UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Keith Rogers, *Plaintiff,* *-vs-* Thomas Dart, Sheriff of Cook County, et al., *Defendants.*	No. 15-cv-11632 Hon. Edmund E. Chang

DEFENDANT COOK COUNTY'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DECERTIFY OR IN THE ALTERNATIVE AMEND THE CLASS DEFINITION

Defendant Cook County, Illinois ("Cook County") by and through its attorney, Kimberly Foxx, State's Attorney of Cook County, by Assistant State's Attorney Lyle Henretty, for its Motion to Decertify or, in the alternative, Amend the Class Definition. In support, Cook County provides the following memorandum.

I. Introduction

Plaintiffs are former detainees at the Cook County Jail ("CCJ") who participated in the CCJ's opioid treatment program ("OTP") during their incarcerations. The OTP treats patients with Opioid Use Disorder ("OUD") and provides medication-assisted treatment ("MAT") to patients who were legally enrolled in treatment programs prior to their detainment. On November 29, 2020, this Court certified two similar classes (for pre-trial and post-conviction detainees, respectively) who received medical treatment at the OTP and had their methadone dose tapered, pursuant to explicit OTP policy. (Docket No. 178). Now that the parties have completed discovery, including

expert discovery, Defendant Cook County moves to decertify both classes or, in the alternative, amend the class definitions.

Expert discovery brought the issues of this case into sharp relief. Plaintiffs' experts agree that the OTP complied with all state and federal Regulations. Plaintiffs maintain that the OTP was lacking and that its policies "violated the standard of care," despite their own experts agreeing that the OTP was one of the first and only OTPs operating within a correctional center *in the country* during the class period. (September 29, 2022 Deposition of Jasdeep Mangat ("Mangat Dep."), pp. 70:19-71:24, 100:4-7, 132:2-7,138:17-139:10; October 3, 2022 Deposition of Adeyemi Fatoki "Fatoki Dep.," pp. 128:9-.130:1. The Mangat Dep. and the Fatoki Dep. are attached hereto as Exhibits A and B, respectively). Plaintiffs' experts could not identify a single jail *in the country* that did not engage in the mandatory taper of opioid agonists during the class period. (*See* Exh. A, 142:9-11). Most tellingly, Plaintiffs' experts readily conceded that many class members in fact *benefited* from the OTP tapering policy. (Exh. A, pp. 94:23-96:8; Exh. B, pp. 129:3-30:1). Given this, as discussed in more detail below, Plaintiffs are unable to establish that their classes meet the commonality, typicality, or predominance requirements of Federal Rule of Civil Procedure 23 and should be decertified.

Alternatively, the class definitions should be amended to exclude members who benefitted from the tapering policy, and who were incarcerated after the OTP stopped subjecting patients to mandatory tapering in July 2017. Between July 2017 and the end of the current class periods (October 7, 2019), the undisputed evidence shows that the OTP did not engage in mandatory tapering for all class members.

II. Relevant Facts

A. The OTP

The OTP provides access to methadone or other opioid agonists to CCJ detainees who had legally enrolled in an opioid treatment program prior to their detainment. (January 3, 2020 Declaration of Stamatia Richardson, ¶ 2. The Declaration of Stamatia Richardson is attached hereto as Exhibit C). The OTP is a cutting-edge treatment program. (May 10, 2018 Deposition of Stamatia Richardson ("Richardson Dep."), pp. 20:10-15. The "Richardson Dep." is attached hereto as Exhibit D). At the time the named Plaintiffs' were incarcerated in 2013 and 2014, only about 1% of correctional facilities in the country had an OTP. (Exh. D, p. 20:16-22). Further, most correctional facilities did not provide any detoxification to patients that were on methadone. (Id.).[1] Prisons in Illinois still do not provide inmates with methadone. (Exh. A, pp. 94:23-95:4; Exh. C, ¶ 10). Similarly, the CCJ is the only jail in Illinois that provides MAT to detainees. (Exh. A, p. 95:9-24; August 8, 2022 Expert Report of Stamatia Z. Richardson, p. 3. Dr. Richardson's report is attached hereto as Exhibit E.). As such, a patient in the OTP who is transferred from the CCJ to the Illinois Department of Corrections ("IDOC"), or transferred to another County jail, is not provided any further MAT after leaving the CCJ. (Exh. C, ¶ 10).

Prior to entering the OTP, Cermak[2] personnel must verify the dose of methadone or other agonist the individual patient was prescribed prior to detainment (the "verified prior dosage"). (Exhibit C, ¶ 2). Methadone is a medication that is dangerous, and thus, heavily regulated as to who can proscribe it, how it is stored, and to whom it is dispensed. (Exh. D, pp. 15:20-16:20).

