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

MONTRELL CARR and QUINTIN SCOTT, individually and for a class,	)	
Plaintiffs,	)	
	)	Case No. 17-cv-7135
v.	)	
	)	Hon. Martha M. Pacold
SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS	)	Magistrate Hon. David Weisman
Defendants.	)	

DEFENDANT COOK COUNTY'S RESPONSE TO PLAINTIFFS' MOTION TO CERTIFY CASE AS A CLASS ACTION

Defendant COOK COUNTY, ILLINOIS, by its attorney KIMBERLY M. FOXX, State's Attorney of Cook County, through Special Assistant State's Attorney, JOHNSON & BELL, LTD., pursuant to Federal Rule of Civil Procedure 23, submits the following response in opposition to Plaintiffs' motion to certify the case as a class action.

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INTRODUCTION

Plaintiffs, Montrell Carr and Quintin Scott, bring this action under 42 U.S.C. § 1983, alleging they received inadequate dental care, in violation of their Fourteenth Amendment rights. (Am. Compl., ECF No. 30.) Plaintiffs seek to certify this action under Rule 23(b)(3) and propose the following class definition:

> All persons who were detained at the Cook County Jail at any time between November 1, 2013 and March 12, 2020 and, after having been referred to an oral surgeon by a dentist at the Jail, awaited treatment at the Stroger Hospital Oral Surgery Clinic, excluding those persons who are members of the subclass certified in *Whitney v. Khan*, 18-cv-4475, N.D.Ill., Mem.Op. March 25, 2020, ECF No. 175.

(Mot. for Class Cert. 1, ECF No. 129.) For the reasons set forth below, Plaintiffs' motion for class certification should be denied.

FACTS

Cermak Health Services ("Cermak"), an operating unit of Cook County Health ("CCH"), provides healthcare to individuals at the Cook County Jail ("Jail"). (Ex. A, Dr. Alexander Decl. ¶ 2.) Dr. Jorelle Alexander is the Department Chair of Oral Health for CCH and has served in this capacity since approximately 2013, although her official title has changed during that time. (*Id.* ¶ 1.) As Department Chair, Dr. Alexander oversees the various County dental clinics located across the County, including the dental clinics at the Jail and the County ambulatory dental clinics. (*Id.* ¶ 3.) There are six dental clinics at the Jail that provide care to detainees and eight ambulatory dental clinics that provide care to members of the general public. (*Id.*)

Jail detainees may request non-emergency services relating to their health, including dental care, by filling out a health service request form ("HSRF") and placing it in a collection box located on the tier. (Ex. B, E-07 Non-Emergency HSRF Procedure ¶ 1.) If a detainee has an emergency

health condition, correctional staff transports the detainee directly to the dispensary during the day or to the Jail's Urgent Care clinic open 24 hours a day, 7 days a week. (*Id.* ¶ 9; Ex. A, Dr. Alexander Decl. ¶ 4.)

For non-emergency conditions, nursing staff triages the HSRFs and selects those that require a face-to-face evaluation of the detainee in the dispensary. (Ex. B, E-07 Non-Emergency HSRF Procedure ¶ 4.) If the detainee presents with dental pain, the nurse will give the detainee pain medication pursuant to nursing protocol and refer the detainee to the dental staff to schedule an appointment with the dentist. (Ex. C, Nursing Protocol 53–54.). Detainees also have access to other health care professionals who may execute standing orders for pain medication. (Ex. A, Dr. Alexander Decl. ¶ 6.)

During the dental appointment, the Cermak dentist will exercise his or her professional judgment to determine what examinations and treatment, if any, are needed. (*Id.* ¶ 5.) If the detainee has dental pain, the dentist may prescribe pain medications to alleviate the pain. (*Id.* ¶ 6.) If the dentist determines that the detainee needs an extraction, the dentist may extract the tooth or teeth at the dental clinic. (*Id.* ¶ 7.) If the detainee requires an extraction that falls outside the skill set or training of the dentist, or the detainee would be better served by a specialist in a hospital environment, the dentist may refer the patient to the Oral and Maxillofacial Surgery ("OMFS") outpatient clinic at the John H. Stroger, Jr. Hospital of Cook County ("Stroger"). (*Id.*)

A Cermak dentist has multiple options available to refer a detainee for oral surgery at Stroger OMFS, depending on the detainee's dental condition. (*Id.* ¶ 8.) If the detainee does not have an emergent or urgent condition, the dentist will enter a routine referral order in Cerner, the electronic medical records system used by CCH. (*Id.*) A clerk at Stroger will then schedule a routine oral surgery appointment based on the next available date. (*Id.*; Ex. D, Macias Dep.

147:21–148:3, June 24, 2020.) Scheduling detainees the next available date for routine oral surgery is appropriate, as these detainees have been evaluated by a Cermak dentist and do not need to be prioritized based on urgency. (Ex. E, Dr. Qaisi Decl. ¶ 6.)

If a detainee presents with a condition that requires prioritization based on urgency, the dentist may escalate a referral through Cermak's scheduling department at the Jail. (Ex. A, Dr. Alexander Decl. ¶ 9.) Although a clerk at Stroger is responsible for scheduling oral surgery appointments based on routine referrals, one of the clerks at Cermak, Laura Hernandez, is involved in scheduling oral surgery appointments that need prioritization based on the detainee's dental condition. (*Id.*; Ex. F, Hernandez Decl. ¶¶ 2–3.)

