UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEITH ROGERS, Plaintiff, v. THOMAS DART, SHERIFF OF COOK COUNTY, et al., Defendants.	No. 15 C 11632 Judge Edmund E. Chang

DEFENDANT COOK COUNTY'S REPLY
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 Reply in Support of its Motion to Decertify or, in the alternative, Amend the Class Definition. In support, Cook County provides the following memorandum.

I. Introduction

On November 29, 2020, this Court certified two similar subclasses of detainees at the Cook County Jail ("CCJ") who participated in the CCJ's opioid treatment program ("OTP") during their detention. (Docket No. 178). 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. Before July 2017, pursuant to policy, OTP patients had their methadone dose tapered daily. This changed in July 2017, when providers were no longer mandated to taper patients (though many patients were still tapered on an individual basis).

It was the uniformity of this mandatory policy that the Court relied on in its certification. However, now that discovery has been completed, it is clear that the current class members are not similarly situated with respect to the policy. Rather than address this head-on, Plaintiffs attempt to move the goalposts. They argue that regardless of the mandatory nature of the policy, or how many class members actually benefitted from the policy, each patient that was tapered, in any way at any time, is a proper class member. This ignores the fact that the mandatory nature of the policy, and the fact that Plaintiffs argued that each of the class members were harmed by the policy, were central to the Court's certification decision. (*See* Docket No. 178, pp. 9-10).[1]

The classes should be decertified or significantly modified for two reasons. First, the classes currently contain an unknown number of members who *could not* have been harmed by the policy (as opposed to those who could have been harmed but did not suffer damages). Second, the class currently includes two years' worth of class members who were never subjected to the mandatory "linear-taper-to-zero policy."

II. Argument

A. The Motion to Decertify is Based on Plaintiffs' Inability to Maintain a Cohesive Class Claim.

Plaintiffs attempt to waive away Defendants' commonality, typicality, and predominance arguments by claiming they are only relevant to damages. (Docket No. 226, pp. 2-4). This is not well taken. Defendants' arguments are not simply about "damages," but Plaintiffs inability to draw

[1] ("*Dukes* requires a common injury and a common answer only in the sense that class members' injuries are all allegedly caused by the *same conduct* of the defendant and can be answered with the *same liability* decision; the injuries need not the injuries need not be exactly the same, so long as the Court can answer the liability question in one common stroke. *Id.* at 602. That is the case here: the plaintiffs have argued that imposing a uniform linear-taper-to-zero policy is unlawful. Although patients' withdrawal symptoms may vary, they are all caused by common conduct—the same linear-taper-to-zero policy, applied without exception to non-pregnant detainees.")

a coherent connection between the myriad class members and the alleged "unconstitutionality" of the OTP's mandatory tapering policy. Defendants are not only arguing that a significant number of the class members *were not* harmed by the policy, but that they *could not* be harmed by the policy.

One of the stated reasons for the mandatory tapering policy was to prevent detainees from having to go "cold turkey" once they are released from CCJ. (Docket No. 218-5, p. 2). During the class period, a patient who was transferred from the CCJ to another jail in Illinois, or to the Illinois Department of Corrections ("IDOC"), would not be provided with any methadone or opioid agonist treatment. (*Id*). Even those released back into the community may not be able to continue their methadone treatment as it was not covered by Medicaid. (*Id.*). Both of Defendants' experts readily agreed that tapering was superior to going "cold turkey." (Docket Nos. 218-1, pp. 94:15-96:8; 218-2, pp. 129:3-130:1). Plaintiffs have taken the position that about 13% of detainees released from Cook County Jail were sentenced to imprisonment in the penitentiary. (Docket No. 218-6, p. 5). These patients (and those released to other prisons and those who simply could not restart their methadone doses upon their return to the community) are not proper class members because they could not have been harmed by the policy.

In certifying the class, the Court found that commonality hinged on if the "class members' injuries are all allegedly caused by the *same conduct* of the defendant and can be answered with the *same liability* decision." (Docket No. 178, p. 10) (emphasis in original). In this case, the Court focused on the mandatory nature of the tapering policy, applied without exception. (*Id*. at 9-10). With the benefit of expert discovery, we now know that Plaintiffs cannot establish commonality nor typicality. There is a distinct difference between the class members who were released into the community and were able to continue their doses, and those who were not. The class definitions,

and Plaintiffs' Response, draws no such distinction. A purpose of the tapering policy was to prevent patients from suffering through painful, abrupt withdraw. Many the class members benefited exactly as intended. For purposes of commonality, Plaintiffs also cannot establish that they "suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)).

Plaintiffs try to eschew this by arguing that, under the "principles of tort law," any pain suffered due to tapering (mandatory or otherwise) was an "injury in fact" for purposes of commonality and typicality. (Docket No. 225, pp. 3-4). This is wrong. The Court initially found commonality because Plaintiffs allegedly suffered injuries due the *mandatory* nature of the tapering. (Docket No. 178, p. 9). Plaintiffs' class claim is not "all tapering is bad" (a position their position more extreme than those taken by their experts), but rather that having a "mandatory tapering" policy is unconstitutional. (Docket No. 178, pp. 9-10).