1 Meaning that the facility would not provide any methadone or other agonist at all, and at most treat the symptoms of withdrawal.

2 Cermak Health Services ("Cermak"), a division of the Cook County Health and Hospitals System.

The primary concern of the OTP is to have individual treatment plans to ensure the safety of each patient. (Id.).

From at least September of 2009 through July of 2017, all patients in the OTP were subject to the "detoxification" or "tapering" provisions of the Opioid Treatment Program Policy, Policy Number G-06.1. (Exh. C, ¶ 4). Per G-06.1, all non-pregnant patients who qualified for the OTP were prescribed methadone with a linear taper to zero. (Exh. C, ¶ 5). As such, their daily dose of methadone decreased at an integer rate proportional to the initial dose, starting at the verified prior dosage and decreasing not more than 7 mg each day. (Exh. C, ¶ 5). Prior to July of 2017, all patients subject to tapering were provided with tapering plans, based on the amount of their verified prior dosage and their individual healthcare needs. (Exh. C, ¶ 6). While the tapering could not decrease by more than 7 mg each day, the amount of the decrease was explicitly tailored to the need of each patient. (Exh. C, ¶ 6). A physician determined the amount of the taper for each patient and could decide to decrease the taper using their medical discretion. (Exh. C, ¶ 6).

Patients do not react to tapering in a uniform manner. (Exh. C, ¶ 8). Some patients experience no side effects from the tapering, and do not need to be treated for any withdrawal symptoms. (Exh. C, ¶ 8). Others experience varying levels of withdrawal, including vomiting and diarrhea. (Exh. C, ¶ 8). Of the patients that do experience withdrawal symptoms, those symptoms vary from patient to patient, both in terms of severity and the specific symptoms suffered. (Exh. C, ¶ 8). As such, each patient in the OTP is provided a treatment plan customized to their individual needs. (Exh. C, ¶ 8). Given the transient nature of the patient population at the CCJ, many patients are released or transferred before they are tapered to zero. (Exh. C, ¶ 9). Some patients are given only one or two doses of methadone prior to release or transfer. (Exh. C, ¶ 9).

In July 2017, the Cermak OTP received grant money, and for the first time could hire a case manager to review patient files. (Exh. E, p. 3). Currently, the case manager reviews each patient's criminal case. (Id.). Patients with parole holds or who are going to be transferred to another county after they leave the CCJ are tapered, as neither the state nor neighboring county jails provide opioid agonist treatment to patients with OUD. (Id.). The OTP medical staff works with the case worker to make an "educated guess," based on the review of each patient's specific circumstances, and the social worker and the medical staff's combined experiences. (Id.). If it is determined that the chances are good that a patient may be released from the CCJ back into the community, the patient is given a choice to taper. (Id.). While most of these patients choose to remain on their maintenance dose of medication, some elect to continue to taper, fearing a forced detoxification without taper in the event their circumstances change. (Id.). While the Cermak OTP began this policy in July 2017, the written policy was not amended until October 7, 2019. (Id.).

Plaintiffs' experts agree that the tapering policy, as it existed during the class period, benefitted patients who transferred from the CCJ to another facility in Illinois. Plaintiffs' own analysis is that this could affect approximately 13% of all detainees who enter the Cook County Jail. (May 12, 2022 Repot of Jasdeep S. Mangat, p. 5. Dr. Mangat's report is attached hereto as Exhibit F).[3] In fact, Plaintiffs' expert Jasdeep Mangat was the head of a similar program at Riker's Island in New York City. (Exh. A, pp. 27:6-18:3, 19:4-19). Until September of 2017, patients

[3] Dr. Mangat was shown "information provided to [him] by [Plaintiffs'] counsel about persons released from the Cook County Jail in 2019, which shows that only about 13% of those persons released were sentenced to imprisonment in the penitentiary." (Exh. F, p. 5). Based on this assertion, Defendant Cook County requested that the Cook County Sheriff's Office provide data to establish which members of the current subclasses were transferred from the CCJ to either the IDOC or to another County in Illinois that did not provide MAT. Due to their own internal operations, the CCJ was unable to provide this data in time to include it in this motion. To the extent the Court believes that more precise date will assist it in ruling on this motion, Defendant asks that briefing be staying until the data is provided.

prescribed opioid agonists who entered Rikers' Island charged with a felony were immediately tapered from their medication. (Exh. A, p. 98:14-19; Exh. E, p. 4). In September 2017, Rikers' Island stopped tapering OUD patients who were charged with felonies unless and until they were sentenced to a facility that did not provide MAT, necessitating tapering. (Exh. A, pp. 98:20-99:9). This was *after* the OTP ceased its mandatory tapering policy in July of that same year. (Exh. E, p. 3). Both of Plaintiffs' medical experts agree that a mandatory tapering policy is beneficial to OUD patients who are being transferred to a facility that does not provide MAT. (Exh. A, pp. 94:23-96:8; Exh. B, pp. 129:3-30:1). Otherwise, the patient would be forced to withdrawal from methadone "cold turkey." (Exh. A, p. 94:15-20).