When a Cermak dentist determines that a detainee has an urgent dental condition that requires prioritization outside the routine referral process, Ms. Hernandez will schedule an expedited appointment at Stroger OMFS pursuant to instructions by the dentist. (Ex. A, Dr. Alexander Decl. ¶ 9; Ex. F, Hernandez Decl. ¶¶ 5–6; Ex. E, Dr. Qaisi Decl. ¶ 7.) For example, detainees D.L., J.C., and R.S. were each scheduled an expedited appointment at Stroger OMFS by Ms. Hernandez.[2] (Ex. F, Hernandez Decl. ¶¶ 8a–c.) If a Cermak dentist determines that a detainee needs to be seen at Stroger OMFS the same day, Ms. Hernandez will schedule a same-day appointment for the detainee. (*Id.* ¶ 6.) There has never been a time when Ms. Hernandez was unable to schedule an appointment within the time frame instructed by the dentist. (*Id.* ¶ 7.)

Finally, if a detainee presents with an emergent condition, the detainee is transported to the Urgent Care clinic at the Jail for an evaluation by a physician. (Ex. A, Dr. Alexander Decl. ¶ 10.) Depending on the physician's assessment, the detainee may be sent to the Emergency Department at Stroger where a head and neck specialist is always on call. (*Id.*; Ex. E, Dr. Qaisi Decl. ¶ 8.)

[2] The detainees are identified by their initials to protect their privacy.

The Stroger OMFS oral surgery referral process described above for detainees mirrors the process for members of the general public who are referred from one of the County ambulatory clinics. (*See* Ex. A, Dr. Alexander Decl. ¶¶ 11–13.) A dentist at one of the ambulatory clinics may enter a routine referral order for oral surgery through Cerner, and the patient will be scheduled an initial consultation the next available date, which could be ninety days out or longer. (*Id.* ¶ 11; Ex. G, Prendergast Decl. ¶ 7.) If a patient at one of the County ambulatory clinics needs to be prioritized because of an urgent condition, the dentist may reach out to a resident on call at Stroger OMFS to request an expedited appointment. (Ex. A, Dr. Alexander Decl. ¶ 12.) If a patient presents to one of the County ambulatory clinics with an emergent condition, the dentist may send the patient directly to the Emergency Department at Stroger or to the emergency room of the nearest hospital. (*Id.* ¶ 13.)

Detainees who are referred to Stroger OMFS by a Cermak dentist for extractions are generally seen and treated the same day regardless of the complexity or number of teeth extracted. (Ex. E, Dr. Qaisi Decl. ¶ 9.) In contrast, members of the general public who require complex or multiple extractions are generally seen for an initial consultation and then scheduled a follow-up appointment, which could be ninety days out. (*Id.*; Ex. G, Prendergast Decl. ¶¶ 7, 12.)

Members of the general public who do not have a referral from a dentist yet need an extraction may call a designated phone number ("dental extraction line") in an attempt to get an appointment at Stroger OMFS. (Ex. G, Prendergast Decl. ¶¶ 3, 8.) This appointment, which is for an initial consultation, is typically scheduled a date that is within two business days. (*Id.* ¶ 11; Ex. E, Dr. Qaisi Decl. ¶ 10.) Each day, Tuesday through Friday, the dental extraction line opens in the morning and stays open until the limited number of designated slots are filled. (Ex. G, Prendergast Decl. ¶ 8.) Due to the high demand and limited number of slots, there is no guarantee that a member

of the general public calling the dental extraction line will receive an appointment. (*Id.* ¶ 10.) Those who are able to schedule an appointment through the dental extraction line, and who need complex or multiple extractions, are scheduled a follow-up appointment based on the next available date, which could be ninety days out or longer. (*Id.* ¶ 12; Ex. E, Dr. Qaisi Decl. ¶¶ 9–10.)

Jail detainees who are referred by a Cermak dentist to Stroger OMFS for routine oral surgery could receive treatment within ninety days. (Ex. A, Dr. Alexander Decl. ¶ 14.) This is appropriate care and comparable to the amount of time members of the general public may be seen at Stroger OMFS when referred from one of the County's ambulatory clinics. (*Id.*; Ex. E, Dr. Qaisi Decl. ¶ 5.)

It is not the case that all detainees must wait ten to twelve weeks for oral surgery. (Ex. A, Dr. Alexander Decl. ¶ 17.) For example, detainee A.H. received treatment eight days after the referral to Stroger OMFS. (*Id* ¶ 17a.) Detainee L.G. received treatment thirteen days after the referral. (*Id.* ¶ 17b.) Detainee I.W. was seen at Stroger OMFS fourteen days after the referral order was entered, but I.W. refused treatment on that date. (*Id.* ¶ 17c.) Detainee D.M. received treatment twenty-one days after the referral to Stroger OMFS, and detainee A.H. received treatment twenty-seven days after the referral. (*Id.* ¶¶ 17d–e.) Detainee D.G. was seen at Stroger OMFS twenty-nine days after the referral order was entered, but D.G. refused treatment on that date. (*Id.* ¶ 17f.) Detainee J.G. received treatment thirty-four days after the referral to Stroger OMFS; detainees D.C. & E.S., thirty-five days; detainees R.D. & E.F., forty-three days; and detainee Q.P., forty-nine days. (*Id.* ¶¶ 17g–*l*.) These are just a few examples of detainees who were seen sooner than ten or twelve weeks.

Juana Macias also testified that the ten-to-twelve-week estimate she gave during her deposition on July 19, 2019, in *Ammons v. Dart*, 18-cv-5271, was the length of time for an oral

surgery appointment at the time of her deposition. (Ex. D, Macias Dep. 116:17–118:4.) Ms. Macias testified that the next available date for scheduling detainees an oral surgery appointment at Stroger OMFS generally ranges from one to twelve weeks. (*Id.* at 93:14–94:8, 96:12–97:6.)

