

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Keith Rogers, et al.,)
)
)
Plaintiffs,)
)
) (Judge Chang)
-vs-)
)
) 15-cv-11632
Sheriff of Cook County and Cook)
County, Illinois,)
)
)
Defendants)

**PLAINTIFF'S MOTION TO RECONSIDER ORDER
RESETTING CLASS CLOSING DATE**

In its order of March 30, 2024, the Court set the closing date of the class as July 1, 2017 (ECF No. 243 at 14-15) based on the finding that “the mandatory, across-the-board tapering policy stopped” on July 1, 2017. (ECF No. 243 at 13.) Plaintiffs show below that the Court should reconsider this finding because it was based on a manifest error of fact. *Nucap Indus., Inc. v. Robert Bosch LLC*, No. 15 C 02207, 2020 WL 13645506, at *2 (N.D. Ill. Aug. 23, 2020) (citing *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987).)

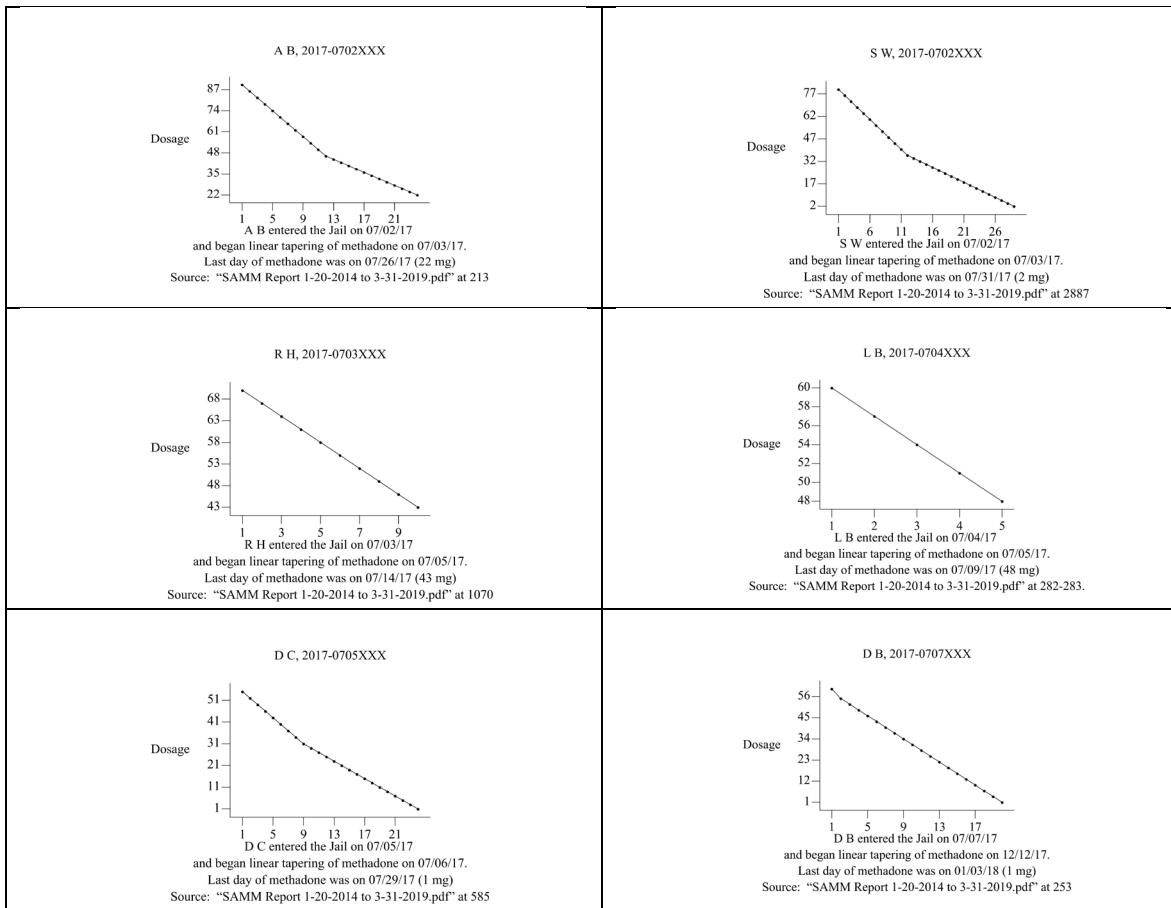
I. The Finding that the Linear Tapering Policy Ended on July 1, 2017 Is Clearly Erroneous