B. Class Certification

On October 31, 2019, Plaintiffs moved to certify a single class of detainees who entered the CCJ on or after December 23, 2013 who were, at the time of entry into the jail, lawfully taking an opioid agonist and were not on parole or held on a warrant from another jurisdiction, and were not pregnant. (Docket No. 153). Plaintiffs sought to have this class certified as to their Eighth and Fourteenth Amendment claims, as well as to their Americans with Disabilities Act ("ADA") and Rehabilitation Act claims. (Id.). This Court denied the motion to certify with respect to the ADA and Rehabilitation Act claims, and granted and it with respect to the Eighth and Fourteenth Amendment claims, modified as followed:

Class 1 (Pre-trial Detainees) comprises all pre-trial detainees who (1) entered the Cook County Jail between December 23, 2013 and October 7, 2019, inclusive and (2) opted out of, or are otherwise excluded from, participation in *Parish v. Sheriff*, 07-cv-4369; and were, at the time of entry into the Jail, lawfully taking an opioid antagonist, as defined in 42 C.F.R. 8.12(h)(2), who were not then on parole or held on a warrant from another jurisdiction, who were not pregnant, and who received more than one dose of methadone while detained;

Class 2 (Post-sentence Prisoners) comprises all post-sentencing prisoners who (1) entered the Cook County Jail between December 23, 2013 and October 7, 2019, inclusive and (2) opted out of, or are otherwise excluded from, participation in *Parish v. Sheriff*, 07-cv-4369; and were, at the

time of entry into the Jail, lawfully taking an opioid antagonist, as defined in 42 C.F.R. 8.12(h)(2), who were not then on parole or held on a warrant from another jurisdiction, who were not pregnant, and who received more than one dose of methadone while detained.

(Docket No. 178, p. 18).

The Court also noted that the parties disagreed on the proper closing date for the classes. (Docket No. 178, p. 13). Defendants argued that the class should end no later than July 2017, when the OTP modified its tapering policy. (Id.). Plaintiffs argue that the class end date should be tied to the amendment to the written policy on October 7, 2019. (Id.). This Court held that "[a]s the litigation proceeds, the parties will have the opportunity to fully litigate the end-date question. At the appropriate time, the Court will decide whether the end-date should stay as-is (October 7, 2019) or instead must be modified and truncated." (Id.).

III. Legal Standards

To certify a class, a plaintiff must satisfy all four elements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a); *Dukes*, 131 S. Ct. at 2548.[4] In addition, a class must be sufficiently definite that its members are ascertainable. *Jamie S. v. Milwaukee Public Schools et. al*., 668 F.3d 481, 492 (7th Cir. 2012) (citing *Oshana v. Coca-Cola Co*., 472 F.3d 506, 513 (7th Cir. 2006)). Named Plaintiffs have the burden of showing that the proposed class satisfies each requirement of Rule 23 by a preponderance of the evidence. *See Szabo v. Bridgeport Machines, Inc*. 249 F.3d 672, 675-77 (7th Cir. 2001); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). Failure to meet any one of the requirements of Rule 23 precludes certification of a class. *Harriston v. Chi Tribune Co*., 992 F.2d 697, 703 (7th Cir. 1993).

[4] Defendants do not object to numerosity at this time but reserve the right to object in the future if the proposed class definition is altered in any way.

