UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Keith Rogers, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. 15-cv-11632
-*vs*-	)	
	)	Hon. Edmund E. Chang
Sheriff of Cook County and Cook County, Illinois,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER

Defendants Cook County, Illinois and Thomas Dart, Sheriff of Cook County, by and through their respective attorneys, and for their response to Plaintiffs' Motion to Reconsider Order Resetting Class Closing Date, state as follows:

INTRODUCTION

In November 2020, this Court certified a class of former Cook County Department of Corrections ("CCDOC") detainees who were subject to tapering of their methadone dosages while enrolled in the Opioid Treatment Program ("OTP"). ECF 178. Plaintiffs in this case object to the mandatory, across-the-board tapering practice that was in place until July 2017. ECF 243 at 1, 14. The class period originally ended in October 2019, when CCDOC updated its official written policies to reflect the changes in practice within the OTP that occurred two years earlier after a grant allowed the program to hire a social worker. ECF 178 at 13; ECF 218-5 at 3. During discovery, the deposition testimony and report of the OTP program director, Dr. Stamatia Richardson, clarified the end date for the actual practice of across-the-board tapering. ECF 178 at 13; ECF 218-5. Considering this new information, this Court closed the class period when the

practice shifted because common questions no longer predominate in each individual case after that time. ECF 243.

First, there is no appropriate basis for Plaintiffs' motion. Plaintiffs do not cite new facts or law to warrant the Court's reconsideration. Furthermore, the Court's decision to redefine the class aligns with the Seventh Circuit's precedent and is based on sound evidentiary findings and proper consideration of arguments presented by the parties.

ARGUMENT

I. Plaintiffs Have Not Established the Procedural Grounds for a Motion to Reconsider.

As an initial matter, the Court should deny Plaintiffs' motion because it is not procedurally proper. Motions to reconsider are appropriate for the limited function of correcting manifest errors of law or fact or presenting new evidence. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987). A party cannot use a motion to reconsider to present new evidence that could have been presented earlier. *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Motions to reconsider "may not merely rehash arguments that were previously made or make arguments that could have been previously made but were not." *Prayitno v. Nextep Funding LLC*, No. 17 C 4310, 2021 U.S. Dist. LEXIS 264013, at *2 (N.D. Ill. Jan. 13, 2021), citing *Oto*, 224 F.3d at 606. The standard of review for a motion to reconsider is high; "litigants must fight an uphill battle in order to prevail." *United Air Lines v. ALG, Inc.*, 916 F. Supp. 793, 795 (N.D. Ill. 1996).

A. Plaintiffs' Motion to Reconsider Is Based Solely on Facts Available When the Issue Was First Briefed.

One appropriate basis for a motion to reconsider is newly discovered evidence that could change the outcome. *Rothwell Cotton*, 827 F.2d at 251. However, it is not an appropriate avenue through which to present evidence that could have been presented earlier. *Oto*, 224 F.3d at 606.

Plaintiffs' motion is based on facts that have been available to them since, at minimum, the original briefing of Defendants' motion to decertify.

Discovery in this case has been closed for some time. Fact discovery closed more than two years ago in February 2022. ECF 195. Expert discovery was completed in October 2022. ECF 209; ECF 211. Additionally, the specific information Plaintiffs rely on in their motion was available to Plaintiffs and the Court at the time of the original briefing. Plaintiffs reference the report of Dr. Richardson, attached as an exhibit to Defendants' motion to decertify. ECF 218-5.[1] Neither is the patient data upon which they base their assertions "newly discovered." Plaintiffs have had the complete individual patient data since April 26, 2019. ECF 226 at 9, n. 4 (noting that patient data through March 31, 2019 was produced on that date).

Plaintiffs cite no newly discovered information and no reason that they could not have raised these facts earlier. Recently in *Hossfeld v. Allstate Insurance Company*, the court denied a motion for reconsideration on a denial of class certification where the plaintiffs' stated basis was their review of "the infirmities relied upon by the Court in its original opinion." No. 20-CV-7091, 2024 U.S. Dist. LEXIS 15139, at *8 (N.D. Ill. Jan. 29, 2024). There, while some new evidence was presented, there was no showing that the evidence was unavailable when the court first considered the issue. *Id.* Here, Plaintiffs have not even adduced new evidence; they simply restate evidence already in the record. As in *Hossfeld*, Plaintiffs "[have] not shown a material change in circumstances needed to obtain a second bite at the proverbial apple." *Id.* at *14.

