STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

EDWARD ALLEN, OLIVER HARDY, and MICHAEL WATKINS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v

DANIEL HEYNS, THOMAS COMBS, and RICHARD SNYDER,

Defendants.

No. 12-907-CZ

HON. JOYCE A. DRAGANCHUK

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DEFENDANTS' MOTION TO STAY IMPLEMENTATION OF REMEDIATION

NOW COME Defendants, Daniel Heyns, Thomas Combs, and Richard Snyder, by and through their attorneys, Bill Schuette, Attorney General, and A. Peter Govorchin, Assistant Attorney General, and submit this Motion to Stay Implementation of Remediation pursuant to MCR 2.119(A) and 2.614 (B) – (E) because Defendants can demonstrate that they have a substantial likelihood of succeeding on the merits of their appeal; Defendants would suffer irreparable injury

if the stay were not granted; granting the stay would not substantially harm the other parties; and granting the stay would serve the public interest.

This motion is based on the attached brief, filed in support of Defendants' Motion to Stay Implementation of Remediation.

RELIEF

WHEREFORE, for the reasons stated, Defendants respectfully request that an order be entered staying implementation of any remediation order pending the outcome of Defendants' anticipated appeal.

Respectfully submitted,

Bill Schuette
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Dated: October 23, 2013

2012-0020322-A Allen / Def Mtn Stay Remediation

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DEFENDANTS' BRIEF IN SUPPORT FOR THEIR MOTION TO STAY IMPLEMENTATION OF REMEDIATION

STATEMENT OF FACTS

On August 28, 2013, the Court granted Plaintiffs' Motion for Summary Disposition under MCR 2.116(C)(10). The order setting forth that decision was entered on September 11, 2013. That order allowed the parties to submit proposed remediation orders to implement the Court's decision. Those opposing proposed orders have been submitted and the hearing to consider those orders or alternative implementation is set for 4:00 p.m. on October 30, 2013.

The Court, in granting Plaintiffs' summary disposition, held that parolable lifers who also have a consecutive term of years sentence should be considered to have a 10, 15, 17½ or 20 year minimum sentence on the parolable life sentence, as applicable, for purposes of determining the prisoner's parole eligibility date, even when the parolable life sentence is followed by a consecutive term of years sentence and when consecutive sentences were received for a new crime committed while on parole, on escape status, or while in a correctional facility.

A remedial order implemented to carry out the Court's ruling, while the Defendants are appealing the merits of that ruling in the appellate courts, will create great uncertainty in the Parole Board's operation, for the Plaintiff class members, and for the sentencing judges, prosecutors and crime victims of the lifers who are members of the *Allen* class. This case has presented a question of first impression. Implementing the Court's ruling represents a change in more than 70 years' practice by the Parole Board for similarly situated persons as described by the *Allen* class definition. A stay for the time necessary to prosecute the appeal is appropriate.

AUTHORITY

A court should stay its judgment pending appeal where the moving party can demonstrate that: (1) it is likely to succeed on the merits; (2) it would suffer irreparable injury if the stay were not granted; (3) granting the stay would not substantially harm the other parties; and (4) granting the stay would serve the public interest. *MSEA v Dep't of Mental Health*, 421 Mich 152: 365 NW2d 93 (1994).

This test is flexible and allows a movant to obtain a stay pending appeal by showing "a substantial case on the merits when a serious legal question is involved" and that "the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v Estelle*, 650 F2d 555, 556 (5th Cir 1981); see also *Mohammed v Reno*, 309 F3d 95, 101 (2d Cir 2002) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay."). The Defendants satisfy all four prongs of this test.

ARGUMENT

I. Defendants are likely to prevail on the merits in the Court of Appeals.

Although Defendants respect this Court and its decision, Defendants nevertheless believe that the Court of Appeals is likely to disagree with this Court's judgment on several independent grounds.

On appeal, Defendants expect to raise two principal issues. First, that prisoners serving a parolable life sentence and an indeterminate sentence consecutively, who committed the offense punishable by an indeterminate sentence while (1) incarcerated, (2) deemed to be an escapee from a correctional facility, or (3) on parole, are subject to MCL 768.7a(1) or (2) and are therefore treated as serving a life sentence without parole under the clear language of the statute and Defendants' longstanding application of MCL 791.768 consistent with the statute's clear language when applied to parolable lifers with a consecutive term of years sentence.

Second, that a life sentence, as a determinate sentence, does not have a minimum sentence upon which parole eligibility can be calculated.