The class members themselves are not similarly situated with respect to the policy. Many of the class members did not suffer an injury because they were tapered prior to being transferred (or released) to a location where they would not have access to methadone. The fact that these individuals had pain with respect to their treatment is irrelevant; the treatment itself was successful, and they benefitted from the policy. *See Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996) (It would be "absurd to say … that the Constitution requires prison doctors to administer the least painful treatment. That may be preferable, but the Constitution is not a medical code that mandates specific treatment"). The treatment, tapering, is exactly the same treatment provided by one of Plaintiffs' experts to his own patients who were transferred to a facility without MAT. (Docket No. 218-1, pp. 117-118, 235-36). As such the current class members lack commonality.

Similarly, the class members fail typicality because the class is fatally overbroad. There is a critical difference between a class that contains members whose claims will fail and a class with members who *could not have been harmed*. *Messner v. Northshore Univ. Health Sys*., 669 F.3d 802, 824 (7th Cir. 2012). 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)) (internal quotation marks omitted).

For these reasons, and those set forth in the underlying motion, Plaintiffs' classes should be decertified.

B. Plaintiffs Have Failed to Demonstrate the Continued Propriety of Maintaining a Class Action.

Plaintiffs do not (and cannot) dispute that the "abrupt cessation of MAT" that would occur if a class member was not tapered prior to going to another correctional facility in Illinois. (*See* Docket 225, pp. 4-6). Nor do they argue that some current class members *did* in fact go to another correctional facility after they left CCJ. Instead, they suggest that the onus is on Defendants to show which class members were transferred to an outside facility. (*Id*.). Plaintiffs, however, "bear[] the burden of producing a record demonstrating 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). Here, they have made no effort to show which class members were transferred to other facilities (thus necessitating the "abrupt cessation of MAT") and those who, like the named Plaintiffs, returned to the community and continued their treatment.

Plaintiffs next argue that it is speculative to assume any class member benefited from the mandatory tapering policy. (Docket No. 226, pp. 5-6, 7-8). Again, Plaintiffs suggest that Defendants have the burden of establishing how many class members could not have been harmed

by the mandatory tapering policy. (*Id*. at 7-8). It is Plaintiffs' burden to demonstrate the continued propriety of maintaining the class. Further, it is not disputed that a certain number of detainees charged with crimes at the CCJ will be convicted and go to the IDOC (or are otherwise transferred to another jail). Plaintiffs' expert suggest at least 13% are remanded to the custody of the IDOC but make no effort to support this number. (Docket No. 218-6, p. 5). Plaintiffs also suggest changing the class definition to exclude detainees with parole holds or a warrant in another county. (Docket No. 226 at 12-13). Yet Plaintiffs make no showing as to how this will affect the class. Plaintiffs are not entitled to the class of their choosing: they must produce "a record demonstrating continued propriety of maintaining the class action." *Ellis*, *supra*. They have failed to do so and ask the Court to take on faith that a class is still appropriate.[2]

C. Alternatively, the Class Definitions Should be Modified

The Court identified the proper end date for the classes as the date the OTP ceased its practice of "across-the-board taper policy." (Docket No. 178, pp. 13-14). The undisputed evidence shows that the tapering policy ceased to be mandatory as of July 2017. That is, as of July 2017, some patients were tapered, some were not, and others were tapered some of the time, but not tapered the entire time they were in the OTP. (*See* Docket Nos. 218-5, p. 2). Because there was evidence that the procedure regarding tapering changed in July 2017, but the written policy was not amended until 2019, the Court invited the parties to litigate the proper endpoint at the "appropriate time." (Docket No. 178, p. 13). The Court tacitly acknowledged that patients who

[2] This is also true of Plaintiffs' argument that post-sentence detainees are not sent to outside correctional institutions. (Docket No. 226, pp. 6-7). Plaintiffs do not differentiate from detainees *serving* their sentences in the CCJ, and those who are awaiting transfer to another facility. Obviously, a post-conviction detainee who has been sentenced to life in prison, and who is tapered in the time between conviction and transfer, is in a different position than a one who is tapered while completing a sentence for a misdemeanor. Again, it is Plaintiffs' burden to establish how these facts affect the class, and they have eschewed this responsibility entirely.

entered the jail after the policy change would not be proper class members. (Docket No. 178, pp. 12-13).