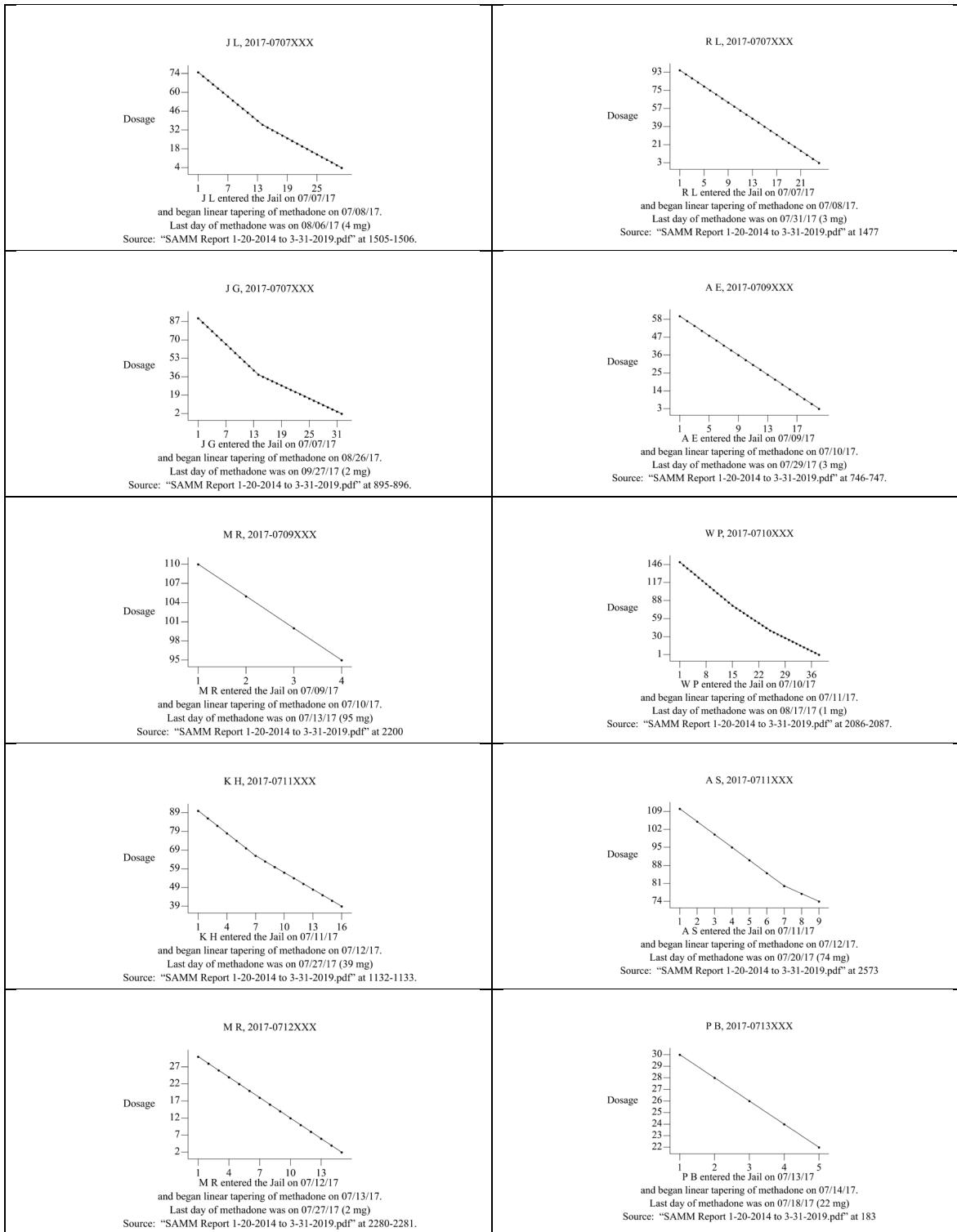
Records produced by defendant show that 36 detainees who had been taking methadone entered the Jail in July of 2017; 34 out of 36 were subjected to linear tapering.¹