The Parole Board has, for more than 70 years, interpreted consecutive term of years sentences under MCL 768.7a to require service of the combined minimum sentences, added together, before it had parole jurisdiction, rather than the entire underlying sentence before the consecutive sentence's minimum could begin to be served. The reason for this interpretation is that an indeterminate sentence can require the person so sentenced to serve anywhere from the minimum term to the maximum term. Service of time anywhere in between may be considered the person's sentence and they may be discharged from further service obligation after their minimum is served by the Parole Board's grant of parole and subsequent discharge of the parole. The current interpretation by the Defendants does not conflict with the plain language of the statute and has been implicitly approved by the Legislature, thereby affording the Defendants' interpretation considerable deference by the courts.

In *Wayne County Prosecutor v Dep't of Corrections*, 451 Mich 569, 579; 548 NW2d 900, 905 (1996), the Court held that "[t]he department has consistently construed the language of [MCL 768.]7a(1) since its enactment." The "statutory construction of the department has gone unchallenged until this litigation, entitling it to considerable deference by this Court." *Id.* at 580.

The *Wayne County* case involved a challenge to the Parole Board's interpretation of MCL 768.7a to still allow adding the minimum sentences on

consecutive term of years sentences to calculate when a person serving a term of years sentence and committing a new crime while incarcerated, on escape or on parole, could be considered for parole. The Wayne County Prosecutor argued that the plain language of the statute required that the entire underlying term of years sentence be served before the consecutive sentence time could begin being served.

Despite this language, and without reference to MCL 791.234(3), the Court upheld the Michigan Department of Corrections' interpretation of a person's parole eligibility when that person was serving consecutive term of years sentences.

If the Michigan Supreme Court found the Defendants' interpretation to be acceptable, even while it was arguably inconsistent with the statute's plain language, based on the long standing practice of applying the minimum sentence stacking practice to determine parole eligibility, it naturally follows that the same deference to the Defendants' longstanding interpretation consistent with the plain language of MCL 791.768 should be afforded by the courts. The Defendants continue to interpret both subsections (1) and (2) of MCL 768.7a identically to the manner upheld in *Wayne County Prosecutor v Dep't of Corrections*, 451 Mich 569; 548 NW2d 900 (1996).

The Defendants have interpreted MCL 768.7a(1) in the same manner since the statute's enactment in 1954, and this same interpretation has been applied to subsection (2) of MCL 768.7a since the Legislature's modification of its statutory language 25 years ago. Courts "will ordinarily assume that the Legislature was aware of past practice in the administration" of a statute by a state agency. *Wayne*

County Prosecutor, 451 Mich at 580. In effect, if the Legislature has tacitly approved an agency's interpretation of its statute by choosing not to act for a substantial period of time, then the agency's interpretation is entitled to "considerable deference by this Court." *Wayne County Prosecutor,* 451 Mich at 580.

This Court cited *People v Waterman,* 137 Mich App 429, 437; 358 NW2d 602, 607, as authority in support of its conclusion that parolable lifers who have a consecutive term of years sentence should be considered to have a calendar year minimum (10, 15, 17 ½ or 20, as applicable) sentence for purposes of determining parole eligibility dates. In *Waterman,* the Court stated that "the 'lifer law' . . . sets the minimum term on all life sentences other than first-degree murder and major controlled substance offenses at ten calendar years." 137 Mich App 429, 437; 358 NW2d 602, 607 (1984). But, the Court of Appeals' language referenced above from *Waterman*, which this Court cited, was not a part of the main issue presented or required for the *Waterman* Court's holding and thus, was dicta. The issue brought before the *Waterman* Court was "whether the 1978 Initiative Proposal B expressly or impliedly repealed MCL 791.234; MSA 28.2304, the "lifer law" [not the query as to whether Proposal B applied to determinate and/or indeterminate sentences]. 137 Mich App 429, 437; 358 NW2d 602, 607(1984).

In *People v Johnson*, 421 Mich. 494; 364 NW2d 654 (1984), the Supreme Court resolved the query as to whether Proposal B applied to determinate and/or indeterminate sentences. Proposal B provides in relevant part that,

> A person convicted and sentenced for the commission of any of the following crimes shall not be eligible for parole until the person has

> served the minimum term imposed by the court which minimum term shall not be diminished by allowances for good time, special good time, or special parole.