Currently, there are three full-time attending physicians, one part-time attending physician, and ten residents employed at Stroger OMFS. (Ex. E, Dr. Qaisi Decl. ¶ 3.) This has been the approximate level of staffing for the past four years. (*Id.*) A detainee who is referred from Cermak to Stroger OMFS can be seen and treated by any attending or resident. (*Id.* ¶ 4.) Cook County jail detainees have more reliable access to oral surgery than members of the general public and typically receive extractions at Stroger OMFS in a shorter time frame than members of the general public. (*Id.* ¶¶ 5, 10; Ex. A, Dr. Alexander Decl. ¶ 15.)

ARGUMENT

Plaintiffs are unable to satisfy the requirements of Federal Rule of Civil Procedure 23(a) and (b). "The burden rests on the party seeking certification to show by a preponderance of the evidence that certification is proper." *Lacy v. Cook County*, 897 F.3d 847, 863 (7th Cir. 2018) (citation omitted). "A class may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites for class certification have been met." *Id.*

Here, Plaintiffs have failed to meet their burden of establishing commonality, typicality, predominance, and superiority. In addition, Plaintiffs have not identified a sufficiently ascertainable class and has proposed a class period that falls outside the statute of limitations. Accordingly, this case may not be certified as a class. *See id.*

I. PLAINTIFFS FAIL TO PRESENT A QUESTION THAT IS COMMON TO THE PROPOSED CLASS.

To meet Rule 23's commonality requirement, a plaintiff must do more than raise a common question, which any plaintiff with a competently crafted class complaint could do. *See Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Rather, the commonality requirement is much more demanding and "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). The proposed common question "must be of such a nature that it is capable of classwide resolution." *Id.*

When assessing the commonality requirement, "courts are not simply applying a pleading standard; instead a prospective class 'must be prepared to prove that there are *in fact* . . . common questions of law or fact.'" *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 550 (7th Cir. 2016) (quoting *Wal-Mart*, 564 U.S. at 350 (emphasis in original)). This analysis may "entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

Plaintiffs in this case have proposed two questions, both of which are insufficient to meet Rule 23's commonality requirement:

> (1) Whether the members of the proposed class have been subjected to a common policy of unreasonable delay in scheduling oral surgery procedures following referral by a dentist.
>
> (2) Whether defendants' refusal to replace the oral surgeon employed at the Jail before the 2007 cutbacks has harmed detainees referred to an oral surgeon by causing unreasonable delay in treatment.

(Mot. for Class Cert. 15–16.)

A. Plaintiffs' Proposed Question Regarding an Unreasonable Delay Has Already Been Considered and Rejected by the Seventh Circuit in a Similar Case.

In *Phillips v. Sheriff of Cook County*, 828 F.3d 541 (7th Cir. 2016), a case that was brought by the same attorneys in this case, the Seventh Circuit rejected an almost identical question that Plaintiffs now propose. In *Phillips*, the plaintiffs proposed the following question: "Does the failure of the Jail to provide timely 'return to clinic' appointments result in preventable and

gratuitous pain?" *Id.* at 555. The Seventh Circuit held that this question did not meet Rule 23's commonality requirement because "to determine whether a return visit is 'timely,' a court must look at evidence that will be unique to each individual class member." *Id.* at 556. This is because "the constitutionality of a wait for medical treatment will depend on a variety of individual circumstances" and these "questions can only be answered by looking at the unique facts of each detainee's case." *Id.* at 555–56.

Here, Plaintiffs have replaced "timely" with "unreasonable delay." Nevertheless, the result is the same: to determine whether a detainee had an "unreasonable delay" in oral surgery, "a court must look at evidence that will be unique to each individual class member." *Id.* at 556. Just as in *Phillips*, Plaintiffs have failed to meet Rule 23's commonality requirement with their proposed question. Because the question of whether detainees experienced an "unreasonable delay" cannot be resolved "in a classwide manner," it does not present a question that is common to the class.

In *Phillips*, the Seventh Circuit stated that a delay in treatment case "probably" could be brought as a class action if a plaintiff presents *evidence* that a jail had a "policy that regularly and systemically impeded timely examinations" or had a "consistent pattern of egregious delays" across the entire class. *Id.* at 557–58. Plaintiffs appear to be proceeding down this path when they state that the County adopted "a defective procedure for providing oral surgery services to detainees at the Jail." (Mot. for Class Cert. 16.) Plaintiffs, however, make no argument beyond this conclusory statement. In their "Theory of the Case" section, Plaintiffs set forth some facts about the oral surgery referral process, but they do not develop an argument that ties these facts to Rule 23's commonality requirement. (*See id.* at 5–6, 16.) As such, they have forfeited any argument relating to commonality based on a systemic deficiency. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (stating that a party waives an argument that is "underdeveloped,

conclusory, or unsupported by law" and that a party must "allege facts and *indicate their relevance* under the correct legal standard" (emphasis added) (citation omitted)).[3]

In addition, Plaintiffs cite the wrong legal standard for establishing a constitutional violation based on an alleged systemic deficiency. Plaintiffs state that they intend to proceed under the "objective unreasonableness" standard set forth in *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018). This standard, however, is the standard for *individual* liability, not municipal liability. *See id.* In fact, in *Miranda*, the Seventh Circuit applied the deliberate indifference standard to an official capacity claim against the defendant sheriff. *See id.* at 346. As the Supreme Court has held, for claims where the municipal action itself does not violate federal law, a plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407 (1997) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Thus, the deliberate indifference standard applies to the policy claims in this case.

Even if Plaintiffs did not forfeit their undeveloped argument about a systemic deficiency (and did not cite the wrong legal standard), their argument still falls short of meeting Rule 23's commonality requirement. In their "Theory of the Case" section, Plaintiffs state that Defendant Cook County failed to satisfy its constitutional duty because detainees "wait 10 to 12 weeks for treatment by an oral surgeon." (Mot. Class Cert. 7–8.) However, to certify a class based on this question, Plaintiffs were required to back up their assertion with "evidence" of "a pattern of egregious delays across the entire class." *Phillips*, 828 F.3d at 558. Plaintiffs have failed to present this evidence for at least three reasons.