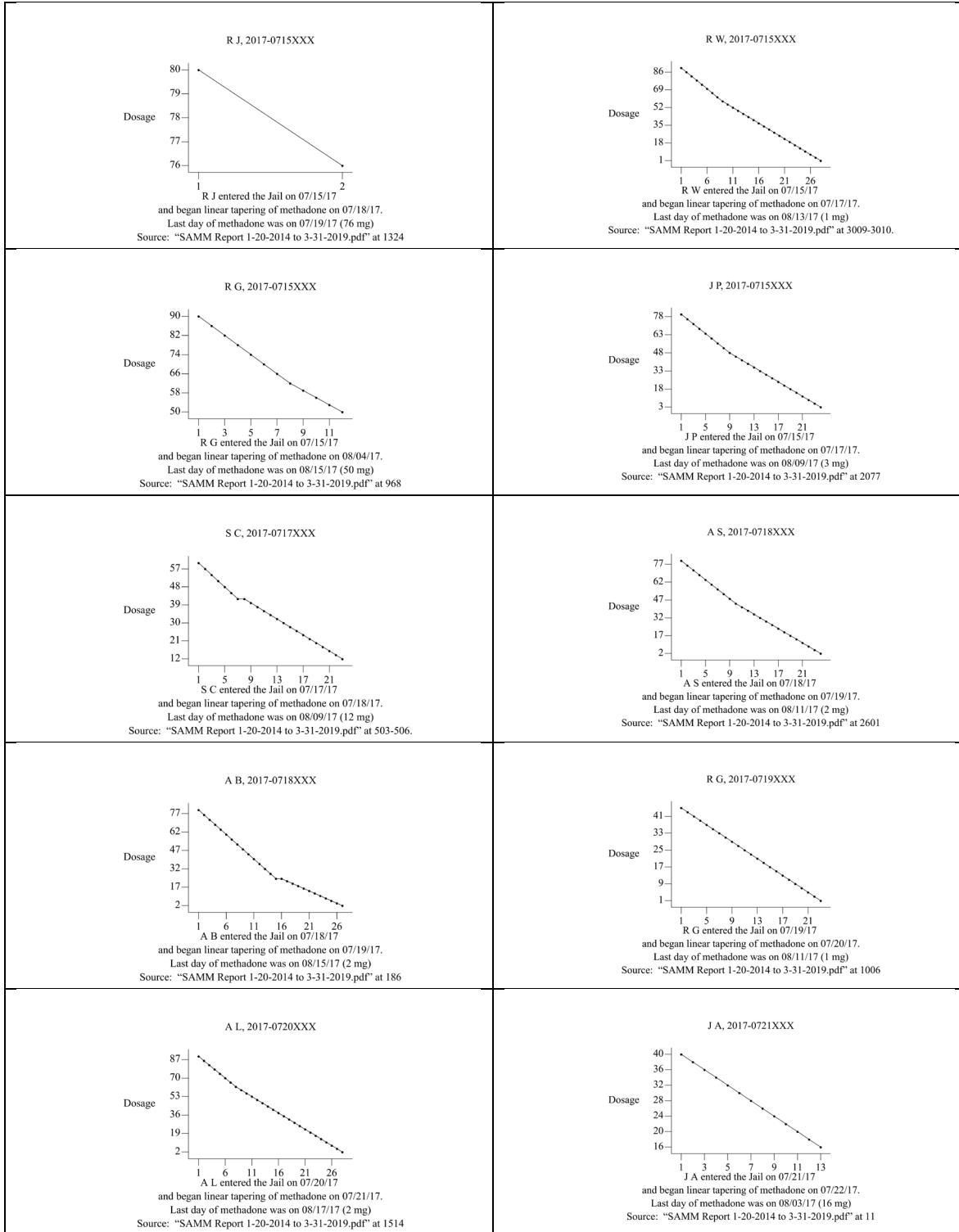
¹ Defendant identified in its spreadsheet (ECF No. 223 at 1-4, rows 82 and 383) the two who were not tapered. Each is female and would have been excluded from the mandatory tapering policy if pregnant.