While Plaintiffs argue that the Court erroneously based its finding on the statement of Dr. Richardson indicating the end date of the CCDOC's mandatory tapering policy, the argument is without merit as Plaintiffs have agreed that after July 2017, mandatory linear tapering was no

[1] Dr. Richardson was also deposed by Plaintiffs, providing a substantial amount of the information in the report—including the July 2017 date of the change in practice—on May 10, 2018. *See, e.g.*, ECF 153-20.

longer automatic. In fact, "Plaintiffs agree with defendants that the policy was not applied to all [detainees] after July 1, 2017." ECF 226 at 12. At no point in Plaintiffs' response to Defendants' Motion to Decertify did Plaintiff ever challenge the credibility of Dr. Richardson's deposition testimony. *See generally* ECF 226. Not only is Plaintiffs' newfound challenge to the credibility of Dr. Richardson disingenuous, but Plaintiffs' failure to timely raise the issue constitutes waiver. *See Downes v. Volkswagen of Am.*, 41 F.3d 1132, 1138 (7th Cir. 1994); *Roche v. City of Chi.*, 24 F.3d 882, 887 (7th Cir. 1994). *See also Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

Finally, Plaintiffs twice cite *Fonder v. Sheriff of Kankakee County* for the proposition that "if evidence calls into question the propriety of defining a class in a particular way, then the definition must be modified or subclasses certified." 823 F.3d 1144, 1147; ECF 247 at 6, 8. However, *Fonder* supports this Court's redefinition. *Fonder* involved the modification of a class definition in light of new evidence, including declarations produced during discovery. *Id.* at 1147. Here, the evidence that was uncovered during discovery supports truncating the class period. Plaintiffs attempt to twist *Fonder* into supporting their reversion to the original definition against this evidence. Plaintiffs do not cite any new or changed evidence in support of their request to revert the definition. "The class definition must yield to the facts, rather than the other way 'round." *Id.*

B. Plaintiffs Did Not File Their Motion Based on New Law or Controlling Precedent.

Plaintiffs additionally do not identify any change in the governing law as a basis for their motion. A change in the law can justify a motion for reconsideration. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). However, Plaintiffs' motion

does not identify any such relevant developments.[2] The Plaintiff has not met the standard for a motion to reconsider. The Court, therefore, should deny the motion on procedural grounds.

II. The Court Did Not Err Because After July 2017, Questions Common to the Class No Longer Predominate.

In corroborating this Court's recent redefinition of the class, two Seventh Circuit cases are particularly instructive. In the recently decided *Scott v. Dart*, the appellate court vacated and remanded a denial of class certification whereas in *McFields v. Dart*, the court upheld the denial of class certification. *Scott*, No. 23-1312, 2024 U.S. App. LEXIS 10305 (7th Cir. Apr. 29, 2024); *McFields*, 982 F.3d 511 (7th Cir. 2020). The distinctions between these cases are illustrative here. This Court's decision follows the Seventh Circuit's guidance in both cases by redefining the class to end in July 2017.

In *Scott*, the plaintiff sought to certify a class of detainees who experienced delays in medical care related to the lack of an on-staff oral surgeon at the jail. *Scott*, No. 23-1312, 2024 U.S. App. LEXIS 10305, *29 (7th Cir. Apr. 29, 2024). The appellate court determined the lack of an oral surgeon was a single policy that applied uniformly to all detainees. *Id.* While detainees had different issues resulting from this, the appellate court found that the policy that allegedly caused the damages was the same. *Id.*

In *McFields*, the court "quickly discard[ed]" a common question proposed by the Plaintiff because it required individualized analysis. *McFields*, 982 F.3d at 516. The plaintiff there challenged the "paper triage" policy whereby detainees were generally evaluated for dental