The Court reiterated its observation from a previous opinion in stating that if a life sentence is imposed, there can be no minimum term. *Johnson,* at 497. Furthermore, the Court stated that the Legislature viewed the phrase "life or any term of years" as mutually exclusive. The *Johnson* Court explained that if a statute authorized the imposition of a sentence that was for "life" or an indeterminate sentence, that allowed for a discretionary imposition of a fixed sentence by the courts in addition to the authorization for an indeterminate sentence. The courts must impose an indeterminate sentence if the sentence was for "any term of years." *Id.* The Supreme Court held that Proposal B applies only to indeterminate sentences and does not apply to fixed or life sentences. Therefore, imposition of a fixed minimum sentence under proposal B is only applicable to an indeterminate sentence and not to a fixed, meaning "life" sentence. *Id.* (See also, *People v Viltali,* 156 Mich 370; 120 NW 1003 (1909) ("There could be no minimum sentence in [a] case if the life sentence were given").

A life sentence, as a determinate sentence, does not have a minimum sentence upon which parole eligibility can be calculated. In *Chico-Polo v Dep't of Corrections,* 299 Mich App 193 (2013), the Plaintiff was trying to obtain a Court declaration that his parole consideration eligibility date should be construed as a "minimum" sentence so that he could then take advantage of an earlier parole opportunity granted to persons who were subject to a valid deportation order. The Court's decision turned on whether the Plaintiff had a "court imposed minimum

sentence". The Court of Appeals explained that the drug law's grant of parole eligibility after 20 years was not the same as a "court imposed minimum sentence" and did not convert the Plaintiff's parolable drug law life sentence into a sentence with a minimum term. Even though the Court in *Chico-Polo* did not resolve the precise issue of whether a statutory grant of jurisdiction to the Parole Board is equivalent to a minimum sentence, the Court made clear that there is a difference between an opportunity for parole consideration granted by the Legislature and a court imposed minimum term of sentence. The Parole Board's argument in the matter now before this Court, just as they did without resolve in *Chico-Polo*, is that a sentence of parolable life has no determinable minimum sentence. The Supreme Court's reasoning in *People v Johnson* supports the Parole Board's interpretation in that there is no statutory minimum if the sentence is for life.

The statutory grant of jurisdiction to the Parole Board to consider a person serving a life sentence in certain circumstances should not be interpreted as a minimum term of sentence grafted onto the determinate life sentence. Any such declaration should be left to the Legislature.

The Court is entrusted with the responsibility of saying what the law means. "Although [the Court] may not usurp the lawmaking function of the legislature, the proper construction of a statute is a judicial function . . . ." *Webster v Rotary Electric Steel Co*, 321 Mich 526, 531; 33 NW2d 69 (1948). In that pursuit, the determination of legislative intent is of the utmost importance. "The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain

language of the statute." *Chico-Polo* at *3. "[C]ourts may not speculate regarding legislative intent beyond the words expressed in a statute." *Mich Ed Ass'n v Secretary of State,* 489 Mich 194, 217; 801 NW2d 35 (2011).

An injunction represents an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity. *Reed v Burton,* 344 Mich 126, 132; 73 NW2d 333 (1955); *Senior Accountants Ass'n v Detroit,* 218 Mich App 263, 269; 553 NW 26 679 (1996); *Holly Twp v Dep't of Natural Resources* (On Rehearing), 194 Mich App 213; 486 NW2d 307 (1992). See also, *Durant v State of Michigan,* 456 Mich 175, 205-206; 566 NW2d 272 (1997) ("issuance of injunctive relief to enjoin legislative or executive action require utmost delicacy on the part of the judiciary, and respect for the unique office of [those constitutional bodies]'"). Therefore, Defendants assert that they have a substantial likelihood of prevailing on the merits on appeal.

II. The Defendants will be irreparably harmed if the Court remediation order is not stayed.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable harm." *Maryland v King,* 133 S Ct 1, 3, 2012 WL 3064878, at *2 (July 30, 2012) (quoting *New Motor Vehicle Bd of Cal v Orrin W Fox Co,* 434 US 1345, 1351, 98 S Ct 359, 54 L Ed 2d 439 (1977)). As Board members, all of the movants are public officials charged with the responsibility of faithfully discharging the provisions of state statutory law. Consonant with the public safety, each member was afforded the authority to

consider for parole a prisoner serving life sentences. If during the pendency of appeal, the Board would have to alter its procedures, it would mean that the individual Board members would be rendered incapable of discharging their duty to decide when and under what parole conditions to release a prison inmate from custody and from carrying out the important duty to safeguard the public. Any such declaration which changes the longstanding practice of the Parole Board in applying the applicable statutes should be left to the Legislature. If on appellate review it is determined that a life sentence in certain circumstances should not be interpreted as a minimum term of sentence grafted onto the determinate life sentence, it would mean that the Parole Board was wrongfully impaired in executing their responsibilities.