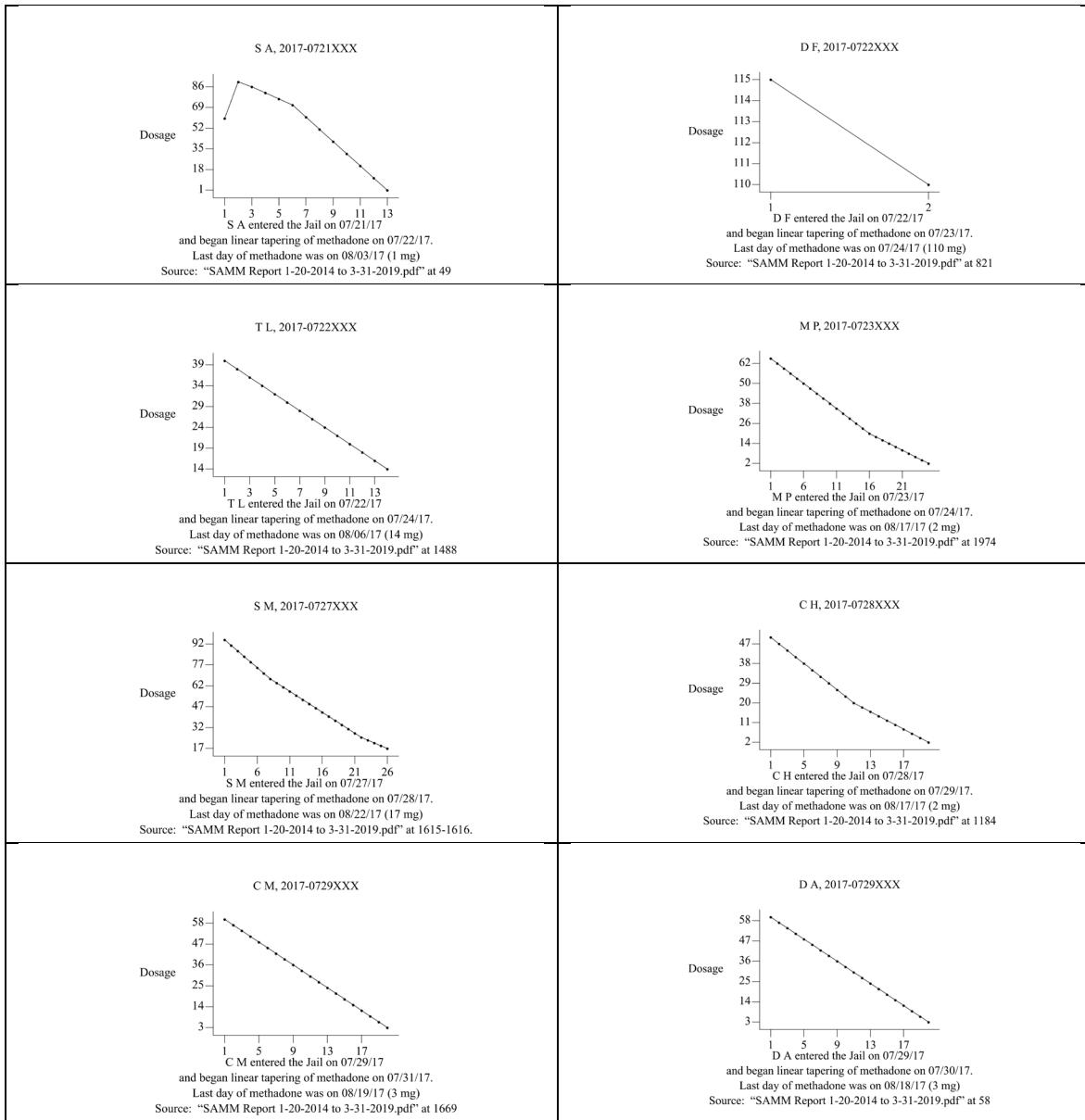
Plaintiffs have prepared line graphs from data produced by defendants showing the dosage of methadone over time to detainees who entered the Jail in July of 2017. Each graph identifies the source (by document name and page numbers) for the data summarized in the graph.

Reduced size images of the graphs for all detainees tapered in July of 2017 appear below and in the next three pages. Because methadone dosage records are confidential by federal law, plaintiffs have redacted from this public filing the name and jail identification number of each person who received methadone. Plaintiffs submit full size graphs with the supporting data as Exhibit 1, both in redacted and unredacted form (which will be filed under seal)









It is impossible to look at these 34 graphs of linear tapering of methadone dosage and conclude that defendants stopped applying their linear taper policy on July 1, 2017.

The Court based its erroneous finding on the statement of Dr. Richardson that “[f]rom July of 2017 to the present, patients in the OTP are not automatically

tapered.” (Richardson Report, ECF No. 218-5 at 2.) The data call Dr. Richardson’s credibility into question.

Dr. Richardson was also the sole source for the Court’s finding that after July 1, 2017, “the ultimate decision to taper was made on a case-by-case by the health care providers.” (ECF No. 243 at 14.) Because Dr. Richardson mischaracterized the data about when defendants stopped applying their linear tapering policy, the Court should not accept Dr. Richardson’s assertions about “case-by-case” decisions. The Court should decide this issue, if it is material to the class definition, at an evidentiary hearing.