[3] Plaintiffs also state that there were "dental care cutbacks" at the Jail and that the County "refus[ed] to hire an oral surgeon." (Mot. for Class Cert. 16.) This argument about an oral surgeon at the Jail is also undeveloped and thus forfeited. Defendant nonetheless addresses the merits of this argument in the next section, which more appropriately falls under Plaintiffs' second proposed question.

First, Plaintiffs rely on the testimony of Juana Macias, the clerk who scheduled routine referrals for oral surgery at Stroger OMFS, for the proposition that *all* detainees wait ten to twelve weeks for oral surgery. Plaintiffs appear to quote from Judge Kennelly's order in *Whitney v. Khan*, No. 18 C 4475, 2020 WL 1445610 (N.D. Ill. Mar. 25, 2020), for this proposition, but they omit key language in their motion. The order actually states, "All appointments, *according to Macias*, are scheduled 10 to 12 weeks away . . . ." *Id.* at *3 (emphasis added). Upon closer examination, however, Ms. Macias' testimony does not support this proposition. As an initial matter, this testimony was given in the *Ammons* case, which was not a class action or even a putative class action, and Ms. Macias even testified that the plaintiff in that case was seen six weeks after the appointment was scheduled. (Mot. for Class Cert., Ex. 7, Macias Dep. 74:2–16.)

In Ms. Macias' deposition taken in *Whitney* after Judge Kennelly's order was entered, Ms. Macias explained that the ten-to-twelve-week estimate was the length of time for an oral surgery appointment *at the time of her deposition* in July 2019. (Ex. D, Macias Dep. 116:17–118:4.) Ms. Macias testified that the next available date for scheduling detainees an oral surgery appointment at Stroger OMFS generally ranges from one to twelve weeks. (*Id.* at 93:14–94:8, 96:12–97:6.) Furthermore, since that time, Dr. Alexander has reviewed the scheduling histories of detainees who were referred to Stroger OMFS. (Ex. A, Dr. Alexander Decl. ¶¶ 17a–*l*.) Dr. Alexander's review of these records clearly shows that not all detainees wait ten to twelve weeks for an oral surgery appointment. (*Id*.) For these reasons, Plaintiffs statement that all detainees wait ten to twelve weeks for oral surgery is simply not supported by the evidence, much less by a preponderance of the evidence. As such, under *Phillips*, commonality has not been established.

Second, Plaintiffs point out that the Stroger scheduling clerk schedules detainees the next available date and does not exercise any independent judgment when scheduling an appointment.

(Mot. for Class Cert. 6.) Plaintiffs, however, focus solely on what happens on the *Stroger* (hospital) side of scheduling oral surgery appointments and ignore what happens on the *Cermak* (jail) side of scheduling oral surgery appointments. Any examination of the oral surgery referral process must be considered based on the entire process, not just a part of the process that paints a misleading picture of what actually occurs.

Here, the evidence shows that the Stroger clerk schedules oral surgery appointments from routine referrals. (Ex. A, Dr. Alexander Decl. ¶ 6; Ex. F, Hernandez Decl. ¶ 4.) For routine oral surgery referrals, scheduling the next available date is appropriate. (Ex. E, Dr. Qaisi Decl. ¶ 6.) If a detainee needs prioritization because of an urgent condition, his or her appointment is expedited by a Cermak clerk. (Ex. A, Dr. Alexander Decl. ¶ 9; Ex. F, Hernandez Decl. ¶¶ 5–7.) Cermak dentists can escalate a referral to Stroger OMFS through Laura Hernandez, who has the ability to schedule an appointment within any time frame pursuant to the instructions of the dentist and can even schedule same-day appointments. (Ex. F, Hernandez Decl. ¶¶ 6–7.) Cermak also has procedures in place for detainees who require emergency care. (Ex. A, Dr. Alexander Decl. ¶ 10.)

For a delayed treatment case to be certified as a class action based on a deficient process, Plaintiffs were required to present evidence that the process "regularly and systemically impede[s] timely examinations." *Phillips*, 828 F.3d at 557. Because Plaintiffs focus solely on the Stroger side of the scheduling process and ignore the Cermak side where prioritization occurs, Plaintiffs' evidence falls short of this showing.

Third, Plaintiffs conclude, without supporting evidence, that the County "treats detainees at the Cook County Jail differently." (Mot. for Class Cert. 5.) Plaintiffs reach this unfounded conclusion from their allegation that members of the general public "who need the services of an oral surgeon to alleviate pain can telephone the Stroger Hospital hotline and make an appointment

for the next day." (*Id.*) Plaintiffs' characterization of this "hotline" is incomplete and misleading. Members of the general public who call the dental extraction line are not guaranteed to receive an appointment, as the demand is higher than the number of appointments available. (Ex. G, Prendergast Decl. ¶ 10.) Even if a member of the general public is able to schedule an appointment through the dental extraction line, the appointment is for an initial consultation. (*Id.* ¶ 11; Ex. E, Dr. Qaisi Decl. ¶ 10.) If an oral surgeon determines they need complex or multiple extractions, they are scheduled a follow-up appointment based on the next available date, which could be ninety days out or longer. (Ex. G, Prendergast Decl. ¶ 12; Ex. E, Dr. Qaisi Decl. ¶¶ 9–10.) If anything, detainees are treated better because detainees generally receive their consultation and treatment on the same day without the need for a follow-up appointment. (Ex. E, Dr. Qaisi Decl. ¶¶ 9–10.)

For these reasons, Plaintiffs have failed to present evidence, as required by *Phillips*, that the Stroger OMFS scheduling process regularly and systemically impedes timely access to oral surgery, and therefore, commonality has not been met.

