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

Montrell Carr, et al.,	)	
	)	
Plaintiffs	)	1:17-cv-07135
	)	
-vs-	)	*(Judge Martha M. Pacold)*
	)	
Cook County et al.,	)	*(Magistrate Judge Weisman)*
	)	
Defendants	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY CASE AS A CLASS ACTION

The recent decision of the Seventh Circuit in *McFields v. Dart*, 982 F.3d 511 (7th Cir. 2020), *petition for rehearing filed* December 22, 2020, requires that the Court overrule defendants' arguments that the proposed class fails to meet the commonality and typicality requirements of Rule 23(a). The Court should also overrule defendants' other objections, reject defendants' attempts to sandbag plaintiffs with witnesses, records, and opinions not disclosed until after plaintiffs had filed their motion for class certification, and order that the case proceed under Rule 23(b)(3) for the following class:

> 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.

I. *McFields* and Commonality

The Seventh Circuit's recent opinion in *McFields v. Dart*, 982 F.3d 511 (7th Cir. 2020) revolved around the failure of the Cook County Jail to provide a face-to-face evaluation of every complaint of dental pain. The Court of Appeals held that this claim was not suitable for class certification based on two considerations: First, because the class claim turned on "an individualized inquiry that depends in large part on what is disclosed on each detainee's HSRF [Health Service Request Form]." *Id.* at 514. And second, because the claim involved facts about "each individual class member based on his or her specific circumstances." *Id.* Neither consideration is present in this case.

In this case, each member of the putative class has been examined at the Jail by a dentist who determined that the detainee required treatment by an oral surgeon. As defendants concede, this means that a dentist has concluded that "an extraction … falls outside the skill set or training of the dentist, or the detainee would be better served by a specialist in a hospital environment." (Alexander Affidavit[1], ¶ 7, Exhibit 11 at 2.) Thus, no individualized inquiry is required into each detainee's specific circumstances. For each member of the putative class, a dentist at the Jail has exercised "medical discretion." *Pyles v. Fahim*, 771 F.3d 403, 411 (7th Cir. 2014).

[1] Plaintiffs attach as Exhibit 11 the redacted affidavit of Dr. Alexander, which defendants filed under seal as ECF No. 137. Defendants have agreed that the redacted affidavit does not contain any confidential materials.

That a dentist has prescribed treatment by an oral surgeon means that each member of the putative class has an objectively serious medical condition—"one that 'has been diagnosed by a physician as mandating treatment.'" *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010), quoting *Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008). The common questions in this case do not turn on "what is disclosed on each detainee's HSRF," as in *McFields*.[2] The glue that connects each common question is the determination by a Jail dentist that the class member requires treatment by a specialist.

The direction by the Jail dentist for treatment by a specialist distinguishes the class claim from the case-by-case determination involving "a different type of dental pain, [that] took place at a different time, and involved different medical professionals and prison staff" at issue in *McFields*, 982 F.3d at 517 (quoted by defendants at ECF 142-1 at 3.) The claim in this case turns on the undisputed need of each member of the putative class for treatment by an oral surgeon.

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[2] Plaintiffs identified two common questions in their motion for class certification (ECF No. 129 at 15-16:

> 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?
>
> 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?

A third common question arises from defendants' attempt to justify the delay by relying on the time required to treat a member of the public:

> Whether Cook County is violating the duty imposed by the Constitution to provide adequate dental care to pre-trial detainees when it requires detainees referred to an oral surgeon by a Jail dentist to wait the same amount of time for oral surgery treatment as members of the public?

Defendants read *McFields* as setting out a black-letter rule that any challenge to a policy turning on the reasonableness of a delay cannot proceed as a class action. (ECF No. 142-1 at 2.) The Court should reject this reading of *McFields* because it assumes that *McFields* overruled *Driver v. Marion Cty. Sheriff*, 859 F.3d 489 (7th Cir. 2017).

The plaintiffs in *Driver* challenged "the Sheriff's policy, practice or custom of allowing the jail staff to hold inmates for up to 72 hours before releasing them." 859 F.3d at 491. The Sheriff argued before the Seventh Circuit "that common questions do not predominate where the core complaint challenges the length of detention rather than the conditions of confinement, and that any extended detention must be evaluated on a case-by-case basis." *Id.* at 492. The defendants in this case offer the identical argument about delay in treatment by an oral surgeon, arguing that "deciding whether a delay in treatment was objectively unreasonable is not a question that can be resolved on a classwide basis." (ECF No. 142-1 at 3.)