In addition to meeting all the requirements of Rule 23(a), the proposed class action must satisfy one of the three categories identified in Rule 23(b). *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010). "Rule 23 does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551. A court may not simply assume the truth of the matters asserted by Plaintiff in deciding class certification. *See Messner v. Northshore Univ. Health Sys*., 669 F.3d 802, 811 (7th Cir. 2012); *Szabo*, 249 F.3d at 675-77 (a judge need not "just take the plaintiff's word about what happened" in ruling on a motion or class certification). Instead, district courts must engage in a rigorous analysis to ensure that "the party seeking class certification [has] affirmatively demonstrate[d] compliance" with Rule 23 by "'prov[ing] that there are in fact sufficiently numerous parties, common questions of law or fact,' [and] typicality of claims and defenses…" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (U.S. 2013) (citation omitted); *Creative Montessory Learning Ctrs. v. Ashford Gear LLC.*, 662 F.3d 913, 916 (7th Cir. 2011). Moreover, plaintiffs seeking class certification "must produce quality evidence for each Rule 23 element – period." *In re: Kosmos Energy Ltd. Securities Litigation*, 2014 U.S. Dist. LEXIS 36365, at * 58 (N.D. Texas, March 19, 2014). "The Supreme Court [in *Comcast*] announced a clear directive to plaintiffs seeking class certification—in any type of case—that they will face a 'rigorous analysis by the federal courts, will not be afforded favorable presumptions from the pleadings or otherwise, and must be prepared to prove with facts—and by a preponderance of the evidence—the requirements of Rule 23." *Id*. (emphasis in original) (footnotes omitted).

The Court "remains under a continuing obligation to review whether proceeding as a class action is appropriate, and may modify the class or vacate class certification pursuant to evidentiary developments arising during the course of litigation. … Thus, the court's initial certification of a class is inherently tentative. … The party seeking class certification bears the burden of

demonstrating that initial certification is appropriate and likewise on a motion to decertify the class, bears the burden of producing a record demonstrating the continued propriety of maintaining the class action." *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003)(internal citations and quotation marks removed).

IV. Argument

A. Commonality

The "commonality" prerequisite of Rule 23(a)(2) requires the Plaintiff to establish that there "are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). The "common question" cannot be superficial, such as "whether each class member 'suffered a violation of the same provision of law.'" *Jaime S.*, 668 F.3d at 497, *quoting Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Such a "common question" is insufficient to certify a class. *Id.* Instead, the putative representatives must "demonstrate that class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 349-350 *quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982). For purposes of commonality, the Supreme Court instructs that it is not the "common question" that drives the analysis, "'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.'" *Wal-Mart*, 564 U.S. at 350, *quoting* Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 131-132 (2009)(emphasis in original).

When a "class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012). Plaintiffs' experts capitulates that there are class members who were not

merely left "unharmed" by the tapering policy, but in fact benefitted from it. This is, in fact, one of the stated reasons for the tapering policy in the first place: to protect detainees from having to go "cold turkey" once they are released from CCJ custody. (Exhibit E, p. 2). A detainee who claims to be harmed because they suffered nausea from mandatory tapering for three or four days before being released back into the community (and, theoretically, returning to their normal methadone regimen), has nothing in common with a detainee who was tapered prior to entering the IDOC. Per Plaintiffs' own experts, the tapering policy benefits some patents and allegedly harms others. The class cannot be said to have a "common question" or "common answer" to drive the resolution of their case when they are in direct conflict with one another. The class should be decertified on commonality grounds.

B. Typicality

A putative class claim under Rule 23(a)(3) is " 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 his or her claims are based on the same legal theory." *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998) (citations and internal quotation omitted). "[T]here must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). "Representative class members fail the typicality prong when the class contains a great many persons who have suffered no injury at the hand of the defendant." *Perez*, 2019 WL 7290848, at *13 (internal quotations and citations omitted).

A class is "fatally overbroad" when it contains members who could not have been harmed by Defendants' alleged wrongdoing. *Messner*, 699 F.3d at 824. The Seventh Circuit has found the difference between a class that contains members whose claims will fail and classes with

members who *could not have been harmed* to be of critical importance. *Id*. The former is merely a situation where a class cannot meet it burden on the *merits*, while the latter is overbroad and should not be certified. *Id.* This distinction is important given the *"'in terrorem* character of a class action.'" *Id.* at 825, *quoting Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 678 (7th Cir. 2009).

> Even if a class's claim is weak, the sheer number of class members and the potential payout that could be required if all members prove liability might force a defendant to settle a meritless claim in order to avoid breaking the company. While that prospect is often feared with large classes, the effect can be magnified unfairly if it results from a class defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances. For this reason, a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant.

Id. (Internal quotation marks and citations omitted). The certified classes here are fatally overbroad, as they contain members (at least 13 percent, per their own analysis) who could not have been harmed by the alleged unconstitutional actions of the Plaintiffs. To the contrary, they benefitted from the policies. There is no congruence between the class members who allegedly had to be tapered, only to be released back into the community and presumably (like all three named Plaintiffs) returned to their MAT treatment once released, and those who were transferred to a facility that did not provide any MAT whatsoever. The latter would have suffered immensely without the existence of this policy. The fact that the classes encompass both those who were allegedly harmed and those who *could not* have been harmed is fatal to their class. As such, the classes should be decertified.