[2] The recently decided Seventh Circuit case, *Scott v. Dart*, No. 23-1312, 2024 U.S. App. LEXIS 10305 (7th Cir. Apr. 29, 2024), may have bearing on the issues in this case. However, the Seventh Circuit's holding in that case reinforces this Court's ruling rather than changing the outcome, as discussed in Section II, *infra*. Further, the decision came out two weeks after Plaintiffs filed their motion to reconsider on April 15, 2024. Notably, Plaintiffs failed to supplement their motion to reconsider with the ruling in *Scott* even though they were counsel of record on appeal for the plaintiffs in that lawsuit.

appointments based only on request forms without seeing a healthcare provider face to face. *Id.* at 513. However, a multitude of factors went into each determination, including different types of injury, different levels of pain, different medical providers involved, and different times that the detainees suffered the alleged injuries. *Id.* at 517. The appellate court upheld the district court's conclusion that "individual issues—the facts and circumstances of each individual detainee's claim—predominate." *Id.* at 519.

The distinction made by the Seventh Circuit between these cases highlights why this Court was correct to end the class period in July 2017. Contrary to Plaintiffs' contention, the key issue is whether the tapering was mandatory and indiscriminate, or individualized and based on an evaluation of each patient. This is not the same inquiry as whether a patient was or was not tapered. If the policy had been applied indiscriminately across the board to all patients, as it had been before July 2017, this case would be analogous to the appellate court's recent decision in *Scott*. No. 23-1312, 2024 U.S. App. LEXIS 10305, *29 (7th Cir. Apr. 29, 2024). However, when individualized evaluation of patients began in July 2017, any class-wide questions no longer predominate, and the case becomes akin to *McFields*. 982 F.3d at 517.

The predominant questions for determining whether any given detainee has suffered a violation hinges on individual circumstances, like what was considered in determining whether to taper, whether a detainee intended to switch to a different medication for the treatment of opioid use disorder, and whether a detainee voluntarily opted to discontinue treatment, among other factors. ECF 218-4, Deposition of Dr. Richardson, at 44-46 (discussing factors considered in decision making), 39 (describing CCDOC starting a program offering other forms of medication for opioid use disorder beginning in April 2017), 45-46 (estimating that ten percent of patients

chose to taper). These issues are far more significant to the resolution of any individual's claim than class-wide questions.

III. The Court Did Not Err Because Sufficient Evidence and Legal Arguments Were Presented by the Parties Prior to the Court's Decision.

Plaintiffs do not have new evidence or authority to present, so instead they attempt to argue that the Court made a "manifest error of fact" based on a "clearly erroneous" finding about when the mandatory tapering policy ended. ECF 247 at 1. In doing so, Plaintiffs deliberately obfuscate the key distinction between a mandatory across the board tapering policy and tapering of any patients at all. This confusion of the issues is a common theme for Plaintiffs across briefing for the class definition. However, the Court's proper acknowledgment of this critical difference is not error simply because Plaintiffs would prefer to ignore the distinction.

A. Plaintiffs Had All Information Necessary to Make Credibility or Other Evidentiary Challenges at First Briefing and Failed to Do So.

Plaintiffs' motion to reconsider rests on the shaky proposition that "[t]he Court was not aware of the [alleged] issues about Dr. Richardson's credibility." ECF 247 at 6. There are two central issues with this contention. First, as noted in Section I.A. *supra*, the evidence upon which Plaintiffs' credibility challenge rests was all available at the time that the original briefing occurred. Second, if Plaintiffs believed there was reason to challenge the credibility of Dr. Richardson's assertions as to the time when the across-the-board tapering policy ended, it was their responsibility to raise those issues, and they did not do so.

The evidence that Plaintiffs lean on to attack Dr. Richardson's credibility is not new. Dr. Richardson's report was introduced at the first briefing of this issue, and the patient data used by Plaintiffs was presented to this Court well before that. Dr. Richardson first offered the information about the end date of the mandatory policy in her deposition in May 2018. ECF 153-20. Patient

data for the month of July 2017 cited here by Plaintiffs was produced in April 2019. ECF 226 at 9, n.4. Both pieces of evidence were presented in some form to the Court by October 2019. ECF 153-19, 153-20. Plaintiffs had nearly four years to compare the numbers from the available patient data with Dr. Richardson's deposition testimony prior to the filling of Defendants' motion that suggested redefining the class based on this information. ECF 217 (Defendants' Motion to Decertify Class or in the Alternative Amend the Class Definition filed on January 9, 2023).