The Court of Appeals rejected the Sheriff's argument in *Driver*, holding that the case satisfied the commonality requirement of Rule 23(a) when "the plaintiffs assert that the defendants' policy or practice caused them to be detained for an unconstitutionally-unreasonable length of time." *Driver*, 859 F.3d at 492. The same result is required here, where plaintiffs challenge policies and practices that cause a delay in treatment by an oral surgeon "for an unconstitutionally-unreasonable length of time." Plaintiffs intend to show at trial that the 10-12 week delay

between a referral by a dentist until treatment by an oral surgeon is an unconstitutionally-unreasonable length of time.

There is no merit in any argument that *McFields* overruled *Driver*. *McFields* was a panel decision that was not circulated to the full Court pursuant to Seventh Circuit Rule 40. The Court must therefore read *McFields* as having "made a different point" than *Driver*, *Iqbal v. Patel*, 780 F.3d 728, 729 (7th Cir. 2015), and as not adopting a strict rule barring a class challenge to a policy that involves an "unconstitutionally-unreasonable length of time." *Driver*, *supra.*

1. Unreasonable Delay in Scheduling Oral Surgery Procedures Presents a Common Question

Defendants do not dispute that the district court in *Whitney v. Khan*, 18-cv-4475, 2020 WL 1445610 (N.D. Ill. Mar. 25, 2020) found that whether there was "unreasonable delay in scheduling oral surgery procedures following referral by a dentist," *id.* at *3, presents a common question under Rule 23(a). Nor do defendants dispute that plaintiffs in this case propose the same common question recognized in *Whitney*: "Whether the members of the proposed subclass have been subjected to a common policy of unreasonable delay in scheduling oral surgery procedures following referral by a dentist." *Whitney*, 2020 WL 1445610 at *3.

Defendants argue, however, that evidence in their response to the motion for class certification shows that the delay is not part of a common policy. (ECF No. 135 at 13-15.) The Court should reject this invitation to resolve the merits of the class claim because "certification is largely independent of the merits." *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1031 (7th Cir. 2018), quoting *Schleicher v.*

Wendt, 618 F.3d 679, 685 (7th Cir. 2010). But even if defendants' argument about delay is viewed as a "peek at the merits," *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1005 (7th Cir. 2019) (citation omitted), this claim is belied by repeated admissions defendants made in responses to detainee grievances.

a. Admissions Made by Defendants in Response to Detainee Grievances

The Cook County Jail employs a grievance system that permits detainees to complain, *inter alia*, about inadequate dental care. *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 546 (7th Cir. 2016). Defendant Sheriff has produced grievances related to dental care.[3] Responses to these grievances makes plain that during the proposed class period, referral to an oral surgeon was expected to result in a delay of more than twelve weeks.[4]

E.D.[5] filed a grievance on July 10, 2017, complaining that a dentist had referred him to an oral surgeon in April but "it is now July and I'm still in extreme pain due to the wisdom teeth." (Exhibit 15 at 1.) The grievance was followed by a visit to a jail dentist on July 19, 2017 and another referral "to Stroger for the extraction." (Exhibit 15 at 2.) The transportation logs show that E.D. was not taken to Stroger until November 27, 2017.[6]

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[3] The Sheriff has marked these grievances as "Confidential" because of concerns about HIPAA violations. Plaintiffs have therefore redacted all personal identifying information from the grievances that are submitted as exhibits with this memorandum.

[4] Plaintiffs discuss defendants' attempt to justify this delay *infra* at 9-11.

[5] Plaintiffs refer to each grievant by the initials of their first and last names.

[6] Defendants produced in discovery spreadsheets identifying the detainees (by name and jail identification number) who were scheduled to be transported from the Jail to Stroger for oral surgery services between January 3, 2013 and October 9, 2019. The County

C.O. submitted a grievance on January 2, 2018, complaining that he was experiencing "pain and discomfort" while waiting to see an oral surgeon. (Exhibit 16 at 1.) C.O. reiterated that he was in pain when he appealed the disposition of his grievance. (Exhibit 16 at 3.) The Jail, through a grievance officer, responded by stating that "Appts for oral surgery can take 90 days or more." (*Id.*)

C.M. filed a grievance on January 25, 2018 complaining that he had been in pain for two and half months waiting to see an oral surgeon. (Exhibit 17 at 1.) The Jail responded to his complaint, telling C.M. to be patient:

> Oral surgery appointments can take up to 90 days and pt has upcoming appointment.