B. Plaintiffs' Proposed Question Regarding an Oral Surgeon at the Jail Does Not Meet the Commonality Requirement for the Same Reasons.

Plaintiffs' second proposed question asks whether not having an oral surgeon at the Jail caused an "unreasonable delay" in treatment for those detainees referred for oral surgery. (Mot. for Class Cert. 16.) This proposed question suffers from the same fatal flaw as the first proposed question. To determine whether a detainee had an "unreasonable delay" in oral surgery, "a court must look at evidence that will be unique to each individual class member," which defeats commonality. *Phillips*, 828 F.3d at 556.

Under *Phillips*, a class action cannot be certified on a question that asks whether an appointment was timely, or, by extension, whether a delay was unreasonable. *See id.* The Seventh Circuit stated that a delay in treatment case "probably" could be brought as a class action if a

plaintiff presents some evidence that a jail had a "policy that regularly and systemically impeded timely examinations." *Id.* at 557. Plaintiffs fail to establish commonality through this approach because they do not develop such an argument and because they do not present the required evidence.

First, Plaintiffs did not develop an argument that ties the location of the oral surgeon (at the Jail or at Stroger) to Rule 23's commonality requirement, and therefore, they have forfeited the argument. *See Puffer*, 675 F.3d at 718. To the extent Plaintiffs made an argument in their "Theory of the Case" section, Plaintiffs argue that not having an oral surgeon at the Jail is deficient because it causes "detainees to wait 10 to 12 weeks for treatment by an oral surgeon." (Mot. for Class Cert. 7.) However, the evidence shows that not all detainees wait ten to twelve weeks for oral surgery. (Ex. A, Dr. Alexander Decl. ¶ 17; Ex. F, Hernandez Decl. ¶ 8.) For this reason, Plaintiffs fail to present a question that "is capable of classwide resolution" because the question will not produce a "common answer" for all detainees. *Wal-Mart*, 564 U.S. at 350.

Second, Plaintiffs did not present any evidence to show that sending detainees to Stroger for oral surgery, as opposed to having an oral surgeon at the Jail, "regularly and systemically" impedes timely appointments for oral surgery. Rather, the evidence shows that the location of the oral surgeon is not a barrier to timely care. Ms. Hernandez testified in her declaration that she is able to schedule an appointment at Stroger OMFS for any time frame instructed by a Cermak dentist and that there has never been a time when she could not schedule an appointment within the specified time frame. (Ex. F, Hernandez Decl. ¶¶ 6–7.) In fact, Ms. Hernandez can schedule a same-day appointment at Stroger OMFS if a dentist finds it necessary. (*Id.* ¶ 6.) Plaintiffs have simply failed to establish that the location of the oral surgeon regularly or systemically impedes

timely oral surgery.[4] As such, they have failed to "identify 'conduct common to members of the class' which advances the litigation." *Phillips*, 828 F.3d at 557 (citation omitted).

Although Plaintiffs point to a 2016 email by Dr. Alexander where she wrote that there was a "desperate" need for a part-time oral surgeon at the Jail, Dr. Alexander was simply following up on someone else's request. (Ex. A, Dr. Alexander Decl. ¶ 16.) After Dr. Alexander personally assessed whether an oral surgeon was needed at the Jail, she concluded that an oral surgeon at the Jail is not necessary because detainees receive appropriate and timely care at Stroger OMFS, which is a hospital-based clinic.[5] (*Id.*)

For all these reasons, Plaintiffs have not met Rule 23's commonality requirement because they failed to present questions that can be resolved on a classwide basis and have failed to present evidence of systemic deficiencies or egregious delays across the entire proposed class.

II. PLAINTIFFS FAIL TO MEET THEIR BURDEN ON THE TYPICALITY REQUIREMENT.

Plaintiffs fail to establish that their claims are typical of any other proposed class member's claim, much less the claims of the entire proposed class. The typicality requirement is meant to ensure that the named plaintiffs' claims have "the same essential characteristics as the claims of the class at large." *Lacy*, 897 F.3d at 866 (citation omitted). However, "[c]laims of inadequate medical care by their nature require individual determinations, as the level of medical care required

[4] Plaintiffs may reply that Defendant is improperly arguing the merits of the case. This is not so. It is Plaintiffs' burden to demonstrate compliance with Rule 23's requirements, which means that Plaintiffs "must be prepared to prove that there are *in fact* . . . common questions of law or fact." *Wal-Mart*, 564 U.S. at 350. Under *Phillips*, this means that Plaintiffs must present "some evidence that [the jail] had a policy that regularly and systemically impeded timely examinations." 828 F.3d at 557. Defendant simply points out that Plaintiffs have failed to present this evidence. Moreover, as the Supreme Court has made clear, a district court must conduct a "rigorous analysis" to determine whether Rule 23's requirements are met, and this rigorous analysis "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351.

[5] Plaintiffs also refer to a 2011 memorandum by Dr. Ronald Townsend. As Defendant explains in Section VI, *infra*, Plaintiffs cannot bring a follow-on class action past the statute of limitations' cutoff date of October 3, 2015. As such, the 2011 memorandum is irrelevant to this action.

to comport with constitutional and statutory standards will vary depending on each inmate's circumstances . . . ." *Kress v. CCA of Tenn., LLC*, 694 F.3d 890, 893 (7th Cir. 2012) (quoting district court with approval).

Here, Plaintiffs offer absolutely no evidence to support their bald contention that their claims are typical of all proposed class members. Rule 23 "does not set forth a mere pleading standard." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). A plaintiff must "be prepared to prove that there are *in fact* . . . typicality of claims." *Id.* (citation and internal quotation marks omitted).