C. Rule 23(b)(3) Predominance and Superiority Requirements

This Court certified the subclasses pursuant to Rule 23(b)(3), which requires "that the questions of law or fact common to class members predominate over any question affecting only individual members." Fed. R. Civ. P. 23(b)(3). While this analysis is related to the requirement of commonality, "the predominance criterion is far more demanding." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Predominance tests whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Id*. at 623. Here, even if the named Plaintiffs could establish the commonality requirement (which they cannot), the individual issues of each class member predominate the questions of law and fact.

Individual inquiry is the appropriate method of addressing any specific claims regarding the tapering policy. Many individuals in the OTP were tapered at the CCJ before they were transferred to the Illinois prison system, which does not provide inmates with methadone. Without the tapering policy, these patients would have had to go "cold turkey" and suffer the withdrawal symptoms without the benefit of tapering. (Exh. A, pp. 94:23-96:8; Exh. B, pp. 129:3-30:1, Exh. E, p. 2). Withdrawal symptoms for these individuals can be avoided through the tapering policy. (Exh. E, p. 2) Plaintiffs' experts agree that this policy benefitted any MAT patients released to the IDOC or any other prison. Further, many patients chose to taper their doses even when offered a maintenance dose. (Exh. D, pp. 43:21-45:15). Additional patients were tapered and suffered no ill effects. (Exh. C, ¶ 8). These individual questions predominate any potential "common question" identified by Plaintiffs.

D. Defendant Adopt the Arguments Set Forth In Response to Plaintiffs' Motion for Class Certification.

To preserve them, Defendant Cook County adopts all the arguments set forth in its response to Plaintiffs' motion for class certification, as if set forth herein. (Docket No. 157).

II. In the Alternative, The Class Definitions Should be Modified

a. Patients who were transferred to the IDOC or to Another Facility that did Not Provide MAT Should Not Be Part of the Class

If this Court disagrees with Defendant's analysis above and denies the motion to decertify the class, this Court should modify the class definition to exclude all patients who were transferred from the CCJ to the IDOC or another Facility that did not provide MAT. As set forth above, far from being harmed by the tapering policy, these patients actually *benefitted* from it. A class definition that includes members who *could not* have been harmed is overly broad and cannot be certified. *See Messner, supra.* As such, the class definition should be modified accordingly.

b. The Proper End Date for Both Classes is July 2017.

The undisputed evidence is that the OTP ceased its across-the-board mandatory tapering policy in July 2017. Per Dr. Stamatia Richardson, the Director of the OTP, in July 2017 the OTP began to review each patient's criminal case. (Exh. E, p. 3). Patients with parole holds or who are going to be transferred to another county after they leave the CCJ are tapered, as neither the state nor neighboring county jails provide opioid agonist treatment to patients with OUD. (Id.). The OTP medical staff works with the case worker to make an "educated guess," based on the review of each patient's specific circumstances, and the social worker and the medical staff's combined experiences. (Id.). If it is determined that the chances are good that a patient may be released from the CCJ back into the community, the patient is given a choice to taper. (Id).

A review of the OTP dosing history for all class members reveals that approximately 400 patients were provided MAT without tapering for some or all of their time in the CCJ between July 2017 and October 2019 (the end of the class period). (*See* Group Exhibit G). This evidence is undisputed and establishes that the mandatory tapering policy (that is, the policy where every patient was subject to tapering) was no longer in effect as of July 2017. As such, in the event this Court decides not to decertify the class, the class definition should be amended with July 2017 end dates.

WHEREFORE, Defendant Cook County prays this Court enters an order decertifying the sub classes certified by this Court on November 29, 2020 (Docket No. 178) or, in the alternative, amend the subclasses as set forth herein, and for any other relief that this Court deems just and proper.

Dated: January 9, 2023

Respectfully Submitted,
KIMBERLY M. FOXX
State's Attorney of Cook County

By: */s/ Lyle Henretty*
Lyle Henretty
Assistant State's Attorney
50 West Washington, Ste. 2760
Chicago, Illinois 60602
(312) 603-1424
lyle.henretty@cookcountyil.gov
For Defendant Cook County

CERTIFICATE OF SERVICE

I, Lyle K. Henretty, Assistant State's Attorney, hereby certify that I served a copy of the attached document on the parties of record via the ECF electronic filing system on January 9, 2023.

/s/ Lyle K. Henretty