(Exhibit 17 at 2.) The transportation logs show that the upcoming appointment was on February 14, 2018.

D.L. filed a grievance on February 27, 2018 complaining about the "extreme pain" he had been experiencing while he waited to have his tooth pulled. (Exhibit 18 at 1.) D.L. appealed the denial of his grievance and was told about the waiting time to see an oral surgeon:

> Pt was seen in dental and now referred to Oral Surgery which **can take up to 90 days.** Pt. has had pain meds since December 2017.

(Exhibit 18 at 2) (emphasis added.) The transportation logs show that D.L. was taken to Stroger on April 16, 2018.

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designated these spreadsheets as confidential to comply with HIPAA. Plaintiffs therefore refer to the date scheduled for transport to Stroger without identifying the detainee.

R.N. filed a grievance on May 18, 2018, complaining that he had been waiting for a wisdom tooth extraction for three months. (Exhibit 19 at 1.) R.N. was treated by an oral surgeon on May 22, 2018; the Jail responded to the grievance by informing R.N. that his treatment after a three month delay was "adequate and timely care." (Exhibit 19 at 2.)

The statements of the grievance officer are admissible under Federal Rule of Evidence 801(d)(2)(D) because they are offered against defendants and because each grievance response is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" *See Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 310 (7th Cir. 2010). The Court should reject defendants' attempts to contradict these admissions.

b. Admissions Made by Defendants in Their Response to the Motion for Class Certification

Defendants provide additional information in their response to the motion for class certification that supports the existence of a common question that will allow resolution of plaintiffs' claim in "one fell swoop." *McFields v. Dart*, 982 F.3d 511, 516 (7th Cir. 2020).

Dr. Mohammed Qaisi is the Program Director for the Oral and Maxillofacial Surgery outpatient clinic at Stroger Hospital. (Qaisi Declaration, ¶ 1, ECF No. 135-5 at 1.) Dr. Qaisi explains that once a Jail dentist concludes that the detainee requires treatment by an oral surgeon, a "referral order" is entered into the

electronic medical records system and assigned the "next available date." (Qaisi Declaration, ¶ 6, ECF No. 135-5 at 2.)

Dr. Alexander, the head of oral health at the Jail, reveals that the "next available date" is "within ninety days" (Alexander Declaration, ¶ 14, Plaintiff's Exhibit 11 at 3.) This is consistent with the deposition testimony of Juana Macias in *Ammons v. Dart*, 18-cv-5271 (ECF No. 129, Motion for Class Certification at 5), which defendants summarize as follows: "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."[7] (ECF No. 135 at 13.) (emphasis in original)

Dr. Alexander seeks to justify the 10-12 week delay because it is "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." (Alexander Declaration, ¶ 14, Exhibit 11 at 3.) Plaintiffs explain below why the Court should reject this justification. More important, defendants' position that the 10-12 week

[7] Defendants rely on deposition testimony given by Ms. Macias in *Whitney v. Dart*, 18-cv-4475 on June 24, 2020 to assert that at the time of that deposition, the delay to see an oral surgeon was "normally 1 to 12 weeks." (Defendants filed that deposition as ECF No. 135-4.) Defendants did not disclose their intent to rely on this assertion until December 3, 2020 (Supplemental MIDP Disclosures at 3-4, Exhibit 14), about a month after plaintiffs filed their motion for class certification. Had defendants made this disclosure earlier, plaintiffs would have deposed Ms. Macias to learn the meaning of "normally 1 to 12 weeks." Plaintiffs would have sought to learn whether Ms. Macias means that the waiting time was uniformly distributed over this 11-week period, or whether the "1 to 12 weeks" meant that 99% of those referred to an oral surgeon wait between 10 to 12 weeks, while the remaining 1% would see an oral surgeon within one week. But the waiting time in June of 2020 has nothing to do with this case, because plaintiffs propose a closing date for the class March 12, 2020, when COVID concerns changed the way dental care was provided at the Jail. (ECF No. 129 at 12-13.)

delay is the standard at the Jail demonstrates the existence of another common question that satisfies Rule 23(a):

> Whether Cook County is violating the duty imposed by the Constitution to provide adequate dental care to pre-trial detainees when it requires detainees referred to an oral surgeon by a Jail dentist to wait the same amount of time for oral surgery treatment as members of the public?