In fact, the evidence Plaintiffs present shows that their claims are *atypical* of the claims of the proposed class. Plaintiff Montrell Carr alleges that a Jail dentist referred him for oral surgery on April 26, 2016, and that he did not receive oral surgery by the time he left the Jail on October 3, 2016. (Mot. for Class Cert. 3–4.) Plaintiff Quentin Scott alleges that a Jail dentist referred him for oral surgery on August 8, 2013, and that he received oral surgery on March 28, 2014. (*Id.* at 4–5.) Thus, Plaintiff Carr alleges that approximately twenty-two weeks elapsed before he was released, while Plaintiff Scott alleges that approximately thirty-three weeks elapsed before receiving oral surgery. In contrast, the evidence shows that the proposed class members generally receive their oral surgery appointment before twelve weeks have elapsed. (Ex. D, Macias Dep. 93:14–94:8.) As such, far from being typical, Plaintiffs' claims are undeniably atypical of the proposed class members' claims.

Moreover, Plaintiff Carr alleges that he was in pain and could not sleep or eat on his right side, and Plaintiff Scott alleges that the pain was becoming unbearable. (Mot. for Class Cert. 3–4.) Plaintiffs have not presented evidence of the proposed class members' pain to establish that Plaintiffs' pain was typical of the pain of the proposed class members, or even if they had pain.

Without this evidence, Plaintiffs have not shown that their claims *in fact* have the same essential characteristics as the claims of the class at large. *See Comcast*, 569 U.S. at 33; *Lacy*, 897 F.3d at 866. For these reasons, Plaintiffs failed to meet their burden on Rule 23's typicality requirement.

III. PLAINTIFFS FAIL TO MEET THEIR BURDEN ON THE PREDOMINANCE REQUIREMENT.

"Rule 23(b)(3) permits class certification only if the questions of law or fact common to class members 'predominate' over questions that are individual to members of the class." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012). While similar to the requirements for typicality and commonality, the predominance requirement is "far more demanding." *Id.* (citation omitted).

Here, Plaintiffs utterly failed to meet their burden on the predominance requirement. In a single, two-sentence paragraph, Plaintiffs merely assert that the alleged common issues are more prevalent or important than the individual issues. (Mot. for Class Cert. 19.) In fact, their assertion is nothing more than language quoted from *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The Seventh Circuit has rejected the idea that such a bare bones argument could discharge the plaintiff's burden on a motion for class certification. "Mere *assertion* by class counsel that common issues predominate is not enough. That would be too facile. Certification would be virtually automatic." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) (emphasis in original). This Court should find that Plaintiffs mere assertion of predominance is insufficient to satisfy Rule 23.

Even if Plaintiffs did develop an argument, it would still fail. The "starting point" in an analysis of predominance is "the substantive elements of plaintiffs' cause of action and . . . the proof necessary for the various elements." *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1008 (7th Cir. 2019) (quoting *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981). Because Plaintiffs seek to hold

liable only local government entities, their claims are governed by *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

> In order to succeed on a *Monell* claim, a plaintiff must ultimately prove three elements: (1) an action pursuant to a municipal policy, (2) culpability, meaning that policymakers were deliberately indifferent to a known risk that the policy would lead to constitutional violations, and (3) causation, meaning the municipal action was the "moving force" behind the constitutional injury.

Hall v. City of Chicago, 953 F.3d 945, 950 (7th Cir. 2020). As a "threshold matter," though, a plaintiff must demonstrate the existence of an underlying constitutional violation to succeed on a *Monell* claim. *Id.*

The alleged underlying constitutional violation in this case is inadequate medical care in the form of delayed treatment. *See, e.g.*, *Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760, 764 (7th Cir. 2002) (stating that under the Fourteenth Amendment, a pretrial detainee has a right to "adequate medical care"). To establish that a delay in dental treatment rises to a constitutional violation, a plaintiff must prove that the delay was "objectively unreasonable." *Miranda*, 900 F.3d at 351 (emphasis removed). "[A] delay in medical treatment 'is not a factor that is either always, or never, significant. Instead, the length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.'" *Phillips*, 828 F.3d at 555 (quoting *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010)).

Here, Plaintiffs cannot prove, in a classwide proceeding, that each member of the proposed class suffered an unconstitutional delay in treatment. First, the length of time between an oral surgery referral and treatment varies for each proposed class member, generally ranging from one to twelve weeks. (Ex. D, Macias Dep. 93:14–94:8.) Second, the level of pain any detainee experienced, if any, also varies. For example, Plaintiff Carr alleges, not that he could not sleep or eat, but that he could not sleep or eat *on his right side*, while Plaintiff Scott alleges that the pain

was becoming "unbearable." (Mot. for Class Cert. 3–4.) Given the difference in alleged pain levels, a jury could reach different conclusions for each Plaintiff regarding the objective reasonableness between referral and treatment (or release from the Jail).

Relatedly, pain is subjective, and due process requires that Defendant be afforded an opportunity to test the credibility of each proposed class member before liability is imposed (including cross-examination on commissary purchases, lack of purchases for pain medication, and nurse face-to-face assessments and dentist assessments that contradict reported symptoms). *See, e.g.*, *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1030 (7th Cir. 2018) (stating that defendants' due process rights are not harmed where they "have the opportunity to challenge the class members' credibility" on individual issues); *see also Berry v. Peterman*, 604 F.3d 435, 442 n.2 (7th Cir. 2010) (stating that purchases of candy and junk food from the commissary is evidence that could be used to impeach a plaintiff's testimony of pain); *Walker v. Benjamin*, 293 F.3d 1030, 1040 (7th Cir. 2002) (holding that evidence of plaintiff malingering presented jury issue); *Lloyd v. Moats*, No. 13-CV-1291-JES, 2016 WL 10950013, at *6 (C.D. Ill. Nov. 2, 2016), *aff'd*, 721 F. App'x 490 (7th Cir. 2017) (finding relevant that the plaintiff "did not purchase any over-the-counter pain medication though he had made numerous other commissary purchases"). For example, although Plaintiff Carr wrote on an HSRF on June 28, 2016, that he had a "7" out of "10" pain level, when he was seen by a dentist on July 1, 2016, the dentist documented that his pain was only 2/10 and that he complained of tooth sensitivity. (Ex. A, Dr. Alexander Decl. ¶ 21.) On July 14, 2016, the dentist documented that Plaintiff Carr "does not appear to be in distress or in pain" and that he filled out an HSRF just to "get out of his housing unit." (*Id.* ¶ 22.) On August 12, 2016, the dentist charted that Plaintiff Carr "has no pain or discomfort." (*Id.* ¶ 23.) Factual differences regarding the levels of pain, if any, of proposed class members also exist. (*See id.* ¶¶ 18a–e.)

