("Whether the County was aware of and deliberately indifferent to the conditions at the [jail] is a common question subject to class-wide resolution."); *McGee v. Pallito*, No. 1:04-cv-00335, 2015 WL 5177770, at *4, 2015 U.S. Dist. LEXIS, at *15 (D. Vt. Sept. 4, 2015) (finding "common issue" of whether prison officials' policy amounted to deliberate indifference and observing that "common questions" pertinent to the individual class members "frame the ultimate question of whether the Defendants' policy violates the Constitution, such that they should be enjoined from implementing it"); *V.W.*, 236 F. Supp. 3d at 575 (concluding that common questions included whether the defendants "applied a common course of unlawful conduct to the members of the class and subclass . . . acted with deliberate indifference to the substantial risk of serious harm posed by certain aspects of that common

course of conduct," and whether the defendants "have collectively deprived plaintiffs of the education, special services, and related procedural protections to which they are entitled" and that the "common answers to these questions will drive the resolution of the litigation").[7]

3. Typicality

Typicality "requires that the claims of the class representatives be typical of those of the class." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care. L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007) (internal quotation marks omitted). This requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (citations omitted).

"[T]he test for typicality is not demanding." *Pyke v. Cuomo*, 209 F.R.D. 33, 42 (N.D.N.Y. 2002) (quotations and citations omitted). But here, the Court requires further briefing as to whether Plaintiff is best characterized as a pretrial detainee or a convicted prisoner, and whether the Eighth Amendment or Fourteenth Amendment applies to Plaintiff's claims. Clarification is necessary because, although Plaintiff appears to maintain that the Eighth Amendment applies, he seeks to represent pretrial detainees, to whom the Fourteenth Amendment applies. Thus, in view of the questions as to Plaintiff's own status and legal claim, the Court cannot conclude that he has shown that he and the class members share the same legal

[7] *See also Johnson*, 780 F.3d at 140 ("We need not decide, however, whether each of plaintiffs' ten issues are properly treated as common or individual. In the context of a Rule 23(b)(3) class certification, the issues raised by Nextel are more efficiently addressed in light of the predominance and superiority requirements of Rule 23(b)(3).").

arguments or that his claims are typical of the class. *Cf. V.W.*, 236 F. Supp. 3d at 576 (finding that the plaintiff carried their burden on typicality, explaining that "the members of the class and subclass share the same legal arguments because their claims are based on the common application of certain challenged policies."). Accordingly, the Court concludes that, at this time, Plaintiff has failed to show typicality.

4. Adequacy of Representation

Plaintiff must also demonstrate that he "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). In other words, the plaintiff must be "prepared to prosecute fully the action and have no known conflicts with any class member." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 253 (2d Cir. 2011). In this case, Plaintiff's own status (as pretrial detainee or convicted prisoner) requires briefing. Additionally, it is unclear, based on Plaintiff's assertion that the Eighth amendment applies, whether he seeks to represent pretrial detainees or convicted prisoners. Moreover, to the extent Plaintiff seeks to represent both, he must address whether he, in light of his own status, can adequately do so. Therefore, Plaintiff has not satisfied the adequacy requirement at this time.[8]

[8] As to his attorneys, Plaintiff asserts the law firms representing him "possess extensive experience in litigating class actions, including those involving civil rights violations." (Dkt. No. 74, at 20). Defendants do not dispute that Plaintiff's counsel are capable of protecting the interests of the class.

5. Ascertainability[9]

The Second Circuit recently clarified that "[t]he ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec.*, 862 F.3d at 264. "This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way." *Id.* at 269. The Circuit expressly "decline[d] to adopt a heightened ascertainability theory that requires a showing of administrative feasibility at the class certification stage." *Id.* at 265. Plaintiff asserts that the proposed class is "readily identifiable" and those individuals who remained in MCJ for more than two weeks can be identified through "booking records maintained at the MCJ." (Dkt. No. 74, at 21–22). While it appears feasible to identify class members based on MCJ records, because Plaintiff's own status is unclear and Plaintiff has not clearly identified which class of individuals (pretrial detainees or convicted prisoners) he seeks to represent, ascertainability does not save his motion.

C. Summary

Having found that Plaintiff has not met all of the preliminary requirements for certification under Rule 23(a) and that further briefing is required on several issues, the Court does not reach Rule 23(b). Accordingly, Plaintiff's motion for class certification is denied without prejudice to renewal upon briefing the following issues:

1. Whether Plaintiff, while being detained at MCJ on a probation violation should be characterized as a pretrial detainee or a convicted prisoner and whether the Eighth Amendment or Fourteenth Amendment applies; and

[9] Citing, *inter alia*, *Floyd v. City of New York*, 283 F.R.D. 153, 172 (S.D.N.Y. 2012) ("It would be illogical to require precise ascertainability in a suit that seeks no class damages."), Plaintiff asserts that because he primarily seeks injunctive relief, "the implied requirement of ascertainability" is inapplicable. Dkt. No. 74, at 21. As Plaintiff also seeks class certification under Rule 23(b)(3), though on liability only, as allowed by Rule 23(c)(4), the Court finds ascertainability relevant.

2. Whether Plaintiff seeks to represent MCJ pretrial detainees or convicted prisoners, or both, and whether he is a proper representative for that class.

Additionally, the Court notes that Plaintiff seeks injunctive relief on behalf of the class, but that he appears to have been released from MCJ *prior* to filing this action. (Dkt. No. 1, ¶ 3; Dkt. No. 75-6, at 16). In the Second Circuit, "an inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006). Although the relation-back doctrine "has unique application in the class action context, preserving the claims of some named plaintiffs for class certification purposes that might well be moot if asserted only as individual claims," *Amador v. Andrews*, 655 F.3d 89, 100 (2d Cir. 2011), "it is the date of the complaint, not the date of the certification motion, that is relevant." *Butler*, 289 F.R.D. at 100 n.5 (citing *Mental Disability Law Clinic v. Hogan*, No. 06–CV–6320, 2008 WL 4104460, at *10 (E.D.N.Y. Aug. 29, 2008). Accordingly, the parties are directed to brief whether Plaintiff has standing to pursue a claim for injunctive relief in this case.

IV. CONCLUSION

For these reasons, it is

ORDERED that Defendants' letter motion (Dkt. No. 97) is **DENIED**; and it is further

ORDERED that Plaintiff's motion for class certification (Dkt. No. 73) is **DENIED** without prejudice to renewal upon briefing the above issues; and it is further

ORDERED that if Plaintiff seeks to renew his motion for class certification, he must file a brief, and any exhibits, on or before October 31, 2017. The brief may not exceed thirty pages and must address the above-identified issues. Plaintiff need not file a new motion for class certification, and may incorporate his prior motion papers. Defendants' response, and any

exhibits, must be filed by November 14, 2017, and may not exceed thirty pages. Any reply is due by November 21, 2017.

IT IS SO ORDERED.

Dated: September 29, 2017

Brenda K. Sannes
U.S. District Judge