Plaintiffs intend to show that this amount of delay is not reasonable because the delay experienced by a member of the public to receive treatment from an oral surgeon at Stroger Hospital is the incorrect benchmark to measure Cook County's obligation to attend to the medical needs of pre-trial detainees. A pre-trial detainee is not free to obtain health care, but "must rely on [jail] authorities to treat his medical needs." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Thus, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

Plaintiffs will also show at trial that delaying oral surgery prolongs pain typically experienced by a patient who requires oral surgery, will usually worsen the patient's condition, increases the risk of infection, and prolongs the time for recovery from dental surgery.

This common question about delay by scheduling for the "next available appointment" is not undermined by Dr. Alexander's claim that Cermak dental staff may secure an appointment earlier than "next available" if the Jail dentist asserts

that the patient has an "emergent or urgent condition." (Alexander Declaration, ¶ 8, Plaintiff's Exhibit 11 at 3.) Defendants do not provide any information about the criteria used by the Jail dentist to determine whether a patient has an "emergent or urgent condition" other than the declaration of Laura Hernandez that refers to "urgent," rather than "emergent or urgent" conditions. (Hernandez Declaration, ¶ 3, Exhibit 12 at 1.) Ms. Hernandez avers that she will "expedite" a referral "when a Cermak dentist determines that a detainee has an urgent condition that requires a sooner appointment than what is available through the routine oral surgery referral process." (*Id.*)

The assertions of Ms. Hernandez are additional factual contentions that defendants did not disclose until after plaintiffs had filed their motion for class certification. Had defendants timely disclosed these contentions, plaintiffs would have inquired of Jail dentists about their knowledge of this practice and learned how, if at all, the Jail dentist learns of the date of the "next available" appointment. Plaintiffs would also have discovered how often Ms. Hernandez has been asked to use her claimed power to expedite appointments.

Defendants' admissions about the standard 10-12 week waiting period, and their claimed justification for that waiting period, provide common questions that satisfy Rule 23(a).

c. The Court Should Ignore Factual Assertions about Medical Records Defendants Have Not Shared with Plaintiffs

Defendants seek to support their factual argument that detainees are treated by an oral surgeon whenever a Jail dentist perceives an "emergent or urgent condition" with 15 examples where a detainee may have been treated by an oral surgeon sooner than the standard 10-12 weeks from the referral by the Jail dentist. (ECF No. 135 at 8, 16, citing Exhibit 11, Alexander Declaration, ¶¶17(a)-17(l) and Exhibit 12, Hernandez Declaration, ¶ 8.) The Court should reject any argument based on these claimed exceptions to the 10-12 week "next available appointment" practice for several reasons.

Dr. Alexander states that she reviewed "the scheduling and medical records of various detainees" (Exhibit 11 at 4, ¶ 17) and provides information she claims to have obtained from the records of 12 detainees. (*Id.*) Dr. Alexander appears to base her opinions on the review of medical records from 12 of the 2186 persons who were transported to Stroger Hospital between January 3, 2013 and October 9, 2019 for oral surgery services.[8] This minute sample (about one half of one percent) is too small to be a representative sample.[9] Dr. Alexander's representations about the contents of medical records cries out for an explanation that

[8] These transportation logs referred to in note 6 above show that 2186 detainees were scheduled to be transported to Stroger Hospital for oral surgery services during this period.

[9] A sample size of 11 selected from a population of 2186 provides a margin of error of nearly 30%. A random sample of 327 produces a more useable margin of error of 5%. (Calculations performed using the calculator at https://www.checkmarket.com/sample-size-calculator/#sample-size-calculator)

plaintiffs are unable to provide because defendants have not shared any of the medical records of the 12 persons selected by Dr. Alexander and did not identify its intent to rely on those records until December 7, 2020, after class discovery had closed and after plaintiffs had filed their motion for class certification.

Defendant Cook County identified Dr. Alexander in its initial disclosures and described her expected testimony as follows:

> [Dr. Alexander] is expected to testify regarding dental procedures at CCDOC [Cook County Department of Corrections] and pertaining to the facts and circumstances surrounding the events described in Plaintiff's Complaint.

(Exhibit 13 at 2.) Defendant also described the documents it believed were relevant to the case (Exhibit 13 at 3-4), but did not include any of the medical records to which Dr. Alexander refers in her affidavit. (Exhibit 11 at 4-8.)