If Plaintiffs believed that there were issues of credibility at the time of that motion, Plaintiffs could have raised them then. However, Plaintiffs offered no competing report, contradictory deposition testimony, or other evidence to rebut Dr. Richardson's statements that the practice changed from a mandatory across-the-board tapering policy to a discretionary tapering system in July 2017. Indeed, Plaintiffs concede that there was no longer an across-the board tapering policy after that point. ECF 226 at 12. Plaintiffs' evidence that patients were tapered in July 2017 does not rebut this.[3] If some (or even most) patients were individually evaluated and then tapered off methadone, this still aligns with Dr. Richardson's report and deposition testimony. There is no issue of credibility. It also aligns with this Court's ruling redefining the class because the class-wide questions no longer predominate in each individual case.

Dr. Richardson's deposition testimony and report remain uncontradicted as to when the policy of ***mandatory*** tapering ended. The Court had plenty of evidence in the record to determine the credibility of the witness and make a finding of fact on this issue. This includes the exact evidence that Plaintiffs now cite in the motion to reconsider. The Court had this information at its

[3] It is notable that Plaintiffs argue for two entire years to be added back into the class period based on the several pages of graphs interjected into their motion that represent only one month of data. This makes no sense. If there is ambiguity in testimony and reports about when in July 2017 the practice changed, it may be justifiable to consider July 15, 2017 or July 31, 2017 as a closing date. But the data upon which Plaintiffs base their argument goes no further than this. Even entertaining Plaintiffs' unsound premise, Plaintiffs have only offered evidence that supports moving the closing date by at most one month.

disposal when making a credibility determination in the first place, and Plaintiffs' reiteration is unnecessary and uncompelling. In addition, as stated above, Plaintiffs' failure to timely raise said issue constitutes waiver. *See* Section I.A. *supra*.

B. The Court Did Not Err in Deciding Based Upon a Predominance Issue That Was Raised in Defendants' Previous Briefing.

While Plaintiffs discount the argument on the issue of predominance in Defendants' Motion to Decertify as "brief," they nonetheless acknowledge that the issue was before this Court as one reason that the class should be decertified or redefined. ECF 247 at 7, citing ECF 218 at 12. Plaintiffs additionally acknowledge that the issue of predominance was again raised in Defendants' reply brief. ECF 247 at 7, citing ECF 233 at 9. There are further arguments on the issue of predominance included within the briefing that go unacknowledged by Plaintiffs. *See* ECF 218 at 13, incorporating the arguments of ECF 157; ECF 233 at 8. Thus, the Court properly decided the redefinition of the class based on issues raised by Defendants.

It is absurd for Plaintiffs to claim that they were not previously granted an opportunity to address the issue of predominance. Plaintiffs have now filed multiple motions to certify the class in which they carried the burden to prove the issue of predominance. ECF 74; ECF 153. *See Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 376 (7th Cir. 2015) (stating that it is the plaintiff's burden to prove each Rule 23 requirement, including predominance). Most recently, Plaintiffs responded to Defendants' Motion to Decertify, which they admit raised the issue. *Supra* at Section III.A. *See also* ECF 226; ECF 233 at 9 (noting that "Plaintiffs do not substantively challenge the Rule 23(b)(3) superiority and predominance standards addressed in the underlying brief"). If Plaintiffs opted not to address it at that time, it was no fault of Defendants or the Court.

Simply put, Plaintiffs arrive a day late and a dollar short. The Court need not reach the merits of Plaintiffs' Motion to Reconsider because there are no procedural grounds to bring such

a motion. However, if the Court chooses to entertain the motion, the arguments presented do not hold water. The Court's decision to redefine the class based upon the end of the mandatory tapering policy is in line with controlling precedent and was made based on a sufficient evidentiary record and issues properly raised by the parties. Thus, as the Court did not err in modifying the class, there is no basis for an evidentiary hearing and furthermore, no need for the Court to change its ruling.

CONCLUSION

WHEREFORE, Defendants respectfully request that this Court enter an order denying Plaintiffs' Motion to Reconsider Order Resetting Class Closing Date, and for any other relief that this Court deems just and proper.

Dated: May 21, 2024

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Dortricia Penn, 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 May 21, 2024.

/s/ Dortricia Penn