The Court recognized in its order granting class certification (ECF No. 178) that the closing date of the class “might turn on credibility decisions as to witnesses.” (*Id.* at 18.) The Court was not aware of the issues about Dr. Richardson’s credibility when it set the closing date of the class as July 1, 2017.

As the Court noted, plaintiffs agreed in briefing the motion to decertify that defendants did not apply its linear tapering policy “to all class members after July 1, 2017.” (ECF No. 243 at 14, citing ECF No. 226 at 12.) The decision of the Seventh Circuit in *Fonder v. Sheriff of Kankakee County*, 823 F.3d 1144 (7th Cir. 2016) teaches that when, as here, “the evidence calls into question the propriety of defining a class in a particular way, then the definition must be modified or subclasses certified.” *Id.* at 1147. Plaintiffs proposed that the class definition be modified to exclude persons who were not tapered. (ECF No. 226 at 12.) The Court rejected plaintiff’s approach, reasoning that “after the mandatory policy ended

(that is, after July 2017), class litigation would not present a predominately common question.” (ECF No. 243 at 14.)

Defendants did not make any argument about predominance in asking the Court to set a class closing date of July 2017. Defendants made a brief argument about predominance in their motion to decertify (ECF No. 218 at 12) and included an equally brief discussion in their reply. (ECF No. 233 at 9.) Thus, the parties did not engage on whether a change in application of the linear tapering policy meant that the case no longer presented “a predominantly common question.”

The rule of “party presentation” requires that the Court grant the parties an opportunity to be heard on a legal issue before deciding it. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Plaintiffs, had the Court provided that opportunity, would have presented the following argument:

The core of plaintiffs’ claim is that the linear tapering of methadone for pretrial detainees and prisoners serving misdemeanor sentences violates the Fourteenth Amendment (for pretrial detainees) and the Eighth Amendment (for sentenced prisoners). This question was at issue in *Parish v. Sheriff of Cook County*, No. 07 C 4369, 2019 WL 2297464, at *17 (N.D. Ill., May 30, 2019), where the Court found that whether the “linear taper to zero” policy resulted in “gratuitous pain to enrolled detainees” was a jury question.²

Persons who enter the Jail while enrolled in a methadone program are taking prescription medication for a serious medical need. *Foelker v. Outagamie*

² *Parish* was subsequently resolved by settlement.

County, 394 F.3d 510 (7th Cir. 2005); *Davis v. Carter*, 452 F.3d 686 (2006); *Chencinski v. Zaruba*, No. 17-cv-5777, 2018 WL 10705083 (N.D. Ill. June 21, 2018). Under *Zentmyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000), a jail policy or practice to discontinue medication that had been prescribed for a serious health need offends the Eighth and Fourteenth Amendments.

Defendants' linear taper procedure fits neatly within this framework: Methadone has been prescribed for a medical need and refusing to honor that prescription offends the Eighth and Fourteenth Amendments.

Defendants in this case—the Sheriff of Cook County and Cook County, Illinois—are liable for the linear taper procedure because the procedure was mandated by a written directive. Defendants remain liable if the persons who are charged with implementing the procedure decide to ignore it and only impose linear tapering on some, but not all, detainees. This is an example of a “widespread practice” that establishes *Monell* liability, *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 303 (7th Cir. 2010), when, as plaintiff would show at an evidentiary hearing, defendants subjected about 400 detainees to linear taping after July 1, 2017.

Consistent with the decision of the Seventh Circuit in *Fonder v. Sheriff of Kankakee County*, 823 F.3d 1144, 1147 (7th Cir. 2016) the subclasses certified in this case should be modified as follows:

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, who received more than one dose of methadone while detained, and who were provided methadone on a linear tapering schedule.

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, who received more than one dose of methadone while detained, and who were provided methadone on a linear tapering schedule.

II. The Possibility of Settlement

In accordance with the Court's order of March 30, 2024, the parties have initiated settlement discussions. If the parties succeed in this endeavor, it is conceivable that any settlement would avoid the need for the Court to hold an evidentiary hearing to set a closing date for the class.

III. Conclusion

It is therefore respectfully requested that the Court vacate its order setting July 1, 2017 as the class closing date and await the report from the parties about the status of settlement negotiations.

Respectfully submitted,

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman
ARDC No. 08830399
Joel A. Flaxman
200 S Michigan Ave, Ste 201
Chicago, IL 60604
Attorneys for Plaintiffs