Defendant Cook County served supplemental disclosures (Exhibit 14) on December 7, 2020, the same day it filed its response to plaintiffs' motion for class certification. Defendant included in those supplemental disclosures the names of the 12 detainees whose files Dr. Alexander reviewed, as well as the name of three additional detainees whose records were reviewed by Laura Hernandez. (Plaintiff's Exhibit 12 at 2, ¶8.) This was the first time defendant County identified these members of the putative class as potential witnesses.

Rule 26(a) of the Federal Rules of Civil Procedure requires a party to disclose the name of "each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support

its claims or defenses …" FED. R. CIV. P. 26(a)(1)(A)(i). Defendant Cook County has not complied with this rule and has prejudiced plaintiffs.

Plaintiffs are unable to test the veracity or the completeness of Dr. Alexander's averments about the contents of these records without access to those medical records. This is an appropriate case for the "automatic and mandatory" exclusion under Rule 37 of all assertions purportedly derived from the unproduced medical records. *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004). The Court should therefore decline to consider this cherry-picked data.

d. The Court Should Ignore the Undisclosed Opinions of Dr. Qaisi

Defendants seek to rely on the opinion of Dr. Qaisi, an employee of Cook County, who is a non-retained expert. Dr. Qaisi offers the opinion that "[f]or routine oral surgery referrals, scheduling the next available date is appropriate." (Qaisi Declaration ¶ 6, ECF No. 135-5 at 2.)

Defendants did not disclose Dr. Qaisi as a witness until December 7, 2020—long after the close of discovery on class certification and about a month after plaintiffs had filed their motion for class certification. Moreover, while defendants identify Dr. Qaisi as a fact witness in their tardy supplemental disclosures (Exhibit 14 at 2-3), defendants seek to rely on opinions from Dr. Qaisi without having complied with the disclosure requirements for non-retained experts.

Pursuant to Rule 26(a)(2)(C), defendants were required to disclose (1) the subject matter of Dr. Qaisi's expert testimony and (2) "a summary of the facts and opinions" on which he would offer an opinion. *Karum Holdings LLC v. Lowe's*

Companies, Inc., 895 F.3d 944, 951 (7th Cir. 2018). Defendants have made neither disclosure, which requires the exclusion of Dr. Qaisi's opinions. *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004).

Exclusion is especially appropriate because Dr. Qaisi seeks to offer opinions about matters beyond his knowledge and expertise. For example, Dr. Qaisi offers various opinions about the dental care provided to detainees at the Jail. (Qaisi Declaration ¶¶ 6-8, ECF No. 135-5 at 2.) But when deposed in *Whitney v. Khan*, 18-cv-4475 on August 14, 2020, Dr. Qaisi stated that he does not "know how the process" works at the Jail. (Exhibit 20, Quasi Dep., *Whitney v. Khan*, 35:19-20.) Dr. Qaisi reitereated his lack of knowledge about "the processes" at the Jail, explaining, "I just see them on my end." (Exhibit 20, Quasi Dep., *Whitney v. Khan*, 44:23-45:1.) Dr. Qaisi's knowledge about practices at the Jail is limited to information he received from Dr. Alexander. (Exhibit 20, Quasi Dep., *Whitney v. Khan*, 81:11-12.)

Dr. Qaisi admitted that he does not know how a dentist at the Jail would schedule an appointment for a detainee at Stroger: "I do not. Otherwise, I would be speculating." (Exhibit 20, Qaisi Dep., *Whitney v. Khan*, 45:14-15.) Dr. Qaisi reiterated his lack of knowledge when asked "how a dentist at the jail can schedule an appointment for a detainee in the oral surgery clinic after making a referral for that patient." (Exhibit 20, Qaisi Dep., *Whitney v. Khan*, 139:1-12.) Dr. Qaisi also responded "I don't know" when asked if he knew how Dr. Alexander could schedule an appointment for a detainee in the oral surgery clinic after the detainee has received a referral from a jail dentist." (Exhibit 20, Qaisi Dep., *Whitney v. Khan*,

139:14-140:12.) The Court should therefore not consider any opinions offered by Dr. Qaisi.

2. The Second Common Question: Failure to Fill the Vacant Oral Surgeon Position

Defendants do not dispute that Cook County employed an oral surgeon at the Jail before it cut back in 2007 on dental services for detainees.[10] Nor do defendants disagree that in 2011, the Chief of Dental Services at the Jail requested Cook County to provide funds to restore the oral surgeon position at the Jail, explaining that this was "absolutely necessary." (ECF No. 129, Plaintiff's Motion for Class Certification at 6-7.)