III. The Defendants' irreparable injuries strongly outweigh any harm to the Plaintiff.

The impact on others if a stay is granted would be comparatively small. The only people affected by the Board's procedures at issue are lifers who obtained merit review on their case. And, as it has been stated on numerous occasions, "parole eligibility does not mean that a defendant has a right to parole." *People v Hill,* 267 Mich App 345, 351; 705 NW2d 139 (2005) (citing *Morales v Michigan Parole Bd*, 260 Mich App 29, 39; 676 NW2d 221 (2003)). "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz,* 442 US at 7. Similarly, "[i]n *Sweeton v. Brown* . . . the Sixth Circuit, noting 'the broad powers of the Michigan authorities to deny parole,'

held that the Michigan system does not create a liberty interest in parole." *Catanzaro,* 848 FSupp2d at 793 (quoting *Sweeton,* 27 F3d at 1164-65). Simply put, "[u]ntil Plaintiff[s] ha[ve] served [their] full sentence, therefore, [they] ha[ve] no reasonable expectation of, or protected interest in, early release on parole." *Catanzaro,* 848 FSupp2d at 794.

IV. A stay pending appeal is in the public interest.

Plaintiffs have asked for the re-interpretation of legislation by the Court. The Parole Board has never interpreted a life sentence to have a minimum term. As there is no minimum term to a life sentence, there is no minimum to add to a consecutive term of years sentence to determine a parole eligibility date. This has left the Parole Board, for more than 70 years, to follow the language of MCL 768.7a, to require that a person who is serving a life sentence, even if that person could have received parole consideration eventually, had they not committed a new felony and received a new term of imprisonment, to have no minimum term. Rather, the prisoner has a determinate term of Life. The possible privilege of parole consideration at a certain point being forfeited by the prisoner receiving a consecutive term of years sentence to the Life sentence. The implementation of the proposed remediation order, which is an injunctive relief order, seeks to disrupt the cohesive administrative scheme that has long been in place and is consistent with those decisions on the merits that have addressed the question of whether a life sentence has a minimum. To mandate a new interpretation to be applied that is such a radical departure from past practice will be extremely disruptive to all those

involved. This includes not just the *Allen* class members but also the Parole Board operation, the sentencing judges or their successors, the prosecutors involved and the families of the victims of the class members' crimes. It is an unnecessary creation of confusion that can be allayed by entry of a stay to allow time for the appeal of the issue on the merits.

CONCLUSION

Wherefore, the Defendants respectfully request that this Honorable Court stay the implementation of the remediation until the completion of the appellate review process.

Respectfully submitted,

Bill Schuette
Attorney General

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Assistant Attorney General
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Dated: October 23, 2013

2012-0020322-A Allen / Def Brief Mtn Remediation

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NOTICE OF HEARING

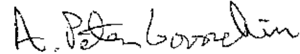
TO: Clerk of the Court
Paul D. Reingold, Attorney for Plaintiffs

PLEASE TAKE NOTICE that Defendants' Motion to Stay Implementation of Remediation will be heard before the Honorable Draganchuk, 313 West Kalamazoo,

Lansing, Michigan, on Wednesday, October 30, 2013, at 4:00 p.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

Bill Schuette
Attorney General



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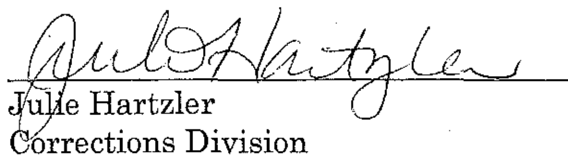
CERTIFICATE OF SERVICE

I certify that on October 23, 2013, I emailed and mailed by U.S. Postal Service, the following documents to: Paul D. Reingold, Michigan Clinical Law Program, 363 Legal Research Bldg., 801 Monroe St., Ann Arbor, MI 48109-1215:

1. Defendants' Motion to Stay Implementation of Remediation;
2. Defendants' Brief in Support of Motion to Stay Implementation of Remediation;
3. Notice of Hearing; and
4. Certificate of Service.



Julie Hartzler
Corrections Division

2012-0020322-A Allen / COS Mtn Stay