Plaintiffs have criticized Defendants for providing the Court with over a thousand pages of OTP dosing histories "without analysis," forcing the Court "to search the record to find support." (Docket No. 226, p. 9). This could not be further from the truth. Each of the dosing histories contained in Exhibit G to the underlying motion identify a patient who had a continuing maintenance dose of MAT (meaning it was not tapered) for some or all of their time in OTP. Plaintiffs attempt to mislead the Court by showing that some of these nearly 400 detainees were tapered for all or a portion of their treatment. (Docket No. 226, p. 10). Specifically, all seven of the examples cited by Plaintiffs were given maintenance doses as set forth below:

- K.B. was tapered between 3/12/19 and 3/19/19, then was provided maintenance doses from 3/19/19 until 3/24/19 (Docket No. 218-1, p. 54);
- W.B. was tapered between 12/22/17 and 1/3/18, then provided a maintenance dose from 1/3/18 until 1/7/18 (*Id*. at p. 68);
- T.B. was given a maintenance dose from 9/24/18 until 10/5/18, then tapered from 10/6/18 until 10/15/18 (*Id*. at 75);
- D.B. was tapered from 5/17/18 until 5/22/18, then was provided maintenance does from 5/21/18 until 6/20/18. He was additionally tapered from 8/1/19 until 8/27/18 (*Id*. at 203-205);
- R.B. was tapered from 5/24/18 until 5/26/18, then was provided a maintenance dose from 5/27/18 until 5/29/18, and then tapered again from 5/30/18 until 6/13/18 (*Id*. at 109);
- A.B. was tapered from 12/9/17 until 1/5/18, then was provided a maintenance does from 1/5/18 until 5/4/18[3] (*Id*. at 130-134); and
- J.B. was tapered from 12/25/17 until 12/25/17, then was provided a maintenance from 12/25/17 until 12/28/17 (*Id*. at 137).

[3] The dose was changed by four milligrams on February 27, 2018 and stayed at that number until May 4, 2018.

This does not evidence "across the board" tapering. Prior to July 2017, every single non-pregnant OTP patient was tapered daily. The undisputed evidence, both from Defendants' expert and the documents attached to the underlying motion, is that this practice changed in July 2017. (*See generally* Docket Nos. 218-5, p. 2; 218-7 through 218-14).

Plaintiffs offer no evidence to the contrary. Instead, they try to elide the class definition to include anyone who was *tapered* after July 2017. (Docket No. 226, pp. 8-11). However, the class claims did not hinge on whether tapering MAT is *ever* constitutional; that would certainly have to be decided on a case-by-case basis, as it would involve the specific circumstance of each patient. *See, e.g., Money v. Pritzker*, 453 F. Supp. 3d 1103, 1128 (N.D. Ill. 2020) (Dow, J.) (recognizing the difficultly of certifying a class when "[e]ach putative class member comes with a unique situation" such as "medical history"). Plaintiffs' offer to amend the class definitions to exclude those patients whose "ending dose of methadone was less than their starting dose" misses the mark. The issue is not whether patients were tapered after July 2017, but whether they were subjected to the mandatory tapering provision. Plaintiffs' proposed amended definition would include as class members patients whose dose was changed for individual medical reasons, or even at the request of the patient. None of the patients tapered after July 2017 were subject to mandatory tapering, and the decision to taper (in whole or in part) was made on a case-by-case basis by the OTP providers. (Docket No. 218-5, p. 3).

In the event the Court is not inclined to decertify the classes in their entirely, Defendants ask that the Court "modify and truncate" the end dates to July 2017. (*See* Docket No. 178, pp. 13). Further, as set forth above, and in the underlying motion, Defendants request that the Court modify the class definition to exclude any patients that were transferred directly to the IDOC or to another county in Illinois after leaving CCJ custody.

D. Plaintiffs Do Not Substantively Address Rule 23(b)(3) Predominance and Superiority Requirements.

Plaintiffs do not substantively challenge the Rule 23(b)(3) superiority and predominance standards addressed in the underlying brief. Instead, they argue that there have been no "material changes" since the Court granted class certification in November 2020. This is false. There has been additional discovery, including the production of additional OTP dosing records and, more importantly, expert discovery. Defendants had no way of knowing that Plaintiffs' experts would agree that the OTP policy was superior to maintaining MAT at the CCJ, and then allowing patients to go "cold turkey" at the IDOC or in another facility. Further, Defendants were unaware that Plaintiffs' experts would concede that the CCJ was one of the only jails in the country to provide *any* MAT during the class period (docket Nos. 218-1, pp. 70-71, 100-101; 218-2, pp. 128-129), or that their experts would not identify even a single correctional facility that met Plaintiffs' "standard of care" for OTP treatment.

As such, Defendants stand on their Rule 23(b)(3) arguments as set forth in their underlying brief and initial response to Plaintiffs' motion to certify. (Docket Nos. 157 and 217).

III. Conclusion

Defendant Cook County respectfully requests that the Court enter an Order decertifying the subclasses 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 the Court deems just and proper.

Dated: March 24, 2023

Respectfully Submitted,

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By: */s/ Lyle Henretty*

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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 March 24, 2023.

/s/ Lyle K. Henretty