Defendants concede that Dr. Alexander warned Cook County about the "DESPERATE" need for an oral surgeon in an email she sent in 2015. (ECF No. 129, Plaintiff's Motion for Class Certification at 7.) And defendants do not dispute that they have never hired an oral surgeon to work at the Jail since eliminating the position in 2007.

Based on defendants' failure to fill the "DESPERATE" need for an oral surgeon at the Jail, plaintiffs proposed a second common question:

> 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?

[10] Defendants suggest that the Jail includes "eight ambulatory dental clinics that provide care to members of the general public." (ECF No. 135 at 4.) This an apparent grammatical error: the ambulatory clinics are at Stroger Hospital.

Defendants offer a variety of meritless objections to argue that this issue fails to present a common question required by Rule 23(a).

First, defendants argue that the statement in 2011 by the Chief of Dental Services at the Jail that hiring an oral surgeon was "absolutely necessary" is "irrelevant to this action" because this statement was made before the beginning of the class period. (ECF No. 135 at 17 n.5.) The Supreme Court rejected this argument in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), when it noted that a time-barred claim of discrimination "may constitute relevant background evidence." *Id.* at 558. The Seventh Circuit applied this rule in *Shanoff v. Illinois Department of Human Services*, 258 F.3d 696 (7th Cir. 2001) when it considered time-barred conduct "to illuminate the nature of the hostility involved in the actionable conduct." *Id.* at 705.

Second, defendants assert that Dr. Alexander did not mean that there was a "desperate" need for an oral surgeon, because she "was simply following up on someone else's request." (ECF No. 135 at 17, citing Dr. Alexander Decl. ¶ 16.) Dr. Alexander avers that she "personally assessed whether an oral surgeon was needed at the Jail, [and] concluded that an oral surgeon at the Jail is not necessary." (ECF No. 135 at 17.) The Court should ignore Dr. Alexander's attempt to patch-up her contrary deposition testimony in this case.

When deposed in this case on September 25, 2020, Dr. Alexander denied that she had made any decision about the need for an oral surgeon at the Jail; Dr. Alexander claimed that she had been following instructions from the Department

of Justice Monitor in the CRIPA litigation, *United States v. Cook County*, 10-cv-2946 (N.D. Ill.).[11] (Page references are to the appendix filed with the class motion, ECF No. 129-01.)

(App. 163:7-9) Question:	Did you – were you involved in any decision to not hire an oral surgeon to work at the Cook County Jail?
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(App. 163:11-17) Dr. Alexander:	I was involved in conversations with Department of Justice who stated that we did not have to have an oral surgeon at Cook County Jail, that we were merely following the fact that that was something we had posted, so that they were following through with what we had originally posted.
***	
(App. 165:16-22) Question:	My question was did the Department of Justice ever communicate in writing to you that it was not necessary for County Health Service or Cook County or any of its subsidiaries to hire an oral surgeon to work at the Cook County Jail; that's a yes or no question, could you answer it that way, please?
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(App. 165:24) Dr. Alexander:	No.
App. (166:2-7) Question:	Okay. And did anyone communicate – from the Department of Justice communicate orally to you stating that was not necessary for Cook County or any of its subsidiaries to employ an oral surgeon to work at the Cook County Jail?
(App. 166:8) Dr. Alexander:	Yes.
(App. 166:9) Question:	Who?
(App. 166:10) Dr. Alexander	Dr. Porsa.
App. 166:11)	

[11] The Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 *et seq.*, authorizes the Attorney General to bring a civil action for injunctive relief in response to "egregious or flagrant conditions" at county jails and other public institutions." 42 U.S.C. § 1997a(a).

Question: Can you tell us who Dr. Porsa is?
(App. 166:12-13)
Dr. Alexander: Dr. Porsa was the Department of Justice monitor.

Dr. Alexander's testimony about out-of-court statements made to her by Dr. Porsa are classic inadmissible hearsay. This is true even for Dr. Porsa's written reports. *Daniel v. Cook County*, 833 F.3d 728, 743 (7th Cir. 2016). In addition, Dr. Alexander's deposition testimony that she was following the instructions of the medical monitor in the CRIPA litigation are inconsistent with her more recent claim that she made an independent determination that an oral surgeon was not required at the Jail.