Third, the availability of treatment in the form of pain medication is another factor that bears on the objective reasonableness of any delay. *See, e.g.*, *Harris v. Wexford Health Sources, Inc.*, No. 3:14-CV-50373, 2019 WL 4464307, at *10 (N.D. Ill. Sept. 18, 2019) (stating that a plaintiff's access to pain medication that is sufficient as determined by a doctor "rebut[s] [any] inference that [a] two-month delay had any effect on [the plaintiff's] condition or pain"). Thus, a jury must consider, at a minimum, whether any of the proposed class members had standing orders for pain medication and whether they requested pain medication pursuant to those standing orders. (Ex. A, Dr. Alexander Decl. ¶ 6.) For example, Plaintiff Carr had active orders for acetaminophen and ibuprofen at various times during 2015 and 2016. (*Id.* ¶ 24.)

As the above shows, Plaintiffs will be unable to prove an underlying constitutional violation on a classwide basis. Where "[l]iability, to say nothing of damages, would need to be determined on an individual basis . . . , common issues do not predominate over individual issues, making [the] case inappropriate for class disposition." *Harper v. Sheriff of Cook Cty.*, 581 F.3d 511, 515 (7th Cir. 2009).

Furthermore, another element of Plaintiffs' *Monell* claim—causation—would also need to be determined on an individual basis, including whether any detainees refused dental appointments or treatment and thus delayed his or her own dental care. For example, Plaintiff Scott was given the option to have his tooth extracted at the Jail on December 20, 2013, but he refused treatment and instead wanted to go to Stroger OMFS for the extraction. (Ex. A, Dr. Alexander Decl. ¶ 26.) Proposed class members have also refused treatment. (*Id.* ¶¶ 17c, 18c.)

Even if a common question exists, separate trials for each proposed class member would still be required to resolve the individual issues, and these trials would overwhelm the litigation and predominate over any common questions.

As the Seventh Circuit stated in a Fourth Amendment case, "Because reasonableness is a standard rather than a rule, and because one detainee's circumstances differ from another's, common questions do not predominate and class certification is inappropriate." *Portis v. City of Chicago*, 613 F.3d 702, 705 (7th Cir. 2010). "In the same way, the constitutionality of a wait for medical treatment will depend on a variety of individual circumstances." *Phillips*, 828 F.3d at 555–56. For all these reasons, Plaintiffs failed to meet their burden on the predominance requirement.

IV. PLAINTIFFS FAIL TO MEET THEIR BURDEN ON THE SUPERIORITY REQUIREMENT.

A class action is not the superior way of adjudicating the controversy in this case. *See* Fed. R. Civ. P. 23(b)(3). One factor to consider in assessing the superiority requirement is "the likely difficulties in managing a class action." *Id.*

If this case were certified as a class action, the difficulties in managing the case would overwhelm the litigation. As discussed, individual trials (and thus individualized discovery) would be required to prove whether the length of time between referral to oral surgery was objectively unreasonable in each detainee's particular case. This would require an examination into each detainee's credibility regarding their level of pain, if any, whether they received pain medication that alleviated their pain, whether they refused any appointments, and so on. As the Seventh Circuit has stated, "If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims." *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008). Accordingly, this case cannot be maintained as a class action because it is not the superior way of adjudicating these claims.

V. PLAINTIFFS FAIL TO DEFINE AN ASCERTAINABLE CLASS PURSUANT TO RULE 23.

Plaintiffs fail to satisfy the threshold requirement of Federal Rule of Civil Procedure 23 that the proposed class be sufficiently ascertainable. *Jamie S. v. Milwaukee Pub. Schs*, 668 F.3d 481, 495 (7th Cir. 2012). To satisfy the ascertainability requirement, a plaintiff must show that class members are identifiable through clear, objective criteria so that it is administratively feasible to determine who is a member. *Id.* at 496. Under Seventh Circuit precedent, a plaintiff fails to meet the requirements of Rule 23 when the proposed class definition is "too vague." *Steimel v. Wernert*, 823 F.3d 902, 917 (7th Cir. 2016).

Here, Plaintiffs propose a class of detainees that is defined based on whether the detainee was referred to an oral surgeon and then "awaited treatment" at Stroger OMFS. (Mot. for Class Cert. 1.) Plaintiffs, however, offer no guidance on what they mean by "awaited treatment." It could mean any length of time, even hours, or it could mean that the detainee waited for treatment but did not receive it. Plaintiffs could also have a different idea of what they mean by the phrase "awaited treatment." Regardless of the intended meaning, Plaintiffs' inclusion of this phrase makes the proposed class definition "too vague," and therefore, the proposed class does not meet Rule 23's ascertainability requirement.

VI. PLAINTIFFS' CLASS CLAIM IS UNTIMELY UNDER THE APPLICABLE TWO-YEAR STATUTE OF LIMITATIONS.

Plaintiffs allege a class claim with a starting date of November 1, 2013. This date, however, falls outside the statute of limitations' cutoff date of October 3, 2015 (two years before the complaint was filed). *See Tobey v. Chibucos*, 890 F.3d 634, 645 (7th Cir. 2018) ("[T]he statute of limitations for section 1983 actions filed in Illinois is two years."). Therefore, the class claim is untimely unless a tolling doctrine applies.

Plaintiffs believe that the filing of the *Smentek* case tolled the limitations period, not only of their individual claims, but also their *class claim*. For this proposition, Plaintiffs cite to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), but they misread this case. The Supreme Court has already considered and rejected the argument Plaintiffs make regarding the tolling of class claims. In short, *American Pipe* tolls the limitation period for individual claims, not class claims. *See generally China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018).

In *China Agritech*, the Court made clear that "*American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations." *Id.* at 1804. "*American Pipe* tolls the limitation period for *individual claims*." *Id.* at 1806 (emphasis added). "Time to file a class action falls outside the bounds of *American Pipe*." *Id.* at 1811.

The Court's express holding in *China Agritech* is that "*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." *Id.* at 1806. As the Court explained, "The efficiency and economy of litigation that support tolling of individual claims do not support maintenance of untimely successive class actions; any additional *class* filings should be made early on, soon after the commencement of the first action seeking class certification." *Id.* (emphasis in original) (internal citation and quotation marks omitted).

Notwithstanding the clear language against tolling of class claims, Plaintiffs argue that *China Agritech* is limited only to when a court *denies* class certification. Plaintiffs argue *China Agritech* does not apply to him because the *Smentek* court granted class certification but then excluded the class of plaintiffs he now seeks to represent. There are three problems with Plaintiffs' argument.

First, although *China Agritech* involved a follow-on class action from the denial of class certification, the Court's holding was not limited to cases with that exact procedural posture. *See id.* at 1806 (holding that a plaintiff cannot "piggyback on an earlier, timely filed class action" to bring a class action outside the statute of limitations); *see also Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil Inc.*, No. 14 C 2032, 2018 WL 3659349, at *4 (N.D. Ill. Aug. 2, 2018) (addressing the same argument and pointing out that the Court "adopted 'a blanket no-tolling-of-class-claims-ever rule,'" which means that class claims are not tolled under *American Pipe*, "regardless of how the prior class actions were resolved").

Second, the timing of when class certification is denied is relevant under *American Pipe* because that is the time the limitations period starts again for tolled claims. And, whether the limitations period starts again only on a denial of class certification, or also when persons are excluded from the class, is an argument that is relevant only if the claim was tolled in the first place. *China Agritech* teaches that the limitations period for class claims are never tolled to begin with, so there is nothing to start again regardless of when that occurs (denial or exclusion).

Third, the Seventh Circuit has made clear that *American Pipe* is not limited only to cases where a court denies class certification but that it also applies to cases where persons are excluded from a certified class, such as in *Smentek*. As explained by the Seventh Circuit: "Once a suit is filed as a class action, the statute of limitations is tolled until the district judge declines to certify a class, *or certifies a class that excludes particular persons*." *Lewis v. City of Chicago*, 702 F.3d 958, 961 (7th Cir. 2012) (emphasis added). And again, under *American Pipe* and *China Agritech*, the statute of limitations is tolled only for individual claims, not class claims. So, while a plaintiff may file an untimely *individual claim* after a denial of class certification or after certification of a class that excludes him, the plaintiff may not file an untimely *class claim*. *See Practice Mgmt.*

Support Servs., Inc., 2018 WL 3659349, at *6 (applying *China Agrigtech* and decertifying class because the class claims were untimely). For these reasons, Plaintiffs' class claim is untimely and must be dismissed.

Furthermore, Plaintiffs cannot rely on *American Pipe* for an additional reason: their claim is different from and peripheral to the claim raised in the *Smentek* case. As the Supreme Court explained, "*American Pipe* applies when the earlier class suit involve[s] 'the same cause of action subsequently asserted.'" *Johnson-Morris v. Santander Consumer USA, Inc.*, 194 F. Supp. 3d 757, 761 (N.D. Ill. 2016) (quoting *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 467 (1975)). In determining whether to toll claims under *American Pipe*, courts in this district consider "whether the underlying factual allegations in the earlier and later-filed claims are sufficiently similar to constitute the same 'cause of action.'" *Id.*

To receive the benefit of tolling under *American Pipe*, a plaintiff cannot raise claims that are "different or peripheral" to the claims raised in the class suit. *Spann v. Cmty. Bank of N. Virginia*, No. 03 C 7022, 2004 WL 691785, at *6 (N.D. Ill. Mar. 30, 2004) (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354–55 (1983) (Powell, concurring) (citations omitted)).

Here, Plaintiffs' claim is different from and peripheral to the *Smentek* claim. Plaintiffs allege delays in treatment for oral surgery at Stroger OMFS, while *Smentek* involved alleged treatment delays at the Jail. *See Smentek v. Cook County*, No. 09 C 529, 2011 WL 13136965, at *2 (N.D. Ill. Aug. 17, 2011). Therefore, for this additional reason, *American Pipe* did not toll the limitations period for Plaintiffs' class claim.

WHEREFORE, Defendant Cook County respectfully requests that this Honorable Court deny Plaintiffs' motion for class certification and grant any other relief this Court deems equitable and just.

Respectfully Submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

Dated: December 7, 2020

/s/ *Samuel D. Branum*
Special Assistant State's Attorney

Brian P. Gainer (gainerb@jbltd.com)
Monica Burkoth (burkothm@jbltd.com)
Lisa M. McElroy (mcelroyl@jbltd.com)
Samuel D. Branum (branums@jbltd.com)
Johnson & Bell, Ltd.
33 W. Monroe, Ste. 2700
Chicago, Illinois 60603
(312) 372-0770

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on **December 7, 2020**, I caused to be served the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Samuel D. Branum*
Special Assistant State's Attorney