Defendants also argue that plaintiffs will lose on the merits because "the location of the oral surgeon is not a barrier to timely care to treatment by an oral surgeon at Stroger." (ECF No. 135 at 16.) But this merits question is inappropriate at the class certification stage. *Driver v. Marion County Sheriff*, 859 F.3d 489, 493 (7th Cir. 2017) (ruling on class certification does not "include a determination of the case on the merits"). In any event, the issue highlights the common question requiring class certification: whether providing pre-trial detainees with an appointment in the same 10-12 week schedule for persons who are not dependent on the County for health care complies with the Due Process Clause of the Fourteenth Amendment. *See ante* at 10.

II. *McFields* and Typicality

The court in *McFields* concluded that the claims of the named plaintiff could not satisfy the typicality requirement of Rule 23 because each complaint of dental

pain "is different." *McFields v. Dart*, 982 F.3d 511, 518 (7th Cir. 2020) (internal citation omitted). Those differences are not present here because, as explained above, a dentist examined each member of the putative class, observed an objectively serious condition, and concluded that the detainee required treatment by an oral surgeon.

Defendants do not offer any argument to rebut plaintiffs' showing that members of the putative class experienced the same type of unbearable pain described by the named plaintiffs while waiting for treatment by an oral surgeon. Plaintiff Carr described pain that prevented him from sleeping and eating while he waited to see an oral surgeon. (ECF No. 129 at 3-4.) Plaintiff Scott likewise complained of "unbearable" pain while waiting to see an oral surgeon. (*Id.* at 4-5.)

The grievances defendants produced in this case leave no doubt that the pain experienced by the named plaintiffs because of delay in seeing an oral surgeon is "typical of the pain of the proposed class members." (ECF No. 135 at 18.) Following are examples extracted from those records.

C.W. filed a grievance on January 1, 2015 (Exhibit 21), complaining about the pain he was experiencing while awaiting a visit to the oral surgeon at Stroger Hospital. C.W. stated that he had been referred to the oral surgeon on December 10, 2014 and was experiencing pain of level "10 higher." (Exhibit 21 at 2.) C.W. saw an oral surgeon on January 21, 2015.

K.L. filed a grievance on January 18, 2015. (Exhibit 22) stating that she had been referred to see an oral surgeon at Stroger Hospital at the end of October but

was still waiting for her appointment. K.L. stated that she was in "constant pain." The dental treatment records produced by defendants show that a dentist at the Jail referred K.L. to an oral surgeon on November 11, 2014. The transportation logs show that the Jail did not take K.L. to see an oral surgeon until March 4, 2015.

M.C. submitted a grievance on March 8, 2015 complaining about "excruciating pain" and stating that he was awaiting an appointment with the oral surgeon that had been set "almost a month ago." (Exhibit 23.) The grievance officer responded on March 13, 2015 that M.C. has an upcoming appointment. (Exhibit 23 at 2.) M.C. appealed, asserting on March 26, 2015 that he was still waiting to see an oral surgeon "and nothing has been done." (*Id.*) The grievance officer did not respond until after M.C. had left the jail on May 4, 2015. (*Id.*)

T.P. (Exhibit 24) filed a grievance on March 17, 2015 and stated as follows:

> Today I went and seen Dental, Dr. Montgomery, because I have a rotten tooth that needs to be pulled. She agreed it needs to be pulled. Yet she did not do it. She said I was being referred to a oral surgeon which would 4-6 months, which is unethical as well as deliberate medical neglect. I do not have enough pain medicine for pain. As well as I can't drink anything cold. To drink water it has to be hot. I'm having problems sleeping due to pain. …

T.P. was informed in the response to his grievance that he had been referred to an oral surgeon. (Exhibit 24 at 2.) T.P. appealed that disposition, pointing out that he was "still in pain." *Id.* The response to the appeal was "you have an appointment with an oral surgeon with the next 3-4 weeks." *Id.* The transportation logs show that the Jail did not take T.P. to see an oral surgeon until May 19, 2015.

M.B. filed a grievance on September 13, 2014 (Exhibit 25) complaining about painful wisdom teeth because he had not been taken to see the oral surgeon. The response to the grievance was that M.B. had been seen by a dentist at the Jail and was scheduled to see the oral surgeon at Stroger "in the next few weeks." (41.) M.B. responded with a second grievance, denying that he had been seen by a dentist at the jail and complaining about continued pain from his wisdom teeth. (43.) The transportation logs show that the Jail did not take M.B. to see an oral surgeon until October 16, 2014.

J.C. complained in his grievance (Exhibit 26) about delay in treatment by an oral surgeon:

> I have wires on my mouth that I have been asking the Doctor and nurses if I can go to Stroger Hospital to have them remove[d] because they are cutting my gums and make them bleed, and they [are] causing me pain every time I eat. I don't need them. They have no purpose. On April 17, 2014, Dr. Martinez told me that he was going to send me to the specialist in Stroger but I still haven't gone.

The transportation logs show that the Jail took J.C. to see an oral surgeon on August 15, 2014.

III. Ascertainability

There is no merit in defendants' terse argument that the proposed class is not ascertainable. (ECF No. 135 at 24.)

First, as another judge in this district recently recognized, "the Seventh Circuit has declined to impose the *heightened* 'ascertainability' standard that some other circuits have required." *Rogers v. Sheriff of Cook Cty.*, No. 1:15-CV-11632,

2020 WL 7027556, at *3 (N.D. Ill. Nov. 29, 2020), citing *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

Second, a class is ascertainable when it is defined by "policies and practices" that are applied to each member of the class. *Orr v. Shicker*, 953 F.3d 490, 499 (7th Cir. 2020). This case involves the policy of refusing to hire an oral surgeon to work at the Jail and the practice of requiring detainees at the jail to wait 10-12 weeks (or more) before treatment by an oral surgeon after a dentist at the Jail has ordered treatment by a specialist. Neither is determined by "a class member's state of mind." *Mullins v. Direct Digital, LLC*, 795 F.3d at 657.

IV. Temporal Limits of the Class

Defendants raise the same statute of limitations defense the district court correctly rejected in *McFields v. Sheriff of Cook Cty.*, No. 17-CV-7424, 2018 WL 1784138, at *2 (N.D. Ill. Apr. 13, 2018), *aff'd on other grounds* 982 F.3d 511 (7th Cir. 2020). Plaintiffs anticipated and thoroughly answered this argument in their motion for class certification. (ECF No. 129 at 10-12.) The key point that defendants overlook was firmly rejected in *McFields*: "Plaintiffs here belonged to a *successful* class action until the *Smentek* court set a closing date prior to when they experienced untreated dental pain." *McFields*, 2018 WL 1784138, at *3.

V. Certification Is Appropriate Under Rule 23(b)(3)

The Court should reject defendants' argument that the common questions in this case do not predominate over the individual issues. (ECF No. 135 at 19-23.) The Court should likewise reject defendants' conclusory assertion that 2,000

individual lawsuits (the size of the putative class) would be superior to one class action. (ECF No. 135 at 24.)

As in *Whitney v. Khan*, No. 18 C 4475, 2020 WL 1445610 (N.D. Ill. Mar. 25, 2020), this case involves "significant common questions." *Id.* at *4. The *Whitney* court summarized these questions as follows:

> [W]hether there is a policy or common practice of extended delay in scheduling oral surgery for detainees referred by a dentist; how the policy or practice came into being; its justification; and whether it is unreasonable and violative of detainees' constitutional rights.

This case presents an additional "significant common question" arising from the admissions defendants made in their response to the motion for class certification:

> Whether Cook County is violating the duty imposed by the Constitution to provide adequate dental care to pre-trial detainees when it requires detainees referred to an oral surgeon by a Jail dentist to wait the same amount of time for oral surgery treatment as members of the public?

Resolution of these common questions, as in *Whitney*, "will drive the determination of liability with regard to the subclass." 2020 WL 1445610 at *4. The Court will not be asked to determine whether the delay in treatment was "objectively unreasonable in each detainee's particular case." (ECF No. 135 at 23.) While the amount of damages may vary among class members, denial of class certification on this ground would be "a mistake." *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017).

Another judge in this district recently concluded that a class action is superior to "adjudicating the same question repeatedly across the 1,000 or so separate

lawsuits that could, in theory, be brought by the class members as individual lawsuits." *Rogers v. Sheriff of Cook Cty.*, No. 1:15-CV-11632, 2020 WL 7027556, at *7 (N.D. Ill. Nov. 29, 2020). The same is true here, where there are more than 2,000 persons in the proposed class.

VI. Conclusion

Pursuant to Rule 23(c), the Court should therefore order that this case proceed as a class action under Rule 23(b)(3) for:

> 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.

Respectfully submitted,

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